WHATCOM COUNTY DISTRICT COURT
Whatcom County Courthouse
311 Grand Avenue, Suite 401
Bellingham, WA 98225-4081

BRUCE VANGLUBT
Administrator

MATTHEW S. ELICH
DAVID M. GRANT
Judges

ANTHONY S. PARISE
Commissioner

March 21, 2008

Mr. Ronald Carpenter
Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Re: Comments on Amendments to CrRLJ 3.1(d)(4), CrRLJ 4.1, and CrRLJ 8.3

Mr. Carpenter:

I have written to comment on certain amendments proposed to the Criminal Rules for Courts of Limited Jurisdiction as described in volume 161 of Washington Reports 2d Series, specifically, the amendments offered to CrRLJ 3.1(d)(4), CrRLJ 4.1, and CrRLJ 8.3. The comments are my thoughts and should not be attributed to other members of the Whatcom County District Court bench or staff.

First, I have several concerns to voice with respect to the proposed amendment to CrRLJ 3.1. Initially, I would like to mention that since the amendment to CrRLJ 3.1 references the "Standards for Indigent Defense Services as endorsed by the Washington State Bar Association," I have tried to locate those standards on both the Bar Association's and the Court's websites without any success. As of this writing, the Washington State Bar Association website only offers a link to a Washington Defender Association's website which at http://www.defensenet.org/resources/standards provides access to two documents which may or may not be the aforementioned standards, one is entitled "National Standards" and the other is entitled "WDA Standards." However, the link provided by the Bar Association to these documents does not state that either of the described standards have been "endorsed" by the Bar Association. As a result, the first comment I must make is that it is rather difficult to offer comment on a proposed rule when critical materials referenced in the proposal are either unavailable or extremely difficult to locate. To the state obvious, if adopted, the Court will need to provide a better means of accessing the referenced document(s) so that the public, practitioners, and those charged with enforcing the rule can more readily read the standards to be applied.

Although I was unable to locate the "as endorsed" standards referenced in the amendment, for the sake of commenting, I will assume that the above referenced documents found on the Bar Association's website are likely the standards referenced in the amendment. If that is the case, one needs to take note that specific numeric caseload

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limits are established by the standards referenced. In pertinent part, the WDA Standards state:

> The caseload of a full-time public defense attorney or assigned counsel shall not exceed the following:
>
> . . . 300 Misdemeanors per attorney per year; or
>
> . . . 25 Appeals to appellate court hearing a case on the record and briefs per attorney per year.
>
> A case is defined by the Office of the Administrator for the Courts as: A filing of a document with the court naming a person as defendant or respondent.
>
> Caseload limits should be determined by the number and type of cases being accepted and on the local prosecutor's charging and plea bargaining practices. In jurisdictions where assigned counsel or contract attorneys also maintain private law practices, the contracting agency should ensure that attorneys not accept more cases than they can reasonably discharge. In these situations, the caseload ceiling should be based on the percentage of time the lawyer devotes to public defense.

WDA Standards for Public Defense Services, "Standard Three: Caseload Limits and Types of Cases."

The National Standards likewise contain references to similar numeric caseload limits, including those adopted by the Seattle-King County Bar Association Indigent Defense Services Task Force Guidelines for Accreditation of Defender Agencies, 1982.

Since numeric caseload limits would become a part of CrRLJ 3.1 by virtue of the standards referenced, I believe it is important for the Court to consider the propriety of delegating the legislative and/or judicial authority to establish such caseload limits to the Washington State Bar Association and the organizations which promulgate them. Indigent defense services is a subject that has been addressed by our state legislature, *see* Chapter 10.101 RCW. By virtue of RCW 10.101.030 the Legislature has directed all jurisdictions operating under the chapter to adopt local standards for the delivery of public defense services. The adopted standards are to include caseload limits and local legislative bodies are told the standards endorsed by the Washington State Bar Association should serve as a guideline. RCW 10.101.030. Arguably, this legislative mandate allows for some local variation or experimentation in establishing standards and caseload limits across the state. In contrast, the proposed amendment to CrRLJ 3.1 makes application of the endorsed caseload standards mandatory across all jurisdictions, regardless of differences in local circumstances. The rule may eliminate the prerogatives offered to local legislative and judicial authorities by RCW 10.101.030.

