Seattle
City Attorney's Office
Ann Davison, City Attorney

April 26, 2024

Honorable Mary Yu, Chair
Supreme Court Rules Committee
c/o Clerk of the Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

Dear Justice Yu and the Supreme Court Rules Committee:

I am writing to express my opposition to the proposed changes to CrR 8.3(b) and CrRLJ 8.3(b). Like the other prosecuting attorneys who have commented, I agree that it would be a mistake to remove the requirement of prejudice as a prerequisite to dismissal. Without this requirement, harmless or curable mistakes that result in no prejudice to the accused will provide trial courts with a discretionary basis to dismiss a criminal charge. The exercise of this discretion will depend on an individual judge's conceptualization of what "justice" means. Without any type of clear legal reference point, this type of freewheeling administration of justice will undoubtedly lead to disparate outcomes that are determined more by the identity of the judicial officer or the parties instead of the relevant facts or applicable law. I respectfully suggest that our justice system should not be restructured in a manner that encourages this departure from the rule of law. I also invite this Court's attention to the following five reasons outlining why this proposed amendment is legally unwise.

1. The proposed amendment presents separation of powers concerns.

The proposed change invites violations of the state constitution's separation of powers. As this Court has explained, "a prosecutor's broad charging discretion is part of the inherent authority granted to prosecuting attorneys as executive officers under the Washington State Constitution." *State v. Rice*, 174 Wn.2d 884, 904, 279 P.3d 849 (2012). Prosecutorial discretion cuts both ways: trial courts should not second-guess a filing decision when there is probable cause to support the charge, but also should not second-guess a prosecutor's decision to dismiss a case. *See, e.g., State v. Agustin*, 1 Wn. App. 2d 911, 407 P.3d 1155 (2018) (holding that separation of powers limited trial court's authority to deny prosecutor's motion to dismiss). "A prosecuting attorney's charging prerogative, required by separation of powers, has informed legislation and been held to limit judicial review in other contexts." *Id.* at 917.

Just three years ago this Court considered the citizen complaint rule under former CrRLJ 2.1(c). Although the majority declined to reach the constitutional question, Justice Yu and Justice Gordon McCloud wrote separately that the rule "derogates our constitutional vision of separation of powers among three branches of government. Within this constitutional framework, a judicial officer cannot determine in the first instance whether criminal charges should be filed against an individual without usurping the authority of the executive branch." *Stout v. Felix*, 198 Wn.2d 180, 189-90, 493 P.3d 1170 (2021) (Yu, J., concurring in result only). This Court then promptly amended CrRLJ 2.1 and eliminated citizen complaints. The purpose of that amendment was to stop putting judges in a position to serve as both public prosecutor and judicial officer. Those roles are fundamentally – and constitutionally – separate and independent.

That type of dual role, however, is precisely what the proposed amendment seeks to accomplish. The requested amendment is not intended to provide clarity for trial judges or lawyers. It is not intended to increase consistency in outcomes. It does not strive to protect any identifiable legal rights secured to the accused. Instead, it is a request to amend the rule and allow judges to second-guess prosecutorial charging decisions. But as this Court has repeatedly emphasized, "CrR 8.3(b) 'is designed to protect against arbitrary action or governmental misconduct and not to grant courts the authority to substitute their judgment for that of the prosecutor.'" *State v. Michielli*, 132 Wn.2d 385, 240, 937 P.2d 587 (1997) (quoting *State v. Cantrell*, 111 Wn.2d 385, 390, 758 P.2d 1 (1988) (quoting *State v. Starrish*, 86 Wn.2d 200, 205, 544 P.2d 1 (1973)).

2. **Trial courts should not be encouraged to overrule discretionary charging decisions.**

As noted in other comments, allowing courts to dismiss criminal prosecutions "in the furtherance of justice" without any showing of unfair prejudice to the defendant puts the judiciary in the position of second-guessing the discretionary propriety (rather than the objective legality) of prosecutorial charging decisions. The Proponents contend that this change is needed so "that courts are not simply 'passive instruments of prosecutorial policies.'" *See* GR 9 coversheet (quoting *Starrish*, 86 Wn.2d at 214 (Utter, J., dissenting). The Proponents thus envision a more active role for the judiciary so that judges are not relegated "to the status of mere clerks." *Id.* The practical effect of this would be a rule that "permit[s] a court to abort [a] criminal prosecution simply because it disagrees with a prosecutor's judgment." *Cf. State v. Moen*, 150 Wn.2d 221, 226, 76 P.3d 721 (2003). Approving that radical new role for judicial branch would upend settled case law and be a tectonic shift in Washington's criminal procedure.

