Background

This case arises from a violent assault on a police officer, where the officer was fighting for his life until backup officers arrived. It took six officers to restrain a meth intoxicated Joseph Zamora. Mr. Zamora suffered a cardiac arrest after the altercation due to his exertion and methamphetamine intoxication. During trial the former elected prosecutor, who was conducting voir dire, raised the issue of drugs and the border wall. When asked about the issue defense counsel, after consulting with fellow public defenders, felt that this line of questioning only hurt the State. I was assigned as appellate counsel for the State after the trial. The Court of Appeals disapproved of the prosecutor's line of approach during voir dire, saying it unnecessarily politicized the case, but upheld the conviction.

Due to undisputed issues with Mr. Zamora's offender score he needed to be resentenced. He had already served more time than he would receive under his new offender score. Because of this our office worked with trial counsel to resentence Mr. Zamora prior to his petition for review to the Supreme Court being completed. Ms. Trombley was aware of this action, and was consulted by defense counsel. She did not express any concern with how things were being communicated. In due course, the Supreme Court granted review of the prosecutor's conduct during voir dire. Due to staffing issues with the office, discussed further below, and the fact that Mr. Zamora had already served his time, I moved to dismiss the case in the trial court, and notified trial counsel. The trial court signed a dismissal order, subject to Supreme Court approval pursuant to RAP 7.2. I then sought permission from the Supreme Court to dismiss the case. Ms. Trombley vigorously objected to the dismissal by the Supreme Court, and they denied the motion without explanation.

The Supreme Court reversed, concluding that the prosecutor committed race based misconduct. Once the case returned to the trial court I reevaluated the decision to dismiss, and chose to continue with the case, as discussed below. Ms. Trombley then filed this bar grievance.

Response to Grievance

1. I did not violate any ethical rule by moving to dismiss the case and only notifying trial counsel.

A. The State can dismiss criminal cases ex parte.

Criminal cases are routinely dismissed ex parte. During the past two years counties around the State have been dismissing literally thousands of cases without notice to defendants because those convictions are no longer valid pursuant to *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). Ms. Trombley claims that Mr. Zamora's interests were not protected during the dismissal motion. She does not identify what those interests were. The motion was for a dismissal with prejudice. A person is not an aggrieved party under RAP 3.1 if the State dismisses his case. *State v. Taylor*, 150 Wn.2d 599, 603, 80 P.3d 605, 607 (2003)(Defendant is not an aggrieved party if his case is dismissed without prejudice) In *Taylor* the State dismissed the case without notice to the defendant. The Court ruled the defendant had no legal interest in appealing that dismissal.

The cases Ms. Trombley cited do not dictate otherwise.

> Under the Sixth and Fourteenth Amendments, a criminal defendant has the right to attend all critical stages of his trial. [T]HIS RIGHT ENTITLES a defendant to be present at every stage of his trial for which 'his presence has a relation, reasonably substantial, to the ful[l]ness of his opportunity to defend against the charge. This is true even in situations where the defendant is not actually confronting witnesses or evidence against him. This right is not unlimited, for example, "when presence would be useless, or the benefit but a shadow. But an accused "is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure. The presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence,

and to that extent only.

State v. Pruitt, 145 Wn. App. 784, 798, 187 P.3d 326, 333 (2008)(emphasis in orginal). There is significant case law about what constitutes a critical stage in the proceedings. Because a motion to dismiss does not implicate the defendant's rights to defend against a charge, it does not implicate a defendant's right to pre hearing notice.[1] A motion by the State to dismiss is, as far as I am aware, is simply not a critical stage. A defendant does not have a right to be prosecuted. If there is no right to be prosecuted, there is no right to notice or be present when a case is dismissed. In the cases cited by Ms. Trombley there was a bench trial and an entry of findings of fact and conclusions of law, both instances where the defendant's rights were clearly at stake. While it is certainly professional curtesy to let opposing counsel know a case has been dismissed so they can stop working on it, Ms. Trombley was notified the day after the dismissal was entered via the RAP 7.2 motion. Her claim that the State cannot ex parte dismiss a case is not well grounded in fact or law. If it were to be substantiated it would be a substantial change in the law that would affect operations around the State, particularly the response to *State v. Blake*. There is simply no RPC, court rule or case law that was violated.

