Prosecutor Questionnaire

The United States leads the world in incarceration rates. We represent 5% of the world's population but house 25% of the people behind bars. Blacks, Latinos, and Native Americans are incarcerated at higher rates than whites; according to data published by the U.S. Census and U.S. Bureau of Justice Statistics, Black people are 6 times as likely as white people to be incarcerated in Washington. These data have led to calls for criminal justice reform by a broad and bipartisan range of legislative and law enforcement leaders here and across the nation. The data have also highlighted the impacts of generations of institutionalized racism on educational and economic opportunities, which are inextricably intertwined with racial disparities in neighborhoods experiencing persistent poverty, higher crime rates, and harsher criminal justice system responses. Public investment strategies have not yet caught up to the identified needs. For example, over the past two decades, research advances in brain development science confirm the critical role of adult mentorship of young people throughout their teens and well into their early 20s—years when the risk of criminal justice system involvement is highest. However, public investment in after-school and evening programs that strengthen bonds among families, schools, and communities has either failed to keep pace or been cut entirely.

Criminal justice policy is set primarily at the state and local levels. Prosecutors wield significant influence with legislators and policymakers who determine what supports will be available to individuals and families to address behavioral health needs and what investments will be made in communities to address poverty and other systemic conditions contributing to the prevalence of crime. Prosecutors also exercise tremendous control over who will come into the criminal justice system, how each case will be resolved, and whether incarceration will be a part of that resolution. The elected Prosecuting Attorneys for Washington's 39 counties set policies and standards that define what success looks like for the deputy prosecuting attorneys who report to them.

<u>Metrics for Success</u>
What metrics do you believe should be used to determine whether the Office of the Prosecuting Attorney is succeeding in its mission and improving the criminal justice system? How would you realign local, state, and federal budget appropriations to support your vision of how we could most effectively accomplish the following:
1. Prevent crime in the first place;
2. Provide crime victims what they need;
3. Hold people accountable for the harms they cause; and
4. Bring recidivism rates down as close as possible to zero?

I do not believe the traditional metrics - number of filings, conviction rates, years in prison - are helpful or relevant as primary indicators as to whether a County Prosecutor is doing a good, poor, or mediocre job. There can be both good and bad reasons for a high conviction rate (e.g., filing that is too tight, loose ethical standards, etc.). I will seek to re-align county and local city priorities towards pre-booking, pre-filing diversion programs, away from low-level crimes, and

focus on serious felonies. I will implement a working, effective version of the Law Enforcement Assisted Diversion (LEAD) program first developed in Seattle, which is now being utilized in cities all over the United States. (The diluted, uncertified LEAD program implemented by the incumbent prosecutor failed, only assisting one individual during its entire existence.) I will hold police criminally accountable for excessive use of force, and ensure law enforcement falsehoods and misleading reports are dealt with due severity, adding such officers to the Brady list promptly and seeking administrative action from their respective agencies.

My inclination is to use some of the metrics proposed by Prof. David Slansky and his colleagues at the Stanford Criminal Justice Center. However, one of the key questions raised by modern metrics in criminal justice is this ambiguity: what should the prosecutor's role be? What is the mission of the Prosecutor's Office? That changing role affects what metrics should be used to judge such offices.
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120431

Bias
What training, supervision, and review policies and practices would you implement to identify and eliminate explicit and implicit biases in the screening, filing, and prosecution of cases by your office, and to promote equity and inclusion in your workplace?

First, the prosecutor's office needs specific written policies and practices put in place regarding in filing, charging, plea bargaining, evidence production, professional conduct, and sentencing. The current prosecutor believes written policies are unnecessary, relying entirely on the "prosecutorial discretion" of individual deputies, so there are virtually no policies. This management deficiency was recognized in the June 1, 2017 report, Felony Caseflow and Calendaring Study of Thurston County, conducted by the National Council for Superior Courts (at pp. 48-52). https://www.co.thurston.wa.us/superior/documents/ncsc-report-20170601.pdf

When too much discretion is given individual prosecutors, this "results in a wide range of plea agreements based on each individual prosecutor's personal policies." Id. at p. 4. Given the disparity in Thurston County in sentencing when sorted by racial/ethnic background of the defendant, I believe such results may be a byproduct of implicit or explicit bias of the individual prosecutor. Without clear policies, procedures, and guidelines, there is no check on such bias within the prosecutor's office, no review by fresh sets of eyeballs that may perceive unfairness that has unconsciously bled into the charging, sentencing, or settlement/plea process. Now, as long as the sentence or result is technically within legal bounds, the deputy prosecutor's judgment is not subject to standardized supervisor direction, educational/professional development, or discipline. I seek to change that within days of taking office by implementing written policies and guidelines and training staff and deputy prosecutors on newer methods. There are standardized guidelines for prosecutors freely available from the Washington Association of Prosecutors, the King County Prosecutor's Office, and the American Bar Association that could be utilized on an interim basis until more finely tailored expectations could be written.

One policy I would implement right away is to establish hard expectations on receiving evidence from law enforcement, and turning it over to defense counsel. If we decided to dismiss a case due to failure of law enforcement to promptly disclose evidence, or continue it, we would put the previously established written obligations of the law enforcement agency into the court record. We would document discussions with officers, detectives, and chiefs regarding compliance with evidentiary production expectations. The public and the courts should know what is happening behind the scenes to delay cases from going to trial. For an in-custody defendant, a three-month trial date extension costs over $10,000 (annual cost for one custody is $43,000). Shining sunlight into the criminal justice system will be part of this disclosure of the internal workings of the system, as only through better information can we improve criminal justice in this County and throughout the state.

Bail

In Washington, up to 70% of those in our county jails are being held pretrial because they cannot afford bail. Pretrial detention is a leading cause of mass incarceration and racial disparity in Washington's criminal legal system. What specific steps have you taken or will you take, if elected, to reduce or eliminate the imposition of cash bail and reduce the pretrial detention rate in the county jail?

First, I would flip the current presumption that prosecutors should keep a maximum number of people in custody, and instead presume that, absent a danger to public safety or a history of not showing up for appearances, defendants will return to court for hearings while awaiting trial. I would not seek to set bail except where required by statute. I would work with other groups to create legislation (and a constitutional amendment if necessary) to reform our bail system and hopefully eliminate cash bail. I would set policies on when and whether to add enhancements for missing a court date.

Second, I would set written expectations for prosecutors and police to make available case evidence to the defense expeditiously. If evidence was unreasonably delayed, we would consider trying the case without the evidence, dismissing and refiling at a later date if the evidence became available, or sweetening the plea agreement as appropriate. The right to a speedy trial would cease to be a dead letter in Thurston County, as the prosecutor's office would lead the way in affirming that constitutional right through best practices, and a greater respect for defendants' humanity and the crucial role played by opposing counsel. No more would continuances be routinely granted, without good cause, simply because the prosecutor so requested; I would cease that practice immediately, and counsel or discipline deputy prosecutors who filed such groundless motions - whether or not they were granted by the court.

Third, set a reasonable level of excess capacity as the ceiling for in-custody defendants. Right now our County Jail is at 105% capacity, which is ethically - and financially - unsustainable. We are one-eighth the population of King County, which has a 2,000 bed jail, but our Thurston

County jail is almost 500 beds, or twice as large as per capita as it should be. I would reduce filings and sentences to ensure our current 488-bed jail was "full" when at 90% of its actual capacity. That would extend the life of the structure and lessen our $43,000 per bed per year costs of incarceration. This would free up approximately $1.9 million per year from the county budget for other, more cost-effective crime reduction programs such as on-scene mental health responders and screening, drug counselors, etc.

Disabilities

People with intellectual disabilities have a 4 to 10 times higher risk of becoming victims of crime when compared to those without disabilities. They are also over-represented in the prison population: while they comprise just 2 to 3 percent of the general population, they represent 4 to 10 percent of the prison population, with even greater disparities in juvenile detention facilities and jails. Would you support cross-training and coordination among schools, police departments, victim service providers, and judges and courtroom staff to promote a comprehensive community-based response to situations involving people with intellectual and other developmental disabilities so they can experience equitable justice? If so, how?

I would. But three out of eight voters in Thurston County voted for Trump in 2016. Other issues in our county - overincarceration, prosecutor misconduct, no policies or standards, police abuse, racial/ethnic bias - are so prevalent that I confess this has not been a focus of my campaign.

To that end, I have formed an Advisory Committee (who will serve, if available, on a Transition Committee) to advise me on policy. My Advisory Committee includes: Prof. Robert Wiseberg, Stanford Law School, Founder of Stanford Criminal Justice Center; Prof. Lara Zarowsky, Univ. of Wash. School of Law, Policy Director at Innocence Project Northwest; Prof. John A. Strait, Seattle Univ. Law and professional and legal ethics expert; Tarra Simmons, Attorney, Criminal Justice Advocate, Civil Survival Project; Skadden Fellow at Public Defender Association; Policy Director at Civil Survival Project; Christopher Polous, Director of the Washington State Reentry Council; Justin Bingham, the progressive Spokane City Attorney; and former prosecutor Richard Rosenthal, with vast experience in forming and managing independent police review processes in a variety of jurisdictions, including Denver, Portland, and Vancouver B.C.

Drug Policy

Drug arrests have risen in Washington over the last few years – more than 12,000 in 2016. Do you believe that people with substance use disorders should face criminal penalties? Do you believe people who use drugs and do not have substance use disorders should face criminal penalties? What types of charging practices, diversion programs, and treatment programs do you support?

I do not believe in "status crimes" that criminalize being human, disabled, poor, or having a mental or physical health disorder.

Further, I do not believe simple drug use in private by adults is a high or medium criminal priority. It is, at best, a low priority. Most of the detainees in jail custody are awaiting trial on, or sentenced in, drug possession cases. That would change within days of my taking office.

Our Advisory Team is set up to develop or modify appropriate diversion and treatment program based on working models elsewhere and locally.

Mental Health

According to the Washington State Department of Social and Health Services – "demand for all forms of mental health services far outweighs what is currently available including competency evaluation and restoration services." What specific steps will you take as prosecutor to keep people with mental illness out of the criminal justice system and to get them into community treatment?

Competency evaluation and restoration services are poor tools for mental health evaluations, as is the criminal justice process generally. Something like 45% of the detainees in our jail have mental health problems. Pre-booking diversion methods such as Crisis Health Response teams (mental health episodes, addiction/abuse issues) for each city and for the county need to be given more resources as a start.

Prostitution

In 2011, King County and the City of Seattle launched Law Enforcement Assisted Diversion (LEAD), the first known pre-booking diversion program for people arrested for narcotics or prostitution offenses in the United States. In prostitution cases, offering people diversion to services at the first point of police contact, before any formal charges have been filed by a prosecutor, is intended to reduce the harms experienced by individuals who are trafficked or are engaging in the sex trades due to complex economic, mental health, and substance use reasons. What are your thoughts on this approach?

I am 100% in favor of the work done by LEAD, and of effective pre-booking and pre-filing diversion programs generally, including crisis response teams. For additional thoughts on LEAD, I would direct you to my response above to Metrics for Success.

Automated Decision Making

Increasingly, judges are turning to risk-assessment tools created by private companies to make bail, sentencing, and supervision decisions. The private vendors do not disclose the calculation formulas and processes that produce the tools' recommendations. Significant evidence suggests the recommendations produced by these tools amplify existing racial biases in our criminal justice system. What recommendations would you make about whether and how the county should use such tools, and how the county should monitor and evaluate their reliability and effectiveness?

We have a "data-poor" criminal justice system in Thurston County. Data collection within the system needs to be greatly enhanced at all levels: we have quite a bit of racism in sentencing and charging baked into our system in the defense, prosecution, police, judges, parole, probation, and political officials here. We have never had an elected or appointed judge who was a person of color in the entire existence of the County. If I am elected, I will be the first man of color elected to a countywide office. So I do not trust our current data set to be the sole arbiter of bail, sentencing, or supervision decisions. Garbage in, garbage out. I believe we need to clean house at the prosecutor's office and let our reforms percolate through the rest of the system before the data outputs will be anything but racialized, biased decisions made behind the seemingly neutral veil of computer science and artificial intelligence.

Juvenile Justice

In 2018, the Washington Legislature passed SB 6550, which expands the ability of prosecutors to divert most juvenile offenders, including those who have committed felony offenses or who have prior history. If you are elected, how will your office use the expanded authority granted by SB 6550 to implement diversion programs that are responsive to the needs of youth and prevent prosecution and incarceration?

To the fullest extent possible without jeopardizing public safety.

My opponent, the incumbent prosecutor, testified against a similar bill that eliminated legal financial obligations (LFOs) for poor juveniles, SB 5564, using the same argument that WAPA always uses when attempting to defeat reform legislation: "we like the idea, but this particular bill has a few problems so we cannot support it."

SB 5564 concerned the sealing of juvenile records and fines imposed in juvenile cases (2/5/15, Senate Human Services, Mental Health and Housing Committee) -
www.tvw.org/watch/?clientID=9375922947&eventID=2015021123&eventID=2015021123&startStreamAt=2758&stopStreamAt=3201&autoStartStream=true
Here is a link to the Final Bill Report for 5564:
http://lawfilesext.leg.wa.gov/biennium/2015-16/Pdf/Bill%20Reports/Senate/5564-S2.E%20SBR%20FBR%2015.pdf
Although my opponent testified against it, this bill passed by huge margins out of both the Senate and House, and signed into law by the Governor.

Reentry

The Washington State Institute for Public Policy released a 2017 report detailing the effectiveness of several existing programs in combating recidivism and aiding reentry. If elected, how will you evaluate and utilize current programs to aid reentering individuals in your community? If elected, how will you and your office consider new and innovative ways to ensure successful reentry?

We have not fully formulated a plan on this, but our Advisory Committee (who will serve, if available, on a Transition Committee) includes inmate-turned-attorney Tarra Simmons and Christopher Polous, Director of the Washington State Reentry Council, to advise me on policy.

Hate Crimes

According to Uniform Crime Reporting (UCR) data compiled by the FBI, hate crimes have been on the rise in the U.S. since 2014. What instructions would you provide deputy prosecuting attorneys and support staff about the investigation, charging, and prosecution of hate crimes by your office? What actions would you take as a public official to discourage hate crimes in your county?

Currently there are few policies in the Thurston County Prosecutor's Office that deal with hate crime prosecutions. I will create comprehensive ones.

Immigration

For immigrants, being convicted of a crime can result in double punishment. They may go to jail, but unlike citizens, they may also face the devastating punishment of deportation - even for a simple misdemeanor. These severe consequences happen even if they have a green card, a U.S. citizen spouse and children, or long-standing community ties.

In the case of *Padilla v. Kentucky*, the U.S. Supreme Court made clear that prosecutors have the power to consider immigration consequences when they are making decisions about how to resolve a case, resulting in more just outcomes for everyone. When a conviction can lead to such disproportionate consequences even for a low-level offense, how do you plan to ensure just outcomes for immigrant defendants and their families?

As a Mexican-American citizen born in Southern California, I am very aware of these issues and know how the immigration system can tear apart families. It makes no sense to split apart a functioning family, especially one that often includes bonafide American citizens, by misdemeanor pleas with life-altering consequences. Such a plea can be devastating to an immigrants, whether documented or not. It can result in derailing a pathway to citizenship, or in deportation to a country where the immigrant faces almost certain death upon return.

For 35 years here in Washington, and over 25 years before Padilla v. Kentucky, RCW 10.40.200 has acknowledged and tried to lessen the risk of immigration consequences facing immigrant defendants. Our law requires the court make certain that defendants are advised that if he or she is not a U.S. citizen, deportation may result from entering a plea resulting in conviction. However, this applies mostly to the court's actions during a plea, rather than other law enforcement authorities. "It is further the intent of the legislature that at the time of the plea no defendant be required to disclose his or her legal status to the court." RCW 10.40.200(1).

However, ignorance is not bliss, and such adverse consequences should be discussed during confidential plea negotiations. True justice weighs not only the impact to the person, but the

costs to the individual qua individual, and to society as a whole. For some, a misdemeanor guilty plea is not a few days in jail, a small fine, or probation, but can lead to the permanent destruction of nuclear family ties, separation by continental distances, or even death. Every prosecutor will have to run such decisions by a special team or assigned prosecutor specializing in such decisions.

Our current elected official on the County level are so oblivious to these issues that they signed a Certification on Nov. 11, 2017, that they would cooperate with DHS-ICE, just to gain $25,000 in Byrne JAG program funds. I have included a copy of my incumbent opponent's certification. From September 11-25, 2018, I organized the local sanctuary community to convince the County Commissioners not to certify in 2018; I convinced the County Commissioners to formally withdraw (on October 10th) our County's Byrne JAG program application for both 2017 and 2018, and withdraw my opponent's 2017 certification of compliance with federal immigration law.

Thank you for the opportunity to fill out this questionnaire.

Victor M. Minjares
Candidate for Thurston County Prosecutor
Friends of Victor Minjares
PO Box 6577
Olympia, WA 98507
(360) 515-7979

Victor Minjares
Jon Tunheim Thurston County Prosecuting Attorney

U.S. DEPARTMENT OF JUSTICE
OFFICE OF JUSTICE PROGRAMS

State or Local Government: FY 2017 Certification of Compliance with 8 U.S.C. § 1373

On behalf of the applicant government entity named below, and in support of its application, I certify under penalty of perjury to the Office of Justice Programs ("OJP"), U.S. Department of Justice ("USDOJ"), that all of the following are true and correct:

(1) I am the chief legal officer of the State or local government of which the applicant entity named below is a part ("the jurisdiction"), and I have the authority to make this certification on behalf of the jurisdiction and the applicant entity (that is, the entity applying directly to OJP). I understand that OJP will rely upon this certification as a material representation in any decision to make an award to the applicant entity.

(2) I have carefully reviewed 8 U.S.C. § 1373(a) and (b), including the prohibitions on certain actions by State and local government entities, -agencies, and -officials regarding information on citizenship and immigration status. I also have reviewed the provisions set out at (or referenced in) 8 U.S.C. § 1551 note ("Abolition ... and Transfer of Functions"), pursuant to which references to the "Immigration and Naturalization Service" in 8 U.S.C. § 1373 are to be read, as a legal matter, as references to particular components of the U.S. Department of Homeland Security.

(3) I (and also the applicant entity) understand that the U.S. Department of Justice will require States and local governments (and agencies or other entities thereof) to comply with 8 U.S.C. § 1373, with respect to any "program or activity" funded in whole or in part with the federal financial assistance provided through the FY 2017 OJP program under which this certification is being submitted ("the FY 2017 OJP Program" identified below), specifically including any such "program or activity" of a governmental entity or -agency that is a subrecipient (at any tier) of funds under the FY 2017 OJP Program.

(4) I (and also the applicant entity) understand that, for purposes of this certification, "program or activity" means what it means under title VI of the Civil Rights Act of 1964 (*see* 42 U.S.C. § 2000d-4a), and that terms used in this certification that are defined in 8 U.S.C. § 1101 mean what they mean under that section 1101, except that the term "State" also shall include American Samoa (*cf.* 42 U.S.C. § 901(a)(2)). Also, I understand that, for purposes of this certification, neither a "public" institution of higher education (*i.e.*, one that is owned, controlled, or directly funded by a State or local government) nor an Indian tribe is considered a State or local government entity or -agency.

(5) I have conducted (or caused to be conducted for me) a diligent inquiry and review concerning both—

(a) the "program or activity" to be funded (in whole or in part) with the federal financial assistance sought by the applicant entity under this FY 2017 OJP Program; and

(b) any prohibitions or restrictions potentially applicable to the "program or activity" sought to be funded under the FY 2017 OJP Program that deal with sending to, requesting or receiving from, maintaining, or exchanging information of the types described in 8 U.S.C. § 1373(a) or (b), whether imposed by a State or local government entity, -agency, or -official.

(6) As of the date of this certification, neither the jurisdiction nor any entity, agency, or official of the jurisdiction has in effect, purports to have in effect, or is subject to or bound by, any prohibition or any restriction that would apply to the "program or activity" to be funded in whole or in part under the FY 2017 OJP Program (which, for the specific purpose of this paragraph 6, shall not be understood to include any such "program or activity" of any subrecipient at any tier), and that deals with either— (1) a government entity or -official sending or receiving information regarding citizenship or immigration status as described in 8 U.S.C. § 1373(a); or (2) a government entity or -agency sending to, requesting or receiving from, maintaining, or exchanging information of the types (and with respect to the entities) described in 8 U.S.C. § 1373(b).

I acknowledge that a materially false, fictitious, or fraudulent statement (or concealment or omission of a material fact) in this certification, or in the application that it supports, may be the subject of criminal prosecution (including under 18 U.S.C. §§ 1001 and/or 1621, and/or 42 U.S.C. § 3795a), and also may subject me and the applicant entity to civil penalties and administrative remedies for false claims or otherwise (including under 31 U.S.C. §§ 3729-3730 and §§ 3801-3812). I also acknowledge that OJP awards, including certifications provided in connection with such awards, are subject to review by USDOJ, including by OJP and by the USDOJ Office of the Inspector General.

