WASHINGTON
ASSOCIATION OF
PROSECUTING ATTORNEYS

April 28, 2008

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

Re: Proposed Court Rules CrR 4.1, CrRLJ 4.1 and JuCR 7.15

Dear Justice Johnson:

Please accept these comments which explain the Washington Association of Prosecuting Attorneys' (WAPA) position with respect to proposed new rules that will require significant monetary commitments.

The rule making process is authorized by RCW 2.04.190.[1] Court rules are limited to procedural matters. Substantive law is within the providence of the Legislature.

Many of the proposed new court rules and suggested rule changes involve the provision of counsel at public expense in excess of that required by the federal or state constitution. While the proponents of these non-constitutionally mandated rights are motivated by a desire to help their constituencies, the Court has repeatedly recognized that the decision to expend public funds for such purposes rests with the Legislature.[2]

The Legislature is the best body to address the competing needs of citizens. Diverting general fund monies for counsel in excess of the constitutional right in criminal cases will reduce the money available to other needs, such as to assist a battered woman, to feed a homeless family, to offer therapeutic courts, or to increase compensation for jurors.

The provision of counsel to indigents, beyond what is constitutionally required, is uniquely within the power of the legislature.[3] The Legislature has already rejected some of the proposals contained in the rules discussed below. *See, e.g.*, HB 1531 (2005-06) (limiting the waiver of counsel in juvenile proceedings); HB 1644 (2005-06) (changing the law pertaining to waiver of rights by a juvenile). Their determination should not be

upset by another branch of government. The cost of court-appointed counsel is funded, in the most part, by local governments. One slight change on a state level, can have a cataclysmic impact on an impoverished county's fragile budget. This reality led the people of the State of Washington to mandate that no new programs or increased levels of services under existing programs be imposed upon local governments, unless the cost is paid for by the state.[4] Thus, when the Legislature considered whether to expand counsel as requested in the suggested JuCR 7.15, the Legislature had to ponder the fiscal impact to the state budget. Unfortunately, when a court rule creates a new program or increases levels of services under existing programs, the entire fiscal burden falls on the local government.[5] In some communities, the expense of providing a public defender to advise everyone who wishes to exercise their constitutional right to represent themselves, may result in the loss of a police officer, firefighter, or other emergency aid worker.

While this Court has some power to compel the expenditure of public funds when the legislature does not act and when an emergency arises, that power is limited to funds sought to be compelled are reasonably necessary, under a clear, cogent, and compelling standard, for the holding of court, the efficient administration of justice, or the fulfillment of its constitutional duties.[6] None of the proposed new rules or amendments satisfy this test. While the Legislature chose not to adopt the proposed bills, they were duly considered by that body and there is no indication that the Legislature is unwilling to consider similar bills in the future.

The proposals that compel prosecutors to attend arraignments run afoul of the same fiscal concerns as the rules regarding the provision of non-constitutionally mandated counsel. These proposals, however, present additional separation of power problems.

The county prosecuting attorney is a constitutionally created office in the executive branch.[7] The state legislature establishes the powers and duties of the county prosecutor.[8] Those duties must then be carried out within the budgetary constraints imposed by the local legislative authority. The available resources drive numerous decisions, including whether to staff infraction calendars, whether to participate in therapeutic courts, and whether to retain certain expert witnesses. With respect to each decision, the prosecuting attorney remains accountable to the local electorate.

Many counties are experiencing financial hardship. Many county prosecuting attorneys are facing hiring freezes, if not actual reductions in staffing. The number of referrals, however, are not decreasing. No prosecutor would agree that the public is best served by delaying charging decisions, so that his or her deputies can travel to distant courthouses to attend arraignment calendars.

I now turn from WAPA's general concerns, to identify the issues specific to the proposed new rules and amendments.

CrR 4.1 and CrRLJ 4.1

WAPA opposes the proposed amendment to CrR 4.1(f) and CrRLJ 4.1(f). The proposed amendment states that the "prosecuting attorney shall read" the indictment or other charging document to the defendant. This, of necessity, would require that a prosecuting attorney attend every arraignment in every court.

Initially, it should be noted that while Const. art. I, § 22, requires that the defendant be informed of the nature and cause of the accusation and be provided with a copy of the indictment or other charging document, Const. art. I, § 22, does not require that the indictment or other charging document be read to the defendant. Thus, the requirement of a "reading" is not constitutionally mandated.

Prosecuting attorneys constantly struggle with high caseloads, in many instances far higher than the levels suggested by the Washington State Bar Association (WSBA) for defense counsel. Requiring a prosecuting attorney to attend an arraignment calendar, reduces the hours available for reviewing police referrals for charging decisions, interviewing witnesses, preparing for trial, interviewing witnesses, writing appellate court briefs, and advising the county government on civil issues. The elected prosecuting attorney, who is answerable to the public, is the proper entity to decide whether the potential benefit of staffing the arraignment calendar is outweighed by the reduction in hours available to complete other needed tasks.

