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April 30, 2025

Supreme Court Rules Committee
c/o Clerk of the Supreme Court
PO Box 40929
Olympia, WA 98504-0929

RE: Comments on Proposed Amendments to CrR/CrRLJ 8.3(b)

Dear Honorable Justice Yu and members of the Rules Committee,

Thank you for the opportunity to comment on the proposed amendments to CrR/CrRLJ 8.3(b). I write to you to address the concerns my office has related to the proposal and to urge you to reject the amendments.

The requirements that both arbitrary action or government misconduct and prejudice to a defendant's right to a fair trial must exist to justify dismissal predate the existence of CrR/CrRLJ 8.3(b). For over five decades, it has been recognized that dismissal of charges is "an extraordinary remedy."[1] In 1970, the Court explained in *State v. Baker* that the remedy is only available "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."[2] Our courts have repeatedly applied this standard since then.[3]

Proponents claim that an amendment is necessary to return the rule to its original state. The problem is that such an interpretation of CrR/CrRLJ 8.3(b) never existed. Courts have always applied the common law requirements discussed in *Baker*, regardless of the exact text of the rule.[4] Such well-developed jurisprudence provides for certainty and guardrails when applying CrR/CrRLJ 8.3(b). The proposed changes interject uncertainty into the rule and undermine its rationale.

A finding of prejudice combined with governmental misconduct ensures that the rule accomplishes its purpose, protecting defendants' due process by ensuring fair trials.[5] The

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[1] *See City of Spokane v. Kruger*, 116 Wn.2d 135, 144-45, 803 P.2d 305 (1991); *see also State v. Baker*, 78 Wn.2d 327, 332, 474 P.2d 254 (1970).
[2] *Baker*, at 332-333, 474 P.2d 254.
[3] *State v. Michielli*, 132 Wn.2d 229, 239, 937 P.2d 587 (1997).
[4] *State v. Rohrich*, 149 Wn.2d 647, 653, 71 P.3d 638 (2003).
[5] *State v. Jieta*, 12 Wn.App.2d 227, 232, 457 P.3d 1209 (2020).

current rule and its long-standing interpretation allow courts to sanction government misconduct or arbitrary action when it interferes with a defendant's right to a fair trial without providing a windfall for defendants any time a mistake is made. Adopting the proposed changes would broaden the rule significantly by allowing for dismissal, even if government action did not affect a defendant's right to fair a trial, based on vague, uncertain criteria.

The proposal goes further than protecting a defendant's right to a fair trial. By replacing prejudice with vague factors, the rule would become what our courts have repeatedly stated CrR 8.3(b) is not – substitution of the court's judgment for that of the prosecutor.[6] When considering the proposed factors, ungrounded in Washington law, the temptation to supplant a prosecutor's judgment with a judge's own personal and private notions of fairness would be significant.[7] Moreover, an all-inclusive list of factors threatens greater disparate outcomes than the current rule as judges are invited to consider subjective criteria. Such a scenario weakens confidence in the criminal justice system and the judiciary.

The proposed changes also significantly intrude upon separation of powers. Separation of powers is a fundamental principle of our system of government.[8] The decision to charge and try a case is for the prosecuting attorney.[9] The ability of trial courts to dismiss a prosecution under CrR/CrRLJ 8.3(b) is balanced by underlying separation of powers concerns between prosecutors and the judiciary.[10] By limiting dismissal to situations where the government's arbitrary action or misconduct actually prejudices a defendant's right to a fair trial, the present rule finds a balance between the government's interest and the judiciary's responsibility to ensure due process. The proposal undermines this balance in favor of a process that allows for dismissal of any criminal case for what amounts to policy disagreements.

CrR/CrRLJ 8.3(b) has long served to protect Washingtonians' right to a fair trial while respecting constitutional boundaries between the executive and judicial branches. There is no need to substantially overturn our jurisprudence and adopt a rule rife with fundamental issues. On behalf of the entire Clallam County Prosecuting Attorney's Office, I ask the Committee to reject the proposal.

Respectfully,

Mark B. Nichols
Prosecuting Attorney
Clallam County

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[6] *State v. Cantrell*, 111 Wn.2d 385, 390, 758 P.2d 1 (1988).
[7] *Id.* at 389, 758 P.2d 1 (quoting *United States v. Lovasco*, 431 U.S. 783, 790, 97 S.Ct. 2044, 2049, 52 L.Ed.2d 752 (1977)).
[8] *State v. Rice*, 174 Wn.2d 884, 900, 279 P.3d 849 (2012).
[9] *State v. Meacham*, 154 Wn.App. 467, 471, 224 P.3d 472 (2010).
[10] *State v. Aguirre*, 73 Wn.App. 682, 690 n.7, 871 P.2d 616 (1973).

From: OFFICE RECEPTIONIST, CLERK
To: Farino, Amber
Cc: Ward, David
Subject: FW: Comments to proposed amendments to CrR/CrRJL 8.3 (b) and CrR 4.1/CrRLJ 4.1 and CrRLJ 3.2.1
Date: Wednesday, April 30, 2025 2:46:15 PM
Attachments: Comments on Proposed Amendments to CrR CrRLJ 8.3(b).pdf
Comments on Proposed Amendments to CrR 4.1, CrRLJ 4.1, and CrRLJ 3-2.I..pdf

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From: Nichols, Mark <mark.nichols@clallamcountywa.gov>
Sent: Wednesday, April 30, 2025 1:55 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comments to proposed amendments to CrR/CrRJL 8.3 (b) and CrR 4.1/CrRLJ 4.1 and CrRLJ 3.2.1

Greetings:

Please find attached my comments to the proposed court rule amendments referenced above.

Best,

Mark Nichols
Clallam County Prosecuting Attorney