



**King County**  
**Department of**  
**PUBLIC DEFENSE**

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April 30, 2024

Justice Mary Yu

P.O. Box 40929

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Dear Justice Yu,

The proposed amendment to CrR 8.3 and CrRLJ 8.3, Dismissal, aims to ensure that Washington judges are empowered to dismiss cases when needed in furtherance of justice without the overburdensome constraints the state Supreme Court prescribed in past decades. Judges in many other states, such as Idaho, Ohio, and Iowa, already have discretion over such dismissals.

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, involuntary commitment of the mentally ill. Certainly, the power to dismiss a criminal charge upon a particular showing can also be entrusted to judges to apply faithfully. Further, over and above the respect due to our State's jurists, three powerful guardrails will still curtail their authority under the proposed rule.

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.

Second, the 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 will rise to the level of dismissal, and the State will have the opportunity to identify and argue for particular intermediate remedies.

Third, even once government misconduct 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."

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 letter to the legal community, the Court wrote that we:

continue to see racialized policing and the overrepresentation of black Americans in every stage of our criminal and juvenile justice systems. The legal community must recognize that we all bear responsibility for this on-going injustice, and that we are capable of taking steps to address it, if only we have the courage and the will.

For example, in these cases of government misconduct, the judge may have been able to dismiss the case in the furtherance of justice if the bar for such action were not set unreasonably high:

- In a Municipal Court case, the police destroyed exculpatory evidence – video of the person charged acting in self-defense after being threatened with a taser. In that case, the trial court did not find sufficient prejudice 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 existed.
- In another Municipal Court case, an officer’s body-worn camera footage documenting an arrest was destroyed because police wrongly marked it for destruction. The judge denied the dismissal motion citing insufficient prejudice to the defendant. The accused was a non-English speaker and asserted that their interactions with police were not as written in the officer’s report narrative.
- During the global pandemic a Superior Court routinely found insufficient prejudice due for discovery violations because all trials were held in abeyance. In one case, the State failed to disclose the lead detective’s report despite numerous requests. The report was ultimately disclosed months after the case had been confirmed for trial. The report contained significant additional information, including an entire interrogation and statements attributed to the client that did not appear anywhere else in discovery. The court found it was a clear CrR 4.7 violation, but there was no prejudice because the trial could not have happened anyway due to the suspension of jury trials.
- In a Superior Court case, the defense filed a motion for dismissal based on prosecutorial misconduct regarding discovery. The judge denied the motion to dismiss—even though the discovery was provided after *jury selection* began— because the court found that the defense could get a continuance of the trial and therefore there was no prejudice.

As the Court has recognized, judges and the rest of the legal community bear responsibility for the ongoing injustice in our criminal legal system. Removing the limitation on such dismissals to “when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial” will help them take long-overdue steps to address it.

Sincerely,

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