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**To:** Washington State Supreme Court
**From:** Kevin J. McCrae, Grant County Prosecuting Attorney
**RE:** Comment of Kevin J. McCrae, Grant County Prosecuting Attorney, on the proposed rule for standards for indigent defense: CRR 3.1, CRRLJ 3.1, JUCR 9.2

**A. On its face the proposed rule is unworkable, unwise and unconstitutional. It should be rejected.**

***1. The RAND survey the proposal is based on is significantly flawed.***

Well over half a century ago President Eisenhower gave his farewell address. This speech is remembered for his warning about the influence of military industrial complex, and the danger it posed to overwhelm other aspects of society. But what is less well remembered is that the military industrial complex was only an example of a larger problem. Before he discussed that issue, President Eisenhower laid out the larger theme:

> Crises there will continue to be. In meeting them, whether foreign or domestic, great or small, there is a recurring temptation to feel that some spectacular and costly action could become the miraculous solution to all current difficulties. A huge increase in newer elements of our defense; development of unrealistic programs to cure every ill in agriculture; a dramatic expansion in basic and applied research-these and many other possibilities, each possibly promising in itself, may be suggested as the only way to the road we wish to travel.

> But each proposal must be weighed in the light of a broader consideration: the need to maintain balance in and among national programs-balance between the private and the public economy, balance between cost and hoped for advantage-balance between the clearly necessary and the comfortably desirable; balance between our essential requirements as a nation and the duties imposed by the nation upon the individual; balance between action of the moment and the national welfare of the future. Good judgment seeks balance and progress; lack of it eventually finds imbalance and frustration.

Here the RAND survey has gone out and asked leading criminal defense attorneys what resources should ideally be devoted to public defense. Unsurprisingly the answer is "a lot." This is like asking a general how many tanks or aircraft he needs to ensure he will win the next war. Any general will tell you the answer is a lot more than he has right now. This is not a criticism of generals. Their job is to ensure they win the next war, not to balance those needs with other needs of society. This is perhaps why WWI French Prime minister Georges Clemenceau said that "war is too important to be left to the generals."

Here the RAND survey simply asked "what would be ideal for you to do your job?" Every leader who has ever been asked that question at any sort of a high level is going to answer: more resources, more time, more money, more people, more equipment. Everyone who is dedicated to their job and fulfilled by it thinks that it is very important to society, that's why they do it. They also believe that if only they had more resources they could do it better and society

would be better off. That does not mean they are in the best position to dictate how society should balance its use of resources.

The RAND survey acknowledges this problem to some extent in its discussion on the Delphi method used, but does not seek to control for it. The study does not conduct observational studies of what public defenders actually do, or take any other step to objectively measure the need, instead relying completely on the subjective opinion of biased participants. The study assumes that every case goes the full distance. As is common knowledge in the justice system, this is rarely the case. Charges are reduced as part of plea deals. A large factor, although not the only one, in agreeing to pleas is because there simply is not resources to take every case to trial. Assuming this proposal is fully implemented (see discussion infra, of what that would take) that reason for plea bargains is eliminated. The simple fact is the vast majority of people charged with crimes are in fact, guilty of those crimes. Defense attorneys can often do their clients a disservice by taking a case to trial where conviction is highly likely, rather than striking a deal. Alternative resolutions that come after or instead of a plea, such as treatment rather than confinement are often in the defendant and societies best long term interests. Yet a defendant who takes an agreement simply does not require the amount of work a full trial creates. The numbers proposed for felony case loads are based on hours needed for a case

that are at least in the ball park of reasonable time required to complete cases if the vast majority of cases actually go to trial. The simple fact is that outcome would probably be a negative outcome for many if not most defendants, because they would lose the advantages of a plea bargain. If the Prosecution is still forced, due to one sided resource constraints, to offer attractive pleas, then the hour numbers vastly overestimate the time it would take to process a case by a public defender, and the system would be underutilizing the public defenders available. Nor does the RAND survey allow for innovation. For example, AI transcripts can potentially reduce the time needed to review body cameras. The assumptions and premise that the proposed rule is based on is deeply flawed.

***2. The "crisis in public defense" is a misnomer. The rule would be impossible to implement at current prosecution levels.***

The proponents of the rule advocate that the problem is that public defenders are overworked, and thus leaving the profession, and by reducing the work load of public defenders the profession will become more attractive, and thus alleviate the problem by bringing in more attorneys. This hypothesis is based on a misreading of the facts, has no objective studies behind it, and even if it were true, and the proposed solution worked, the result would simply be to transfer the crisis to other areas of the legal profession.

