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To: [Martinez, Jacquelynn](#)
Subject: FW: Letter to WASC in re 8.3 amendments
Date: Wednesday, January 17, 2024 8:20:37 AM
Attachments: [Letter to WASC in re 8.3 amendments.pdf](#)

-----Original Message-----

From: D. Angus Lee <angus@angusleelaw.com>
Sent: Tuesday, January 16, 2024 5:00 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Letter to WASC in re 8.3 amendments

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Please see the attached comment in re the proposed amendment to rule 8.3.



Wednesday, January 17, 2024

Supreme Court of the State of Washington
P.O. Box 40929
Olympia, WA 98504-0929
supreme@courts.wa.gov

RE: PROPOSED RULE 8.3 AMENDMENT

Justices of the Supreme Court:

The current formulation of Rule 8.3 is a well-intentioned safeguard that allows for criminal prosecutions to be dismissed when there has been prejudice to the rights of the accused, impacting their right to a fair trial. The rule, as it stands, seeks to strike a balance between the pursuit of justice and the protection of the accused from arbitrary governmental actions. Proponents seek to amend the rule as follows:

On Motion of Court. The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct ~~when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.~~ The court shall set forth its reasons in a written order.

The proposed amendments to Rule 8.3, seeking to eliminate the requirement of demonstrating prejudice to the rights of the accused, are concerning. This modification would provide the trial courts with unrestrained power to dismiss criminal cases under the broad and undefined mandate of “furtherance of justice.” The absence of a clear definition of what constitutes “justice” under this rule raises concerns about consistency and fairness in the application of the proposed rule.

Furthermore, granting such unbounded discretion to trial courts without a precise definition of justice may lead to disparate interpretations and applications

across jurisdictions. It may inadvertently create a system where justice varies significantly from one county to another, undermining the uniformity of the legal system.

History has shown that unchecked judicial discretion can lead to unequal outcomes. The introduction of the Sentencing Reform Act (SRA) addressed the disparities resulting from broad sentencing authority once held by trial judges. A similar disparity might arise if Rule 8.3 is amended without adequately addressing the potential for varied interpretations of justice.

However, it is acknowledged that the current rule is overly restrictive, leading to situations where governmental misconduct is acknowledged but deemed insufficiently prejudicial to warrant dismissal. This often places an undue burden on the defense to rectify issues caused by governmental actions.

To enhance the effectiveness of Rule 8.3 and address these concerns, it is proposed that the rule should be amended to establish that once misconduct is identified, prejudice is presumed unless the government can demonstrate otherwise by a preponderance of the evidence. This shift places the onus on the party responsible for the misconduct, rather than on the defense, to prove the absence of prejudice.

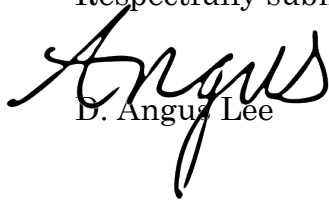
While the proponents of the amendment correctly identify the need for refinement in Rule 8.3, the proposed changes are not the solution. Instead, the rule would benefit from amendments that shifts the burden of proving the absence of prejudice to the government in cases of established misconduct.

Proposed Amended Language for Rule 8.3:

(b) On Motion of Court or the Defendant: The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. Upon the establishment of misconduct, prejudice shall be presumed. The government bears the burden of proof, by a preponderance of the evidence, to demonstrate the absence of prejudice. In cases of established misconduct, the defense shall not be tasked with rectifying the resulting or presumed prejudice. The court shall set forth its reasons for granting or denying a motion under this rule in a written order.

The proponents are indeed correct in identifying the imperfections of Rule 8.3. However, our goal should be to refine and improve the rule for clarity and fairness, not merely to alter it.

Respectfully submitted,



D. Angus Lee

*In halls of justice, voices rise,
To shape the rules, the law's wise guise.
A safeguard stands, Rule Eight Point Three,
Guarding rights in equity.*

*"Dismiss," it says, "when wrongs are clear,
When prejudice to rights appear."
A balance struck 'twixt guilt and grace,
In every case, a rightful place.*

*Yet voices call for change anew,
To strip the rule of clauses true.
Unfettered power, the courts might hold,
A path unchecked, unduly bold.*

*"Justice," a term, so broad, so wide,
Varies in eyes where biases reside.
From county to county, the scales might tip,
Leaving fairness in a faltering grip.*

*Recall the past, the lessons taught,
Disparities that justice sought.
The Sentencing Act, with aims so true,
Curbed the whims that once freely flew.*

*Yet, the rule, too strict, might often bind,
Leaving rightful dismissals behind.
The defense burdened, an unfair toll,
When government actions escape control.*

*Propose we now, a thoughtful change,
Balance restored, within justice's range.
When misconduct's proven, let prejudice be presumed,
Upon the government, the burden resumed.*

*Rule Eight Point Three, in balance, refined,
In pursuit of a system, justly designed.
Our goal, not merely to alter, but enhance,
In the dance of law, let fairness advance.*