Signature of Chief Legal Officer of the Jurisdiction	Jon Tunheim Printed Name of Chief Legal Officer
11/13/2017 Date of Certification	Prosecuting Attorney Title of Chief Legal Officer of the Jurisdiction

Thurston County, Washington
Name of Applicant Government Entity (*i.e.*, the applicant to the FY 2017 OJP Program identified below)

FY 2017 OJP Program: **Byrne Justice Assistance Grant ("JAG") Program**

Minjares
LAW OFFICE PLLC

Victor Minjares
Candidate for Thurston County Prosecuting Attorney

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September 24, 2018 VIA EMAIL ONLY

TO: Bud Blake, Commissioner bud.blake@co.thurston.wa.us
John Hutchings, Commissioner john.hutchings@co.thurston.wa.us
Gary Edwards, Commissioner gary.edwards@co.thurston.wa.us

cc: petersc@co.thurston.wa.us; robin.courts@co.thurston.wa.us

Re: Public Comment In Opposition To Certification by Thurston County of its Compliance With Federal Immigration Enforcement

Honorable Commissioners:

As an attorney and a tax-paying resident of Thurston County, I urge the County Commissioners to reject the $25,000 Byrne JAG grant and refuse to sign the certification. Under current circumstances, certification is morally and ethically unthinkable; further, doing so potentially creates tremendous civil liability for Thurston County.

Background

The Byrne JAG grants have been around for years, but in 2017, in order for states, counties, or cities to receive the money, special certification requirements were added by Attorney General Jeff Sessions for cooperation with federal immigration enforcement efforts.

Thurston County wants to certify such cooperation on behalf of the County in order to receive a grant in the amount of $25,000. The certification in question is an official statement under penalty of perjury signed by the County's legal counsel (i.e., the Thurston County Prosecutor) that the county is fully cooperating with Immigration Control and Enforcement (ICE, the federal immigration authorities) in data sharing and communicating with local government officials, complying with 8 USC § 1373, and cooperating in various other ways, the parameters of which are not clearly laid out in the document or its appendices.[1]

[1] A copy is viewable here: https://www.bja.gov/funding/JAGLocal18.pdf.

In 2017, a nationwide injunction was in place that prevented enforcement by DOJ upon states and localities of similar certifications as a condition of receiving a Byrne grant. However, as of today's date, there is no federal injunction in place preventing DOJ enforcement of immigration cooperation requirements as a predicate for receipt of Byrne funds.

Discussion

First, the 2018 certification is more onerous than the one enjoined in 2017. because ICE added federal immigration enforcement laws to the list of compliance certifications.[2] Since immigration enforcement is solely a federal governmental responsibility, it is entirely unclear what "compliance" means in the context of a local government certification, and Thurston County lacks the excess capacity to litigate against USDOJ to find out. It would not be cost-effective to hire outside counsel to determine this for a $25,000 grant; the legal fees could be higher than the grant itself.

Second, two federal district courts have found 8 USC § 1373 to be *facially unconstitutional under the Tenth Amendment.*[3] Why would Thurston County want to certify that it will comply with an arguably facially unconstitutional statute that violates the sovereignty of our state?

Finally, even constitutional laws can be enforced in illegal, unconstitutional ways that create civil liability for the government and for individuals acting under color of law. This is September of 2018. We know things now that we did not in January of 2017, and this knowledge creates liability for Thurston County if it now certifies compliance. DHS-ICE is separating parents from their infant children, moving them without proper records, and putting them in cages, some to never be again reunified as families. American citizens born near the border are losing their right to travel by summary revocation of their American passports, and in danger of having their very birthright citizenship revoked. American citizens are watching their family members get arrested at public schools.

Substantive, fundamental rights cannot be restricted without due process of law. The County is aware of these terrible events nationally and cannot certify cooperation with federal immigration enforcement under these extraordinary circumstances without taking on vast potential liability. Thurston County and its officers could be

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[2] *See, e.g.*, pp. 36-37 of the document posted in fn. 1.

[3] *City of Philadelphia v. Sessions*, No. CV 17-3894, 2018 WL 2725503, at *31-33 (E.D. Pa. June 6, 2018); City of Chicago v. Sessions, No. 1:17-cv-05720 (N.D. Ill Jul. 27, 2018). *See also United States v. California*, No. 2:18-cv-00490 at *35 (E.D. Cal, July 5, 2018), where the court did not rule on the constitutionality of Section1373 because it found that California's laws did not conflict with the statute.

liable for civil rights violations under 42 U.S.C. Sec. 1983, including attorneys' fees, which could amount to millions of dollars, due to its knowing cooperation with federal immigration enforcement activities conducted in an unconstitutional manner.[4]

These things have been alleged to have happened here in Thurston County, as Sheriff Snaza and TCPA Tunheim are aware. For example, on November 16, 2017, ICE agents arrested Mr. Juan Cu Coc outside the Thurston County Jail in Tumwater. There is an affidavit by Mr. Cu Coc about the conduct of the ICE agents, which clearly alleges excessive force, racial animus, and acts constituting abusive assault while and after he was placed in custody. The conduct alleged went far beyond the reasonable force necessary to effect an arrest. St. Peter's hospital medical personnel who saw Mr. Cu Coc concurred; however, Thurston County authorities declined to investigate. Sheriff Snaza concedes it was a Thurston County Sheriff's deputy who, allegedly against official policy, notified ICE that Mr. Cu Coc was being released from custody.

So fears of county civil liability for excessive, unconstitutional immigration enforcement actions taken in Thurston County are not mere hypotheticals. If Thurston County signs the 2018 Byrne certification, which is under penalty of perjury, it is reasonable to anticipate there will be an upsurge in 42 U.S.C. 1983 lawsuits against the County for any arguably unconstitutional actions by ICE made under color of law in this county.

Conclusion.
It is unethical to cooperate with federal immigration enforcement efforts as long as they are being conducted in an illegal and unconstitutional manner. There is no need to tarnish Thurston County's reputation by accepting a Bryne JAG grant at the present time.

Further, it makes no financial sense for Thurston County to incur the risk of millions of dollars in potential civil liability and defense costs in return for a paltry

[4] "As-applied" challenges, which claim that a facially valid statute was enforced in an unconstitutional manner.

$25,000 – less than nine cents for each resident of Thurston County. The risk greatly outweighs the reward. Certification would be a grievous, costly mistake.

I urge the County Commissioners to reject the Bryne JAG grant and instruct the Thurston County Prosecutor not to certify compliance, or if already certified, revoke certification immediately.

Very respectfully,

Victor M. Minjares

Victor M. Minjares
Attorney-at-law

Victor Minjares
Candidate for Thurston County Prosecuting Attorney

THURSTON COUNTY
WASHINGTON
SINCE 1852

COUNTY COMMISSIONERS

John Hutchings
District One

Gary Edwards
District Two

Bud Blake
District Three

BOARD OF COUNTY COMMISSIONERS

October 10, 2018

Via email to: Patrick.Fines@usdoj.gov

Mr. Michael L. Alston, Director
Office of Justice Programs
U.S. Department of Justice
ATTN: Patrick Fines, Program Manager
810 7th Street NW
Washington, DC 20531

RE: Award Number: 2017-DJ-BX-0632

Dear Mr. Alston,

This letter will confirm the Thurston County Board of County Commissioners and the Thurston County Prosecuting Attorney are (1) withdrawing their application and respective certifications and (2) declining the award for the above referenced grant.

These actions are in response to the federal government attempting to impose conditions in these grants which, in Thurston County's view, are possibly unconstitutional and contrary to current county policy. Currently these conditions are the subject of litigation in federal court[1] and are temporarily barred by a federal court injunction. We believe at this point, it is in the best interest of Thurston County residents to wait for a final ruling on the validity of these conditions before proceeding further. At this time, Thurston County will take no action to spend or collect any money under this grant.

Sincerely,

Jon Tunheim, Prosecuting Attorney

Bud Blake, Chair

John Hutchings, Vice-Chair

Gary Edwards, Commissioner

[1] *City of Philadelphia v. Sessions,* 309 F.3d _____; (2018 Civil Action No. 17-3894); *City of Los Angeles v. Sessions,* 293 F Supp. 3d 1087 (2018)(preliminary injunction imposed); and *States of New York, et al. v. US Dept. of Justice, et al.*, S.D.N.Y. (2018 Civil Action No. 18-2921)(the state of Washingtmoveon is a party to this lawsuit).

FELONY CASEFLOW AND CALENDARING STUDY
SUPERIOR COURT OF WASHINGTON, THURSTON COUNTY

JUNE 1, 2017 FINAL REPORT

Gordon Griller, Project Director
Hon. Roxanne Bailin, Project Consultant

Daniel J. Hall, Vice President
Court Consulting Services
National Center for State Courts
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National Center for State Courts

This Final Report was prepared for the Superior Court in Thurston County, Washington ("Superior Court," "Court"), a general jurisdiction court serving the Olympia Metro Area. The County is the sixth most populous in the state and home to the State Capitol. The study was funded through a technical assistance grant from the State Justice Institute ("SJI"), a federal program dedicated to improving the quality of justice in state courts and fostering innovative, efficient solutions to common issues faced by all courts.

Consulting services were provided by the National Center for State Courts ("NCSC," "National Center," or "Center"). The NCSC is an independent, private nonprofit corporation, chartered in 1971, targeting the betterment of courts nationwide and around the world. **The study assesses felony case processes at the Superior Court and its affiliated justice system agencies. It identifies procedural and performance issues that cause troublesome delays, system inefficiencies, and productivity problems. In response, the authors recommend a series of methods and evidence-based techniques to address needless delays, and offer a set of key practices with potential to improve the overall efficiencies of the Court and various justice system stakeholders.** Many of the suggestions outlined are based on best practices in trial courts throughout the country. We are hopeful this analysis, along with the recommendations and ideas proposed can serve as a strategic framework for discussion and an agenda for improvement.

The points of view and opinions expressed in this report are those of the authors as agents of the National Center, and do not necessarily represent the official position or policies of SJI, the Washington Judicial Branch, the judges and staff of the Superior Court in Thurston County, the Supreme Court of Washington and its Administrative Office of Courts, or the justice system agencies in Thurston County.

This Report also outlines the initial directions or actions Court and justice system leaders plan to pursue to address the problems and recommendations. Those initial strategies are outlined in Section 6: Court and Justice System Future Directions.

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Felony Caseflow and Calendaring Study
Superior Court, Thurston County, Washington
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1.0 BACKGROUND, PURPOSE, AND ORGANIZATION OF THE STUDY

This Final Report, developed and conducted by the National Center for State Courts ("NCSC," "Center," or "National Center") at the request of the Superior Court in Thurston County, Washington ("Court," "Superior Court") outlines a series of suggestions and directions to improve the adjudicatory processes and efficiencies in the movement of felony cases through the Court. The report also references the pace of litigation and associated scheduling problems impacting the principal justice system entities working with the Court, including the Thurston County Office of the Prosecutor (TCPO), the Thurston County Office of Public Defense (TCPD), the Clerk of Superior Court, and the Thurston County Sheriff's Office.

Among the questions addressed are:

- What are the key delay points in the Court's ability to dispose of criminal cases in an efficient and timely manner?
- What changes, if any, need to be initiated to improve case scheduling?
- What data needs to be collected to (1) determine the impact of any new processes, (2) identify areas needing further change, and (3) enable the Court to monitor and report on its case processing performance in more informative and effective ways?

The study was funded through a State Justice Institute ("SJI") grant.[1] Many of the recommendations presented are based on best practices, as identified by the Center, which are operative in state general jurisdiction courts throughout the country and have proven to be successful in streamlining and strengthening judicial and justice system procedures without compromising due process protections for those litigating matters in the Court.

1.1 SUPERIOR COURT STRUCTURE; FUNDING; GOVERNANCE

Thurston County, Washington is located at the southern end of a number of important and beautiful waterways. It is approximately an hour's drive southwest of Seattle and southeast of Olympic National Park, a stunning rainforest and alpine park. Olympia is the county seat of Thurston County as well as the state capitol. It is Washington's sixth most populous county; home to 270,000 people.

Washington handles criminal cases through a traditional two-tiered trial court system. Superior courts are courts of general jurisdiction handling felonies. Courts of limited jurisdiction

[1] The State Justice Institute is a federal program funding technical assistance to state courts to improve the quality of justice and foster innovative solutions to common issues faced by all courts. The grant, in the amount of $49,613.66 supported the work of the National Center. No State of Washington funds were used to pay for this study.

include district and municipal courts. District courts are county courts and serve defined territories, both incorporated and unincorporated, within the counties. Their criminal jurisdiction includes misdemeanors and gross misdemeanors that involve traffic or non-traffic offenses. Municipal courts, created and funded by cities and towns, handle violations of city ordinances, many of which mimic state statutes so penalties are often the same. They have jurisdiction over gross misdemeanors, misdemeanors and infractions committed within municipal boundaries. All trial courts are part of a statewide, integrated judicial branch ultimately under the authority of and responsible to the Washington Supreme Court.

Thurston County is a single-county judicial district.[2] Counties in Washington are responsible for the majority of the criminal justice system funding for superior and district courts. These costs include court facilities, court staff, and half of the judicial salaries for superior court judges and all the salary for district court judges. Counties fund numerous other justice agencies as well, including prosecutors' offices, public defense services, pre-trial services, sheriffs and county jails (called the Accountability and Restitution Center or ARC in Thurston County).

There are eight Superior Court Judges in the County: four are trial judges, two are criminal judges (processing cases until trial),[3] and two are family and juvenile judges. The family court also has two commissioners. Superior Court judges rotate major assignments: civil, criminal, and family/juvenile.

A Superior Court Presiding Judge is elected by his or her peers for two-year terms and a professional Superior Court Administrator is appointed by the judges. Together, they administer the Court. Although there is a Presiding Judge, the Court typically votes by majority rule on most major policy issues, including case processing.

The Thurston County District Court operates independently from the Superior Court and elects its own Presiding Judge, appoints its own Court Administrator, and manages its calendars and caseflow separately. In addition to overseeing misdemeanor and DUI matters, the Court operates a Mental Health Court and Veterans Court. It does not handle the preliminary stages of felony cases, such as preliminary and bail setting appearances at the jail.

[2] There are superior courts in Washington, in each of the State's 39 counties. For administrative purposes, smaller populated counties may combine as a single district which has resulted in only 30 districts statewide. A superior courthouse is located in each county, meaning judges in rural areas may rotate between counties as needed. Each county courthouse has its own courtroom(s) and staff.

[3] The two criminal judges have an alternating system of case calendaring that is appended as Appendix A.

1.2 COUNTY JUSTICE SYSTEM OPERATIONS

In the Superior Court, there are three judicial assistants at the main courthouse campus building with the four trial judges and two criminal judges. Two judicial assistants' office at a separate juvenile/family building providing support for the two judges and two commissioners chambered there. Therefore, one judicial assistant assists two superior court judges at the main campus.

The Clerks of the Court in Washington State are elected. In Thurston County, the Clerk manages the courtroom clerks and the docketing clerks outside of the courtroom.

The TCPO prosecutes all felony and misdemeanor cases. The TCPD defends all indigent defendants either directly through one of its deputy public defenders or through a list of contracted private counsel.

Thurston County Superior Court has adopted the Odyssey case management system, as has much of the State. At present, there is no statewide search capacity nor does the Thurston County Odyssey software currently allow aggregate data analysis of such things as age of case, time from arrest to disposition, numbers of continuances, or other information essential to the analysis of case processing. Certain modules and capabilities have not been implemented; for example, neither the prosecutor nor the public defender modules has been purchased and activated nor has a "lawyer facing" capacity been activated that would allow attorneys to schedule appearances.

Until 2015, the county jail was located on the main campus building such that transport of prisoners to court was a matter of moving inmates upstairs and visits by defense attorneys could be made easily and without delay. The County opened the ARC in 2015. It is 1.5 miles from the courthouse. It has proven difficult for defense attorneys to visit their clients. The transport of inmates cannot be done on an ad hoc basis. The jail has only two transportation vehicles that can accommodate a total of fourteen inmates. The county instituted video conferencing for preliminary appearances/bail-setting proceedings and for arraignments during which the public defender is at the jail with defendants and the district attorney and criminal judge are at the courthouse.

1.3 CASE ASSIGNMENT SYSTEMS

Generally speaking, the overall felony process includes a preliminary appearance/bond-setting calendar, omnibus hearings, motion hearings, a trial confirmation/status conference calendar, and trial. Thurston County uses a master calendaring system for its trials; meaning criminal cases are not assigned to a particular judge until the trial confirmation/status conference hearing (hereinafter TC/SC). Both criminal trial judges and civil trial judges may be

assigned criminal trials. As in many courts across the country, criminal case processing takes precedence over civil matters due to speedy trial rules and laws.

There is a felony trailing docket calendar set on Monday mornings for two hours before one of the criminal judges. This docket serves as a placeholder for cases confirmed for trial, but that are not going to trial Monday morning for various reasons. A common reason for this is that the TCPO has too many trials. The judge may set cases later in the week, set new trial dates, grant motions to dismiss filed by the TCPO, or take guilty pleas.

The Superior Court judges are concerned about the length of time criminal cases take to the point of resolution, the large calendars during which the vast majority of cases are continued without meaningful change in the status of the case, and the lack of flexibility in the calendars.

Importantly, most everyone in the criminal justice system interviewed by the NCSC project team is dissatisfied with its functioning. To create the changes this report is recommending, every participant in the system, including the TCPO and the TCPD, must be willing to modify and reengineer their operations to improve overall system productivity for the public and for themselves.

The move toward greater efficiency is not without difficulty. As with many county-level felony caseflow systems, individual justice agencies possess a relatively high level of autonomy vis-à-vis the larger system within which they exist. Actions in one part of the system can have little or no effect on another or may trigger unintended consequences that cause technical or case processing difficulties in other parts of the system. Although communications among the various justice system leaders are cordial and businesslike, none has the ability to compel the others to change internal operations, staffing, business processes, or organizational configurations.

The way in which cases are internally managed within prosecutor and public defender offices also can greatly influences the efficiency of the case assignment system including the pace by which felonies proceed from filing to disposition. The Prosecutor, like many prosecutors, assigns attorneys by case type. Contrary to most prosecutors, however, the Thurston County Prosecutor gives his lawyers substantial discretion to exercise independent judgment in how to negotiate and manage their cases. On the upside, it permits familiarity by the assigned lawyer with the case; on the downside, it results in a wide range of plea agreements based on each individual prosecutor's personal policies.

The TCPD makes an effort to assign defense attorneys to a case at arraignment, although that does not always happen. That assigned defense lawyer then represents the accused through the resolution of the case whether by plea agreement, dismissal, or trial.

Defense lawyers are generalists and not assigned by case type specialty unless the case is a notorious one or a capital matter.

Interestingly, however, nationwide experience by the National Center has repeatedly shown that when interagency and court discussions take place in earnest, even where substantial differences exist in how cases are distributed to judges, prosecutors and public defenders, there often is a high level of consistency among issues related to efficient work processes. Often this surprises participants who assume the interests and perceptions of judges, prosecutors and defense attorneys differ substantially and are irreconcilable. In fact, it turns out that given the proper motivation, most participants can look beyond their immediate concerns, positions and work distribution approaches when defining how an effective justice system should operate and build on those common values. This is our hope for Thurston County.

Lastly, it is important to note three significant changes by the Thurston County Board of Commissioners that have occurred since the Center's visit in late January 2017. To buttress judicial resources, the county commissioners approved a Superior Court commissioner who will, among other matters, handle preliminary appearances four days a week, thus freeing a criminal judge from at least 3:00 to 5:00 four days a week. This change will add opportunities for defendants to plead guilty and permit more time for motions hearings. Also, the Commissioners terminated the services of the Chief Public Defender for several reasons, including substantial cost overruns in the public defense budget. Both developments are factored into the report's recommendations. Third, the Prosecutor has hired a Chief Deputy from outside the TCPO who has significant management, organization and collaborative skills that in the opinion of the National Center will be extremely helpful in the change process.

1.4 STUDY METHODOLOGY AND REPORT FORMAT

The National Center project team, Gordon Griller, Project Director, and Hon. Roxanne Bailin (ret.), Consultant, conducted a site visit to the Court on January 23-26, 2017.[4] They observed in-court calendars in progress and interviewed judicial officers, the Superior Court administrator, court staff, clerk's office staff, jail staff, pre-trial services staff, prosecutors,

[4] Mr. Griller is a Principal Court Management Consultant at the Center. He is an eleven-year, full-time employee at the Center's Court Consulting Services and has over 40 years of experience in leading, managing, and analyzing state trial courts and their affiliated agencies throughout the nation. Prior to joining the Center, he managed state courts in Minneapolis/St. Paul, Minnesota and Phoenix, Arizona. Judge Bailin is the former Chief Judge of the Twentieth Judicial District Court (equivalent to Superior Court) in Boulder County, Colorado. She is a part-time special consultant and advisor to the Center on caseflow management, facilities/space planning, and judicial leadership projects. As the top administrative judge in Boulder County (pop. 320,000), Judge Bailin oversaw both general and limited jurisdiction courts in that jurisdiction. Mr. Griller and Judge Bailin have worked together on various trial court studies.

public defenders, court-appointed counsel, and deputy attorneys general. At the end of the visit, the team conducted an exit meeting with several Superior Court judges and the Court administrator to discuss their preliminary observations.