The fundamental problem is not that public defense is less attractive as a career path than it has been in the past. The fundamental problem does not even have anything to do with public defense. The fundamental problem is a demographic problem that is affecting the entire economy, and was foreseen decades ago. The largest generation, the baby boomers, have mostly left the workforce. There are not enough educated workers to fill all the jobs out there. A simple google search reveals articles discussing this issue across industries and professions.[1] Grant County is neither in the best or worst condition regarding attorney workforce compared to the rest of the State. Notably, in my experience, we have not suffered a particularly large exodus of defense attorneys, or prosecutors for that matter. The rate of attorneys leaving has not been abnormally high. I have not seen any statistics or data that show that attorneys are leaving the profession of public defense at especially high rate,

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[1] *E.g.*
Chipmakers face a labour crisis (ft.com) https://www.ft.com/content/e4dc9ec2-1fcf-48cb-b774-8b112bd48398
The U.S Navy's warship production is in its worst state in 25 years. What's behind it? https://apnews.com/article/navy-frigate-shipyard-workforce-retention-318c99f2161c4284e5ddcf0c1fa2b353
Labor Shortages plague high stakes industries https://www.axios.com/2023/08/27/labor-shortages-air-traffic-health-care-teachers-police
Can We Avoid The Impending Healthcare Workforce Labor Shortage? (forbes.com) https://www.forbes.com/sites/sachinjain/2023/04/24/can-we-avoid-the-impending-healthcare-workforce-labor-shortage/

particularly given the demographics of the baby boomer retirement. The problem has been obtaining replacements of those who do leave due to natural attrition. There simply are not applicants. The jurisdictions that are having the most trouble with public defenders are also having the most problems recruiting prosecutors. All this would indicate the "crisis in public defense" is not actually a problem with public defense, but simply a reflection of a larger problem in the economy applied to the public defense setting.

By misidentifying the problem, the proponents of the rule identify a solution that will make things worse. Assume that the proposal works, that the reduced workload and higher pay necessary to attract attorneys to the profession of public defense actually does what the proponents say it does. (A highly doubtful proposition.) Where do those attorneys come from? It takes at least four years from the time someone says "I want to be an attorney" to the time they are actually licensed to practice. (one year for the process of applying to law school and three years in law school), as well as at least a year or two to work up to be able to handle felonies. As I understand the issue, to fully implement this proposal would require an increase of about 20% in the attorney workforce in Washington State.[2] It would take even longer to increase the size

[2] The numbers in this comment are largely my estimates. I believe they are conservative. The fact that no one has actually done a formal analysis of what

of the law school classes or found another law school to increase the number of attorneys being produced in any significant way and get those extra attorneys through the process.

Thus the only way to make this proposal actually work inside of about 10 years is to recruit active attorneys from other areas of law. But other areas of law do not have attorneys sitting around doing nothing. The legislature, in the past few years, has been granting public attorneys for other areas, specifically for first collateral attacks on criminal judgments and evictions. As I understand it there are now personal restraint petitions piling up at the Court of Appeals for lack of attorneys, and the anecdotal evidence is that the inability to effectively process evictions for lack of attorneys is causing disruption in the rental housing markets. Now the proposal is to take what the legislature has done and increase the need for additional attorneys by at least an order of magnitude, without any formal studies or analysis of what this actually means or if it is feasible. The legislature did not adequately plan for its extension of publicly provided attorneys. The Court should learn from the legislature's errors, not say "hold my beer" and "watch this."

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the numbers actually are before considering this reckless rule should be cause for extreme concern.

If this proposal is to work it would require exacerbating the crisis in other areas of law. Prosecutors face the same personnel problems as defense attorneys. Grant County has not been fully staffed with prosecutors for almost half a decade now. If public defense became significantly easier than prosecution due to case load limits prosecutors may well go over to public defense. Other areas of law, such as civil legal aid and eviction defense will be left without attorneys. Non indigent defendants will be unable to find or afford attorneys, as the demand for attorneys will skyrocket, with no way to increase supply in the short to medium run. In economic terms the supply of attorneys in inelastic in the short to medium term. The supply cannot be increased quickly, even with a large increase in price. This will greatly increase the cost of private attorneys, as well as public ones.

***3. There is no way to fund what is proposed.***

Of course the above discussion assumes there is funding for this proposal. For 2024 the Grant County General fund is $61.7 million. The prosecutor's budget is $4.5 million, and the public defense budget is $4.1 million. The District and Superior Courts' budgets together total about $6 million out of the general fund. To maintain current levels of court activity the proposal requires at least three times the number of attorneys for public defense, plus more support staff than is currently utilized. That would increase the

public defense budget to at least 13 million. But if there is more demand for something without increasing supply the cost goes up. The County has tried to increase wages to attract more attorneys. It has not worked. Increases of 15 or 20 percent are proving ineffective. If this proposal goes through there will have to be at least a doubling of wages to attract attorneys from other areas of law. That would move the public defense budget up to the range of 25 million.

