No. 101269-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

MICHAEL CHARLTON,
Petitioner.

BRIEF OF *AMICI CURIAE* WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON FOUNDATION, WASHINGTON DEFENDER ASSOCIATION, AND KING COUNTY DEPARTMENT OF PUBLIC DEFENSE

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IDENTITY AND INTEREST OF *AMICI*

The identity and interest of *amici curiae* are addressed in the accompanying motion for leave to file an amicus brief.

ISSUE ADDRESSED BY *AMICI*

The trial court failed to provide Mr. Charlton with counsel at his preliminary appearance hearing, second appearance hearing where charges were filed, and arraignment hearing. At the preliminary appearance, the Court failed to advise Mr. Charlton of his constitutional rights. At the next hearing, the Court corrected this error, but issued an illegal cash-only bail order. Even at the time of his arraignment, Mr. Charlton had yet to meet his assigned attorney. He was thus forced to spend 15 days in jail until he could appear with an attorney who was able to advocate meaningfully for release from custody. *Amici* write to urge this Court to issue an opinion that condemns the disregard for Mr. Charlton's right to counsel and makes clear that every court in our state must provide counsel at preliminary appearance hearings.

ARGUMENTS AND AUTHORITY

The discrepancy between the rights granted to individuals detained in custody and the actions of the Grays Harbor County Superior Court in this case is stark. The Sixth Amendment of the United States Constitution, Article I, Section 22 of the Washington Constitution, and Criminal Rule 3.2.1 mandate that a person arrested on suspicion of a felony offense and detained in custody has a right to counsel at his preliminary appearance hearing the next court day following his arrest. Instead, Mr. Charlton was brought into court three times without a lawyer while the prosecutor and Judge discussed his detention with one another. In the absence of counsel, the Court first failed to advise Mr. Charlton of his constitutional rights, then issued an illegal bail order. As a result, he languished in jail for over two weeks without being able to consult with an attorney or have a meaningful hearing about his conditions of release.

Perhaps most troublingly, the transcripts of Mr. Charlton's first three court hearings reflect indifference to

these rights violations, which likely would have been prevented by the presence of counsel. No party in the courtroom mentioned Criminal Rule 3.2.1, expressed any concern that the Court failed to advise Mr. Charlton of his constitutional rights, discussed the presumption of release guaranteed by Criminal Rule 3.2, or stated that it was in any way improper to proceed without defense counsel for any one of these three hearings.

It should already be clear to all participants in our criminal legal system that an arrestee is entitled to counsel at his or her preliminary appearance hearing the next court day following arrest. To the extent these mandates are being ignored around our state (as evidenced by similar proceedings in Clark County Superior Court, in the accompanying case of *State v. Heng*, No. 101159-8[1]), *amici* requests that this Court reiterate that every defendant, in every county of our state, shall

[1] A brief of the same *amici*, with substantially identical argument, has been filed in the *Heng* case.

be represented by a lawyer at his or her preliminary appearance hearing and bail hearings.

I. The Constitution Requires the Appointment of Counsel at Appearances Where Bail is Set.

As the Petitioner explains persuasively, the Washington and United States Constitutions require the presence of counsel at a preliminary appearance hearing. In *Rothgery v. Gillespie County*, the Supreme Court made clear that "the first formal proceeding is the point of attachment" of the Sixth Amendment right to counsel. 554 U.S. 191, 203, 128 S. Ct. 2578, 171 L. Ed. 2d 366 (2008). In reaching this holding, the Court surveyed state law and found that the practice of "denying appointed counsel on the heels of the first appearance" was the "distinct minority" in our country. *Id.* at 205. Indeed, the Supreme Court's statement in *Rothgery* was little more than a restatement of its observation in *McNeil v. Wisconsin* that "[t]he Sixth Amendment right to counsel attaches at the first formal proceeding against an accused, and in most States, at least with respect to serious offenses, free counsel is made available at

that time and ordinarily requested." 501 U.S. 171, 180–81, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991).