To aid in evaluating and assessing felony caseflow, NCSC requested and analyzed a sample of 45 randomly-selected, recently-closed felony cases to help decipher bottlenecks and pinpoint case processing delays. Although felony case disposition and filing trend data produced by the State's automated legacy case management system called SCOMIS (Superior Court Management Information System) is quite detailed, it lacks the specificity needed to unscramble the causes of unnecessary delay between major events in the caseflow.[5]

SCOMIS does provide summary caseflow management data, including some elements of NCSC's key *CourTool* performance measures. *Time to disposition* data measuring the percentage of cases disposed/resolved within specific time frames is available by county for each superior court's composite criminal caseload. It is limited, however, in providing beneficial statistics at the trial court level in other areas, including the *age of active pending caseloads* measured from the number of days from filing until the time of measurement, and *trial date certainty,* the number of times cases disposed by trial are scheduled for trial.[6] There is also some data regarding the number of times key pretrial events were continued, struck or canceled and who (i.e. judicial officer, court staff, defense or prosecution) precipitated the delay, but it is rather cursory. The ability to routinely present accurate and timely case status reports in a manner judges, court managers, and policymakers can effectively use to reduce unnecessary delay is an essential feature of continuous caseflow improvement efforts.

The study was conducted independently. No person pressured, influenced, or otherwise compromised the objective nature of this review. All those interviewed and contacted provided requested data and information openly and in a timely manner. At all times, Center consultants were free to determine whom to interview, what questions to ask, how to collect needed data and information, which justice agencies and functions to visit, and how to assemble this report.

The NCSC project team returned to Thurston County on May 15, 2017, for a working session of the Superior Court judges and the Superior Court Administrator to consider the recommendations, to facilitate discussion, and to examine and prioritize the most feasible opportunities for change. This Final Report contains an added addendum entitled section 6.0 Court and Justice System Future Directions that reviews the salient portions of that session and

[5] Currently, the Washington Judicial Branch is migrating from SCOMIS to a new, configurable software package for courts marketed by Tyler Technologies called *Odyssey*. *Odyssey* is a tailorable case processing management system operational in a numerous states and courts throughout the country and is expected to provide much more insightful and useful trial court delay information.

[6] More detailed information about CourTools can be found at www.courtools.org

lays out a framework for any decisions regarding case processing improvements. The ultimate goal is to provide the Court and its justice system partners with a set of proven techniques and approaches to reduce needless trial court delay and generate more efficient, system-wide work processes.

The body of this Report is arranged in two major sections. First, a review of current felony caseflow system is presented. Both subjective (interviews) and objective (case processing data) information is outlined. Second, twelve major problems are listed that the National Center concludes greatly reduce the efficiency and productivity of the Court and its affiliated County justice system stakeholders in processing felony cases. Each problem set is addressed in terms of five issues: (1) best practices known to be successful in resolving the problem, (2) observations by the consultants regarding what factors precipitate the difficulties, (3) challenges to overcome in improving felony caseflow vis-a-vis the problem, (4) advice and recommendations that hold promise in diminishing or ameliorating the current situation, and (5) expected results and benefits the Court and justice community can expect in tackling the problem.

Admittedly, the subjects outlined here certainly may not be the only caseflow matters that should or could be improved. They do represent, however, the most obvious ones to the National Center consultants. Also, the NCSC project team feels they are the most valuable and practicable in advancing both immediate and sustained case processing improvements and a better functioning felony justice system in the County.

Since some who read this report will be anxious to "know the bottom line" concerning recommendations, we have summarized them on the following pages. The page numbers where a detailed discussion of the problems, issues, and findings can be found are also listed.

2.0 SYNOPSIS: RECOMMENDATIONS AND STRATEGIES

Embrace the Doctrine of Judicial Responsibility

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1. The doctrine of judicial responsibility – judge control of the caseflow — must be instituted in the Superior Court. Without such a commitment from Court leaders and policymakers, the current situation marked by multiple continuances, meaningless hearings, and needless delay will persist. The doctrine has been thoroughly researched for decades and found to be absolutely essential to reducing trial court delay.
2. The Court must adopt a policy of early intervention and continuous control of cases. Allowing counsel to control the pace of criminal cases is a commonly held, but outmoded, philosophy that has created the current culture of excessively delayed case resolution. This philosophy is inimical to justice and efficiency.
3. Criminal justice partners in Thurston County currently meet weekly for 45 minutes. Although these meetings have value for day-to-day logistics, a monthly 2-hour planning and strategy meeting should additionally be arranged to initiate and shepherd needed improvements in overall case processing.

Limit and Monitor Continuances

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4. The Court should adopt a unified continuance policy along the lines set forth in the Model Continuance Policy. This could include allowing only one continuance at the initial omnibus hearing for good cause. No continuance of the second omnibus hearing should ever be allowed. There is no reason that an omnibus order cannot be entered. The omnibus hearing should be treated as an early case management order. An additional pretrial can be set to allow the Court to ascertain accountability to the order and move the case to resolution.
5. The TCPO should overhaul its system of moving cases from filing to resolution.
6. The TCPD, the TCPO, and the Court should advocate for the employment of in-house investigators for the TCPD.
7. The Court should develop a means to collect accurate, timely data by judicial officer that clearly indicates for each case in which a continuance is granted: the length of the delay, the requesting party, and the reasons for delay. Keeping such data will highlight those judges who are and are not complying with the continuance policy and will also show whether it is primarily the TCPO or the TCPD that is causing the delay.

Ensure Court Events are Meaningful and Realistic

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8. The TCPO should work with the Court to develop one to two meaningful pretrial conferences after the omnibus hearing and a reasonable plea cut-off policy rather than utilizing the omnibus hearing to trigger the suspension of plea negotiations.
9. The TCPD should triage what cases are investigated and otherwise be prepared to accept realistic, informed plea offers when generated.
10. The Superior Court should re-evaluate its Treatment Review Calendar and institute best practices so that the calendar is properly utilized to maximize positive outcomes.

Promote Opportunities for Changes of Pleas

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11. The omnibus hearings should be set at a realistic time to allow for the actions contemplated by Supreme Court Rule 4.5 to take place. The dates set ought to allow enough time to complete the necessary tasks, without providing more time than is necessary.
12. The TCPD should prioritize cases for investigation and be more adequately prepared for plea negotiations.
13. Judges should take pleas at arraignment, at the omnibus hearings, at the motions date hearings, and on the TC/SC calendar.
14. If the Change of Plea and Sentence (COPAS) calendar becomes unwieldy even with the addition of a new commissioner to handle first appearances and bond setting, the Court should consider setting smaller omnibus calendars during which pleas can be taken.
15. Trial dates and motion hearing dates should not be set until the omnibus calendar, with appropriate waivers, unless the TCPD or private defense counsel demands that the Supreme Court rule be followed.
16. Odyssey's attorney-facing software capacity for setting cases on designated dockets should be implemented as soon as possible.
17. The Board of County Commissioners should be encouraged to build a least one courtroom at the ARC as part of any jail expansion program. This will allow pleas to be taken at arraignments and defense counsel to obtain needed signatures without having to drive back and forth to the ARC during court calendars. In addition, the Board should provide sufficient staff and vehicles to the ARC so that inmates can be transferred to the courthouse for hearings and pleas throughout the processing of a case.

Guarantee Firm Trial Dates

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18. The Court should adopt a firm continuance policy, publicize it as a local rule in the form of a resolution signed by all judges, and consistently apply it.
19. Judges must be willing to deny motions to continue trials unless the motions comply with the Court's continuance policy even if the defense attorneys waive speedy trial. This may be painful at first but counsel will soon appreciate the fact that continuances will not be allowed.
20. Data on continuances and plea agreements occurring on the day of trial should be developed and kept. Continuance data should include who requested the continuance, what reasons were given, whether opposing counsel objected or not, how long the continuance was granted and who granted the continuance. Plea agreement data should include whether the plea was offered earlier and refused, or whether the plea was substantially different than any previous plea offer.
21. Every 2-3 months, summary information on all granted continuances, and on the date of trial, should be disseminated to all judges.

Develop Prosecution Case Management Policies and Procedures

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22. The TCPO should develop policies and procedures that ensure fair and consistent charging.
23. The TCPO should develop a policy whereby cases are analyzed within two weeks of arraignment to determine whether additional investigation is necessary. Cases should be analyzed in tandem with a supervisor or more experienced deputy.
24. The discovery delivery system should be overhauled to include a check sheet that includes a list of all discovery in the case so that defense attorneys can see what is being delivered and is not yet delivered. Deputies should be required to read the discovery before it is delivered to make sure there are no additional discovery items embedded in the documents. Discovery should be entirely electronic. Other counties nearby have systems that could be copied. The TCPO should work with the TCPD and the County to obtain compatible prosecutor and defense software modules such that discovery can be truly automated and electronic.
25. The TCPO should invest considerable time in developing guidelines for expected plea offers under various circumstances in order to ensure fairness, consistency, and ultimately justice to defendants. Obviously, strict adherence to guidelines would create its own arbitrary results, but they provide a place to start and greater assurance of consistency. Such guidelines are readily available.

26. Absent problems with such matters as DNA analysis or mental incompetence of defendants, there is no reason that appropriate, case ending plea offers cannot be made within thirty days of arraignment.

27. The policy of terminating plea negotiations if an omnibus order enters should be abandoned. As highlighted in Section 4.4.1, only 2.5% of all felonies should remain set for trial the week before trial. Pleas entered at various junctures will regularly remove cases from the calendar resulting in the right number of cases remaining set for trial.

28. The TCPO should insist all prosecutors must e-file without exception. Some still carry paper to the Clerk's Office because they are in the courthouse, and it is convenient to do so. Paper filing is much more inefficient and runs counter to purposes of the new Odyssey case management system and any future prosecution module that will be added.

Evaluate Bringing Defense Investigations In-House

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29. The TCPD has provided data regarding the percentage of cases for which investigations have occurred. The percentage appears appropriate and consistent with national norms.

30. All investigations are currently being performed by independent investigators pursuant to specific orders issued by the Director of the TCPD regarding scope and hours. The use of independent investigators has been identified by all criminal justice stakeholders as a significant cause of delay in case processing because the TCPD has no control over their availability or the pace of their investigations. The oversight and control over investigators needs to be strengthened.

31. Based on a review of investigative cases, the Director of the TCPD should determine whether it would be more cost effective to fund in-house investigators for the TCPD. Using the number of hours determined to be necessary for investigations during a typical year, the costs that would be charged by private investigators can be compared with the cost of hiring in-house investigators to cover those hours. In addition, the value of control over the availability of the in-house investigators and over the pace of investigations should be factored into the conclusion regarding the use of in-house investigators.

Increase Public Defenders; Reduce Assigned Defense Counsel

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32. The Board of County Commissioners, through independent empirical research, should (1) determine the mean costs of felony cases handled by the TCPD and assigned private defense counsel, (2) determine the difference between the length of time cases remain in the adjudication system as between the TCPD and assigned

private counsel, and (3) determine any other differences that affect cost and quality of criminal defense services provided to the Superior Court.

33. Should it be determined the overall quality of defense services will improve and costs will go down, or at worst, stay the same or slightly increase; by expanding the number of TCPD lawyers, the County policymakers should take steps to provide adequate TCPD resources.

Triage and Differentiate Cases

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34. A task force should be assigned the duty of developing a Triage/DCM system.
35. The Triage/DCM plan should be developed in tandem with the overhaul of the case flow management system for the entire jurisdiction. It cannot be done in isolation.
36. Regarding the Mental Health Court, the policies and procedures should be changed in the following ways:
    a. The TCPO should have a specific period of time to object to a defendant's entry into the Court after which it is deemed to have agreed.
    b. The change in plea and down-file should occur in District Court.
    c. The Mental Health Court Supervisor (MHCS) should have authority to perform the screening and assessment as they have the credentials to do so. If the defendant is a client of the local community mental health center, he or she can obtain the diagnosis from that agency.
    d. The District should consider having the MHCS supervise defendants under consideration for the Mental Health Court, rather than having pre-trial services do so, so that they can provide appropriate supervision for persons with mental illness and keep track of them pending entry.
    e. The MHCS should be empowered to receive training from the NCSC and/or NDCI on procedures and outcomes.

Increase Superior Court Support Staff

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37. The judicial support staffing level in the Superior Court has fallen below what is reasonably necessary to run an efficient criminal and civil calendaring system in an urban, multi-judge general jurisdiction court. A great many tasks go undone or partially done, which leads to inefficiency and inflexibility in the case processing system. Accordingly, each Superior Court judge should have a judicial assistant.

Develop Accurate, Timely, Useful Case Management Data

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38. The Court should strive to implement a data collection and analysis system to determine the status quo across all desired metrics and to pinpoint delay points and bottlenecks to verify whether progress is being made toward achieving desired case processing goals. For example, such data should identify judges that are not complying with the continuance policy, whether the number of continuances is dropping, and whether cases are unnecessarily languishing on calendars and dockets.
39. The Clerk of Court should work with the State to develop specialized codes and definitions that are used consistently statewide in order to establish and maintain data integrity.
40. A criminal justice system that cannot measure itself objectively through timely, accurate, and useful statistical data is a system that cannot substantiate whether it is making progress toward change and one that can easily slip into continual delay difficulties. Superior Court leaders should confirm that adequate Odyssey criminal caseflow data is available and in a format local presiding judges and trial court administrators can use easily and effectively.

Improve Prison Inmate Access to the Court

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41. Complaints or motions filed by prison inmates should be set for hearing. The order for hearing should state that the inmate shall appear by telephone from his or her prison facility, without any requirement for a motion. The order should also state that in the event the inmate is released before the hearing, he or she should appear on the date and at the time scheduled.
42. The Attorney General's Office should continue to be responsible for setting up the telephonic appearance for the inmates at the prison.
43. No continuances of the calendar should occur, unless the inmate is unavailable.

3.0 CURRENT FELONY CASEFLOW SYSTEM

Caseflow systems have never been deliberately designed or systematically planned in many trial courts. Calendar and assignment practices often have been driven by problems or resources of the moment (e.g. budget cutbacks, spikes/drops in filings, special programs, new facilities or technology) or merely evolved in piecemeal ways over time. Rarely is there a concerted, systematic effort to analyze and define delay problems. This study is a change in that pattern.

In many respects, courts that ask for an outside, objective assessment such as this review should be commended. It is often hard for any group of court policymakers (i.e. bench en banc, leadership judges, court executives) to detach themselves from the day-to-day urgencies and stresses of the justice system, step back, and reflect on overall issues, problems, and future directions. The engagement of the Center, on the other hand, offers an impartial perspective from seasoned consultants in judicial administration and court management.

3.1 SUPERIOR COURT ADJUDICATION PROCEDURES

All felony defendants must appear in court for findings of probable cause and setting of bail. Thurston County does not have a system of bond commissioners with authority to release defendants prior to preliminary appearances. The pre-trial services office provides information to the judges about defendants in order to assist them in making bail determinations, and the TCPO provides police reports and other information necessary for determining probable cause. The new pre-trial services director is exploring more valid pre-trial assessment tools. New empirically-driven risk evaluation methods are becoming more readily available; most are free of charge to courts and not staff-heavy to implement or operate.[7]

Because the jail is now off-site, **preliminary appearances** are held by interactive video conferencing. The judge and the prosecutor appear in the courtroom at the courthouse, and the defendants and the public defender assigned for that afternoon appear at the jail. The preliminary appearance calendar is held on Mondays at 3:00 p.m. and Tuesday through Friday at 3:30 p.m. The judges would prefer that the docket occur earlier, but the district attorney and pre-trial services do not believe they can process the cases any more quickly each morning. As such, the risk evaluation and charging reports are often not ready until 1:00 p.m.

[7] Judge Bailin and Mr. Griller provided her with sources for high quality and validated assessment tools. Examples include statewide tools in Virginia, Ohio, Kentucky, Colorado, and an empirically-derived tool used nationwide in the federal courts. The newly developed Arnold Foundation's Public Safety Assessment – Court (PSA-Court) risk tool based on a study of 750,000 cases of defendants released during the pretrial period from 300 different jurisdictions around the country is also a very well researched evaluation measure.

Sometimes cases on the Monday preliminary appearance docket cannot be processed in court by 5:00 p.m. because it is a large post-weekend docket. The cases that are not processed are held over until Tuesday. It is not feasible for the judges to continue processing cases after 5:00 p.m. even though they are willing to, because the Clerk of Court's staff and some Court personnel cannot work past 5:00 p.m. due to various human resource and union policies.

At these appearances, defendants who are found to be indigent are assigned counsel; however, the designated attorney who will be representing a specific defendant is not determined at that time. Usually, the assignment of a defense attorney occurs before the arraignment.

At the preliminary appearance, substantial numbers of defendants are placed on pre-trial supervision. The arraignments for that calendar are set two weeks later on a Tuesday for both in and out-of-custody defendants.

At the **arraignment**, the Court sets an omnibus hearing, which is essentially a case management hearing, required by Supreme Court rule,[8] about fifteen days after the arraignment for defendants in custody and about twenty days for defendants out of custody. Another Supreme Court rule requires that the trial date be set sixty (60) days from arraignment for defendants in custody and ninety (90) days from arraignment for defendants out of custody.[9] There is no specific or required case management conference or pre-trial conference set before or after the omnibus hearing.

Almost all cases set on **omnibus calendars** are continued to a later date.[10] (See Case Flow Management Data sections of the Report). Approximately 5% of the cases resolve at the initial omnibus hearing and 3% result in an omnibus order. Participants in the system other than public defenders or assigned counsel often call the first omnibus hearing a "meet and greet" session where defense counsel encounter their clients for the first time. Defense counsel and the prosecutor assigned to the case also appear to conduct their opening conversations about the case at this initial hearing.

The TCPD flatly denies that its attorneys are meeting their clients at the first omnibus hearing for the first time. Instead, their data show contact between public defenders and in-custody defendants within 72 hours of filing and, in most cases, within 48 hours. Out-of-custody defendants are given an office appointment before the first omnibus hearing. On the other hand, some assigned private counsel, TCPD leaders admit, are generally not meeting their clients in a timely manner.

[8] https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=CrR&ruleid=supCrR4.05
[9] https://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=sup&set=CrR&ruleid=supCrR3.3
[10] The caseflow management data section appearing later in this report analyzes 45 randomly selected closed felony cases which corroborates this fact.

The vast majority of cases proceed through many omnibus settings.[11] At any time during the omnibus calendar, and before the entry of an omnibus order, a case may be set by the lawyers or staff on a session calendar called the **COPAS (change of plea and sentence) calendar**. However, no COPAS matters are taken at the omnibus hearing itself because the high volume of cases set permit little time to take pleas. The COPAS calendar is capped at ten pleas per day, except on Monday when only a maximum of six pleas are taken.

The lawyers are allowed to stipulate to a continuance of the omnibus hearing by written stipulation. No record is made, and no justification for the continuance is required. Because e-docs (electronic documents) are not used for omnibus hearings and because in-custody defendants are not transported to the courthouse for omnibus hearings, defense attorneys must go to the jail during the omnibus hearings in order to get their clients' signatures on stipulations for continuances or to fill out an omnibus order. The TCPD asserts that this requires defense attorneys to drive back and forth between the courthouse and jail throughout the calendar because they have insufficient time to obtain the signatures the previous day.

Each time an omnibus hearing is continued, any subsequent calendar dates for a postponed case may also be reset, including the trial date, unless the new omnibus date is shortly after the previous one. This creates an enormous amount of work for the clerks, who are generally too busy handling the omnibus calendar to perform this work in the courtroom. In addition, long periods of time elapse during the omnibus calendars when the judge is not addressing anyone and is simply waiting for the next matter to be ready. At the end of the calendar, there is a flurry of activity during which stipulations are handed to the judge and matters are reset.

During the time between omnibus hearings, the TCPO is providing discovery and the TCPD is conducting its own independent investigation regarding the case.

Once an omnibus order is entered, the TCPO's policy is to discontinue plea offers; and the case proceeds to an **evidentiary hearing**, if requested, and the trial date. Evidentiary hearings are usually heard on Mondays. On the Tuesday before the hearing date, judicial assistants send out email requests to the attorneys asking them to notify the court if the hearings are expected to move forward to an actual hearing. They receive about an 80% response rate from the lawyers. Only a few of the evidentiary hearings set on the calendar can be heard. Counsel and defendants usually do not appear at the hearing even if the case has resolved in a proposed plea or the motion abandoned or resolved; therefore, no pleas are taken on the hearing date.