However, there cannot only be an increase in the public defender budget. The prosecutors and the Courts must go up as well, and at least the prosecutor's office must go up similar to the public defenders. The proposal implements a drastically reduced case load for public defenders. Prosecutor pay will have to go up to match public defender pay. Otherwise almost all the prosecutors will go over to be public defenders. If prosecutor caseloads stay the same while public defender caseloads dramatically decrease first prosecutors will go be public defenders for the easier work load. Second, prosecutors have to put at least a similar amount of work into their cases that public defenders do, and have the task of reviewing cases not filed[3]. If they are not able to put in a similar amount of work on a case prosecutors will have to make plea offers exceptionally low to manage their workloads, which will mean the defense will

[3] Who puts more into a case is probably a point that can be argued to no end, but in speaking to those that have done both, it is fair to say that the work per case litigated is at least equivalent.

not have to put in the hours on their cases the standards contemplate, again meaning there will be wasted attorney hours and tax payer dollars as defense attorneys settle their cases for extremely favorable plea agreements, while still receiving full case credits for them. Therefore there will have to be a commiserate increase in the prosecution budget, again to something like $25 million for Grant County. If the budgets are increased to allow for all these extra attorneys, both on the prosecution side and the defense side, it is very likely that there will be significantly more hearings and trials, requiring more judges, courtrooms and clerks. A conservative estimate would be to double the costs for the Courts to $12 million.

Thus the cost of this proposal completely swallows the Grant County general fund budget. This leaves absolutely nothing for the other elected officials, such as the sheriff, auditor, treasurer or assessor, or the planning department, human resources, IT support ect. But even assuming the money could be found, say with State support, that still would not solve the problems mentioned above such as simply not enough attorneys to implement the proposal.

***4. The proposal is not constitutionally required, and is therefore unconstitutional***

No one has suggested this rule is necessary to implement the Sixth Amendment right to counsel or Art. 1 Sec. 22 of the Washington State Constitution. Nor could they. The proposed rule does not apply to privately hired attorneys, even though the non-indigent have the same rights under those constitutional provisions as the indigent. Nor do the rights for the indigent exceed the rights of the non-indigent in this regard. Only the wealthiest can afford unlimited representation. The non-indigent but non-extremely wealthy have to consider the cost of a case versus the chances of success. Private Attorneys understandably charge more for taking a case to trial than a negotiated plea. Nowhere does the Constitution require unlimited representation, reasonable representation satisfies the right to counsel. Indeed, because significantly increasing the demand, and therefore the cost, of attorneys, this rule will significantly inhibit access to counsel for those who are not indigent.

Nor has there been a rash of ineffective assistance of counsel findings by the courts. And for those that are found, there is very little likelihood that the new caseload standards would have made a difference. Again, there has been no analysis to justify the extreme cost of this rule. The constitutional right to counsel, like all other constitutional rights, has limits. The Fourth Amendment is tempered by exceptions to the warrant requirement. The First Amendment

right does not include yelling "fire" in a crowded theater. Second Amendment rights are limited through firearm regulations. The list goes on. The right to counsel is no different. It contains limits on the right to representation. This proposal goes far beyond what is required by the applicable constitutional provisions.

In *Matter of Salary of Juvenile Dir.*, 87 Wn.2d 232, 233, 552 P.2d 163, 164 (1976) the Superior Court of Lincoln County attempted to raise the salary of its Juvenile Director over the objection of the Board of County Commissioners. The Court examined the propriety of the Court usurping the legislative and executive branch in allocating funds. In that case the Court ruled it had the inherent power to obtain funds if necessary to conduct its constitutional functions. However the Court could only do so if its constitutional functions were threatened. "The unreasoned assertion of power to determine and demand their own budget is a threat to the image of and public support for the courts. In addition, such actions may threaten, rather than strengthen, judicial independence since involvement in the budgetary process imposes upon the courts at least partial responsibility for increased taxes and diminished funding of other public services." *Id* at 248. "The burden is on the court to show that the funds sought to be compelled are reasonably necessary for the holding of court, the efficient administration of justice, or the fulfillment

of its constitutional duties. In addition, it is generally recognized ... that inherent power is to be exercised only when established methods fail or when an emergency arises." *Id.* at 249. The Court must prove this by clear, cogent and convincing evidence. *Id.* At 251.

