From: OFFICE RECEPTIONIST, CLERK
To: Martinez, Jacquelynn
Subject: FW: Comment re Proposed New CrR/CrRLJ 8.3(b)
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From: Shen, Tim <tshen@kingcounty.gov>
Sent: Thursday, April 25, 2024 3:53 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment re Proposed New CrR/CrRLJ 8.3(b)

To Whom It May Concern:

I am writing to express my objection to the proposed rule changes to CrR/CrRLJ 8.3(b). I agree with the reasons put forth by others who are voicing their objections to these proposed changes. As many commenters have already addressed the practical considerations the proposed rule, I would like to address the authorities from other jurisdictions that the proponents cite in support of the proposed rule.

The proponents of the rule change cite criminal rules from Idaho, Ohio, and Iowa to argue that other jurisdictions already "allow for broader discretion than Washington for courts to dismiss charges." However, a quick examination of the rules in these states and the case law from these states reveals that courts in these jurisdictions are not actually imbued with the dismissal powers that the proponents claim.

The proponents' reliance on criminal rules from Idaho, Ohio, and Iowa is misplaced, and their representations are not an accurate reflection of the law or practices within those states. In all three states, the procedural criminal rules largely do not grant courts the authority to dismiss cases with prejudice, based solely upon a finding of government mismanagement or misconduct, and their case law makes it clear that if a trial court does dismiss a case with prejudice, then the trial court must engage in an analysis of whether the defendant has suffered a violation of a constitutional right.

The Rules From Other Jurisdictions Cited By the Proponents Are Typically More Restrictive on Courts Than CrR/CrRLJ 8.3(b) and In Application Do Not Actually Align with The Proponents' Proposed Rule.

Idaho Criminal Rule 48(a)(2)

Idaho Criminal Rule 48(a)(2) can only be used to dismiss misdemeanor offenses with prejudice.

By the plain language of Idaho Criminal Rule 48(c), dismissals will only be a bar to prosecution in cases where the offense was a misdemeanor and an "order for dismissal is not a bar if the offense is a felony."

No such limitation applies to Washington Courts exercising authority under CrR/CrRLJ 8.3(b).

Further, in Idaho cases where courts considered government misconduct, they have required the defendant to make a showing of prejudice to his or her right to a fair trial. See e.g., State v. Summers, 152 Idaho 35, 39, 266 P.3d 510 (Idaho Ct. App. 2011) (defendant failed to show that a prosecutor's threat to seek an arrest warrant or intentional delay of trial "impaired her ability to receive a fair trial" or "was a deliberate device to gain an advantage over her"); State v. Bacon, 117 Idaho 679, 683, 791 P.2d 429, 433 (1990) (defendant failed to show actual prejudice where, due to procedural errors by the State, the complaint was dismissed and refiled three times).

Thus, the broad grant of authority that the proponents are asking for and purporting to be available to Idaho courts does not actually exist in the state in the same manner that it would in Washington under their proposed rule change.

Ohio Criminal Rule 48(b)

Ohio Criminal Rule 48(b) has a more limited application than CrR/CrRLJ 8.3(b).

Unlike CrR/CrRLJ 8.3(b), Ohio Criminal Rule 48(b) does not inherently give Ohio courts the ability to dismiss a case with prejudice and limits the types of cases that can be dismissed with prejudice.

Ohio law limits Ohio courts' ability to dismiss cases with prejudice only "where there is a deprivation of a defendant's constitutional or statutory rights, the violation of which would, in and of itself, bar further prosecution." State v. Troisi, 169 Ohio St. 3d 514, 525, 206 N.E.3d 695 (2022). Ohio courts have held that this generally entails "cases involving the deprivation of a defendant's rights to a speedy trial or against double jeopardy, which would preclude further proceedings." Id. (citing, State v. Michailides, 114 N.E.3d 382, 390 (Ohio Ct. App. 2018); State v. Dunn, 101648, 2015 WL 4656534 (Ohio Ct. App. Aug. 6, 2015)).

This is fundamentally different and more restrictive than Washington Court's authority under CrR/CrRLJ 8.3(b). For example, CrRLJ 8.3(b) has been applied to cases involving violations of CrRLJ 4.7. See e.g., State v. Salgado-Mendoza, 189 Wn.2d 420, 403 P.3d 45 (2017). Finally, when Ohio courts do engage in similar discovery violation analyses, they do require a showing of prejudice. See e.g., State v. LaMar, 95 Ohio St. 3d 181, 190, 767 N.E.2d 166 (2002) (rule-based discovery violation requires "the accused has suffered prejudice.")