The Supreme Court kept this case without explanation when the State moved to dismiss it as moot. The Supreme Court is able to ignore the rules when it suits it. RAP 1.2(c). However, once the case is dismissed, Mr. Zamora is not injured in any legal sense. *Taylor*, 150 Wn.2d at 603. (It would be illogical for us to hold that he (Taylor) has been injured by the order of dismissal without prejudice or that his personal rights have been affected.) Mr. Zamora simply had no interest to protect. The State could have moved to dismiss the case ex parte, even though,

[1] This is the second case I have had with Ms. Trombley where she seems to display a fundamental misunderstanding about the right to appeal. The right to appeal is a procedural right, meant to validate and uphold substantive rights. The right to appeal does not exist for its own sake. If there is no substantive right at stake, there is no right to appeal.

as a courtesy it notified trial counsel. There is no case law or reasoning that notification was required.

2. Even if notice was required, it was adequate under the procedures all attorneys had operated under without objection.

Even if notification was required, notifying trial counsel was sufficient. Trial Counsel filed a notice of withdraw in March of 2020. Att. A. In May of 2021 trial counsel and the State engaged in conversations about resentencing Mr. Zamora due to the *Blake* case. Att. B. According to the records I reviewed trial counsel never filed a new NOA on the matter, yet worked closely with the State to accomplish the resentencing, and represented Mr. Zamora at the resentencing. In the Court of Appeals case the State agreed that Mr. Zamora needed to be resentenced due to offender score issues, and the Court of Appeals so ruled. In the end it was the State reaching out to Ms. Trombley to file the RAP 7.2 motion in the Court of Appeals to allow the resentencing that ensured Mr. Zamora did not serve any more time. Att C. In summary trial counsel took considerable action in this case after his notice of withdraw was entered, with Ms. Trombley's knowledge, and she raised no objections or concerns. When trial counsel had issues to discuss with Ms. Trombley, it appears he raised them with her.

When the State had another motion appropriate for the trial court, specifically the motion to dismiss, I did precisely what I did before, notify trial counsel. I have no ability to monitor the communications between defense trial counsel and appellate counsel. I have done motions in the trial courts while appeals are pending for various reasons several times. *See, e.g. State v. Hernandez*, 6 Wn. App. 2d 422, 425, 431 P.3d 126, 128 (2018) In my experience trial counsel and appellate counsel communicate during these events, just like Ms. Trombley and trial counsel did during the work on Mr. Zamora's resentencing. There was no reason to expect that

communication had not occurred in respect to the dismissal motion. If trial counsel needed a delay to consult, I would not have objected and the trial court would have granted the motion.[2]

Trial counsel apparently did not communicate with Ms. Trombley regarding the dismissal. This is something over which I have no control. Previously during trial court proceedings my office and I had worked with trial court counsel during resentencing, and trial court and appellate counsel had communicated about the case. Trial counsel never entered a new NOA for the resentencing, and Ms. Trombley never objected to the procedures we were using. If she had a problem with how we worked with trial counsel she needed to raise it when we were conducting the resentencing. She only became concerned with the formalities when trial counsel did something she did not like.

2. There was no lack of candor to the tribunal

In my motion to dismiss I mentioned two reasons why dismissal was in the interests of justice. One was the staffing levels and workload of the prosecutor's office. The other was the fact that Mr. Zamora has already served all the time he would serve on the case. The second fact is still true to the best of my knowledge. That factor still weighs in favor of dismissal. However, the staffing levels of the prosecutor's office has changed significantly, and other factors now lead towards continued prosecution of this case.

Garth Dano, then the Grant County Prosecuting Attorney, announce his retirement in September of 2021. By November 2021 the office was down to twelve attorneys, out of 16 allotted, with the elected prosecutor soon to leave, the chief criminal deputy having announced his retirement, a very experienced civil/appellate attorney had just retired, and another senior deputy had just left to take a chief criminal deputy position in another county. I was the leading

[2] I do not mean to imply I believe trial counsel acted inappropriately in this situation. Trial Counsel was accepting a dismissal of the case, a win for his client.

candidate (as it later turned out the only candidate) to be appointed to the Prosecutor position. Two of the deputy prosecuting attorneys had recently come into my office expressing their concerns and contemplating leaving "a sinking ship." I was aware that two other experienced criminal attorneys were entertaining an offer from another prosecutor's office. Other attorneys also had issues that lead me to believe they could be leaving. I was very concerned about the decisions I might have to make regarding prioritizing cases. I also was concerned about the time I would have to spend preparing for a Supreme Court argument at the time I would be taking over an office in significant disarray. While I had some leads on new attorneys, none were guaranteed at that time.

Today things are considerably different. I have hired seven new attorneys over the past year, with another 3L law student agreeing to work in my office starting next August. Some of the attorneys who were at risk of leaving did not leave. At the time I wrote the declaration the office had 12 attorneys, with some already having informed me they were leaving and considerable risk of others leaving, risking driving the numbers much lower. Fortunately my worst fears were not realized. Not everyone who was threating to leave left. I was able to hire more attorneys than I expected. As of November 2022 the office will be at 14 attorneys, with one more agreeing to start next year. The triage calculation I made in November of last year is considerably different than the one I make today. Changed circumstances does not equal lack of candor to the tribunal.