Here the Court proposes to pass a rule whose cost is extreme, abrogating to itself the power to delegate where funding will go, without a constitutional mandate and without a showing by clear, cogent and convincing evidence that it is necessary to implement the constitution or the efficient administration of justice. The legislature has shown, by providing attorneys at public expense in areas both required by the Constitution and not required by the Constitution, that it is perfectly capable of considering the issue and passing legislation on the subject. *See* RCW 10.73.150. In requiring the allocation of additional funds by forcing the counties to pay for, at minimum, additional defense attorneys to meet the new case load numbers, this proposal goes far beyond what the Court can justifiably do under its rule making authority.

**B. The actual motivations behind the rule are unconstitutional, undemocratic, and dishonest.**

The above discussion has treated the proposal for what it purports to be, a serious but misguided attempt to improve the justice system, and points out its flaws. The simple fact is the proposal is not a serious attempt to improve the

justice system, but an attempt to break the social contract that forms the foundation of our criminal system. [F]or while the Constitution protects against invasions of individual rights, it is not a suicide pact. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160, 83 S. Ct. 554, 563, 9 L. Ed. 2d 644 (1963).

The simple reality is this rule is another attempt to decriminalize the justice system. Even the advocates of the rule acknowlege that fact. King County Prosecutor Leesa Manion wrote a letter to King County Leaders outlining some of the many issues with proposed rule and asking for assistance in responding to it. In response an advocate of the new rule, Director Antia Khandelwal, responded that the solution was simple, stop charging cases and make more attractive plea offers. See attached letters. Director Khandelwal believes prosecutors should stop charging many cases and of the cases they do charge, more cases should be sent to diversion or alternative programs, although she ignores the fact many diversion programs still require defense attorneys. This response honestly acknowledges the reality of the proposed rule. The only solution to the new rule is for prosecutors to stop prosecuting the vast majority of cases. This is the only realistic and practical response to the proposed rule, and the actual intent behind it. To implement the new rule prosecutors would only be able to charge a third or less of the cases they charge now.

Over the past few years there have been attempts to decriminalize certain behaviors. By initiative in Oregon, and through the *Blake* decision in Washington, possession of illicit drugs was decriminalized. These experiments failed. Through the democratic process of legislation drugs were recriminalized in both States, at least to some extent. The Washington Legislature also in effect largely decriminalized eluding the police by forbidding chasing those who attempted to elude, with certain exceptions. The people responded with a petition recriminalizing eluding the police that was recently adopted by the legislature. The Defund the Police movement attempted to gut the criminal justice system by getting legislatures to remove funding for police. It failed when the consequences were actually considered. During the current gubernatorial campaign both candidates for governor are advocating for increases in the number of police. What is the point if we cannot prosecute the cases that those extra officers would solve?

Advocates for decriminalization, realizing that the traditional democratic processes of legislation, initiative or petition will not achieve their goals, have turned to a different method, court rules. Court rules are a very good tool for this purpose. They generally fly under the radar, they are not subject to the democratic processes of normal law making, and they cannot be overturned by

the legislative processes found in the State Constitution. If a Court rule is passed that makes it impossible to prosecute a crime, it is no longer a crime.

Division III of the Court of Appeals recently held that such a use of Court Rules was unconstitutional in *State v. A.M.W.*, 30 Wn. App. 2d 472, 475, 545 P.3d 394, 397 (2024). JuCr 7.16 forbids the Court from issuing warrants unless a juvenile posed a serious threat to public safety. This effectively decriminalized, at the option of the respondent, all juvenile crime except those that posed a serious threat to public safety. If the juvenile did not want to be prosecuted for theft, all they had to do was not show up to court, and there was nothing anyone could do about it. As the Court noted advocates for JuCr 7.16 argued on the basis that incarceration was harmful and decriminalization was the better route, and that was the point of the rule. The Court held that the rule was unconstitutional because it undercut the juvenile justice act and the determination of the legislature that criminalization of juvenile crime was appropriate. "This renders the juvenile court an ineffective tribunal for many of the cases the State is authorized to charge under the Act. And it conflicts with the legislature's policy choice that the Juvenile Justice Act should apply to all juveniles who violate criminal statutes, not just those who pose grave risks to the community." *Id.* at 484.

The true purpose of the proposed rule on indigent defense is the same as

JuCr 7.16, only applied on a larger scale. Court rules are supposed to guide the way courts gather and process information and make decisions, they are not supposed to undercut the laws passed by the legislature and evade the democratic process. A person can have an honest belief there are better ways to address crime than the criminal justice system. If the advocates for this rule believe holding people who commit crimes accountable is not the appropriate path for society to take, they should go to the legislature and subject their beliefs to the democratic process in the State Constitution, not sneak them in through court rules that make it impossible to prosecute crimes.

