

My name is Bruce Adsero; I work for Feldman & Lee and the bulk of my practice is public defense cases. I also devote a significant amount of free time toward consulting with lawyers on issues related to CrRLJ 8.3 and its applicability to myriad discovery issues. I have also personally work with CrRLJ 8.3 in my day-to-day practice with issues like improperly withheld discovery, competency hearings, and other government misconduct. The court rules do not give a framework for dismissal under CrRLJ 8.3 in all but the rarest circumstances as a practical matter.

## **I. CrRLJ 8.3 does not facilitate dismissal on its face when the government violates constitutional prohibition against indefinite detention of incompetent defendants.**

Take, for example, the issue with competency delays. Because our court rules stay speedy trial, no amount of government misconduct will ever justify dismissal under 8.3; instead, the defense must rely on a Hand motion.<sup>1</sup> A patchwork of common law and federal law provide the authority for this motion, but the legislature has not codified a specific set of circumstances where dismissal is appropriate within the existing framework for preventing restoration delays. A small revision to the court rule would give trial court a clear procedure to dismiss, but under the current version CrRLJ 8.3, indefinite detention without restoration appears to be acceptable. The court has not yet squared the implication in Hand<sup>2</sup> that detainees should plea a speedy trial violation with the practicality that speedy is stayed and prosecutors frequently argue there is no speedy trial to violated when a competency process is pending. See Hand at 301. Thus, there is no state level court rule that detainees can rely on when they are detained indefinitely.

## **II. Discovery Violations and Prosecutorial Misconduct rely too heavily on the speedy trial rule to encourage good public policy in the interest of justice.**

Many prosecutors do not take their obligation to ensure a fair trial seriously. Reversal of a trial is rare, and when a new trial is the only punishment, there is no incentive to change behavior. The current version of CrRLJ 8.3 does not permit dismissal when a new trial or continuance for a current trial would “cure” prejudice. What authority there is for dismissal largely is derived from State v. Michielli, 132 Wn. 2d 229, 244 (1997), which coaches such violations in terms of “due process” violations. The focus on a new trial and speedy generally leads to perverse incentives and does not encourage a change in behavior

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<sup>1</sup> State v. Hand, 192 Wash. 2d 289, 293, 429 P.3d 502, 504 (2018). (holding dismissal is not warranted for past due process violation for delayed restoration treatment).

<sup>2</sup> “There is a distinction between pretrial detention and pretrial competency restoration commitment, which implicates different constitutional rights. Since there is no fundamental right or statutory right in receiving services, the Sixth Amendment’s speedy trial clause governs issues relating to pretrial detention, not substantive due process. Because Hand fails to argue his right to a speedy trial has been violated here, his conviction should stand. State v. Hand, 192 Wash. 2d 289, 307–08, 429 P.3d 502, 511 (2018)

for prosecutors who are willing to flout the rules when the only risk is doing things over again.

Discovery violations do have case law supporting dismissal, but manipulation of time for trial is a common tactic to avoid accountability when prosecutors fail to comply with their discovery obligations. When faced with CrRLJ 8.3 motions to dismiss for wrongfully withheld evidence or late discovery<sup>3</sup> prosecutors in Seattle Municipal Court and King County District Court will routinely review past motions to continue by the defense and “count them” as justifications for the court to continue a case outside speedy as alternative to dismissal. While these tactics don’t always succeed, they show how CrRLJ 8.3 incentivizes the gamification of speedy trial to avoid accountability. Under CrRLJ 8.3, a case reversed for Brady violations by an appellate court and remanded to a trial court would not be a candidate for dismissal under 8.3, so long as the new trial “cured” the prejudice suffered by a criminal defendant.

Prosecutorial misconduct at trial such as improper arguments, invocation of racial bias or burden shifting have essentially no case law justifying dismissal under 8.3. So long as the prosecutor’s office is willing to re-try a case, a new trial is often the only consequence. Even offices that engage in a pattern of misconduct are free to make the same “mistakes” repeatedly, with only a new trial to concern themselves with.

### **III. Prosecuting Attorneys across the state fail to meaningfully prioritize their Brady obligations.**

Many commenters opposed to the rule change are uniquely situated to educate the court about their efforts as elected prosecutors to enforce Brady but have not done so because no serious efforts have been made. The only consideration many prosecutors give Brady is how to minimally comply to avoid a conviction being overturned. However, an examination of misconduct in many of the jurisdictions opposing this rule change show that examples of positive Brady policy changes are not forthcoming, but negative examples where they fail to comply with Brady abound.

For example, in Kitsap County, the elected prosecutor sued a journalist to stop disclosure of Brady records under the PRA before ultimately relenting.<sup>4</sup> In another case out

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<sup>3</sup> See STATE’S RESPONSE IN OPPOSITION TO DEFENDANT’S MOTION TO DISMISS PURSUANT TO CrRLJ 8.3(b) King County District Court, Case # 520EXD005. A copy of the motion can be provided to the committee.

