



**King County**

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Clerk of the Supreme Court

P.O. Box 40929

Olympia, WA 98504-0929

Dear Justices of the Washington State Supreme Court,

The proposed amendments to CrR 8.3 and CrRLJ 8.3, Dismissal, aim to ensure that Washington judges are empowered to dismiss cases following arbitrary action or governmental conduct, without the current rule's overburdensome constraints that unnecessarily limit judicial discretion.

To be clear, increased discretion is not unfettered discretion. We trust our judges to make some of the most consequential decisions in society: deprivation of human liberty, termination of parental rights, and involuntary commitment of the mentally ill. Certainly, judges can be entrusted with the power to dismiss a criminal charge upon a particular showing.

Further, the proposed rule contains four important guardrails to guide judicial decision-making.

First, the proposed rule does not permit judges to simply substitute their judgment for that of the prosecuting authority. Nearly fifty years ago this Court explained that a case may not be "dismissed on equitable grounds absent a showing of arbitrary action or governmental misconduct." *State v. Starrish*, 86 Wn.2d 200, 205 (1975). The text of CrR 8.3(b) was subsequently amended to incorporate this prerequisite and that text is unchanged in the proposed amendments.

Second, this Court has long held that "dismissal under CrR 8.3 is an extraordinary remedy," and that courts must explore "intermediate remedial steps" when analyzing a claim under CrR 8.3(b). *State v. Wilson*, 149 Wn.2d 1, 12 (2003). Clearly not every act of government misconduct or mismanagement will require dismissal, and the State will have the opportunity to identify and argue for intermediate remedies.

Third, even once government misconduct or mismanagement has been established and intermediate remedial steps are shown inadequate, the court still may dismiss only when such action is “in the furtherance of justice.”

Fourth, the proposed amendments provide judges with specific direction on the factors to consider when deciding whether to dismiss a case: (1) the seriousness and circumstances of the offense, (2) the impact of a dismissal on the safety or welfare of the community (including the accused as a member of the community), (3) the impact of a dismissal or lack of dismissal upon the confidence of the public in the criminal justice system, and (4) the degree and impact of the arbitrary action or governmental misconduct.

This Court can and should authorize courts to use CrR/CrRLJ 8.3(b) as it was intended and as the demands of justice require. In its June 4, 2020, Open Letter on Racial Injustice, the Court instructed the legal community to address “racialized policing and the overrepresentation of black Americans in every stage of our criminal and juvenile justice systems.”

Allowing judges greater discretion to dismiss in cases of government misconduct or mismanagement is a critical step to making the legal system more just. For example, in the following examples of government misconduct, the judge may have dismissed in the furtherance of justice if the current bar was not set unreasonably high:

- In a Municipal Court case, the police destroyed exculpatory evidence – video of the accused acting in self-defense after being threatened. In that case, the trial court did not find sufficient prejudice to the accused’s right to a fair trial to warrant dismissal.
- In another Municipal Court case, the police officer witnesses and prosecutor deliberately failed to disclose impeaching information. The judge did not dismiss because the case was pretrial and insufficient prejudice to the accused’s right to a fair trial existed.
- In another Municipal Court case, police wrongly destroyed an officer’s body-worn camera footage documenting an arrest. The accused was a non-English speaker and asserted that their interactions with police were not as written in the officer’s report narrative. The judge denied the dismissal motion, citing insufficient prejudice to the accused’s right to a fair trial.

In each of the cases, under the proposed rule, the trial court would have been able to look beyond the individual prejudice to the accused’s right to a fair trial in the case to consider how the public’s confidence in the legal system is undermined when police destroy evidence, the importance of preventing this kind of misconduct, and whether it was intentional misconduct that should be sanctioned so that it will not continue.

As the Court has recognized, judges and the entire legal community bear responsibility for the ongoing injustices in our criminal legal system. Replacing the broad limitation on dismissals “when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial” with specific guidance on other factors that promote the integrity and fairness of our legal system will help judges take long-overdue steps to better address governmental mismanagement and misconduct.

Sincerely,

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King County Department of Public Defense

OTHER SIGNATORIES