The primary attribute of government of any type is it has a monopoly on the legitimate use of force. How it obtains, maintains and utilizes that monopoly are the fundamental questions government has to answer in order to exist. In our society citizens largely give up the right to use force to defend themselves and obtain justice for crimes done against them in return for the expectation that the government will legitimately exercise that force to ensure their property and rights are respected, and those that do them harm are held to account. This social contract is the foundation of our justice system. If this rule is passed prosecutors will be forced to choose which crimes to prosecute significantly more than they already do, and most likely will only be able to prosecute the most serious ones, as sufficient public defenders will not be

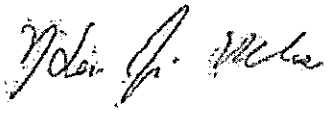
available to process any other cases. When crimes like theft, lesser assaults, burglaries, possession and delivery of drugs, possibly possession of depictions of minors or other lesser sex crimes, animal cruelty or other crimes are not prosecuted, and the prosecutor answers, we cannot prosecute this type of crime because of a court rule that you cannot even ask your legislature to correct, what actions are citizens going to take? There is already a perception, arguably a fair one, that the criminal justice system is ineffective and citizens need to take matters into their own hands. This proposal for effective decriminalization is not one the court should adopt. If the advocates for decriminalization can convince their fellow citizens that is the correct path, then they need to take that path to the legislature. This back door approach through court rules violates the democratic principles of our system.

**CONCLUSION**

The proposed rule is unworkable, unwise and unconstitutional. There is a reason the legislature has the power of the purse, and has to balance competing priorities, rather than specialists deciding their area of focus is the most important one. The RAND survey this proposal is based on makes the mistake President Eisenhower warned about, and only analyzes what experts in the field would like to have, not what they actually need. The rule is impossible to implement, even with completely unrealistic levels of funding, and even if it

were, it would cause considerable damage to other areas of law. The advocates for the rule know this, and the unworkability of the proposed rule is the ultimate point. This rule will cause all but the most serious crimes to go unprosecuted. This rule require one of two choices, the legislature, through the power of the purse, to dedicate unreasonable amounts of money to the justice system at the expense of other priorities (and even that is unlikely to work given the lack of available attorneys), or for the executive to stop enforcing the laws passed by the legislature. If that is what the people want, the legislature should be the one to decide that is what will happen, not the Court through its rule making power. The proposed rule should be rejected.

Respectfully submitted,



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# KING COUNTY PROSECUTING ATTORNEY'S OFFICE

LEESA MANION (she/her)
PROSECUTING ATTORNEY

JUSTICE
COMPASSION
PROFESSIONALISM
INTEGRITY
LEADERSHIP

Dear King County Leaders:

The purposes of this letter are to share my serious concerns regarding the Washington State Bar Association's recently adopted *Standards for Indigent Defense Services* and to encourage your consideration of the potentially catastrophic fiscal and practical impacts this proposal will have on King County's criminal justice system.

We respect the job and the difficult work that public defenders do, and they are an important part of the criminal legal system. This note about financial concerns and unintended disparities does not change the respect we have for the many good people who are public defenders.

If adopted by our Washington State Supreme Court, these proposed caseload standards will bankrupt King County's General Fund and create huge disparities between defense and prosecution.

In their current form, the new public defense standards establish that "[t]he maximum annual caseload for a full-time felony attorney is 47 case credits." Public defense attorneys would be assigned variable credits based on case type – ranging from eight credits per case for cases where the defendant faces a possible punishment of life without parole, to one credit per case for certain less serious felonies. There are different standards for misdemeanor attorneys and civil commitment (Involuntary Treatment Act or ITA) attorneys. These new caseload standards would *drastically* reduce current maximum caseloads for public defenders and would result in three immediate consequences:

- King County would be required to fund hundreds of new public defenders and other legal service support staff; and
- There would be an extremely wide and disparate gulf between the large caseloads of prosecutors and the significantly smaller caseloads of public defenders. This gulf would add to the existing landscape in which some cases assigned to the King County Prosecuting Attorney's Office (PAO) are not currently covered by public defenders, but by private counsel.
- If these proposed caseload standards are adopted, we will also see critical impacts on the administration of justice because our current court system will not have anything close to the personnel required to staff cases at the required level.