3. **The prejudice requirement in Rule 8.3(b) was not derived from *Starrish*.**

Despite the Proponents heavy reliance on Justice Utter's dissent in *Starrish*, the issue in that case was *not* unfair prejudice to the accused but rather whether dismissals should be permitted without arbitrary action or governmental misconduct. *Starrish*, 86 Wn.2d at 205 ("[t]he State's basic position is that CrR 8.3(b) is designed to protect against arbitrary action or governmental misconduct and not to grant courts the authority to substitute their

judgment for that of the prosecutor. We agree"). Curiously, the Proponents take great issue with *Starrish* but focus only on prejudice and do not recommend removing the "arbitrary action or governmental misconduct" language. The prejudice requirement, however, is entirely separate from *Starrish* and was taken from older decisions. *E.g., State v. Baker*, 78 Wn.2d 327, 332-33, 474 P.2d 254 (1970) (explaining "[d]ismissal of charges is an extraordinary remedy. It is 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 and that prejudice cannot be remedied by granting a new trial"); *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963) (no additional showing of prejudice needed where law enforcement eavesdropped on attorney-client conversations); *see also, State v. Fuentes*, 179 Wn.2d 808, 819-820, 318 P.3d 257 (2014) (expanding on analysis under *Cory* and CrR 8.3(b)).

What the proposed amendment *actually* seeks to do is dismantle the law as set forth in this Court's other decisions like *Baker*. The portion of the rule's language that was taken from *Starrish* has nothing to do with this proposed amendment.

4. **Removing the prejudice requirement does not change how the Rule operates under this Court's decisions.**

As may be inferred from the above, striking the prejudice clause as requested by the Proponents is either a) meaningless, or b) would require this Court to also overrule numerous past decisions. The prejudice requirement is rooted in decisions like *Baker* where this Court explained what "in the furtherance of justice" means. *E.g., Cantrell*, 111 Wn.2d at 388-89. This Court noted in *Michielli* that "the language added [by the 1995 amendment to CrR 8.3(b)] is insubstantial in that it merely reflects preexisting common law requirements for dismissing charges." 132 Wn.2d at 239 (applying 1973 version of the rule). As explained by the Washington State Bar Association drafters in 1995, "[t]he amendment thus incorporates the essential elements of the case law as it has evolved in this area." *See* 4A WAPRAC, CrR 8.3. (8th ed.) (quoting drafter's comment accompanying 1995 amendment). Removing this language would therefore have one of two effects: either a) the meaning of the rule will remain the same but its language will be less clear to practitioners, or b) the meaning of the rule will be different and require this Court to re-interpret "in the furtherance of justice." Either way, the proposed amendment will only increase confusion and make the "[r]ules of court [less] clear and definite in application." *See* GR 9(a)(6).

5. **The Proponents misrepresent how the court rules cited from Idaho, Iowa, and Ohio are applied in those jurisdictions.**

As the evolution of CrR 8.3(b) itself demonstrates, court rules that purport to allow dismissals "in the furtherance of justice" should rarely be taken at face value without first scrutinizing the applicable common law. Similar to Washington's jurisprudence, many of the decisions from those states have required a showing of prejudice and are rooted in (or parallel to) the notions of fundamental fairness derived from the Due Process Clause.

Iowa. The Proponents incorrectly cite to a former rule. The correct current rule is Iowa R. Crim. P. 2.33(1). While the Proponents declined to elaborate on how the Iowa rule is applied, the court in the case cited by Proponents listed 12 factors to guide a trial court's determination of whether a criminal charge may be dismissed.[1] Furthermore, the Iowa rule "may only be invoked by the court on its own motion or by the prosecuting attorney; it is not available to a defendant." *State v. Fisher*, 351 N.W.2d 798, 801 (1984). Assuredly, *that* restriction is not something that Proponents or the defense bar would like to see here in Washington. Moreover, Iowa courts in fact *do* typically require a showing of prejudice before dismissal is authorized. *See State v. Swartz*, 541 N.W.2d 533, 540 (Ct. App. 1995) (noting "dismissal is ordinarily inappropriate, even when the misconduct involved was deliberate, where there is no continuing prejudice"). The Iowa supreme court explained sixty years ago that "justice is not 'furthered' by wholesale dismissals of cases with no opportunity for each side to be heard and for no better reason than that the presiding judge thinks the offended statutes are unfair in their application." *In re Judges of Municipal Court of Cedar Rapids*, 256 Iowa 1135, 1137, 130 N.W. 2d 553, 555 (1964) (discussing former statute subsequently replaced by court rule).

Idaho. Idaho R. Crim. P. 48 does not supply trial courts with the unfettered discretion that Proponents suggest. *E.g., State v. Sarbacher*, 168 Idaho 1, 478 P.3d 300 (2020) (explaining Idaho standards of review for Rule 48 dismissals, and reversing trial court's dismissal as an abuse of discretion for failing to properly apply the Due Process spoliation standards provided in *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)). As explained by the Idaho supreme court, the discretion afforded to trial courts under rule 48 is limited and generally subject to close scrutiny on appeal. *See, e.g., State v. Roth*, 166 Idaho 281, 283-85, 458 P.3d 150 (2020) (reversing dismissal as an abuse of discretion because 1) it barred the prosecutor from refiling the charge, and 2) the trial court misapplied the law regarding procedural due process). Idaho decisional law is replete with many other examples of appellate decisions reversing a trial court's Rule 48 dismissals for various abuses of discretion.

