April 29, 2025

Clerk of the Supreme Court
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I ask the Court to please consider the following comments and concerns relating to the proposed criminal rule changes.

CrR/CrRLJ 8.3 – Dismissal

Concerns:

- **The proposed amendment is contrary to this Court's precedent requiring a showing of prejudice to warrant dismissal even when the text of the court rule does not mention it.** As initially enacted in 1973, CrR 8.3 read: "The court on its own motion in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution and shall set forth its reasons in a written order." Despite the seemingly broad discretion allowed under the original rule, this Court held that dismissal under CrR 8.3(b) is only warranted if the defendant shows both arbitrary action or governmental misconduct ***and*** prejudice affecting the defendant's right to a fair trial. *State v. Michielli*, 132 Wn.2d 229, 239-40, 937 P.3d 587 (1997). In 1995, CrR 8.3(b) was amended to explicitly include the prejudice requirement already imposed by case law. As this Court recounted in *State v. Rohrich*, 149 Wn.2d 647, 654-55, 71 P.3d 638 (2003), courts had long recognized that "dismissal of charges is an extraordinary remedy ... available only when there has been *prejudice to the rights of the accused which materially affected the rights of the accused to a fair trial.*" *State v. Baker,* 78 Wash.2d 327, 332–33, 474 P.2d 254 (1970) (emphasis added in *Rohrich*). This conclusion was based on principles of both due process and separation of powers. *State v. Cantrell*, 111 Wn.2d 385, 758 P.2d 1 (1988). In light of both the prior case law and the 1995 amendment codifying that case law, this Court reaffirmed in *Rohrich* that a trial court may not dismiss charges under CrR 8.3(b) unless the defendant shows prejudice affecting their right to a fair trial. 149 Wn.2d at 653-54. Because the prejudice requirement is based on constitutional principles, amending the rule to omit it is contrary to law and will only result in confusion. To the extent that the proponents seek to overrule constitutional holdings of this Court via an amendment to the criminal rules, it is an improper attempt to avoid *stare decisis* through the rule-making process.

- **By allowing dismissal of a prosecution based on policy disagreements with the prosecutor, the proposed amendment violates the separation of powers between the judiciary and the prosecutor.** The separation of powers doctrine is "one of the cardinal and fundamental principles of the American constitutional system" and forms the basis of our state government. *State v. Rice*, 174 Wn.2d

884, 900, 279 P.3d 849, 857 (2012) (quoting *Wash. State Motorcycle Dealers Ass'n v. State*, 111 Wn.2d 667, 674, 763 P.2d 442 (1988). The authority of a trial court to dismiss a prosecution under CrR 8.3(b) must be tempered by this principle. Prosecutors are vested with wide discretion in determining how and when to file criminal charges. *Bordenkircher v. Hayes*, 434 U.S. 357, 365, 98 S.Ct. 663, 669, 54 L.Ed.2d 604 (1978); *State v. Lewis*, 115 Wn.2d 294, 299, 797 P.2d 1141 (1990). A prosecutor's broad charging discretion is part of the inherent authority granted to them as executive officers under the state constitution. *Rice*, 174 Wn.2d at 904. Because the proposed amendment would allow a court to dismiss charges based purely upon the court's subjective determination of "arbitrariness" without any requirement of prejudice to the defendant's constitutional rights, it violates the separation of powers doctrine.

- **The proponents justify the proposed amendment by referring to "aggravated sentencing laws," suggesting that dismissal of a prosecution should be authorized if the court disagrees with the charging decision or the sentence provided for under the SRA.** This illustrates that the intent of the amendment is to create an interpretation of "arbitrary action or governmental misconduct" that is so broad as to allow a judge to dismiss a prosecution based purely on a disagreement with the decision of the prosecutor as to which charges to file and/or with the legislature's setting of punishments in the Sentencing Reform Act. Such broad and unfettered discretion would violate the separation of judicial, executive, and legislative powers.

- **Because the proposed amendment does not require the action or misconduct to prejudice the accused in any manner, it untethers the rule from due process.** As a result, defendants would benefit—and victims and public safety would suffer—even when the State's action has in no way interfered with a defendants' right to a fair trial. This significant broadening of the rule, and trial court's discretion, would lead to unequitable application of the law

- **The proposed amendment does not resolve any of the problems identified by numerous commenters when a similar amendment was proposed and rejected in 2024.** The inclusion of four vague and ambiguous factors for the court to consider—along with removing the clear standard of requiring a showing that the accused's right to a fair trial was materially affected—provides courts with no meaningful guidance on how to evaluate a particular governmental action. Further, the inclusion of the catchall phrase, "any other information the court believes is relevant to the inquiry," effectively gives courts the same amount of broad, unchecked discretion to dismiss a case for any reason that the amendment proposed in 2024 did. In short, the proposed amendment would allow a court to find that dismissal was not warranted for any of the reasons enumerated in the rule but still dismiss based purely upon a judge's own personal beliefs.

