The Defender Initiative
Fifth Annual Conference on Public Defense
March 6, 2015 | 8:30 a.m.-5:30 p.m.
5.5 General and 1.0 CLE Credits | WSBA Activity ID #395160

Agenda

8:30-8:45 a.m. Welcome by Dean Annette Clark

8:45-9:30 a.m. Session 1: National Trends and Their Impact in Washington
Professor Bob Boruchowitz will discuss his work as an expert witness in the ground-breaking Hurrell Harring case in New York State, its relationship to the Wilbur case in Federal Court in Seattle, and how these cases might affect issues such as implementation of standards in Washington. He also will discuss briefly the recent study on the cost of the death penalty in Washington State, a caseload study in Texas, and introduce some of the race bias issues to be discussed later in the day.

9:30-10:30 a.m. Session 2: Input and output issues in Criminal Justice
King County Prosecutor Dan Satterberg will discuss his ideas on diversion and re-entry, including the 360 Juvenile Diversion program.

10:30-10:45 a.m. Break

10:45 a.m.-12:00 p.m. Session 3: How to get your client into diversion; how to expand LEAD to other counties
Lisa Daugaard, Policy Director for the Public Defender Association and supervisor of the Racial Disparity Project, Mary Barbosa, Trial Unit Chair, King County Prosecutor's Office, and Jim Pugel, Chief Deputy, King County Sheriff's Office will discuss the ground-breaking LEAD (Law Enforcement Assisted Diversion) program, which allows pre-booking diversion to community-based services for low-level drug and prostitution offenders.

12:00 noon Lunch - 2nd Floor Gallery
12:20-12:30 p.m.  Welcome from Bob Chang, Executive Director, The Fred T. Korematsu Center for Law and Equality.

12:30-1:30 p.m.  **Keynote Address**
Frankie Guzman, a lawyer with the National Center for Youth Law, will discuss his work advocating for alternative sentences for juveniles and his own experience as a youthful offender.

1:30-1:45 p.m.  Break

1:45-2:45 p.m.  **Session 4: How to help your client with post sentencing issues before and after sentencing**
This discussion will focus on what trial lawyers can do to help their clients with post-sentencing issues, with perspective provided by attorneys who work as trial lawyers, appellate counsel and in post-conviction relief. Veteran defender Travis Stearns will moderate a panel that includes Innocence Project Northwest’s Anna Tolin, Washington Appellate Project’s Nancy Collins and King County Department of Public Defense TDA Division’s Daron Morris.

2:45-3:00 p.m.  Break

3:00-3:30 p.m.  **Session 5: Tale of Two Cities**
Eileen Farley, the court-appointed supervisor for public defense services in the two cities sued in the *Wilbur* case, will discuss her work there.

3:30-4:30 p.m.  **Session 6: Implementation of the rule on standards in Misdemeanor courts**
Joanne Moore, Director of The Washington Office of Public Defense, will discuss her office’s report on Misdemeanor Public Defense Costs in Washington, and will have a conversation with Professor Boruchowitz about the implementation of the Supreme Court Rule on standards and caseload limits.

4:30-5:30 p.m.  **Session 7: How defenders can address Implicit Bias in their daily practice**
Bob Boruchowitz will introduce the discussion which will be led by King County Department of Public Defense TDA Division's felony attorney Twyla Carter and felony supervisor Ben Goldsmith.

5:30 p.m.  **Course Evaluations and Adjourn**
Faculty Biographies

Program Chairperson

Robert C. Boruchowitz

Robert C. Boruchowitz is Professor from Practice and Director of The Defender Initiative at Seattle University School of Law. Before joining the faculty in 2007, he was Director of The Defender Association in Seattle for 28 years. He founded the Racial Disparity Project at The Defender Association. He has appeared at every level of state and federal court. He was an expert witness in the Hurell Harring case in New York State and in the Best v. Grant County case in Washington. Professor Boruchowitz was co-principal investigator on the recently released report, "An Analysis of the Economic Costs of Seeking the Death Penalty in Washington State."

Professor Boruchowitz developed a Right to Counsel Clinic, which won a writ of mandamus on right to counsel in Department of Corrections revocation hearings. He has taught in the Youth Advocacy Clinic where he pursued due process rights for children in truancy proceedings. He has taught criminal procedure and a seminar on Right to Counsel. He wrote "Diverting and Reclassifying Misdemeanors Could Save $1 Billion per Year: Reducing the Need For and Cost of Appointed Counsel," published by the American Constitution Society. As the founding president of the Washington Defender Association and a former member of the Executive Committee of the American Council of Chief Defenders, he has been instrumental in developing defender standards in Washington and nationally. He was a Soros Senior Fellow working on access to counsel in misdemeanor and juvenile cases. He worked on a similar project on a grant from the Foundation to Promote Open Society, working in Kentucky, South Carolina, and New Hampshire as well as in Washington. He has received numerous awards including the National Association of Criminal Defense Lawyers Champion of Indigent Defense Award, the Washington Association of Criminal Defense Lawyers William O. Douglas Award, and the Washington Defender Association Gideon Award.

The Defender Initiative is working with the Sixth Amendment Center on a grant from the U.S. Department of Justice in Utah and Mississippi. One of the Initiative's first projects was a study of misdemeanor defense, resulting in the report "Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts", published by the National Association of Criminal Defense Lawyers.

Keynote Speaker

Frankie Guzman

Frankie Guzman is the recipient of the highly prestigious Soros Justice Fellow, and serves as an attorney at the National Center for Youth Law. Frankie’s fellowship project challenged the practice of prosecuting and jailing children in California’s adult criminal justice system and advocate for alternative sentencing and local treatment for youth charged with serious offenses.

After graduating from UC Berkeley, Frankie worked at the Greenlining Institute and the National Center for Youth Law before attending UCLA School of Law. As a law student, Frankie served as President of La Raza Law Students Association and Pacific Regional Director of the National Latino Law Students Association. He has clerked at the Prison Law Office, and Public Counsel Law Center. Frankie is a recipient of the Paul and Daisy Soros Fellowship for New Americans and the Outstanding Achievement Award from the California Department of Corrections and Rehabilitation, Division of Juvenile Justice.

There are few people better qualified to do this work. Frankie is himself a product of the juvenile justice system. When he was just 15 years old, he was convicted of armed robbery and sentenced to 15 years in the California Youth Authority. After serving six years, he was released on parole. After his release, he enrolled in Oxnard College and later transferred to UC Berkeley, where he earned a BA in English. The rest, as they say, is history.
Presenters

Mary Barbosa
Mary Barbosa is a Senior Deputy Prosecuting Attorney with the King County Prosecutor's Office. For the past 17 years, Mary has prosecuted a variety of crimes ranging from drugs and property crimes to sexual assault and homicide. Currently, Mary is the chair of the Felony Trial Unit in Seattle. Since 2011, Mary has been the King County Prosecutor's Office's liaison to the Law Enforcement Assisted Diversion (“LEAD”) program.

Twyla Carter
Twyla Carter, SU Law ’07, is a staff attorney handling felonies at The Defender Association Division of the newly formed King County Department of Public Defense. Prior to her current assignment, Twyla represented youth charged with crimes in juvenile court, adults charged with domestic violence crimes in district court, and defendants who appealed their municipal and district court convictions. In 2011, Twyla won a published decision from the Court of Appeals, Division One, in State v. Green, which addressed due process requirements for trespass orders issued by public school districts. Twyla is a member of the Loren Miller Bar Association (LMBA), which awarded her the "Young Lawyer of the Year" award in 2008. Twyla was recently named to King County's Equal Employment Opportunity/Affirmative Action Advisory Committee, becoming the first public defender to join the 21-member committee. While a student at Seattle University School of Law, she served as the President of the Black Law Students Association (BLSA), and under her leadership, Seattle University's BLSA chapter was recognized as the largest chapter in the western region and was named the region's Chapter of the Year. Twyla has maintained close ties to the law school, serving as a mentor, guest speaker, panelist, mock trial judge and evaluator, BLSA and ARC supporter, and donor.

Robert Chang
Robert S. Chang is a Professor of Law and Executive Director of the Fred T. Korematsu Center for Law and Equality at Seattle University School of Law. He has also previously served as Associate Dean for Research and Faculty Development. He joined the School of Law from Loyola Law School in Los Angeles, where he was Professor of Law and J. Rex Dibble Fellow. A graduate of Princeton and Duke Universities, he writes primarily in the area of race and interethnic relations. He is the author of "Disoriented: Asian Americans, Law and the Nation-State" (NYU Press 1999) and more than 50 articles, essays, and chapters published in leading law reviews and books on Critical Race Theory, LatCrit Theory, and Asian American Legal Studies.

He has received numerous recognitions for his scholarship and service. He was the 2009 co-recipient of the Clyde Ferguson Award, given by the Minority Groups Section of the Association of American Law Schools, which is “granted to an outstanding law teacher who in the course of his or her career has achieved excellence in the areas of public service, teaching and scholarship.” Most recently, he was the co-recipient of the 2014 Charles A. Goldmark Distinguished Service Award from the Legal Foundation of Washington for his leadership role in a statewide task force on race and the criminal justice system. In addition to co-chairing the task force, he led the research team that produced its Preliminary Report on Race and Washington's Criminal Justice System that was presented to the Washington Supreme Court and was published simultaneously in the Gonzaga Law Review, the Seattle University Law Review, and the Washington Law Review.

He is currently serving as co-counsel representing high school students in Tucson who have challenged the constitutionality of an Arizona statute that has resulted in the termination of the Mexican American Studies Program in the Tucson Unified School District. That case is now before the U.S. Court of Appeals for the Ninth Circuit. Students from his Civil Rights Amicus and Advocacy Clinic the past several years have assisted on this case.

Nancy Collins
Nancy Collins served as a public defender at the Legal Aid Society in New York for five years before joining the Washington Appellate Project in 1999. She handles appeals in both state and federal court and is certified to represent capital defendants in the Washington Supreme Court. Cases Nancy has argued and won in the Washington Supreme Court include State v. Barrara Garcia (2014); State v.

Lisa Daugaard
Lisa Daugaard supervises the RDP. Lisa has been a felony and misdemeanor lawyer at the Defender Association, and supervised its misdemeanor division from 2002-2006. In 1999, as a staff attorney, she led the successful defense of hundreds of activists falsely arrested during the WTO demonstrations. Prior to becoming a public defender in 1996, she directed the Urban Justice Center Organizing Project and was Legal Director of the Coalition for the Homeless, both in New York City. She was also a fellow at the ACLU National Legal Department, where she helped to coordinate the successful campaign and litigation to shut down the internment camp for HIV+ Haitian refugees at Guantanamo Bay Naval Base. Lisa graduated from the University of Washington in 1983, obtained an M.A. in Government from Cornell University in 1987, and a J.D. from Yale Law School in 1992.

Eileen Farley
Eileen Farley is the Court-Designated Public Defense Supervisor for the cities of Mount Vernon and Burlington. Before that she was director of the Northwest Defenders for 11 and 1/2 years. She has 12 years of experience as a judge pro tem and worked in private practice for six years after three years at The Defender Association. She was President of the Washington Defender Association Board from 2011-2012. She is a graduate of the University of California Davis Law School.

Benjamin Goldsmith
Benjamin Goldsmith is Acting Felony Supervisor for The Defender Association-Division King County Department of Public Defense. He received a J.D. from University of Michigan, cum laude and an LLM from Georgetown University Law Center, where he was an E. Barrett Prettyman Fellow.

Joanne Moore
Joanne Moore has been the Director of the Washington State Office of Public Defense since 1998. She oversees the state's programs on indigent appellate defense, civil commitment defense under RCW 71.09, and parents' representation in dependency and termination cases, as well as Washington's RCW 10.101 public defense improvement program. Joanne is an active, longstanding member of the WSBA Council on Public Defense, and has been a leader in implementing the Supreme Court Standards for Indigent Defense. She co-chaired the House Judiciary Workgroup on Misdemeanor Public Defense Costs. She has authored numerous articles on public defense issues, and is Editor of Immigrants in Courts, published by the University of Washington Press, and a chapter on Reforming the Legal System, to be published by the ABA in 2015. Joanne has received several awards for her indigent representation work, including WDA's President's Award and WACDL's Champion of Justice Award.

Daron Morris
Daron Morris is the deputy director and felony supervisor for the TDA division of the King County Department of Public Defense. His previous experience includes working with the Legal Aid Society of New York City and as a private attorney in Seattle, where his work included providing post-conviction relief.

Jim Pugel
Jim Pugel is the Chief Deputy at the King County Sheriff's Office, located in Seattle Washington. As Chief Deputy, Jim oversees Patrol Operations Division, Criminal Investigation Division, Special Operations, Training, 911 Communications Center, Records and Data as well as the 16 cities and agencies that contract for services with the Sheriff's Office. Prior to that Jim was Interim Chief at the Seattle Police Department.
He began his career at the Seattle Police Department as a volunteer officer and was hired as a police officer in 1983, was on the SWAT and then promoted to Sergeant in 1990 where he worked patrol and the Training Academy. As a lieutenant he worked as a Watch Commander before commanding the Sexual Assault Unit. He became Captain of the West Precinct in 1999. Jim was promoted to Assistant Chief in 2001. He served as the Operation Bureau Chief, Field Support Bureau Chief and Criminal Investigation Bureau chief. Jim retired in April of 2014 after 31 years of service. Jim then joined the King County Sheriff's Office in September of 2014, working directly for Sheriff John Urquhart.

While an assistant chief Jim was the department's executive sponsor working closely with numerous community groups, non-profit organizations and government groups in creating the Law Enforcement Assisted Diversion (LEAD). LEAD is the only initiative of its kind in North America where low level, non-violent drug users, dealers and sex workers are given a chance to divert to treatment and other care at point of arrest instead of being put in jail. Jim serves on the Kennedy School of Government Executive Session on Community Corrections, and the VERA Institute Advisory Panel of Justice Reform for Healthy Communities. Both groups focus on ways to better divert people from prison and integrate released offenders while improving the health of all.

Jim is a graduate of the University of Washington with a BA in Political Science and English. He graduated from the FBI National Academy in 1997, the Senior Management Institute for Police at Boston University in 2002 and the Cascade Executive Management Program, Evans School of Public Policy, University of Washington in 2006. He lives in Seattle is involved in community organizations.

Dan Satterberg

Dan Satterberg was elected King County Prosecuting Attorney in November 2007 to succeed his longtime friend and mentor, the late Norm Maleng. He was re-elected in 2010 without opposition. Dan served as Chief of Staff for Norm Maleng for 17 years, and was responsible for the management and operation of the Prosecuting Attorney's Office, including budget, human resources, technology, legislative and policy matters. The Prosecuting Attorney's Office employs more than 210 attorneys, 230 staff, and has a budget of over $55 million. Before 1990, Dan was a trial attorney in the Criminal Division, where he spent rotations in the Special Assault Unit, Drug Unit, and served as the office's first gang prosecutor in 1988. Dan was born and raised in South King County and attended Highline High School. His father was a lawyer in White Center and his mother was a nursing instructor at Highline Community College. He graduated from the UW undergraduate school (Political Science and Journalism) and the UW Law School.

Travis Stearns

Travis Stearns has represented clients and worked on criminal justice reform his entire career. He is an adjunct professor at Seattle University School of Law, working formerly with the Washington Defender Association, the Whatcom County Public Defender and the Legal Aid Society of New York City. He currently represents criminal defendants in state and federal court at the trial and appellate level. He has written numerous articles and briefs on the obligations attorneys have to their clients post conviction.

Anna Tolin

Anna Tolin is the deputy director of the Innocence Project Northwest and a law lecturer at the University of Washington School of Law. She supervises law students investigating claims of wrongful conviction and represents prisoners seeking post-conviction relief. She has spoken frequently on post-conviction obligations and works steadily to overturn wrongful convictions. She provides management and supervisory support to IPNW, develops and implement case management policies, provides media and outreach communication, and coordinates with Advisory Council and Innocence Network members.
STIPULATION AND ORDER OF SETTLEMENT

WHEREAS, Plaintiffs, on behalf of the Plaintiff Class, as defined by the Appellate Division, Third Department ("Plaintiffs"), commenced and are pursuing a class action lawsuit entitled Hurrell-Harring, et al. v. State of New York, et al., Index No. 8866-07, in New York Supreme Court, Albany County, seeking declaratory and prospective injunctive relief for, among other things, the alleged deprivation by the State of New York and the Governor of the State of New York (the "State Defendants") of Plaintiffs' right to counsel in the counties of Onondaga, Ontario, Schuyler, Suffolk, and Washington (together the "Five Counties" and each a "County") guaranteed to Plaintiffs by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, § 6 of the New York State Constitution, and various statutory provisions; and

WHEREAS, the parties have been engaged in litigation since November 2007 and the New York Court of Appeals has determined that Plaintiffs may proceed with their claims for actual and constructive denial of counsel, Hurrell-Harring v. State of New York, 15 NY3d 8 (2010); and

WHEREAS, the Appellate Division, Third Department determined that Plaintiffs could pursue

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the litigation as a class action in accordance with Article 9 of the New York State Civil
Procedure Law and Rules ("CPLR"), Hurrell-Harring v. State of New York, 81 AD3d 69
(3d Dept. 2011); and

WHEREAS, in 2010, the State established the Office of Indigent Legal Services ("ILS") and the
Indigent Legal Services Board ("ILSB") (Executive Law Section 832 and Section 833,
respectively) to, among other things, improve the quality of the delivery of legal services
throughout the State for indigent criminal defendants; and

WHEREAS, the parties have conducted extensive fact and expert discovery, and have engaged
in motion practice before the Court, and the Court has set the matter down for trial; and

WHEREAS, the parties have negotiated in good faith and have agreed to settle this Action on
the terms and conditions set forth herein; and

WHEREAS, the parties agree that the terms of this settlement are in the public interest and the
interests of the Plaintiff Class and that this settlement upon the order of the Court is the most
appropriate means of resolving this action; and

WHEREAS, the parties understand that, prior to such Court order, the Court shall conduct a
fairness hearing in accordance with CPLR Article 9 to determine whether the settlement
contained herein should be approved as in the best interests of the Plaintiff Class; and

WHEREAS, ILS and the ILSB have the legal authority to monitor and study indigent legal
services in the state, to recommend measures to improve those services, to award grant monies to
counties to support their indigent representation capability, and to establish criteria for the
distribution of such funds; and

WHEREAS, the parties agree that ILS is best suited to implementing, on behalf of the State,
certain obligations arising under this Agreement; and

WHEREAS, the ILSB has reviewed those obligations contemplated under this Agreement for
implementation by ILS and has directed ILS to implement such obligations in accordance with
the terms of this Agreement, and this direction is reflected in the Authorization of the Indigent Legal Services Board and the New York State Office of Indigent Legal Services Concerning Settlement of the Hurrell-Harring Lawsuit, appended hereto as Exhibit A and incorporated by reference herein; and

WHEREAS, ILS is legally required to execute this direction from the ILSB; and

WHEREAS, the Plaintiff Class entered into a settlement agreement with Ontario County dated June 20, 2014, and the Court approved the settlement and dismissed the Plaintiff Class’s claims against Ontario County on September 2, 2014; and

WHEREAS, the Plaintiff Class entered into a settlement agreement with Schuyler County on September 29, 2014, which is currently scheduled for a fairness hearing on November 3, 2014; and

WHEREAS, Plaintiffs and the State intend that the terms and measures set forth in this Settlement Agreement will ensure counsel at arraignment for indigent defendants in the Five Counties, provide caseload relief for attorneys providing Mandated Representation in the Five Counties, improve the quality of Mandated Representation in the Five Counties, and lead to improved eligibility determinations;

NOW, THEREFORE, IT IS HEREBY STIPULATED, AGREED, AND ORDERED as follows:

1. **PARTIES TO THIS AGREEMENT**

The parties to this Settlement Agreement are the parties named in the Second Amended Complaint in the Action, which are the Plaintiff Class, the State of New York, Governor Andrew Cuomo, Onondaga County, Ontario County, Schuyler County, Suffolk County, and Washington County. If a County fails to execute the Agreement, it shall not be considered a party to this Agreement.
II. DEFINITIONS

As used in this Agreement:


**Agreement** and **Settlement Agreement** mean this Stipulation and Order of Settlement dated as of October 21, 2014 between and among Plaintiffs, the State Defendants, and the Five Counties.

**Arraignment** means the first appearance by a person charged with a crime before a judge or magistrate, with the exception of an appearance where no prosecutor appears and no action occurs other than the adjournment of the criminal process and the unconditional release of the person charged (in which event Arraignment shall mean the person’s next appearance before a judge or magistrate).

**Effective Date** means the date of entry of the order of Supreme Court, Albany County approving this Settlement Agreement.

**Executive** means the Office of the Governor.

**Five Counties** means Ontario, Onondaga, Schuyler, Suffolk, and Washington Counties, each of which was named as a defendant in the Second Amended Complaint filed on August 26, 2008 in *Hurrell-Harring v. State of New York*. Each of the Five Counties may also be referred to as a **County** in this Agreement.

**Mandated Representation** means constitutionally mandated publicly funded representation in criminal cases for people who are unable to afford counsel.

**Plaintiffs** or **Plaintiff Class** means the class of individuals certified by the Appellate Division on January 6, 2011 in *Hurrell-Harring v. State of New York*. 
III. COUNSEL AT ARRAIGNMENT

(A) (1) The State of New York (the "State") shall ensure, within 20 months of the Effective Date and continuing thereafter, that each criminal defendant within the Five Counties who is eligible for publicly funded legal representation ("Indigent Defendant") is represented by counsel in person at his or her Arraignment. A timely Arraignment with counsel shall not be delayed pending a determination of a defendant’s eligibility.

(2) Within 6 months of the Effective Date, the New York State Office of Indigent Legal Services ("ILS"), in consultation with the Executive, the Five Counties, and any other persons or entities it deems appropriate, shall develop a written plan to implement the obligations specified above in paragraph III(A)(1), which plan shall include interim steps for achieving compliance with those obligations. That plan shall be provided to the parties, who shall have 30 days to submit comments. Within 30 days of the end of such comment period (which will be no later than 8 months after the Effective Date), ILS shall finalize its plan and provide it to the parties. Starting within 6 months of finalization of the plan, the State shall undertake good faith efforts to begin implementing the plan, subject to legislative appropriations.

(3) The parties acknowledge that the State may seek to satisfy the obligations set forth in paragraph III(A)(1) by ensuring the existence and maintenance within each of the Five Counties of an effective system for providing each Indigent Defendant with representation by counsel in person at his or her Arraignment. Nothing in this provision alters the State’s obligations set forth in paragraph III(A)(1).

(4) Incidental or sporadic failures of counsel to appear at Arraignments within a County shall not constitute a breach of the State’s obligations under paragraph III(A)(1).
(B) The Executive shall coordinate and work in good faith with the Office of Court Administration ("OCA") to ensure, on an ongoing basis, that each judge and magistrate within the Five Counties, including newly appointed judges and magistrates, is aware of the responsibility to provide counsel to Indigent Defendants at Arraignments, and, subject to constitutional and statutory limits regarding prompt arraignments, to consider adjustments to court calendars and Arraignment schedules to facilitate the presence of counsel at Arraignments. If, notwithstanding the Executive's satisfaction of the terms of this paragraph III(B), lack of cooperation from OCA prevents the provision of counsel at some Arraignments, the State shall not be deemed in breach of the settlement for such absence of counsel at those Arraignments.

(C) In accordance with paragraph IX(B), the State shall use $1 million in state fiscal year 2015/2016 for the purposes of paying any costs associated with the interim steps described in paragraph III(A)(2). The State shall use these funds in the first instance to pay the Five Counties for the costs, if any, incurred by them in connection with the interim steps described in paragraph III(A)(2), and thereafter any remaining amounts shall be used to pay costs incurred by ILS.

(D) ILS, in consultation with the Executive, OCA, the Five Counties, and any other individual or entity it deems appropriate, shall, on an ongoing basis, monitor the progress toward achieving the purposes set forth in paragraph III(A)(1) above. Such monitoring shall include regular, periodic reports regarding: (1) the sufficiency of any funding committed to those purposes; (2) the effectiveness of any system implemented in accordance with paragraph III(A)(3) in ensuring that all Indigent Defendants are represented by counsel at Arraignment; and (3) any remaining barriers to ensuring the representation of all Indigent Defendants at Arraignment. Such reports shall be made available to counsel for the Plaintiff Class and the public.
(E) In no event shall the Five Counties be obligated to undertake any steps to implement the State’s obligations under Section III until funds have been appropriated by the State for paragraph III(A)(1) or paragraph III(A)(2). Nothing in this paragraph shall alter the Five Counties’ obligations under Section VII.

IV. CASELOAD RELIEF

(A) Within 6 months of the Effective Date, ILS shall ensure that the caseload/workload of each attorney providing Mandated Representation in the Five Counties can be accurately tracked and reported on at least a quarterly basis, including private practice caseloads/workloads. In accordance with paragraph IX(B), the State shall provide $500,000 in state fiscal year 2015/2016 to ILS for the purposes of paying any costs associated with the obligations contained in this paragraph IV(A), and ILS shall use those funds for such purposes. To the extent practicable, and subject to the specific funding commitments in this Agreement, the tracking system developed by ILS should be readily deployable across the state.

(B) (1) Within 9 months of the Effective Date, ILS, in consultation with the Executive, OCA, the Five Counties, and any other persons or entities ILS deems appropriate, shall determine:

(i) the appropriate numerical caseload/workload standards for each provider of mandated representation, whether public defender, legal aid society, assigned counsel program, or conflict defender, in each County, for representation in both trial- and appellate-level cases; (ii) the means by which those standards will be implemented, monitored, and enforced on an ongoing basis; and (iii) to the extent necessary to comply with the caseload/workload standards, the number of additional attorneys (including supervisory attorneys), investigators, or other non-attorney staff, or the amount of other in-kind resources necessary for each provider
of Mandated Representation in the Five Counties.

(2) In reaching these determinations, ILS shall take into account, among other things, the types of cases attorneys handle, including the extent to which attorneys handle non-criminal cases; the private practice caseloads/workloads of attorneys; the qualifications and experiences of the attorneys; the distance between courts and attorney offices; the time needed to interview clients and witnesses, taking into account travel time and location of confidential interview facilities; whether attorneys work on a part-time basis; whether attorneys exercise supervisory responsibilities; whether attorneys are supervised; and whether attorneys have access to adequate staff investigators, other non-attorney staff, and in-kind resources.

(3) In no event shall numerical caseload/workload standards established under paragraph IV(B)(1) or paragraph IV(E) be deemed appropriate if they permit caseloads in excess of those permitted under standards established for criminal cases by the National Advisory Commission on Criminal Justice Standards and Goals (Task Force on Courts, 1973) Standard 13.12.

(C) Starting within 6 months of ILS having made the caseload/workload determinations specified above in paragraph IV(B), the State shall take tangible steps to enable providers of Mandated Representation to start adding any staff and resources determined to be necessary to come into compliance with the standards.

(D) Within 21 months of ILS having made the caseload/workload determinations specified above in paragraph IV(B) (which shall be no later than 30 months from the Effective Date) (the "Implementation Date") and continuing thereafter, the State shall ensure that the caseload/workload standards are implemented and adhered to by all providers of Mandated Representation in the Five Counties.
(2) The parties acknowledge that the State may delegate to ILS the primary responsibility for overseeing the implementation, monitoring, and enforcement of the caseload/workload standards required hereunder, provided, however, that nothing in this provision alters the State's obligations set forth in this Section IV.

(3) The parties acknowledge that the State may seek to satisfy the obligation in paragraph IV(D)(1) by ensuring the existence and maintenance within each of the Five Counties of an effective system for implementing and enforcing any caseload/workload standards adopted under this Section IV. Nothing in this provision alters the State's obligations set forth in this Section IV.

(E) Beginning approximately 18 months after the Implementation Date, and no less frequently than annually thereafter, ILS shall review the appropriateness of any such standards in light of any change in relevant circumstances in each of the Five Counties. Immediately following any such review, ILS shall recommend to the Executive whether and to what extent the established caseload/workload standards should be amended on the basis of changed circumstances. Any proposed change to a caseload/workload standard implemented hereunder by ILS shall be submitted by ILS for approval by the Executive, provided, however, that such approval shall not be unreasonably withheld. Nothing in this provision shall limit the authority of ILS or the ILSB pursuant to Executive Law Article 30, Sections 832 and 833.