Prosecuting attorneys are struggling to cover superior courts, juvenile courts, and district courts with limited numbers of deputies. In some counties, the number of courtrooms that would need to be covered exceeds the number of criminal prosecutors and no resources are available to hire additional attorneys. In some rural counties, the distance between the prosecutor's office in the county seat and one of the district courts exceeds 50 miles, consuming hours of travel time. *See* Adams County Court Directory (district court is held in both Ritzville and Othello). In more urban counties, traffic gridlock prevents the relatively shorter distances from being covered in less than an hour.

The problems identified by the proponents of this amendment are mainly of the court accepting unknowing waivers of counsel. This problem will not be resolved by the presence of a prosecuting attorney, as the prosecuting attorney is precluded from seeking such a waiver. See RPC 3.8(b) and (c). This problem is not wholly resolved by the presence of a public defender, as the attorney's communication with the defendant who elects to represent himself will not be subject to disclosure.

The most effective way to address this problem is for this Court to adopt a written waiver of counsel form, much like the written change of plea form, that advises the defendant of the risks and dangers of going pro se. Once the defendant has completed the form, the oral colloquy with the trial court judge can focus on questions that the defendant may still have and can highlight the risks to ensure that the defendant's decision to exercise his or her Const. art. I, § 22 right to defend without a lawyer is knowingly and voluntarily made.

Many prosecuting attorney's offices have written waiver of counsel forms. A sample form is enclosed. WAPA would be happy to provide a representative to any committee appointed by this Court to prepare a pattern waiver of counsel form.

JuCR 7.15

The Washington Constitution expressly recognizes the right of an accused to "appear and defend in person, or by counsel." Const. art. I, § 22. To date, this right has not been limited to adults. Proposed JuCR 7.15 forces an attorney upon an offender in violation of the offender's Const. art. I, § 22, right. This violation of the offender's Const. art. I, § 22 right is not subject to a finding of harmless error.[9]

Regardless of whether an offender consults with an attorney prior to exercising his Const. art. I, § 22 right to "defend in person", the juvenile court must enter into a comprehensive colloquy to establish on the record that any waiver of counsel is knowingly, intelligently and voluntarily made. WAPA is concerned that judges may abbreviate the on-the-record colloquy on the grounds that the lawyer the offender was compelled to meet with covered the necessary information.

WAPA is not wholly opposed to JuCr 7.15. WAPA strongly supports that portion of the rule that adopts a written waiver of counsel form to guide the judge through the colloquy. WAPA, however, is concerned that the proposed form has some omissions that need to be corrected prior to its adoption.

First, the list of consequences in the following paragraph should include some mention of ineligibility for federal benefits[10] and, if a non-citizen, that a conviction may impact his ability to remain in the United States.

> The maximum possible punishment that can be imposed by Juvenile Court is _____ years or commitment to JRA to age 21, whichever is less. I also understand that there may be lasting consequences even after I turn eighteen, if I am found guilty, including: employment disqualification, loss of my right to possess a firearm, suspension of ability to keep or obtain a driver's license, and school notification.

Second, paragraph 7 of the proposed form, which sets forth much of the information the offender needs in order to make a knowing, intelligent, and voluntary waiver, does not contain two critical pieces of information.

> I understand that if I represent myself:
>
> - <u>If I chose to testify, I will be required to present my testimony by asking myself questions.</u>
> - <u>If I represent myself and I am convicted, I will not be able to complain, on appeal or in a collateral attack, about the quality of my defense.</u>[11]

Thank you for your consideration.

Sincerely,

John Knodell

John Knodell, President
Washington Association of
Prosecuting Attorneys

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1.RCW 2.04.190 provides that:

> The supreme court shall have the power to prescribe, from time to time, the forms of writs and all other process, the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving writs and process of all kinds; of taking and obtaining evidence; of drawing up, entering and enrolling orders and judgments; and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts, and district courts of the state. In prescribing such rules the supreme court shall have regard to the simplification of the system of pleading, practice and procedure in said courts to promote the speedy determination of litigation on the merits.

2.In re Marriage of King, 162 Wn.2d 378, 398, 174 P.3d 659 (2007) (the decision to publicly fund actions other than those that are constitutionally mandated falls to the legislature. Outside of that scenario, it is not for the judiciary to weigh competing claims to public resources."); Pannell v. Thompson, 91 Wn.2d 591, 599, 589 P.2d 1235 (1979) ("The decision to create a program as well as whether and to what extent to fund it is strictly a legislative prerogative.").

3.See In re Personal Restraint Petition of Woods, 154 Wn.2d 400, 437, 114 P.3d 607 (2005) (Chambers, J., concurring in part and dissenting in part) ("Providing publicly funded counsel for indigent petitioners is uniquely within the power of the legislature."); Dependency of Grove, 127 Wn.2d 221, 228, 897 P.2d 1252 (1995) (because the legislature has the power to tax, the power to appropriate funds, and is answerable to the public for the expenditure of taxes collected, it is for the legislature to prioritize the amount of public funds to be made available to assist litigants in civil cases)

4. See RCW 43.135.010; RCW 43.135.060(1).

5.See Seattle v. State, 100 Wn.2d 16, 21, 666 P.2d 359 (1983).

6.In re Salary of Juvenile Director, 87 Wn.2d 232, 250-51, 552 P.2d 163 (1976).