A **trial confirmation/status conference (TC/SC)** date is set for the Wednesday[12] before

[11] Ibid
[12] This will change to Tuesdays beginning June 1, 2017.

each trial week. At that time, counsel can announce they are ready for trial or they can request their case be continued. On occasion, cases are dismissed. Often there are too many cases set for trial for the TCPO to try or assigned private counsel is double or triple set for trials in other jurisdictions. Also, there are frequently too many cases for the two criminal trial judges (or up to four judges if the civil trial judges assist) to handle during the subsequent week so some cases are "bumped," a word used to indicate the inability of the court to provide the appropriate resources, either a courtroom or a judge. Pleas are not taken on the TC/SC calendar but can be set on the COPAS calendar. Cases that confirm for trial that do not go to trial Monday morning are set for the felony trailing calendar the Monday after the trial week for resetting, dismissal, or plea. Pleas are often taken the morning of trial regarding cases confirmed for trial but which reach disposition between the TC/SC and the morning of trial.

Generally, pleas are not taken at arraignment, on the omnibus calendar, on the hearing calendar, or at the TC/SC. Instead, the pleas are set on the COPAS or Monday felony trailing docket calendars. Once a plea agreement is reached, the COPAS date is set approximately one week from the date of the agreement.. There is little flexibility in the calendar; that is, when attorneys have reached an agreement, it is difficult to convince a judge to take an immediate plea or a plea within a day or two. Counsel are required to file a motion to add a case to the COPAS calendar at least five days before the calendar. If the cap has already been reached, counsel must obtain a judge's signature in order to add a case to the COPAS docket. When a quick plea is requested, the defense attorney is required to file a written motion and order to shorten time. Although some judges feel more comfortable with this fairly rigid organization of the dockets, some would like the system to be more nimble and flexible.

3.2 PROSECUTOR CASE PROCESSING ACTIVITIES

Prosecutors in Washington are elected officials. They process all criminal cases, including those filed in Superior Court. The TCPO has thirteen deputy prosecutors assigned to process felony cases under the supervision of a seasoned, felony team leader.

Washington is a "sentencing guidelines" state, so the prosecutor's ability to condition the plea on a certain sentence is dependent on the number of charges he files against any given defendant.[13] It was one of the first states in late 1970's and early 1980's, along with Minnesota and Pennsylvania, to establish sentencing commissions to examine and analyze sentencing

[13] Originally established under Washington's Sentencing Reform Act of 1981, the State's Sentencing Guidelines Commission was eliminated as an independent agency in July 2011. A State Caseload Forecast Council (CFC) assumed responsibility for the adult felony and juvenile disposition databases, annual sentencing statistical summaries, and sentencing manuals. That Commission and a Sex Offender Policy Board (SOPB) were established within the State's executive branch Office of Financial Management (OFM) to advise the governor and legislature on adult and juvenile sentencing.

practices within their states. Today, 21 states and the District of Columbia have some type of a sentencing commission.[14]

The Thurston County Prosecutor affords his deputies substantial discretion to charge, negotiate plea agreements, and resolve their cases. He believes that each case is unique and that his deputies should be given wide latitude in how to deal with them. Although the Prosecutor's preference is that the deputies discuss their proposed pleas with other deputies and although he believes there is a culture of staffing cases, there is no formal mechanism for this to occur and no written standards or guidelines. If a deputy's offers are substantially different from those of other deputies, the Prosecutor expects this divergence will be handled as an attorney performance issue.

The TCPO has no data from which it can analyze the types of charges filed and the eventual charges to which defendants plead guilty in the aggregate and by deputy. Such an analysis could guide the office in structuring guidelines and expectations and reveal consistency or lack thereof among deputies.

Deputies are expected to make plea offers as early as arraignment, although this does not happen in all cases. Generally speaking, these offers are not acceptable to the TCPD and may not be based on a full analysis of the case. In addition, the plea offers appear to improve over time.

It is the policy of the TCPO to suspend plea negotiations once an omnibus order is entered in a case. In the Prosecutor's view, that is when the case begins to move toward trial triggering the issuance of subpoenas and other formal steps to ready it for formal litigation. Although there are several factors that contribute to multiple continuances of omnibus hearings, this policy appears to be one of the major causes.

In addition, data offered by the TCPO show a significant number of pleas are accepted and finalized after the omnibus order is entered and before trial. These pleas are primarily taken on the COPAS calendar. Pleas are taken at the Monday felony trailing docket calendar as well.

The Prosecutor supports the practice of differential case management (DCM) such that serious and complex cases requiring more processing time (i.e. cases with multiple and severe charges, complicated forensic evidence, intricate legal issues, contradictory fact patterns, etc.) are put on a different track with customized settings and greater judicial supervision. To put the plan in place, the Prosecutor and Superior Court need to devise a workable plan. At this point, neither the Prosecutor nor the Superior Court has taken steps to implement this direction.

[14] Source: National Association of Sentencing Commissions

The TCPO's process for providing discovery is not fully electronic and often results in incomplete provision of discovery. There is no cover sheet, checklist, tracking or logging system for the discovery that shows what exists and what has or is being transmitted regarding all discoverable items. Deputy prosecutors often do not read police reports early to determine whether there are videos or other reports referred to in the police report. As such, defense counsel may learn of the existence of videos or other reports late in the pretrial process and must ask for them separately bringing about needless delays. Some of the discovery is in hard-copy form, and some is in electronic format. The TCPO does not believe that this is a significant problem; but instead believes that the TCPD may not know how to locate certain discovery in the system. If this is a correct appraisal, obviously communication between the offices is a significant problem with regard to the exchange of discovery.

Since electronic discovery is becoming the norm in many criminal justice systems, it would be quite helpful if the new Odyssey e-case management system currently being implemented by the Judicial Branch would include the available prosecution and defense modules. It would be extremely wise for the County to acquire these modules because ultimately there will be cost savings related to delays in the system and incarceration of defendants for longer than is necessary.

According to CY 2016 data provided by the TCPO, the Office brought 1.2% (20 of 1606) of the general felonies filed that year to trial, 5.5% (18 of 325) of the domestic violence felonies to trial, and 6.2% (9 of 145) of the special victim felonies to trial. Collectively, this amounts to 47 cases, or an overall 2.3 percent trial rate, which is consistent with state trial courts nationwide.[15] The Court's data indicates that there were 49 trials in 2016, using impaneling the jury as the definition of a trial.

At the TC/SC hearing on Wednesdays before the trial week, the TCPO sometimes declares it is ready for trial but the trial does not actually happen the following Monday as it should, or it declares it is not ready for trial and requests a continuance. The week before the project team's visit, six trials were declared ready for trial but none of them actually was tried. Cases declared ready for trial sometimes are not tried because the TCPO has too many cases set or because of a last-minute continuance, a change of plea, or a dismissal. On occasion, the deputy prosecutor has not ascertained the cooperation of a witness in a domestic violence case until the last minute and requests a continuance. On other occasions, a deputy prosecutor may dismiss the case even after confirming readiness for trial for the same reason.

The TCPO identifies the failure of the TCPD to assign an attorney to a case until shortly before the first omnibus hearing as a source of continuances. In the Prosecutor's view, a public

[15] Source: National Center for State Courts' Court Statistics Project (CSP). See www.courtstatistics.org

defender or assigned counsel may not be assigned until after the arraignment. The TCPD strongly denies this, as indicated in the next section.

The TCPO also identifies as a problem the inability to obtain guilty plea settings on an as-needed or at least a fairly immediate basis. Pleas are capped each day, and it can sometimes take a week to three weeks to get a guilty plea set on the Court's docket.

3.3 PUBLIC / CONTRACT DEFENDER CASE PROCESSING ACTIVITIES

The Thurston County Office of Public Defense (TCPD) provides counsel to those defendants who meet income eligibility standards. Washington State has established a cap of seventy-five (75) new cases that each public defender can handle each month. There are nine full-time felony public defenders. As a result, the TCPD must assign as many as 50 percent of its cases to private assigned counsel that hold contracts with it to provide defense services to indigent defendants. The cases assigned from the TCPD are a mix of serious and minor cases.

The Court, the TCPO, and the TCPD identify the use of assigned private counsel as a significant problem Many of these contract lawyers practice in several jurisdictions. On occasion, an assigned counsel may not appear in Court; they are sometimes unavailable for trial even on the day of trial because they are double or triple scheduled elsewhere. Some assigned counsel do not promptly obtain discovery or set motions such that cases must be continued.

In *Dolan v. Washington*, some contract defense firms filed a lawsuit claiming counties had substantial control over their lawyers such that they should be considered public employees and eligible for state pensions. As a result, the TCPD does not exercise control over assigned private counsel. It views its only means of control as refusing to renew contracts. This becomes a problem if insufficient numbers of attorneys are willing to take assigned cases but lately has been somewhat ameliorated in Thurston County since the hourly reimbursement rate has been raised from $65 to $90/hour for more serious cases.

The TCPD is provisionally appointed for every defendant without an attorney at the preliminary appearance at the jail. A full appointment occurs when the TCPO files charges, which occurs within 72 hours of the prelim. At that point, the TCPO sends the TCPD limited discovery that allows it to determine if there is a conflict of interest that requires the appointment of assigned counsel. In addition, if the TCPD has reached its cap of clients for the month, cases are assigned to private counsel.

In-custody defendants are given assignment priority. The goal for each in-custody defendant is to receive an initial visit from a defense attorney within 72 hours of the preliminary hearing. That target is often not only met, but exceeded, since most defendants are seen within 48 hours. Regarding out-of-custody defendants, however, it is often the case that

the assignment of counsel occurs just before arraignment. The goal of the TCPD is to assign all counsel in a timely manner.

The TCPD does not collect any data regarding the timeliness of contact between assigned private counsel and their clients. It is generally believed by Court and TCPD officials that they take longer to meet with their clients and generally are not as efficient in timely case processing as the TCPD lawyers.

The Director of the TCPD ordered investigations in approximately 25% of all felonies assigned to the TCPD in CY 2016. This percentage appears appropriate to NCSC in comparison to felony public defense operations nationwide. All investigations are currently being performed by independent investigators pursuant to specific orders issued by the Director of the TCPD regarding scope and hours. The use of independent investigators has been identified by all criminal justice stakeholders as a significant cause of delay in case processing because the TCPD has no control over their availability or the pace of their investigations.

The ARC (new jail) has presented many challenges. Arraignment proceedings occur at the ARC by interactive video conferencing. No pleas are taken at arraignment; a Court rule requires defendants to be physically present in court for a plea to be taken.[16] E-docs (electronic documents) are not used for omnibus hearings and in-custody defendants are not transported to the courthouse; accordingly, defense attorneys must drive to the jail to meet with their clients to obtain their signatures agreeing to a continuance and perhaps a waiver of speedy trial, and then return to the courthouse to advise the Court while the omnibus calendar is proceeding. [17] In addition, access to inmates is limited by jail procedures that prevent access from 4:15 p.m. to 8:00 p.m. each day. Access on weekends is also limited.

Offers made to the defense attorneys improve over time, thus removing any incentive to accept an early plea offer. Furthermore, the TCPD feels strongly that some cases need to be investigated independent of the police in order to ascertain information that would be useful in making a counteroffer or developing mitigation claims. These investigations can take time because the TCPD must use private investigators. Also, domestic violence cases are susceptible to late dismissal due to uncooperative witnesses and the TCPO's failure to verify the availability of witnesses early in the case prompting defense lawyers to refuse early plea offers.

[16] It may be that the court would not require the physical presence of the defendant in the courtroom, but the structure of the arraignment calendar does not allow for pleas, and the attorneys are never ready to change a plea at the arraignment.

[17] Since the NCSC visit, the Court has decided to set the SC/TC calendar on Tuesdays to allow for greater time to prepare for trials and firm up the calendar. Therefore, the in-custody omnibus hearings are no longer on the same day as the SC/TC calendar. It is unclear what effect this will have on the need for the public defender to drive to the jail during the calendar.

Once a plea agreement is reached, the TCPD often wishes to set the plea before the Court quickly but is frustrated by the five-day notice requirement. If the TCPD wants to shorten the time to obtain a place on the calendar, they must file a motion to shorten time. In addition, when the COPAS calendar has reached its cap, the TCPD must file a motion to add a case above the cap and obtain a judge's signature. Sometimes an opening may appear in Odyssey case management system after that time, but the Superior Court requires the TCPD to file a notice to fill the opening or to be placed on the calendar. These notices must go to the Clerk's Office where they are placed in a basket or tray unless they are e-filed. The clerks then process the notices in the order received. Notices that are processed first may pre-empt the particular notice filed by the TCPD. Consequently, it is very difficult to know whether a request for a plea has secured a place on the docket. The TCPD usually does not pursue open spots on the COPAS docket for this reason. The TCPO would also like more flexibility in the calendar and supports removing some of the paperwork that the TCPD must file to get on the calendar.

3.4 ATTORNEY GENERAL CASE PROCESSING ACTIVITIES

Because Olympia is the capital of Washington State, Thurston County Superior Court is obliged to hear cases that may be filed in the County related to state matters. Many of these matters are civil in nature, including public records requests, ballot title challenges, tort cases against the State, and appellate reviews from regulatory agencies (ALRs).

Although the project team met with three deputy attorney generals who had issues with the way all four of these matters are handled by the Court, the one most relevant to the criminal case processing scope of this report is the scheduling of prison inmate complaints.

Currently, inmates are required to file motions for telephonic appearances at least a week before the calendar on which they have been set. Some inmates do not file because they are unaware of the procedure because it is a local not state rule. Some may not have the mental capacity to do so. The inmates are required to mail the motions because they have no access to Odyssey, which causes a delay.

Judges are inconsistent about whether they will entertain the underlying motion if the rule is not followed. Some judges continue the hearing if the motion for telephonic testimony is not filed in a timely manner. Other judges will hear the case even if the motion for telephonic testimony is not filed in strict accordance with the local rule.

On occasion, the assistant attorney general in charge of the case is not informed of the continuance. As a result, the Attorney General's Office experiences a high level of frustration concerning the current system.

Sometimes, the assistant attorney general files the motion for telephonic testimony just to make sure it is filed. The attorney then arranges for the telephonic appearance with the prison.

If the inmate is released before the hearing, he or she is reset on another calendar for defendants out of custody. Very few inmates are released pending hearing.

3.5 FELONY CASEFLOW STATISTICS: AOC DATA / NCSC DATA

The Center consultants used two objective data sources to review case processing information: a CY 2016 annual statistical report on superior court filings produced by Washington's Administrative Office of the Courts (AOC), and a randomly selected 45 case sample of recently disposed felony matters in Thurston County. Superior Court Administration assembled the case sample at the request of the NCSC consultants.

3.5.1 Washington State AOC Calendar Year 2016 Data

The AOC information composed of felony processing statistics and data element definitions is presented on pages 25 and 26. The tables NCSC extracted from the annual report compare Thurston County Superior Court to Superior Courts in four of Washington's 39 counties that are similar in size and case volume to Thurston. In researching these figures, NCSC consultants were hopeful they may help in providing objective, factual insights into critical delay points or bottlenecks in Thurston County's felony caseflow vis-à-vis the movement of felonies in analogous justice systems.

Unfortunately, there is little NCSC can discern from the data other than Thurston tends to exhibit more pre-resolution hearings (which include omnibus dockets) and stricken or canceled proceedings than the other counties, most notably its closest comparable counties, Kitsap and Yakama.[18] However, based on the relatively widespread variance in the figures among all counties multiple data entry errors could be the cause of some of the divergence.[19]

Data disparities can result from clerks recording information differently in the State's electronic case management system even though statewide data definitions are somewhat detailed. Also, the variety of calendaring systems among the State's 39 superior courts likely permit substantial latitude in how various proceedings may be defined and what codes to use to record case activities.

[18] AOC data showing a large number of pre-resolution hearings does correlate with the Thurston sample data, which reveals a high level of stipulated continuances and resets at omnibus hearings.

[19] Much of the data appears inaccurate to the Court. The inaccuracies appear to be caused by inconsistent use of the definitions of events and errors in entry the specialized codes. Some states, including Colorado, have developed a universal definition and code system, trained clerks statewide on this system, and monitor data integrity frequently during the year providing Courts with the percentage of accuracy of entered data.

Consequently, there is a considerable need for more useful, analytic information concerning the pace of case processing that can be used in actionable ways by superior courts to diagnose delay problems and develop improvement options. Routine AOC statistical information and reports tend to be broad in their current format and not overly practical for case management purposes regarding such metrics as elapse times between major events (not just between filing and final disposition), age of pending caseloads by case types, and continuance tracking in more meaningful ways than currently provided by the AOC.[20] One-off reports can likely be created, especially given the statewide move to the new Odyssey CMS, so there may be the possibility of producing more meaningful operational data on a reoccurring basis in the future.

Most trial courts need better performance data to monitor the pace of litigation. It is often difficult to produce, however, since the original design purpose of traditional case management systems was to automate the results of judicial and staff decisions and actions; essentially digitizing the register of actions. Even as CMS systems have been increasingly upgraded to computerize business processes involving routine clerical tasks in managing cases (i.e. sending notices, capping docket settings, or printing calendars), monitoring and reporting on the progress and movement of cases from one adjudicatory proceeding to the next has not been seen as a critical need. It also can be confounding to computerized case management systems when new hearings or case types may be developed or court officials change their calendaring practices (i.e. moving from a master to individual calendaring system as an example).

The National Center's four core case processing performance measures, part of its *CourTools* suite of ten analytics developed to assess the overall performance of trial courts, are at the heart of any statistical assessment data for case processing and need to be routinely captured by the individual trial courts and likely throughout the State for all of them. They include clearance rates, time to disposition by case type, age of active pending caseload by categories of cases, and trial date certainty. A review of these measures can be obtained at www.courtools.org.

[20] Continuance tracking by judge, party or parties requesting the delay, the point (proceeding) in the case processing continuum where the request is initiated, the specific reasons for the delay, and the length of delay granted are important caseflow management metrics to decipher reasons for unnecessary delay. As an example: The District Court in Hennepin County MN (Minneapolis) recently experienced numerous continuances in drug cases at initial felony pretrials set 45 days after arraignment. The Public Defender's Office, representing most of those accused, refused to plead or defer their clients to treatment program until forensic chemical reports were completed and reviewed by defense attorneys. The state's Bureau of Criminal Apprehension (BCA) lab was unable to complete tests and return reports in less than 60 days. Once that became apparent, County officials provided $250K to the BAC for added lab technicians to specifically analyze Hennepin County Attorney submitted forensic evidence to ensure reports were completed in 35 days or less.

Washington Judicial Branch Superior Court Felony Case Processing Statistics · CY 2016
Thurston County Compared to Four Counties Similar in Size and Case Volumes
Data Source: Administrative Office of the Courts, Washington

County	Population July 2015 (est.)	Felony Filings CY 2016
Spokane	488,310	2,721
Clark	451,820	2,764
Thurston	267,410	2,313
Kitsap	258,200	1,647
Yakima	249,970	2,204

County	Case Resolved w/o Trial	Dismissal	Guilty Plea	Deferred Prosecution
Spokane	4252	936	2854	0
Clark	2781	287	2310	113
Thurston	1550	283	1160	80
Kitsap	1470	428	1024	0
Yakima	1463	229	540	5

Case Resolved Jury Trial	Acquitted	Convicted
175	31	144
68	13	55
97	7	90
87	5	82
10	2	8

County	Total Non-Trial Hearings	Preliminary Hearings	Initial Arraignments	Pre-Resolution Hearings	Guilty Plea Hearings	Sentencing Hearings	Other Review Hearings	Post-Resolution Hearings
Spokane	25114	1447	3721	12887	2777	417	227	3638
Clark	33932	736	2428	8561	2318	552	6209	13128
Thurston	19843	197	1871	**12172**	1205	196	168	4045
Kitsap	16705	29	1509	8399	1377	1103	47	4301
Yakima	3322	311	335	1850	251	49	0	526

County	Proceedings Stricken or Canceled	Proceedings Continued	Judicial Conflict	Calendar Conflict	Defense Requested	Prosecutor Requested	Stipulated	Unspecified
Spokane	4761	4768	0	0	749	61	3950	8
Clark	1679	400	0	6	36	203	3	152
Thurston	**3578**	331	0	110	11	79	87	44
Kitsap	62	1	0	0	0	0	0	1
Yakima	4	10	0	0	0	0	0	10

Definitions

Filing or Case	A separate defendant who may have a single or multiple felony charges.
Resolved Case	A case that has been tried, settled, or otherwise concluded.
Dismissal	Resolution by the court dismissing the case for all parties before trial or adjudicatory hearing commencement.
Guilty Plea	Resolution by guilty plea to any or all charges before trial or adjudicatory hearing commencement.
Deferred Prosecution	Resolution upon placing a defendant under court supervision with specific conditions of behavior before any formal finding of guilt.
Jury Trial	Resolution of a criminal case by a jury verdict.
Total Non-Trial Hearings	All formal, scheduled pretrial proceedings in felony matters where evidence and arguments are presented to the court.
Preliminary Hearing	A pretrial hearing held after a criminal defendant's first appearance in court to determine whether there is probable cause to believe the accused committed the felony offense charged.
Initial Arraignment	Formal pretrial court proceeding where a judge informs a defendant charged with a crime the nature of the charges; the defendant is request to enter a plea in response. If the defendant is indigent, the court ensures a public defender is appointed to represent the accused.
Pre-Resolution Hearing	**Pretrial hearings that include pre-resolution/ motion conferences, omnibus hearings, evidentiary hearings, not guilty plea hearings, continued prosecution hearings, voir dire only hearings, dismissal hearings, RALJ hearings, warrant identification hearings, and pretrial management hearings.**
Guilty Plea Hearing	Pretrial hearings that include guilty plea only, guilty plea and sentencing, arraignment and guilty plea, and sentencing hearings.
Sentencing Hearing	A hearing in which the convicted defendant receives the sentence imposed.
Other Review Hearing	Hearings that include financial reviews and sentence condition violation hearings only.
Post Resolution Hearing	Hearings that include review hearings, post resolution/motion hearings, post WID hearings, and execution death penalty jury proceedings.
Stricken; Canceled Proceeding	**A stricken proceeding is one which has been removed from the court calendar by a judicial officer and not recorded on a calendar to take place at another date. A canceled proceeding is one removed from the court calendar by a non-judicial officer and not recorded on a calendar to take the place of another date. A stricken or canceled proceeding is only an instance where the proceeding is set for a specific date and stricken or canceled before that scheduled commencement.**
Proceedings Continued	A continued proceeding is one in which a hearing has been set for a specific date and is deferred before that hearing commences. Continued hearings are classified by the reason for the scheduling change.
Judicial Conflict	A continuance caused by the filing of an affidavit or prejudice or by the recusal of the assigned judge.
Calendar Conflict	A granted hearing continuance caused by the court's calendar becoming too full to hear the case. These continuances result from judicial or courtroom resources being unavailable.
Defense Requested	A granted hearing continuance requested by the defense for reasons other than a judicial or calendar conflict.
Prosecutor Requested	A granted hearing continuance requested by the prosecuting attorney for reasons other than a judicial or calendar conflict.
Stipulated	A granted hearing continuance requested by stipulation of all concerned parties for reasons other than a judicial or calendar conflict.
Unspecified	A granted hearing continuance requested by unknown concerned parties for reasons other than a judicial or calendar conflict.