To illustrate the practical and fiscal impacts of these standards, I have outlined how they would play out if they were to be applied to the PAO. The PAO currently has 175 Deputy Prosecuting Attorneys (DPAs) working on adult felony, adult misdemeanor cases, juvenile cases, ITA cases and additional areas of work. If the new public defense standards were applied to the last 12 months of cases for adult felony and misdemeanor cases, juvenile cases, and ITA cases alone, the PAO would need a minimum of 539 total DPAs. This means that the PAO would need 364 additional DPAs and about same number of corresponding Legal Service Professionals (LSPs) plus administrative support staff and resources. The costs for additional positions and administrative resources would be an added cost of at least $154 million each year, including costs for space, IT costs, or equipment needs for hundreds of new additional FTEs. $154 million represents an additional 13% of the total 2024 General Fund budget of $1.17 billion.

Assuming the PAO receives funding to provide parity with the proposed public defense caseload and staffing standards, the combined increased costs of DPD and PAO would result in King County's criminal justice system agencies totaling more than 100% of the county's General Fund.

In our approach to calculating the impact of the proposed caseload standards, the PAO applied an intentionally conservative number. The position numbers would necessarily be much higher once additional mandatory work of the PAO is considered.

Below is more information about how we calculated the above figures:

- The work required by DPAs to file a criminal case was considered as part of the case handling.
- A case review that resulted in a decline of an adult felony was counted as 1/3 of a felony caseload credit per-case (the same as the public defense standards applies for probation violations).
- Juvenile declines were counted as 1/3 of a misdemeanor caseload credit per-case. Other types of declines were not included as part of obtaining a conservative calculation of the number of needed attorneys.
- The public defense standards also provide varying number of credits for various classes of cases. The KCPAO converted its case categorization to the public defense categories in a conservative fashion.

To make these standards consistent with the goals of managing an integral criminal justice system anywhere in the state or country, realistic capacities and feasible expectations are needed. Any standard that will be applied statewide should consider the varying and diverse systems of criminal justice across Washington State.

There is still time to act to raise concerns with the Washington State Supreme Court, which has ultimate authority on whether these standards will be enforced. On Monday May 13, the Washington State Supreme Court Rules Committee voted on an expedited public comment period through the end of October, with a final decision in early 2025. Additionally, given the possible impacts of the rule, they voted to propose at least two public meetings to accept additional comments before the end of October. This means that there is still time to make your voice heard to the Supreme Court about the impact these standards will have on King County.

There are also actions the court can take that have not yet been analyzed and would not have the same drastic consequences on the criminal justice system. For example, recent changes in court rules have significantly increased the amount of time defense holds onto cases. These changes reduced the number of hearings where a defendant's presence is required, and the number of warrants issued. The total absence of any appearances or check-ins from defendants between arraignment and trial means there are many cases where the attorney has no contact, stopped working on a case, and it is still on their books preventing new assignments. Further, when defendants never have to come to court or interact with their case, the case can become "out of sight, out of mind" and there's no urgency to move forward. Requiring a reasonable number of appearances before trial would likely yield lower caseload standards while avoiding the negative impacts of the proposed caseload standards.

I am happy to further discuss these issues and answer any questions you may have. I also encourage you to join me in sharing this information with relevant interested parties before this issue is decided by the Washington State Supreme Court.

Sincerely,

Leesa Manion

Prosecuting Attorney

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June 17, 2024

Dear King County Leader,

KCPA Leesa Manion recently wrote to you regarding her concerns about WSBA's newly revised Standards for Indigent Defense Services. I do not believe her letter accurately reflects the different roles of public defenders and prosecutors and how those differences determine appropriate caseloads.

The Sixth Amendment guarantees counsel to those facing a loss of liberty at the hands of the state. The WSBA's revised standards are a critical acknowledgment that all indigent individuals, including the disproportionately Black, Indigenous and People of Color ensnared in the criminal legal system, must have counsel with the time and resources necessary to devote to their cases.

Ms. Manion's letter reflects a misunderstanding of the WSBA's Standards. Three specific errors undermine her analysis and conclusions:

- First, Ms. Manion proceeds as if the indigent defense standards apply to prosecutors. The standards apply only to public defense.

- Second, Ms. Manion contends that the only way to reduce public defense caseloads is to hire more public defenders. There are many alternative ways to reduce the demand for public defense.

- Third, Ms. Manion protests differences between prosecutor and public defender workloads. Because prosecutors' offices control their workloads and operate with efficiencies that public defense cannot, this disparity is necessary and appropriate.

**1. The American Bar Association has long rejected efforts to apply public defense caseload standards to prosecutorial workloads.**

The WSBA's Standards for Indigent Defense Services establish "the standards necessary to ensure legal representation for clients represented by a ***public defense attorney*** meets constitutional, statutory, and ethical requirements." (Emphasis added). Ms. Manion is not the first prosecutor to oppose indigent defense standards by arguing that prosecutors must be staffed similarly to public defense offices. The American Bar Association emphatically rejected that previous attempt.