- **The proposed amendment would allow a trial judge to dismiss any criminal prosecution.** A court could conclude that any decision made by a prosecutor was arbitrary, from charging decisions to sentencing recommendations. On that

basis, the amendment would authorize dismissal of any or all charges or convictions. For example, the term "government misconduct" has been interpreted to include negligence as well as affirmative misconduct. As a result, a court could conclude that a prosecutor's charging standards or allocation of office resources was arbitrary or negligent. The amendment would authorize dismissal of any case that a court concludes was affected by that policy.

- **The justifications for this proposed amendment are nearly identical to the ones submitted in support of the proposed amendment that was rejected in 2024.** Both then and now, the materials lack any compelling explanation of why this change is necessary. No specific case examples have been given and no multi-jurisdictional analysis has been done to demonstrate any issues in Washington that require this change to the rule. Instead, the proponents simply cite to a dissenting opinion from 1975 and make reference to problems within the general criminal justice system; thereby implying that a court could somehow address those problems by individually dismissing lawfully filed criminal charges in this state. This argument lacks merit and is an oversimplification of numerous multifaceted issues.

- **The proposed amendment is justified by citing to a cherry-picked selection of court rules from other states without analysis, context, or meaningful application.** As with many components of law, the bare text of a court rule rarely exists in a vacuum. The proponents have provided insufficient analysis as to how these rules actually function within the jurisdictions from which they have been plucked, how certain terms have been defined in those other jurisdictions, or how incorporating certain language into a Washington rule would impact or clash with existing Washington caselaw.

- **The proposed amendment is justified by referencing a "New York State Criminal Procedure Law," but fails to include more than half of the factors listed in the rule that New York courts must evaluate when considering dismissal.** Some of the removed factors include the extent of the harm caused by the offense, the evidence of guilt, the history and character of the defendant, the seriousness of the misconduct on the part of the State, and the victim's position regarding dismissal. While the proponents are quick to point out that the New York law deals with the "interests of justice" and not "arbitrary action or governmental misconduct," that distinction actually weighs in favor of Washington's existing approach of requiring that any arbitrary action or misconduct must have materially affected the defendant's right to a fair trial before a dismissal is warranted.

- **The proponents justify the proposed amendment by making the assertion that courts should be able to dismiss cases because of the "overrepresentation of black Americans in every stage of our criminal and juvenile justice systems."** This implies that courts can and should dismiss entire categories of cases if a judge concludes that the category contributes to that overrepresentation. However, it is unclear how a judge could conclude that a particular case is a contributor to overrepresentation of Black persons in the

criminal justice system. Absent prejudice to a specific defendant, the rule suggests that a judge could elect to dismiss all such cases against Black Americans but not other racial groups.

- **The four factors enumerated in the proposed amendment are overly vague and underinclusive of the factors that ought to be considered before a court dismisses criminal charges.** While the inclusion of some factors a court must consider is different from the amendment proposed in 2024, the factors themselves are not helpful and ultimately yield the same result. For example, the first factor requires a court to consider the seriousness and circumstances of the offense. Does that mean that less arbitrary action would be required to dismiss a misdemeanor as opposed a felony? The third factor requires a court to consider the impact of dismissal upon the confidence of the public in the criminal justice system. How could an individual trial judge possibly evaluate this in an unbiased manner? The fourth factor requires a court to consider the degree and impact of the arbitrary action. Again, how could this possibly be measured or evaluated? In short, without a clear standard by which to evaluate an arbitrary action or misconduct (i.e. whether it has materially affected the defendant's right to a fair trial), these factors do not provide meaningful guidance as to how a court should make this decision.

- **The proposed amendment ignores the public interest in the prosecution of crimes and protection of the victim and the community.** Because the proposed amendment would do away with the need for connection between any misconduct of the State and the defendant's ability to have a fair trial, it does not serve the public interest in punishment of the guilty and public safety. While one of the four factors is, "the impact of a dismissal on the safety or welfare of the community (the defendant is part of the community)," no guidance is given on how this factor ought to be weighed, if at all, against the other enumerated factors or any other information a court might deem "relevant to the inquiry." This factor also implicitly shifts focus away from the victim and disregards the victim's right to justice and protection from the defendant.

CrR/CrRLJ 4.1 Arraignment

<u>Concerns:</u>

- **The proposed amendment does not provide sufficient time for victim notification.** In many cases, prosecutors must still rely on the postal system to provide victims with notice that a case has been filed and scheduled for arraignment. The proposed three-day window between filing and arraignment is insufficient to generate notice, submit it to the postal service, and have it delivered and received prior to the arraignment date. At best, the notice will arrive the day before arraignment, providing victims of crime with insufficient time to make work, childcare, or transportation arrangements to attend the arraignment and potential bond motion or provide input to an advocate or prosecutor to relay to the court. As a result, the proposed three-day timeline is not trauma-informed

for victims on serious cases. Even eight days of notice would allow victims the opportunity to prepare for the stress of attending and participating in an arraignment hearing.