<sup>4</sup> Andrew Binion, *Kitsap prosecutors file lawsuit against journalist over records request, then back down*, KITSAP SUN, (Mar. 3, 2021) <https://www.kitsapsun.com/story/news/2021/03/02/kitsap-prosecutors-file-lawsuit-against-journalist-over-records-request/6842045002/>.

of Chelan County, the prosecutor only reluctantly dismissed very serious charges following a sustained failure to comply with even basic discovery rules.<sup>5</sup>

Many county prosecutor's offices have a long history of prosecutorial misconduct, which remains unbroken between elected officials. In 2009, Grant County was considered one of the state's most troubled criminal justice systems.<sup>6</sup>

Almost fifteen years later, Grant County serves as an example of why revisions to CrRLJ 8.3 are needed. After the Washington State Supreme Court reversed a morally repugnant conviction, it returned to the County prosecutor in State v. Zamora.<sup>7</sup>

Rather than dismiss the case like it had attempted to do before an adverse ruling, the elected prosecutor attempted to prosecute Mr. Zamora, leading to the arcane invocation of prosecutorial vindictiveness to justify dismissal.<sup>8</sup>

Why didn't CrRLJ 8.3 help Mr. Zamora despite a decade of misconduct by an office with no interest in giving him a fair trial? Because of the narrow set of circumstances under which it would apply. Had the court been allowed to consider dismissal in the interest of justice, overwhelming evidence could have been proffered to justify dismissal.

As these continued failures continue to pile up, some prosecutors are more concerned with removing officers from Brady lists than complying with its underlying requirement.<sup>9</sup>

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<sup>5</sup> Pete O'Cain World news editor. (2023, September 19). Child pornography charges dropped against Wenatchee Valley chiropractor. The Wenatchee World. [https://www.wenatcheeworld.com/publicsafety/child-pornography-charges-dropped-against-wenatchee-valley-chiropractor/article\\_85028964-571b-11ee-9c48-8f35f7f08b87.html](https://www.wenatcheeworld.com/publicsafety/child-pornography-charges-dropped-against-wenatchee-valley-chiropractor/article_85028964-571b-11ee-9c48-8f35f7f08b87.html)

<sup>6</sup> Armstrong, K. (2012, September 9). *Chief prosecutor, predicted to be an 'unmitigated disaster,' now facing disciplinary charges*. The Seattle Times. <https://www.seattletimes.com/seattle-news/chief-prosecutor-predicted-to-be-an-unmitigated-disaster-now-facing-disciplinary-charges/>

<sup>7</sup> Gutman, D. (2022, June 30). *Prosecutor who asked jury about immigration, border wall committed racial bias, misconduct, WA Supreme Court rules*. The Seattle Times. <https://www.seattletimes.com/seattle-news/law-justice/prosecutor-who-asked-jury-about-immigration-border-wall-committed-racial-bias-misconduct-wa-supreme-court-rules/>

<sup>8</sup> Gutman, D. (2023, October 19). *Judge cites 'vindictive' prosecution, tosses case against WA man beaten by police*. The Seattle Times. <https://www.seattletimes.com/seattle-news/law-justice/judge-cites-vindictive-prosecution-tosses-case-against-wa-man-beaten-by-police/#:~:text=EPHRATA%2C%20Grant%20County%20%E2%80%94%20The%20almost,the%20second%20time%2C%20against%20Zamora>

<sup>9</sup> Banks, G. M. (2021). Request for a formal Attorney General Opinion Interpreting SHB 1088 (Laws 2021, Ch. 322). In *Attorney General Opinion*. [https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/About\\_the\\_Office/AGO\\_Opinions/Pending\\_AGO\\_Opinion/s/Banks%20Opinion%20Request.pdf](https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Home/About_the_Office/AGO_Opinions/Pending_AGO_Opinion/s/Banks%20Opinion%20Request.pdf)

Investigative reporting by CrossCut revealed that a large number of law enforcement officers with credibility issues work around the state.<sup>10</sup> A follow up revealed inconsistent policies amongst our elected prosecutors in maintaining Brady lists.<sup>11</sup>

Trial judges should be empowered to correct and deter poor behavior by the government. The changes to CrRLJ 8.3 should be adopted. While there are concerns about “creating additional” 8.3 motions, the practical impact is that the court rule will provide a procedural standard to unify the myriad methods by which dismissal is already being sought. As discussed above, arguments for dismissal, and justifications for granting dismissal arise when there is no clear procedure. This rule change would establish that procedure.

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<sup>10</sup> Santos, M. (2022, January 11). Nearly 200 cops with credibility issues still working in Washington state. *Crosscut*. <https://crosscut.com/news/2021/04/nearly-200-cops-credibility-issues-still-working-washington-state>

<sup>11</sup> Santos, M. (2022b, April 20). WA prosecutors who withhold evidence rarely face discipline. *Crosscut*. <https://crosscut.com/news/2022/04/wa-prosecutors-who-withhold-evidence-rarely-face-discipline>