When prosecutors in South Carolina submitted a budget request claiming that public defense caseload limits applied to them, the ABA response took the extraordinary step of demanding a retraction:

"Because the ABA has not adopted caseload limits for prosecutors, we ask that you correct the erroneous reference to the ABA in citing authority for numerical caseload limits for prosecutors." (*See* attached). The WBSA has not adopted numerical caseload limits for prosecutors.

Ms. Manion's extensive calculations of how much additional staff she would need to meet public defense caseload standards are irrelevant because she does not need to meet public defense caseload standards. Similarly, these standards have no impact on court system staffing. The standards would simply reduce public defender workloads to a level allowing them to provide meaningful representation to indigent individuals while avoiding burnout.

I do not fault Ms. Manion for seeking workload standards for her office. The path there, however, is through a local study. The American Prosecutor's Research Institute has concluded that "it is not feasible to develop national caseload and workload standards.[1] This is distinct from public defense, where the ABA and RAND have conducted numerous state level studies and found the caseload numbers to converge, regardless of location. These standards were also reviewed by the WSBA Board of Governors. The WSBA Board of Governors passed the standards nearly unanimously, after being recommended by the Council on Public Defense. The Council on Public Defense, in turn, included stakeholders including a public defender, judges—and a King County prosecutor.

**2. Rather than hire hundreds of new defenders, King County could meet the new caseload standards by shifting to evidence-based ways to address harm in our community.**

Unlike public defense, prosecutors exercise discretion in determining which charges to pursue. Prosecutors could exercise their discretion to prosecute charges that are likely to protect public safety. For instance, there is no evidence to suggest that arrest and prosecution for property crimes deters individuals from engaging in crime. There is a great deal of evidence that incarcerating individuals, even for short periods, destabilizes them and increases the likelihood of recidivism.[2] Relying on the criminal legal system to address crimes is also, as Ms. Manion notes, extremely expensive.

In contrast, programs involving cash transfers have been shown to decrease crime—particularly property crimes. Given that most cases filed by the PAO involve non-violent crime, the County could simply choose to invest in universal basic income as a crime prevention strategy. In addition to being more effective, such an approach would also avoid the racial disproportionality of the criminal legal system.

**3. Because prosecutors control their work flow, disparity in workloads between prosecutors and public defense is appropriate.**

The King County Code requires DPD to follow the American Bar Association principles of public defense. Those principles mandate that public defenders engage in vertical representation. Our clients are constitutionally entitled to an attorney who will meet with them, review the charges and discovery

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[1] "How Many Cases Should A Prosecutor Handle? Results of the National Workload Assessment Project." American Prosecutors Research Institute, 2002, https://pceinc.org/wp-content/uploads/2023/05/20020000-How-Many-Cases-APRI-Borakov.pdf.

[2] In one study, researchers estimated that the pretrial detention of 10,000 people charged with misdemeanors could be expected to result in 400 additional felonies and 600 more misdemeanors than if they had been released pretrial. Digard, Léon, and Elizabeth Swavola. "Justice Denied: The Harmful and Lasting Effects of Pretrial Detention." Vera Institute, April 2019, https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf.

(which can be voluminous) against them, learn their goals for the case, develop mitigation, connect with family members who may have relevant information, and countless other critical tasks. This work must be done even for a client who intends to plead quickly.

PAO operates in a horizontal fashion. "Under a horizontal model of prosecution, assistant prosecutors are assigned to units that handle specific steps or functions in the judicial process that are routine in nature and involve limited discretion. For example, regardless of the type of case . . . one attorney or a group of attorneys may be responsible for all initial appearances, another for preliminary hearings, and others for arraignments, and so on. Horizontal prosecution is generally used in larger offices as it handles a large number of cases with great efficiency."[3]

A small number of prosecutors staff PAO's "Early Plea Unit," where many felony cases are resolved.[4] Given the work that each attorney is constitutionally required to do for its clients, DPD can have no parallel unit.

Prosecutors also drive case resolution based on the pleas they offer. In 2023, nearly one-third of the felony cases PAO filed were resolved as misdemeanors. By making attractive plea offers, PAO can more quickly resolve cases. They can also exercise prosecutorial discretion and not file cases which do not forward any public safety interest. For example, the *Seattle Times* recently noted that PAO routinely files felony charges for those who engage in low-level assaults during a mental health crisis.[5] PAO could reduce its own workload by diverting those charges. While PAO is in the best position to determine how to exercise their discretion, they can reduce the number of cases in the system and the number of public defenders required to defend those cases.