(F) Incidental or sporadic noncompliance with the caseload/workload standards by individual attorneys providing Mandated Representation shall not constitute a breach of the State's obligations under this Section IV.
V. INITIATIVES TO IMPROVE THE QUALITY OF INDIGENT DEFENSE

(A) No later than 6 months following the Effective Date, ILS, in consultation with the Five Counties, the providers of Mandated Representation in the Five Counties, and any other individual or entity ILS deems appropriate, shall establish written plans to ensure that attorneys providing Mandated Representation in criminal cases in each of the Five Counties: (1) receive effective supervision and training in criminal defense law and procedure and professional practice standards; (2) have access to and appropriately utilize investigators, interpreters, and expert witnesses on behalf of clients; (3) communicate effectively with their clients (including by conducting in-person interviews of their clients promptly after being assigned) and have access to confidential meeting spaces; (4) have the qualifications and experience necessary to handle the criminal cases assigned to them; and (5) in the case of assigned counsel attorneys, are assigned to cases in accordance with County Law Article 18-B and in a manner that accounts for the attorney’s level of experience and caseload/workload. At a minimum, such plans shall provide for specific, targeted progress toward each of the objectives listed in this paragraph V(A), within defined timeframes, and shall also provide for such monitoring and enforcement procedures as are deemed necessary by ILS.

(B) ILS shall thereafter implement the plans developed in accordance with paragraph V(A). To address costs associated with implementing these plans, ILS shall provide funding within each County through its existing program for quality improvement distributions, provided, however, that ILS shall take all necessary and appropriate steps to ensure that any distributions intended for use in accomplishing the objectives listed in paragraph V(A) are used exclusively for that purpose.

(C) In accordance with paragraphs IX(B) and IX(E), respectively, the State shall provide to ILS $2 million in each of state fiscal year 2015/2016 and state fiscal year 2016/2017 for the purposes of accomplishing the objectives set forth in
paragraph V(A), and ILS shall use such funds for those purposes. No portion of such funds shall be attributable to ILS’s operating budget but shall instead be distributed by ILS to the Five Counties.

(D) The Five Counties may, but shall not be obligated to, pay all or a portion of the funds identified in paragraph V(C) to ILS to provide services designed to effectuate the objectives set forth in paragraph V(A), provided such services are rendered in state fiscal years 2015/2016 and 2016/2017 and pursuant to a written agreement between ILS and the relevant County.

VI. ELIGIBILITY STANDARDS FOR REPRESENTATION

(A) ILS shall, no later than 6 months following the Effective Date, issue criteria and procedures to guide courts in counties outside of New York City in determining whether a person is eligible for Mandated Representation. ILS may consult with OCA to develop and distribute such criteria and procedures. ILS shall be responsible for ensuring the distribution of such criteria and procedures to, at a minimum, every court in counties outside of New York City that makes determinations of eligibility (and may request OCA’s assistance in doing so) and every provider of mandated representation in the Five Counties. The Five Counties shall undertake best efforts to implement such criteria and procedures as developed by ILS. Nothing in this paragraph otherwise obligates the Five Counties to develop such criteria and procedures.

(B) At a minimum, the criteria and procedures shall provide that: (1) eligibility determinations shall be made pursuant to written criteria; (2) confidentiality shall be maintained for all information submitted for purposes of assessing eligibility; (3) ability to post bond shall not be considering sufficient, standing alone, to deny eligibility; (4) eligibility determinations shall take into account the actual cost of retaining a private attorney in the relevant jurisdiction for the category of crime charged; (5) income needed to meet the reasonable living expenses of the
applicant and any dependent minors within his or her immediate family, or
dependent parent or spouse, should not be considered available for purposes of
determining eligibility; and (6) ownership of an automobile should not be
considered sufficient, standing alone, to deny eligibility where the automobile is
necessary for the applicant to maintain his or her employment. In addition, ILS
shall set forth additional criteria or procedures as needed to address: (7) whether
screening for eligibility should be performed by the primary provider of
Mandated Representation in the county; (8) whether persons who receive public
benefits, cannot post bond, reside in correctional or mental health facilities, or
have incomes below a fixed multiple of federal poverty guidelines should be
deemed presumed eligible and be represented by public defense counsel until that
representation is waived or a determination is made that they are able to afford
private counsel; (9) whether (a) non-liquid assets and (b) income and assets of
family members should be considered available for purposes of determining
eligibility; (10) whether debts and other financial obligations should be
considered in determining eligibility; (11) whether ownership of a home and
ownership of an automobile, other than an automobile necessary for the applicant
to maintain his or her employment, should be considered sufficient, standing
alone, to deny eligibility; and (12) whether there should be a process for appealing
any denial of eligibility and notice of that process should be provided to any
person denied counsel.

(C) ILS shall issue an annual report regarding the criteria and procedures used to
determine whether a person is eligible to receive Mandated Representation in
each of the Five Counties. Such report shall, at a minimum, analyze: (1) the
criteria used to determine whether a person is eligible; (2) who makes such
determinations; (3) what procedures are used to come to such determinations;
(4) whether and to what extent decisions are reconsidered and/or appealed; and
(5) whether and to what extent those criteria and procedures comply with the
criteria and procedures referenced in paragraph VI(A). The first such report shall
be issued no later than 12 months following the establishment of the criteria and procedures discussed in paragraph VI(A).

VII. COUNTY COOPERATION

The Five Counties shall use best efforts to cooperate with the State and ILS to the extent necessary to facilitate the implementation of the terms of this Agreement. This obligation is in no way subject to or conditioned upon any obligations undertaken by Ontario and Schuyler Counties by virtue of their separate agreements to settle this Action. Such cooperation shall include, without limitation: (1) the timely provision of information requested by the State or ILS; (2) compliance with the terms of the plans implemented pursuant to paragraphs III(A)(2), IV(B)(1), and V(A); (3) assisting in the distribution of the eligibility standards referenced in part VI(A); (4) assisting in the monitoring, tracking, and reporting responsibilities set forth in parts III(D), IV(A), and VI(C); (5) ensuring that the providers of Mandated Representation and individual attorneys providing Mandated Representation in the Five Counties provide any necessary information, compliance, and assistance; (6) undertaking best efforts to ensure the passage of any legislation and/or legislative appropriations contemplated by this Agreement; and (7) any other measures necessary to ensure the implementation of the terms of this Agreement. County failure to cooperate does not relieve the State of any of its obligations under this Settlement Agreement.

VIII. MONITORING AND REPORTING

In order to permit Plaintiffs to assess compliance with all provisions of this Agreement, the State shall:

(A) Promptly provide to Plaintiffs copies of the following documents upon their finalization and subsequent to any amendment thereto:

(1) The plan(s) concerning counsel at arraignment referenced in paragraph III(A)(2);
(2) The reports concerning counsel at arraignment referenced in paragraph III(D);

(3) The determinations regarding caseload/workload referenced in paragraph IV(B)(1) and any changes proposed or made pursuant to paragraph IV(E);

(4) The plan(s) for quality improvement referenced in paragraph V(A);

(5) The eligibility criteria referenced in paragraph VI(A);

(6) The reports regarding eligibility determinations referenced in paragraph VI(C);

(7) The relevant portions of each Executive Budget submitted during the term of this Agreement.

(B) Provide written reports to Plaintiffs concerning the State’s efforts to carry out its obligations under this Agreement and the results thereof, including, without limitation:

(8) Ensuring counsel at arraignment pursuant to paragraph III(A)(1);

(9) Coordinating with OCA pursuant to paragraph III(B);

(10) Implementing the tracking system referenced in paragraph IV(A);

(11) Implementing the caseload/workload standards referenced in paragraph IV(B) or paragraph IV(E) and ensuring that those caseload/workload standards are adhered to;

(12) Implementing the plans referenced in paragraph V(A).

Within 90 days of the Effective Date, the State and Plaintiffs shall meet and confer in good faith to identify the content and frequency of the specific reports
identified above that will be provided to Plaintiffs pursuant to this Section VIII.

IX. BEST EFFORTS AND APPROPRIATIONS

(A) The parties shall use their best efforts to obtain the enactment of all legislative measures necessary and appropriate to implement the terms of the Settlement Agreement.

(B) The Executive shall include in an Executive budget appropriation bill submitted to the Legislature for state fiscal year 2015/2016 sufficient appropriation authority to fund $3.5 million for purposes of implementing paragraphs III(C), IV(A), and V(C) of this Agreement.

(C) In order to prevent the obligation to provide counsel at Arraignment as set forth in Section III from imposing any additional financial burden on any County, the Executive shall include in an Executive budget appropriation bill submitted to the Legislature for the state fiscal year 2016/2017, and for each state fiscal year thereafter, sufficient appropriation authority for such funds that it, in consultation with ILS, OCA, the Five Counties, and any other individual or entity the Executive deems appropriate, determines, in its sole discretion, are necessary to accomplish the purposes set forth in Section III.

(D) In order to prevent the caseload/workload standards implemented under Section IV from imposing an additional financial burden on any County, the Executive shall include in an Executive budget appropriation bill submitted to the Legislature for the state fiscal year 2016/2017, and for each state fiscal year thereafter, sufficient appropriation authority for such funds that it, in consultation with ILS, OCA, the Five Counties, and any other individual or entity it deems appropriate, determines, in its sole discretion, are necessary to accomplish the purposes set forth in Section IV. In the absence of such funds, the Five Counties shall not be required to implement the caseload/workload standards referenced in
Section IV; provided, however, that nothing in this provision alters the State’s obligation to ensure that caseload/workload standards are implemented and adhered to.

(E) The Executive shall include in an Executive budget appropriation bill submitted to the Legislature for the state fiscal year 2016/2017 sufficient appropriation authority to fund $2 million to ILS for the purposes of implementing paragraph V(C).

(F) The Executive shall use best efforts to seek and secure the funding described in paragraphs IX(B), IX(C), IX(D), and IX(E), as well as any other funding or resources necessary, as determined in the sole discretion of the Executive, to implement the terms of this Agreement including, without limitation, funding and resources sufficient for ILS to carry out its responsibilities under the Agreement. Consistent with the State Constitution and the State Finance Law, this Agreement is subject to legislative appropriation of such funding. The State shall perform its obligations under this Agreement in each fiscal year for the term of the Agreement to the extent of the enacted appropriation therefor.

(G) Except as provided in paragraph XIII(A), nothing herein shall be construed to obligate the Five Counties to provide funding to implement any of the obligations under this Agreement.

X. LEGISLATIVE PROCESS AND OUTCOMES

(A) Upon the Effective Date, this Action shall be conditionally discontinued only as to the parties that execute this Agreement, pending the enactment of the budget for the state fiscal year 2015/2016 and, if required, the completion of the meet-and-confer process described in paragraph X(B) below.

(1) No later than 21 days after the enactment of the 2015/2016 budget, the State shall provide Plaintiffs with written notice stating whether or not the
State believes that it can fully implement its obligations under this Agreement in light of the amount of funding appropriated by the Legislature.

(2) If the written notice provided under X(A)(1) sets forth the State’s determination that the State can fully implement all of its obligations under this Agreement, then this Action shall be discontinued with prejudice only as to the parties that execute this Agreement. Such discontinuance shall not preclude Plaintiffs from commencing any new action pursuant to paragraph X(C)(2) below.

(B) If at any time the State believes it cannot fully implement one or more of its obligations under this Agreement in light of the Legislature’s action, the State shall notify Plaintiffs in writing of that fact and the parties shall meet and confer to determine whether they can mutually resolve the issue(s). If the parties are unable to resolve the matter within 45 days of the written notice provided by the State, the State within 10 days shall notify Plaintiffs in writing which obligation(s) the State is unable to fully implement. If the State notifies Plaintiffs that it cannot fully implement one or more of its obligations in Section III, Plaintiffs may pursue, as specified in paragraph X(C)(1) or X(C)(2), as appropriate, judicial remedies on their claims for actual denial of counsel. If the State notifies Plaintiffs that it cannot fully implement one or more of its obligations in Section IV or V of this Agreement, Plaintiffs may pursue, as specified in paragraph X(C)(1) or X(C)(2), as appropriate, judicial remedies on their claims for constructive denial of counsel. The State shall remain obligated to comply with the relevant affected provision(s) of the Agreement to the extent it has funding to do so and shall remain obligated to implement all provisions not affected by legislative action unless the State notifies Plaintiffs within 90 days of enactment of the 2015/2016 budget that it can implement no provision of Sections III, IV, and V of the Agreement, in which case the entire Agreement would be discontinued with prejudice only as to the parties that execute this Agreement.
shall be deemed null and void, and the relevant parties shall be restored to the same positions in the litigation that they had immediately prior to October 21, 2014.

(C)(1) **State Fiscal Year 2015/2016.** If the State, pursuant to paragraph X(B), notifies Plaintiffs within 90 days of enactment of the 2015/2016 budget that it cannot fully implement one or more of its obligations under the Agreement, Plaintiffs may pursue judicial remedies as allowed under paragraph X(B) by restoring this Action to the trial calendar by serving written notice upon the Court and the relevant parties that have signed the Agreement within 30 days after receiving such notice from the State, in which case the relevant parties shall be restored to the same positions in the litigation that they had immediately prior to October 21, 2014, with respect to the restored claim(s).

(2) **State Fiscal Year 2016/2017 to the Expiration of this Agreement.** In accordance with any notice pursuant to paragraph X(B) with respect to the 2016/2017 state fiscal year or any later state fiscal year through the expiration of this Agreement, Plaintiffs may pursue judicial remedies as allowed under paragraph X(B) only by filing a new action for declaratory and prospective injunctive relief. Nothing in the Stipulation of Discontinuance filed in this Action is intended to bar or shall have the effect of barring, by virtue of the doctrine of res judicata or other principles of preclusion, any new action as allowed under paragraph X(B) or any claims within such action. Neither the State nor any other defendant shall assert or argue that any such action or claim asserted therein is barred by virtue of the prior discontinuance of this Action.

(3) Nothing in this paragraph shall be construed to alter the parties’ rights under paragraph XIII(S).
XI. **DISPUTE RESOLUTION**

(A) If Plaintiffs believe that the State is not in compliance with a provision of this Settlement Agreement, Plaintiffs shall give notice to all parties in writing, and shall state with specificity the alleged non-compliance. Upon receipt of such notice by the State, Plaintiffs and the State will promptly engage in good-faith negotiations concerning the alleged non-compliance and appropriate measures to cure any non-compliance. Any party may request the participation of ILS in such negotiations. If Plaintiffs and the State have not reached an agreement on the existence of the alleged non-compliance and curative measures within forty-five (45) days after receipt of such notice of alleged non-compliance, Plaintiffs may seek all appropriate judicial relief with respect to such alleged non-compliance, upon ten (10) days’ prior notice in accordance with the Escalation Notice terms set forth in paragraph XI(B). The State and Plaintiffs may extend these time periods by written agreement. Nothing said by either party or counsel for either party during those meetings may be used by the other party in any subsequent litigation, including, without limitation, litigation in connection with this Agreement, for any purpose whatsoever.

(B) Plaintiffs shall provide notice ("Escalation Notice") to the individuals identified in paragraph XIII(G)(2) at least ten (10) business days before seeking judicial relief as described in paragraph XI(A), which notice shall inform such individuals that Plaintiffs intend to seek judicial relief and shall attach the notice provided under paragraph XI(A).

(C) Notwithstanding the dispute resolution procedures set forth above, if exigent circumstances arise, Plaintiffs shall be able to seek expedited judicial relief against the State based upon an alleged breach of this Agreement, upon five (5) business days’ prior notice to the individuals identified in paragraphs XIII(G)(1) and XIII(G)(2).
(D) Plaintiffs shall not seek to enforce any provision of this Agreement against any County. No provision of this Agreement shall form the basis of any cause of action by Plaintiffs against any County. In no event shall County action or inaction relieve the State of any of its obligations under this Agreement.

(E) If the State believes that a County is not meeting its obligations under this Agreement, it may seek relief following the same procedures as set out above in paragraphs XI(A), XI(B), and XI(C).

(F) Venue over any disputes concerning enforcement of this Agreement (1) between Plaintiffs and the State, (2) involving all the parties to this Agreement, or (3) between the State and more than one County shall be in a court of competent jurisdiction in Albany County. Venue over any disputes concerning enforcement of this Agreement between the State and a single County shall be in a court of competent jurisdiction in that County.

XII. ATTORNEYS’ FEES AND COSTS

(A) The State agrees to make a payment to Plaintiffs’ counsel, the New York Civil Liberties Union Foundation and Schulte Roth & Zabel LLP, in the aggregate amount of $5.5 million, as follows:

(1) The sum of $2.5 million (Two Million Five Hundred Thousand Dollars) for which an I.R.S. Form 1099 shall be issued to the New York Civil Liberties Foundation, and the sum of $3.0 million (Three Million Dollars) for which an I.R.S. Form 1099 shall be issued to Schulte Roth & Zabel LLP in full and complete satisfaction of any claims against the State and the Five Counties for attorneys’ fees, costs, and expenditures incurred by Plaintiffs for any and all counsel who have at any time represented Plaintiffs in the Action through the Effective Date.
(2) The payment of $2.5 million referred to in this paragraph shall be made payable and delivered to “New York Civil Liberties Union Foundation,” 125 Broad Street, 19th Floor, New York, New York 10004. The payment of $3.0 million referred to in this paragraph shall be made payable and delivered to “Schulte Roth & Zabel LLP,” 919 Third Avenue, New York, New York 10022.

(B) Any taxes on payments and/or interest or penalties on taxes on the payments referred to in paragraph XII(A) of this Agreement shall be the sole responsibility of the New York Civil Liberties Union Foundation and Schulte Roth & Zabel LLP, respectively, and Plaintiffs’ attorneys shall have no claim, right, or cause of action against the State of New York or any of its agencies, departments, or subdivisions on account of such taxes, interests, or penalties.

(C) Payment of the amounts recited in paragraph XII(A) above will be made (1) after the filing of a stipulation of discontinuance as set forth in paragraph XIV(A), upon complete discontinuance of this Action, or paragraph XIV(B), in the case of a partial restoration of this Action, and (2) subject to the approval of all appropriate New York State officials in accordance with Section 17 of the New York State Public Officers Law. Plaintiffs’ counsel agree to execute and deliver promptly to counsel for the State all payment vouchers and other documents necessary to process such payments, including, without limitation, a statement of the total attorney hours expended on this matter and the value thereof and all expenditures. Counsel for the State shall deliver promptly to the Comptroller such documents and any other papers required by the Comptroller with respect to such payments. Pursuant to CPLR 5003a(c), payment shall be made within ninety (90) days of the Comptroller’s determination that all papers required to effectuate the settlement have been received by him. In the event that payment in full is not made within said ninety-day period, interest shall accrue on the outstanding balance at the rate set forth in CPLR 5004, beginning on the ninety-first day after
the Comptroller's determination.

(D) Upon receipt of and in consideration of the payment of the sums set forth in paragraph XII(A), Plaintiffs shall (1) in the case of a complete discontinuance of this Action pursuant to paragraph XIV(A), waive, release, and forever discharge the State Defendants, including the State of New York, and the Five Counties and each of their respective current and former employees in their individual capacities, and their heirs, executors, administrators, and assigns from any and all claims for attorneys' fees, costs, and expenditures incurred in connection with this Action through the Effective Date; or (2) in the case of a partial discontinuance of this Action pursuant to paragraph XIV(B), waive, release, and forever discharge the State Defendants, including the State of New York, and the Five Counties and each of their respective current and former employees in their individual capacities, and their heirs, executors, administrators, and assigns from any and all claims for attorneys' fees, costs, and expenditures incurred in connection with this Action through the Effective Date, it being specifically understood that, upon such restoration, Plaintiffs shall also be free to seek reimbursement for their attorneys' fees, costs, and expenditures incurred after the Effective Date.

(E) Plaintiffs' counsel agree to maintain their billing records and documents evidencing payment of expenses relating to this Action for the term of this Agreement.

(F) In the event that this Agreement becomes null and void pursuant to paragraph X(B) or Section XVI, then (1) the State shall be under no obligation to make the payments referred to in paragraph XII(A); and (2) Plaintiffs shall be free to seek reimbursement of their full attorneys' fees, costs, and expenditures incurred in connection with this Action (including those incurred both before and after the date of this Agreement).
XIII. GENERAL PROVISIONS

(A) **Supplementation of Funds.** State funds received by a County pursuant to this settlement shall be used to supplement and not supplant any local funds that such County currently spends for the provision of counsel and expert, investigative, and other services pursuant to County Law Article 18-B. All such state funds received by a County shall be used to improve the quality of Mandated Representation services provided pursuant to County Law Article 18-B.

(B) **Modification.** This Agreement may not be modified without the written consent of the parties and the approval of the Court. However, the parties agree that non-material modifications of this Settlement Agreement can be made, with the written consent of the parties, without approval of the Court. For purposes of this paragraph, written consent from a County shall be deemed to exist with respect to a modification of any provision of this Agreement other than Section VII if such County (1) has been notified in writing that Plaintiffs and the State have agreed upon such modification; and (2) does not, within ten (10) business days of receipt of such notice, object in writing to such modification.

(C) **Expiration of Agreement.** This Agreement shall expire 7.5 years after the Effective Date.

(D) **Entire Agreement.** This Agreement contains all the terms and conditions agreed upon by the parties with regard to the settlement contemplated herein, and supersedes all prior agreements, representations, statements, negotiations, and undertakings (whether oral or written) with regard to settlement, provided, however, that nothing herein shall be deemed to abrogate or modify the separate settlement agreements entered into between Plaintiffs and Ontario County, dated June 20, 2014, and between Plaintiffs and Schuyler County, dated September 29, 2014.
(E) Interpretation. The parties acknowledge that each party has participated in the drafting and preparation of this Agreement; consequently, any ambiguity shall not be construed for or against any party.

(F) Time Periods. If any of the dates or periods of time described in this Agreement fall or end on a public holiday or on a weekend, the date or period of time shall be extended to the next business day. A “day” shall mean a calendar day unless otherwise specifically noted.

(G) Notice.

(1) All notices required under or contemplated by this Agreement shall be sent by U.S. mail and electronic mail as follows (or to such other address as the recipient named below shall specify by notice in writing hereunder):

<table>
<thead>
<tr>
<th>If to the State Defendants:</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Adrienne Kerwin</td>
<td>Seth H. Agata</td>
</tr>
<tr>
<td>Assistant Attorney General</td>
<td>Acting Counsel to the Governor</td>
</tr>
<tr>
<td>The Capitol</td>
<td>New York State Capitol Building</td>
</tr>
<tr>
<td>Albany, New York 12224</td>
<td>Albany, New York 12224</td>
</tr>
<tr>
<td><a href="mailto:Adrienne.Kerwin@ag.ny.gov">Adrienne.Kerwin@ag.ny.gov</a></td>
<td><a href="mailto:Seth.Agata@exec.ny.gov">Seth.Agata@exec.ny.gov</a></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>If to Plaintiffs:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Corey Stoughton</td>
</tr>
<tr>
<td>New York Civil Liberties Union Foundation</td>
</tr>
<tr>
<td>125 Broad Street</td>
</tr>
<tr>
<td>New York, New York 10004</td>
</tr>
<tr>
<td><a href="mailto:cstoughton@nyclu.org">cstoughton@nyclu.org</a></td>
</tr>
</tbody>
</table>

| Kristie M. Blase |
| Schulte Roth & Zabel LLP |
| 919 Third Avenue |
| New York, New York 10022 |
| kristie.blase@srz.com |
If to Onondaga County:
Gordon Cuffy
Onondaga County Attorney
Department of Law
John H. Mulroy Civic Center
421 Montgomery Street, 10th Floor
Syracuse, New York 13202
GordonCuffy@ongov.net

If to Ontario County:
Michael Reinhardt
Ontario County Courthouse
27 North Main Street
Canandaigua, New York 14424
Michael.Reinhardt@co.ontario.ny.us

If to Schuyler County:
Geoffrey Rossi
Schuyler County Attorney
105 9th Street
Unit 5
Watkins Glen, New York 14891
grossi@schuyler.co.ny

If to Suffolk County:
Dennis Brown
Suffolk County Attorney
H. Lee Dennison Building
100 Veterans Memorial Highway
P.O. Box 6100, 6th Floor
Hauppauge, New York 11788
dennis.brown@suffolkcountyny.gov
(2) Any Escalation Notice shall be sent as follows:

<table>
<thead>
<tr>
<th>If to Washington County:</th>
<th>If to ILS:</th>
</tr>
</thead>
<tbody>
<tr>
<td>William A. Scott</td>
<td>Joseph Wierschem</td>
</tr>
<tr>
<td>Fitzgerald Morris Baker Firth P.C.</td>
<td>Counsel</td>
</tr>
<tr>
<td>16 Pearl Street</td>
<td>Office of Indigent Legal Services</td>
</tr>
<tr>
<td>Glens Falls, New York 12801</td>
<td>Alfred E. Smith Building, 29th Floor</td>
</tr>
<tr>
<td><a href="mailto:WAS@fmbf-law.com">WAS@fmbf-law.com</a></td>
<td>80 South Swan Street</td>
</tr>
<tr>
<td></td>
<td>Albany, New York 12224</td>
</tr>
<tr>
<td></td>
<td><a href="mailto:Joseph.Wierschem@ils.ny.gov">Joseph.Wierschem@ils.ny.gov</a></td>
</tr>
</tbody>
</table>

(3) Each party shall provide notice to the other parties of any change in the individuals or addresses listed above within thirty (30) days of such change, and the new information so provided will replace the notice listed herein for such party.

(H) **No Admission.** Nothing in this Agreement shall be construed as an admission of law or fact or acknowledgement of liability, wrongdoing, or violation of law by the State or any Ratifying County regarding any of the allegations contained in the Second Amended Complaint in this Action, or as an admission or
acknowledgment by the State or any other defendant concerning whether Plaintiffs are the prevailing party in the Action by virtue of this settlement.

(I) **Precedential Value.** This Agreement and any Order entered thereon shall have no precedential value or effect whatsoever, and shall not be admissible, in any other action or proceeding as evidence or for any other purpose, except in an action or proceeding to enforce this Agreement.

(J) **No Waiver for Failure to Enforce.** Failure by any party to enforce this entire Agreement or any provision thereof with respect to any deadline or other provision herein shall not be construed as a waiver of its right to enforce deadlines or provisions of this Agreement.

(K) **Unforeseen Delay.** If an unforeseen circumstance occurs that causes the State or ILS to fail to timely fulfill any requirement of this Agreement, the State shall notify the Plaintiff in writing within twenty (20) days after the State becomes aware of the unforeseen circumstance and its impact on the State’s ability to perform and the measures taken to prevent or minimize the failure. The State shall take all reasonable measures to avoid or minimize any such failure. Nothing in this paragraph shall alter any of the State’s obligations under this Agreement or Plaintiffs’ remedies for a breach of this Agreement.

(L) **No Third-Party Beneficiaries.** No person or entity other than the parties hereto (a “third party”) is intended to be a third-party beneficiary of the provisions of this Agreement for purposes of any civil, criminal, or administrative action, and accordingly, no such third party may assert any claim or right as a beneficiary or protected class under this Agreement. This Agreement is not intended to impair or expand the rights of any third party to seek relief against the State, any County, or their officials, employees, or agents for their conduct; accordingly, this Agreement does not alter legal standards governing any such claims, including those under New York law.
(M) **Ineffectiveness Claims Unimpaired.** Nothing in this Agreement is intended to, or shall be construed to, impair, curtail, or operate as a waiver of the rights of any current or former member of the Plaintiff Class with respect to such member’s individual criminal case, including, without limitation, any claim based on ineffective assistance of counsel.

(N) **Confidential Information Relating to Plaintiff Class Members.** The parties acknowledge that privileged and confidential information of Plaintiff Class members, including documents and deposition testimony designated as confidential, information protected by the attorney-client privilege and/or work product doctrine, and documents revealing individuals’ social security numbers, private telephone numbers, financial information, and other private and sensitive personal information, was disclosed and obtained during the pendency of this Action. None of the State Defendants or the Five Counties shall use or disclose to any person such documents or information except as required by law. If any of the State Defendants or the Five Counties receives a subpoena, investigative demand, formal or informal request, or other judicial, administrative, investigative, or legal process (a “Subpoena”) requesting such confidential information, that party shall (1) give notice and provide a copy of the request to Plaintiffs as soon as practicable after receipt and in any case prior to any disclosure; (2) reasonably cooperate in any effort by Plaintiffs to move to quash, move for protective order, narrow the scope of, or otherwise obtain relief with respect to the Subpoena; and (3) refrain from disclosing any privileged or confidential information before Plaintiffs’ efforts to obtain relief have been exhausted.