It is also important to note the proposed amendment to CrRLJ 3.1 appears to grant the Bar Association unilateral authority to alter the applicable indigent defense standards. The proposed rule does not contain any restriction upon the Bar Association's ability to endorse revised standards. If the governing body responsible for the promulgation of the "Standards for Indigent Defense Services" decides to change the standards, those changes would become a part of the court rule so long as they are also endorsed by the Bar Association. Approval by the Court of future changes in the endorsed standards would not be necessary. As a result, the Court's role in overseeing alterations in the applicable standards would be reduced or eliminated.

When considering the amendment proposed to CrRLJ 3.1, the Court should carefully review and reconcile to its satisfaction the potential conflicts which may arise between the amended rule and our existing legislatively crafted requirements. The Court should also consider whether it is appropriate to delegate to the Bar Association the authority to unilaterally implement modifications to the standards without following the normal rule making process. If, as stated, the purpose of the amendment is to focus the authority and responsibility for ensuring adequate representation of indigent defendants into the hands of the judiciary, the amendment may miss the mark.

Next, I would like offer a comment on the proposed amendments to CrRLJ 4.1(c)(1) and (2). Whatcom County does have a public defender office, however, it does not as a matter of practice currently offer standby limited appearance counsel for indigent services at all arraignments. The Whatcom County Public Defender currently has five full time deputy public defenders assigned to the district court. The District Court has two elected judges, of which I am one. To give effect to the proposed amendments to CrRLJ 4.1(c)(1) and (2) it appears that counsel from the public defender's office would have to attend and standby at all arraignments. Given the caseloads and assignments of our currently assigned public defenders, I believe one additional full time public defender staff attorney would be needed to meet the requirements of the proposed amendments. For my jurisdiction, this would constitute a 20% increase in salary costs for the staffing of district court assigned attorneys in the public defender's office. At present, funding for such staffing is not budgeted. A change in the court rule would require additional funding which must be authorized by the county legislative authority. I doubt this type of fiscal impact would be a consequence unique to Whatcom County. The Court may wish to consider the fiscal impacts the proposed amendments to CrRLJ 4.1 may have upon local jurisdictions if adopted. In a similar vein, the proposed amendment to CrRLJ 3.1 may also present unfunded fiscal impacts which should be considered as well. Staff funding is likely to become an issue trial courts will have to address with their local legislative authorities if the amendments are adopted.

Finally, as for CrRLJ 8.3, given the existing common law surrounding the subject, *see, State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986), the proposed amendment seems unnecessary for courts and practitioners. If the purpose of the court rules are to "govern the procedure in the courts," it may not be sensible to codify or limit the common law doctrine described in the amendment by expressing it in a procedural rule. On the other hand, since the amendment does more specifically describe the procedure

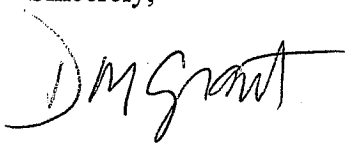
required, it may allow *pro se* defendants to more effectively represent themselves in seeking the relief described. This is, of course, a laudable objective in itself.

Last year the Whatcom County District Court handled about 5,300 criminal misdemeanor cases. I would have handled about one half of those cases. I would be surprised if I heard more than six or eight *Knapstad* motions across the entire year. Numerically, motions to suppress evidence or dismiss charges based on other grounds, such as lack of probable cause to initiate the stop or inappropriately seized evidence, outnumber *Knapstad* motions in frequency of occurrence. While I realize the relative frequencies by which various pretrial motions have been made in the past does not mean that *Knapstad* motions might have been raised more often, I do hope these personal recollections gives the Court an idea of the frequency by which the issue seems to be raised. I must add that in the last three years that I have been on the bench, I do not recall a *pro se* defendant having brought a *Knapstad* motion before me. As for practitioners, they seem well aware of the *Knapstad* requirements and appear capable of pursuing the motion without the aid of a specific court rule.

On balance, the proposal to amend CrRLJ 8.3 does seem useful for *pro se* defendants, but it also raises fundamental questions surrounding the need and appropriateness of broadening the scope of our procedural rules in order to incorporate selected substantive rules of law. If the purpose of the amendment is to assist *pro se* defendants, perhaps it would be equally important to consider reducing other often used motions for suppression and dismissal to procedural rules as well.

I thank the Court for considering my comments.

Sincerely,



David M. Grant
Judge