While the United States Supreme Court has never explicitly held that a preliminary appearance is void if counsel is not present, this conclusion is inescapable when considering what is at stake in a hearing where bail will be determined. As the New York Court of Appeals put it:

> [A]rraignment itself must under the circumstances alleged be deemed a critical stage since, even if guilty pleas were not then elicited from the presently named plaintiffs, a circumstance which would undoubtedly require the critical stage label, it is clear from the complaint that plaintiffs' pretrial liberty interests were on that occasion regularly adjudicated with most serious consequences, both direct and collateral, including the loss of employment and housing, and inability to support and care for particularly needy dependents. There is no question that a bail hearing is a critical stage of the State's criminal process.

Hurrell-Harring v. State, 15 N.Y.3d 8, 20, 930 N.E.2d 217 (2010) (internal quotation marks and citations omitted).

This statement mirrored that of the Second Circuit Court of Appeals, which in 2004 wrote:

> [B]ail hearings, like probable cause and suppression hearings, are frequently hotly contested and require a court's careful consideration of a host of facts about the defendant and the crimes charged. . . . Bail hearings do not determine simply whether certain evidence may be used against a defendant at trial or whether certain persons will serve as trial jurors; bail hearings determine whether a defendant will be allowed to retain, or forced to surrender, his liberty during the pendency of his criminal case.

United States v. Abuhamra, 389 F.3d 309, 323 (2d Cir. 2004).

The preliminary appearance hearing in our state is likewise a significant proceeding that can be "hotly contested" and require the "careful consideration" of a "host of facts." A preliminary appearance is not merely a pro forma procedure where a judge follows a bail schedule, but instead is an individualized determination of conditions of release based on myriad factors. *See Westerman v. Carey,* 125 Wn.2d 277, 892 P.2d 1067 (1994). At a bail hearing, the court must apply Criminal Rule 3.2, which directs the judicial officer to make

specific findings regarding the risk posed by pretrial release and consider many factors that are not apparent from a police report. *See* CrR 3.2(c)(1)-(9), (e)(1)-(8).

In light of these considerations, this Court should affirm the determination of the Court of Appeals that the preliminary hearing at which bail was set is a critical stage of the criminal proceedings against the accused.

II. Washington's Court Rules Unambiguously Require Counsel to be Present at Preliminary Appearance Hearings.

This Court has reinforced the constitutional guarantee to the appointment of counsel by issuing Superior Court Criminal Rule (CrR) 3.2.1, and the accompanying Criminal Rule for Courts of Limited Jurisdiction (CrRLJ) 3.2.1. The plain text of this rule uses unambiguous language to guarantee specific rights to individuals who are arrested and detained in jail.

First, an arrestee must have a preliminary appearance hearing "the next court day" following his arrest. CrR 3.2.1(d)(1); *see also Khandelwal v. Seattle Municipal*

Court, 6 Wn.App.2d 323, 338, 431 P.3d 506 (2018) (holding that CrRLJ 3.2.1(d)(1)'s timing requirement is mandatory and rejecting the Seattle Municipal Court's policy of delaying preliminary appearance hearings). At this hearing, the judge must tell the accused of "the nature of the charge." CrR 3.2.1(e)(1)(i). The arrestee must also be informed of his or her "right to remain silent" and his or her "right to be assisted by a lawyer at every stage of the proceedings." CrR 3.2.1(e)(1)(ii)-(iii).

Critically to this case, "[a]t the preliminary appearance, the court *shall* provide for a lawyer pursuant to rule 3.1." CrR 3.2.1(e)(1) (emphasis added). Rule 3.1, in turn, mandates that the Court must provide a lawyer to a defendant "as soon as feasible after the defendant is taken into custody, appears before a committing magistrate, or is formally charged, whichever occurs earliest." CrR 3.1(b)(1).

As the Court of Appeals has held, Rule 3.2.1 "is a mandatory rule." *State v. Reisert*, 16 Wn.App.2d 321, 324, 480

P.3d 1151, *review denied*, 197 Wn.2d 1023, 492 P.3d 169 (2021). The rule is mandatory because it employs the word "shall" in relation to the obligations of the court. Under Washington law, "[i]t is well settled that the word 'shall' in a statute is presumptively imperative and operates to create a duty." *Erection Co. v. Dep't of Labor & Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993). "The word 'shall' in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent." *Id.*; *see also Khandelwal*, 6 Wn.App.2d at 338 ("Washington courts have consistently held that 'must' and 'shall' are synonymous and both words impose mandatory duties."). It is therefore clear from the plain text of the rule that counsel must be provided at preliminary appearance hearings.