3.5.2 Thurston County Superior Court 45-Case Data Sample

A random sample of 45 recently closed felony cases was assembled by Superior Court Administration at the request of the NCSC consultants and analyzed by them. Elapse times between filing and final disposition were examined, regardless of the type of disposition. The cases reviewed exhibited the following offense characteristics:

Principal Charge	Number of Cases	Percent of Total
Assault	10	22.2
Burglary/Trespass	9	20.0
Sex Offense	6	13.3
Theft/Robbery	6	13.3
Drug Possession	5	11.1
Drug Sale/Purchase	2	4.4
Fraud	2	4.4
Harassment	2	4.4
DUI (gross misdemeanor)	1	2.2
Malicious Mischief	1	2.2
Protection Order Violation	1	2.2
Total	**45**	**99.7**

The sample was assessed against two felony case processing measures: the new American Bar Association Time Standards developed by the National Center for State Courts and adopted by ABA Board of Governors in August 2011, and Washington's Advisory Case Processing Time Standards. Washington State standards, issued in 1992 and revised in 1997, are voluntary and were developed by the Washington Board of Judicial Administration, an assembly of leadership judges and selected bar officials chaired by the State's Chief Justice.[21]

Felony Case Processing from Filing to Resolution[22]	
Washington Advisory Standards	**ABA | NCSC Model Standards**
90% within 4 months (120 days) 98% within 6 months (180 days) 100% within 9 months (270 days)	75% within 3 months (90 days) 90% within 6 months (180 days) 98% within 12 months (365 days)[23]

[21] The Board for Judicial Administration (BJA) is charged with providing effective leadership to the state courts and developing policy to enhance the administration of the court system in Washington State. Judges serving on the Board pursue the best interests of the judiciary at large in representing the more than 400 elected and appointed judges presiding at four levels: the Supreme Court, the Court of Appeals, Superior Courts, and District and Municipal Courts.

[22] Resolution has the same meaning as disposition; the adjudication or settlement of all issues in a case via plea, trial verdict, dismissal, etc,

[23] A 98 percent level is used rather than 100 percent in recognition that there will be a very small number of cases that will require more time to resolve such as capital murder and extremely complex cases.

Admittedly the sample size (45 cases) is small, but it does give a relative indication of the elapse times from filing to resolution. Overall, time to disposition ranged from 28 days in a burglary case to 681 days in a drug sale case.

Elapse Time from Filing Date to Disposition Date
Total 45 Sampled Felony Cases

ABA | NCSC Time Standards	Elapse Time (Days or Percentages)	Washington State Advisory Standards	Elapse Time (Days or Percentages)
Maximum	681 days	Maximum	same
75% within 90 days	24%	90% within 120 days	27%
90% within 180 days	48%	98% within 180 days	49%
98% within 365 days	90%	100% within 270 days	80%
Over 365 days	10%	Over 270 days	20%
Average (mean)[24]	199 days	Average (mean)	same
Median (midpoint)[25]	181 days	Median (midpoint)	same
25th Percentile	105 days	25th Percentile	same
Minimum	28 days	Minimum	same

Cumulative Percentage of 45 Sampled Cases Disposed within ABA | NCSC Time Standards
By Case Type (Offense Category)

Offense Category	% within 90 days	% within 180 days	% within 365 days	% over 365 days
Assault	30%	60%	100%	none
Burglary/Trespass	33%	67%	100%	none
Sex Offense	0%	30%	60%	40%
Robbery/Theft	17%	34%	100%	none
Drug Possession	20%	80%	100%	none
Drug Sale/Purchase	0%	0%	50%	50%
Fraud	50%	50%	100%	none
Harassment	50%	50%	100%	none
DUI (gross misdemeanor)	0%	0%	0%	100%
Malicious Mischief	0%	0%	100%	none
Protection Order Violation	100%	100%	100%	none

Although many cases in the sample were disposed within a year's time, sex offense and drug sale/purchase cases took the longest to reach finality; excluding the single DUI (gross misdemeanor), which the consultants considered an outlier. Times to disposition look somewhat worse when the Washington Advisory Standards are used as the performance measure.

[24] The mean is the average value (central tendency) of all the elapsed days divided by the number of cases.
[25] The midpoint is also called the median. It is the middle value of the list of elapsed days where half the cases disposed are under that elapse time and half are over it.

The sample data revealed a substantial continuance problem involving all cases after arraignment. Most of the delays occurred as a result of stipulated delays by the parties. Of all pretrial proceedings, omnibus hearings were continued the most. Seven out of ten stipulated continuances occurred at the omnibus hearings.[26] Of 388 scheduled pretrial events in the 45-case sample, only 138 (35%) occurred on the date and time scheduled.[27] The following page provides a more detailed review of this data.

Regarding the types of dispositions in the 45-case sample, 25 defendants eventually pled guilty to the original charge, which included 3 instances where the defendant also pled to amended/reduced secondary charges and 6 cases where the secondary charges were dismissed. Twelve defendants pled to amended/reduced charges. Two cases were dismissed without prejudice. Four jury trials took place (3 defendants were found guilty, 1 defendant was acquitted). One bench trial took place wherein the defendant was found guilty, and one case was still pending trial and was not closed.

The incarceration status of the 45 defendants changed somewhat during the life of their cases as some made bail, and some who were released failed to appear and were re-incarcerated. Twenty-four defendants remained in custody throughout the duration of their case. Eleven were released: 10 on personal recognizance, including one who was on work-release. Of those ten, one was present at all court appearances, four missed one appearance, four missed two appearances, one missed three appearances, and one missed four appearances. Ten defendants were released on bail; six of those made all court appearances, three missed one appearance, and one missed two appearances. Bench warrants were issued at each failure to appear and caused some delays in rescheduling proceedings, but nothing inordinate or unusual as matters proceeded with or without the defendant present.

The defendants were almost exclusively represented by government defense lawyers. Twenty-five were represented by the public defender, 19 had a defense panel attorney, and one defendant retained private counsel. During the course of the pretrial proceedings, one defendant opted to represent himself.

[26] In the 45-felony case sample, a total of 211 stipulated continuances occurred throughout all pretrial events/proceedings scheduled. Omnibus hearings accounted for 150 stipulations or 71 percent.
[27] 211 stipulated continuances + 19 continuance requests by prosecutor + 17 hearings stricken by prosecutor + 3 hearings stricken by defense + 138 hearings occurring as scheduled = 388 total hearings scheduled.

Pretrial Scheduled Events (Proceedings) after Preliminary Hearing (Event 1) and Arraignment (Event 2)[28]
Data Source: 45 Randomly Selected, Recently Closed Felony Cases

Pretrial Events	Event 3	Event 4	Event 5	Event 6	Event 7	Event 8	Event 9	Event 10	Event 11	Event 12	Sub Total
Stipulated Continuance	20	30	20	19	19	15	18	16	12	9	178
Continuance request: Prosecutor	3		3		2	2	2		2	2	16
Stricken: Prosecutor	1	1	2	3	3	1		2		1	14
Stricken: Defense					1				1		2
Hearing Occurred as Scheduled	13	8	16	14	10	13	8	5	8	9	104
Omnibus Order Issued	6	1	3	3	1	1	1	1			17
Confirmed for Trial		3		2	2	2	2	1	1	2	15
Bench Warrant	2	2	1		1	2			2	2	12
Total Number of Events	45	45	45	41	38	36	31	25	26	25	358

Pretrial Events	Event 13	Event 14	Event 15	Event 16	Event 17	Event 18	Event 19	Event 20	Event 20+	Sub Total	Grand Total
Stipulated Continuance	5	6	5	7	3	2	3		2	33	211
Continuance request: Prosecutor	1		1	1						3	19
Stricken: Prosecutor	1	1	1							3	17
Stricken: Defense		1								1	3
Hearing Occurred as Scheduled	4	7	6	3	7	4		2	1	34	138
Omnibus Order Issued									1	1	18
Confirmed for Trial			1		1				1	3	18
Bench Warrant		2	2	1						5	17
Total Number of Events	11	17	16	12	11	6	3	2	5	83	441

[28] Events 3-20+ include: Omnibus Hearings, Motion Hearings, Arraignment ID Hearings, Warrant ID Hearings, Change of Pleas, Competency Hearings, Status Hearings, Sentencings, BW Hearings, Trial Settings, and Dismissals

4.0 BEST PRACTICES VIS-À-VIS CURRENT COURT OPERATIONS

The National Center contends there are a series of felony caseflow and calendaring inefficiencies inherent in the operations of the Court and its justice system partners that are causing unnecessary delays and should be addressed. In doing so, the work of judges and Court staff can be more streamlined and less redundant, appearances by lawyers and litigants will be more productive, jail capacity can likely be reduced, and more time will be available for the Court's family, juvenile and civil work.

Proven, evidence-based caseflow management techniques have been developed over 40+ years of research and tested in hundreds of trial courts by the National Center, numerous other court improvement organizations and courts themselves. When consistently applied, these principles, and the practices associated with them, help assure that needless delays are minimized and scheduling efficiencies maximized. Each principle or best practice targets one or more critical steps in the flow of felony cases.

4.1 EMBRACE THE DOCTRINE OF JUDICIAL RESPONSIBILITY

4.1.1 Best Practice: *Once a case is filed with the court, judges are duty bound to control the judicial process and monitor the pace of litigation until the case is resolved.*

The sound administration of justice vests the court with upholding, protecting, and developing the methods and procedures in the adjudication process to assure fair and just outcomes. In doing so, the court is guided by and accountable for all related due process and Constitutional requirements in moving a case from filing to disposition with reasonable speed, regardless of the type of disposition.[29]

Unnecessary Delay is the Enemy of Justice

Of critical importance in this duty is the Court's obligation to reduce unnecessary delay. This does not include legitimate case processing time essential to ensure evidence is adequately secured and analyzed, witnesses are interviewed, and needed investigations take place. Realistic procedural steps should be tailored to the type and complexity of a case. Needless delay — waiting time when nothing happens to move a dispute forward toward resolution — is the enemy of justice. It affects the very purpose of a trial court to promote a fair, impartial

[29] Principles for Judicial Administration, National Center for State Courts (July 2012). Ostrom, Brian; Hanson, Roger, Achieving High Performance: A Framework for Courts, National Center for State Courts (April 2010). Ostrom, B., and Hanson, R., Efficiency, Timeliness and Quality: A New Perspective from Nine State Criminal Trial Courts, National Center for State Courts (1999). Steelman, David; Goerdt, John; McMillian, James, Caseflow Management: The Heart of Court Management in the New Millennium, National Center for State Courts (2004).

result. With time, memories fade and justice is harder to secure. Those unjustly deprived of liberty, property, position or reputations are unduly harmed. As the public watches cases languish due to inefficiency and disorganization, public trust and confidence in the justice system is diminished. Justice is more difficult to achieve with the passage of time.

This principle of caseflow management has repeatedly been found to be the bedrock of capable, productive performance in highly successful trial courts. Judges that refuse to lead efforts to oversee and efficiently manage the adjudicatory process, leaving it instead to lawyers and parties to tell them when they want their involvement, are antithetical to productive, well-organized courts. Without collective judicial direction and guidance in establishing court control of the caseflow, the National Center submits no real or lasting change can occur.

Early Intervention and Continuous Control is Necessary

Early intervention and continuous control by the Court from filing to disposition is an essential corollary concept in the doctrine of judicial responsibility. The court, not the litigants, must control the progress of a case from filing to disposition. The rationale for court control of calendaring and the pace of the adjudicatory process is based on the proposition that in a democratic system of justice, the court is the only neutral party capable of resolving a dispute brought to the government in a fair, unbiased, and independent manner. All other parties have a vested interest in the outcome of a case. The court's only interest is justice.

Early court intervention means that the court monitors the progress of the case as soon as charges are initiated and again at established intervals to ensure that the case is continuing to progress along an established time track.

Early court control involves conducting early case conferences. A successful early case conference enables the judicial officer to review the status of discovery, learn of negotiations concerning possible non-trial disposition, schedule motions, and make any orders needed to advance the case to finality.

Court control must also be continuous, meaning that every case should have a next scheduled event. This prevents the case from being delayed because of inattention by litigants or the court.

4.1.2 Observations

At present, attorneys are allowed without restraint to govern the pace of criminal cases. The Court maintains little, if any control.

At present, the Superior Court allows counsel to stipulate to continuances without stating a cause and routinely grants virtually all requests. Many cases are being reset numerous times.

Delays in processing cases mean incarcerated defendants spend much more time in jail thus increasing the length of stay and costs to county government as well as affecting the lives of defendants. Out-of-custody defendants must contend with repeated court appearances, work loss, and wage loss.

The TCPD believes that it cannot supervise assigned private counsel. As such it becomes even more important for the Court to set standards and apply them rigorously.

4.1.3 Challenges

Some judges contend they have tried to take control of the caseflow in the past but it has not worked. For example, if they deny the requests for continuances of the second omnibus hearing, the attorneys ask for a continuance at trial because they are not ready. Unprepared lawyers, as a result, are not held accountable for improving their performance. Instead, the Court unwittingly enables poor work practices to continue unremedied.

Some judges believe there are so many cases on the omnibus calendars that they cannot possibly call each case and demand good cause for the requested continuances.

Assigned private counsel are accustomed to being able to control their own cases to the point that some do not show up in Court, some double and triple set themselves in other jurisdictions, and some are disinterested in resolving cases efficiently.[30]

4.1.4 Recommendations

1. The doctrine of judicial responsibility – judge control of the caseflow — must be instituted in the Superior Court. Without such a commitment from Court leaders and policymakers, the current situation marked by multiple continuances, meaningless hearings, and needless delay will persist. The doctrine has been thoroughly researched for decades and found to be absolutely essential to reducing trial court delay.
2. The Court must adopt a policy of early intervention and continuous control of cases. Allowing counsel to control the pace of criminal cases has created the current culture of excessively delayed case resolution. This philosophy is inimical to justice and efficiency.
3. Criminal justice partners in Thurston County currently meet weekly for 45 minutes. Although these meetings have value for day-to-day logistics, a monthly 2-hour planning and strategy meeting should be additionally arranged, pending decisions by the Court and justice system stakeholders to move toward fundamental criminal

[30] The commodity lawyers sell is time. Where there is a "deep pocket" (read: government) willing to pay by the hour for criminal defense work, unnecessary delay may result on the part of some lawyers who may be lackadaisical or disingenuous regarding their assigned cases.

caseflow reforms, to initiate and shepherd needed improvements in overall case processing.

4.1.5 Expected Results

Continuances will decrease. Meaningless hearings will shrink in number. The number of cases set on calendars will decline. Length of stay in jail will decrease. The numbers of jail transports will drop. The average age of felony cases pending in the system will decrease. Fewer defendants will be supervised by pre-trial services. Time available for civil matters will increase. Judge and judicial system stakeholder satisfaction will rise.

4.2 LIMIT AND MONITOR CONTINUANCES

4.2.1 Best Practice: *Continuances delay the resolution of cases and clog court calendars with unnecessary settings. They lead to diminished expectations that hearings will occur, which often result in lack of adequate preparation by attorneys. Some continuances are unavoidable due to judicial resources and heavy caseloads. Although some continuances are necessary, they should be granted only when unforeseen emergencies occur.*

There are an excessive number of continuances requested and granted, many appearing to lack good cause. Continuances and postponements seem to commonly begin at proceedings following arraignment and then reoccur throughout the duration of most cases. Unfortunately, there is a general expectation among prosecutors and defense lawyers that continuances will be granted, especially if both lawyers stipulate to the request. There appears to be no correlation between the length of a continuance granted and the time needed to complete whatever tasks were required to be done by the lawyers.

Only a 35 Percent Chance a Scheduled Hearing will Occur

The 45-felony case sample indicates nearly 7 out of 10 pretrial proceedings calendared after arraignment do not take place as scheduled.[31] This is a tremendously high percentage given the number of events that take place. Eighty percent of the postponements occurring at any scheduled hearing after arraignment are stipulated continuances where the lawyers or parties are present but not ready to proceed as the Court expects.

The "local legal culture" among lawyers and judges permits this condition to exist. Local legal culture is a term coined through an in-depth analysis of trial court delay a number of years ago where researchers determined that the speed of disposition for both criminal and civil cases was not singularly conditioned by court structure, resources, procedures, workload, or

[31] 138 hearings were held out of 338 that were scheduled

trial rate.[32] Rather, it was largely determined by the established norms, expectations, practices and informal rules of behavior of judges and lawyers practicing in a particular court. In other words, court systems become accustomed to a given pace of litigation. In courts where the practitioners expect cases to be resolved in a timely manner, they are resolved faster. Expectations for timelines were associated with the degree of timeliness.

Court Efficiency Begets Lawyer Efficiency

Studies have also shown that as court efficiency increases, the quality of lawyering does as well. Why? Because the court thoughtfully establishes and uniformly enforces predictable, meaningful, monitorable events, which, in turn causes lawyers to earnestly and conscientiously prepare for them. The result is that as more lawyers are prepared for court events, greater pressure is placed on those who are not. Poor work habits then begin to improve.

Continuance Policies Must be Authoritative and Binding

Most trial courts have strict continuance policies in their local rules requiring adequate, formal, timely notice by the parties to postpone a court event. Thurston County does not have such policies. This review of the court's caseflow provides an opportunity to develop a workable continuance policy. A model continuance policy designed by the National Center appears below and provides a good starting point.

MODEL CONTINUANCE POLICY[33]

It is the policy of this Court to provide justice for citizens without unnecessary delay and without undue waste of the time and other resources of the Court, the litigants, and other case participants. For all of its case types and dockets, and in all of its courtrooms, the Court looks with strong disfavor on motions or requests to continue court events. To protect the credibility of scheduled trial dates, trial-date continuances are especially disfavored. No hearing or trial date setting shall be vacated or continued except by formal order of the Court.

Except in unusual circumstances, any continuance motion or request must be in writing and filed not later than 48 hours before the court event for which rescheduling is requested, except in an emergency. Each continuance motion or request must state reasons and be signed by both the attorney and the party making the request. In order for this recommendation to be successful, education for both attorneys and self-represented parties will be required to ensure compliance and to avoid additional continuances to adhere to the practice.

The Court will grant a continuance only for good cause shown. On a case-by-case basis, the Court will evaluate whether sufficient cause justifies a continuance. As a guide to practitioners, the following will generally *not* be considered sufficient cause to grant a continuance:

- Counsel or the parties agree to a continuance;
- The case has not previously been continued;
- The case probably will settle if a continuance is granted;

[32] Thomas Church, "The Old and the New Conventional Wisdom about Court Delay," 7 Justice System Journal 3 (1982).

[33] This model policy was originally developed by David C. Steelman, Principal Court Management Consultant, National Center for State Courts, and has been modified since by caseflow management consultants at the National Center as part of various technical assistance projects concerning trial court delay.

- Discovery has not been completed;
- New counsel has entered an appearance in the case or a party wants to retain new counsel;
- Unavailability of a witness who has not been subpoenaed;
- A party or counsel is unprepared to try the case for reasons including, but not limited to, the party's failure to maintain necessary contact with counsel;
- Any continuance of trial beyond a second trial date setting.