The WSBA standards are a long overdue recognition that we have hidden the true costs of the criminal legal system on the backs of the indigent, BIPOC individuals ensnared within it and on the defenders who represent them. We now understand the true costs and can decide whether we want to pay those costs or explore evidence-based paths to public safety.

Sincerely,

Anita Khandelwal
Director

cc: Leesa Manion, King County Prosecuting Attorney

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[3] Hemmens, Craig, *et al.* "Criminal Courts: A Contemporary Perspective." Fifth Edition, Sage Publications, January 2022, https://www.sagepub.com/sites/default/files/upm-binaries/53219_ch_5.pdf.

[4] KCPAO data from January 2016 – December 2018 suggests that individual prosecutors were able to resolve cases with an efficiency unavailable to a public defense attorney: Tod Bergstrom - 1347 cases, Gretchen Holmgren - 599 cases resolved, Bridgette Maryman - 503 cases resolved, and Grace Ritter - 608 cases resolved. To put this in context, the prior outdated WSBA standards limit public defenders to 150 felony case assignments in a year. These are but a handful of examples of the efficiency accomplished by a horizontal case management approach that is incompatible with DPD's work.

[5] Thompson, Christie, *et al.* "They were in a Mental Health Crisis at a Hospital. This Is How They Landed in Jail." *The Marshall Project* and *Seattle Times*, 9 June 2024, https://www.themarshallproject.org/2024/06/09/seattle-arrest-assault-mental-illness.

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December 16, 2014

Kevin S. Brackett
Chairman
South Carolina Commission on Prosecution Coordination
Post Office Box 11561
Columbia, South Carolina 29211-1561

Dear Chairman Bracket and Members of the Commission on Prosecution Coordination:

I write on behalf of the American Bar Association ("ABA") to inform you of an erroneous reference to a standard attributed to the ABA in a recent Commission publication and to respectfully request that the error be corrected. On October 14, 2015, your Commission released its Caseload Equalization Budget Proposal ("Proposal"), which states in pertinent part that "[t]he American Bar Association has set a criminal caseload standard of no more than 150 felony cases or 400 misdemeanor cases per attorney." Proposal, at 7. It further states that "[i]n South Carolina, we are operating at 2.5 times the ABA standard . . . ." *Id.* However, the Proposal does not cite any specific ABA policy or standards for this reference.

Our relevant standards were adopted by the ABA House of Delegates – our policy-setting body – as the *ABA Standards for Criminal Justice: Prosecution and Defense Function* (3d ed.) ("Criminal Justice Standards") in 1992 and published in 1993. Standard 3-2.9(e) addresses prosecutorial workloads:

> A prosecutor, without attempting to get more funding for additional staff, should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the interests of justice in the speedy disposition of charges, or may lead to the breach of professional obligations. *Criminal Justice Standards*, Standard 3-2.9(e).

While the ABA therefore encourages reasonable prosecutorial workloads, the ABA House of Delegates has not adopted numerical caseload limits for prosecutors.

Your Proposal's reference to "150 felony" and "400 misdemeanor" cases appears to stem from the National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973) ("NAC Standards"). The NAC Standards – now more than 40 years old – pertain only to defense caseloads, not prosecutorial caseloads. Further, the NAC

Standards' validity may be questionable given the Standards' lack of empirical basis and failure to account for modern developments in criminal law, such as forensics and collateral consequences. Norman Lefstein, Securing Reasonable Caseloads 43-49 (American Bar Association 2011).

Because the ABA has not adopted numerical caseload limits for prosecutors, we ask that you correct the erroneous reference to the ABA in citing authority for numerical caseload limits for prosecutors.

As Standard 3-2.9(e) above illustrates, the ABA supports prosecutors' efforts to maintain reasonable workloads. We take no position on whether prosecutorial workloads in South Carolina are excessive. We caution, however, that, in seeking additional funding for the prosecution function, the State of South Carolina should ensure resource parity between the defense counsel and the prosecution.

Justice cannot be delivered without properly funded judicial, prosecutorial, and defender offices. An expansion of prosecutorial resources absent a commensurate expansion of defender resources would violate ABA standards. (*See ABA Ten Principles of a Public Defense Delivery System*, Principle 8, with Commentary (2002).) We understand that the Commission does not advise the legislature on the defender budget, but we wish to share our view that these issues are closely related and to urge that the State of South Carolina legislature consider each criminal justice stakeholder in determining future budget allocations; that is why we are sending copies of this letter to responsible legislative committee chairs.

Thank you for accommodating our request.

Sincerely,

Thomas M. Susman

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