From: OFFICE RECEPTIONIST, CLERK
To: Martinez, Jacquelynn
Subject: FW: Comments re: proposed changes to CrR 8.3/CrRLJ 8.3 and CrR 4.7
Date: Monday, April 29, 2024 3:06:00 PM

From: Pearce, Brett <BPEARCE@spokanecounty.org>
Sent: Monday, April 29, 2024 2:24 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments re: proposed changes to CrR 8.3/CrRLJ 8.3 and CrR 4.7

External Email Warning! This email has originated from outside of the Washington State Courts Network. Do not click links or open attachments unless you recognize the sender, are expecting the email, and know the content is safe. If a link sends you to a website where you are asked to validate using your Account and Password, **DO NOT DO SO!** Instead, report the incident.

Thank you for the opportunity to comment on the proposed changes.

Regarding CrR 8.3 and CrRLJ 8.3, I believe the current form of the rule imposes a fair substantive requirement, as it distinguishes between conduct that results in harm with that which does not, respects separation of powers, and respects the statutory and constitutional rights of victims.

The first concern I have is that the proposed rule will itself be subject to application in an arbitrary, unpredictable, or unreviewable manner, potentially in violation of separation of powers. For example, animal cruelty is personally important to me, important to the legislature which has criminalized the conduct under various statutes (including poisoning animals), and important to prevent future abuse of animals and so I charged those cases when I was a trial court prosecutor. Suppose, however, that a trial court does not think that the prosecutor should be "wasting" limited, underfunded, state or judicial resources on animal cruelty cases, or that in the assigned trial court judge's personal experience, most prosecutors did not charge animal cruelty unless it rose to the level of a first degree offense. That would invalidate my charging decision, invalidate the legislature's promulgation of statutes, and ill-serve the animals at issue. In short, the trial court judge would be exercising prosecutorial and perhaps legislative discretion under the guise of a criminal court rule. Worse, two different judges might impose two different remedies, which will encourage judge shopping once trial court practitioners get a sense of what particular judges think about particular subjects.

As another example, the courts, offices of public defense, and prosecutor's offices are woefully underfunded. A court could conceivably dismiss cases to rectify the (subjectively, in the mind of the trial court judge) mismanagement by the county commissioners' funding, or the office of public defense's staffing issues, both situations of which are entirely out of the prosecutor's control. There are already constitutional remedies for constitutional violations, e.g. due process or constitutional speedy trial, and multiple statutory or rule-based remedies available for violations of statute or court rule. For that matter, if the *court* erred, by inadvertently forgetting to set a hearing date or CrR 3.3 trial date (another anecdote that is not wholly hypothetical) the defendant's remedy could be the State's case being dismissed, through no fault of the State. If such a request was granted, because the proposed rule sets no standards for the exercise of discretion, the State would have to show that

no reasonable judge would have dismissed the case under the circumstance, even if remedies available pursuant to CrR 3.3 or CrRLJ 3.3, such as a cure period or buffer period, would otherwise be adequate. This is how the proposed rule change could grant essentially unreviewable power to trial court judges.

Equally troubling is that the proponents of the rule indicate expressly via the submitted cover sheet that the intended function of the proposed rule change is to permit any trial court judge to second guess any prosecuting decision and remedy perceived inequities with the criminal justice as a whole. No disrespect is intended by this comment to those accused of crimes, but each alleged crime is a unique circumstance of facts and law. The criminal justice system is *not* perfect. But as a reminder, a disproportionate number of victims of certain classes of crimes are also people of color, indigent, otherwise lack access to resources, and face substantial obstacles to justice. A civil tort claim with civil remedies is very often a fantasy; this means that often the only justice a victim will experience is vicarious and imposed through the criminal justice system in the form of a conviction and the legislature's setting of potential punishment. Prosecutors are in a unique position; they do not represent victims and do not advocate for them other than indirectly through the filing of charges. But, they will be the ones responsible for explaining to victims that a judge dismissed a strangulation, an assault, a burglary, or a stalking charge by prioritizing general problems with the criminal justice system over the individual, provable facts of a case and that individual victim's lived experience, not the judge who dismissed the case. Under Washington law, crime victims also have constitutional and statutory rights. *See* Wash. Const. art. 1, sec. 35; chapter 7.69 RCW. The current rule provides an appropriate structure for and balance between the policy considerations in favor of victims and those in favor of the accused.

Finally, the law is well acquainted with the concept of harmless error. The proposed rule change will have the effect of turning *any* pre-conviction error into potential structural error, at the whim of the assigned judicial official. Yet, this Court has recognized that many errors or oversights have no effect on the outcome of a case; even most constitutional errors are subject to harmless error review. *E.g. Heng*, 2 Wn.3d 384 (appointed defense counsel did not appear at the preliminary hearing, but the error was harmless under the facts). Outcomes should not depend on whether the request for relief was filed before the judgment was entered, where quasi-structural error applies, or after the judgment was entered, where longstanding principles related to error apply. The proposed change will make the most final remedy available for errors, even those which are out of the prosecutor's control, inadvertent, or which would not have otherwise affected a case.

The current rule strikes a careful balance between the rights of the accused, victims' rights, and the separation of powers. For those reasons, it should be maintained.

Regarding the proposed changes to CrR 4.7, I agree in general, but I think there is room for improvement. Clients are entitled to their client file, including attorney/client communications, legal strategies, and redacted discovery. The prosecutor's role is very limited, we should never have access to any of these materials other than our small role in approving the proposed redactions to discovery, which necessarily originated with our office. This transfer is not currently being facilitated as it should be, and the automation of redactions should help.

The potential problem I see with the proposed rule change is that there is no oversight of the automated process, and if sensitive information is inadvertently or negligently disclosed, that information will *never* be clawed back. Maybe that means that sensitive information or discovery related to child sexual abuse victims is disclosed. Or maybe that means that sensitive information in a gang case, with real-world reprisal consequences including serious assaults or murder, is disclosed. My hope is that those mistakes would never happen, but they might. I'm not sure that the current proposal provides enough oversight or any feasible remedy.