WASHINGTON
ASSOCIATION OF
PROSECUTING ATTORNEYS

April 30, 2008

Honorable Charles Johnson
Rules Committee Chairman
Temple of Justice
PO Box 40929
Olympia, WA 98504-0929

Re: Proposed Court Rules CrRLJ 8.3(c), CrR 8.3(c), RALJ 2.2 and RAP 2.2

Dear Justice Johnson:

Please accept these comments which explain the Washington Association of Prosecuting Attorneys' (WAPA) position with respect to the proposed amendments to CrRLJ 8.3, CrR 8.3, RALJ 2.2 and RAP 2.2.

CrRLJ 8.3 and CrR 8.3

WAPA supports the proposed codification of the *Knapstad* procedure as CrRLJ 8.3(c) and CrR 8.3(c). The proposed rule is an accurate statement of case law. We request that one additional clarifying statement be added to (c)(3) of both rules that reminds the court of the following:

> (3) The court shall grant the motion if there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt. In determining defendant's motion, the court shall view all evidence in the light most favorable to the prosecuting attorney and the court shall make all reasonable inferences in the light most favorable to the prosecuting attorney. The court may not weigh conflicting statements and base its decision on the statement it finds the most credible. <u>The court may not consider affirmative defenses in ruling upon the motion.</u> The court shall not dismiss a sentence enhancement or aggravating circumstance unless the underlying charge is subject to dismissal under this section. A decision denying a motion to dismiss under this rule is not subject to appeal under RAP 2.2. A defendant may renew the motion to dismiss if the trial court subsequently rules that some or all of the prosecuting attorney's evidence is inadmissible.

The above addition is supported by the following cases, which hold that affirmative defenses do not negate probable cause. *See State v. Fry*, 142 Wn. App. 456, 174 P.3d

1258 (2008) (affirmative defense of medical use of marijuana did not negate probable cause; officers did not have to cease their search pursuant to a search warrant solely because the defendant presented a physician's authorization to use marijuana); *McBride v. Walla Walla County*, 95 Wn. App. 33, 40, 975 P.2d 1029, 990 P.2d 967 (1999) (defendant's claim of self defense did not negate the officer's probable cause for arrest).

RALJ 2.2 and RAP 2.2

We support the companion amendments to RALJ 2.2 and RAP 2.2. The addition of a right to appeal the granting of a *Knapstad* motion is already firmly established by case law.

We respectfully request that the Court add another specific right to appeal when it modifies RALJ 2.2 and RAP 2.2. The proposed language, which WAPA submitted to this Court in 2004, appears below:

RALJ 2.2

(a)-(b) [Unchanged.]

(c) Appeal by State or a Local Government in Criminal Case. The State or local government may appeal in a criminal case only from the following decisions of a court of limited jurisdiction and only if the appeal will not place the defendant in double jeopardy:

(1) *Final Decision, Except Not Guilty.* A decision which in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing a complaint or citation and notice to appear, or a decision granting a motion to dismiss under CrRLJ 8.3(c).

(2)-(4) [Unchanged.]

(5) *Withdrawal of Guilty Plea.* An order granting a motion to withdraw guilty plea.

RAP 2.2

(a) [Unchanged.]

(b) Appeal by State or a Local Government in Criminal Case. Except as provided in section (c), the State or a local government may appeal in a criminal case only from the following superior court decisions and only if the appeal will not place the defendant in double jeopardy:

(1) *Final Decision, Except Not Guilty.* A decision that in effect abates, discontinues, or determines the case other than by a judgment or verdict of not guilty, including but not limited to a decision setting aside, quashing, or dismissing an indictment or information, or a decision granting a motion to dismiss under CrR 8.3(c).

(2) – (4) [Unchanged.]

(5) *Withdrawal of guilty plea.* An order allowing a defendant to withdraw a plea of guilty.

(6) *Disposition in Juvenile Offense Proceeding.* A disposition in a juvenile offense proceeding which that is below the standard range of disposition for the offense or that the state or local government believes involves a miscalculation of the standard range.

(7) (((~~6~~))) *Sentence in Criminal Case.* A sentence in a criminal case that is outside the standard range for the offense or that the state or local government believes involves a miscalculation of the standard range.

(c) – (d) [Unchanged.]

The same reasons that support the addition of the right to appeal from an adverse *Knapstad* ruling support the addition of the right to appeal from the granting of a motion to withdraw a guilty plea. Case law places restrictions upon the trial court's ability to grant a *Knapstad* motion, and case law places significant restrictions upon the trial court's ability to grant a motion to withdraw a guilty plea. *See also* CrR 4.2(f) and CrRLJ 4.2(f).

The grounds for granting relief to a defendant who seeks to withdraw his or her guilty plea are essentially the same, regardless of whether the defendant brings the motion before or after sentencing. The current court rules, however, only expressly grant the government a right to appeal a post-sentencing order granting a motion to withdraw guilty plea. And the case law is inconsistent on whether the government may obtain review of an order granting a pre-sentencing motion to withdraw guilty plea as a matter of right or only by discretionary review. *Compare State v. Haydel*, 122 Wn. App. 365, 369-370, 95 P.3d 760 (2004) (granting discretionary review pursuant to RAP 2.3(b)(2)), *with State v. McDermond*, 112 Wn. App. 239, 242, 47 P.3d 600 (2002) (the State appealed as a matter of right), *and State v. Armstrong*, 109 Wn. App. 458, 460-61, 35 P.3d 397 (2001)(same).

WAPA attempted to have the above inconsistency addressed in 2004. WAPA proposed this language regarding a right to appeal from the granting of a motion to withdraw guilty plea as appears above. The proposal was sent to the Washington Supreme Court Rules Committee, which referred the proposal to the Washington State Bar Association (WSBA) Rules Committee. The WSBA Rules Committee did not recommend the adoption of the proposal. The WSBA Rules Committee's action foreclosed any further action on the proposed rule, including any opportunity for the general public to comment on the merits of the proposal.

This proposed language is consistent with the current grant of an appeal as a matter of right from a pre-sentencing order granting a new trial. Both a jury's verdict of guilt and a guilty plea are considered a conviction. *See* RCW 9.94A.030(12). A guilty plea and a trial both trigger double jeopardy protections. *State v. Higley*, 78 Wn. App. 172, 179, 902 P.2d 659 (1995) (jeopardy attaches in a guilty plea proceeding when the court accepts the plea). If the defendant were to be acquitted in a trial held pursuant to an order granting a new trial or an order granting a motion to withdraw guilty plea, the propriety of the order granting the new trial or withdrawing the guilty plea is moot, as double jeopardy would preclude the reinstatement of the original verdict or plea reinstated. *See, e.g., State v. Haydel*, 122 Wn. App. 365, 95 P.3d 760 (2004). The same conundrum arises when the defendant is convicted of a lesser charge than that which he pled guilty to originally.

Defendants enter guilty pleas at all stages of the proceeding – arraignment, omnibus hearings, pre-trial hearings, after jury selection, after the State presents its case, and while the jury is deliberating. In each of these situations, the government releases witnesses from subpoenas and, hopefully, provides some measure of relief to victims. When a guilty plea is withdrawn, victims are resubpoened and the government's case often is weakened by scattered witnesses and released evidence. Allowing the government an appeal as a matter of right from such motions, respects the public's legitimate expectation of finality in the guilty plea.

Sincerely yours,

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Staff Attorney