Caselaw interpreting Rule 3.2.1 is sparse, but the recent discussion of the right to counsel in the case of *Khandelwal v. Seattle Municipal Court* is instructive. While the primary issue in the *Khandelwal* case related to the timing of the preliminary

appearance, the Court derided the very suggestion that a preliminary appearance could occur without defense counsel present:

> [R]ule [3.2.1] also provides that the court 'shall provide for a lawyer' . . . It would be quite surprising indeed for the court to suggest that the use of the word 'shall' in [that] provision[] is precatory only.

Khandelwal, 6 Wn.App. at 338.

This is plainly a correct statement of the law: the text of the rule is unambiguous and brooks no exceptions to the right to counsel as provided by Criminal Rule 3.1.

It is no response to argue that the failure to provide counsel at the preliminary appearance is somehow authorized by Criminal Rule 3.1. That rule states that counsel must be provided "as soon as feasible" following the defendant being "taken into custody," and "at every stage of the proceedings." CrR 3.1. This Court has clarified that the guarantee to counsel as soon as practicable means that the right to counsel accrues "*immediately* upon arrest." *State v. Templeton*, 148 Wn.2d 193,

218, 59 P.3d 632 (2002) (emphasis added); *see also State v. Kirkpatrick*, 89 Wn.App. 407, 415, 948 P.2d 882, 886–87 (1997) ("[T]he 'earliest opportunity' to put [the defendant] in touch with an attorney was *immediately* after his request.") (emphasis added). Indeed, cases addressing the applicability of Rule 3.1 typically address whether a defendant's rights were violated when the government withholds an attorney from a defendant for a matter of a few hours. *See, e.g.*, *State v. Scherf*, 192 Wn.2d 350, 374, 429 P.3d 776 (2018) (hours-long delay in obtaining public defender assistance was justified by safety concerns and overnight closure of public defender's office). *Amici* have been unable to find any published opinion where an appellate court in our State has found that a delay of days or weeks in appointing an attorney to meaningfully consult with an arrestee is authorized by Rule 3.1 or any other provision of Washington law.

Finally, the mandatory nature of the right to counsel contained in Rule 3.2.1 is confirmed by the fact that the Rule

contemplates a release hearing "pursuant to rule 3.2." CrR 3.2.1(e)(1). That rule codifies a "presumption of release" and mandates that the Court make substantial individualized findings about a defendant's life history, including his or her community ties, work history, criminal history, substance use, educational history, and financial support. *See* CrR 3.2(c)(1)-(9), (e)(1)-(8). Given the complexity of this rule, it is difficult to imagine how anyone who is arrested for a crime, booked into jail, and produced into a courtroom the next court day could be expected to make an argument for release "pursuant to rule 3.2" without the assistance of a lawyer.

The detrimental effect of not having counsel present for preliminary appearance hearings is evident from the transcript of this case. At the preliminary appearance hearing, the Court failed to inform the defendant of his right to remain silent or his right to counsel at all stages of the proceedings. The Court did not permit argument regarding release. There is no evidence that any of the mandates of Rule 3.2 were meaningfully applied

when bail was set at $25,000—instead of presuming release and considering all less restrictive alternatives before resorting to the imposition of bail, the Court and the prosecutor appeared to simply pick a bail number designed to keep Mr. Charlton in jail. *See* RP at 15 (prosecuting attorney states that the $25,000 bail "seems to be doing the trick").

Making matters worse, at the second court hearing (where Mr. Charlton again was denied counsel), the trial court converted the bail to "cash, no bond." RP at 16. If Mr. Charlton had been provided with defense counsel at the hearing, that attorney would have been able to point out that the practice of imposing cash-only bail has been declared unconstitutional by this Court. *State v. Barton*, 181 Wn.2d 148, 167–68, 331 P.3d 50, 59 (2014) (cash only bail order that "excluded a surety bond . . . was more restrictive than 3.2(b) as a whole allows and contrary to article I, section 20").