The following ***will*** generally be considered sufficient cause to grant a continuance:

- Sudden medical emergency (not elective medical care) or death of a party, counsel, or material witness who has been subpoenaed;
- A party did not receive notice of the setting of a hearing or trial date through no fault of that party or that party's counsel;
- Facts or circumstances arising or becoming apparent too late in the proceedings to be fully corrected and which, in the view of the Court, would likely cause undue hardship or possibly miscarriage of justice if the hearing or trial is required to proceed as scheduled;
- Unanticipated absence of a material witness for either party;
- The case was inadvertently set on a religious high holy day, if the continuance request is made substantially in advance of the hearing or trial date;
- A scheduling conflict with another court between cases in the Family Court or any other courts, counsel or the parties have a duty to notify the judges and parties involved in order that the conflict may be resolved. Upon being advised, the judges involved shall confer in an effort to resolve the conflict and in doing so may consider the following factors: the nature of the cases and the presence of any speedy trial problems; the length, urgency, or relative importance of the matters; whether the cases involve out-of-town witnesses, parties or counsel; the age of the cases; the matter that was first set; any priority granted by rule or statute; and any other pertinent factor:
- Illness or family emergency of counsel.

Any grant of a continuance motion or request by the Court shall be documented on the record, with an indication of who requested it and the reasons for granting it. Whenever possible, the Court shall hold the rescheduled court event not later than 30 days after the date from which it was continued.

Information about the source of each continuance motion or request in a case and the reason for any continuance granted by the Court shall be entered for that case in the Court's computerized case management information system. At least once a quarter, the chief judge and other judges of the Court shall promote the consistent application of this continuance policy by reviewing and discussing the computer report by major case type as to the number of continuances requested and granted during the previous period, especially as they relate to the incidence and duration of trial-date continuances. As necessary, the Court shall work with bar representatives and court-related agencies to seek resolution of any organizational or systemic problems that cause cases to be rescheduled, but which go beyond the unique circumstances of individual judicial officers or individual cases.

4.2.2 Observations

Calendars, especially omnibus calendars, are very large. Calendars with 100 defendants are not unusual. As a result, judges must continue a large percentage of the cases in order to complete the docket in the allotted ninety (90) minutes. Very few cases result in meaningful activity that moves the cases forward. In fact, the system *depends* on almost all of the cases not proceeding to an omnibus hearing. As the cases are moved forward to another calendar, they artificially pad that calendar with cases that also do not resolve. Preliminary data show

that only 5% of the cases resolve at the omnibus hearing and 3% result in an omnibus order. The 5% that resolve do not resolve at the first or second omnibus hearing.

Every time a hearing is continued, the clerks must set a new hearing. If the new hearing requires a continuance of subsequent hearings, which is most often the case, those hearings must also be continued. The constant continuances take up enormous amounts of clerk time that could be used in other more productive ways.

Every time a hearing is continued, the jail must prepare for transporting in-custody defendants again at a later date or arrange for them to appear by video conferencing depending on the type of hearing.

Defendants who are out of custody and under pre-trial supervision must continue pre-trial supervision for months longer than is necessary. These defendants must continue to take time off work in order to attend hearings that do not move the case forward. By all reports, defendants become frustrated by these constant appearances without action. When a case is continued ten times, out-of-custody defendants must take up to half a day off from work each time. In most cases, employed defendants are wage earners who do not get paid if they do not work. Such loss of income can be extremely burdensome to low-income wage earners. They risk not paying the rent, buying food, paying child support, and the like.

In-custody defendants spend much longer in jail to their detriment. The length of stay at the jail is longer than it needs to be. Jail staff is required to transport inmates back and forth much more often than necessary. The jail population is higher than it needs to be leading to higher costs for the county.

The TCPO's current practices are a substantial cause of continuances.

The TCPD's need to assign private investigators over whom they have little control is another substantial cause of continuances.

Continuances breed continuances. Where the court culture is lax regarding continuances, they generally become automatic. If attorneys believe their cases will not proceed as scheduled, they will not prepare. It is incumbent on the Court to ensure the pace of litigation is reasonable and not unnecessarily delayed due to the lack of lawyer diligence. A firm hearing or trial date makes lawyers prepare.

The TCPO and TCPD each assign responsibility for continuances to each other.

4.2.3 Challenges

Some attorneys are used to being able to continue cases at will and manage the timing of their cases. Some may resist the change.

Some judges do not see a way forward to change the system.

Accurate, timely data by judicial officer has not been developed that clearly indicates for each case in which a continuance is granted: the length of the delay, the requesting party and the reasons for the delay. It is impossible to improve the certainty of hearings without a firm and factual understanding of the nature of continuances.

Those who cause the continuances may not accept responsibility for their part of the problem.

4.2.4 Recommendations

4. The Court should adopt a unified continuance policy along the lines set forth in the Model Continuance Policy. This could include allowing only one continuance at the initial omnibus hearing for good cause. No continuance of the second omnibus hearing should ever be allowed. There is no reason that an omnibus order cannot be entered. The omnibus hearing should be treated as an early case management order. An additional pre-trial conference can be set to allow the Court to ascertain accountability to the order and move the case to resolution.

5. The TCPO should overhaul its system of moving cases from filing to resolution.

6. The TCPD, the TCPO, and the Court should advocate for the employment of in-house investigators for the TCPD.

7. The Court should develop a means to collect accurate, timely data by judicial officer that clearly indicates for each case in which a continuance is granted: the length of the delay, the requesting party, and the reasons for delay. Keeping such data will highlight those judges who are and are not complying with the continuance policy and will also show whether it is primarily the TCPO or the TCPD that is causing the delay.

4.2.5 Expected Results

Calendars will be reduced to the point that judges can process omnibus orders and take pleas early and often. Cases will be much more likely to reach trial on the initial trial date. Dockets will be real dockets rather than dockets loaded with cases that will not be heard. Meaningless hearings will decrease. Clerks will have more time to devote to other duties because they will not have to re-docket as many cases. Case resolution time (age of case) will diminish. Length of stay for inmates will decline, and jail population will decrease. Inmate transports will decrease. Pre-trial services caseloads will decrease. Stakeholder satisfaction with the system will increase, including the satisfaction of the public.

4.3 ENSURE COURT EVENTS ARE MEANINGFUL AND REALISTIC

4.3.1 Best Practices: *Effective caseflow management systems create an expectation of timeliness by providing credible pretrial events and dates that move cases toward disposition.*

Almost all felony cases are resolved by negotiation between the parties. Five trials occurred in the 45-case sample. Which is a high trial rate (9%) for general jurisdiction courts and likely a result of the small sample. Nationwide, fewer than 5% of all felony cases are resolved by trial. The actual overall trial rate appears to be closer to 3% according to the TCPO's data; but, nonetheless, with a more productive pretrial process, Thurston County's trial rate would likely be lower and cases would resolve earlier in the caseflow than they do now.

The central theme of any pretrial process should be to promote circumstances for prosecutors and defense counsel to identify the cases requiring trials as early as is just and feasible and to reach non-trial outcomes sooner rather than later. An optimal time for lawyers to make a decision on whether to try or settle an individual case is typically after they have learned enough about the case but before they have become so committed to the cost of expert witnesses and other expensive discovery that they might as well set a case for trial. Consequently, the essence of case management by the Court in criminal cases is to create circumstances for prosecutors and defense counsel to avoid unnecessary delay in the resolution of motions (and especially motions to suppress evidence), provision of disclosures and discovery, and realistic discussion of plea prospects.

Pretrial procedures and events should not be conceptualized as a series of isolated events but a chain of steps that build on each other to achieve a particular end; the disposition of a case. The purpose is to narrow the issues in a case, clearly identify the options, assess the strength of the evidence and any mitigating circumstances, and lead to a plea to the original or reduced charges. In doing so, it is critical for the Court to promote preparation by the lawyers for pretrial events. Counsel preparation is the single most important factor in any criminal settlement process.

Pretrial conferences must be realistically set far enough in advance to permit preparation but soon enough to stimulate preparation. Of importance in the preparation process for the accused and defense counsel is adequate time to review crucial evidence (i.e. videos, forensic results, etc.), obtain basic discovery, review any plea offer by the state, and privately discuss the strength of the state's case. In doing so, it is important that the defendant be present for all pretrial events.

All of this considered, the numerous stipulated continuances at reoccurring omnibus hearings indicate very little happens early in the caseflow process to advance negotiated pleas soon after arraignment. The hurried, overcrowded, repetitive omnibus calendars portray a

disordered and confused pretrial process; not the needed thorough review and assessment of the evidence and reasonable options by the lawyers. The current situation appears to actually foster continuances rather than stimulate settlements.

The purpose of an omnibus hearing to review pretrial discovery issues, set a schedule to examine and rule on any pretrial motions, and establish milestones to resolve the case is extremely difficult to accomplish given the number of matters on a calendar and the fact that many defendants may be meeting their court-appointed lawyer for the first time at the hearing. Given this situation, the TCPD's reluctance to have the Court enter an omnibus order, which prompts the TCPO to suspend plea negotiations and place the case on a trial track, is understandable. Consequently, omnibus hearings are set over many times without producing an omnibus order.

What needs to be done, short of an omnibus order, is to develop effective methods and procedures prior to issuing an omnibus order to stimulate, monitor, and compel lawyer preparedness targeting plea agreements, not trial preparation. There are various ways to promote meaningful, required lawyer-court discussions and information exchange that can move a case toward agreeable resolutions. Many of the best practices outlined in this report work in concert toward those ends.

Various courts purposefully set initial and final pretrial conferences providing 15-30 minute sessions with a judge for each case with the format established by the court to facilitate settlement. Prosecutors in some justice systems set plea cut-off policies rather than depend on the court to do so through an omnibus order. Plea cut-off policies are standard, acceptable case management practices in many jurisdictions.

A typical policy requires defendants to accept or reject a plea offer at a specific time before trial, usually prior to a trial date but after one or more court scheduled pretrial conferences aimed at settlement. By that time, essential discovery generally has been exchanged, and the defense has had time to assess the offer. If the accused chooses to plead after the cut-off, she or he must plead to the original charge(s) unless extenuating circumstances are found by the court to be inconsistent with the fair administration of justice.

A plea cut-off policy provides both prosecutors and defense lawyers strong incentives to evaluate the merits of their respective positions and make informed and timely decisions to negotiate a plea or try their case. Such policies also tend to reduce spurious case continuance requests. At first glance, the policy may sound unfair to the defendant, but in practice it operates as an inducement to engage in meaningful discussions about the strength and value of a case.

To be successful, such a policy must provide an opportunity for a "best and final" offer that is credibly based on the evidence and what a reasonable defense attorney would expect to happen if the case went to trial. This policy would eliminate the current Thurston County practice in which offers improve over time, even until the morning of trial.

To work effectively, a plea cut-off policy must be normally applied after the defense attorney has sufficient discoverable evidence to assess the strength of the state's case and has met with the defendant often enough to have attorney-client credibility in discussing the prosecution offer. The defense, in assessing the offer, must have carefully weighed three elements: (a) the seriousness of the charge and particular circumstances of the case, (b) the strength of the state's evidence and whether it can be successfully refuted by facts and testimony from the defense, and (c) the defendant's background, including prior criminal convictions.

Prosecutor-initiated plea cut-off policies do not, in and of themselves, violate constitutional protections for criminal defendants. They are in use in many courts, including a statewide rule in New Jersey,[34] and have been repeatedly upheld by appellate courts.[35]

Lastly, in reviewing the "meaningfulness" of criminal hearings, the project team briefly observed the Treatment Review Calendar, a special post-conviction docket that enables the Court to monitor offenders convicted of domestic violence and sex crimes in regard to their compliance with court-ordered treatment programs. Increasing numbers of courts nationwide are employing this approach to enhance offender accountability, especially in states where probation may not be operated and managed by the state judicial branch. Washington is such a state.

Based upon limited observations, however, it appears the way the Treatment Review Calendar is currently conducted may not meet best practices. For example, there is only a brief perfunctory interchange between the judge and prosecutor regarding an offender's compliance as opposed to a more robust discussion between the judge and the defendant using motivational interviewing methods. Accordingly, it would be wise for the Court to examine its policies and procedures to ensure best practices are followed and make any appropriate adjustments. Research supports the use of such calendars to increase accountability when best practices are employed.

[34] N.J. CT. R. Rule 3:9-3(g) (2009) ("Plea Cut Off. After the pretrial conference has been conducted and a trial date set, the court shall not accept negotiated pleas absent the approval of the Criminal Presiding Judge based on a material change of circumstance, or the need to avoid a protracted trial or a manifest injustice.")
[35] Michigan v. Grove, 566 N.W.2d 547, 558-60 (Mich. 1997).

4.3.2 Observations

In addition to the repeated continuances, little occurs at most pretrial hearings. This circumstance is supported by both interviews and statistical analysis.

The TCPO does not want to fill out the omnibus order until plea negotiations are ended; because at that point, the deputies reportedly start focusing on trial preparation.

The TCPO's reluctance to complete the omnibus order unless trial is likely and its insistence that completion of the omnibus order prevents further negotiation drives some of the continuances occurring at the omnibus hearings.

In fact, many pleas are taken after the omnibus order is entered including on COPAS dockets and on the Monday overflow dockets after the trial week.

Because of the size and structure of the calendars, there is little time to take pleas, which is the primary way cases are removed from the system given that few cases go to trial.

According to TCPO data, forty-seven (47) trials were actually heard in 2016. According to the Court's data forty-nine (49) trail were held. There are approximately forty-six (46) trial weeks each year. Correspondingly, given that there are two criminal trial judges (and more when the civil trial judges assist), only half of the available trial weeks are being used except for those additional trial days during which trials to the court are heard, yet a large number of cases are being continued because of unavailability of counsel or insufficient numbers of judges to hear them. This is caused by "upstream" case management problems resulting in many more cases set for trial than can be heard. (See Reverse Telescope concept in Problem 4.)

4.3.3 Challenges

The TCPO will have to change its practices dramatically as indicated below in Problem 6.

The TCPD will have to triage what cases are investigated and be prepared to accept plea offers at an earlier date.

4.3.4 Recommendations

8. The TCPO should work with the Court to develop one to two meaningful pretrial conferences after the omnibus hearing and a reasonable plea cut-off policy rather than utilizing the omnibus hearing to trigger the suspension of plea negotiations.
9. The TCPD should triage what cases are investigated and otherwise be prepared to accept realistic, informed plea offers when generated.
10. The Superior Court should re-evaluate its Treatment Review Calendar and institute best practices so that the calendar is properly utilized to maximize positive outcomes.

4.3.5 Expected Results

Each case will have many fewer court appearances. Cases will resolve much more quickly. Public confidence in the criminal justice system will increase.

4.4 PROMOTE OPPORTUNITIES FOR CHANGES OF PLEAS

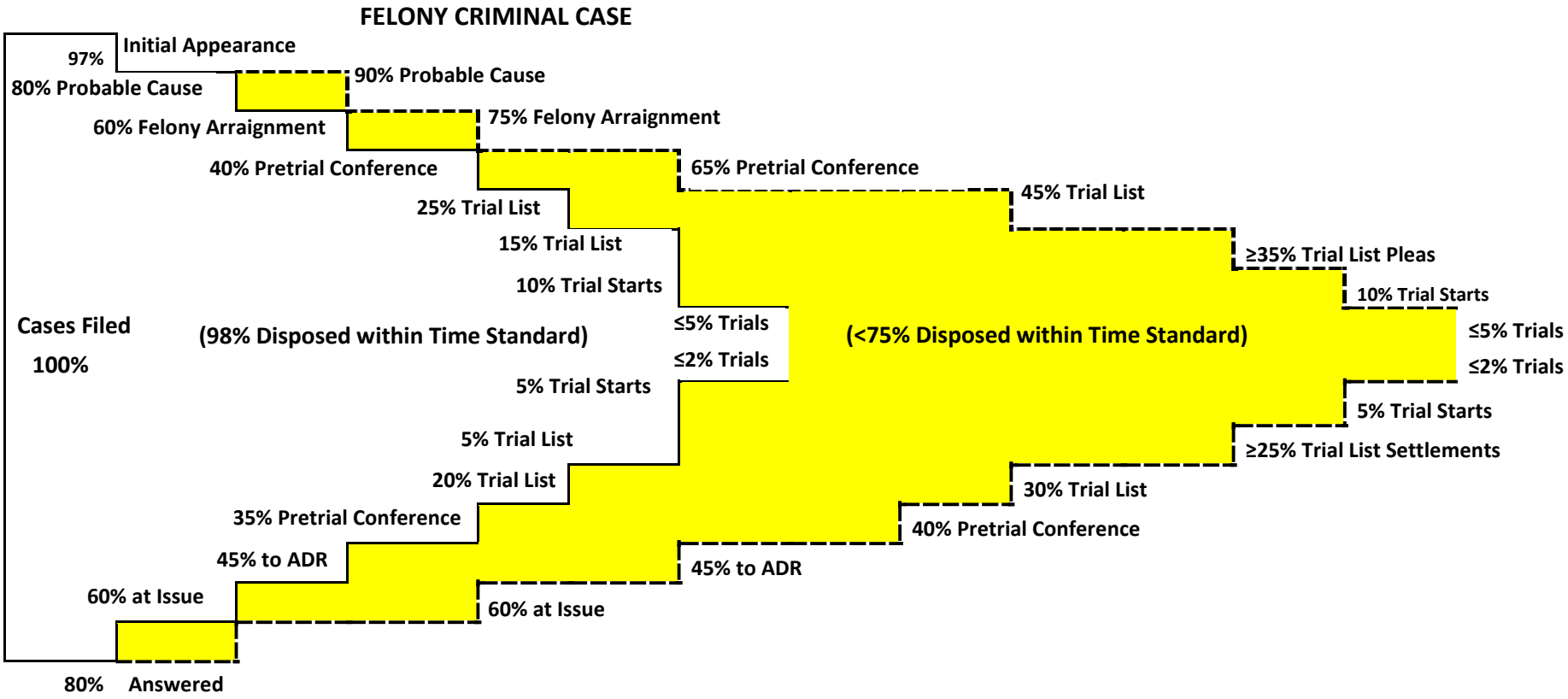
4.4.1 Best Practices: *The concept of the "reverse telescope," depicting the "fallout" (disposition points) of cases in their movement along a caseflow continuum from arrest to trial is a fundamental truth in case processing. The general concept is that cases must drop out of the criminal processing system on a regular basis by virtue of plea or dismissal, with the majority of the cases resolving at an early stage in the process. A good rule of thumb is that 25% reach disposition at the first omnibus hearing; 40% reach disposition at the second omnibus hearing or pre-trial conference; 30% reach disposition at the motions / disposition hearing; 5% are set for trial and 2.5% of those cases are resolved between the motions hearing and the TC/SC calendar. Typically, cases should not be set for trial until the second omnibus setting.*[36]

The current calendar system does not allow for pleas to be taken except on COPAS calendars, which are too limited, on the morning of trial, and on the felony trailing docket calendars on the Mondays when confirmed cases do not actually go to trial and reach disposition. There are a few pleas taken by some judges at other times. It is often the case that pleas can be set one week after the plea agreement has been reached, thus delaying resolution of cases and increasing incarceration time.

[36] The notion of a "reverse telescope" was originally conceived by Professor Ernest Friesen of the California Western School of Law to help conceptualize what happens in criminal and civil cases in view of the fact that less than one case in 20 is resolved by an actual trial. Following Friesen's suggestion, one can observe what occurs to cases once they are filed and see that, with each significant event, a percentage of cases are either settled or dismissed. See National Conference of State Trial Judges, Court Delay Reduction Committee, *Litigation Control: The Trial Judge's Key to Avoiding Delay* (ABA, 1996), p. 12.

"Reverse Telescope" Concept

Visualizing the Impact of Unnecessary Delays on Case Time to Disposition



Legend: = Case progress and court events if no delays = Added time and court events due to delay

4.4.2 Observations

The first omnibus hearing is set a month after the preliminary appearance, which is two weeks after arraignment, for those in custody and five weeks after the preliminary appearance, which is three weeks after the arraignment, for those who are not in custody. These dates are driven by the Supreme Court rule that requires the trial to be set 60 days from arraignment for in-custody cases and 90 days from arraignment in out-of-custody cases. This timetable for omnibus hearings and trial settings is unrealistic and sets up the need for continuances and waivers of speedy trial.

The Supreme Court rule does allow for considerable latitude in setting omnibus hearings and envisions that the work necessary to promote plea agreements will be done in advance of the first omnibus setting. It is commonly understood that hardly any cases will actually go to trial within the 60-day and 90-day timeframes. In the 45-case sample, only one of the 5 cases disposed by trial was completed in fewer than 90 days. The defendant, charged with assault, was found guilty of a lesser offense by the jury.

Superior Court Criminal Rules, RULE 4.5
OMNIBUS HEARING

(a) When Required. When a plea of not guilty is entered, the court shall set a time for an omnibus hearing.

(b) Time. The time set for the omnibus hearing shall allow sufficient time for counsel to (i) initiate and complete discovery; (ii) conduct further investigation of the case, as needed; and (iii) continue plea discussions.

