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18 July 2024
Clerk of the Supreme Court
P.O. Box 40929
Olympia, WA 98504-0929

Re: Suggested Amendments to Standards for Indigent Defense Services

To the Clerk of the Washington Supreme Court,

I write today to respectfully request that the Washington Supreme Court reject the suggested Amendments to CrR 3.1/CrRLJ 3.1/JuCR 9.2 Standards for Indigent Defense (hereafter Amendments).

I am the prosecuting attorney for Jefferson County, a county of approximately 33,000 people located on the Olympic Peninsula. Our County has one incorporated city, Port Townsend, which sits on the Quimper Peninsula at the extreme northeastern corner of the Olympic Peninsula.

80% of the county is owned by the state and federal governments, much of the remaining land is owned by private timber companies; across much of East Jefferson County (where most of the county population lives) the US Navy owns development easements to prevent development. I mention this to underscore that my county not only has a limited budget, but also has very limited means with which to increase the budget.

The proposed Amendments are extremely problematic for Jefferson County because based on our projections the cost of indigent defense will more than double without any obvious accompaniment of new revenue. However, finances are not even the main concern that I have with this proposed rule change. The real problem is that the additional attorneys needed to bring the county in compliance with the Amendments *simply do not exist*.

The June edition of the Washington State Bar News features an article entitled *Walking in their Shoes*¹. Although problematic with some of its analysis, I do not disagree with the main thrust of the article in that there is a shortage of defense attorneys in Washington². The article contains a graphic with some pretty startling vacancy rates as of December 2023; I have no doubt that these are accurate because I have spoken to prosecutors in some of those counties who are presently forced to not charge otherwise chargeable cases due to the lack of defense attorney availability. In other words, the *current* case load standards – though created with good intent, have helped to manufacture the present problem, and are making communities less safe as I write this letter.

In Jefferson County, we have attempted to solve our attorney shortage by obtaining the services of out of town counsel. However, the Court's recent decision in *Luthi*³ casts doubt on our ability to obtain those services in the future. Most out of area attorneys choose not to physically travel to Port Townsend for routine hearings on account of our geographic remoteness and instead prefer to appear remotely via Zoom. Until *Luthi* this scenario worked well because our in-custody defendants (who also appear remotely via Zoom) could confer privately with their attorneys in a breakout room. *Luthi* now requires inmates to be physically transferred to the courthouse, which poses a client communication problem for out-of-area attorneys appearing via Zoom. This is a problem that exists *right now* in Jefferson County due to a shortage of local legal practitioners. I anticipate the Amendments will lead to fewer out-of-area attorneys choosing to take cases in Jefferson County, which will create a representation crisis here where none presently exists – *and that is without the proposed Amendments*.

This is why I find the proposed Amendments so perplexing – the solution to a supply problem is to create more demand? This is such a counter-intuitive approach that I am left to assume that the real motivation here is to simply break the back of the system. By forcing prosecutors to charge fewer cases based on false notions that prosecutors systemically overcharge or that the State of Washington engages in “mass incarceration”^{4,5}. Or perhaps the proponents of the Amendments think that police are too active and refer too many cases despite the fact that Washington is the *most under policed state* in the country⁶.

The adoption of such rule would constitute a massive overreach of the Court's constitutional authority by infringing on the executive branch's ability to enforce the law as it

¹ Colin Rigley, *Walking in their Shoes*, Washington Bar News, June 2024 at 24.

² There is also a shortage of prosecutors should any intrepid journalist wish to write about it.

³ *State v. Luthi*, __ Wn.2d __, 2024 Wash. Lexis 309 (2024)

⁴ Washington has the 10th lowest incarceration rate in the United States -

<https://www.sentencingproject.org/research/us-criminal-justice-data/>

⁵ The Washington Department of Corrections is currently closing facilities due to lack of demand -

<https://www.columbian.com/news/2023/jun/26/larch-corrections-center-to-close-this-fall-says-washington-department-of-corrections/>

⁶ <https://www.safehome.org/resources/states-with-most-police/>

clearly violates the very spirit of separation of powers central to our form of government. It will leave our communities less safe and it will undermine the legal representation that criminal defendants presently receive. I do not think I am going too far afield when I suggest that a rise in vigilantism is a possible, if not probable, natural consequence of this action. And why not? If I cannot prosecute a criminal perpetrator due to representation shortages then it is reasonable to assume that I will not be able to prosecute someone who sought revenge against their perpetrator for the same reason. The net impact of the Amendments will potentially undermine the entire purpose of even having a criminal justice system - preventing the cycle of violence caused by people taking the law into their own hands and providing the accused a fair opportunity to contest the allegations against them.

From my perspective it appears obvious. The purpose of this rule is to deconstruct the criminal justice system by severely curtailing the ability of prosecutors to keep their communities safe. And unfortunately, it is the small, rural, and remote communities like mine that will pay a disproportionate financial and social price as the more well-heeled communities in the state buy up all of the legal representation that is left.

Though perhaps well-meaning, steps the Supreme Court has taken in recent years such as the first round of the caseload standards, the *Luthi* decision, and now a second round of caseload standards have compounded the problem. The Court is not helping the situation with these actions, it is *making them worse*.

My years as an officer in the United States Army taught that I should avoid critiquing proposed solutions to a problem without having any potential solutions of my own to offer. With that in mind I offer the following potential solutions to be considered in whole or in part to alleviate the current shortage of attorneys in the criminal justice system:

1. Repeal the current caseload standards
 - a. These have helped manufacture the current crisis and are redundant to RPC 1.1
2. Reject the Amendments
3. Collaborate with the Washington State Bar Association and the other branches of State government to do the following -
 - a. Provide tax incentives to attorneys working in public service employment
 - b. Reduce or waive bar dues for attorneys working in public service employment
 - c. Increase funding for public sector attorneys
 - d. Encourage Washington's only public law school, located at the University of Washington (which also happens to be the most inexpensive law school in the state) to increase enrollment and scholarship opportunities for law students

interested working in the criminal justice system, particularly in rural and underserved areas⁷

- e. Encourage the legislature to repeal of RCW 59.18.640. This will simultaneously free up funding as well as legal capacity
 - i. Although I love the spirit of the rule, when demand outstrips supply statutory rights must give way to constitutional rights.
- f. Promote and incentivize the APR 6 Law Clerk Program, this has the added benefit of training individuals in situ, which is particularly valuable for rural and underserved areas.

The current problem with representational capacity will not be cured by fiat via court rule. It will require a multi-dimensional approach involving all branches of government. However, at a minimum, please *REJECT* these amendments.

Respectfully,



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⁷ This could be modeled after a program at the University of Washington School of Medicine to encourage medical providers to serve rural communities - <https://www.uwmedicine.org/school-of-medicine/md-program/curriculum/rural-programs>

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Martinez, Jacquelynn](#)
Subject: FW: Comment on Standards for Indigent Defense - CrR3.1/CrRLJ3.1/JuCR9.2
Date: Thursday, July 18, 2024 4:07:20 PM
Attachments: [Comments on Proposed Amendments.pdf](#)

From: James Kennedy <JKennedy@co.jefferson.wa.us>
Sent: Thursday, July 18, 2024 4:05 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on Standards for Indigent Defense - CrR3.1/CrRLJ3.1/JuCR9.2

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Good Afternoon,

I write today to request that the court reject the proposed amendments altering the current caseload standards. Please see my attached letter.

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