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Honorable Charles W. Johnson
Supreme Court Rules Committee
PO Box 40929
Olympia, WA 98504

In Re: Proposed repeal of CrCLJ 2.1 (c)

The provision allowing citizen complaints is purported to infringe on the Separation of Powers Doctrine. If anything, it does the opposite. It merely allows, in misdemeanant cases, the ability of a citizen to access the Courts and thus achieve a chance at justice. There is no complimentary procedure for felony cases.

The DCMJ states in their letter supporting deletion of CrRLJ 2.1 (c) that it violates the Separation of Powers Doctrine. The cases they cite are dated and only minimally on point and do not address the central issue.

Commencing with a plain reading of the rule:

CrRLJ 2.1 (c) Citation and Notice.

> "(c) Citizen Complaints. Any person wishing to institute a criminal action alleging a misdemeanor or gross misdemeanor shall appear before a judge empowered to commit persons charged with offenses against the State, other than a judge pro tem. The judge may require the appearance to be made on the record, and under oath. The judge may consider any allegations on the basis of an affidavit sworn to before the judge. The court may also grant an opportunity at said hearing for evidence to be given by the county prosecuting attorney or deputy, the potential defendant or attorney of record, law enforcement or other potential witnesses. The court may also require the presence of other potential witnesses."

Nowhere in this Rule does it require a Judicial Officer to act as a Prosecutor. It states "may require the appearance to be made on the record and under oath." Similar procedures in District and Superior Courts are used routinely, and no separation of powers issues arise there.

"The Judge may consider any allegations on the basis of an affidavit sworn to before judge." Note the permissive words "may" this leaves it to the discretion of the reviewing magistrate as to

whether or not to avail themselves of that procedure. It does not require or allow a judge to act as a prosecutor.

"The court may also grant an opportunity at said hearing for evidence to be given by the County Prosecuting Attorney or Deputy, the potential Defendant or Attorney of record, Law Enforcement or other potential witnesses." Clearly this contemplates the presence of a Prosecuting Attorney, presumably to explain why a charge was not filed. Again the rule uses the word "may" making the procedure discretionary with a reviewing magistrate.

"The Court may also require the presences of other potential witnesses." Presumably the Court would sign a properly presented subpoena if the citizen wishes to bring that before the court. There is nothing in CrCLJ 2.2 (c) that *requires* a judge to act as a prosecutor.

In order for the DCMJ's position to be viable it has to assume that a Judge lacks the intellectual flexibility to recognize a separation of powers issue. It also then requires Judges to voluntarily assume the role of a Prosecutor, a position usually discouraged by the Commission on Judicial Conduct. The fact that a court rule may provide an opportunity for misuse is hardly grounds for its repeal. Every court rule extant provides a court or a lawyer the opportunity for misuse or misapplication.

The provision allowing citizen complaints is purported to infringe on the separation of powers doctrine. If anything, it does opposite. It merely allows, in misdemeanant cases, the ability of a citizen to access the courts and thus achieve a chance at justice. There is no complimentary procedure for Felony cases.

Prosecuting Attorneys, from elected County Officials to District Courts, and the Municipal Courts, may for a wide variety of non legal reasons, decline prosecution of a criminal case. In some cases, prosecutors are old and tired, lazy or inept, and don't want to try any cases, and may experience or perceive themselves to be under various societal and professional pressures which dissuade them from prosecution. Many courts have only part time contract Prosecuting Attorneys, which are universally undercompensated, thus further discouraging the prosecution of meritorious cases. 18 of Washington's 39 counties have populations less than 50,000 (2010 census) and thus in any "legal" community, the vast majority of practitioners know each other, recreate together, celebrate together and morn together.

To then have to bring charges against a relative or a friend of a relative, a grandson or daughter, or prominent member of the community makes ultimate prosecution for some wrong nearly non-existent. This also true of the various police agencies, the relatives and friends of police agencies, which will rarely, if ever be prosecuted for a crime. The citizen complaint procedure allows for relief for the citizens, if a prosecuting attorney will not act usually for an improper reason. A prosecuting Attorney may not act to prosecute a policeman for fear of job loss, retaliation, or opprobrium from the law enforcement community or the public at large. The citizen complaint procedure grants freedom to act in a legal way, when the Government will not.

In some areas, and at some points in time, Prosecutors have been completely co-opted, either by Chiefs of Police, the County Sheriff, County Commissioners, City Managers, and City

Counsels, strong Mayors or Municipal attorneys. A vaporous apparition of consent among the powered and moneyed, strongly discourages prosecution in some communities. Our esteemed Supreme Court may not wish to acknowledge it but it is as real as the stone floors that they walk on daily.

An analogous procedure exits in Federal Law. In common law, a writ of ***qui tam*** is a writ whereby a private individual who assists a prosecution can receive all or part of any penalty imposed. Its name is an abbreviation of the Latin phrase ***qui tam pro domino rege quam pro se ipso in hac parte sequitur***, meaning "[he] who sues in this matter for the king as well as for himself."

The writ fell into disuse in England and Wales following the Common Informers Act 1951 but, as of 2010, remains current in the United States under the False Claims Act, 31 U.S.C. § 3729 *et seq.*, which allows a private individual, or "whistleblower," with knowledge of past or present fraud committed against the federal government to bring suit on its behalf. There are also *qui tam* provisions in 18 U.S.C. § 962 regarding arming vessels against friendly nations, 25 U.S.C. § 201 regarding violating Indian protection laws, 46a U.S.C. 723 regarding the removal of undersea treasure from the Florida Coast to Foreign Nations.

I suspect the DCMJ's previous attempt and now this one to delete the citizen complaint procedure has far more to do with the weariness of entertaining pro-se litigants than with the rather specious argument of separation of powers. It should be observed and kept as a default setting that the courts exist to serve the citizens in their community, not the other way around. A citizen forced to bring an action under the citizen complaint procedure because a Prosecuting attorney will not act is not an interruption of the Court's business; it is the purpose of it. The Supreme Court needs only ask one question: Are the court house doors open to the citizens that support them, or are they closed? Deleting this ability for a common citizen to seek redress in the courts is a step backwards, diminishes a citizen's right to seek redress in the courts, and forces citizens to be completely dependent on Prosecuting Attorney's unwillingness to act.

If the Supreme Court takes any action at all, it should be to strengthen and expand the ability of a citizen to seek redress in the courts.

Respectfully Submitted;

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Concurring with all of the above;

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