The current policy of the Superior Court is to require counsel to file a notice at least five days before a COPAS calendar to place a plea on the COPAS calendar. If there is space on the calendar during the five days and the TCPD wants to take that space, it must file a motion to shorten time and a notice to set the matter on the calendar. Because these notices are filed with the Clerk's Office, which may or may not address the motions in a timely manner because of workload issues and which address the notices in the order in which they are filed, the notice may be preempted by other motions that the Clerk's Office deals with first. The TCPD does not know whether the plea will be heard until it receives notice that its request has been "bumped." In order to request a setting over the cap, the TCPD must obtain a judge's signature. There is no current attorney-facing setting capacity through Odyssey, so attorneys cannot set hearings on particular calendars when they find an opening.

Of particular importance is that the County Commissioners have approved a commissioner who will hear the preliminary appearances four times a week. This frees a criminal judge for four afternoons a week and should almost double the number of pleas that

can be taken every week. Now, forty-six pleas are taken (ten every afternoon except Mondays, when six are taken) during COPAS hearings. COPAS hearing capacity will expand to fifteen additional pleas per week.

4.4.3 Challenges

Setting cases realistically will require choosing to set various omnibus hearings later.

Establishing a new practice whereby cases are set on a differential basis will require agreements to waive up front the Supreme Court rule on trial settings in many cases.

The TCPO will have to change its procedures and practices consistent with the recommendations under Problem 6.

The judges will have to change to a system whereby pleas are taken at frequent junctures. The ability to take pleas more frequently depends on the calendars being brought under control such that plea time is available, and pleas are expected.

4.4.4 Recommendations

11. The omnibus hearings should be set at a realistic time to allow for the actions contemplated by Supreme Court Rule 4.5 to take place. The dates set ought to allow enough time to complete the necessary tasks, without providing more time than is necessary.
12. The TCPD should prioritize cases for investigation and be more adequately prepared for plea negotiations.
13. Judges should take pleas at arraignment, at the omnibus hearing, at the evidentiary hearings, on the TC/SC calendar, on the morning of trial, and on the felony trailing docket calendar.
14. If the COPAS calendar becomes unwieldy even with the addition of a new commissioner to allow for handling additional pleas, the Court should consider setting smaller omnibus calendars during which pleas can be taken.
15. Trial dates and motion hearing dates should not be set until the omnibus calendar, with appropriate waivers, unless the TCPD or private defense counsel demands that the Supreme Court rule be followed.
16. Odyssey's attorney-facing software capacity for setting cases on designated dockets should be implemented as soon as possible.
17. The Board of County Commissioners should be encouraged to build a least one courtroom at the ARC as part of any jail expansion program. This will allow pleas to be taken at arraignments and defense counsel to obtain needed signatures without having to drive back and forth to the ARC during court calendars. In addition, the

Board should provide sufficient staff and vehicles to the ARC so that inmates can be transferred to the courthouse for hearings and pleas throughout the processing of a case.

4.4.5 Expected Results

Cases will begin resolving at much earlier dates, and the age of cases will decrease. Calendars will decrease in size thus allowing for pleas to be taken at every court appearance. Clerks will reset many fewer cases. The jail population will decline and fewer inmates will be brought to court. Fewer cases will be set for trial. Fewer trials will be continued. Judges and all other criminal justice stakeholders will have more time to do meaningful work.

4.5 GUARANTEE FIRM TRIAL DATES

4.5.1 Best Practices: *A court's ability to hold trials on the first date they are scheduled to be heard (trial date certainty) is closely associated with timely case disposition. Effective caseflow management systems create an expectation of timeliness by providing credible events and dates.*

There is little likelihood that trials will take place at either the first or subsequent settings. Commonly, problems in the criminal pretrial process include overcharging, ineffective plea negotiations, lack of timely discovery, unprepared lawyers, or a combination of those factors. These situations cause cases to languish in the caseflow system to the day of trial, only to be resolved by a negotiated plea. For Thurston County, it means a greater level of justice system resources (i.e. judges, lawyers, staff, jurors, etc.) are consumed by the litigation process up to and including trial settings than in many other courts.

4.5.2 Observations

As many as ten cases declare ready for trial at the TC/SC set the Wednesday before each trial week. As the system can only handle two trials (although possibly three or four if one or two of the civil trial judges hear criminal trials), all but two to three cases should have reached disposition before the Wednesday before the trial week.

Even some cases that declare ready for trial often do not actually go to trial because of unavailability of witnesses, unavailability of attorneys, plea agreements, or dismissals.

According to the TCPO data, their office brought 47 felony cases to trial in 2016 and according to the Court's data, 49 cases when to trial during 2016. As there are approximately 46 trial weeks per year, the two criminal trial judges can handle about 92 trials per year. Although some trial space is taken by trials to the Court, only somewhat more than half of the trial weeks are used, yet many cases are continued. The underutilization of trial weeks is clear evidence of poor caseflow management.

4.5.3 Challenges

Monitoring and analyzing canceled trial settings will need to routinely take place so data can be gathered on underlying reasons for cancelations. AOC data for CY 2016 show 110 calendar conflicts, but do not identify the proceedings.

Back-up judge reserves need to be established to ensure trials are not canceled due to a lack of court resources.

4.5.4 Recommendations

18. The Court should adopt a firm continuance policy, publicize it as a local rule in the form of a resolution signed by all judges, and consistently apply it.
19. Judges must be willing to deny motions to continue trials unless the motions comply with the Court's continuance policy even if the defense attorneys waive speedy trial. This may be painful at first but counsel will soon appreciate the fact that continuances will not be allowed.
20. Data on continuances and plea agreements occurring on the day of trial should be developed and kept. Continuance data should include who requested the continuance, what reasons were given, whether opposing counsel objected or not, for how long the continuance was granted and who granted the continuance. Plea agreement data should include whether the plea was offered earlier and refused or whether the plea was substantially different than any previous plea offer.
21. Every 2-3 months, summary information on all granted continuances and on the date of trial, should be disseminated to all judges

4.5.5 Expected Results

All but a few trials will be heard on the first date scheduled. Wasted judge and court staff time will be diminished. Time by lawyers preparing for trial will be well spent.

4.6 DEVELOP PROSECUTION CASE MANAGEMENT POLICIES AND PROCEDURES

4.6.1 Best Practices: *In high performing, multi-attorney, urban-based prosecution offices, policies and procedures regarding overall case management and discretion are characteristically in place. These policies generally include guidelines regarding initial reasonable charging, early and complete investigations, discovery management, plea agreements, and assessment of cases for trial.*

According to the National District Attorney's Association, there are no standards governing prosecutor office organization or individual policies. As such, because the chief

prosecutor has the authority and discretion to decide how an office will be organized and to establish policy, each office varies greatly across the country.

In dealing with large urban courts and their prosecution offices, the National Center has found that where a range of office-wide policies exist to guide deputy prosecutors, there is more predictability and equity in how cases are handled by them. This, in turn, creates a more open communication climate with defense counsel, hastens discovery exchange, promotes earlier plea agreements, and reduces continuances.

4.6.2 Observations

Although the deputy prosecutors in the TCPO are well meaning and hard working, they reportedly operate quite independently without reference to any policies and procedures governing their core duties as prosecutors. Although this report also lays out the contribution of the Court and the TCPD in causing needless delays in the system, the absence of TCPO policies and procedures contributes substantially to that problem as well.

There are no charging guidelines that were provided to the project team. The widespread view by many participants in the criminal justice system is that the TCPO overcharges and that charges are inconsistent across deputy prosecutors. One example provided was that one deputy might add bail jumping charges to a charging document if a defendant fails to appear in court but calls in quickly to explain his absence and another deputy might not do so concluding the behavior does not justify such a charge. One deputy might file a charge of residential burglary when a man violates a restraining order by living with his alleged victim on a consensual basis, and another deputy will charge only the violation of the restraining order. In other words, the conduct is treated as a serious felony rather than a misdemeanor. The TCPO does not enter and analyze any data regarding charging practices.

The failure to investigate cases early and rigorously causes deputies to make plea offers that are typically unacceptable to the defense. A seasoned defense attorney who knows that some cases will fail late in the process because of inadequate investigation or because of an uncooperative witness has substantial incentive to wait.

The Prosecutor believes that his discovery delivery process is automatic, automated, and complete. The defense bar does not agree. Their experience is that there is no check sheet or tracking document that lists all discovery in a case so they can ascertain whether they have everything. They find that in many cases discovery is incomplete. For example, the existence of a video or statements may become apparent when defense counsel reads the discovery, but they must then make a special request for items referenced in documents that have not been disclosed. Some discovery is in paper form and some in electronic form. Delay in case resolution occasioned by discovery issues is common.

There are no guidelines for plea agreements. The Prosecutor believes in case management autonomy for his deputies. Although this may sound good in theory, in practice autonomy leads to large-scale plea agreement inconsistencies across his deputies. This is an issue of justice and fairness. If one defendant receives a plea offer from one deputy that varies markedly from the plea offer made to another defendant for the same conduct under similar circumstances (including prior crimes and risk and need assessments), the system is inherently unjust. Most prosecutor offices have guidelines or grids that establish the norms and expectations of the office regarding plea agreements.

Plea offers improve over time. Accordingly, many defense attorneys wait to see how much the plea offers improve as the case progresses, thus delaying cases.

The Prosecutor believes his deputies make offers at arraignment in all but the most serious cases. Data kept by the TCPD in recent months show that, on average, deputies make offers in only about 40% of the cases. Although the TCPO may dispute this data, it is clear that deputies do not make offers in a significant percentage of cases.

The TCPO has a policy terminating plea negotiations once the omnibus order enters. The purpose of the policy, purportedly, is to allow deputies to pivot toward trial preparation. Such a policy ensures repeated continuances of the omnibus hearings as the parties continue to negotiate. It is also not true that plea negotiations are discontinued after the entry of the omnibus order because 73% of cases in the data sample reached a non-trial disposition after the last omnibus hearing.

Based on TCPO data provided to the NCSC team, only 2.3% of cases overall go to trial, many more cases are still set for trial the week before the trial week. As such many trials are continued, despite the fact there are somewhat less than twice the number of trial weeks available to try all of the cases that eventually go to trial, again based on the TCPO's data.

Based on data provided by the Superior Court Administrator, approximately 50% of trials end in not guilty findings or guilty findings to lesser charges. The NCSC consultants contend that lack of supervision of deputy prosecutors and ineffective pretrial conferences contribute to poor-quality decisions regarding which cases to take to trial. This, too, leaves many cases set for trial that should have reached a plea agreement.

4.6.3 Challenges

The Prosecutor has strongly-held beliefs regarding autonomy.

The culture of the TCPO is one in which the attorneys act independently.

The TCPO does not value consistency in charging or in resolving cases.

The Prosecutor believes that continuances are primarily driven by the defense.

4.6.4 Recommendations

22. The TCPO should develop policies and procedures that ensure fair and consistent charging.
23. The TCPO should develop a policy whereby cases are analyzed within two weeks of arraignment to determine whether additional investigation is necessary. Cases should be analyzed in tandem with a supervisor or more experienced deputy.
24. The discovery delivery system should be overhauled to include a check sheet that includes a list of all discovery in the case so that defense attorneys can see what is being delivered and is not yet delivered. Deputies should be required to read the discovery before it is delivered to make sure there is no additional discovery items embedded in the documents. The discovery should be entirely electronic. Other counties nearby have systems that could be copied.
25. The TCPO should invest considerable time in developing guidelines for expected plea offers under various circumstances in order to ensure fairness, consistency, and ultimately justice to defendants. Obviously, strict adherence to guidelines would create its own arbitrary results, but they provide a place to start and greater assurance of consistency. Such guidelines are readily available.
26. Absent problems with such matters as DNA analysis or mental incompetence of defendants, there is no reason that appropriate, case ending plea offers cannot be made within thirty days of arraignment.
27. The policy of terminating plea negotiations if an omnibus order enters should be abandoned. As highlighted in the section 4.4.1, only 2.5% of cases should remain set for trial the week before trial. Pleas entered at various junctures will regularly remove cases from the calendar resulting in the right number of cases remaining set for trial.
28. The TCPO should insist all prosecutors must e-file without exception. Some still carry paper to the Clerk's Office because they are in the courthouse and it is convenient to do so. Paper filing is much more inefficient and runs counter to purposes of the new Odyssey case management system and any future prosecution module that will be added.

4.6.5 Expected Results

Charging policies will be consistent and fair across defendants. Defense counsel will receive the discovery they need in a complete and timely manner. Realistic, consistent, and fair

plea offers will be made at an early stage in the proceeding. Defense counsel will develop trust that offers will be realistic, consistent, and fair at the outset and will not improve over time. Cases will drop out of the system earlier such that only those case that are actually going to trial will still be set for trial the week of the trial date. Deputy prosecutors will have substantially more time to investigate cases and do their work if they are not in court constantly participating in omnibus calendars that produce no meaningful movement in their cases. There will be dramatic reduction in the length of time cases stay in the system before resolution. Public anger with the current system that requires frequent court appearances with no apparent activity that moves the cases forward will decrease, and public confidence in the DAO will increase.

4.7 EVALUATE BRINGING DEFENSE INVESTIGATIONS IN-HOUSE

4.7.1 Best Practices: *Investigations should be requested when it is likely that such inquiries by the defense will improve the favorability of a plea settlement or improve chances for a favorable outcome at trial.*

Criminal defense investigation is an important aspect of competent representation and a normal component of urban public defense offices. It is through such investigations that a defense attorney can learn necessary and relevant information about a case and verify/validate the work done by investigating law enforcement agencies. Investigators locate and interview witnesses, gather case-related information, review discovery, examine crime scene evidence, secure experts, and prepare exhibits to aid defense attorneys.

When interviewed in January 2017, the previous Director of TCPD asserted that his policy has been to conduct an investigation in almost every case. In doing so, the TCPD Director relied on a case called *State v. A.N.J.*, 168, Wn. 2w91 (2010), stated as follows:

> *Duty to investigate*: *Counsel maintains a duty to investigate the facts in order to assist a client in making an informed decision about a plea agreement, even when the client is prepared to confess to a crime. Investigative costs should not be paid out of the public defender's own fees because such arrangement creates a financial disincentive for the attorney to do any investigation.*

In fact, recent data shows that he was not approving investigation in almost every case. In CY 2016, the TCPD was assigned to represent 2149 adult felony cases, many of which were assigned to private contract counsel. The TCPD Director assigned/approved 538 investigations out of those 2149 cases, which equates to 25 percent of all cases. This is consistent with national standards. Although the cost of the investigations has risen in the past year, felony filings also increased by 13 percent. It is unclear whether this is a brief anomaly or the beginning of a more lasting trend.

4.7.2 Observations

A new Director of Public Defense will soon be appointed, and it is unknown what the policy regarding defense investigations may be in the future, but it is unlikely that he or she will order investigations in less than 25 percent of the cases.

The TCPD has no in-house investigators. As such, it hires outside private investigators for the Office and for assigned private counsel. Although the TCPD Director controls the number of hours and scope of the investigation, investigators have multiple clients so that availability is always an issue and can cause continuances and delays.

4.7.3 Challenges

The current Board of County Commissioners has expressed displeasure with indigent defense investigative costs. The TCPD will be obliged to make the case for procedural due process for indigent defendants.

4.7.4 Recommendations

29. The TCPD has provided data regarding the percentage of cases for which investigations have occurred. The percentage appears appropriate and consistent with national norms.

30. All investigations are currently being performed by independent investigators pursuant to specific orders issued by the Director of the TCPD regarding scope and hours. The use of independent investigators has been identified by all criminal justice stakeholders as a significant cause of delay in case processing because the TCPD has no control over their availability or the pace of their investigations. The oversight and control over investigators needs to be strengthened.

31. Based on a review of investigative cases, the Director of the TCPD should determine whether it would be more cost effective to fund in-house investigators for the TCPD. Using the number of hours determined to be necessary for investigations during a typical year, the costs that would be charged by private investigators can be compared with the cost of hiring in-house investigators to cover those hours. In addition, the value of control over the availability of the in-house investigators and over the pace of investigations should be factored into the conclusion regarding the use of in-house investigators.

4.7.5 Expected Results

If the data supports hiring in-house investigators or a mix of in-house and private investigators, the TCPD should have easier, quicker access to investigators. The investigator's performance will be more effectively monitored and evaluated. Although costs may not be

reduced, the delays caused by the use of private, independent investigators can be reduced thus reducing costs to the overall criminal justice system.

4.8 INCREASE PUBLIC DEFENDERS; REDUCE ASSIGNED DEFENSE COUNSEL

4.8.1 Best Practices: *A Public Defender's Office should have a sufficient number of lawyers to handle all the cases except for those in which there are multiple defendants or a conflict of interest with other clients.*

Washington State has limited the number of cases that an individual public defender may handle each month. As such, if the number of cases coming into the TCPD's office each month exceeds that cap, the office must assign the additional cases to their contracted private counsel.

The TCPD believes that it cannot supervise private counsel because of the danger that such counsel can make the argument that they are state employees as presented in *Dolan v. Washington*. Because the Court is somewhat permissive toward lawyer-initiated case delay and is restrained in demanding assigned private counsel meet certain case processing standards, no one is supervising them.

4.8.2 Observations

Data regarding a 45-case random sample of recently closed felony cases show that both client-retained private defense counsel and government-appointed private defense counsel (i.e. panel attorneys) stipulate to more continuances or strike more court events than public defenders.[37] This is true both in total number of continuances and continuances per case. Three client-retained private defense lawyers continued 30 events or an average of 10 "delays" per case. Twenty government-appointed private defense attorneys continued 95 events; an average of 4.7 postponements per case. Twenty-two public defenders continued 82 events for an average of 3.7 continuances per case.

A more extensive study done by the National Bureau of Economic Research contends public defenders operate at a much higher standard than assigned private defense counsel.[38] The study concluded that lawyers paid by the hour are less qualified and let cases drag on even as they achieve worse results for their clients, including sentences that are longer.

Although many government-appointed defense counsel are drawn to such work

[37] Court events include omnibus hearings, motion hearings, status conferences, competency evaluations, pretrials, changes of plea, and sentencings.

[38] *An Analysis of the Performance of Federal Indigent Defense*, *Radha*, Iyengar. NATIONAL BUREAU OF ECONOMIC RESEARCH

because of a sense of duty to indigent defendants and do fine work, the low hourly rate for assigned counsel often attracts lawyers who may not be doing well in their practices or who are new to the profession. There are likely many other possible reasons for the differences in performance, too. Salaried public defenders generally handle more cases and have more interactions with prosecutors, meaning they may well have a better sense of what they can hope to negotiate for their clients. Government employed, salaried defense lawyers also tend to have superior credentials and more legal experience in criminal defense work, and those factors probably result in better performance. Salaried lawyers have no incentive to spend more time on a case than it deserves and may run up their bills. Per hour, appointed lawyers also tend to cost government funders more than salaried public defenders do. Largely for these reasons, public defender systems have been developed in most states.

The TCPD assigns private counsel rather than the Court doing so. This takes time away from representation and other appropriate TCPD work.

The TCPD reports using significant staff time fielding complaints from defendants about their assigned private counsel.

4.8.3 Challenges

The County Commissioners may not want to expand the TCPD.

4.8.4 Recommendations

32. The Board of County Commissioners, through independent empirical research, should (1) determine the mean costs of felony cases handled by the TCPD and assigned private defense counsel, (2) determine the difference between the length of time cases remain in the adjudication system as between the TCPD and assigned private counsel, and (3) determine any other differences that affect cost and quality of criminal defense services provided to the Superior Court.

33. Should it be determined the overall quality of defense services will improve and costs will go down, or at worst, stay the same or slightly increase, by expanding the number of TCPD lawyers, the County policymakers should take steps to provide adequate TCPD resources.

4.8.5 Expected Results

The criminal justice system participants will be less frustrated by the delay occasioned by assigned private counsel. There will be less delay in the case processing system. The criminal justice system participants will experience greater consistency and quality across indigent defendant cases. The County Commissioners will receive better value for the criminal justice

dollars. The TCPD will stop spending hours every week fielding complaints about private counsel. Criminal defendants will receive better, more prompt service.

4.9 TRIAGE AND DIFFERENTIATE CASES

4.9.1 Best Practices: *The filing of each felony case should trigger an effort by the Court to identify its complexity and the likely time and effort on the part of the Court to resolve it without damaging the rights or interests of the litigants. This includes the effective use of diversion programs, placing cases on pathways, tracks or calendars based on their legal, procedural and factual complications, and determining what resources may be needed to conclude the case. Often, such an approach requires remaking Court rules, procedures, and business practices to trigger closer and more effective review of cases at the very beginning of the adjudication process.*

The triage/DCM premise is simple: Because cases differ substantially in the time required for a fair and timely disposition, not all cases make the same demands upon judicial system resources. Thus, they need not be subject to the same processing requirements. Some cases can be disposed of expeditiously, with little or no discovery and few intermediate events. A second portion of felony cases often reach disposition after one or two pivotal issues are resolved (e.g. suppression motion). And a few may involve more protracted issues and procedures including extensive court supervision over pretrial motions, scheduling of forensic testimony and expert witnesses, and settlement negotiations. Early case screening or triaging a case enables a court to prioritize cases for disposition based on case complexity, likely time to disposition, prosecutorial priorities, age or physical condition of the parties or witnesses, and local public policy issues.

