RE: Response to CrR 8.3(c) amendment - Order No. 25700-A-1552

I write to urge you not to adopt the proposed amendment to CrR/CrRLJ 8.3(b). This amendment is inconsistent with long-established jurisprudence, would encourage trial courts to violate the separation of powers doctrine, and would most likely be bad for the courts, victims of crime, and even defendants.

The proposed amendment is inconsistent with case law.

As currently written, CrR/CrRLJ 8.3(b) is consistent with the long-established standard for any due process violation; before a court applies the "extraordinary remedy" of dismissal, the defendant must demonstrate prejudice. *See e.g. City of Seattle v. Holifield*, 170 Wn.2d 230, 238 (2010). This standard is consistent with long standing state and federal case law. For example, in the recent case of *State v. Stearns*, No. 101502-0 (March 28, 2024), this court reiterated that in a claim of alleged preaccusatorial delay a defendant must demonstrate actual prejudice.

If the requirement of prejudice were removed, as the proponents want, there would be inconsistent, competing standards for dismissal. For example, if a defendant wants to assert preaccusatorial delay, under amended CrR 8.3(b) he or she would not have to demonstrate prejudice. But *Stearns* makes clear that prejudice is required in such a claim. The resulting appellate litigation could take decades and millions of dollars in public resources to resolve.

The prejudice requirement also keeps the various courts of the state consistent. Removing the requirement, especially if used to remedy perceived racial injustices within the criminal justice system, will result in wildly different outcomes in different regions, and perhaps even between different judges in the same county. Legal principles, not the luck of drawing a certain judge, should govern whether a case is dismissed. Increasing inconsistency among outcomes is not a desirable goal, and for this reason alone, the proposed amendment should be rejected.

The proposed amendment could result in a violation of the separation of powers.

The proposed amendment will encourage trial court judges to exercise raw judicial power to intrude upon matters that are the province of the legislature and executive branches. The executive branch is imbued with the power to decide when to bring charges and which charges to bring. *E.g. State v. Rice*, 174 Wn.2d 884, 901 (2012). As the *Stearns* decision makes clear, courts have authority to dismiss cases because it is a remedy to government action which prejudiced the defendant's rights. Dismissing cases without any prejudice is tantamount to second-guessing the executive branch's decision to file a case, and/or the legislature's decision to criminalize a behavior. That is a violation of the doctrine of the separation of powers inherent in Washington's system of constitutional government. *See e.g. Carrick v. Locke*, 125 Wn.2d 129, 135, 882 P.2d 173, 177 (1994); *Freedom Found. v. Gregoire*, 178 Wn.2d 686, 696, 310 P.3d 1252, 1258 (2013).

The proposed rule amendment would undermine the legitimacy of the courts.

The proponents of the proposed amendment baldly state they want to use this proposed expanded trial court power to remedy perceived disproportionate outcomes in the criminal justice system. This

idea probably came from the law review article Judicial Dismissal in the Interest of Justice, 80 Mo. L. Rev. 629, 632 (2015), which expressly advocates using increased judicial power in just this way. But this can only harm the judiciary as a whole.

Dismissing a case to address a social ill suffered by others, whether real or perceived, is to give persons who are not a party to the case or controversy standing in the action. This goes beyond the province of the courts - the judiciary decides the cases and controversies brought before them. *Wash. State Labor Council v. Reed*, 149 Wn.2d 48, 64, 65 P.3d 1203, 1212 (2003, Chambers, J. concurring, *and see Marbury v. Madison*, 5 U.S. 137, 170, 2 L.Ed. 60, 71 (1803, "The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion.") Addressing large-scale public inequities is what the legislative and executive branches, not the judiciary, should be doing.

The intersection of race affects and the criminal justice system is an issue that divides Americans of all political stripes, even members of the same political party. Encouraging the trial courts to use raw judicial power on behalf of one voice in this debate would contribute to the perspective that the courts are political. This would harm the public perception of the legitimacy of the courts. "The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship." *Mistretta v. United States*, 488 U.S. 361, 407, 109 S. Ct. 647, 673, 102 L.Ed.2d 714, 753 (1989).

This has already happened on the national level, where the U.S. Supreme Court's growing reputation as "political" has harmed the public's perception of that previously unassailable institution. *See* Katy Lin and Carroll Doherty *Favorable views of Supreme Court fall to historic low*, Pew Research Center (July 21, 2023, last viewed April 29, 2024) https://www.pewresearch.org/short-reads/2023/07/21/favorable-views-of-supreme-court-fall-to-historic-low/.

Putting trial courts in the position of having to enter this fraught area of public disagreement can only harm the entire judiciary. This is another reason to reject the proposed amendment.

The proposed amendment would be bad for defendants.

The court Rules do not only guide the actions of the court, the Rules also guide the actions of the parties. CrR/CrRLJ 8.3(b) guides the actions of prosecutors by serving as clearly established guardrails for the prosecution, the same way as the exclusionary rule serves as a guardrail for the police. The Rule's warning is clear: if the state's actions cause prejudice to the defendant, the consequence can include dismissal.

Removing the requirement of prejudice also removes the guardrails. As a former prosecutor, I hope and believe that prosecutors would nonetheless remain stalwart guardians of the rights of the defendant, as is the duty of a prosecutor. However, giving trial courts the authority to dismiss cases without any prejudice will lead to a perception, whether real or perceived, that a prosecutor's cases are dismissed for arbitrary and/or capricious reasons. Because the judge's actions can guide and inform the actions of the other members of the courtroom workgroup, I fear a reaction of more arbitrary and capricious actions by frustrated prosecutors. And not all of these actions will result in

dismissals or any other action. Some may go undetected, and result in real injustices, such as convictions to higher or unfounded charges than would otherwise be justified.

Because the requirement of prejudice to the defendant makes clear standards for both courts and prosecutors, the proposed rule amendment should be rejected.

The proposed amendment would be bad for crime victims.

Criminal cases are different from most other court cases because the damaged party – the one who has actually suffered the most – is not a party to the action. Victims of crime have had their bodily integrity violated, their loved ones taken from them, and the sanctity of their homes intruded upon.

Despite being the party who has actually been harmed, victims are not a party to a criminal action. And although crime victims have been given statutory and constitutional rights, many still feel that their rights are second to the rights of those who injured them.

Whether this perception is correct or not, more dismissals of criminal cases involving victims can only reinforce that viewpoint. This will inevitably lead to a decrease in the confidence of the entire justice system.

Encouraging criminal case dismissals, as this proposed rule amendment would do, would inevitably alienate, frustrate and harm those who have already suffered. This proposed rule amendment could be catastrophic for a victim of crime. This is yet another reason to reject this proposal as harmful and wrong.

The proposed rule amendment should not be adopted.

This proposed Rule amendment is inconsistent with a long-established body of case law, will push trial courts towards violating the separation of powers, thereby delegitimizing the perceived legitimacy of the courts, and harm victims as well as defendants. For these reasons, this Court should deny the suggested rule amendment and leave CrR and CrRLJ 8.3(b) unchanged.

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