In sum, the statement in Criminal Rule 3.2.1 that a court must provide an arrestee with counsel at arraignment is

mandatory and contains no exceptions. The trial court failed to follow this rule, resulting in clear violations of Mr. Charlton's constitutional rights. The absence of counsel had a tangible impact on these hearings, as the trial court made several basic legal errors during the hearings where defense counsel was not present.

To the extent that this transcript reflects the common practice in Grays Harbor County—and may be indicative of proceedings around our state[2]—it necessitates a clear and forceful statement from this Court that the ongoing practice of failing to provide counsel will not be tolerated.

III. Failure to Provide Counsel for Preliminary Appearance Hearings Harms Individuals and Communities in a Manner that Undermines Faith in the Justice System.

Failing to provide an arrestee with an attorney to advocate meaningfully for pretrial release can lead to outcomes

[2] *See State v. Heng*, 22 Wn.App.2d 717, 512 P.3d 942 (2022) (noting the absence of counsel at the preliminary appearance)

that are deeply harmful to individuals accused of crimes and the communities in which they live. Unnecessary pretrial detention and unwarranted delays in the appointment of counsel exacerbate racial disparities in the criminal legal system and undermine the integrity of criminal investigations.

A. Unnecessarily Prolonged Pretrial Detention Harms Arrestees in a Manner that Inflicts Particular Harm on Communities of Color

This Court's review of the issue presented in this case must consider two critical facts: that pretrial incarceration is extraordinarily harmful to those detained, and that communities of color and the poor will be disproportionately impacted if our trial courts fail to protect the rights at issue here.

The profound and often irreversible harms of pretrial incarceration are well established. "[P]retrial detention leads to worse outcomes for the people who are held in jail—both in their court cases and in their lives—as compared with similarly situated people who are able to secure pretrial release." Digard, Léon, and Swavola, Elizabeth, "Justice Denied: The Harmful

and Lasting Effects of Pretrial Detention," *Vera Evidence Brief* (2019) at 2.[3] Even setting aside the fact that an individual detained pretrial is more likely to be convicted and more likely to plead guilty in light of the pressures of incarceration, *id.* at 3-5, the immediate consequences of pretrial incarceration can be life-altering. Nearly 50 years ago the United States Supreme Court recognized that even short "[p]retrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships*." Gerstein v. Pugh*, 420 U.S. 103, 114, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975).

The necessity for a timely determination of bail has been reinforced by rigorous academic research into the harmful effects of unnecessarily delaying pretrial release. In a comprehensive study of bail practice in Kentucky, researchers found even a short delay in obtaining pretrial release has serious impacts. Lowenkamp, Christopher et al., "The Hidden Costs of

[3] Available at https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf

Pre-Trial Detention," *Laura and John Arnold Foundation* (2013).[4] The study reported three "critical findings" related to the timing of release hearings:

- First, "[l]onger pretrial detentions, up to a certain point, are associated with the likelihood of [failure to appear] pending trial."
- Second, "[l]onger pretrial detentions are associated with the likelihood of [New Criminal Arrest] pending trial."
- Third, "[b]eing detained pretrial for two days or more is related to the likelihood of post-disposition recidivism."

Id. at 4.

When parsing data from over 150,000 cases, the study further found that delaying pretrial release for 8-14 days—which appears to be the amount of time the Court below thought was appropriate for appointing counsel and scheduling

[4] Available at: https://craftmediabucket.s3.amazonaws.com/uploads/PDFs/LJAF_Report_hidden-costs_FNL.pdf.

a contested bail hearing—results in the defendant being 41% more likely to commit a new criminal offense compared with an individual who obtained prompt pretrial release. *Id.* at 16.

As the ACLU of Washington found in their study, "No Money, No Freedom: The Need for Bail Reform":[5]

> Individuals jailed before trial are more likely to receive a sentence of jail or prison, and for a longer time, than those who are free before their trial. Keeping a person in jail may also prevent a trial from even occurring: The loss of income, possible loss of employment and housing, disruption of prescribed medications, and stresses on one's family that accompany incarceration have induced many a person to accept a plea bargain to get out. Poor people, people of color, and people with certain disabilities are disproportionately affected by the unfairness of bail.