Inherent in this tripartite model is the recognition that many cases can—and should—proceed through the court system at a faster pace than others if appropriate pathways are provided. Under a triage/DCM system, cases do not wait for disposition simply on the basis of the chronological order of their filing. [39] In many ways, such an approach complements the underlying rationale used in establishing the Washington State and ABA/NCSC time standards mentioned earlier in this report.

4.9.2 Observations

The Thurston County Superior Court does not use a Triage/Differential Case Management system to process felony cases. Rather, all cases are processed along a single

[39] Bureau of Justice Assistance, *Differentiated Case Management*: Implementation Manual, 1993.

pathway in which they may suffer from many continuances whether they are simple or complex. Complex cases may even accumulate more continuances.

Mental health cases are especially delayed for many reasons; it can take months for defendants to be accepted into the Mental Health Court in the County, which is supervised by a District Court judge. Defendants can be referred by anyone in the system to the Mental Health Court Supervisor (MHCS). In order to pursue the case, the MHCS must obtain a release from the defendant and then refer the defendant for a diagnosis and obtain the consent of the TCPO. If the defendant has been in treatment with the local community mental health center, obtaining the diagnosis is a simple matter. If not, the process of getting a diagnosis can be time consuming. Obtaining consent or refusal from the TCPO is difficult. Some deputies are very responsive. Some respond but tell the MHCS that they are not ready to decide; some do not respond at all. After she obtains consent, the MHCS must complete a risk/need assessment regarding whether there is a likely nexus between the mental health diagnosis and the criminal conduct, whether the defendant is amenable to treatment, and whether he or she would benefit from treatment. Then the Mental Health Court team staffs the case and decides whether to accept the defendant.

In some cases, the felony is "down filed," meaning that the TCPO amends the charge to a misdemeanor or suspends the felony pending successful completion of the Mental Health Court program. It can take weeks to get into Superior Court to accomplish this task. The average time from referral to entry is typically 60 days. As such, people with mental illness spend much more time in jail than is reasonable especially if their criminal conduct is directly related to their illness. The timeline is completely incompatible with best practices for Mental Health Courts, which usually recommend 20 days.[40]

A few years ago, the TCPO commissioned a study and report on differentiated case management that was done by the Criminal Courts Technical Assistance Project (CCTAP) at American University.[41] In 2009, the TCPO received the CCTAP proposed plan for felony case processing and he subsequently developed tracks for a pre-assigned court track, a complex case track, a standard track, a mental health track, and a substance abuse track. No expedited track was developed. The Prosecutor supports a Triage/DCM plan as do the judges, but the mechanics and logistics have not been put in place.

4.9.3 Challenges

The Prosecutor has had the CCTAP plan for three years but has not instituted it to date. It is inconclusive as to whether it is a priority to accomplish in the immediate future.

[40] Resources for Mental Health Courts can be supplied by the NCSC team upon request.
[41] CCTAP was a project funded by the U.S. Department of Justice's Bureau of Justice Assistance (BJA). The project and funding are no longer in existence.

Although the Presiding Judge has generally given her approval for developing the Triage/DCM system, she is relying on the Prosecutor to develop the plan. There appears to be some confusion around instituting a plan at present.

In order to make the process of admitting defendants in the Mental Health Court consistent with best practices, the criminal justice system will need to make significant major changes in the process, whether the system as a whole embraces a Triage/DCM case management approach or not.

In order to implement the Triage/DCM plan, substantial changes must be made in the current system, which will require involvement of the courts, the TCPO, and TCPD. The plan will require a great deal of work that must be done collaboratively. A task force must be established to do this work.

4.9.4 Recommendations

34. A task force including the TCPO, TCPD, the Court and all other stakeholders should be assigned the duty of developing a Triage/DCM system.
35. The Triage/DCM plan should be developed in tandem with the overhaul of the case flow management system for the entire jurisdiction. It cannot be done in isolation.
36. Regarding the Mental Health Court, the policies and procedures should be changed in the following ways:
    a. The TCPO should have a specific period of time to object to a defendant's entry into the Court after which it is deemed to have agreed.
    b. The change in plea and down-file should occur in District Court.
    c. The MHCS should have authority to perform the screening and assessment as she has the credentials to do so. If the defendant is a client of the local community mental health center, she can obtain the diagnosis from that agency.
    d. The District Court, which controls the Mental Health Court, should consider having the MHCS supervise defendants under consideration for the Mental Health Court, rather than having pre-trial services do so, so that she can provide appropriate supervision for persons with mental illness and keep track of them pending entry.
    e. The District Court should also empower the MHCS to receive training from the NCSC and/or NDCI on procedures and outcomes.

4.5 Expected Results

Appropriate simple, routine cases will move through the system much more quickly. More complex cases will be set for hearings properly rather than being set as standard or expedited cases. Setting complex cases with others results in an inordinate number of continuances and many hearings are meaningless. Mental health cases can move through the system more expeditiously, and defendants with mental illness will spend less time in jail.

4.10 INCREASE SUPERIOR COURT SUPPORT STAFF

4.10.1 Best Practices: *In urban general jurisdiction courts the ratio of non-judicial, chambers-support staff to judges is generally 1:1; Thurston County's ratio is 1:2. Each Superior Court judge should have at least one full-time judicial assistant, who can assist the judge and who is accessible to counsel and unrepresented defendants.*

General jurisdiction judges largely work in isolation even in urban, multi-judge courts with master calendar assignment systems such as exists in Thurston County. Case management is complicated and largely lawyer-dependent in these courts. And in high stakes criminal matters, lawyers make variable requests at unpredictable intervals on judges for decisions on such things as motions and plea agreements and on calendaring personnel for scheduling.

Since the 2008 recession, Superior Court judges have had to share judicial assistants. The current judicial assistants work on the master trial calendar, set up mandatory arbitration, and handle numerous other clerical and logistical matters such that they have no time to directly support their judges or interact with the Bar.

4.10.2 Observations

A few judges are content with the Bar having no access to judicial assistants because they believe that the former system, which allowed access, permitted some lawyers to receive favorable treatment. They were also concerned that the judicial assistants were excessively occupied with telephone calls and special requests. These judges value the strict organization of calendars with less opportunity for flexibility. Other judges lament the lack of access to judicial assistants and believe that the former system was more flexible and more responsive to attorneys and to the public.

Regardless of philosophy, the judges do not have sufficient staff to provide them with even the basic support they need. In the criminal area, judicial assistants do not have time to keep track of which jail inmates do not need to be brought to the courthouse or communicate with lawyers regarding the need for a scheduled hearing. Civil trial judges have no one to pull motions, responses, replies and other relevant documents and organize them.

Although typically the Clerk's Office sets and reset cases, the inaccessibility of judicial assistants prevents lawyers from requesting immediate action or filling up calendars where hearing slots are available. As such, the lack of staff makes the calendaring system much less flexible and responsive to the needs of lawyers and litigants, and contributes to unnecessary delay.

The judicial assistants have no time to inquire of lawyers about their plea settlement status, trial status, or other matters. Periodically checking the circumstance and progress of pending cases through intermediate contact prior to formally scheduled court proceedings increases the preparedness of lawyers and litigants, and, therefore, boosts early case dispositions.

4.10.3 Challenges

The County Commissioners may not wish to increase their budget to add four more judicial assistants and allocate appropriate space for them.

Some judges do not like the flexibility that comes from access to judicial assistants and prefer a formal calendaring process.

4.10.4 Recommendations

37. The judicial support staffing level in the Superior Court has fallen below what is reasonably necessary to run an efficient criminal and civil calendaring system in an urban, multi-judge general jurisdiction court. A great many tasks go undone or partially done, which leads to inefficiency and inflexibility in the case processing system. Accordingly, each Superior Court judge should have a judicial assistant.

4.10.5 Expected Results

The Superior Court will operate in a more streamlined fashion, and cases will progress through the system more quickly. Judicial assistants will not feel so overwhelmed by their duties. The Superior Court judges will get the support they need to perform their duties more effectively.

4.11 DEVELOP ACCURATE, TIMELY, USEFUL CASE MANAGEMENT DATA

4.11.1 Best Practices: *Effective caseflow management for individual judicial officers in managing their dockets and for a court as an institution in assessing, monitoring and correcting unnecessary delay in the overall pace of litigation requires timely, complete, accurate, and useful data. To this end, a court's information system, whether digitized or not, must deliver correct operational statistics to the right people, at the right time, and in the right format.*

There is a significant need for useful, analytic information regarding the pace of case processing that can be used in actionable ways by the Superior Court to diagnose delay problems and develop improvement options. Routine Washington AOC statistical information and reports tend to be broad in their current format and not particularly useful for case management purposes regarding such data as elapse times between major events, age of pending caseloads by case types, and continuance tracking. One-off reports can likely be created through the new, developing Odyssey CMS, so there may be the possibility of producing more meaningful operational data on a reoccurring basis.

Most trial courts need better performance data to monitor the pace of litigation. It is often difficult to produce, however, since the original design purpose of traditional case management systems is to automate the results of judicial and staff decisions and actions. Even as CMS systems have been increasingly upgraded to computerize business processes involving routine clerical tasks in managing cases and to e-file documents and integrate the flow of data with other justice system partners, monitoring the progress and movement of cases from one adjudicatory proceeding to the next has not been seen as a critical need.

The use of new analytical software applications to help judges and court system leaders better manage individual caseloads as well as assess court-wide operations is only now beginning to surface in more robust and useful formats. According to Tyler Technologies, the parent corporation that developed Odyssey Case Manager® software for trial courts, their web-based package will provide both standard real-time reports include caseload data information, caseflow statistics, event activity, and time standards. One-off caseflow management reports reportedly can also be produced using Microsoft® SQL Reporting Services. According to Tyler promotional materials, once fully implemented the Odyssey will also be able to provide case performance data on NCSC's four case processing CourTool measures: case clearance, time to disposition, age of active pending caseload, and trial date certainty.

4.11.2 Observations

Odyssey standard and custom case management reports will be better than SCOMIS statistical reports.

Currently, basic Odyssey Case Manager software is operational in Thurston County Superior Court, yet the standard caseflow information NCSC usually seeks in criminal caseflow studies (i.e. CourTool measures, continuance data) and Odyssey says it provides, is seemingly not available in useful formats at the trial court level.

4.11.3 Challenges

Because the superior courts in Washington State operate differently with somewhat different case processing systems; data entry, event coding, and data definitions may continue to present problems even with the Odyssey system.

4.11.4 Recommendations

38. The Court should strive to implement a data collection and analysis system to determine the status quo across all desired metrics and to pinpoint delay points and bottlenecks to verify whether progress is being made toward achieving desired case processing goals. For example, such data should identify judges that are not complying with the continuance policy, whether the number of continuances is dropping, and whether cases are unnecessarily languishing on calendars and dockets.

39. The Clerk of Court should work with the State to develop specialized codes and definitions that are used consistently statewide in order to establish and maintain data integrity.

40. A criminal justice system that cannot measure itself objectively through timely, accurate, and useful statistical data is a system that cannot substantiate whether it is making progress toward change and one that can easily slip into continual delay difficulties. Superior Court leaders should confirm that adequate Odyssey criminal caseflow data is available and in a format local presiding judges and trial court administrators can use easily and effectively.

4.11.5 Expected Results

The criminal justice system can establish its status quo and measure its progress toward common goals. It can monitor the change process over time.

4.12 IMPROVE PRISON INMATE ACCESS TO THE COURT

4.12.1 Best Practices: *Inmates committed to a department of corrections should be afforded reasonable access to the courts. No inmate should be prohibited or discouraged from filing a civil action or appealing a civil or criminal judgment unless such filings have been concluded by the court to be vexatious.*

Prison inmates who file civil motions are allowed to appear by telephone automatically without having to file motions. The Attorney General is obliged to communicate with the prisons and set up the telephonic procedure. Appropriate, scheduled time is set on the Court's

calendar for the telephonic hearings. If the inmate is released, the hearing should go forward on the telephonic docket.

4.12.2 Observations

Currently, inmates are required to file motions for telephonic appearances at least a week before the calendar on which they have been set. Some inmates do not file because they are unaware of the procedure since it is a local, not state, rule. Some may not have the mental capacity to do so. The inmates are required to mail the motions because they have no access to Odyssey, which causes a delay.

The judges are inconsistent about whether they will entertain the complaint if the rule is not followed. Some judges continue the hearing if the motion is not filed in a timely manner. On occasion, the assistant attorney general in charge of the case is not informed of the continuance. The Attorney General's Office experiences a high level of frustration over the current system.

Sometimes, the assistant attorney general files the motion for telephonic testimony just to ensure it is filed. The attorney then arranges for the telephonic appearance with the prison.

If the inmate is released before the hearing, he or she is reset on another calendar for defendants out of custody. Very few inmates are released pending hearing.

4.12.3 Challenges

Some judges believe that rules should be developed around each type of hearing or calendar and then followed regardless of whether the rule matches the needs of the litigants or the lawyers.

4.12.4 Recommendations

41. Motions filed by prison inmates should be set for hearing. The order for hearing should state that the inmate shall appear by telephone from his or her prison facility, without any requirement for a motion. The order should also state that, in the event that the inmate is released before the hearing, he or she should appear on the date and at the time scheduled.

42. The assistant attorney general should continue to be responsible for setting up the telephonic appearance for the inmates at the prison.

43. No continuances of the calendar should occur, unless the inmate is unavailable.

4.12.5 Expected Results

Dispensing with the requirement that inmates file motions will make the processing of inmate complaints and motions simple and smooth. No continuances will be required.

5.0 EPILOGUE: SOUND FELONY CASEFLOW MANAGEMENT

It is clear from over 40 years of research and experimentation that courts that are willing to apply proven techniques in managing felony cases can achieve clear results in the reduction of delay. This is especially so in jurisdictions where there is (a) active court leadership within the local criminal justice community; (b) broad support and commitment by judges and other key stakeholders; (c) regular communication from court leaders to other key stakeholders; (d) regular education and training; and (e) ongoing attention to creating and maintaining external support from the public and state and local governments.

Of particular importance in following these guidelines is what we label *courageous leadership* by the Court. In our opinion, it is the single most important and crucial ingredient for productive change which is why we began this report with an emphasis on the Doctrine of Judicial Responsibility, which is essentially the moral and judicial duty of the Third Branch in our tripartite, democratic system of government to ensure unbiased, fair, efficient justice concerning any criminal accusation filed in a court of law. In this respect, we feel it is important to conclude our report and advice on felony caseflow improvement in Thurston County by reemphasizing that underlying precept.

Courageous court leadership is necessary to honestly diagnose problems and face brutal facts that may surface where processes and operations are determined not to be going well. It is necessary in searching for solutions, in spite of the conflict that will be generated by those attached to the status quo. It is not the exclusive province of those in authority; authority is not necessary to lead courageously. It involves the ability to harness the energy released through conflict to discover and invent new solutions. It requires the willingness to openly and honestly consider the pros and cons regarding suggested changes. And, it is founded on the ability to act with integrity and candor while resisting the urge to demonize others who may disagree.

Finally, we believe the judges and staff of the Superior Court, as well as the justice system stakeholders in Thurston County and at the Washington State Administrative Office of the Courts, are capable and earnest in their desire to improve felony caseflow in ways outlined in this report. In doing so, the National Center is always available for guidance and help.

6.0 COURT AND JUSTICE SYSTEM FUTURE DIRECTIONS

Oftentimes in complicated caseflow studies such as this one, the National Center conducts an on-site retreat or workshop for court leaders to review a report, and begin planning possible case processing improvements. A day-long retreat was held on May 15, 2017 at the Lacey Community Center.

6.1 SUPERIOR COURT RETREAT

At the retreat, the findings and recommendations in the Report were examined and the participants began strategizing about future directions. The NCSC project team prepared the agenda and facilitated the discussion.

All Superior Court Judges were present as well as the Superior Court Administrator. The participants openly dealt with their perceptions, frustrations, and opinions while brainstorming together ideas for change.

In complex systems such as calendaring felony cases, there is no one right way to structure changes. There are a variety of different approaches as long as they are vested in proven case management techniques. The judges expressed that they felt the retreat met their expectations and hopes. National Center consultants also concluded that the retreat was a successful first step toward developing a vision and initial ideas toward a more efficient and manageable felony case processing system.

6.2 JUSTICE SYSTEM STAKEHOLDER MEETINGS

An important feature in building more effective scheduling patterns, however, is to first ensure the stakeholders (principally the justice system policymakers) have an opportunity to gain a shared appreciation of the problems encountered throughout the system and the range of solutions. To that end, the Court distributed the Final Draft Report prepared for the retreat to the major County justice system agencies, including the Board of County Commissioners, the Thurston County Prosecutor and the Acting Director of Thurston County Public Defense shortly prior to May 15.

Also, the NCSC consultants met with the TCPD Acting Director and his Interim Felony Unit Lead for breakfast the day of the retreat and with the Prosecutor and his new Chief Criminal Deputy for dinner following the retreat. These meetings were structured to answer any questions the leaders in both offices had about the Report. The meetings, NCSC concludes,

were very promising and reassuring in respect to the Report's findings and conclusions, and quite supportive concerning the possibilities of change.

6.3 GENERAL CONCENSUS AMONG THE JUDGES

Based on the perceptions of the National Center consultant team at the conclusion of the Court retreat, the Superior Court Judges agreed upon a series of principles and values to guide Court directions toward improving overall felony caseflow. There was unanimous support toward undergirding any and all calendar reforms upon the Court's overarching mission to assure fairness, justice, and access for all participants involved in felony adjudication processes. Also, there was undisputed agreement that unnecessary delays do not serve the ends of justice.

There was general consensus on a number of important case flow management fundamentals, including the following:

6.3.1 Doctrine of Judicial Responsibility

The Court will embrace the Doctrine of Judicial Responsibility and make it clear to stakeholders. All decisions regarding case flow management shall flow from this principle.

6.3.2 Omnibus Hearings

The Court will change the way omnibus hearings are handled. The Court will set the omnibus hearing early in the process and enter an omnibus case management order at the first hearing, or in rare cases, the second hearing.

6.3.3 Pretrial Conferences

The Court will set an additional hearing (called a pre-trial conference or other equivalent name) several weeks after the omnibus hearing to determine that the parties have complied with the omnibus order and that the case is progressing toward resolution. The Court will have an active role in developing the omnibus order and in evaluating adherence to the order.

6.3.4 Criminal Hearings

The Court will restructure criminal hearings to make more meaningful use of them.

6.3.5 Reduced Continuances

The Court will restrict criminal calendars, assure that hearings are more meaningful, and reduce the number of continuances and hearings.

6.3.6 Continuance Policy

The Court will develop a shared understanding of what is and is not good cause for a continuance. The Court will strive to develop a continuance policy that will significantly reduce continuances and increases lawyer preparedness.

6.3.7 Triaged/Differentiated Case Management System

The Court will implement a Differential Case Management System with the criminal justice stakeholders that will triage cases by placing them on pathways according to their complexity and estimated time to resolution.

6.3.8 Plea Dispositions

The Court will increase the availability of plea dispositions at multiple hearings along the caseflow continuum and explore a more streamlined process for placing cases on the calendar that have reached a plea agreement.

6.3.9 Coalition of Stakeholders

The Court will convene a coalition of criminal justice stakeholders to implement the commitments and make other changes that improve the system.

6.4 OVERALL IMPROVEMENTS CONCERNING THE TCPO AND TCPD

Based on NCSC discussions with the TCPO and the Acting Director of the TCPD as well as the discussions during the retreat, the NCSC also recommends the following:

6.4.1 Discovery Improvements

The coalition should examine the continuing conflict regarding discovery exchange with the defense, because, without early, complete discovery, efforts to reduce continuances and streamline the plea process will be slowed.

6.4.2 Compatible Software for Prosecution and Defense

The Court, the TCPD, and TCPO should all support the purchase of both prosecutor and public defender software modules developed by Odyssey, or other compatible software that effectively interfaces with Odyssey. Purchase of mismatched software for the prosecutor and public defense has a great likelihood to be problematic in any electronic exchange of discovery.

6.4.3 Plea Offers and Negotiations

The coalition should promote development of policies and procedures in the TCPO and TCPD's offices that include early, in-depth evaluation of cases, and early, realistic plea negotiations, as well as clear parameters for plea offers. In addition, the TCPO should abandon the policy that plea negotiations terminate upon entry of the Omnibus Order and institute a firm plea cut-off date that is accompanied by early, well-developed plea offers.

6.4.4 Plea Discussions outside Court Calendars

The coalition should discuss ways to promote opportunities for plea discussions outside the court calendar.

6.4.5 Access to Inmates

The coalition should work toward improving access to inmates in the jail.

6.4.6 Jail Staffing and Vehicle Increase

The coalition should support increased staffing and vehicles for the jail so that more inmates can be transported to hearings where additional pleas can be taken, thus reducing the jail population and attendant costs.