Nor is there a signed order dismissing the case, as Ms. Trombley asserts. There is a signed order dismissing the case contingent upon Supreme Court approval per RAP 7.2. That approval never happened due to Ms. Trombley's objection to the Supreme Court. Therefore the order is simply a dead letter,

Other factors have since arisen that lead toward it being more in the interests of justice to retry this case. Part of the reason for criminal prosecution is specific deference. Hopefully the individual involved learns something and is deterred from further similar actions in the future. At the time I wrote the motion to dismiss I had no evidence that this was or was not the case for Mr. Zamora. I could hope it was. That is no longer the case. After the Supreme Court decision was issued I received two e-mails from individuals demanding that I charge Officer Hake with attempted murder. Att D. I do not know if these two individuals have a connection to Mr. Zamora. However, shortly after I received these e-mails I received a voice mail from Mr. Zamora also demanding that I charge Officer Hake with attempted murder. He also claimed that Officer Hake forced his gun into his mouth. This was contrary to both testimony at trial and Mr. Zamora's own statement given to law enforcement investigating the incident, in which Mr. Zamora claimed lack of memory. When he came into court for the first time after the Supreme Court opinion Mr. Zamora demanded to know when he could file his tort claim. It is clear to me that Mr. Zamora had not accepted responsibility for his role in this incident. While there is no more jail time available in this case, any conviction would still count as criminal history on his offender score, would have an effect on the sentence for any future crimes Mr. Zamora may commit, and hopeful impress upon Mr. Zamora the improperness of his behavior.

Finally, the public's interest in having a full airing of the facts of this case has gone up considerably. As is demonstrated by this complaint and her appellate briefing, Ms. Trombley is very good at ignoring facts and law that do not fit her narrative. Unfortunately the Supreme Court, especially the concurrence, also engaged in this practice. Ms. Trombley cites the Zamora concurrence that states "this was a prosecution where a citizen's mistaken report of vehicle prowling led to a violent altercation with police officers that almost resulted in the death of the

defendant who was guilty of nothing more than walking while high on drugs." Zamora, 199 Wn.2d. at 719,724. (Concurrence by C.J. Gonzalez, joined by J. Montoya-Lewis). First, there is little evidence the citizen's report was mistaken. Second, this assertion ignores the fact that Mr. Zamora reached into a pocket where an open knife was later found and refused to remove his hand. It also ignores the fact that Mr. Zamora tried to choke Officer Hake and tried to take his gun away. It ignores the fact that Officer Hake had the ability to shoot Mr. Zamora and did not, despite being under a violent assault from Mr. Zamora. It ignores the fact that it took six officer to subdue Mr. Zamora in his meth induced state.

With the Supreme Court decision this case has generated considerable public interest. It does have some superficial resemblances to the George Floyd case. But the details beyond the headlines are considerably different, and they matter. The prosecutor's statements during voir dire were, at best, unwise. However, the Supreme Court opinion goes much farther, undercutting faith in law enforcement and the legal system in general. The widely published AP article[3] on this case quoted Ms. Trombley's statement of facts in the case, which was very distorted. One of the purposes of a public trial is to allow the public to observe the legal system and work, and determine what actually happened. Ms. Trombley and the Supreme Court have managed, based on a poor decision by the prosecutor, to turn the case into an indictment of law enforcement, when the purpose of a criminal case is to hold an offender accountable. When I moved to dismiss this case there was an unpublished decision that received little notice. Now there is considerable public interest in this case. The interest in determining the facts free from the influence, whatever that was, of the prosecutor's remarks in voir dire is much more important to the public than it was before.

[3] https://apnews.com/article/elections-crime-united-states-immigration-washington-9ca9bc527acb07701bfcae1b8c4975cc (last visited October 14, 2022)

In short, there was no failure to display candor to the tribunal. My declaration was accurate when I wrote it. The circumstances surrounding this case have changed, so my decision on whether to prosecute this case has changed.