Ohio. Unlike Iowa and Idaho, Ohio R. Crim. P. 48(B) has been interpreted to grant broad discretion to trial courts to dismiss criminal charges in the "interests of justice." At the same time, Ohio courts have explained that the "power to dismiss an indictment, information or complaint pursuant to [rule] 48 is not without limitation." *City of Maple Heights v. Redi Car Wash*, 51 Ohio App. 3d 60, 62, 554 N.E. 2d 929, 932 (Ct. App. 1988); *see also, State v. Hornsby*, 153 N.E.3d 960, 965, 2020 Ohio 1526 (Ct. App. 2020) (reversing dismissal because there was not "any legally valid basis for the dismissal of the

[1] In *State v. Brumage* the Iowa supreme court nodded approvingly of the following factors: "(1) weight of the evidence of guilt or innocence; (2) nature of the crime involved; (3) whether defendant is or has been incarcerated awaiting trial; (4) whether defendant has been sentenced in a related or similar case; (5) length of such incarceration; (6) possibility of harassment; (7) likelihood of new or additional evidence at trial; (8) effect on the protection to society in case the defendant should actually be guilty; (9) probability of greater incarceration upon conviction of another offense; (10) defendant's prior record; (11) the purpose and effect of further punishment; and (12) any prejudice resulting to defendant by the passage of time." 435 N.W. 2d 337, 341 (1989).

indictment, and the trial court accordingly had no legally sufficient grounds on which to order that the indictment be dismissed").

An examination of Ohio case law shows the type of outcomes made possible by unguided and subjective constructions of justice. For example, in the case cited by the Proponents, the Ohio supreme court affirmed a trial court's decision to dismiss a domestic violence charge involving "relatively serious" injuries at the request of the complaining witness but over the objection of the prosecutor. *State v. Busch*, 76 Ohio St. 3d 613, 616, 669 N.E.2d 1125 (1996). The court explained:

> Trial courts deserve the discretion to be able to craft a solution that works in a given case. Certainly a court's resources in a domestic violence case **are better used by encouraging a couple to receive counseling and ultimately issuing a dismissal** than by going forward with a trial and impaneling a jury in a case where the only witness refuses to testify.

Id. at 615-16, 669 N.E.2d at 1128 (emphasis added); *see also, State v. Montiel*, 185 Ohio App. 3d 362, 924 N.E. 2d 375 (Ct. App. 2009) (affirming dismissal where trial court permitted defendant to withdraw domestic violence guilty plea due to unadvised immigration consequences, and then decided to dismiss the case *sua sponte* because defendant had not been arrested in the preceding five years). Notably, the *Busch* decision was immediately abrogated by Ohio legislation that prohibits trial courts from dismissing charges at the request of the complaining witness over the prosecutor's objection. *See State v. Sanders*, 3 N.E. 3d 749, 752-53, 2013 Ohio 5220 (Ct. App. 2013) (discussing the post-*Busch* legislative change).

The proposed amendment to Rule 8.3(b) lacks legal wisdom, is inconsistent with case law interpreting the pre-1995 rule, and provokes separation of powers violations. For these reasons, I oppose this suggested change and respectfully submit that this Court should reject this proposal. Thank you for your consideration of my comments.

Sincerely,

Ann Davison
Seattle City Attorney

From:	OFFICE RECEPTIONIST, CLERK
To:	Farino, Amber
Cc:	Ward, David
Subject:	FW: Comment on Proposed Amendment to CrRLJ 8.3(b)
Date:	Wednesday, April 30, 2025 3:12:58 PM
Attachments:	image001.png CrRCrRLJ 8.3 comment 4.26.2024.pdf

From: Davison, Ann <Ann.Davison@seattle.gov>
Sent: Wednesday, April 30, 2025 2:37 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on Proposed Amendment to CrRLJ 8.3(b)

Dear Members of the Washington Supreme Court and Rules Committee,

I write to express my objection to the proposed changes to CrRLJ 8.3(b).

Other than the addition of amorphous new factors, the proponents' proposed Rule is identical to the rule proposed in 2024 by the same parties and rejected by this Court. It includes the same hyperbolic mischaracterization of this Court's opinion in *State v. Starrish*; the same misleading description of the "rule" in other jurisdictions; and the same fundamental misunderstanding of the evolution of CrR/CrRLJ 8.3(b).

As others and I pointed out last year, this proposal flouts the separation of powers and places trial judges in the position of second-guessing prosecutors' charging decisions. My comment opposing last year's proposal is attached. Should this Court entertain the proponents' proposed changes again this year, I respectfully re-submit and stand by my words last year.

Thank you for taking the time to consider my comment. I urge you to reject this proposed Rule.

Sincerely,

Ann Davison
Seattle City Attorney

701 Fifth Avenue, Suite 2050
Seattle, WA 98104-7095
Ann.Davison@seattle.gov