- **The proposed amendment is overbroad; defendants subject to conditions of release should not be included.** While there may be a basis for reducing the time between filing and arraignment for those held in custody to eight days, the addition of all those subject to conditions of release would essentially include all defendants with a pending criminal charge, since very few defendants are released without any conditions. Even those defendants who are released on their personal recognizance are still generally subject to the baseline conditions of release requiring them to appear for future hearings and not commit new criminal law violations.

- **The proposed amendment does not allow courts to effectively manage their schedule.** The courts and State require flexibility to manage the volume of cases set for arraignment on given days. Otherwise, circumstances like heavy arrest days, court holidays, and unexpected closures due to weather will result in unmanageable arraignment calendars.

- **The proposed amendment does not provide sufficient time to mail notice to defendants subject to conditions of release.** As drafted, the rule applies to people who are out-of-custody (either because no bail was imposed or because they posted bail), but subject to conditions. In many cases, the courts or prosecutors must still rely on the postal system to provide such defendants with notice that they have been charged with a crime and are scheduled for arraignment. The proposed three-day window between filing and arraignment is insufficient to generate notice, submit it to the postal service, and have it delivered and received prior to the arraignment date. At best, the notice will arrive the day before arraignment, providing defendants with insufficient time to make work, childcare, or transportation arrangements to attend their arraignment.

CrR/CrRLJ 3.2 Release of the Accused
Concerns:

- **The proposed amendment makes a significant change to the bail rules in Washington under the guise of "clarifying" an intentionally broad criterion.** The criterion of "interfere in the administration of justice" is clearly intended to give courts the ability to consider a broad range of facts that may be relevant to setting bail in certain circumstances. Aside from vague and subjective assertions (e.g. "we have seen the state argue…"), the proponents have not provided either concrete examples or a Washington-specific analysis that demonstrate problems with the existing language in the rule. Instead, the proponents cite to a single court decision and make references to general problems within the criminal justice system. While this creates the implication that the proposed rule change would somehow resolve those problems by limiting the factors that courts can

consider in imposing bail, the argument lacks merit and is an oversimplification of numerous multifaceted issues.

- **The proposed amendment is too narrow and ignores the risk that an accused can tamper with witnesses in ways other than by threats or intimidation.** For example, under the proposed amendment, a court setting bail would not be able to consider a given defendant's attempts to bribe witnesses. In this context, the proposed amendment's over-focus on whether the accused will "threaten or intimidate" a victim or witness ignores the numerous other ways in which an accused can attempt to unlawfully dissuade a witness or victim from appearing and testifying truthfully in response to a subpoena. Courts must have sufficient discretion to address all behavior that interferes with the administration of justice, not just those that involve a threat or attempt to intimidate.

- **The proposed amendment "clarifies" the meaning of the "interfering in the administration of justice" factor in a way that renders it mostly superfluous.** Under both the existing rule and the amended version proposed, a court setting bail can consider the likelihood that the accused will commit a violent offense as a factor in and of itself. As a result, limiting the "interfering in the administration of justice" factor to meaning "seeking to intimidate or threaten a witness, victim, or court employee, or tampering with evidence" renders it mostly superfluous; intimidating or threatening a witness, victim, or court employee is committing a violent offense. In that context, the practical impact of the proposed amendment is not to *clarify* the meaning of "interfering in the administration of justice," but to effectively delete it and limit the court to only considering the likelihood that the accused will commit a violent offense.

- **The proposed amendment ignores the fact that the rule applies equally to circumstances in which the court is readdressing release based on the accused having violated conditions of release previously imposed by the court.** Courts commonly impose conditions of release that are necessary for the due administration of justice, but are not necessarily tied to the accused attempting to threaten or intimidate anyone. Examples include prohibiting a defendant from having contact with codefendants, victims (especially in domestic violence and sexual assault cases), minors (especially in sexual assault and CSAM cases), and specific locations. Another example is a condition of release prohibiting new law violations. In this context, it is important to remember that violations of these conditions of release also interfere with the administration of justice even if they do not involve behavior that is threatening or intimidating in intent or effect. The proposed amendment would wholly deprive courts of the ability to enforce such conditions of release.

- **The proposed amendment precludes courts from considering relevant factors that can negatively impact the court's ability to effectively adjudicate a matter.** For example, while an accused's commission of a single new non-violent offense may not be a reason to readdress release or conditions of release, the analysis may be different with an accused who repeatedly commits non-violent offenses in other jurisdictions. The latter circumstance can

cause significant issues with a court's ability to adjudicate the case in a timely manner due to repeated instances of the accused being out of contact with their attorney and unavailable to appear in court due to being in-custody in another jurisdiction. While it may be rare that an accused's behavior rises to the level that raises these issues, it can happen. In that context, the proposed amendment strips courts of the discretion that they need to ensure that justice is properly administered even though there has been no showing of a significant or systematic abuse of that discretion.

Sincerely,
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From: Jacobsen-Watts, Heidi <Heidi.Jacobsen-Watts@kingcounty.gov>
Sent: Tuesday, April 29, 2025 4:10 PM
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Please see the attached.
Thank you,

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