(O) **Binding Effect on Successors.** The terms and conditions of this Agreement, and the commitments and obligations of the parties, shall inure to the benefit of, and be binding upon, the successors and assigns of each party.
(P) **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to the conflicts of law provisions thereof.

(Q) **Signatories.** The undersigned representative of each party to this Agreement certifies that each is authorized to enter into the terms and conditions of this Agreement and to execute and bind legally such party to this document.

(R) **Counterparts.** This Stipulation may be executed in counterparts, and each counterpart, when executed, shall have the full efficacy of a signed original. Photocopies and PDFs of such signed counterparts may be used in lieu of the originals for any purpose.

(S) **Covenant Not to Sue.** Plaintiffs agree not to sue the State Defendants during the duration of this Agreement on any cause of action based upon any statutory or constitutional claim set forth in the Second Amended Complaint, except that Plaintiffs retain their rights to (1) restore this Action pursuant to paragraph X(C)(1); (2) commence a new action pursuant to paragraph X(C)(2); and (3) enforce the terms of this Agreement.

(T) **Authority of ILS.** The parties acknowledge that the New York Office of Indigent Legal Services and the Board of Indigent Legal Services have the authority to monitor and study indigent legal services in the state, award grant money to counties to support their indigent representation capability, and establish criteria for the distribution of such funds.

(U) **ILS as Signatory to this Agreement.** ILS is a signatory to this Agreement for the limited purpose of acknowledging and accepting its responsibilities under this Agreement.
XIV. DISCONTINUANCE WITH PREJUDICE

(A) Without delay after the State provides the notice specified by paragraph X(A)(2), a Stipulation and Order of Discontinuance substantially in the form attached hereto as Exhibit B, shall be executed by counsel for Plaintiffs, the State Defendants, and the relevant Ratifying Counties, and filed with the Court. Nothing in the Stipulation and Order of Discontinuance so filed is intended to bar or shall have the effect of barring, including by virtue of the doctrine of res judicata or other principles of preclusion, a new action, as permitted by paragraph X(C)(2), or any claims within that action. Nor shall anything in the Stipulation and Order of Discontinuance prevent any party from enforcing this Agreement.

(B) In the event that the Action is partially restored pursuant to paragraph X(C)(1), without delay after Plaintiffs provide notice as required by paragraph X(C)(1), the relevant parties shall confer and draft a stipulation of discontinuance that discontinues with prejudice all claims that are not restored pursuant to paragraph X(C)(1). Such stipulation shall be executed by counsel for Plaintiffs, the State Defendants, and the relevant Ratifying Counties, as appropriate, and filed with the Court. Nothing in such stipulation is intended to bar or shall have the effect of barring, including by virtue of the doctrine of res judicata or other principles of preclusion, a new action, as permitted by paragraph X(C)(2), or any claims within that action. Nor shall anything in such stipulation prevent any party from enforcing this Agreement.

XV. COUNTY APPROVAL

This Agreement shall not be binding on any County unless and until the required legislative approval in that County has been obtained and the Agreement has been signed on behalf of the County (in which case, a County may be referred to as a “Ratifying County”). In the event that any County’s legislature does not approve this Agreement (a “Non-Ratifying County”) and, as a result, one or more of the Counties does not become a party to this Agreement, the Agreement
shall nonetheless remain in effect and binding upon all the parties that have signed it, each of which shall perform all obligations hereunder owed to the other parties that have signed the Agreement. In the event a Non-Ratifying County fails to become a party to this Agreement, (1) this Action shall not be discontinued as against any Non-Ratifying County and Plaintiffs shall be free to pursue any claims they may have against such Non-Ratifying County and seek any and all relief to which Plaintiffs may be entitled, except insofar as such claims have been or may be dismissed pursuant to Plaintiffs’ separate settlement agreements with Ontario County and Schuyler County; (2) any stipulation of discontinuance filed hereunder (including the Stipulation and Order of Discontinuance attached as Exhibit B) shall be modified to exclude any Non-Ratifying County and make clear that Plaintiffs’ claims against such Non-Ratifying County are not discontinued; (3) each Non-Ratifying County shall be considered a third party pursuant to paragraph XIII(L) for purposes of this Agreement; and (4) the releases in paragraph XII(D) shall be ineffective as to such Non-Ratifying County. For the avoidance of doubt, as between Plaintiffs and the State: (a) the benefits of this Agreement, including, without limitation, the releases referred to in Section XII and the covenant not to sue referred to in paragraph XIII(S), shall accrue to the State and Plaintiffs, and (b) the State’s and ILS’s obligations relating to Sections III, IV, V, and VI shall remain in effect as to all Five Counties independent of County ratification of this Agreement.

**XVI. COURT REVIEW AND APPROVAL**

This Settlement Agreement is subject to approval by the Court pursuant to CPLR 908. In the event that the Court does not approve the Settlement Agreement, then the parties shall meet and confer for a period of 30 days to determine whether to enter into a modified agreement prior to the resumption of litigation. If the parties have not entered into a modified agreement within such 30-day period, then this Agreement shall become null and void, and the relevant parties shall request the case be restored to the trial calendar and shall be restored to the same positions in the litigation that they had immediately prior to October 21, 2014.
EXECUTION COPY

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Dated: 10/21/2014

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For Defendant Governor Andrew M. Cuomo

By: ANDREW M. CUOMO, Governor of the State of New York

Dated: 10/21/2014

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Dated: 10/21/2014

WILLIAM LEAHY, Director

Dated: 10/21/2014

DOC ID: 22028239.1
So Ordered.

Dated: __________________________

HON. GERALD W. CONNOLLY
Pursuant to New York State Executive Law §832, the Office of Indigent Legal Services ("ILS") has the authority to act in pursuit of its statutory responsibility to make efforts to improve the quality of mandated legal representation in the state of New York. See §832 (1) and (3) (a) through (k). ILS has the further responsibility under §832 (3) (l) "to make recommendations for consideration by the indigent legal services board." ("the Board"). The Board has the authority "to accept, reject or modify recommendations made by the office[,]" §833 (7) (c); and once it has done so, the Office has a duty under §832 (3) (m) to execute its decisions. The Board and ILS have reviewed the agreement settling the action of Hurrell-Harring, et al. v. State of New York, et al., Index No. 8866-07 ("the Agreement"), and the State's obligations contained therein that are expressly intended for implementation by ILS. The Board and ILS acknowledge that those obligations constitute measures that, once implemented, will improve the quality of indigent legal services. Consequently, the Board accepts the recommendation of ILS that ILS implement the obligations under the Agreement and hereby authorizes and directs ILS to implement those obligations in accordance with the terms of the Agreement. The Board represents and warrants that it is authorized to take this action. Moreover, ILS represents and warrants that it has reviewed the obligations contained in the Agreement, and agrees to implement the obligations identified in the Agreement. The Board hereby authorizes ILS to sign the Agreement.

Dated: October 21, 2014

INDIGENT LEGAL SERVICES BOARD
By: John Dunne
JOHN DUNNE, Board Member

Dated: October 21, 2014

OFFICE OF INDIGENT LEGAL SERVICES
By: William Leahy
WILLIAM LEAHY, Director
Combatting Implicit Racial Bias:

Be Mindful About Stereotypes!
Only one of them is a convicted felon.
2.3 million incarcerated

- 75% of Americans are white
- 60% of those incarcerated are non-white

- 0.4% of whites are incarcerated
- 2.2% of blacks are incarcerated
- Nearly 6 times as likely to be incarcerated in black
• 1 in 10 of every black man in their thirties is in prison at any given time

• 1 in 3 black men are expected to go to prison in their lifetime
  • 1 in 6 latino men
  • 1 in 17 white men
Who is responsible?

Police

Prosecution
Implicit Racial Bias

Police
• Increased scrutiny (subconscious association between blackness and danger)
• Interpretation of ambiguous facts
Prosecutors

- Bond requests
- Charging decisions
- Plea offers

Jurors

- Evaluating evidence
- Later remembering facts
- Applying this data when decision-making

Judges

- Setting bail
- Deciding pretrial motions
- Asses guilt
- Instructions
- Sentencing
Eradicating racial disparity is a righteous cause...

...But, proceed with caution

Three Prong Approach

- Self Awareness
- Educating Others
- Stay Inspired
1. Self Awareness

No one is more vulnerable than the person who lacks self-awareness.

American Renaissance
Confessions of a Public Defender

- Most blacks are unable to speak English well. They cannot conjugate verbs. They have a poor grasp of verb tenses. They have a limited vocabulary. They cannot speak without swearing. They often become hostile on the stand. Many, when they testify, show a complete lack of empathy and are unable to conceal a morality based on the satisfaction of immediate, base needs.

- However, my experience has also taught me that blacks are different by almost any measure to all other people. They cannot reason as well. They cannot communicate as well. They cannot control their impulses as well. They are a threat to all who cross their paths, black and non-black alike.

  http://www.amren.com/features/2014/05/confessions-of-a-public-defender/
1. Evaluation of evidence
   • Interactions with Clients
   • Assessment of appropriate outcomes

2. Educating Others

Motions Practice
**Voir Dire**

- Educating the Venire
- Identifying Educable Jurors
  - Questioning About IRB
  - Exploring Relevant Experiences
Educating Jurors During Trail

- Expert Testimony
- Storytelling / Narrative
- Jury Instructions

Sentencing Advocacy

3. Stay Inspired
“[Residents of Harmony, MS] avoided discouragement and defeat because at the moment they determined to resist their oppression, they were triumphant.”

— Foreword – Derrick Bell
Guidelines for Indigent Defense Caseloads

A Report to the
Texas Indigent Defense Commission

Pursuant to House Bill 1318
83rd Texas Legislature
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Preface

The problems in providing criminal defense representation for the indigent in state courts across America are well documented. Due to lack of funding, there are inadequate investigative, expert, and other support services; poor compensation for public defenders and private lawyers; insufficient lawyer training; and poor oversight and supervision of defense providers. But of all the difficulties, none has proven more vexing than outrageously high caseloads of public defenders and even sometimes private lawyers. Although performance standards for defense lawyers, rules of professional conduct, and court decisions warn against accepting too much work, defense service providers have struggled to convince judges and those who fund defense representation of the numbers and types of cases that constitute a reasonable criminal caseload.

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals (hereafter “National Advisory Commission”), organized and funded by the federal government, recommended national annual maximum caseload numbers for indigent defense programs, which included on average not more than 150 felony cases per annum per lawyer and not more than 400 misdemeanor cases per annum per lawyer, excluding traffic offenses. Over the past 40 years, these numbers, referred to as the “NAC standards,” have been repeatedly cited by defense programs, bar associations, and even courts as “national caseload guidelines.” But these standards were not the result of any kind of work performed by the National Advisory Commission. Instead, as the commentary to the National Advisory Commission’s report conceded the caseload numbers were proposed by a defender committee of the National Legal and Defender Association and simply “accepted” by the National Advisory Commission. Moreover, I know from personal knowledge that the NLADA committee arrived at its caseload numbers during a conversation, not as the result of empirical study of any sort. Further, in accepting NLADA’s numbers, the National Advisory Commission repeated NLADA’s acknowledgement of “the dangers of proposing any national [caseload] guidelines.”

Despite the age of the NAC standards, as well as the myriad of changes in the defense of criminal cases during the past four decades, the standards are still frequently cited as if the recommended numbers are a meaningful measure of maximum defense caseloads that an individual lawyer should be able to represent over the course of a year. In 1973, however, defense lawyers handling criminal cases did not need to worry about collateral consequences of convictions, be familiar with a wide range of forensic evidence, or be called upon to represent defendants in sexually violent offender proceedings. In other words, as noted in the 2009 report, Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel, since the NAC standards were published “legal developments and procedural changes have
made indigent defense much more difficult, placing on defense lawyers far greater time
demands and requiring a higher level of expertise.”

We are witnessing today a concerted emphasis to determine appropriate caseload limits for
lawyers representing defendants in criminal cases. The means of achieving this is through the
use of weighted caseload studies applicable either to a state or local jurisdiction. Although such
studies have been performed in the past, the ones now being implemented, including this
Texas study, are more rigorous in their methodology than those previously undertaken. Other
criminal defense weighted caseload studies are currently underway in several other states.

This Texas study – the first ever mandated by a state legislature – is similar in its methodology
to “The Missouri Project” published in 2014 by the public accounting firm of RubinBrown on
behalf of the American Bar Association Standing Committee on Legal Aid and Indigent
Defendants (SCLAID). The Missouri Project was the first of this new breed of defense workload
studies in which, as in this study, my colleague, Steve Hanlon, played a major advisory role. The
Missouri Project focused on the caseloads of the Missouri State Public Defender program,
which furnishes the vast majority of indigent defense representation in that state. Much like
this study, the Missouri Project used a well-designed Delphi methodology. Thus, in Missouri
the expertise of both full-time public defense providers and experienced private defense
practitioners was used to determine how much time lawyers should devote to providing
effective and competent representation of indigent clients charged in various kinds of cases.
And, again much like this Texas study, the Missouri Project compared the amount of time that
should be devoted to representation of different kinds of cases against the amount of time
actually being spent, utilizing recent time records maintained by defense providers.

Because of reporting and offense classification differences between the Missouri Project and
this Texas study, it is difficult to make precise comparisons between the recommended
caseload standards of the two studies. However, both studies concluded that many fewer
felony and misdemeanor cases should be handled by defense lawyers than were suggested as
appropriate by the 1973 NAC standards. The significance of this cannot be overstated. In fact,
when the Missouri Project report was released in 2014, James Silkenat, then President of the
American Bar Association, commented about the study’s implications: “It can now be more
reliably demonstrated than ever before that for decades the American legal profession has
been rendering an enormous disservice to indigent clients and to the criminal justice system in
a way that can no longer be tolerated.”

In several respects, this Texas study conducted by the Public Policy Research Institute at Texas
A&M University improved upon the methodology used in the Missouri Project. For example,
this study included in its calculations “non-controllable case tasks,” which were excluded as
part of The Missouri Project’s methodology. In addition, unlike the Missouri Project, this study
analyzed separately the time required to be spent on cases resulting in guilty pleas and cases that should proceed to trial. Further, this study utilized a time sufficiency study among a broad cross-section of private lawyers and compared the results against the Delphi panel’s recommendations, which as stated in the report, “reached a striking level of agreement” between “two completely independent samples of attorneys....” No such comparison among Delphi panel members and another group of lawyers was part of the Missouri Project’s methodology.

The challenge of this Texas report and similar such workload studies are to translate empirical findings into adequate financial support and thus achieve lower caseloads among indigent defense providers. In the past, caseload reductions have proven difficult to achieve, as suggested at the beginning of this Preface. But in the past such efforts to reduce caseloads were not fortified with the kind of evidence contained in this Texas study. It remains to be seen whether the impressive data presented in this study will lead to enhanced financial support for Texas indigent defense and quality of justice improvements in its criminal courts.

Norman Lefstein
Professor of Law and Dean Emeritus
Indiana University Robert H. McKinney School of Law
Acknowledgements

The Public Policy Research Institute would like to thank the many individuals who made this research possible. We are grateful to everyone who assisted, and specifically acknowledge the following individuals and organizations.

The sponsors of House Bill 1318, passed in the 83rd Texas Legislature, are credited with creating the statutory mandate for the study. The caseload guidelines envisioned by the Honorable Senators Rodney Ellis, Sylvia Garcia, and John Whitmire as well as the Honorable Representatives Sylvester Turner and Armano Walle will serve as a cornerstone for the improvement of indigent defense in Texas.

The Honorable Sharon Keller, Chair of the Texas Indigent Defense Commission (TIDC), as well as Commissioners the Honorable Linda Rodriguez and Don Hase served on the project’s Advisory Panel. Commission staff also provided extensive guidance and support over the course of the study. Executive Director, James Bethke and his team including Edwin Colfax, Wesley Shackelford, and Joel Lieurance have been an invaluable resource from conceptualization through completion of the project. We also appreciate the assistance of Brittany Long and Allison Cunningham with preparation of the final report.

We thank the Regional Presiding Judges of Texas’ nine Administrative Judicial Regions. They helped researchers identify and recruit a geographically representative sample of highly qualified defense attorneys to serve on the Delphi Panel responsible for final caseload recommendations.

We appreciate the tireless and superlative guidance provided by two national caseload scholars, Norman Lefstein, Dean Emeritus and Professor of Law at Indiana University Robert H. McKinney School of Law, and Steve Hanlon, public interest attorney and Adjunct Professor of Law at St. Louis University School of Law. Professor Lefstein’s 2011 book, Achieving Reasonable Caseloads, is a modern classic among academics, policymakers, and advocates seeking to improve indigent defense. Professor Hanlon’s experience, creativity, and leadership in pioneering new, more rigorous methods to determine caseload guidelines in Missouri inspired many aspects of the research approach used here. The participation of these valued contributors elevated the quality of the study.

The project also greatly benefitted from the support and assistance of two of the state’s most prominent leaders in indigent defense. President of the State Bar of Texas, Mr. Buck Files and President of the Texas Criminal Defense Lawyers Association, Mr. Bobby Mims each delivered the full support of their respective organizations. With the backing of Mr. Files and Mr. Mims, these organizations disseminated information to members through announcements at trainings and leadership meetings, in publications, and through social media. These contributions were key to the study’s success engaging over 500 attorneys to provide the necessary data.
We thank the individuals who contributed expertise and information through their service on the project Advisory Panel. Acknowledged in Appendix A, these state and national indigent defense stakeholders shared feedback and ideas for improving the study from many varied perspectives. Their input helped provide direction for the research team while strengthening the relevance and usefulness of the results.

The private and public defender attorneys who voluntarily tracked their time on criminal cases are recognized in Appendix B. These professionals sustained timekeeping over a 12-week period. We thank each of these study participants not only for their personal assistance with data collection, but also for their clear commitment to improving indigent defense policy and practices. An additional 319 attorneys responded to the Time Sufficiency Survey. Though they are not identified by name, their input regarding the time required for effective representation was an important element of the research.

In Appendix G we acknowledge the 18 attorneys who made significant contributions to the study through their service on the Delphi Panel. Their considerable criminal defense expertise, and their conscientious adherence to the prescribed research protocol, was instrumental for developing the final caseload recommendations set forth in this report. Criminal defense attorney Don Hase represented the Texas Indigent Defense Commission on the panel. Without their participation the research would not have been possible.

The authors would like to thank Kellie Bailey, Patricia Cummings, Bradley Hargis, and Jeanette Kinard for their assistance during the planning stages of the study. These attorneys shared their extensive expertise concerning criminal defense to help the research team develop offense and timekeeping categories appropriate for Texas.

Carl and Keith Richey of JusticeWorks, LLC created the custom timekeeping software used by attorneys to track their time on criminal cases. The online system was user-friendly for attorneys which increased reporting compliance, and it was accessible to the research team in real time making it feasible to monitor data collection. The staff of JusticeWorks were reliable partners whose conscientious attention to the study improved the timekeeping data.

Many individuals at PPRI helped with specific aspects of the project. Terry Williams provided extensive assistance with meeting set-up, travel arrangements, and incentive gift cards. Stacy Rhodes oversaw assembly of the master database of appointed counsel from which attorneys were sampled for the study. The staff of PPRI’s Survey Research Laboratory, supervised by Alicia Novoa and Andrea Sesock, recruited study participants. Aaron Williams developed the weighted caseload study website and assisted with cover art. Laura Hugill and Emily Naiser helped program the Time Sufficiency Survey. David Cabrera contributed to earlier drafts of this report. We appreciate these many valued contributions.
Executive Summary
Executive Summary

House Bill (HB) 1318, passed by the 83rd Texas Legislature, instructed the Texas Indigent Defense Commission (TIDC) to “conduct and publish a study for the purpose of determining guidelines for establishing a maximum allowable caseload for a criminal defense attorney that allows the attorney to give each indigent defendant the time and effort necessary to ensure effective representation.”¹ In response to this directive, TIDC determined to conduct a weighted caseload study. This methodology accounts for variation in the amount of attorney time required to defend different types of cases. Unlike other weighted caseload studies, this was the first to include time spent by private assigned counsel. It sought to answer two important questions:

1. How much time “is” currently being spent on the defense of court-appointed criminal cases?
2. How much time “should” be spent to achieve reasonably effective representation?

The Importance of Attorney Caseloads in Effective Representation

The Sixth Amendment of the U.S. Constitution guarantees the right to assistance of counsel for defendants in criminal matters. In 1963, the Supreme Court decision *Gideon v. Wainwright*² affirmed that this right extends to individuals unable to afford an attorney in state felony prosecutions. Today, in Texas and other states, the right to counsel for the indigent is broadly recognized in misdemeanor cases as well.

In 1984, the Supreme Court set forth rules for the reversal of criminal convictions based on ineffective assistance of counsel in *Strickland v. Washington*³ and *United States v Cronic*.⁴ In the *Cronic* decision, the Court has emphasized that beyond not harming a client through deficient representation, defense lawyers must be proactive, providing zealous and meaningful opposition to the prosecutor’s case. Excessive caseloads erode the right to competent and effective counsel by inhibiting attorneys’ ability to devote the time and attention required for “meaningful adversarial testing” of the charges.⁵

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⁵ *Id.*
In addition, professional conduct rules address the duties of lawyers in all of the cases in which they provide legal representation. The *Texas Rules of Professional Conduct*\(^6\) and the *Performance Guidelines for Non-Capital Criminal Defense Representation* of the State Bar of Texas\(^7\) require of lawyers sufficient knowledge, skill, preparation, time and resources for adequate representation. Furthermore, when attorneys cannot provide such representation, professional conduct rules and standards dictate that they should decline or withdraw from the case.\(^8\)

Despite these professional obligations, it is not difficult to find examples of defense lawyers who are overwhelmed by too many cases to defend. In Texas, new reporting requirements under HB 1318\(^9\) reveal some attorneys were paid for 500 to 1,400 court-appointed cases in FY 2014. For some this was only a portion of the clients they represented during the fiscal year. Precise criteria defining excessive caseloads are elusive because of the many different factors that influence the time required for competent and effective representation. Nonetheless, objective research methods integrating time measurement with expert opinion from experienced attorneys can yield meaningful guidelines. This is the purpose of the research reported here.

**Weighted Caseload Study**

Texas’ weighted caseload study began with input from an Advisory Panel of indigent defense stakeholders convened in late 2013. These included national caseload experts, national indigent defense practitioners, Texas Indigent Defense Commissioners, criminal defense attorneys, legislators, state agency representatives, and other stakeholder constituencies with an interest in indigent defense. Their expertise helped research staff integrate diverse perspectives and clarify direction for the Texas study.

Three complementary data collection approaches were used for the study. These included a Timekeeping Study, a Time Sufficiency Survey, and final recommendations generated using the Delphi Method. Investigation was limited to adult-trial level cases, ranging from Class B misdemeanors through first degree felonies. Eight different task categories were used to describe attorneys’ use of time. These included communication with clients or their families, interaction with the court, discovery or investigation by the attorney, time spent by a private or

\(^{6}\) Tex. Disciplinary Rules of Prof’l Conduct R. 1.01.


\(^{8}\) Tex. Disciplinary Rules of Prof’l Conduct R. 1.15.

public defender investigator, legal research and trial preparation, negotiations or meetings related to litigation issues, social work assistance for clients, and case-specific office support.\textsuperscript{10}

**Timekeeping Study**

Timekeeping data was provided by 196 private and public defender attorneys who tracked their time on criminal defense cases over a 12-week period. Results show that in current practice Class B and Class A misdemeanors are being disposed in 4.7 and 7.6 hours, respectively. Low-level state jail and third degree felonies are resolved in 10.8 and 12.9 hours, respectively. Second degree felonies take 15.2 hours to dispose, and the highest-level first degree felonies are resolved with 22.3 hours of attorney time. However, individuals and public defender offices with the highest caseloads may have been disinclined to participate in the study. Timekeeping data may therefore overestimate actual average time spent.

At present, according to the Timekeeping Study, nearly half of all defense-related time is spent in court. The next most time-intensive categories, legal research/trial preparation and communication with clients account for 15 to 20 percent of case time each. The time dedicated to these tasks is as high as 30 percent for high-level felonies. Notably, investigators are rarely used among attorneys, accounting for less than two percent of case time at every offense level. Most investigation is conducted by the lawyers themselves.

**Time Sufficiency Survey**

To ascertain peer perspectives on how much time “should” be spent on criminal cases, 319 survey respondents reviewed and recommended revisions to Timekeeping Study findings. Respondents were able to adjust either the frequency with which tasks were performed or the time spent when the tasks were done.

To ensure effective representation, a 66 percent increase in time was recommended at every offense level. By far, the greatest proportional increase by task was for investigation. Lawyers surveyed advised that non-attorney investigator’s time should increase by a factor of 13 times for misdemeanors, and 10 times for high-level felonies. This guidance is consistent with direction provided by the State Bar of Texas.\textsuperscript{11} Involvement of a third party investigator

\textsuperscript{10} Discovery and investigation by the attorney were treated as a combined category during the Timekeeping Study and the Time Sufficiency Survey. These categories were treated separately during the Delphi deliberations.

\textsuperscript{11} PERFORMANCE GUIDELINES, (stating in Guideline 4.1 that “[i]f counsel conducts interviews of potential witnesses adverse to the client, counsel should attempt to do so in the presence of an investigator or other third person in a manner that permits counsel to effectively impeach the witness with statements made during the interview.”).
provides the defense with a witness who can testify at trial in the event that a witness contradicts what was told to a defense investigator during a prior interview.

A five-fold increase was suggested for time spent in negotiations or meetings with judges, prosecutors, pre-trial services, and other offices that impact case processing. Attorneys also concluded that time spent on client communication and on case management should more than double to enable clients to receive necessary benefits and services.

**Delphi Panel**

To arrive at final caseload guidelines for Texas, a panel of 18 highly experienced criminal defense practitioners was selected to take part in a Delphi process. The Delphi method offers a rational and structured means to integrate opinions of highly informed professionals to solve problems. Members averaging more than 25 years of experience were selected to represent each of the state’s nine Administrative Judicial Regions. Over a two-month period, Delphi Panel members completed a three-round sequence of activities designed to integrate independent judgment and collaborative decision-making to arrive at recommended case weights.

In a departure from workload studies in other states, the Texas Delphi Panel chose to produce separate time recommendations for cases disposed by trial and those disposed in other ways (e.g., plea, dismissal, diversion). Using the Delphi-recommended trial rate, time guidelines generated by the panel are strikingly similar to those suggested by peer attorneys responding to the Time Sufficiency Survey. The high degree of convergence – within a range of just one misdemeanor per week or one felony per month – lends credence to the validity of overall study findings.

Also like their colleagues responding to the Time Sufficiency Survey, Delphi members agreed the greatest time increment is needed the area of investigation. Delphi members supported at least a five-fold increase in attorney discovery and investigation and a twenty-fold increase in non-attorney investigator’s time. As much as forty times more external investigation was recommended for misdemeanors in particular. Delphi members also agreed with survey respondents that about six times more time should be spent in negotiation or meetings with officials such as prosecutors and judges that can impact case outcomes, and that time spent communicating with clients should increase by more than two-thirds on average.

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12 *See generally,* Section II (discussing the Delphi method).
Final Recommended Caseload Guidelines

Whether the Delphi Panel’s ideal trial rates or actual trial rates are applied makes a difference in the final caseload recommendations. The Delphi Panel’s higher assumed trial rate translates to 28% fewer misdemeanors and 20% fewer felonies defended per year than if actual trial rates are used. Clearly, the smaller number of annual cases derived from the panel’s recommendation would allow more time for a competent and diligent defense. For now, however, the “ideal” rate is not aligned with reality. Just 1.1 percent of misdemeanors are tried – not the 14 to 20 percent favored by the panel. Similarly, just 2.5 percent of felony cases are disposed by trial rather than the 11 to 20 percent urged by the panel.

