Seattle
City Attorney's Office
Ann Davison, City Attorney

October 31, 2024

Via Email to: supreme@courts.wa.gov

Clerk of the Supreme Court
Temple of Justice
P.O. Box 40929
Olympia, WA 98504-0929

Re: Proposed Amendments to CrR/CrRLJ 3.1 & JuCR 9.2

Justices,

Thank you for taking the time to review my feedback regarding the proposed changes to Washington's indigent defense caseload standards. The Bill of Rights is a centerpiece of our constitution and our country. As this Court has explained, "[w]ithout an attorney, these fundamental rights are often just words on paper." *State v. A.N.J.*, 168 Wn.2d 91, 97 (2010). Just like the police, the judiciary, and prosecutors, the right to effective defense counsel is an essential pillar of our criminal justice system. From that perspective, I fully support this Court taking appropriate steps to uphold the Sixth Amendment by providing a sustainable framework for attorneys dedicated to this area of public interest law.

I do not, however, support the proposed changes as written. They are drastic and are to be implemented rapidly. On their face, satisfying the new standards seems to require at least three times the number of defense attorneys, investigators, support staff, and office space. Even if the budget, support personnel, and office space were not concerns, it is far from clear that the current marketplace in Washington boasts anywhere near the number of qualified attorneys needed to satisfy the proposed standards. This appears particularly true in the less-populated regions in the State. I am concerned that the proposed standards provide a promise without a plan to follow through.

The proposed standards reduce caseloads to bolster effective assistance of counsel, and to avoid complete denials of counsel by (hopefully) reducing attorney attrition. Although I support these objectives in the abstract, the reality is that many rural counties in Washington are already struggling, and sometimes failing entirely, to find and timely appoint defense counsel when needed. Notably, the comments submitted by the public defense bar in these hard-hit areas have generally opposed the proposed changes and warn of a complete collapse to their local indigent defense systems. By contrast, the comments submitted by public defenders practicing along the I-5 corridor have been overwhelmingly supportive. This apparent opinion divide along regional lines is concerning, particularly given the areas where the crisis is most intense. Regardless of the path this Court takes, I

think it is important to ensure that any standards are workable throughout the geographically and economically diverse jurisdictions in Washington.

Any meaningful change on this issue will also require coordinating with the other branches of state and local government. This has not occurred. To be sure, this Court – indeed, every criminal court – has an obligation to protect the right to counsel in every case. This inherently requires some degree of ongoing judicial oversight to prevent Sixth Amendment violations before they occur. In some cases, this may even demand structural intervention when ineffective assistance of counsel is so systematized that it is effectively part of the institution. *See, e.g., Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013). But the separation of powers does place limits on the role a court may play. While "[t]he judiciary should accept no shortcuts" in protecting the right to counsel, it "is not up to the judiciary to tax or appropriate funds; these are legislative decisions." *A.N.J.*, 168 Wn.2d at 121 (Sanders, J., concurring).

Legislative solutions are not always immediate, but the legislature is not blind to our state's public defense crisis. For example, a dozen state senators submitted a joint letter acknowledging that while the Court "needs to make these changes, we ask that you all give us time to work on this further. If the Legislature does not come together to address the shortfalls, we fear that we will watch our public defense system come crashing down."[1] I urge you to grant this reasonable request. In addition to public defense, legislators are grappling with a growing list of criminal justice failures such as a dysfunctional mental health system, understaffed law enforcement agencies across the state, and myriad issues relating to youth detention. Solving these major problems will require substantial funding, operational planning, and probably some measure of compromise between competing viewpoints. These are questions for the legislature.

