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From: Summers, Ann <Ann.Summers@kingcounty.gov>
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This proposal improperly seeks to undermine this Court's prior case law based on fundamental separation of powers principles.

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, *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.3d 587 (1997), this Court held that both defendant must show arbitrary action or governmental misconduct, citing *State v. Blackwell*, 120 Wash.2d 822, 831, 845 P.2d 1017 (1993), and *State v. Lewis*, 115 Wash.2d 294, 298, 797 P.2d 1141 (1990)). This Court stated: "We repeat and emphasize 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.'" *Michielli*, 132 Wn.2d at 239 (quoting *State v. Cantrell*, 111 Wash.2d 385, 390, 758 P.2d 1 (1988), and *State v. Starrish*, 86 Wash.2d 200, 205, 544 P.2d 1 (1975)). This Court held that the second *necessary* element a defendant must show before a trial court can dismiss charges under CrR 8.3(b) is prejudice affecting the defendant's right to a fair trial. *Michielli*, 132 Wn.2d at 239 (citing *State v. Cannon*, 130 Wash.2d 313, 328, 922 P.2d 1293 (1996)) (emphasis added).

In 1995, CrR 8.3(b) was amended to accurately reflect this case law, and explicitly added the prejudice requirement already imposed by case law. As this

Court recounted in *State v. Rohrich*, 149 Wn.2d 647, 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); *City of Seattle v. Orwick*, 113 Wash.2d 823, 830, 784 P.2d 161 (1989) (adopting the language from *Baker*). In light of both the prior case law and the 1995 amendment codifying that case law, this Court reaffirmed that a trial court may not dismiss charges under CrR 8.3(b) unless the defendant shows prejudice affecting the defendant's right to a fair trial. *Rohrich*, 149 Wn.2d at 653-54 (citing *Michielli*, 132 Wash.2d at 239–40, and *State v. Starrish*, 86 Wn.2d at 205).

The prejudice requirement is based on separation of powers principles. 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) is necessarily limited by the separation of powers. 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). The 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. If the proposed rule is interpreted as allowing the court to dismiss charges upon a subjective determination of “arbitrariness” without any showing of prejudice to the defendant’s constitutional rights, it would violate the separation of powers doctrine and be unconstitutional.

The trial courts’ role is to safeguard the defendant’s right to a fair trial. The courts’ ability to dismiss cases, and thus encroach upon the constitutionally-protected discretion of prosecutors, must be limited to circumstances where the defendant’s right to a fair trial has been materially affected.

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