For this reason, final recommended caseload guidelines for Texas are based on actual FY2014 trial rates. Importantly, annual data is available on the proportion of felony and misdemeanor cases resolved by trial or by other means. It is therefore not only possible, but recommended that proactive measures be taken to align Delphi-recommended and actual trial rates as an element of efforts to create standards of reasonably effective counsel. Until that occurs, however, it is most accurate and efficient to base current caseload guidelines on actual trial practice.

The results indicate for the delivery of reasonably competent and effective representation attorneys should carry an annual full-time equivalent caseload of no more than the following:

- 236 Class B Misdemeanors
- 216 Class A Misdemeanors
- 174 State Jail Felonies
- 144 Third Degree Felonies
- 105 Second Degree Felonies
- 77 First Degree Felonies

Conclusion

According to national standards, defense attorneys “should not accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to

the breach of professional obligations.”

With the development of caseload guidelines for the state of Texas, a valuable new tool will be available to help define the point at which caseloads become excessive. This tool can be used in important ways to protect the Constitutional right to counsel and the equitable administration of justice.

With evidence-based caseload parameters, appointing authorities and attorneys taking appointments can be held accountable for managing workloads, information is available to set fair compensation rates, and jurisdictions adhering to reasonable caseload limits are less exposed to potential litigation. Caseload guidelines alone may not guarantee the provision of reasonably effective counsel, but they are certainly a necessary component, essential to securing the Sixth Amendment right to counsel for the indigent accused.

I. Introduction

In 2013, the 83rd Texas Legislature passed House Bill (HB) 1318 relating to the appointment of counsel for indigent defendants. Among other things, the Bill instructed the Texas Indigent Defense Commission (TIDC) to conduct a study to generate caseload recommendations that enable the state’s criminal defense attorneys “to give each indigent defendant the time and effort necessary to ensure effective representation.”

The Public Policy Research Institute at Texas A&M University (PPRI) assisted with research design and implementation. The State Bar of Texas and the Texas Criminal Defense Lawyers Association partnered to inform attorneys and to engage them in this important undertaking. A 27-member Advisory Panel brought state and national expertise to bear and 17 additional invited observers represented diverse stakeholder constituencies. More than 500 individual attorneys contributed data over the course of the study including 18 highly qualified criminal defense lawyers who served on the Delphi Panel responsible for making final caseload recommendations.

Results from Texas’s first defense attorney caseload assessment are presented herein. Following this introduction, Section II offers an overview of the major issues related to excessive caseloads and the importance of the study. Section III provides background information about the Indigent Defense Commission’s role in implementing HB 1318 and the scope of the bill with regard to indigent defense caseload assessment.

Attention is then focused on the research. Section IV offers an overview of the tasks and timeline associated with the weighted caseload study. In Section V, results of the Timekeeping Study are presented. This section discloses the amount of time currently being spent on court-appointed cases. Next, practicing attorneys were asked to review and provide feedback on the time measurements taken. Their recommended changes in attorney time necessary for effective representation are presented in Section VI. Section VII describes the Delphi Method used to determine the time that “should” be spent on indigent defense to attain effective representation, then shares the time recommendations emerging from that process. Section VIII concludes the report, presenting the criminal defense caseloads recommended by this study. Potential uses of the caseload guidelines are considered in Section IX, followed by conclusions in Section X.
II. Why Defense Caseloads Matter

The Sixth Amendment of the U.S. Constitution guarantees defendants the right to have the assistance of counsel in criminal matters. It was not until the decision in *Gideon v. Wainwright*, however, that this constitutional protection was significantly expanded for indigent defendants. For the first time, *Gideon* established that in state court felony cases if the accused was unable to afford an attorney, the state is obliged to provide one. As accused individuals have gained greater access to legal counsel, the number of cases receiving appointed representation has increased proportionately. In the United States today, approximately 80% of defendants rely on court-appointed counsel.

**Defining Effective Counsel**

Foundational court decisions have created an expectation that attorneys should do more than just be present at court proceedings. They have an obligation to provide indigent defendants with “effective assistance of counsel” in accord with the Sixth Amendment. In 1984, in *Strickland v. Washington*, the US Supreme Court set forth a two-prong test for finding ineffective assistance of counsel: 1) the defendant must show that the attorney’s performance was deficient and 2) that the deficient performance prejudiced the defendant. In *United States v. Cronic*, a companion case decided the same day as *Strickland*, the Court emphasized that defense lawyers must provide zealous and meaningful opposition to the prosecutor’s case. According to the Court, “[T]he adversarial process protected by the Sixth Amendment requires that the accused have ‘counsel acting in the role of an advocate.’ The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing.”

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2 In Powell v. Alabama, 287 U.S. 45 (1932), the United States Supreme Court held that the Sixth Amendment requires that indigent defendants in state court capital cases must be provided the right to counsel. Supreme Court decisions after *Gideon* afforded representation to indigent defendants in other types of cases including misdemeanor cases resulting in imprisonment and juvenile delinquency proceedings. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972); In re Gault, 387 U.S. 1 (1967). In Texas, the Court of Criminal Appeals has long recognized the right to counsel in misdemeanor cases where imprisonment is possible absent a valid waiver of the right to counsel. See, e.g., Lewis v. State, 501 S.W.2d 88 (Tex. Crim. App. 1973).
Professional Performance Criteria

In addition to decisions of the Supreme Court, national and local bar associations impose duties upon lawyers in all cases in which they provide legal representation. Nationally, the American Bar Association’s (ABA) Model Rules of Professional Conduct requires that, “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” In Texas, Rule 1.01 of the Texas Rules of Professional Conduct requires that lawyers provide competent and diligent representation.

Additionally, the State Bar of Texas’s Performance Guidelines for Non-Capital Criminal Defense Representation requires that counsel before taking a case, confirm that they have “sufficient time, resources, knowledge and experience to offer quality representation.” Components of “competent” and “quality” representation include adequate communication with clients, prompt investigation, and appropriate investigation and study of the case facts prior to acceptance of a plea arrangement.

When attorneys cannot provide quality representation, professional standards dictate that they should decline or withdraw from the case. According to commentary for Rule 1.15 of the Texas Rules of Professional Conduct, “A lawyer should not accept representation in a matter unless it can be performed competently, promptly, and without improper conflict of interest.” ABA Criminal Justice Standard, Providing Defense Services 5-5.3 (b) is even more explicit:

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9 Tex. Disciplinary Rules of Prof’l Conduct R. 1.01.
11 Tex. Disciplinary Rules of Prof’l Conduct R. 1.03.
12 Performance Guidelines, supra note 10, at 9–11.
13 Id. at 16. Under Strickland’s two-pronged test, a claim of “ineffective assistance of counsel” requires a the defendant to show there is a reasonable probability the attorney’s failure to investigate prior to accepting a plea could have changed the outcome of the case (i.e., a finding of prejudice). This standard was attained in Lafler v. Cooper, 132 S. Ct. 1376 (2012), where a plea was rejected on the basis of deficient legal advice, and in Missouri v. Frye, 132 S. Ct. 1399 (2012), where a plea agreement lapsed because the defendant was never informed of the offer. However, prejudice is an inquiry only after conviction and is extremely difficult to establish. When caseload standards are available, it is possible to avoid Strickland’s prejudice prong by demonstrating “deficient representation” due to excessive caseloads during the critical stage between arraignment and trial. See Laurence A. Benner, Eliminating Excessive Public Defender Workloads, 26 Crim. Just. 1, 24–33 (2011).
Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organization, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments...15

Consequences of Excessive Caseloads

There is little dispute that excessive caseloads are incompatible with ensuring effective defense representation, as well as competent and diligent legal services. Yet, it is not difficult to find examples of defense lawyers who are overwhelmed with far too many cases to defend.16 Two defense lawyers in Washington State told the New York Times they handled approximately 1,000 cases each in a year.17 In Florida, a non-capital felony attorney had 971 cases in a single year, of which nearly 80 percent were felonies.18 In testimony solicited by the American Bar Association, witnesses from Rhode Island, Pennsylvania, Maryland, Nebraska, and New York affirmed that excessive indigent defense caseloads are endemic nationally. They cited instances of annual misdemeanor caseloads in excess of 1,000 cases, as well as active felony caseloads of more than 100 pending cases.19

In Texas, new reporting requirements under HB 1318 reveal a number of attorneys were paid for 500 to 1,400 court-appointed cases in FY 2014. Moreover, for some, this was just a portion of their total caseload. At least 14 individuals representing more than 600 indigent defendants claimed those clients comprised just 40 to 70 percent of their total cases.

High caseloads contribute to a “meet and plead” system that can result in serious incidents of attorney error. As one example, a Florida public defender with 13 serious felony cases set for trial in a single day found herself unable to respond in a timely manner to a prosecutor’s plea offer. The mistake increased the client’s jail term from one to five years. As another example, the Georgia Court of Appeals ruled that a convicted defendant facing 15 years in prison could withdraw his guilty plea as a result of attorney neglect. Explaining his failure to interview key witnesses, the defense attorney said “he had so many cases on his load that if he looked into every nook and cranny there was to this case, that he would never get anything done.” While it is impossible to precisely quantify the frequency or consequences of mistakes made by overburdened defense lawyers, these examples provide some insight into the ways excessive caseloads distort and threaten individuals’ right to counsel.

Efforts to Address the Caseload Problem

While court decisions, statute, rules of professional conduct, and performance guidelines are in agreement that defense attorneys must limit the number of their cases, determining caseload standards for use in a particular jurisdiction presents certain challenges. Three main approaches have been used to date to derive uniform time recommendations. These include empirical workload studies, professional judgments, and most recently, the Delphi Method.

Attorney Workload Studies

Over the last two decades, workload studies have been widely used by states to develop objective caseload guidelines. Using this methodology, defense attorneys track the time being

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spent to represent cases in their daily work. Recommended time allowances are then based on the actual time used for different types of cases in a jurisdiction. Workload assessments have been conducted in at least 16 states with results being used to help public defender offices determine staffing needs to adequately represent their case volume.  

A limitation of relying solely on workload data, however, is that resulting recommendations assume that adequate time is already being spent. If the work of attorneys contributing time records is constrained by high case volume, the results measure “what is” rather than what “should be” in order to achieve quality representation.

**Professional Judgments**

An alternative means of determining the time required for effective counsel is to assemble the opinions of experts. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals (NAC) adopted the annual maximum caseloads proposed by the National Legal Aid and Defender Association (NLADA). The standards recommend attorneys in a public defender office should take no more than 150 felonies, 400 non-traffic misdemeanors, 200 juvenile court cases, 200 Mental Health Act cases, or 25 appeals per person on average in a year. Though they were never intended to serve as national guidelines, public defense programs often reference these numbers as the accepted benchmark for an attorney’s caseload.

Today, forty years since their inception, there are serious concerns about the adequacy of these NAC Standards. For one thing, the recommendations are entirely based on the opinions of NLADA committee members rather than evidence of the time required for attorneys to do their job well. In addition, critics point out that the standards weigh all felony and misdemeanor cases the same regardless of seriousness, and do not account for changes in defense-related policies and practices that have emerged since 1973. These include the advent of forensic DNA evidence, growth in linguistic diversity, and the rise in collateral consequences stemming from

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27 NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS: COURTS 276 (1973) [hereinafter NAC STANDARDS].

28 For a summary of limitations of the NAC standards, see Lefstein, SECURING REASONABLE CASELOADS, supra note 22, at 43–45.
Some attorneys also consider the NAC time recommendations to be insufficient to achieve quality representation.  

It is rarely noted, however, that the NAC caseload standards are accompanied by several important caveats. The NLADA explicitly acknowledged the “dangers of proposing any national guidelines” because of local differences in a range of factors that could impact time needed to represent similar cases in different jurisdictions. These included possible variations in definitions of a “case,” ways workload is measured, and differences in geographical factors that would impact travel time. These concerns were affirmed in the experience of prosecutors who have attempted but abandoned efforts to develop national caseload standards, a task they deemed to be “impossible.”

**The Delphi Method**

The Delphi method has been recommended by legal experts as a substantially more rigorous means than professional judgment alone to quantify professional opinion about attorney caseload size. Recently, this approach was used in Missouri to help quantify reasonable caseloads for indigent defense attorneys. The Delphi method involves an iterative decision-making process to integrate and rationalize the diverse opinions of highly knowledgeable experts. First, experts provide individual, anonymous responses to a given topic. Next, experts are given aggregated results showing group means, medians, and ranges. At this time, panel members may then choose to adjust their initial answers based on feedback from the group.

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31 NAC STANDARDS, *supra* note 27, at 277.

32 *Id.*


alternating participants’ independent assessments with group feedback, expert opinion can be converted into objective data. The mean or median resulting from the final iteration may be accepted as the group’s opinion.

The Delphi method has been widely used across several research disciplines\(^ {36}\) to help obtain consensus on matters that defy precise measurement. Literature on the advantages of the Delphi method over other types of decision-making procedures generally find that the Delphi method results in estimates that are more accurate than those derived from unstructured interacting groups and statisticized groups.\(^ {37}\)

**Conclusion**

Professional standards of the American Bar Association and the State Bar of Texas agree that criminal defense attorneys must avoid excessive workloads and refuse cases that would adversely affect their ability to deliver quality legal representation to all clients. While excessive caseloads have been challenged in the courts, precise standards remain elusive because of the many different factors that influence the time required for robust representation. Nonetheless, objective research methods integrating time measurement with expert opinion from informed and experienced attorneys can yield meaningful guidelines.

**III. Recent Texas Indigent Defense Caseload Legislation**

Since 2002, the Texas Indigent Defense Commission (TIDC) has been responsible for the oversight and improvement of indigent defense.\(^ {38}\) The Commission promotes quality and consistency by setting policies and standards and by providing technical support. In 2015, TIDC will administer $34 million in formula and discretionary grant funds to offset costs and spur innovation in the state’s 254 counties.

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\(^ {38}\) See e.g., TEXAS INDIGENT DEFENSE COMMISSION, http://tidc.texas.gov/.
For many years, various organizations and persons have voiced concerns about the effects of excessive caseloads on the quality of criminal defense representation.\(^3^9\) In Texas, a recent study found that the top 10% of private attorneys taking appointments in a single jurisdiction averaged 632 indigent cases in 2012, and one attorney received appointments to 952 cases.\(^4^0\) In 2013, policymakers took action to gather the data needed to better understand the scope of the problem.

**Reporting Requirements**

House Bill (HB) 1318, passed by the 83rd Texas Legislature, requires the TIDC to add new reporting requirements related to indigent defense caseloads.\(^4^1\) Beginning October 15, 2014, attorneys taking court-appointed cases in the preceding fiscal year must report the percentage of their practice time dedicated to those cases. At the same time, starting November 1, 2014, counties must report the number of cases assigned and the total amount paid to every attorney taking appointments in each court. This newly required information will provide unprecedented insight into the total case volume of indigent defense attorneys and their compensation. It also will make it possible to assess whether some attorneys are receiving a disproportionate share of overall appointments.

**Weighted Caseload Study**

HB 1318 also instructed TIDC to “conduct and publish a study for the purpose of determining guidelines for establishing a maximum allowable caseload for a criminal defense attorney that... allows the attorney to give each indigent defendant the time and effort necessary to ensure effective representation.”\(^4^2\) A weighted caseload study methodology was chosen to account for variation in the amount of attorney time required to defend different types of cases.

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\(^4^2\) Id.
A number of states have previously applied the weighted caseload methodology in combination with other data sources to develop evidence-based caseload parameters for public defender offices. Texas is the first to also account for time spent by private assigned counsel. By providing the data needed to set professional practice guidelines in specific jurisdictions, weighted caseload studies represent an important step in an effort to ensure that effective and competent legal representation is available for all accused persons. Specifically, caseload guidelines enable policymakers to make data-driven decisions about indigent defense. They can be used to set limits for appointing authorities responsible for indigent case allocations, help policymakers determine resource levels necessary to provide effective and competent representation, and position criminal defense attorneys to provide higher quality services for their court-appointed clients. These many positive outcomes serve to increase efficiency and advance justice for those without the ability to hire effective legal counsel.

IV. Project Design

The Texas Indigent Defense Commission approved the weighted caseload study on August 23, 2013. As a first step, a panel of county, state, and national advisers was assembled to finalize the research approach. The final methodology was designed to address two fundamentally important research questions:

1) How much time “is” currently being spent on the defense of court-appointed criminal cases?
2) How much time “should” be spent to achieve reasonably effective representation?

The following paragraphs provide an overview of the study approach.

Weighted Caseload Study Advisory Panel

A panel of indigent defense stakeholders convened in Austin on October 18, 2013 for a full-day meeting. There were two main objectives of the day. The first was to gather input and feedback on study objectives from caseload experts and key stakeholders. The second was to engage and inform legislators, agency officials, county officials, and others that would potentially have a role in making or implementing policy emanating from the study findings. A complete list of Advisory Panel members is provided in Appendix A. They included five main contingents.

Texas Indigent Defense Commission Members
The Honorable Judge Sharon Keller, Chair of the Texas Indigent Defense Commission, along with Commission members, the Honorable Judge Linda Rodriguez and criminal defense attorney Don Hase advised the study. These individuals and the other ten members of the Commission are responsible for indigent defense policy and standards in Texas.

National Caseload Experts
Two national caseload scholars present were Norman Lefstein, Dean Emeritus and Professor of Law at Indiana University Robert H. McKinney School of Law and Steve Hanlon, public interest attorney and Adjunct Professor of Law at St. Louis University School of Law. These thought leaders named excessive caseloads as a threat to “meaningful adversarial testing” that endangers the Sixth Amendment right to counsel. They reviewed professional and legal standards available to guide the conduct of attorneys and set the tone for the study.

National Indigent Defense Practitioners
Colorado’s State Public Defender Doug Wilson; Public Defender Dennis Keefe from Lancaster County, Nebraska; and Peter Sterling, General Counsel of the Missouri State Public Defender System shared lessons from their experiences with caseload studies in their respective jurisdictions including how the resulting standards and policies have been applied to improve policy and practice.

Texas Criminal Defense Attorneys
Experienced defense attorneys with thorough knowledge of current practice in Texas also provided input at the meeting. Bobby Mims, President of the Texas Criminal Defense Lawyers Association and private practice attorney David Gonzalez attended, as did public defenders in three of the state’s six largest counties. These included William Cox, Deputy Public Defender in the El Paso County Public Defender’s Office; Jeanette Kinard, Director of the Travis County

45 See generally, supra Section II.
Mental Health Public Defender’s Office; and Lynn Richardson, Chief of the Dallas County Public Defender’s Office.

Key Stakeholder Constituencies
Other Advisory Panel members attended on behalf of constituencies with a significant stake in the issue of indigent defense. These included the Conference of Urban Counties, County Judges and Commissioners Association of Texas, Texas Association of Counties, the State Bar of Texas, the Texas Defender Service, the Innocence Project of Texas, and the Texas Fair Defense Project. The National Association of Criminal Defense Lawyers and the Council of State Governments Justice Center were represented as well.

Invited Policymakers
Selected policymakers were invited to hear discussion regarding how the weighted caseload study could potentially be used to impact policy and practice in Texas. Attendees represented each of the legislative sponsors of HB 1318 that called for the study. These were the Honorable Senators Rodney Ellis, Sylvia Garcia, and John Whitmire as well as the Honorable Representatives Sylvester Turner and Armano Walle. Indigent Defense Commissioners, the Honorable Senator Royce West and the Honorable Representatives Roberto Alonzo and Abel Herrero were invited. Others attended on behalf of the Office of the Attorney General, the Texas Legislative Council, and the criminal courts of Harris and Travis Counties.

The combined expertise of the group served to integrate diverse perspectives, refine methods and objectives, and lay a solid foundation for the Texas study.

Methodologies
Three complementary data collection approaches were used to triangulate information about time currently being spent on indigent defense, and to determine adjustments necessary to ensure effective representation. Additional detail on each of these methods, along with accompanying results, is presented in subsequent sections.

Attorney Timekeeping Study
A total of 196 attorneys took part in a Timekeeping Study. These individuals answered a key research question by recording for a period of twelve weeks the actual time that “is” being spent on trial-level court-appointed cases. This timekeeping data was a useful baseline against which to assess the increment of change required for reasonably effective representation.

Time Sufficiency Survey
Results of the Timekeeping Study were shared through a survey with defense attorneys in public and private practice statewide. The survey gathered opinion about the time needed to
deliver effective representation from a broad cross-section of 319 public and private sector criminal defense practitioners.

**The Delphi Process**

A panel of highly experienced criminal defense attorneys from across the state was convened to determine the time that “should” be spent to achieve reasonably effective counsel. The group used the highly structured Delphi method\textsuperscript{46} involving the expression of independent opinions, feedback from peers, and facilitated discussion to reach consensus.

**Case Definition**

Throughout the study, time measures were taken at the “case” level. Because the case definition used can impact interpretation of study findings,\textsuperscript{47} it is necessary to be clear about the meaning applied here. The definition of a “case” adopted for this study is taken from the Office of Court Administration’s (OCA) instructions to reporting courts.\textsuperscript{48} By this standard, one or more charges under a single indictment or information are considered to be a single case. Time for each case was attributed to the highest level offense charged.

**Case Types**

Investigation was limited in focus to adult criminal trial-level cases. Other types of cases such as juvenile cases and appeals were excluded from analysis because of time constraints.

**Offense Types**

In all phases of the study, attorneys were asked to consider six separate levels of cases ranging from Class B misdemeanors through first degree felonies. Offense categories defined in the state’s criminal statutes and associated punishment ranges are summarized in Table 4-1.

\textsuperscript{46} See generally, supra Section II & infra Section VII (discussing the Delphi method).
\textsuperscript{47} See SPANGENBERG GROUP, supra note 39, at 4.
### Table 4-1. Offense Levels and Punishment Range

<table>
<thead>
<tr>
<th>OFFENSE LEVEL</th>
<th>PUNISHMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Class B Misdemeanor</td>
<td>Punishable by up to 180 days in jail, a fine of up to $2,000, or both.</td>
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<tr>
<td></td>
<td>(See Tex. Penal Code Ann. § 12.22)</td>
</tr>
<tr>
<td>Class A Misdemeanor</td>
<td>Punishable by up to one year in jail, a fine of up to $4,000, or both.</td>
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<tr>
<td></td>
<td>(See Tex. Penal Code Ann. § 12.21)</td>
</tr>
<tr>
<td>State Jail Felony</td>
<td>Punishable by 180 days to two years in state jail and a fine of up to $10,000.</td>
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<tr>
<td></td>
<td>(See Tex. Penal Code Ann. §§ 12.04, 12.35)</td>
</tr>
<tr>
<td>Third Degree Felony</td>
<td>Punishable by two to ten years’ imprisonment and a fine of up to $10,000.</td>
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<tr>
<td></td>
<td>(Tex. Penal Code Ann. § 12.34)</td>
</tr>
<tr>
<td>Second Degree Felony</td>
<td>Punishable by two to 20 years in prison and a fine of up to $10,000.</td>
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<tr>
<td></td>
<td>(Tex. Penal Code Ann. § 12.33)</td>
</tr>
<tr>
<td>First Degree Felony</td>
<td>Punishable by life imprisonment or five to 99 years’ imprisonment, as well</td>
</tr>
<tr>
<td></td>
<td>as a fine of up to $10,000.</td>
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<tr>
<td></td>
<td>(Tex. Penal Code Ann. § 12.32)</td>
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</table>

**Time Categories**

During the Timekeeping Study and the Time Sufficiency Survey, attorneys were asked to consider time spent on eight task categories. Two categories – Discovery and Attorney Investigation – that were combined in these initial phases were considered separately during the Delphi deliberations. As a result, there were nine time categories for the Delphi phase only. In all cases, recommendations for external “Investigator’s Time” was recorded in an independent category. The full set of categories, defined in Table 4-2, included communication with clients or their families, interaction with the court, discovery, investigation conducted by the attorney, time spent by a private or public defender investigator, legal research and trial preparation, negotiations or meetings related to litigation issues, social work assistance for clients, and case-specific office support.

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49 Detailed reporting of time in each category is available for the Timekeeping Study in Appendix D, for the Time Sufficiency Survey in Appendix F, and for the Delphi Panel in Appendix I.

50 In the Timekeeping Study, because it was not possible to extract auditors’ payment records in all the participating counties, non-attorney Investigators’ time was ordinarily reported by attorneys rather than being taken from official records. For the four public defender offices that provided electronic records to the study, non-attorney investigation was electronically recoded into the “Investigators Time” category. These offices include Bee County, El Paso County, Harris County, and Willacy County (see Appendix C, Table C-1).
Table 4-2. Time Categories and Definitions

<table>
<thead>
<tr>
<th>Client Communication</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Meetings, letters, emails, texting, phone, discussions at court with client and/or family members</td>
</tr>
<tr>
<td>• Jail visits, wait time, time locating client</td>
</tr>
<tr>
<td>• Arranging for interpreter</td>
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</tbody>
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<table>
<thead>
<tr>
<th>Negotiation/ Meetings</th>
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<tbody>
<tr>
<td>• Negotiation with officials (e.g., judges, DA, probation department, pretrial services) regarding plea bargaining, discovery, trial preparation, motions, client supervision or bond status, sentencing or other litigation issues.</td>
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</table>

<table>
<thead>
<tr>
<th>Discovery</th>
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<tbody>
<tr>
<td>• Discovery requests</td>
</tr>
<tr>
<td>• Review of discovery materials or state’s evidence</td>
</tr>
<tr>
<td>• Listening to jail calls to family and friends</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Attorney Investigation</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Investigation of the facts conducted by the attorney (Record external private practice or public defender investigation under IN)</td>
</tr>
<tr>
<td>• Depositions and statements from witnesses/family/friends</td>
</tr>
<tr>
<td>• Visits to the crime scene</td>
</tr>
<tr>
<td>• Consulting with external investigator</td>
</tr>
<tr>
<td>• (See State Bar Defense Guideline 4.1b3 regarding counsel’s responsibilities in the investigation of potential witnesses adverse to the client)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Investigator’s Time</th>
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</thead>
<tbody>
<tr>
<td>• Investigation of the facts conducted by private practice or public defender investigators.</td>
</tr>
<tr>
<td>• If investigation is conducted by office support staff, record the time as OS</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Legal Research/Trial Preparation</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Consulting with experts (e.g., immigration attorney, social workers, forensics specialists)</td>
</tr>
<tr>
<td>• Drafting case-specific motions and pleadings</td>
</tr>
<tr>
<td>• Developing theory of the case</td>
</tr>
<tr>
<td>• Preparing/coordinating with witnesses, jury instruction</td>
</tr>
<tr>
<td>• Sentencing materials, alternative sentencing research</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Court Time</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Filing documents (including standardized motions)</td>
</tr>
<tr>
<td>• Calls, emails, internet usage to schedule court time or check court dates</td>
</tr>
<tr>
<td>• Calls to court clerk regarding a specific case</td>
</tr>
<tr>
<td>• Court appearances, hearing and trials, time waiting in court</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Social Work/Case Management</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Assistance to help clients to get benefits and services needed for better defense outcomes. Examples include mental health treatment, medical care, public benefits, housing, etc.</td>
</tr>
<tr>
<td>• Other forms of direct client assistance to improve their wellbeing and case outcomes.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Case-Specific Office Support</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Time spent by attorneys or their staff (paralegals, clerical, or administrative support staff) helping to prepare the defense of a specific client.</td>
</tr>
<tr>
<td>• Includes administrative work such as file creation and management, invoicing, and calendaring.</td>
</tr>
<tr>
<td>• May include facto-finding, social work, or other case-specific functions performed by a non-attorney assistant.</td>
</tr>
</tbody>
</table>

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51 The reference to State Bar Defense Guideline 4.1b3 was provided in the Delphi Panel instructions only. It was not provided to attorneys participating in the Timekeeping Study or the Time Sufficiency Survey.
V. Time Currently Being Spent on Court-Appointed Cases

The first phase of the research involved measurement of current indigent defense practice. This data provided a “real world” starting point for describing defense-related services provided in different types of cases. It also offered a baseline for assessing the amount of additional time, if any, that may be required to provide reasonably effective representation. However, the task of measuring actual indigent defense practice time in Texas presents significant challenges, and the limitations of the descriptive data presented below should be noted.