Iowa Rule of Criminal Procedure 2.33(1)[1]

Iowa Rule 2.33(1) is to be exercised "exercised sparingly" and does not apply to as many

cases as CrR/CrRLJ 8.3(b).

Iowa courts have limited the application of Rule 2.33(1); stating the rule "should be 'exercised sparingly' and only in that 'rare' and 'unusual' case where it 'cries out for fundamental justice beyond the confines of conventional consideration.'" State v. Smith, 957 N.W.2d 669, 681 (Iowa 2021).

This clear limitation contrasts greatly with Washington's law where, "governmental misconduct" warranting dismissal of prosecution in furtherance of justice need not be evil or dishonest and simple mismanagement is sufficient to warrant dismissal. State v. Michielli, 132 Wn.2d 229, 239, 937 P.2d 587 (1997).

Iowa Rule 2.33(1) Severely Limits a Trial Court's Ability to Dismiss Cases With Prejudice.

Under Iowa Rule 2.33(1), a dismissal "in the furtherance of justice" allows for refiling of any charges stemming from felonies or aggravated misdemeanors. State v. Fisher, 351 N.W.2d 798, 800–01 (Iowa 1984). While the district court has discretion on the question of dismissals in "the furtherance of justice," "once such a dismissal is ordered, the *court has no discretion to bar future prosecutions*." Id. (emphasis added).

No such limitation applies to Washington Courts exercising authority under CrR/CrRLJ 8.3(b).

Iowa Rule 2.33(1) Cannot Be Applied to a Defendant's Motion to Dismiss.

"Rule 2.33(1) does not apply to a dismissal on the *defendant's* motion." Smith, 957 N.W.2d at 681 (emphasis original). See Also, State v. Fisher, 351 N.W.2d 798, 801 (Iowa 1984) (2.33(1) "may only be invoked by the court . . . or by the prosecuting attorney; it is not available to a defendant").

In Washington, application of CrR/CrRLJ 8.3(b) is not limited purely sua sponte actions by the trial court or to motions by the State. It is often applied in a wide variety of defense motions, e.g. discovery violations, prosecutorial vindictiveness, 6th Amendment right to counsel violations, etc.

In State v. Brumage, the Iowa Court Did Not Expressly Reject Washington's Approach in CrR/CrRLJ 8.3(b).

The proponents appear to misunderstand the Iowa court's analysis in State v. Brumage, 435 N.W. 2d 337, 330 (Iowa 1989) and its review of Washington law and CrR/CrRLJ 8.3(b). In Brumage, the Iowa court reviewed an appeal where a trial court dismissed the state's case because it found the state could not meet its burden of proof. Brumage, 435 N.W. 2d at 339. The Iowa court's analysis of Washington law appears to be a misinterpretation of CrR/CrRLJ 8.3(b) and 8.3(c). Id. at 340. This is further evidenced by the Iowa court's consideration of California and New York case law, wherein the court's string cites are largely focused on the sufficiency of the evidence, and its ultimate holding is whether "the trial court abused its discretion by dismissing the charges "in the furtherance of justice" based on the lack of

evidence before the State had an opportunity to present its case at trial." Id. at 340-42.

Conclusion

The court rules in these jurisdictions simply do not operate in the manner that the proponents suggest. If the rules committee looks to these other jurisdictions, it will see that the proponents' reliance on these other states is misplaced, and that Washington's approach under CrR/CrRLJ 8.3(b) offer better and more protections for defendants than the rules from these other states.

By asking Washington Court's to adopt rules similar to these other jurisdictions, outcomes would actually become worse for defendants. For example, if Washington were to utilize the rules from Idaho and Iowa, the result would likely be that prosecutors' offices could charge more crimes as felonies and be less incentivized to exercise discretion when making charging decisions. Further, defendants would not be able to bring CrR/CrRLJ 8.3(b) motions. This would lead to objectively worse outcomes for defendants.

If the goal of the rule change is to give courts greater authority in dismissing cases, than following precedent from these other jurisdictions would have the opposite effect. Courts in these other jurisdictions appear to have less authority than Washington Courts to dismiss cases with prejudice and the rules in these other jurisdictions have much more limited applications.

As such, the rules committee should reject the proposed rule because the proponents have failed to demonstrate that their proposed rule would in fact solve the problems they seek to address.

Sincerely,
Timothy Shen

4/25/2024
Date

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[1] Proponents cite to Iowa Rule of Criminal Procedure 27(1). However, the Iowa rules have since been renumbered to 2.33(1) since at least 2003. See e.g., State v. Thomas, 659 N.W.2d 217 (Iowa 2003)