They are not questions the Washington State Bar Association, or its Board of Governors, are equipped to answer acting on their own. The practical issues are also not problems that can be solved on the accelerated timeline announced by the WSBA. In 2021 the WSBA revised its Standards for Indigent Defense Services but did not change its recommended caseloads or signal major changes coming down the pipeline. Three years later the WSBA took a sudden and abrupt turn by drastically cutting the recommended caseloads and dictating an arbitrary and unrealistic timeline. Despite the massive undertaking required to fund and create this reimagined public defense model, the WSBA failed to engage the stakeholders who will be responsible for carrying out the mission. More time is needed to coordinate the different branches of government to make sure Washington gets this right. Extending more time to the legislature is even more appropriate given the likelihood that much greater state involvement will be essential to any public defense model sustainable long-term. This is particularly true in rural and less-populated counties. We need only look just south across the Columbia to know this. As the Ninth Circuit recently explained, for decades "[r]ather than employ state or county public defenders, Oregon contract[ed] with individual private attorneys for these services." *Betschart v. Oregon*, 103 F.4th 607, 613

[1] *See* September 4, 2024 public letter comment signed by twelve senators.

(9th Cir. 2024). This created an unsustainable system in an accelerating death spiral. But then the Oregon Public Defense Services Commission "made a bad situation worse when, in 2021 and 2022, it altered the rules governing compensation and caseloads for these private attorneys. These changes rendered public defense work financially untenable, and many private attorneys stopped taking criminal defense cases." *Id.* The proposed caseload standards, and the timeline for implementation, doom many parts of Washington to a similar immediate fate. Indeed, perhaps as a subtle warning, Washington's rural crisis did not go unmentioned by the *Betschart* panel. *See id.* n. 2. I encourage this Court to exercise appropriate deliberative caution and avoid repeating the recent reactionary missteps of our sister state.

Finding the right budgetary balance is necessary to a sustainable system. In Seattle, for example, the City contracts with the King County Department of Public Defense for indigent defense services. For 2024, this total annual budget is $12.6 million.[2] Pursuant to the contract, DPD provides 27.59 full-time equivalent (FTE) caseload attorneys, 6.5 FTE non-caseload attorneys, 3 supervising attorneys, and 29.5 FTE support staff (including investigators and paralegals). By contrast, the 2024 annual budget for the Criminal Division of the Seattle City Attorney is $10.6 million. When fully staffed, this budget supports a criminal division chief, 39 FTE attorney positions (including pre-filing diversion and traffic infractions), and 34.5 FTE support staff (including victim advocates). As a result, the City of Seattle currently spends about $1.19 on public defense for every $1.00 spent on prosecution.[3] This disparity will increase if the proposed standards are adopted. Regardless of whether that would be sustainable in wealthy cities like Seattle, few other jurisdictions in Washington are positioned to absorb similar additional costs.

Finally, as noted, a substantial motivating factor behind the proposed standards is avoiding attorney burnout, particularly for public defenders qualified to handle serious felony cases. *See* Council on Public Defense Report on Revisions to WSBA Standards of Public Defense (2024), p. 2 (noting King County DPD recently lost ten class A felony qualified attorneys in a three-month span). The CPD Report does not highlight similar retention issues for public defenders carrying misdemeanor caseloads. Given this, and absent evidence of rampant ongoing ineffective assistance in courts of limited jurisdiction, one reasonable area of compromise might be to focus first on felony caseloads before enacting any major changes to misdemeanors.

Public defense is a difficult, and mission-critical, job. Prosecution and policing are too. We need to find ways to make all of these essential jobs attractive to qualified candidates to

[2] The current contract runs from January 1, 2023 through December 21, 2027. Under the agreement, caseloads are capped at 325 unweighted misdemeanor credits (rather than 400) and supplemental credits are awarded for every 10 hours worked up to a maximum of 8 credits per case.

[3] These are the current financial numbers in Seattle, a jurisdiction praised in the Council of Public Defense's Report for its progressive model developing alternatives to prosecution that can result in cost-savings. "For example, Seattle-based LEAD is a nationwide leader in providing social services to those interacting with law enforcement in a way that can avoid the cost of prosecution." *See* CPD Report, p. 17. Presumably, jurisdictions that are not nationwide leaders in diversion should expect much higher indigent defense costs than Seattle.

ensure the criminal justice system keeps functioning. For that reason, I support this Court re-examining the current caseload standards in a responsible manner that considers practical realities and is sensitive to the confluence of factors contributing to this critical issue. The proposed standards do not meet this threshold and so I urge the Court to not adopt them.

Sincerely,

Ann Davison
Seattle City Attorney