Because the state has a decentralized, county-based indigent defense system, there is substantial variation across jurisdictions in terms of local systems and practices used to deliver indigent defense. As a result, a statewide perspective on actual time spent on court-appointed cases is difficult to gain with precision. In part, this problem was addressed by recruiting a sample of attorneys balanced against population in all nine regions of the state. In addition, recruitment was focused in the 39 counties with populations in excess of 100,000. These 15 percent of all counties contain approximately 80 percent of Texas’ population, ensuring that the available practice data was from attorneys representing the large majority of indigent defense cases. Over 95 percent of attorneys who kept time records were from these most populous counties.

While previous caseload studies in other states relied on public defender data (which could be required through office policy), the vast majority of indigent defense cases in Texas are handled by private attorneys, most of whom do not routinely track their time. Likewise, public defender offices are administered at the county level, and could choose whether to take part in the study. Consequently, timekeeping data collection was dependent upon volunteer public defender offices and private attorneys who were willing to track and submit their time records.

Individuals that volunteered may differ in important ways from those who did not. Most notably, it is likely that both individual attorneys and public defender offices with the highest caseloads chose not to participate. While these limitations should be noted, the resulting descriptive data is nonetheless useful for providing context for normative recommendations that follow, as well as for providing a baseline against which to assess practice changes over time.

Between November 2013 and January 2014, an “awareness campaign” was conducted to inform Texas defenders about the weighted caseload study and to enroll volunteers through the study website. The Texas Criminal Defense Lawyers’ Association and the State Bar of Texas disseminated information about the project through multiple channels including trainings, leadership meetings, publications, and social media. At the same time, the research team implemented a direct telephone recruitment campaign.
Timekeeping took place over a 12-week period between February 3 and April 25, 2014. Attorneys tracked their time on criminal cases through a customized online data entry system developed specifically for the study. At the end of the study period, 196 participating lawyers made over 25,000 time entries representing 8,151 defendants. Attorneys contributing time records had 14.7 years of experience on average.

During analysis, findings from cases in the 12-week time sample were extrapolated to estimate average time currently being spent on eight defense-related tasks at each of the six offense levels. Attorneys who contributed time records to the study are acknowledged in Appendix B. Additional detail regarding the Timekeeping Study research methods is provided in Appendix C.

**Timekeeping Study Results**

Figure 5-1 shows the average hours the Timekeeping Study found Texas attorneys actually spend per case at each offense level. Class B and Class A misdemeanors are being disposed in 4.7 and 7.6 hours, respectively. Low-level state jail and third degree felonies are resolved in 10.8 and 12.9 hours, respectively. Second degree felonies take 15.2 hours to dispose, and the highest-level first degree felonies are resolved with 22.3 hours of attorney time.

![Figure 5-1. Average Hours Currently Spent on Indigent Defense Cases](chart)
Figure 5-2 provides a more detailed picture of how attorneys are utilizing their time on specific tasks. To reduce complexity, the six offense levels were consolidated into three.\(^{52}\) A fully detailed breakdown of Timekeeping Study results by offense level and task is available in Appendix D. Average misdemeanors are being disposed in 6.0 hours, low-level felonies in 11.8 hours, and high-level felonies in 17.7 hours.

Nearly half of all time on indigent defense cases is being expended in Court Time. The next most time-intensive task categories, Legal Research/Trial Preparation and Client Communication account for about 15 to 20 percent of case time each. A larger proportion of case time (as much as 30 percent) is devoted to Legal Research/Trial Preparation in high-level felony cases.

![Figure 5-2. Average Hours Currently Spent on Indigent Defense Cases by Task](image)

Notably, investigators are rarely used among attorneys in the study. In fact, non-attorney investigation accounts for less than two percent of all case time at every offense level. Most investigation seems to be done by the lawyers themselves, with approximately 5 to 10 percent of case time expended on Discovery/Attorney Investigation.

Not surprisingly, less time is devoted to misdemeanors than felonies. However, it is striking that criminal defendants who have been charged with a misdemeanor receive no more than an hour of attorney time in nearly every time category except Court Time.

While these data establish a baseline in current practice, the weighted caseload study does not assume that the time that “is” being spent on criminal defense necessarily reflects the time that

\(^{52}\) Misdemeanors include Class A and Class B offenses, low-level felonies include state jail and third degree felonies, and high-level felonies include second and first degree felonies. Aggregated results at each level were based on a weighted average of the proportion of cases in each of the two categories being combined.
“should” be spent to deliver effective representation. The next phases of the study moved from a focus on current practice toward normative assessments of the adequacy of measured time.

VI. Time Sufficiency Survey

Upon completion of the timekeeping study, practicing criminal defense attorneys statewide were invited to review results in a Time Sufficiency Survey. They were asked to indicate if, “in your professional judgment, the measured amounts should be increased or decreased to ensure effective assistance of counsel.”53 “No change” was also a response option.

The Time Sufficiency Survey gathered input, as noted earlier, from a diverse body of 319 public and private legal practitioners. Respondents averaged 18.4 years in the criminal defense profession and reported having a slightly larger proportion of retained clients on average (46 percent) than their colleagues in the Timekeeping Study (33 percent). Results provided context for assessing the adequacy of timekeeping findings from the perspective of professional criminal defense peers. The survey is presented in Appendix E.

To make responding to the survey more manageable, the original six offense levels were aggregated into three categories for presentation to respondents.54 Within each offense level, attorneys could adjust either the frequency with which tasks were performed or the time spent when the tasks were done. Time and frequency adjustments were multiplied and aggregated by offense level to get revised time estimates.

Time Sufficiency Survey Results

The Time Sufficiency Survey reveals agreement among a cross-section of practicing criminal defense lawyers that more time “should” be spent on indigent defense than currently “is” the case. Increases were recommended for virtually every indigent defense-related task and at every offense level (Figure 6-1). Full survey results are reported in Appendix F.

53 “Effective assistance of counsel” was defined in the survey as “competent legal representation without errors that would result in the denial of a fair trial.”
54 See supra note 52.
Figure 6-1. Adjustments to Current Practice Recommended by Time Sufficiency Survey Respondents

Figure 6-1a. Misdemeanor “Time Sufficiency Survey” Time Adjustments

\[
\Delta \text{ Misdemeanors:} \\
6.0 + 4.0 = 10.0 \text{ hours}
\]

Figure 6-1b. Low-Level Felony “Time Sufficiency Survey” Time Adjustments

\[
\Delta \text{ Low Felonies:} \\
11.8 + 7.5 = 19.2 \text{ hours}
\]

Figure 6-1c. High-Level Felony “Time Sufficiency Survey” Time Adjustments

\[
\Delta \text{ High Felonies:} \\
17.7 + 12.1 = 29.8 \text{ hours}
\]
For both misdemeanors and felonies, survey respondents advised increasing actual time by about two-thirds above that currently being spent. By far, the greatest proportional increase was recommended for investigation. According to respondents, four times more attorney time should be dedicated to Discovery/Attorney Investigation. However, the largest proportional increases were in time spent by external investigators. Lawyers surveyed advised that non-attorney Investigator’s Time should increase by a factor of 13 times for misdemeanors, and 10 times for high-level felonies. This advice is consistent with direction provided by the State Bar of Texas. Involvement of a third party investigator provides the defense with a witness who can testify at trial in the event that a witness contradicts what was told to a defense investigator during a prior interview.

Substantial time increases were also suggested in the area of Negotiations/Meetings. Surveyed lawyers recommend five times as much time should be spent in meetings with judges, prosecutors, pre-trial services, and other offices that impact case processing. Overall time spent on Client Communication and on Case Management/Social Work should more than double.

The smallest increases were suggested for Court Time and Case-Specific Office Support. It should be noted, however, that attorneys called for increases in time spent in every category. In just one instance – Case-Specific Office Support for misdemeanor cases – did they believe measured time is already sufficient for reasonably effective representation.

While the Sufficiency of Time Survey is useful for demonstrating the general opinions of a broad cross-section of attorneys, a greater degree of precision is required to produce formal guidelines for policy and practice. For this, the research team turned to highly knowledgeable experts who were well versed in criminal case practice in Texas.

VII. The Delphi Method for Determining Caseloads

A central purpose of the case weighting study was to generate more exacting guidelines for the number of cases attorneys can responsibly carry. However, there is no objective way to measure the point at which caseload size interferes with the delivery of reasonably effective counsel. For this determination, qualitative assessments are unavoidable. The research team

55 PERFORMANCE GUIDELINES, supra note 10 (stating in Guideline 4.1 that “[i]f counsel conducts interviews of potential witnesses adverse to the client, counsel should attempt to do so in the presence of an investigator or other third person in a manner that permits counsel to effectively impeach the witness with statements made during the interview.”).
therefore needed a rigorous method of extracting judgmental data from authorities to arrive at valid attorney time recommendations.

The Delphi method offers a rational and structured means to integrate opinions of highly informed professionals to solve problems. Group processes are systematized in order to minimize bias while extracting and reconciling knowledge from capable experts. Because of its relative objectivity, the Delphi method is endorsed by national indigent defense scholars as an alternative to facilitated focus groups to determine the time attorneys “should” spend on different types of cases. The Delphi process is designed to remove sources of bias that can compromise the validity of group decision-making.

Qualifications of the Attorney Panel

The Texas Delphi Panel was comprised of 18 highly experienced criminal defense practitioners selected to represent each of the state’s nine Administrative Judicial Regions. Participants averaged 25.3 years practicing criminal law. Thirteen were solo private practitioners or partners. Three chief public defenders and two managed assigned counsel attorneys were also represented. Panel members included people specializing in both felony and misdemeanor cases, as well as individuals on appointment lists for foreign language clients and mental health cases. A complete list of members is presented in Appendix G.

Panel members were able to offer a well-informed perspective on the elements of effective counsel based on their familiarity with different types of cases in a variety of contexts over many years. As a result of their depth of experience, these attorneys could think holistically about the overall impact on case time of complex and overlapping case attributes such as charge enhancements, sentencing practices, and client characteristics like detention status, immigrant status, or mental illness. Because of the qualifications of the decision-makers and

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56 See generally, Section II (discussing the Delphi method).
57 See M. ADLER & E. ZIGLIO, GAZING INTO THE ORACLE: THE DELPHI METHOD AND ITS APPLICATION TO SOCIAL POLICY AND PUBLIC HEALTH (Kingsley Publishers 1996). The technique was piloted by the RAND Corporation in the mid-1960’s as a means to forecast new inventions and technologies. Since its inception, the Delphi process has been used in industry, government, and academics, particularly in the areas of public health and education. See also, EDWARD CORNISH, FUTURING: THE EXPLORATION OF THE FUTURE (World Future Society 2004).
58 In most weighted caseload studies conducted during the past decade [see supra note 43] focus groups of attorneys reviewed time sample and Time Sufficiency Survey results in order to determine “quality adjustments” needed to arrive at caseload standards. See Lefstein, supra note 22, at 142–146 (arguing that “in making quality adjustments to preliminary case weights derived from the time-based study, some type of a Delphi method is essential to assess individual lawyer guesses about amounts of additional time needed to perform various tasks, such as preparing for pretrial release hearings, trials, sentencing, etc. Through analysis and discussion, the most experienced lawyers in the defense program along with senior management should be able to assess the estimates of individual lawyers respecting additional amounts of time that are needed.”); see also Hanlon, supra note 34; NAT’L LEGAL AID & DEFENDER ASS’N, supra note 34, at 13–14.
the rigorous processes used, time estimates generated through the Delphi process offer the most comprehensive and carefully constructed attorney time recommendations currently available for Texas jurisdictions.

**The Delphi Decision-Making Process**

Panel members were convened for in-person meetings on two occasions. The first meeting, held on August 26, 2014, was to review the group’s charge and to train participants on the procedure. Then, over the next seven weeks, Delphi Panel members completed a highly specified iterative process involving a three-round sequence of activities designed to integrate their cumulative expertise and arrive at recommended case weights. At the final meeting held on October 17, 2014, members reached consensus on final caseload guidelines.

Two members of the project Advisory Panel, Norman Lefstein and Steve Hanlon\(^{59}\) collaborated in the implementation of both the initial and the final Delphi Panel meetings. They brought an external perspective informed by their work supporting the implementation of caseload standards in other jurisdictions. Their role in the Texas study was to advise the research team on methodological considerations regarding the Delphi process and to orient member attorneys to professional norms and standards of practice that should guide their thinking when developing time recommendations.\(^{60}\)

**ROUND 1: Independent Analysis**

Throughout the Delphi process, attorney time estimates were made de novo without reference to earlier results from either the Timekeeping Study or the Time Sufficiency Survey findings. During the first phase of Delphi group decision-making, panel members were required to complete a survey regarding their personal recommendations for frequency and duration of tasks at each offense level (see Appendix H). Data collection was adapted to accommodate panel members’ request to develop separate time estimates for cases resolved by trial and for those resolved by other means such as plea, dismissal, or diversion.

Separation from others in the group was intended to give each member equal influence as more prominent or charismatic individuals were unable to disproportionately affect the decision process. In addition to recording their recommended time values, respondents could also record open-ended comments expressing their rationale to be shared anonymously with peers in the next survey round. Comments helped to inform group thinking without

\(^{59}\) See supra Section IV (referencing Lefstein and Hanlon’s credentials).

\(^{60}\) See generally, supra Section II.
significantly impacting group dynamics. Round One time assessments were aggregated and de-identified so that individual responses remained confidential.

**ROUND 2: Iterative Adjustments of Opinion**
The second Delphi round involved another survey, this time to review and respond to summary recommendations from the first round (see Appendix H). Anonymized results expressed as aggregated medians and ranges, as well as open-ended comments submitted during Round One, were shared with members. Again, the purpose was to encourage frank and thoughtful responses while removing the possibility of undue influence by individual participants.

After reviewing the summary feedback from peers, attorneys were given the opportunity to adjust their original time recommendations. Results from Round Two were then aggregated and summarized by the research team in preparation for the consensus phase.

**ROUND 3: Consensus**
In the third and final stage of the Delphi process, panel members met to reconcile remaining differences in time estimates. The data generated in Round Two was projected on a large screen for the group to see as a starting point for facilitated discussion. A first review iteration was to reach agreement on how frequently each of nine tasks should be performed at every offense level. A second iteration was to reach agreement on the amount of time that should be spent when each activity occurred.

In contrast to earlier rounds, in Round Three anonymity was not a concern. As each of 108 task time or frequency values was considered, participants were encouraged to publicly state a rationale and advocate for their views based on their best professional judgment. Following discussion, a vote was held with a two-thirds majority required to change the frequency or time estimate being considered. Further discussion ensued until at least two-thirds of participants indicated no further adjustments were needed. Time recommendations remaining after completing this process were aggregated to produce totals by offense level.

**Delphi Results**

**Trial and Non-Trial Time Estimates**
In a departure from previous workload studies, the Texas Delphi Panel chose to produce separate time recommendations for cases disposed by trial and for cases disposed by pleas,

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61 The “Discovery/Attorney Investigation” category, combined for the Timekeeping Study and the Time Sufficiency Survey, was divided into two separate components for consideration by the Delphi Panel. See supra Section II (discussing the Delphi method) & Section IV, “Time Categories.”

62 Nine task categories x Six offense levels x Two dimensions (frequency and duration) = 108 categories reviewed.

63 Supra note 43.
dismissals, diversion, or other non-trial means. Figure 7-2 illustrates the final estimates for each scenario. A detailed description of findings is in Appendix I. In general, panel members expect trials to require about 3.5 times as much time as non-trials at each offense level.

**Figure 7-2. Hours Recommended by Delphi Panel for Reasonably Effective Counsel**

In order to deliver effective and competent representation, the Delphi Panel also determined that considerably more cases should be resolved by trial than is currently the case (Table 7-1). Although just 1.1 percent of all misdemeanors in Texas went to trial in FY 2014, Delphi members recommended a trial rate of 14 percent for Class B misdemeanors and 20 percent for Class A violations. Similarly, though 2.5 percent of actual felonies were disposed in trials, Delphi members concluded that higher trial rates ranging from 11 percent for state jail felonies up to 20 percent for first degree felonies are required to achieve reasonably effective and competent representation. On the whole, the panel held that at least 15 times as many misdemeanors and roughly 5 times as many felonies should be tried than are in practice.

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65 Id. at 2. See Activity Detail for District Courts.
Table 7-1. Delphi-Recommended and FY 2014 Actual Trial Rates

<table>
<thead>
<tr>
<th></th>
<th>FY 2014 Observed Percent of Cases Resolved by Trial</th>
<th>Delphi-Recommended Percent of Cases Resolved by Trial</th>
</tr>
</thead>
<tbody>
<tr>
<td>Misdemeanor B</td>
<td>1.1%</td>
<td>14%</td>
</tr>
<tr>
<td>Misdemeanor A</td>
<td></td>
<td>20%</td>
</tr>
<tr>
<td>State Jail Felony</td>
<td></td>
<td>11%</td>
</tr>
<tr>
<td>Felony 3</td>
<td>2.5%</td>
<td>13%</td>
</tr>
<tr>
<td>Felony 2</td>
<td></td>
<td>15%</td>
</tr>
<tr>
<td>Felony 1</td>
<td></td>
<td>20%</td>
</tr>
</tbody>
</table>

The trial rate that is used makes a substantial difference in overall time recommendations. A weighted average of Delphi time estimates based on actual trial rates (1.1 percent for misdemeanors, 2.5 percent for felonies) yields lower estimated hours per case than if weighted averages are based on the higher 11 to 20 percent trial rate recommended by the Delphi Panel. Figure 7-3 illustrates the differences resulting from each weighting scheme. Overall, adopting the Delphi Panel’s higher trial rate increases time guidelines by 39 percent for misdemeanors and 26 percent for felonies. Higher Delphi-recommended trial rates would require more attorney time per case.

Figure 7-3. Hours per Offense Level Using Actual and Delphi-Recommended Trial Rates

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66 Percentages are based on a weighted average accounting for differences in the proportion of felony cases at each level, see supra note 52.
**Delphi Adjustments to Current Practice by Task**

The specific task areas where the Delphi Panel advised increases in defense time are illustrated in Appendix J. Like their colleagues responding to the Time Sufficiency Survey, Delphi members agreed that the greatest increases are needed in the area of investigation. Delphi members articulated at least a five-fold increase in Discovery/Attorney Investigation overall (nine times more for misdemeanors). Showing deference to the State Bar of Texas’s non-capital defense performance guidelines, they also called for a near twenty-fold increase in non-attorney Investigator’s Time. As much as forty times more external investigation was recommended for misdemeanors in particular.

Delphi members agreed that about six times more time should be spent in Negotiations/Meetings, and that Client Communication should increase by more than two-thirds on average. Like surveyed attorneys, Delphi participants concluded increases in Court Time are needed for the lowest- and highest-level cases. However, while surveyed attorneys suggested a 10 percent increase, Delphi members recommended a greater increment for both misdemeanor (46 percent increase) and high-level felony cases (35 percent increase). This greater emphasis on Court Time is consistent with the Delphi Panel’s assessment that more cases should be resolved through trials.

**VIII. Texas Caseload Guidelines**

With the conclusion of Texas’ weighted caseload study, new and important sources of information are now available to guide policymakers’ thinking about criminal defense caseloads. For the first time, data is available to describe how practicing attorneys spend their time on court-appointed cases. In addition, an attorney survey and the Delphi Panel assessment, measure professional norms regarding how indigent defense “should” be provided. This section of the report compares and integrates guidance offered by these data sources, culminating in a recommendation for caseload parameters.

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67 See generally, supra Section VI, “Time Sufficiency Survey Results.”
To begin, it is noteworthy that two completely independent samples of attorneys reached a striking level of agreement regarding the time that “should” be spent on criminal defense cases. If all of the Delphi Panel’s recommendations are fully accepted, including the assumption that reasonably effective counsel requires that more cases go to trial (see Table 7-1), the resulting caseload estimates are in close accord with those of attorneys responding to the Time Sufficiency Survey.

![Figure 8-1. Hours per Case Recommended by Delphi Panel Compared to Time Sufficiency Survey Respondents](image)

Remarkably, the two unconnected attorney cohorts are in perfect agreement that a high-level felony requires 30 hours to defend, on average (see Figure 8.1). Their recommendations are just three hours apart for other case categories. It is reasonable to believe that if the surveyed attorneys had had the benefit of the Delphi process to structure their decision-making, full consensus would likely have been attained between the two groups. This finding increases confidence in the reasonableness of time estimates emerging from the study.

**Delphi Recommended Cases per Year**

The time attorneys say “should” be spent in different types of cases serves as the basis for calculating maximum caseload guidelines. To convert time estimates into annual caseloads, it
was assumed that attorneys work 2,087 hours per year and that all of this time is spent defending clients. The resulting calculation is straightforward:

\[
\frac{(2,087 \text{ Hours/Work-Year})}{(# \text{ Hours/Case})} = \text{Annual Full-Time Caseload}
\]

Calculated separately at each offense level, the resulting guidelines represent the maximum number of clients a single attorney should represent in a year if they handle only a single type of case.

**Figure 8-2. Case Limits per Year Comparing Different Trial Rate Assumptions**

Figure 8-2 shows caseloads computed based on actual current practice time (see Figure 5-1) compared to two different ways of calculating the Delphi Panels’ ideal caseload maximums. The first set of caseload parameters accepts the Delphi time estimates but substitutes actual FY 2014 trial rates for the higher trial rates advised by members. The second set of caseload parameters also accepts the Delphi Panel’s time estimates, but applies the Delphi-recommended trial rate as well.

When the Delphi’s recommended trial rate is used, the maximum number of cases per year ranges from 56 to 149 for different levels of felonies and from 148 to 179 for misdemeanors. When actual trial rates are substituted for the Delphi Panel’s “ideals,” more non-trial

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dispositions are assumed, leaving attorneys with time to defend about 64 additional misdemeanors or 26 additional felonies in a year (see Figure 8-3). Importantly, either calculation method yields case recommendations that are well below those observed in current practice.

Figure 8-3. Change in Caseload Guidelines after Applying Actual Trial Rates to Delphi Panel Recommendations

Caseload Recommendations Compared to NAC Standards and Current Practice

For over 40 years, caseload guidelines set forth by the National Advisory Commission have been widely cited parameters for public defender attorneys. As noted elsewhere in this report, serious concerns have been expressed about the validity of the NAC standards for contemporary criminal defense representation. Guidelines emerging from the Texas study are considerably lower, affirming that today’s defense attorneys need substantially more time to ensure the delivery of adequate defense services.

National Advisory Commission (1973)

A public defender caseload should not exceed 150 felonies, 400 misdemeanors, 200 juvenile cases, 200 Mental Health Act cases, or 25 appeals cases per year.

See generally, supra Section II, “Efforts to Address the Caseload Problem—Professional Judgments.”
Current Practice vs. NAC Standards
Texas lawyers taking part in the Timekeeping Study have full-time equivalent capacity for 340 misdemeanors or 152 felonies each year. Figure 8-4 shows current felony caseloads are similar to the NAC guidelines and misdemeanors are lower. These findings suggest existing agreement among attorneys that the 400 annual misdemeanor cases recommended by NAC in 1973 are not sufficient for quality counsel in today’s practice environment. Public defenders in particular, responsible for two-thirds of the study cases, may be subject to formal office policies constraining misdemeanor caseloads at or below the NAC parameters.

Current Practice vs. Delphi Recommendation.
Second, Figure 8-4 shows that still further reductions are needed in order to ensure reasonably effective representation. The full opinion of the Delphi Panel, using both their time estimates and their recommended trial rate, is that attorneys should take at least 178 fewer misdemeanors or 50 fewer felonies each year. This equates to a 52 percent reduction in misdemeanors and a 33 percent reduction in felonies compared to current practice.

Delphi vs. Surveyed Attorney Recommendations
Third, Figure 8-4 illustrates that caseload recommendations emanating from Delphi Panel members and surveyed attorneys are substantially similar, affirming their general validity. For instance, the Delphi Panel’s misdemeanor case limit (162 cases/year) and the recommendation

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70 Current attorney caseloads are calculated based on Timekeeping Study findings presented in Figure 5-1 and using the Annual Caseload Formula presented earlier in this section.
of attorneys in the Time Sufficiency Survey (208 cases/year) differs by just 46 cases per year, or less than one misdemeanor case per week over the course of a year. Similarly, for felonies the full Delphi recommendation of 102 cases per year is just 11 more cases than the number suggested by surveyed attorneys (91 cases/year). This difference is less than one felony per month over the course of a year. The high degree of convergence – within a range of just one misdemeanor per week or one felony per month – lends credence to the validity of overall study findings.

Factors Contributing to Increased Attorney Time Requirements

The striking discrepancy between the caseload standards emerging from this study and the NAC standards of 1973 are readily understood based upon a review of the literature and interviews with Texas attorneys.71 Lower current caseload recommendations reflect a criminal law practice that has changed dramatically over the past 40-plus years. Factors driving higher attorney time include:

- Increased criminalization of minor offenses requires legal counsel for cases that once were simply deemed undesirable behavior or punished by fine;72
- Tougher sentencing policies make some categories of cases more costly and time-consuming to defend (e.g., DWI, drug, and domestic violence charges);73
- De-institutionalization of people with mental illness increase both case volume and time commitments required to defend complex cases;74
- Growing prevalence of specialty courts create new dockets for public defenders to cover with cases that endure over a longer period of time;75
- Use of forensics and experts increases responsibility of defense attorneys to understand and integrate technical and scientific considerations into the defense;76

71 See supra text accompanying note 28.
73 Personal conversation on October 4, 2013 with criminal defense lawyers Kellie Bailey, Austin Criminal Defense Lawyers Association (ACDLA) Board Member; Patricia Cummings, Adjunct Professor teaching the Criminal Defense Clinic at the University of Texas School of Law; Bradley Hargis, President of the ACDLA; and Jeanette Kinard, Director of the Travis County Mental Health Public Defender Office. See also, ROBERT PERKINSON, TEXAS TOUGH: THE RISE OF AMERICA’S PRISON EMPIRE (Metropolitan Books 2010).
75 See, e.g., Cait Clarke, Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor, 14 GEO. J. LEGAL ETHICS 401, 401–458 (2001); Tamar M. Meekins, Risky Business: Criminal Specialty Court and the Ethical Obligations of the Zealous Criminal Defender, 12 BERKELEY J. CRIM. L. 75 (2007).
Collateral consequences of conviction raise the stakes for defendants—especially in a state with a large immigrant population, many of whom may be undocumented. The magnitude of the transformation demonstrates that criminal defense must evolve to stay current. Not only must attorneys meet current practice requirements, but policymakers must constantly monitor caseload guidelines and related resource requirements for the provision of effective indigent defense.

**Final Recommended Caseload Guidelines**

This report demonstrates that establishing indigent defense caseload parameters is necessarily a qualitative determination. However, the research approach used here has relied upon methods to introduce order and logic into the decision-making process. Methods have followed a rigorous process incorporating:

- Independent judgments made by highly qualified professionals,
- Collaborative consideration of factors impacting time required for effective counsel,
- A rational decision-making protocol to promote valid results,
- Use of evidence from multiple convergent data sources, and
- Consideration of actual trial rate.

Upon its conclusion, the study must offer guidance to policymakers and appointing authorities regarding the number of cases that can be effectively defended. In this instance, the task is complicated by the Delphi Panel’s decision to recommend a larger number of cases be disposed by trial than is currently the case in practice. In fact, members advised more than a five-fold increase in the actual FY 2014 trial rate for felonies, along with a fifteen-fold increase in misdemeanor trials.

Whether the Delphi Panel’s ideal trial rates or actual trial rates are applied makes a difference in the final caseload recommendations. Figures 8-2, 8-3, and 8-4 quantify this difference. The Delphi Panel’s higher assumed trial rate translates to 28% fewer misdemeanors and 20% fewer felonies defended per year than if actual trial rates are used. Clearly, the smaller number of annual cases derived from the Delphi Panel’s recommended trial rate would allow more time for a competent and diligent defense. Indeed, if attorneys had additional time to defend each client, it is likely the number of trials would rise, perhaps to ideal levels. For now, however, the

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*Forensic Science Testimony and Wrongful Convictions, 95 Va. L. Rev. 1, 1–97 (2009).*

77 **NAT’L LEGAL AID & DEFENDER ASS’N, supra** note 39, at 12–13.