3. The bar discipline process is an improper place to regulate prosecutorial discretion.

Ms. Trombley essentially complains I am abusing prosecutorial discretion in continuing with this case. Prosecuting attorneys are vested with great discretion in determining how and when to file criminal charges. *See State v. Lewis*, 115 Wash.2d 294, 299, 797 P.2d 1141 (1990); *see also Deal v. United States*, 508 U.S. 129, 134 n. 2, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993) (recognizing prosecutors have "universally available and unvoidable power *to charge or not to charge* an offense."). *State v. Korum*, 157 Wn.2d 614, 625, 141 P.3d 13, 19–20 (2006) ("It is clear the Sentencing Guidelines Commission and the Legislature intended to prevent judicial review of [the prosecutor's charging] decisions.") As noted in the letter sent with this bar complaint, the WSBA is part of the judicial branch of government. A prosecutor is an attorney, but he or she is also an elected member of the executive branch of government. The charging decision is committed to the executive branch, saving a review for probable cause. There is no question probable cause exists.

As for deterring Mr. Zamora's rights to appeal, first it is highly questionable, to say the least, that he had a right to appeal after the State was willing to dismiss the case. *See Taylor, supra*. Assuming he had that right, the possibility of continuing with the charges if he continued with the appeal is no more than thousands of defendants face everyday. Prosecutors around the country negotiate with defendants to persuade them to give up their rights in return for reduced

or dismissed charges or sentencing recommendations. It is called plea bargaining. Over 95% of cases resolve that way. Most of the ones that do not at least had a plea offer made.

> While confronting a defendant with the risk of more severe punishment clearly may have a "discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable"—and permissible —"attribute of any legitimate system which tolerates and encourages the negotiation of pleas." It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty.
>
> To hold that the prosecutor's desire to induce a guilty plea ... may play no part in his charging decision, would contradict the very premises that underlie the concept of plea bargaining itself.

Korum, 157 Wn.2d at 629–30. Here Mr. Zamora had a choice, he could accept the State's dismissal motion, or he could fight it, and accept the risk that circumstances might change and his case would be recharged.

Mr. Zamora is facing much less deterrent to his rights than the defendant in *Korum* did. In Mr. Zamora's case the State is simply proceeding with the charges he was originally convicted of at trial. This is nowhere near what Mr. Korum faced. Mr. Korum originally pled guilty and was sentenced to 135 months, or about 11 years. Mr. Korum later withdrew his plea based on misadvice about community placement. He then proceeded to trial, where he was convicted and sentenced to 1,208 months, or over a hundred years. I am simply not aware of any case where the State proceeded with the original charges after an appeal was found to be improper prosecutorial conduct.

There is very little case law defining what prosecutors should or should not consider in making charging decisions or continuing with cases. This makes sense, because these decisions are generally not subject to judicial review. There is RCW 9.94A.411, which are non-mandatory prosecutorial guidelines regarding evidentiary sufficiency. It states that "Crimes against persons

will be filed if sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify conviction by a reasonable and objective fact finder." RCW 9.94A.411(2)(a). This also factors towards continuing the prosecution, although it is not a changed circumstance.

The interests of justice are is multifaceted, complicated and subject to reasonable disagreement. However, in our system of government, the decision to charge or continue with a case is left to the prosecuting attorney. "Judges are not free ... to impose on law enforcement officials our personal and private notions of fairness and to disregard the limits that bind judges in their judicial function. *State v. Agustin*, 1 Wn. App. 2d 911, 918, 407 P.3d 1155, 1158–59 (2018)(deletion in original) "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.

> A prosecuting attorney's most fundamental role as both a local elected official and an executive officer is to decide whether to file criminal charges against an individual and, if so, which available charges to file. This "most important prosecutorial power" allows for the consideration of individual facts and circumstances when deciding whether to enforce criminal laws, and permits the prosecuting attorney to seek individualized justice; to manage resource limitations; to prioritize competing investigations and prosecutions; to handle the modern "proliferation" of criminal statutes; and to reflect local values, problems, and priorities.

State v. Rice, 174 Wn.2d 884, 901–02, 279 P.3d 849, 858 (2012)

I am the duly appointed prosecutor for Grant County, and baring something very unusual, will soon be the duly elected prosecutor. Part of the job involves making hard decisions on criminal cases. Reasonable people may disagree with my decisions, and the people of Grant County are free to remove me through the political process. But the State Constitution, as

interpreted by the Courts, places that decision in my hands. The bar grievance process is an inappropriate place to challenge that decision.

Conclusion

This bar complaint is unfounded and inappropriate. There was no failure to notify Ms. Trombley, or ensure Mr. Zamora's rights were protected, because he had no rights to protect after the State was willing to dismiss the case. Even if there was a right to notice, I complied with it by notifying trial counsel for a motion in the trial court. Ms. Trombley had no problems with this procedure until it did not work as she liked. That is something I have no control over. There was no failure of candor to the tribunal, circumstances change. Bar grievances are not the appropriate venue to challenge prosecutorial charging decisions. This complaint should be dismissed.