From: OFFICE RECEPTIONIST, CLERK
To: Farino, Amber
Cc: Ward, David
Subject: FW: Comments on proposed rules CrR 8.3/4.1
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From: Pearce, Brett <BPEARCE@spokanecounty.org>
Sent: Tuesday, April 29, 2025 4:24 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments on proposed rules CrR 8.3/4.1

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

CrR 8.3:
As I mentioned in the comments last year, the current iteration of CrR 8.3 strikes 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 current proposal appears to be an attempt to once again remove the prejudice requirement from CrR 8.3. The first thing that stood out to me is that the proponents of the proposed change appear to believe that those accused with crimes deserve differing levels of protection based on the nature of their charges rather than the nature of the error. Instead of weighing the prejudice to the accused, the proponents advocate that the judge tasked with deciding a CrR 8.3 motion weigh "the seriousness of the circumstances of the offense" and "the impact of a dismissal on the safety or welfare of the community," remembering that the defendant is part of the community and part of the entity that the prosecutor represents.

Does this suggest that some errors are ok if they happened to people charged with really serious crimes, or that a court may tolerate some errors if they simply happen to occur in a simple misdemeanor assault case rather than a murder case? I disagree, and strongly feel that this proposal is contrary to the core tenet of equal protection. If an error is prejudicial enough to require dismissal, that result should follow regardless of the seriousness of the charge, because that is the standard we should all be held to. This is how the rule of law should work, every person is subject to the same rules. For this reason, I believe it is appropriate that the proposed changes should be rejected, and the focus should continue to be on the prejudice suffered by the accused due to an error or misconduct. In addition to prejudice, the case law that has developed alongside CrR 8.3 also holds that dismissal is an "extraordinary remedy to which the court should resort only in 'truly egregious cases of mismanagement or misconduct'" *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003) (internal citation omitted), and that a court should consider lesser sanctions before ordering dismissal. This proposal suggests that dismissal is it, and apparently even if an error or misconduct causes no prejudice. If CrR 8.3 needs any clarification, it should be that a court is encouraged to consider lesser remedies first, because that provision of law is not incorporated into the written rule

even as it binds all lesser courts in Washington.

Appellate law is well acquainted with the concept of harmless error and for good reason. 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.

"[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament." *Snyder v. Com. Of Mass*., 291 U.S. 97, 122, 54 S. Ct. 330, 78 L. Ed. 674 (1934). 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.

CrR 4.1:
I only have a few concerns about CrR 4.1. First, although King County practitioners appear to be the primary drivers behind this change, it's not clear to me that they've considered the impact that this rule change will have on smaller, rural counties that simply do not have the resources available to have an arraignment in 3 days. Notably, people have, prior to arraignment, been granted a first appearance with a first appearance attorney, and had the opportunity to argue for bail and release conditions, so the lengthier period permitted for arraignment allows a person the time to obtain private counsel or be appointed a public defender and consult with them before arraignment. I'm not sure if the smaller counties (Asotin, Ferry, and others, I'm not referring to Spokane) are afforded adequate consideration when substantial changes like these are considered, but their concerns are just as important as those of the larger counties. Perhaps doubly so, given the very well-documented lack of legal practitioners in smaller counties.

Second, I also worry that such a short turn-around could deprive an accused with their rulatory right to plead guilty, which means that any defense attorney will have to review an entire probable cause affidavit and consult with the client by arraignment in order to give effective legal advice in accordance with their duty of diligence. This matters, because those accused of crime have several strategic reasons to want to plead guilty at arraignment, and the right to plead guilty is based on a court rule, not the constitution, and only unconditional at that time. *State v. James,* 108 Wn.2d 483, 488, 739 P.2d 699 (1987); *Conwell,* 141 Wn.2d at 907; *Bowerman,* 115 Wn.2d at 799.

For example, if someone is accused of a lesser degree of rape, and wishes to plead guilty knowing that the State is going to amend the charges to a higher degree, counsel could be ineffective for entering a not guilty plea over the defendant's objection…other examples include manslaughter to murder charges while an investigation is still on-going, or maybe when a prosecutor inadvertently charges a lesser version of a recidivist offense before discovering the appropriate criminal history. *Matter of Burlingame*, 3 Wn. App. 2d 600, 609, 416 P.3d 1269 (2018); *see also State v. Westwood*, 10 Wn. App. 2d 543, 553–54, 448 P.3d 771 (2019). These are real cases, not simply hypotheticals.

Given the amount of discussion of public defense caseload in the bar magazine, it seems likely that reducing the arraignment time for in custody individuals from 14 days to 3 days will impose a very burdensome standard on defense attorneys who may otherwise have the time to strategically avoid greater charges. And while defense attorneys could show up at the 3 day arraignment and ask for a continuance in order for more time to adequately advise their clients, there would be little purpose in advancing the rule change if that is the likely result.