78 **Supra** note 72; see also, **AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION NATIONAL INVENTORY OF THE COLLATERAL CONSEQUENCES OF CONVICTION, available at http://www.abacollateralconsequences.org/**.
“ideal” rate is not aligned with reality. Just 1.1 percent of misdemeanors are tried – not the 14 to 20 percent favored by the panel. Similarly, just 2.5 percent of felony cases are disposed by trial rather than the 11 to 20 percent the panel supports (see Table 7-1).

Figure 8-5. Final Recommended Caseload Guidelines for Texas
(Based on Delphi Time Estimates and FY 2014 Trial Rates)

For this reason, final recommended caseload guidelines for Texas presented in Figure 8-5 are computed based on actual FY2014 trial rates. The results indicate, for the delivery of reasonably effective representation attorneys should carry an annual full-time equivalent caseload of no more than the following:

- 236 Class B Misdemeanors
- 216 Class A Misdemeanors
- 174 State Jail Felonies
- 144 Third Degree Felonies
- 105 Second Degree Felonies
- 77 First Degree Felonies

Importantly, annual data is available on the proportion of felony and misdemeanor cases resolved by trial or by other means. It is therefore not only possible, but recommended that proactive measures be taken to align Delphi-recommended and actual trial rates as an element of efforts to achieve standards of reasonably effective counsel. Annual data is available to
monitor actual changes in the occurrence of trials and caseload guidelines should be reviewed and adjusted to reflect changes over time. Until that occurs, however, it is most accurate and efficient to base current caseload guidelines on actual trial practice.

IX. Uses of Texas Caseload Guidelines

According to national standards, defense attorneys “should not accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.” With the development of caseload guidelines for the state of Texas, a valuable new tool will be available to define the point at which caseloads become excessive. This tool can be used in important ways to protect the Constitutional right to counsel and the equitable administration of justice.

Attorney Accountability Standards

The problem of excessive caseloads is a concern for public defender offices and private assigned attorneys alike. Caseload guidelines give jurisdictions the information needed to hold all court-appointed attorneys accountable for spending sufficient time on each case. Attorneys, likewise, have a tool with which to self-assess their own performance. If cases are being disposed more quickly than allowed under the caseload recommendations, a self-review might reveal more time should be spent on one or more of the tasks required for reasonably effective representation.

Attorney Compensation Standards

If attorneys are to provide the level of defense services required for “meaningful adversarial testing” prescribed by the Supreme Court in United States v. Cronic, besides revised caseload criteria there should also be reasonable compensation for both public defenders and private lawyers. At current average compensation rates of $608 per non-capital felony and $198 per misdemeanor, court-appointed private attorneys spending the time recommended by this guideline

79 See OFFICE OF COURT ADMIN., supra note 64 & 65 (citing misdemeanor and felony trial rates).
80 See ABA, PROVIDING DEFENSE SERVICES, Standard 5-5.3, available at http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_defsvcs_toc.html. See also ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, supra note 19, at 17.
81 Lefstein, supra note 22, at 14; SPANGEBERG GROUP, supra note 39, at 14.
82 466 U.S. 648.
83 Based on indigent case and expense data in the FY 2014 TIDC Indigent Defense Expenditure Report. Personal
study would earn $37 and $20 per hour, respectively. Justice is put at risk not only when caseloads are excessive, but when lawyers are not paid fairly for their work.\textsuperscript{84} This is why parity between defense counsel and prosecutors has long been advocated by the American Bar Association.\textsuperscript{85}

**State-Level Indigent Defense Budgeting**

Likewise, caseload guidelines can enable state policymakers to determine indigent defense appropriation levels required to ensure that every defendant has consistent quality representation irrespective of the county involved. A professionally competitive compensation rate establishes a goal for statewide defense funding, thereby strengthening an indigent defendants’ constitutionally guaranteed right to counsel.\textsuperscript{86}

**Preemption of Litigation**

Adherence to caseload guidelines may help protect jurisdictions against the threat of litigation. Professor Hanlon, advisor to this study, observes that the next generation of indigent defense litigation “will rely heavily on the admonition... that the evidence-based professional judgment of a public defender with respect to excessive caseloads is entitled to substantial deference by the courts.”\textsuperscript{87} Texas’ new caseload recommendations will provide just such an evidence base upon which legal claims can be grounded. Conversely, jurisdictions following evidence-based court-appointed caseload guidelines would be unlikely targets of complaints.

**X. Conclusion**

In order to set appropriate caseload guidelines, policymakers need to know the amount of time needed to provide reasonably effective counsel. A central purpose of this research has been to collect data needed to establish these caseload levels given contemporary requirements of

\textsuperscript{84} NAT’L RIGHT TO COUNSEL COMM., supra note 39, at 7; Lefstein, supra note 22, at 20.


\textsuperscript{86} NAT’L RIGHT TO COUNSEL COMM., supra note 39, at 11.

\textsuperscript{87} See Hanon, supra note 34; see also, LAURENCE A. BENNER, AMERICAN CONSTITUTION SOCIETY, WHEN EXCESSIVE PUBLIC DEFENDER WORKLOADS VIOLATE THE SIXTH AMENDMENT RIGHT TO COUNSEL WITHOUT A SHOWING OF PREJUDICE (2011), available at \url{http://www.acslaw.org/sites/default/files/bennerib_excessivepd_workloads.pdf}.  

communication on Dec. 22, 2014 with TIDC policy monitor Joel Lieurance.
criminal defense within the state of Texas. Rigorous research methods were employed, first to assess current time being spent on different levels of cases, then to get normative judgments from a wide spectrum of attorneys regarding the adequacy of time to meet professional obligations.

Results, presented in Figure 8-5 show the final evidence-based caseload recommendations. The guidelines should prove to be a valuable tool for policymakers and practitioners alike. With evidence-based caseload parameters, appointing authorities and attorneys taking appointments can be held accountable for managing workloads, information is available to set fair compensation rates, and jurisdictions adhering to reasonable caseload limits are less exposed to potential litigation. Caseload guidelines alone do not guarantee the provision of reasonably effective counsel, but they are an essential component in securing the promise of the Sixth Amendment right to counsel for the indigent accused.
APPENDIX A

Weighted Caseload Study Advisory Panel Members
# Advisory Panel Members

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<tr>
<th>Name</th>
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<tr>
<td>Jeff Blackburn</td>
<td>Founder and Chief Counsel</td>
<td>Innocence Project of Texas</td>
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<td>Attorney at Law</td>
<td>Blackburn &amp; Moseley, L.L.P.</td>
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<tr>
<td>Robert Boruchowitz</td>
<td>Professor</td>
<td>Seattle University School of Law</td>
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<td>Dr. Tony Fabelo</td>
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<td>Justice Center, Council of State Governments</td>
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<td>Buck Files</td>
<td>President</td>
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<tr>
<td>Doug Wilson</td>
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APPENDIX B

Attorneys Contributing Timekeeping Data
## Attorneys Participating in the Timekeeping Study*

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*Additional attorneys participating in the study did not give consent to be recognized.*
**Timekeeping Study Research Methods**

The Timekeeping Study took place between September 2013 and June 2014. The following paragraphs review key aspects of the study methodology: participant recruitment, data collection, and analysis methods used to extrapolate from the twelve-week time sample to reach annual caseload estimates. A study timeline is presented in Figure C-2.

**Attorney Recruitment**

Systems for assigning counsel to represent indigent defendants vary widely in Texas. Each of the state’s 254 counties determines independently how they will meet statutory and regulatory guidelines for making court appointments. In the absence of a centralized appointing authority, eligible criminal defense attorneys for the study had to be identified and recruited at the county level. A broad-based media campaign was combined with targeted participant recruitment to enroll study participants.

**Media Campaign**

From October through December 2013, a large-scale recruitment initiative was launched to inform criminal defense attorneys statewide about the weighted caseload study. The Texas Criminal Defense Lawyers’ Association and the State Bar of Texas disseminated information to members through announcements at trainings and leadership meetings, in publications, and through social media. Articles about the study appeared in the state’s major professional print journals including TCDLA’s “Voice for the Defense,”1 “Texas Lawyer”2 and the “Texas Bar Journal.3 Other information about the purpose and scope of the project featuring TIDC staff and national experts was made available in videos posted on the “State Bar TV” Youtube internet channel.4 In addition, email messaging was directed toward local bar presidents and to TCDLA members.

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## Figure C-1. Summary of Tasks and Timeline

<table>
<thead>
<tr>
<th>Task</th>
<th>Description</th>
<th>2013</th>
<th>2014</th>
</tr>
</thead>
<tbody>
<tr>
<td>Task 1: Advisory Panel Planning</td>
<td>1a. Prepare for Advisory Panel Meeting</td>
<td>9</td>
<td>10</td>
</tr>
<tr>
<td></td>
<td>1b. Conduct Advisory Panel Meeting</td>
<td>11</td>
<td>12</td>
</tr>
<tr>
<td>Task 2: Attorney Timekeeping Study</td>
<td>2a. Publicize the Study</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>2b. Recruit Attorneys</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2c. Select and Customize Timekeeping Software</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2d. Collect Attorney Time Data</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>2e. Analyze Attorney Time Data</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Task 3: Sufficiency of Time Survey</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>4b. Conduct Delphi Process Meeting</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Task 5: Prepare Final Report</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
A website was also created to manage attorney registration and to serve as an information portal over the course of the study. Posted resources included legislative guidance, reports outlining the purpose and objectives of the Texas project, similar studies from other states, and resources for participating attorneys. Through these channels, a large number of criminal defense attorneys were made aware of the study and its objectives. The overall information campaign was foundational for attorney enrollment.

**Attorney Enrollment**

While attorneys had the option to sign up through the study website, in order to meet enrollment objectives, direct recruitment was also necessary. Different recruitment approaches were used for public defender and court appointed attorneys in private practice.

<table>
<thead>
<tr>
<th>Table C-1. Participating Adult Trial-Level Public Defender Offices</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Case Types Contributed</strong></td>
</tr>
<tr>
<td>Bee County PDO</td>
</tr>
<tr>
<td>El Paso County PDO</td>
</tr>
<tr>
<td>Harris County PDO</td>
</tr>
<tr>
<td>Travis County PDO</td>
</tr>
<tr>
<td>Webb County PDO</td>
</tr>
<tr>
<td>Willacy County PDO</td>
</tr>
<tr>
<td>Collin County MAC</td>
</tr>
<tr>
<td>Lubbock County MAC</td>
</tr>
<tr>
<td>Montgomery County MAC</td>
</tr>
</tbody>
</table>

**Public Defender Recruitment**

Fourteen Texas counties use public defenders for at least some adult trial cases. To explore whether office-wide timekeeping would be feasible, chief public defenders were contacted directly by the research team. Six of the state’s 14 such offices agreed to contribute time records, and four were able to provide complete time data for all attorneys through records extracted from automated information systems (Table C-1). None of the state’s three Managed Assigned Counsel offices had time records in a form that could be used by the study. Therefore, lawyers in those offices were recruited in the same manner as other private practice attorneys.
Private Assigned Counsel Recruitment

By far the largest proportion of counties in Texas rely exclusively on private assigned counsel systems for adult trial-level cases. Considerable effort was therefore directed toward recruiting individual private practice attorneys for the study. While all Texas lawyers taking court appointments were encouraged to volunteer, telephone recruitment was limited to the state’s 39 counties with population exceeding 100,000.\(^5\)

Importantly, these 15 percent of all counties contain 82 percent of Texas’s population. The targeted recruitment strategy was therefore designed to focus on defense practices in the counties serving the largest majority of indigent defendants. Of the 129 private practice attorneys who ultimately kept time records, 95 percent were from the largest counties. Furthermore, 31 of the 39 largest counties (80 percent) had at least one attorney in the study.

Incentives

To reward busy lawyers agreeing to take part in the study, and to encourage sustained commitment over the entire 12 weeks of timekeeping, several incentives were offered. Continuing Legal Education credit was awarded for completion of the required 1.75 hour webinar-style study training. Everyone who contributed at least four weeks of timekeeping data received a guaranteed $50 gift card. In addition, to reward complete reporting, weekly prize drawings were held for people who updated their time records each week. Prizes ranged from $10 coffee gift cards to a single $600 prize in the final week of the study.

Description of the Study Sample

To help recruit a balanced sample representing private practice attorneys statewide, a sampling frame was used to structure recruitment. To create the frame, lawyers were categorized by county population, Administrative Judicial Region, and case qualifications. Individuals were randomly selected from each cell of the frame to be invited to take part in timekeeping. As enrollment goals were met for each cell, calls were directed to people in unfilled cells. As a result the final sample that was reasonably balanced in terms of key attributes including geographic distribution, offense type, and attorney type.\(^6\)

\(^5\) PPRI requested the list of individuals qualified to take court-appointed cases in each of the state’s 39 counties with population exceeding 100,000. Twenty-three of 39 counties responded, providing the research team with information needed to contact 1,733 attorneys. Attorneys in the remaining large counties were identified from TCDLA membership lists.

\(^6\) Other undetected sources of sample bias may also have been present. These could have had the effect of either inflating or suppressing time estimates in the sample relative to the population.
Practice Characteristics
A total of 196 attorneys participated in the Timekeeping Study. Individuals agreeing to be recognized are acknowledged in Appendix B. They had 14.7 years in criminal defense practice on average. Nine percent of those tracking time were on a special appointment list or represent foreign language clients, and 11 percent qualified for mental health case appointments. Individuals keeping time reported they work an average of 43 hours per week.

Geography
To achieve a geographically representative sample, people were recruited in proportion to the population in each of Texas’s nine Administrative Judicial Regions. Figure C-2 shows the relative distributions. Attorneys in the study are proportionally under-represented in Region One, in part because Dallas County public defenders did not take part. Conversely study lawyers are over-represented in Region Six due to the full participation of the public defender office in El Paso County. Aside from these exceptions, the geographic distribution of the study sample is approximately proportional to the population distribution across the remaining judicial regions statewide.

Figure C-2. Attorney Representation by Administrative Judicial Region

Offense Type
Figure C-3 shows the composition of cases in the final study. Misdemeanors (45 percent) and felonies (55 percent) are about evenly represented. Because there are more misdemeanor attorneys, and a larger number of misdemeanor cases are disposed each week, felony-qualified attorneys were intentionally over-sampled to achieve this balance. By controlling and adjusting the recruitment process, there are enough cases to assess the time being spent on both low- and high-level offenses.
Attorney Type

The research team faced greater challenges achieving balance between cases represented by public defender and private practice attorneys (Figure C-4). While just one-third of the lawyers contributing to the study (35 percent) were public defenders, these same attorneys provided two-thirds of all cases (66 percent). For context, just 14 percent of trial-level felony and misdemeanor indigent defense cases statewide were represented by public defenders in FY 2013.\(^7\) Several factors explain this outcome.

First, private appointed attorneys represent fewer indigent defendants. Those in the study said court appointments average just 66 percent of their practice, while public defenders carry a near 100% indigent caseload. In addition, two of the state’s largest public defender offices contributed complete time records for all cases active in the study period. Due to these two factors, public defender cases, particularly those from Harris and El Paso Counties, over-represented in the study sample.

Timekeeping Data Collection

To prepare for data collection, enrolled attorneys were required to complete a 1.75 hour webinar training held on January 28, 2014. Information was provided about the potential uses and benefits of time tracking in criminal defense, and participants were instructed on the use of an online reporting system developed for the project.

Timekeeping Software

JusticeWorks, a professional developer of attorney timekeeping software, was contracted to create the customized reporting system necessary for the study. The password-protected web-based system allowed attorneys to view confidential information such as client names and case numbers. However, a randomly generated case number was substituted to anonymize records before sharing with the research team. Study information was entered through three screens:

- **Registration Screen (Figure C-5a):** The set-up page where attorneys created a base account and provided some information about their practice.
- **Case Information Screen (Figure C-5b):** Provided fields to document the characteristics of cases being tracked in the study. Variables recorded included date of the offense, date of court appointment, and date of case disposition (if available); charges; custody status; and indicators of case complexity such as probation, mental health, immigration or language concerns, and the use of experts or forensics by the prosecution or the defense.

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8 A recorded version of the training was posted on the website people who were unable to attend the initial training, or who wished to review components of the training.
9 In order to protect confidentiality, client name was visible to attorneys but was not made available to the research team.
• **Time Entry Screen (Figure C-5c):** Provided a search box for case retrieval where the amount and purpose of time spent could be entered using the standardized time categories.

Attorneys and office staff could choose to record timekeeping data on personal cellphones or office computers. Hard copy timekeeping forms were also available for individuals who preferred to take written notes in the field for later online entry. Because the entire current database was available for download by the research team at any time, it was possible to implement regular data quality checks. Attorneys with lapses in data entry were identified each week and attorneys were contacted both individually and as a group to encourage continued participation and accurate reporting.

**Figure C-5a. Registration Screen**
Figure C-5b. Case Information Screen

Figure C-5c. Time Entry Screen
Timekeeping Data Analysis

At the end of the 12-week study period, time records were available for a total of 8,151 defendant-level cases. Although people were encouraged to record time spent with both public appointed and private retained clients, at the end of the study sufficient data was only available to include court-appointed cases in the analyses.

Attorneys were instructed to provide offense information for the most serious charge filed in each information or complaint, as well as a total count of all charges. Time was attributed to the highest named charge category. Table C-2 provides shows the average number of charges by offense level for cases in the study.

Table C-2. Average Number of Charges per Defendant/Case by Offense Level

<table>
<thead>
<tr>
<th>Offense Level</th>
<th>Average Number of Charges per Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Misdemeanor B</td>
<td>1.1</td>
</tr>
<tr>
<td>Misdemeanor A</td>
<td>1.2</td>
</tr>
<tr>
<td>State Jail Felony</td>
<td>1.2</td>
</tr>
<tr>
<td>Felony 3</td>
<td>1.3</td>
</tr>
<tr>
<td>Felony 2</td>
<td>1.2</td>
</tr>
<tr>
<td>Felony 1</td>
<td>1.4</td>
</tr>
</tbody>
</table>

The challenge for the research team was to extrapolate individual case time records to time estimates for cases at all offense levels. Just 16 percent of cases were started and disposed within the study period providing full information about time spent. The remaining cases either began (23 percent), ended (27 percent), or both began and ended (34 percent) outside the data collection window. Yet, conclusions based only on complete cases would inaccurately represent time estimates for more complex, longer-duration case types such as high-level felonies. To correct for this limitation, estimation was based on three case categories as shown in Figure C-6.

**Group 1: Known Duration, Known Time Spent**

Full information about time spent on defense was available for the first group of cases because they were initiated and disposed during the data collection interval. Average actual weekly time requirements for each case were directly calculable and no estimation was required.

**Group 2: Known Duration, Unknown Time Spent**

The second group of cases began before the study but were disposed during the 12-week data collection interval. The duration of these cases was measured as the difference between attorney appointment and disposition dates. Time per week could also be measured for the portion of the case that fell within the study. To complete the estimation for the entire case,
average observed time spent per week for all cases of the same type was applied for the weeks preceding the study interval.

**Figure C-6. Estimation Procedure Used to Extrapolate from 12-Week Time Sample**

**Group 3: Unknown Duration, Unknown Time Spent**

The least information was available for the final group of cases that began before and ended after the data collection interval. The most extensive inferences were therefore required for this case set. As with Group 2, average observed time per week for cases of the same type was applied to weeks outside the study period. However, with the case ending date unknown, additional estimation of the number of weeks to disposition was also required. The median observed number of days to completion for disposed cases of the same type was therefore assigned to all cases in Group 3.\(^\text{10}\)

\(^{10}\) Median was used instead of the mean because it is less susceptible to influence by extreme values. The median is more stable and more likely to reflect time spent on most cases.
Final Computation of Case Time Values

Upon completion of the estimation process, weekly time and duration values were available for all cases in the study. Actual average time expended for cases at each offense level could then be computed according to the following formula:

\[
\text{Average (Time/Week x Number of Weeks)} = \text{Actual Time per Offense Level}
\]

This calculation, done separately for every offense level, produced the final actual time estimates shown in Section V and Figure 5-1 of the main report.
APPENDIX D

Detailed Timekeeping Results
## Average Minutes Currently Spent In Indigent Defense Cases by Offense and Task

<table>
<thead>
<tr>
<th></th>
<th>Misdemeanors</th>
<th>Low-Level Felony</th>
<th>High-Level Felony</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Class B</td>
<td>Class A</td>
<td>State Jail</td>
</tr>
<tr>
<td>Client Communication</td>
<td>30      (10.4%)</td>
<td>58      (12.6%)</td>
<td>109      (16.7%)</td>
</tr>
<tr>
<td>Negotiation/Meetings</td>
<td>7       (2.3%)</td>
<td>10       (2.1%)</td>
<td>20       (3.0%)</td>
</tr>
<tr>
<td>Discovery/Atty. Investigation</td>
<td>13     (4.5%)</td>
<td>22     (4.9%)</td>
<td>42      (6.5%)</td>
</tr>
<tr>
<td>Investigator’s Time</td>
<td>1       (0.3%)</td>
<td>1       (0.3%)</td>
<td>5       (0.8%)</td>
</tr>
<tr>
<td>Legal Research/Trial Preparation</td>
<td>44   (15.6%)</td>
<td>81     (17.7%)</td>
<td>90    (13.9%)</td>
</tr>
<tr>
<td>Court Time</td>
<td>150     (52.7%)</td>
<td>217     (47.5%)</td>
<td>315    (48.4%)</td>
</tr>
<tr>
<td>Case Management/Social Work</td>
<td>11    (3.9%)</td>
<td>24     (5.2%)</td>
<td>31    (4.8%)</td>
</tr>
<tr>
<td>Case-Specific Office Support</td>
<td>29   (10.3%)</td>
<td>44     (9.7%)</td>
<td>38     (5.9%)</td>
</tr>
<tr>
<td><strong>TOTAL MINUTES</strong></td>
<td>284     (100%)</td>
<td>457     (100%)</td>
<td>651    (100%)</td>
</tr>
</tbody>
</table>
APPENDIX E

Time Sufficiency Survey
Time Sufficiency Survey

**PRACTICE DESCRIPTION**

1) How many years have you been licensed to practice criminal law?


2) What type of practice do you have?

- ☐ Solo practice
- ☐ Partnership/LLC
- ☐ Office share agreement
- ☐ Public Defender
- ☐ Managed Assigned Counsel
- ☐ Contract Attorney
- ☐ Other: __________________________________________

3) About how many new clients do you accept in a typical month in each of the following categories:

- **Misdemeanors**
  - ☐ Appointed: ____/month
  - ☐ Retained: ____/month
  - ☐ Do not currently represent misdemeanors

- **Felonies**
  - ☐ Appointed: ____/month
  - ☐ Retained: ____/month
  - ☐ Do not currently represent felonies

- **Juvenile Cases**
  - ☐ Appointed: ____/month
  - ☐ Retained: ____/month
  - ☐ Do not currently represent juvenile cases

- **Civil Cases**
  - ☐ ____/month
  - ☐ Do not represent civil cases

4) How many clients do you usually have on your active caseload at any given time?

- ____ active clients
5) Are you on a specialized appointment list for:

☐ Foreign language clients
☐ Mental health cases
☐ Immigration law
☐ Other

6) About how many hours do you work in a typical week?

   ____________
   hours

7) On average, about how much time per day do you spend...

   On case-related work (i.e., working on behalf of clients)?

   ____________
   hours/day on case-related work

   On non-case-related work such as staff meetings, administrative tasks, supervising law clerks, business travel, etc.? (Do not include personal time such as lunch and vacation.)

   ____________
   hours/day on non-case-related work
**SURVEY INSTRUCTIONS**

The following survey shows the amount of time Texas defense attorneys participating in the Weighted Caseload Study tell us they are spending on court-appointed juvenile delinquency or trial-level criminal cases.

Two questions are addressed:
- In what percentage of cases are key tasks being performed?
- When those tasks are performed how much time is being spent?

You will be asked to review results, then indicate if, in your professional judgment, the measured amounts should be increased or decreased to ensure Effective Assistance of Counsel.

- **Effective Assistance of Counsel**: Competent legal representation without errors that would result in the denial of a fair trial.

Attorney time is reported in eight time categories. Definitions of each category can be viewed by hovering the mouse cursor over each category name.

---

**Trial Level MISDEMEANORS**

Please recommend adjustments (if needed) to ensure Effective Assistance of Counsel.

*Effective Assistance of Counsel*: Competent legal representation without errors that would result in the denial of a fair trial.

<table>
<thead>
<tr>
<th>Time Categories (Hover for definitions)</th>
<th>Hours per Case When Task is Performed</th>
<th>Percent of Cases Where Task Should Be Performed</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Attorney Responses</td>
<td>Your Opinion</td>
</tr>
<tr>
<td>Client Communication</td>
<td>1.7</td>
<td></td>
</tr>
<tr>
<td>Negotiation/Meetings</td>
<td>1.0</td>
<td></td>
</tr>
<tr>
<td>Discovery/Investigation</td>
<td>1.3</td>
<td></td>
</tr>
<tr>
<td>Legal Research/Trial Preparation</td>
<td>3.5</td>
<td></td>
</tr>
<tr>
<td>Court Time</td>
<td>3.9</td>
<td></td>
</tr>
<tr>
<td>Case Management</td>
<td>2.7</td>
<td></td>
</tr>
<tr>
<td>Investigator’s Time</td>
<td>2.5</td>
<td></td>
</tr>
<tr>
<td>Case-Specific Office Support</td>
<td>1.7</td>
<td></td>
</tr>
</tbody>
</table>
### Trial Level STATE JAIL FELONY - FELONY 3

Please recommend adjustments (if needed) to ensure Effective Assistance of Counsel.

**Effective assistance of counsel:** Competent legal representation without errors that would result in the denial of a fair trial.

<table>
<thead>
<tr>
<th>Time Categories</th>
<th>Hours per Case When Task is Performed</th>
<th>Percent of Cases Where Task Should Be Performed</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Attorney Responses</td>
<td>Your Opinion</td>
</tr>
<tr>
<td>Client Communication</td>
<td>4.6</td>
<td></td>
</tr>
<tr>
<td>Negotiation/Meetings</td>
<td>2.5</td>
<td></td>
</tr>
<tr>
<td>Discovery/Investigation</td>
<td>4.4</td>
<td></td>
</tr>
<tr>
<td>Legal Research/Trial Preparation</td>
<td>6.3</td>
<td></td>
</tr>
<tr>
<td>Court Time</td>
<td>7.3</td>
<td></td>
</tr>
<tr>
<td>Case Management</td>
<td>4.1</td>
<td></td>
</tr>
<tr>
<td>Investigator’s Time</td>
<td>8.3</td>
<td></td>
</tr>
<tr>
<td>Case-Specific Office Support</td>
<td>2.4</td>
<td></td>
</tr>
</tbody>
</table>

### Trial Level FELONY 2 - FELONY 1

Please recommend adjustments (if needed) to ensure Effective Assistance of Counsel.

**Effective assistance of counsel:** Competent legal representation without errors that would result in the denial of a fair trial.