This research tracks with a common-sense understanding of how even short periods of incarceration affect individuals and the communities in which they live. A person who is absent from work for a day might be able to keep her job; a person

[5] Available at https://www.aclu-wa.org/bail at p. 4; citation omitted from this quotation.

who has to wait a week for a meaningful opportunity at release likely will not be able to do so. A person who has to spend one night in jail might not miss a rent payment; a person who is gone for a week could be released from jail straight into eviction proceedings. A parent who cannot consult with counsel to develop a cogent release plan for over a week after being arrested may face the devastating consequence of a dependency case. An unhoused person separated from their encampment for a few days may lose literally everything they own except the clothes they were booked into jail with.

The second critical point is that people and communities of color are harmed disproportionately by practices like those reflected in this case. As this Court has expressed forcefully in recent years, "implicit, institutional, and unconscious biases, in addition to purposeful discrimination, have resulted in disproportionate police contacts [and] investigative seizures…against Black, Indigenous, and other People of Color

(BIPOC) in Washington." *State v. Sum*, 199 Wn.2d 627, 631, 511 P.3d 92 (2022).

Moreover, not only are BIPOC individuals overrepresented in the criminal legal system, once ensnared they receive worse outcomes both generally speaking and specific to this very issue: "[B]lack people are subject to pretrial detention more frequently, and have bail set at higher amounts, than white people who have similar criminal histories and are facing similar charges." Hinton, Elizabeth et al., "An Unjust Burden," *Vera Evidence Brief* (May 2018), at 8.[6] Indeed, the Court recently described such racial bias as "a common and pervasive evil that causes systemic harm." *State v. Berhe*, 193 Wn.2d 647, 657, 444 P.3d 1172 (2019). The result of this historic and ongoing racism is that Black and brown people continue to be "overrepresent[ed]…in every stage of our criminal and juvenile justice systems." *Id.*

[6] https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf

These facts reinforce the principle the court rules embody: courts should act promptly to provide arrestees with counsel, hold timely bail hearings, and apply the presumption of release contained in Criminal Rule 3.2 to avoid unnecessary harm to arrestees and the communities in which they live.

B. Furnishing Defense Counsel Promptly Promotes the Integrity of Criminal Investigations

The timely provision of defense counsel can help ensure the accuracy and integrity of the criminal legal system. The role of a defense attorney is not merely to cross-examine witnesses at trial; an attorney is required to act competently throughout pretrial proceedings. *See, e.g.*, *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012) (right to effective assistance of counsel includes pretrial proceedings).

Providing counsel for the accused from the very outset of legal proceedings ensures that a defendant can have assistance in accessing evidence that may have been overlooked by law enforcement. *See, e.g.*, *State v. Armstrong*, 188 Wn.2d 333, 344, 394 P.3d 373 (2017) (discussing loss of video evidence

and claim of "cavalier" attitude of police). When considering the possible loss of transitory evidence, the Court of Appeal of California persuasively wrote:

> Police and prosecutors are more than willing to avail themselves of technology when it is to their advantage; there must be a level playing field that gives defendants equal access to the same evidence. Equal and fair treatment in this respect is nothing less than the foundation upon which due process is built.

People v. Alvarez, 229 Cal. App. 4th 761, 779, 176 Cal. Rptr. 3d 890 (2014).

In sum, *amici*'s members can attest that meeting with a client shortly after learning of the existence of a criminal investigation can be critical to preserving exculpatory materials. Even a brief private conversation within the protection of the attorney-client privilege can be crucial to ensuring that a defendant can present a defense based on complete and reliable evidence. Assigning a defense attorney to represent an arrestee at the time of her preliminary appearance promotes the integrity of criminal proceedings.

CONCLUSION

The Constitution and Criminal Rules unambiguously require that every arrestee in every courtroom in our state has the right to the assistance of counsel at his or her first appearance hearing. Court policies or procedures which deny defendants this right cannot be tolerated. This Court should issue an opinion that eliminates any lingering doubt that the failure to provide counsel at the preliminary appearance hearing violates the law under both the Constitution and applicable court rules. For all the reasons outlined in the Petitioner's brief, reversing and remanding the conviction in this case is an appropriate remedy.

Pursuant to RAP 18.17, I certify that the portions of this document which count towards the word limit contain 3,842 words.

Respectfully submitted this 1st Day of May, 2023

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