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April 22, 2010

The Honorable Justice Charles W. Johnson  
Washington Supreme Court  
Temple of Justice  
P.O. Box 40929  
Olympia, WA 98504--0929

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**Re: Proposed Revision to CrRLJ 4.1  
Supporting WSBA comments and Urging Provision of  
Counsel to all Indigent Defendants at First Appearance,  
Consistent with Recent OPD Report**

Dear Justice Johnson,

The American Civil Liberties Union of Washington (ACLU-WA) submitted comments on proposed revisions to CrRLJ 4.1 on August 14, 2007, and again on April 30, 2008. Each time, we emphasized the importance of protecting the fundamental constitutional right to counsel at defendants' initial appearances and arraignments in courts of limited jurisdiction. We urge the Court to adopt proposed CrRLJ 4.1 with the added provisions proposed by the Washington State Bar Association (WSBA).

WSBA's proposals would provide three important improvements in compliance with the right to counsel in Washington. First, the WSBA proposal would require that courts of limited jurisdiction not find a waiver of the right to counsel at first appearance or arraignment unless a finding was made that the waiver was knowing, intelligent and voluntary. Second, the WSBA proposal would require that the court conduct an inquiry into "whether" a defendant was validly choosing to proceed without counsel, instead of just determining "that" a defendant was choosing to proceed without counsel. Third, the WSBA proposal would ensure that courts conduct a "thorough inquiry" into waiver of counsel, as the courts have held is necessary to obtain a constitutionally valid waiver. All three components of the WSBA's proposal, in addition to the proposed revisions of the DCMJA, are essential to remedy the lack of counsel for indigent defendants in courts of limited jurisdiction which has been occurring in far too many parts of Washington, and for too long.

Moreover, the ACLU urges the Court to adopt a version of CrRLJ 4.1 that mandates access to defense counsel at arraignment or first appearance, for all indigent defendants. This would lessen the burden on the court in accepting waivers,

eliminate prolonged incarceration of defendants due to delay in access to counsel, and would assure that defendants do not waive the right to counsel without full understanding of the risks of a waiver. There are life-altering consequences at stake for defendants in these proceedings, as well as decisions being made about waivers of their rights that may cause irreparable damage to those rights. The complexity of misdemeanor cases and the severity of their consequences have grown tremendously in recent years, necessitating counsel's assistance.

Finally, we urge the Court to review the state Office of Public Defense's 2009 Public Defense Status Report at pages 3-6, which contains compelling proof that provision of counsel at first appearance not only improves compliance with defendants' constitutional rights but also yields significant efficiencies and cost savings:

[http://www.opd.wa.gov/Reports/TrialLevelServices/2009\\_PublicDefenseStatusReport.pdf](http://www.opd.wa.gov/Reports/TrialLevelServices/2009_PublicDefenseStatusReport.pdf)

The report explains:

when defense attorneys are not present, indigent defendants who wish to resolve their cases at the initial court appearance are required to make virtually irrevocable decisions in a hurried and often chaotic atmosphere: They must understand and waive their right to counsel; they must understand the factual and legal issues of why they are accused of a crime; they must understand their legal options and the consequences of each; they must engage in plea negotiations with a trained legal adversary (prosecutor); and they must communicate effectively with the judge. This is difficult, especially for anyone who has just spent the night in jail.

In the increasing number of courts where public defense attorneys are routinely present at first appearance calendars, they can advise defendants of the charges and choices facing them, and the defendants can use this information to make an informed decision about how to proceed. ...

Efficiencies and savings. In addition to ensuring that indigent defendants can access their constitutional right to counsel at a critical stage of a case, defense attorneys at first appearances also contribute significant efficiencies to the administration of public defense, trial courts and jails. As a direct result of providing defense attorneys, more cases are appropriately resolved early at arraignment. Because a continuation of the arraignment is not required for these cases, substantial court time is saved for all the parties and public defense caseloads are reduced, thus reducing fiscal and caseload pressures at the front end of the judicial process. Scarce local resources are preserved to deal with the remaining cases more effectively.

Among the counties and cities that have implemented first appearance counsel in recent years, a number have experienced significant efficiencies and direct cost savings. In 2009 several jurisdictions reported reduced jail time and jail

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transportation costs, as well as improvements in defendants appearances for subsequent hearings, as a result of early communication with their lawyers about upcoming court dates.

We urge the prompt adoption of the proposed revisions to CrRLJ 4.1, with the additions noted above.

Sincerely,

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Staff Attorney