<table>
<thead>
<tr>
<th>Time Categories</th>
<th>Hours per Case When Task is Performed</th>
<th>Percent of Cases Where Task Should Be Performed</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Attorney Responses</td>
<td>Your Opinion</td>
</tr>
<tr>
<td>Client Communication</td>
<td>5.2</td>
<td></td>
</tr>
<tr>
<td>Negotiation/Meetings</td>
<td>2.2</td>
<td></td>
</tr>
<tr>
<td>Discovery/Investigation</td>
<td>6.9</td>
<td></td>
</tr>
<tr>
<td>Legal Research/Trial Preparation</td>
<td>10.9</td>
<td></td>
</tr>
<tr>
<td>Court Time</td>
<td>9.8</td>
<td></td>
</tr>
<tr>
<td>Case Management</td>
<td>5.0</td>
<td></td>
</tr>
<tr>
<td>Investigator’s Time</td>
<td>14.1</td>
<td></td>
</tr>
<tr>
<td>Case-Specific Office Support</td>
<td>3.2</td>
<td></td>
</tr>
</tbody>
</table>
APPENDIX F

Detailed Time Sufficiency Results
## Average Minutes Recommended by Time Sufficiency Survey Respondents

<table>
<thead>
<tr>
<th></th>
<th>Misdemeanors</th>
<th>Low-Level Felony</th>
<th>High-Level Felony</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Client Communication</strong></td>
<td>103 (17.2%)</td>
<td>235 (20.4%)</td>
<td>269 (15.1%)</td>
</tr>
<tr>
<td><strong>Negotiation/Meetings</strong></td>
<td>50 (8.3%)</td>
<td>92 (8.0%)</td>
<td>102 (5.7%)</td>
</tr>
<tr>
<td><strong>Discovery/Atty. Investigation</strong></td>
<td>78 (13.0%)</td>
<td>174 (15.1%)</td>
<td>292 (16.4%)</td>
</tr>
<tr>
<td><strong>Investigator’s Time</strong></td>
<td>14 (2.3%)</td>
<td>62 (5.4%)</td>
<td>162 (9.1%)</td>
</tr>
<tr>
<td><strong>Legal Research/Trial Preparation</strong></td>
<td>82 (13.6%)</td>
<td>141 (12.2%)</td>
<td>310 (17.4%)</td>
</tr>
<tr>
<td><strong>Court Time</strong></td>
<td>198 (33.0%)</td>
<td>330 (28.6%)</td>
<td>492 (27.5%)</td>
</tr>
<tr>
<td><strong>Case Management/Social Work</strong></td>
<td>41 (6.9%)</td>
<td>72 (6.3%)</td>
<td>90 (5.1%)</td>
</tr>
<tr>
<td><strong>Case-Specific Office Support</strong></td>
<td>35 (5.8%)</td>
<td>48 (4.1%)</td>
<td>69 (3.9%)</td>
</tr>
<tr>
<td><strong>TOTAL MINUTES</strong></td>
<td>601 (100%)</td>
<td>1,154 (100%)</td>
<td>1,786 (100%)</td>
</tr>
</tbody>
</table>
APPENDIX G

Delphi Panel Members
<table>
<thead>
<tr>
<th>Name</th>
<th>Title</th>
<th>Organization</th>
<th>AJR/City</th>
</tr>
</thead>
<tbody>
<tr>
<td>Buck Files</td>
<td>President Attorney at Law</td>
<td>State Bar of Texas Bain, Files, Jarrett, Bain, and Harrison, P.C.</td>
<td>AJR: 1 Tyler</td>
</tr>
<tr>
<td>Knox Fitzpatrick</td>
<td>Attorney at Law</td>
<td>Fitzpatrick Hagood Smith &amp; Uhl, LLP</td>
<td>AJR: 1 Dallas</td>
</tr>
<tr>
<td>Alexander Bunin</td>
<td>Chief Public Defender</td>
<td>Harris County Public Defender’s Office</td>
<td>AJR: 2 Houston</td>
</tr>
<tr>
<td>Allen Isbell</td>
<td>Attorney at Law</td>
<td>Law Office of Allen Isbell</td>
<td>AJR: 2 Houston</td>
</tr>
<tr>
<td>Bruce Fox</td>
<td>Attorney at Law</td>
<td>Law Office of Bruce Fox</td>
<td>AJR: 3 Austin</td>
</tr>
<tr>
<td>David Gonzalez</td>
<td>Attorney at Law</td>
<td>Sumpter and Gonzalez, L.L.P.</td>
<td>AJR: 3 Austin</td>
</tr>
<tr>
<td>Russell Hunt, Jr.</td>
<td>Attorney at Law</td>
<td>Law Office of Russell Hunt, Jr.</td>
<td>AJR: 3 Georgetown</td>
</tr>
<tr>
<td>Kameron Johnson</td>
<td>Chief Juvenile Public Defender</td>
<td>Travis County Juvenile Public Defender’s Office</td>
<td>AJR: 3 Austin</td>
</tr>
<tr>
<td>Jeanette Kinard</td>
<td>Director</td>
<td>Travis County Mental Health Public Defender’s Office</td>
<td>AJR: 3 Austin</td>
</tr>
<tr>
<td>Stephanie Boyd</td>
<td>Attorney at Law</td>
<td>Law Office of Stephanie Boyd</td>
<td>AJR: 4 San Antonio</td>
</tr>
<tr>
<td>Joseph Esparza</td>
<td>Attorney at Law</td>
<td>Gross &amp; Esparza, P.L.L.C.</td>
<td>AJR: 4 San Antonio</td>
</tr>
<tr>
<td>Reynaldo Garza III</td>
<td>Attorney at Law</td>
<td>Law Office of Reynaldo Garza III</td>
<td>AJR: 5 Brownsville</td>
</tr>
<tr>
<td>Mary Stillinger</td>
<td>Attorney at Law</td>
<td>Law Office of Mary Stillinger</td>
<td>AJR: 6 El Paso</td>
</tr>
<tr>
<td>Mark Dettman</td>
<td>Attorney at Law</td>
<td>Law Office of Mark Dettman</td>
<td>AJR: 7 Midland</td>
</tr>
<tr>
<td>Don Hase</td>
<td>Commissioner Attorney at Law</td>
<td>Texas Indigent Defense Commission Ball &amp; Hase, P.C.</td>
<td>AJR: 8 Arlington</td>
</tr>
<tr>
<td>Stephanie Patten</td>
<td>Attorney at Law</td>
<td>Law Office of Stephanie Patten</td>
<td>AJR: 8 Fort Worth</td>
</tr>
<tr>
<td>Laurie Key</td>
<td>Attorney at Law</td>
<td>Law Office of Laurie Key</td>
<td>AJR: 9 Lubbock</td>
</tr>
<tr>
<td>Philip Wischkaemper</td>
<td>Professional Dev. Director</td>
<td>Lubbock Private Defender Office</td>
<td>AJR: 9 Lubbock</td>
</tr>
</tbody>
</table>
APPENDIX H

Delphi Survey Response Forms
# Example Delphi Panel Round One Response Form

## Trial Level MISDEMEANOR A

**INSTRUCTIONS:** Consider cases that go to trial, and those that are resolved by a plea. For each group please provide separate estimates of the amount of time that is reasonably required to perform the respective task with reasonable effectiveness.

<table>
<thead>
<tr>
<th>Task</th>
<th>Minutes per Case when Task Is Performed</th>
<th>Percent of Cases where Task Should Be Performed</th>
<th>Minutes per Case when Task Is Performed</th>
<th>Percent of Cases where Task Should Be Performed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Client Communication</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Negotiation/Meetings</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Discovery</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Attorney Investigation</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Investigator's Time</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Legal Research/Case Preparation</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Court Time</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Social Work</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Case-Specific Office Support</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Total Case Time:** 0 hour(s) total case time in Trials

**Explanation (optional):**

### TOTAL CASE TIME

<table>
<thead>
<tr>
<th>Task</th>
<th>Minutes per Case when Task Is Performed</th>
<th>Percent of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Client Communication</td>
<td>0 mins.</td>
<td>0%</td>
</tr>
<tr>
<td>Negotiation/Meetings</td>
<td>0 mins.</td>
<td>0%</td>
</tr>
<tr>
<td>Discovery</td>
<td>0 mins.</td>
<td>0%</td>
</tr>
<tr>
<td>Attorney Investigation</td>
<td>0 mins.</td>
<td>0%</td>
</tr>
<tr>
<td>Investigator's Time</td>
<td>0 mins.</td>
<td>0%</td>
</tr>
<tr>
<td>Legal Research/Case Preparation</td>
<td>0 mins.</td>
<td>0%</td>
</tr>
<tr>
<td>Court Time</td>
<td>0 mins.</td>
<td>0%</td>
</tr>
<tr>
<td>Social Work</td>
<td>0 mins.</td>
<td>0%</td>
</tr>
<tr>
<td>Case-Specific Office Support</td>
<td>0 mins.</td>
<td>0%</td>
</tr>
</tbody>
</table>

**Total Case Time:** 0 hour(s) total case time in Trials

---

Appendix H | 1
## Example Delphi Panel Round Two Response Form

**Trial Level MISDEMEANOR A**

INSTRUCTIONS: Consider cases that go to trial, and those that are resolved by a plea. For each group please provide separate estimates of the amount of time that is reasonably required to perform the respective task with reasonable effectiveness.

<table>
<thead>
<tr>
<th>% of CASES SHOULD GO TO TRIAL</th>
<th>% of CASES SHOULD BE RESOLVED BY PLEA or other non-trial resolutions (e.g., dismissal or diversion)</th>
</tr>
</thead>
<tbody>
<tr>
<td>14% PEERS Median</td>
<td>85% PEERS Median</td>
</tr>
<tr>
<td>10-25% PEERS Range</td>
<td>50-75% PEERS Range</td>
</tr>
</tbody>
</table>

### Minutes per Case when Task is Performed vs. Percent of Cases where Task Should Be Performed

<table>
<thead>
<tr>
<th>Client Communication</th>
<th>240 mins.</th>
<th>120-350 mins.</th>
<th>%</th>
<th>100</th>
<th>100-100%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Negotiation/Meetings</td>
<td>60 mins.</td>
<td>50-120 mins.</td>
<td>%</td>
<td>100</td>
<td>100-100%</td>
</tr>
<tr>
<td>Discovery</td>
<td>120 mins.</td>
<td>90-120 mins.</td>
<td>%</td>
<td>100</td>
<td>100-100%</td>
</tr>
<tr>
<td>Attorney Investigation</td>
<td>180 mins.</td>
<td>60-180 mins.</td>
<td>%</td>
<td>100</td>
<td>90-100%</td>
</tr>
<tr>
<td>Investigator’s Time</td>
<td>120 mins.</td>
<td>60-180 mins.</td>
<td>%</td>
<td>100</td>
<td>25-90%</td>
</tr>
<tr>
<td>Legal Research/Trial Preparation</td>
<td>120 mins.</td>
<td>90-240 mins.</td>
<td>%</td>
<td>100</td>
<td>100-100%</td>
</tr>
<tr>
<td>Court Time</td>
<td>840 mins.</td>
<td>480-1560 mins.</td>
<td>%</td>
<td>100</td>
<td>85-100%</td>
</tr>
<tr>
<td>Social Work</td>
<td>60 mins.</td>
<td>30-90 mins.</td>
<td>%</td>
<td>50</td>
<td>25-75%</td>
</tr>
<tr>
<td>Case-Specific Office Support</td>
<td>60 mins.</td>
<td>60-120 mins.</td>
<td>%</td>
<td>100</td>
<td>100-100%</td>
</tr>
</tbody>
</table>

### Minutes per Case when Task is Performed vs. Percent of Cases where Task Should Be Performed

| Total Case Time: | 0.9 hours total case time in Trials | 0.9 hours total case time in Pleas |

*The range shown is for the middle 50% of answers (i.e., 25th and 75th percentile).*
APPENDIX I

Detailed Delphi Panel Results
## Average Minutes Recommended by Delphi Panel for Non-Trial Case Resolutions

<table>
<thead>
<tr>
<th>NON-TRIAL RESOLUTION</th>
<th>Misdemeanors</th>
<th>Low-Level Felony</th>
<th>High-Level Felony</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Class B</td>
<td>Class A</td>
<td>State Jail</td>
</tr>
<tr>
<td>Client Communication</td>
<td>75</td>
<td>75</td>
<td>108</td>
</tr>
<tr>
<td></td>
<td>(14.5%)</td>
<td>(13.3%)</td>
<td>(15.8%)</td>
</tr>
<tr>
<td>Negotiation/Meetings</td>
<td>60</td>
<td>60</td>
<td>75</td>
</tr>
<tr>
<td></td>
<td>(11.6%)</td>
<td>(10.6%)</td>
<td>(11.0%)</td>
</tr>
<tr>
<td>Discovery</td>
<td>60</td>
<td>60</td>
<td>70</td>
</tr>
<tr>
<td></td>
<td>(11.6%)</td>
<td>(10.6%)</td>
<td>(10.2%)</td>
</tr>
<tr>
<td>Attorney Investigation</td>
<td>60</td>
<td>90</td>
<td>90</td>
</tr>
<tr>
<td></td>
<td>(11.6%)</td>
<td>(5.9%)</td>
<td>(13.2%)</td>
</tr>
<tr>
<td>Investigator’s Time</td>
<td>25</td>
<td>32</td>
<td>41</td>
</tr>
<tr>
<td></td>
<td>(4.9%)</td>
<td>(5.6%)</td>
<td>(5.9%)</td>
</tr>
<tr>
<td>Legal Research/Trial Preparation</td>
<td>60</td>
<td>60</td>
<td>64</td>
</tr>
<tr>
<td></td>
<td>(11.6%)</td>
<td>(10.6%)</td>
<td>(9.4%)</td>
</tr>
<tr>
<td>Court Time</td>
<td>128</td>
<td>132</td>
<td>165</td>
</tr>
<tr>
<td></td>
<td>(24.8%)</td>
<td>(23.4%)</td>
<td>(24.2%)</td>
</tr>
<tr>
<td>Case Management/Social Work</td>
<td>9</td>
<td>11</td>
<td>19</td>
</tr>
<tr>
<td></td>
<td>(1.7%)</td>
<td>(2.0%)</td>
<td>(2.8%)</td>
</tr>
<tr>
<td>Case-Specific Office Support</td>
<td>40</td>
<td>45</td>
<td>51</td>
</tr>
<tr>
<td></td>
<td>(7.7%)</td>
<td>(8.0%)</td>
<td>(7.4%)</td>
</tr>
<tr>
<td>TOTAL MINUTES</td>
<td>517</td>
<td>565</td>
<td>682</td>
</tr>
<tr>
<td></td>
<td>(100%)</td>
<td>(100%)</td>
<td>(100%)</td>
</tr>
</tbody>
</table>
### Average Minutes Recommended by Delphi Panel for Trial Case Resolutions

<table>
<thead>
<tr>
<th>TRIAL RESOLUTION</th>
<th>Misdemeanors</th>
<th>Low-Level Felony</th>
<th>High-Level Felony</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Class B</td>
<td>Class A</td>
<td>State Jail</td>
</tr>
<tr>
<td>Client Communication</td>
<td>168 (8.9%)</td>
<td>225 (11.4%)</td>
<td>240 (11.1%)</td>
</tr>
<tr>
<td>Negotiation/Meetings</td>
<td>80 (4.3%)</td>
<td>80 (4.1%)</td>
<td>106 (4.9%)</td>
</tr>
<tr>
<td>Discovery</td>
<td>81 (4.3%)</td>
<td>104 (5.3%)</td>
<td>119 (5.5%)</td>
</tr>
<tr>
<td>Attorney Investigation</td>
<td>115 (6.1%)</td>
<td>126 (6.4%)</td>
<td>130 (6.0%)</td>
</tr>
<tr>
<td>Investigator’s Time</td>
<td>150 (8.0%)</td>
<td>150 (7.6%)</td>
<td>154 (7.1%)</td>
</tr>
<tr>
<td>Legal Research/Trial Preparation</td>
<td>240 (12.8%)</td>
<td>270 (13.7%)</td>
<td>270 (12.5%)</td>
</tr>
<tr>
<td>Court Time</td>
<td>939 (50.1%)</td>
<td>898 (45.6%)</td>
<td>1,020 (47.2%)</td>
</tr>
<tr>
<td>Case Management/Social Work</td>
<td>23 (1.2%)</td>
<td>24 (1.2%)</td>
<td>31 (1.4%)</td>
</tr>
<tr>
<td>Case-Specific Office Support</td>
<td>78 (4.2%)</td>
<td>93 (4.7%)</td>
<td>92 (4.3%)</td>
</tr>
<tr>
<td>TOTAL MINUTES</td>
<td>1,875 (100%)</td>
<td>1,971 (100%)</td>
<td>2,162 (100%)</td>
</tr>
</tbody>
</table>
APPENDIX J

Delphi Time Increments by Task
Adjustments to Current Practice Recommended by Delphi Panel Members

(Using Delphi-Recommended Trial Rates)

Figure J-1. Misdemeanor Delphi-Recommended Time Adjustments

\[ \Delta \text{Misdemeanors: } 6.0 + 6.9 = 12.9 \text{ hours} \]

Figure J-2. Low-Level Felony Delphi-Recommended Time Adjustments

\[ \Delta \text{Low Felonies: } 11.8 + 3.9 = 15.7 \text{ hours} \]

Figure J-3. High-Level Felony Delphi-Recommended Time Adjustments

\[ \Delta \text{High Felonies: } 17.7 + 11.8 = 29.6 \text{ hours} \]
APPENDIX K

Final Recommended Caseload Guidelines by Task
## Average Minutes Recommended in Final Caseload Guidelines (Using Actual Trial Rates)

<table>
<thead>
<tr>
<th></th>
<th>Misdemeanors</th>
<th>Low-Level Felony</th>
<th>High-Level Felony</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Class B</td>
<td>Class A</td>
<td>State Jail</td>
</tr>
<tr>
<td><strong>Client Communication</strong></td>
<td>76 (14.3%)</td>
<td>77 (13.2%)</td>
<td>111 (15.4%)</td>
</tr>
<tr>
<td><strong>Negotiation/Meetings</strong></td>
<td>60 (11.3%)</td>
<td>60 (10.3%)</td>
<td>76 (10.6%)</td>
</tr>
<tr>
<td><strong>Discovery</strong></td>
<td>60 (11.3%)</td>
<td>60 (10.4%)</td>
<td>71 (9.9%)</td>
</tr>
<tr>
<td><strong>Atty. Investigation</strong></td>
<td>61 (11.5%)</td>
<td>90 (15.6%)</td>
<td>91 (12.7%)</td>
</tr>
<tr>
<td><strong>Investigator’s Time</strong></td>
<td>26 (4.9%)</td>
<td>32 (5.6%)</td>
<td>42 (5.9%)</td>
</tr>
<tr>
<td><strong>Legal Research/Trial Preparation</strong></td>
<td>62 (11.7%)</td>
<td>62 (10.7%)</td>
<td>69 (9.7%)</td>
</tr>
<tr>
<td><strong>Court Time</strong></td>
<td>137 (25.9%)</td>
<td>141 (24.3%)</td>
<td>187 (26.0%)</td>
</tr>
<tr>
<td><strong>Case Management/Social Work</strong></td>
<td>9 (1.6%)</td>
<td>11 (2.0%)</td>
<td>19 (2.7%)</td>
</tr>
<tr>
<td><strong>Case-Specific Office Support</strong></td>
<td>40 (7.6%)</td>
<td>46 (7.8%)</td>
<td>52 (7.2%)</td>
</tr>
<tr>
<td><strong>TOTAL MINUTES</strong></td>
<td>531 (100%)</td>
<td>580 (100%)</td>
<td>718 (100%)</td>
</tr>
</tbody>
</table>
MEMORANDUM OF UNDERSTANDING

Among

SEATTLE OFFICE OF THE MAYOR, SEATTLE CITY ATTORNEY’S OFFICE,
SEATTLE POLICE DEPARTMENT,
KING COUNTY EXECUTIVE, KING COUNTY PROSECUTING ATTORNEY,
KING COUNTY SHERIFF,
THE DEFENDER ASSOCIATION, AND THE ACLU OF WASHINGTON

Regarding

LAW ENFORCEMENT ASSISTED DIVERSION PROGRAM
COORDINATING GROUP: FORMATION, GOVERNANCE, AND RESPONSIBILITIES

WHEREAS, the City of Seattle (“City”), King County (“County”), and residents and
business owners in the Belltown community of downtown Seattle (“Belltown”) and the Skyway
community of unincorporated King County (“Skyway”) want to improve public safety and
public order in the Belltown and Skyway neighborhoods; and

WHEREAS, the City, County, and Belltown and Skyway community members want to
reduce future criminal behavior by low-level drug offenders contacted in Belltown and Skyway; and

WHEREAS, booking, prosecuting, and jailing individuals committing low-level drug
offenses in Belltown and Skyway has had limited effectiveness in improving either public safety
or public order in the neighborhoods; and

WHEREAS, interventions that connect low-level drug offenders with services may cost
less and be more successful at reducing future criminal behavior than processing these
individuals through the criminal justice system; and

WHEREAS, private foundations have stepped forward to provide start-up funding for the
operation and evaluation of a robust pre-book ing diversion demonstration project in the City and
County with the understanding that the project presents a unique opportunity to work with local
partners on a new strategy that holds promise for effecting systemic change and a paradigm shift in the public response to individuals’ low-level drug involvement;

NOW, THEREFORE, THE PARTIES STATE THEIR INTENT AS FOLLOWS:

A. **Formation, Purposes, and Membership of the Law Enforcement Assisted Diversion (“LEAD”) Coordinating Group.** A Coordinating Group is hereby formed for the LEAD prebooking diversion demonstration project. The purposes of the Coordinating Group are to review and provide feedback on the Referral and Diversion Protocols for LEAD candidates, approve Requests for Proposals (“RFPs”) for service providers and program evaluators, select providers and evaluators, review and provide feedback on periodic reports from the Belltown and Skyway Operational Groups\(^1\), make criminal justice and human services system data available for comparison and evaluative purposes, and provide policy guidance and administrative oversight for the LEAD program’s operation and evaluation. The Coordinating Group will select a non-government fiscal sponsor to receive and administer the program’s funding from private donors.

**MOU Signatories’ Individual Statements of Intent**

The parties signing this Memorandum of Understanding (“MOU”) specifically state their respective intents and commitments as follows:

---

\(^1\) The Belltown and Skyway Operational Groups are populated by representatives of the policing and prosecutorial agencies having jurisdiction over the respective communities, each neighborhood’s LEAD Community Advisory Board, and at least one of the organizations providing technical assistance to the LEAD program (The Defender Association or ACLU of Washington). Representatives of the service providers selected for each community will be added after selection. The Operational Groups have primary responsibility for developing and amending the Referral and Diversion Protocols for Belltown and Skyway, for staffing program participants’ cases per the Protocols, and for providing periodic reports on resource utilization and participants’ progress to the Coordinating Group.
1. The Mayor's Office is fully committed to the LEAD model. Over the three decades of the "War on Drugs," it has become apparent that an approach relying solely on using drug laws to jail and prosecute drug-involved individuals has resoundingly negative effects in terms of both justice and public safety, in Seattle and across the country. In 2006, the City initiated a number of pilot programs aimed to address the root causes of drug-related crime: addiction, lack of housing and employment, and lack of access to mental health services to name just a few. LEAD continues this model, and expands it to include partnership with law enforcement and access to a broader array of services. We are hopeful that LEAD may become the cornerstone of Seattle's drug enforcement strategy, and that it might help shift the nationwide paradigm from one that rends communities to one that helps to rebuild them.

The Mayor's office will commit staff to the LEAD Coordinating Group and will look for opportunities to achieve synergies with employment, housing and other initiatives undertaken by the City of Seattle that may be appropriate fits for some LEAD participants.

2. King County, through its Countywide Strategic Plan, is committed to the goals of supporting safe communities and accessible justice systems for all, and promoting opportunities for all communities and individuals to realize their full potential.

The King County Executive believes the LEAD pilot project furthers those goals. The King County Executive's Office (KCEO) has therefore committed to participate in the LEAD Program on both an evaluation and policy level. To that end, the KCEO will provide the following staffing to the program:
At an evaluation level, the KCEO will assign a senior analyst, knowledgeable in criminal justice programs and program data collection and evaluation, to assist the LEAD project evaluator with the collection of data from King County’s information systems.

At a policy level, the King County Executive’s Law and Justice Policy Advisor, or other designee as appointed by the King County Executive, shall serve on the LEAD Coordinating Group.

3. **The Seattle City Attorney’s Office** is committed to the implementation of the LEAD program model at both the operational and policy levels. While the City Attorney does not prosecute felony drug offenses, our office handles a wide variety of misdemeanor cases that are associated with street-level drug dealing (e.g. car prowls, trespass, theft, assault, harassment, etc.). If the LEAD program is successful at transitioning street-level drug dealers and users away from the drug trade, there will be a significant public safety benefit in the community as the crimes associated with the drug activity are reduced.

The City Attorney has a precinct liaison attorney who advises the West Precinct Captain on legal issues, policy matters and criminal investigations. This attorney will play an integral role in developing SPD procedures and policies for the LEAD program. He will also monitor and troubleshoot program issues as they arise. The Director of the Government Affairs Section will work on the policy team to ensure that the overall goals of the program are achieved.
Though they will be informed by the LEAD Operational Groups’ staffing recommendations regarding individual program participants, the King County prosecutor and the Seattle City Attorney’s Office retain ultimate and exclusive authority to make filing decisions in all cases.

4. **The King County Prosecutor’s Office** (PAO) has committed to participate in the LEAD Program on both an operational and policy level. The PAO will provide the following staffing to the program when practicable:

The PAO will have a deputy prosecuting attorney (DPA) knowledgeable in Washington State’s drug laws, search and seizure case law, local, state and federal criminal history records, State Department of Corrections records, warrant records, and the ability to make criminal offense filing decisions, committed to participate in the case review process. The PAO will also provide paralegal services in support of the DPA’s work. The work of the DPA and Paralegal will provide operational support to the program.

At a policy level, the Deputy Chief of Staff of the PAO, or other designee as appointed by the elected Prosecuting Attorney, shall serve on the LEAD Coordinating Group. The Deputy Chief or other designee will serve on the Coordinating Group as long as it exists or unless and until the PAO withdraws from the LEAD Program.

Though they will be informed by the LEAD Operational Groups’ staffing recommendations regarding program participants, the King County prosecutor and
the Seattle City Attorney’s Office retain ultimate and exclusive authority to make filing decisions in all cases.

5. The Seattle Police Department (SPD) has committed to participate in the LEAD Program on both an operational and policy level. The SPD will provide the following staffing to the program:

The SPD will assign several personnel to this initiative including: several specially trained patrol/anti-crime team (ACT) officers who regularly work the Belltown area, as the initial “beta/fidelity working group” who will receive additional focused training on the LEAD referral process; and an officer who works jointly with the State Department of Corrections Neighborhood Correction Initiative (NCI) and who is knowledgeable in Washington State’s drug laws, search and seizure case law, local, state and federal criminal history records, State Department of Corrections records, warrant records, and the ability to make street level decisions on where to direct the low-level drug offenders. The SPD will also provide the part-time services of a West Precinct sergeant and a lieutenant who will ensure that officers working the “street” portion of the initiative remain focused on the components of this initiative while assigned to it.

At a policy level, an Assistant Chief (Jim Pugel) and a Captain (Steve Brown) shall serve on the LEAD Coordinating Group. These representatives will serve on the Coordinating Group as long as it exists or unless and until SPD withdraws from the LEAD Program.
6. **Sheriff Sue Rahr and the King County Sheriff's Office** are pleased to participate in the Law Enforcement Assisted Diversion Program in partnership with TDA, the King County Prosecutor's Office, the Seattle Police Department and all of those committed to this project. We will support this participation at both the policy and operational levels.

At the operational level a captain assigned to the West Precinct Command will provide management-level input to structuring the policies and procedures. That captain will also oversee implementation through the first-line supervisors to the patrol deputies and detectives actually making the contacts and referrals.

At the policy level, the West Precinct Major (or other designee of the Sheriff) will be a member of the LEAD Coordinating Group, offering the perspective and support of the Sheriff and her Executive Leadership Team. It is recognized that the program in the unincorporated areas may differ in some respects from the Seattle city implementation and operation. But we support the same overarching program goals and we desire the same positive outcomes in the lives of those referred to the program and in the communities impacted by public safety issues.

7. **The Defender Association/Racial Disparity Project** will dedicate multiple FTEs to all aspects of LEAD project management, resource development, stakeholder coordination and community outreach. TDA/RDP will serve as liaison between the fiscal sponsor, the program funders, the contract service providers, the Coordinating Group, the community advisory groups and the operational work groups. TDA/RDP, with other partners, will advocate for fidelity to agreed protocols and core principles
of LEAD. TDA/RDP, with other partners, will assist in communicating about the process of creating and operating LEAD with interested policymakers and community leaders in other jurisdictions.

8. The American Civil Liberties Union (ACLU) of Washington is committed to replacing reliance on criminal sanctions with approaches that treat drug abuse as a public health concern and at the same time respect civil liberties, reduce incarceration, and promote racial justice. The ACLU of Washington maintains a Drug Policy Project whose professional staff possess significant relevant experience.

The ACLU of Washington is committed to the success of the LEAD project within its drug policy-related work. Its drug policy staff will assist the LEAD project with advocacy, document drafting, stakeholder consultation, troubleshooting, and technical assistance. The drug policy staff may also seek the assistance of the affiliate’s communication department to consult on media relations and the field department for guidance on outreach and coalition building efforts.