7.See Const. art. IX, §§ 4 and 5; State v. Campbell, 103 Wn.2d 1, 25-26, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985) (recognizing prosecuting attorney as executive branch official); *State ex rel. Schillberg v. Cascade District Court*, 94 Wn.2d 772, 781-782, 621 P.2d 115 (1980) (same); *State v. Thorne*, 129 Wn.2d 736, 762, 921 P.2d 514 (1996) (same).

8.Const. art. IX, § 5.

9.McKaskle v. Wiggins, 465 U.S. 168, 177 n.8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984); Faretta v. California, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975); State v. Silva, 107 Wn. App. 605, 622, 27 P.3d 663 (2001).

10.See United States v. Littlejohn, 224 F.3d 960 (9th Cir. 2000) (when accepting a guilty plea, a court should advise a defendant of his statutory ineligibility for federal benefits as these consequences are automatic and direct).

11.State v. Fritz, 21 Wn. App. 354, 359, 585 P.2d 173 (1978) (the pro se defendant must bear the consequences of his own representation because he cannot complain on appeal of the quality of his defense), citing Faretta v. California, 422 U.S. 806, 835-36 n.46, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975).

IN THE SUPERIOR COURT OF WASHINGTON FOR COUNTY

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	NO.
	)	
-vs-	)	
	)	
	)	WAIVER OF TRIAL
	)	COUNSEL
Defendant.	)	
	)	
	)	

An accused has a constitutional right to represent himself or herself if he or she chooses to do so, but there are potential dangers and disadvantages of representing yourself. The following questions must be filled in so that the Court can determine that your decision to represent yourself is knowingly made.

1. What was the last grade of school you completed?_____.
2. Have you ever studied law? _____.
3. Have you ever represented yourself or any other defendant in a criminal action? _____. If yes, please indicate what the charges were and whether the matter proceeded to trial and/or appeal. _____
4. Do you realize that you are currently charged with _____ in violation of RCW _____? The elements of this offense are as stated in the Information.
5. Do you realize that the maximum penalty for each count of _____ is

confinement in a state correctional institution for a term of ___ years, or by a fine in an amount fixed by the court of $_____, or by both such fine and confinement? _____.

6. Do you realize that if you are convicted of any crime, the court, in addition to imposing jail or prison time and a fine, could also require you to pay restitution to your victim, to pay court costs, and to obey certain post-release restrictions on your conduct? _____?

7. Do you realize that the standard sentence range for the felony counts will be based on the crime charged and your criminal history? Criminal history includes prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere. _____.

8. Do you realize that if you are found guilty of more than one crime, this court can order that the sentences be served consecutively, that is one after another? _____.

9. Do you realize that the State may be able to charge you with additional or other crimes which may carry greater or increased penalties as this case progresses? _____.

10. Do you realize that if you represent yourself, you are on your own? ____. The Court cannot tell you how you should present your case, write your memorandums, or obtain the presence of witnesses.

11. Are you familiar with the Rules of Evidence (ER) and the Superior Court Criminal Rules (CrR)? _____. These rules govern the way in which a criminal matter is presented in the superior court. These rules will apply to you the same as they apply to an attorney. State v. Smith, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985).

12. Do you realize that if you decide to take the witness stand, you must present your testimony by asking questions of yourself? _____. You cannot just take the stand and tell your story. You must proceed question by question through your testimony.

13. Do you realize that a lawyer would be familiar with the Rules of Evidence, skilled in following the Rules of Criminal Procedures, and could advise you of possible defenses to the pending charges? _____.

14. Do you realize that if you proceed pro se that if you do not properly present a defense, subpoena witnesses, or otherwise represent yourself in a competent manner that you will not be able to obtain a reversal of a conviction on the grounds that you received inept representation? _____.

15. Why do you not want an attorney? _____

_____

_____. If it is because you do not believe that you can afford an attorney, do you realize that an attorney can be appointed at public expense if you are indigent, or if you are partially able to contribute to the cost of counsel. Your eligibility for court appointed counsel is determined by a review of your financial resources. Do you wish to be screened for court appointed counsel? _____

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16. Do you realize that once you waive your right to counsel that it is discretionary with the court whether you may withdraw the waiver? _____.

17. Do you realize that if you waive the right to counsel, that the court is not required to delay the currently set trial date? _____.

18. Do you realize that while the court may provide you with an attorney as a legal advisor or standby counsel, that you do not have an absolute right to receive this assistance and that you, and not standby counsel must prepare for trial?

_____.

19. Have any threats or promises been made to induce you to waive your right to counsel? _____.

20. Now, in light of the penalty that you might suffer if you are representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer? _____.

21. Is your decision entirely voluntary on your part? _____.

I have read and completed this form. I have no questions for the court about the risks of proceeding pro se or about my right to have counsel appointed to assist me. I request that the court allow me to represent myself.

DATED this _____ day of _____, 19___.

_____
DEFENDANT

I find that the defendant has knowingly and voluntarily waived his or her right to counsel. I will therefore approve the defendant's election to represent himself.

DATED this ___ day of _____, 19____.

_____
JUDGE