**LEAD Coordinating Group**

The Coordinating Group’s membership shall consist of representatives from the following entities and organizations:

1. Seattle Office of the Mayor;
2. King County Executive Office;
3. Seattle City Council;
4. King County Council;
5. Seattle City Attorney’s Office;
6. King County Prosecuting Attorney’s Office;
7. Seattle Police Department;
8. King County Sheriff’s Office;
9. Belltown LEAD Community Advisory Board;
10. Skyway LEAD Community Advisory Board;
11. The Defender Association, through its Racial Disparity Project; and
12. ACLU of Washington, through its Drug Policy Project.

Additional member entities and organizations may be added to the Coordinating Group upon unanimous consent of the existing members.

B. **Governance.** Participation in the LEAD Coordinating Group is voluntary, and any member may withdraw unilaterally at any time for any reason. This MOU does not amend any law or ordinance; nor does it create any binding obligation on the part of any signatory. This MOU simply memorializes the intent of the Coordinating Group’s members in participating in this demonstration project and describes the responsibilities they understand to be accepting through their participation.

All decisions of the Coordinating Group will be made by modified consensus. For purposes of this MOU, “modified consensus” means a resolution that is acceptable to all participants even if not ideal to one or more.

Each member organization shall designate one representative for purposes of determining consensus in Coordinating Group decisions, but multiple representatives from each organization may attend meetings and participate in discussions.
C. **Responsibilities.** The role of the Coordinating Group is to make policy-level decisions regarding the LEAD program and to provide periodic administrative oversight of the program. Specific responsibilities include, but are not limited to, the following:

1. Review of LEAD Referral and Diversion Protocols;
2. Selection of a fiscal sponsor to receive and administer private funding granted for LEAD operation and evaluation;
3. Oversight, advisement, and direction of fiscal sponsor pursuant to grant agreements;
4. Collaboration on grant applications for LEAD operation and evaluation;
5. Approval of RFPs for LEAD service provision and evaluation;
6. Review of RFP applications and selection of service providers and evaluators;
7. Making available criminal justice and human services system data for comparison and evaluative purposes;
8. Oversight of LEAD implementation, including regular review of reports from the Belltown and Skyway Operational Groups, contract compliance of service providers and evaluators, and solicitation and review of community feedback; and
9. Modification of service provision, or evaluation criteria and process, as needed.

The Defender Association and ACLU of Washington will provide staffing support through document drafting, stakeholder consultation, troubleshooting, and technical assistance to the Belltown and Skyway Operational Groups, but will have no decision-making authority except as members of the Coordinating Group.
This MOU may be signed in counterparts and shall be effective as of the date it is signed by all parties. No amendment or modification of this MOU will have effect unless it is made in writing and agreed to by all signatories or their successors.

Mike McGinn  
Seattle Mayor  
Date: 10-14-10

Dow Constantine  
King County Executive  
Date: 9-16-10

Peter Holmes  
Seattle City Attorney  
Date: 10-4-2010

Dan Satterberg  
King County Prosecutor  
Date: 9-23-10

John Diaz  
Chief of Police  
Seattle Police Department  
Date: 9/21/10

Sue Rahr  
King County Sheriff  
Date: 10/11/10

Floris Mikkelsen  
Director, The Defender Association  
Date: 9/22/2010

Kathleen Taylor  
Executive Director, ACLU of Washington  
Date: 10/15/2010
About LEAD

- Frequently Asked Questions
- LEAD Policy Coordinating Group
- Funders

Law Enforcement Assisted Diversion (LEAD) is a new innovative pilot program that was developed with the community to address low-level drug and prostitution crimes in the Belltown neighborhood in Seattle and the Skyway area of unincorporated King County. LEAD will divert low-level drug and prostitution offenders into community-based treatment and support services, instead of processing them through traditional criminal justice system avenues.

A unique coalition of law enforcement agencies, public officials, and community groups collaborated to create this pilot program. These groups make up LEAD’s Policy Coordinating Group, which governs the program.

LEAD’s goal is to improve public safety and public order, and to reduce the criminal behavior of people who participate in the program. The program will be thoroughly evaluated to determine whether it has been successful or not.

Frequently Asked Questions

Below are frequently asked questions about LEAD. If you have further questions about the program, please contact us.

What is LEAD?

LEAD is a pre-booking diversion program that allows officers to redirect low-level offenders engaged in drugs or prostitution activity to community-based services instead of jail and prosecution. LEAD participants begin working immediately with case managers to access services. LEAD’s goals are to reduce the harm a drug offender causes him or herself, as well as the harm that the individual is causing the surrounding community. This
public safety program has the potential to reduce recidivism rates for low-level offenders and preserve expensive criminal justice system resources for more serious or violent offenders.

How does LEAD differ from other drug programs?

First, LEAD is the result of a commitment from law enforcement agencies, public officials, and community organizations to work together in implementing a new approach to addressing drug and prostitution activity. Second, the diversion in LEAD is made at the pre-booking stage, in the hopes of bypassing the costs and time entailed in booking, charging, and requiring court appearances of an individual. Finally, LEAD provides participants with immediate case management services, and access to additional resources not available through existing public programs.

Who is eligible for diversion into LEAD?

Individuals who are arrested for eligible offenses within specified boundaries for Belltown or Skyway may be diverted into LEAD. Eligible offenses include low-level drug offenses, and engaging in prostitution. Individuals who have certain violent offenses in their criminal history are ineligible for diversion.

Who designed LEAD?

LEAD is the result of an unusual collaboration among diverse stakeholders. Collaborators include the King County Prosecuting Attorney’s Office, the Seattle City Attorney’s Office, the Seattle Police Department, the King County Sheriff’s Office, the King County Executive, the Mayor’s Office, The Washington State Department of Corrections, The Defender Association, the ACLU of Washington, and community members. The collaboration of these stakeholders was motivated by a shared dissatisfaction with the outcomes and costs of traditional drug law enforcement.

Who runs LEAD?

As noted, LEAD is the result of a collaboration among a number of stakeholders. All stakeholders are represented on LEAD’s Policy Coordinating Group, and the group makes decisions by consensus via a memorandum of understanding. LEAD is entirely voluntary, and any stakeholder may choose to withdraw from LEAD at any time.

Who will provide services to LEAD participants?

LEAD stakeholders have contracted with Evergreen Treatment Services (ETS) to provide services to LEAD participants. ETS has provided addiction treatment services in Washington for over 30 years, and has been actively involved in federally-funded research projects. ETS’ REACH Program has been a key provider in the delivery of street outreach services to chronically homeless and chemically addicted adults in Seattle for 15 years. ETS will follow harm reduction principles and will attempt to provide immediate access to services.

How will we know if LEAD works?

All LEAD stakeholders are committed to evaluating the program rigorously.
The evaluation will consider, among other factors, whether LEAD has resulted in reductions in drug use and recidivism, whether LEAD is more cost-effective than traditional criminal justice processing, and whether LEAD has had a positive impact on a community’s quality of life.

**How much will LEAD cost the City of Seattle and King County?**


**Do community members support LEAD?**

Community members strongly support LEAD. LEAD will be piloted first in Belltown, and then in Skyway (in partnership with the King County Sheriff’s Office). Members of both communities have participated in the program’s design, and will continue to provide feedback about the program. For example, the LEAD Community Advisory Board in Belltown includes representatives from the Belltown Community Council, Belltown Business Association, Downtown Seattle Association/Metropolitan Improvement District, Recovery Café, YWCA, Plymouth Housing Group, and Millionair Club Charity. The LEAD Community Advisory Board in Skyway includes representatives from Skyway United Methodist Church, Westhill Community Council, and Skyway Solutions.

**For how long will LEAD be implemented?**

LEAD formally began on October 1, 2011. The program is anticipated to run for two years before an evaluation is begun, and to continue with foundation funding for an additional two years while the evaluation is conducted and analyzed. If LEAD is found to be effective, an ongoing source of funding will be sought.

**Have programs like LEAD been implemented elsewhere?**

LEAD was inspired by “arrest-referral” programs in the United Kingdom. Those programs have recently been implemented in virtually every police department in the United Kingdom because pilot projects proved to be so effective.

**Policy Coordinating Group**

LEAD is governed by a Policy Coordinating Group. The group makes decisions by consensus via a memorandum of understanding. LEAD is entirely voluntary, and any stakeholder may choose to withdraw from LEAD at any time. The members include:

- Seattle Office of the Mayor
- King County Executive Office
- Seattle City Council
- King County Council
- Seattle City Attorney’s Office
- King County Prosecuting Attorney’s Office
- Seattle Police Department
- King County Sheriff’s Office
- Washington Department of Corrections
- Belltown LEAD Community Advisory Board
- Skyway LEAD Community Advisory Board
- The Defender Association, Racial Disparity Project
- ACLU of Washington, Drug Policy Project

**Funders**

LEAD is currently operating as a pilot program and is being funded by private foundations. It is hoped that LEAD will eventually find permanent funding from public sources. The cost-effectiveness of the program will be studied in detail as part of the evaluation for LEAD.

Current funders include:

- Ford Foundation
- Open Society Foundations
- Vital Projects Fund
- RiverStyx Foundation
- Massena Foundation
- The Social Justice Fund Northwest

http://leadkingcounty.org/about/
Local Leaders Announce Innovative Project to Divert Drug Offenders from Jail to Services

Law Enforcement Assisted Diversion (LEAD) Project Begins in Belltown

SEATTLE – A unique coalition of government officials, law enforcement agencies, and community leaders announced today that an innovative new pilot program is now operating in Belltown. Instead of arresting low-level drug offenders and prosecuting them, law enforcement will divert them to community-based treatment and support services. Only a limited number of participants will initially be allowed into the program on a pilot basis.

The Law Enforcement Assisted Diversion (LEAD) program was developed with the community to address the open air drug markets in Seattle and King County. The pilot projects will be conducted in Seattle’s Belltown neighborhood and the Skyway neighborhood of unincorporated King County.

The primary goal of the LEAD program is to improve public safety and public order, and to reduce the criminal behavior of people who participate in the program. “One goal of drug prosecution is to offer addicted people a chance for treatment. LEAD can achieve that goal through bypassing the jail and courthouse and bringing an arrested offender immediately to treatment. I have high hopes that this new option will increase public safety and change lives for those caught in the downward spiral of drug addiction,” said King County Prosecuting Attorney Dan Satterberg.

The LEAD program is based on successful ‘arrest referral schemes’ that have been operating in the United Kingdom for several years. “We know that the issue of chemical dependency in our society cannot be solved by law enforcement alone. It is a complex social problem that requires a comprehensive social solution,” said Seattle Chief of Police John Diaz. “LEAD provides our front line police officers with the discretion necessary to ensure that treatment diversion is utilized as a viable alternative to incarceration.”

As a pilot program, LEAD will undergo a rigorous evaluation to determine whether it has been a success. “We are looking for effective public safety solutions,” said Mayor Mike McGinn. “A recent report from our police department shows that 54 individuals are responsible for 2,700 arrests in Belltown. If drug dealing and crime could be solved by arrests alone, we would have solved this problem a couple thousand arrests ago. LEAD offers a promising alternative to traditional responses to street-level drug dealing, and we look forward to tracking its results in Belltown.”
“Sheriff Sue Rahr and her staff support the concepts that act as the basis for the LEAD program and we look forward to our participation,” said King County Sheriff Major James Graddon. “Respect, open communication and common goals among some historically adversarial groups have created a positive environment to move this program forward. Using the formal criminal justice system for all offenses is costly and has proven to not necessarily be the most effective way to impact future offender behavior.”

Community leaders have been involved with the LEAD program from the very beginning and will continue to work with the program in an advisory capacity. “The Downtown Seattle Association has long recognized that Downtown is everybody’s neighborhood, and investments in robust social service intervention strategies are part of making Downtown a healthy and safe community. We are delighted to see the emergence of LEAD, an innovative strategy to combat open air drug markets in which police response to drug activity is directly connected to services, providing more effective alternatives to incarceration,” said Kate Joncas, President of the Downtown Seattle Association.

The LEAD program will initially be funded by grants from private foundations. “America locks up far too many people for low-level drug offenses; our punitive response to drug use is often far more harmful to society than the drug use itself. We are proud to support LEAD’s effort to develop a practical alternative,” said David Menschel of the Vital Projects Fund. “LEAD is a breakthrough level of collaboration between law enforcement and social services that has a chance to turn the revolving door of drug law enforcement into an exit. The program will benefit the user, the officers on the street, and the community,” said Shaula Massena, of the Massena Foundation. “LEAD is a promising step towards creating greater safety for our streets, businesses, and homes by addressing individual and social harms associated with drug use,” said Cody Swift of the RiverStyx Foundation. “Shifting away from arrest and incarceration, offers hope that there will finally be the resources and compassion necessary to help people struggling with addiction.”

"King County needs innovative criminal justice programs that improve public safety, are cost-effective, and provide social services to people that lead them away from criminal behavior. The LEAD pilot program aims to serve all three of these purposes and it has my full support," said King County Councilmember Larry Phillips.

LEAD is governed by a Policy Coordinating Group which is made up of a diverse set of stakeholders, including representatives from the Seattle Office of the Mayor; King County Executive Office; Seattle City Council; King County Council; Seattle City Attorney’s Office; King County Prosecuting Attorney’s Office; Seattle Police Department; King County Sheriff’s Office; Washington State Department of Corrections; Belltown LEAD Community Advisory Board; Skyway LEAD Community Advisory Board; The Defender Association; and the ACLU of Washington. “It’s heartening to have this unique set of stakeholders working together.” City Attorney Pete Holmes said. “My office will advise SPD on legal issues every step of the way in this innovative attempt to reduce low-level drug activity,”

“Seattle’s groundbreaking initiative forges a new path that unites the whole community in a common mission to reimagine how we improve public safety and the quality of life,” said Kirsten Levingston, Ford Foundation program officer. “We are proud to support this effort, and believe that communities across the country can learn from this approach.”

Although the LEAD program is only a pilot at this point, it is hoped that it could someday be expanded to additional neighborhoods in Seattle and King County. "The LEAD pilot has the potential to help people struggling with addiction and save public dollars at the same time,” said King County Executive Dow Constantine. "We can work in partnership to replace a downward spiral toward jail with support and resources. Our families and neighborhoods are better off when those headed for the criminal justice system are instead given the opportunity to lead fulfilling and productive lives."
Mission & Purpose

Elected officials, law enforcement officers, and residents and business owners in the Belltown community of downtown Seattle (“Belltown”) want to improve public safety and public order in Belltown and want to reduce future criminal behavior by low-level drug offenders contacted in Belltown. Booking, prosecuting, and jailing individuals committing low-level drug offenses in Belltown has had limited effectiveness in improving either public safety or public order in the neighborhoods. LEAD is a new approach that seeks to accomplish the goals of reduced criminal behavior and improved public safety and order by connecting low-level drug offenders with services. This approach may cost less and be more successful at reducing future criminal behavior than processing low-level drug offenders through the criminal justice system.

Process for Diverting Individuals to LEAD in Lieu of Jail & Prosecution

In order to divert an individual to LEAD, the primary decision maker initially will be Seattle Police Department officers on the street, pursuant to clear criteria on which officers have been trained by command staff. Officers will make a series of decisions about the individuals they contact to determine whether or not those individuals are appropriate to go to jail, or to the community-based program. The determinations include:

- Is this person disqualified from community-based diversion due to particular criminal history, exploitation of others, or dealing for profit (not subsistence income)? (Exclusion criteria are detailed below.)
- Is the offense the person is alleged to have committed, an eligible offense for LEAD referral (low-level VUCSA, as defined below, or prostitution)?
- Does the person have any medical conditions at the time of arrest that require immediate medical treatment, detoxification or referral to a hospital?
- Is the person unable to provide informed consent and/or does the person pose a risk to self or others due to mental illness?
- Does the person have an existing no contact order, temporary restraining order, or anti-harassment order prohibiting contact with a current LEAD participant?
- Does the person display any interest in being offered services through a community-based diversion program rather than being taken to and booked into jail, or do the person's words and actions indicate it would be futile to attempt a diversion strategy?

A. Diversion process

In the context of the LEAD community-based diversion approach, diversion means that a person who could have been booked into jail and referred for prosecution will instead be engaged by LEAD program staff (an outreach and case management team) working for a social services provider. The LEAD team will provide an immediate individual assessment to determine what factors lead the individual to engage in street-level drug activity, and then
provide comprehensive services to address those factors and reduce the harm the individual is causing to herself and the community.

Meanwhile, the officer who made the referral to LEAD will complete the records that would be needed to refer the case to the King County Prosecutor or Seattle City Attorney, and forward the arrest packet for review to the arresting officer’s supervisor. The narrative in the incident report will clearly state that the person has been referred to LEAD. If the arresting officer determines that the suspect does not meet the threshold criteria for LEAD referral, and therefore books the suspect into jail and refers the case to the Prosecutor, she may nonetheless refer the case to the supervising sergeant for review by the LEAD team.

Currently there is a lack of adequate resources to appropriately serve all individuals who might be eligible in Belltown. In order to allocate resources in a transparent and fair manner (and one that meets effective evaluation standards), the days and times for diversions to take place will be determined randomly. The precinct will give the service providers, in advance of each month, a monthly calendar of possible shifts for diversions. The service providers will then randomly select from those possible shifts, the actual shifts for diversions each month. Selection of available shifts will be based on the service providers’ capacity and schedule, with adjustments made to regulate the volume of LEAD referrals and participants. If the service provider has capacity, it may designate additional days as green light shifts during the agency’s normal business hours.

On the appropriate day the service provider will notify the supervising sergeants at SPD that they are accepting diversions. The service provider will make ongoing determinations of program capacity during the day/shift when they are accepting diversions (i.e., if three people have been referred in the previous two hours, it is possible that staff will not be available to conduct another intake, and LEAD referrals may cease until a staff member is available again).

After a LEAD-eligible client is arrested, and prior to booking, the supervising sergeant will inform the arresting officer that that individual can be diverted. The arresting officer will call the LEAD service provider and the individual will then be turned over to the case management team for intake. The case management team will come to the West Precinct and bring the individual to the LEAD service provider office or other pre-arranged location appropriate for intake, such as the Sobering Center.

The arresting officer will determine based on the stated eligibility criteria, including her own assessment of the individual’s amenability to the intervention model, whether an individual under arrest will be referred to LEAD. A prior referral does not preclude a second referral, but is a factor the officer can consider with respect to the individual’s amenability to the intervention model.

For purposes of evaluation, SPD officers will complete and attach a “West Precinct LEAD Program Eligibility” arrest cover sheet to the arrest report for all VUCSAs made—including arrests made inside and outside of Belltown, on Green Light and Red Light shifts, as well as those resulting in diversion and those not resulting in diversion.
For purposes of evaluation, DOC officers will follow a different data collection protocol. DOC officers will complete and attach a “West Precinct LEAD Program Eligibility” arrest cover sheet to the arrest report for all arrests resulting in diversion to LEAD. DOC officers will also keep an ongoing log containing the names, dates of birth, and incident numbers of all individuals who are otherwise LEAD-eligible and who would have been diverted if not for resource limitations.

Staff of the LEAD social service provider(s) may also determine at the point of referral or subsequently that the individual is unlikely to make good use of the program’s resources, and refer the case back to the precinct commander for a filing decision.

Monthly, the LEAD team (LEAD program staff, precinct officers and commanders, the King County Prosecutor’s Office, the City Attorney’s Office, community advisory representatives and the LEAD coordinators at The Defender Association) will hold staffing sessions in which referral decisions and program participant progress will be reviewed. To permit such discussions, LEAD participants who accept diversion will be required to sign waivers authorizing program staff to discuss their cases and progress with the other institutional partners at LEAD staffing sessions. These consent authorizations are a condition of participating in LEAD, and if not completed or rescinded, the individual will be deemed not to be participating in LEAD.

Though they will be informed by the LEAD team staffing discussions, the King County Prosecutor’s Office and City Attorney retain ultimate and exclusive authority to make filing decisions in all cases. Individual cases may be staffed more frequently via phone conference as needed.

The King County Prosecutor will receive copies of the investigation packets on diverted cases, for review within 72 hours for compliance with the agreed diversion criteria, and for comparison with those cases in which suspects were jailed and referred for prosecution.

B. Eligibility Criteria for diversion to LEAD

Adults suspected of VUCSA and prostitution offenses will be eligible for diversion to LEAD and presumptively should be referred to LEAD, except when:

- The amount of drugs involved exceeds 3 grams (except that where an individual has been arrested for delivery of or possession with intent to deliver marijuana, or possession, delivery or possession with intent to deliver prescription controlled substances (pills), officers will consider the other criteria listed here without reference to the amount limitation);
- The individual does not appear amenable to diversion;
- The suspected drug activity involves delivery or possession with intent to deliver (PWI), and there is reason to believe the suspect is dealing for profit above a subsistence income;
- The individual appears to exploit minors or others in a drug dealing enterprise;
• The individual is suspected of promoting prostitution;
• The individual has an existing no contact order, temporary restraining order, or anti-harassment order prohibiting contact with a current LEAD participant;
• The individual has an open case in Drug Diversion Court or Mental Health Court; and/or
• The individual has disqualifying criminal history as follows:

  Without time limitation: Any conviction for murder 1 or 2, arson 1 or 2, Robbery 1, Assault 1, kidnapping, VUFA 1, or any sex offense (or attempt of any crime listed here).

  Within the past 10 years: Any conviction for a domestic violence offense, Robbery 2, Assault 2 or 3, Burglary 1 or 2, or VUFA 2.

Individuals who are arrested on a DOC warrant and/or for a DOC violation may be referred to LEAD. The arresting officer (if not a DOC officer) should contact DOC personnel. DOC may determine that the DOC warrant should be quashed/withdrawn and the individual should be referred to LEAD.

Individuals for whom the LEAD program could reduce the harm of their activity to themselves and to the Belltown community, but who are not diverted on the current charge under this protocol (e.g., due to specific criminal history), may still be referred to LEAD services by law enforcement. It is possible that their involvement and progress in the LEAD program might be considered by the prosecutor or the court in subsequent charging, plea offer or sentencing decisions.

An individual who does not meet the threshold eligibility criteria (above) but whom the arresting officer believes would be a good candidate for LEAD diversion may be accepted (post-booking) for diversion by the LEAD team on the recommendation of the arresting officer. There is no substantive right to be offered LEAD diversion. LEAD eligibility is not intended to be a substantive right to be litigated.

C. Warrants

Warrants will be served according to applicable policies and protocols, and individuals will not be immediately referred to LEAD in lieu of booking if they would otherwise be booked on a warrant.

Notwithstanding the above, if a suspect who would otherwise qualify for LEAD has an outstanding DOC warrant, the arresting officer should contact NCI personnel. DOC/NCI may determine that the DOC warrant should be quashed/withdrawn and the individual should be referred to LEAD. Otherwise, the individual shall be booked into jail according to regularly applicable protocols and policies.

D. Referral of “social contacts” to LEAD; DOC CCO referrals
To the extent that the program has capacity to take them after responding to pre-booking diversion cases of individuals who could have been jailed and prosecuted, LEAD will also accept referrals from law enforcement of “social contacts,” that is, individuals perceived by officers as at high risk of arrest in the future for low level drug activity.

All social contact referrals to LEAD must meet the following pre-requisites:

- Verification by law enforcement that the individual is involved with narcotics (possession or delivery) or prostitution.
  - Verification by law enforcement means:
    - Police reports, arrests, jail bookings, criminal charges, or convictions indicating that the individual was engaged in narcotics or prostitution activity; or
    - Law enforcement has directly observed the individual's narcotics or prostitution activity; or
    - Law enforcement has a reliable basis of information to believe that the individual is engaged in narcotics or prostitution, such as information provided by another first responder, a professional, or credible community members.

- The individual's involvement with narcotics or prostitution must have occurred within the LEAD catchment area.

- The individual's involvement with narcotics or prostitution must have occurred within 24 months of the date of referral.

- No existing case in Drug Diversion Court or Mental Health Court.

- The individual cannot have an existing no contact order, temporary restraining order, or anti-harassment order, prohibiting contact with a current LEAD participant.

The Department of Corrections Community Corrections Officers (CCOs) may also refer individuals on community supervision for whom LEAD services are likely to provide assistance in preventing future law violations.

E. Intervention Protocol

*Initial contact and referral by officers.* Following the decision to refer an individual to LEAD, the referring officer will contact the LEAD program staff. The LEAD staff will come to the precinct. LEAD staff will be available to respond immediately during designated periods when they are open for referrals.
When the outreach worker/case manager arrives, the referring officer will provide her with basic information about the individual, including known criminal conviction history. The referring officer will document in his report that the outreach worker/case manager was called, arrived, and provided with this information and the referring officer will then release the suspect from custody. The officer will then leave the outreach worker/case manager to engage the individual.

If a suspect is intoxicated or incapacitated and unable to engage effectively in the intake process, the suspect should not be referred to LEAD at that time. The suspect can be referred to LEAD at a later time according to the same process used for suspects initially ineligible due to criminal history exclusions. If, in the officer and/or case manager’s judgment, a suspect is unable to provide informed consent and/or poses a risk to self or others due to severe mental illness, the suspect will not be referred to LEAD. For non-intoxicated suspects, after the officer leaves, the outreach worker/case manager will complete an initial screening and schedule a follow-up appointment to conduct a detailed intake assessment.

**Arrest Cover Sheets.** SPD officers who are making diversions to LEAD should complete and attach the “West Precinct LEAD Program Eligibility” arrest cover sheet to the arrest report for every VUCSA arrest made. This cover sheet should be completed for arrests made inside and outside Belltown, on Green Light and Red Light shifts, as well as arrests actually resulting in diversion and those not resulting in diversion.

The top portion of the cover sheet (i.e., “Location of Arrest,” “Referring Squad,” and “Arrestee Characteristics”) must be filled out for all VUCSA arrests. The top portion asks the officer to provide basic information about the arrest, and to apply the eligibility criteria for LEAD to all VUCSA arrests, regardless of whether an actual LEAD diversion is made. The bottom portion of the cover sheet, labeled “Belltown Arrest Only,” must be filled out only for VUCSA arrests occurring in Belltown.

DOC officers will follow a different data collection protocol. DOC officers should complete and attach the “West Precinct LEAD Program Eligibility” arrest cover sheet to the arrest report for all arrests actually resulting in diversion to LEAD. (The instructions for completing the cover sheet are the same as described above for SPD officers.) DOC officers should also keep an ongoing log containing the names, dates of birth, and incident numbers of all individuals who are otherwise LEAD-eligible and who would have been diverted if not for resource limitations.

**Social Contacts.** An officer making a social contact referral should contact the individual he/she seeks to refer. If the individual contacted is willing to be referred to LEAD, the officer can contact ETS REACH staff anytime from 8:30am to 4:30pm by calling the LEAD program coordinator at 206.588.9731. If the officer contacts the LEAD program coordinator after hours, he or she can expect a return call the next business day. However, if the officer is making a social contact referral during a Green Light Shift, the officer should contact ETS REACH staff via the LEAD Green Light phone number at 206.455.0386.
**Intake assessment.** When an individual is diverted to LEAD, LEAD staff will immediately conduct an initial screening to gather basic information about the person, identify any acute immediate needs, and assess the person’s appropriateness for diversion. Based on the initial screening, the case manager will first work to meet any immediate needs that must be addressed, such as shelter for the night. She will also thoroughly explain the diversion process and the assistance that might be available through the LEAD program for a willing participant.

During the initial screening, LEAD staff should instruct the participants that they cannot return to the area where they were arrested for their LEAD-referred offense for the next 24 hours. If participants were initially arrested during a buy-bust, and shortly thereafter, return to the scene of a buy-bust, they may possibly be arrested for compromising the safety of the undercover officers who are working the buy-bust.

If an individual does not remain to complete the initial screening that immediately follows diversion, LEAD program staff will contact the supervising sergeant, and either the King County Prosecuting Attorney’s Office or City Attorney’s Office by phone or email. SPD may decide to re-arrest the individual or to refer the case to the prosecutor without arrest.

At the end of the initial screening, LEAD staff will schedule a follow-up appointment to perform an in-depth intake assessment, which should occur optimally between 24-48 hours after the initial screening, or as soon as otherwise possible. When completing the in-depth intake, the first task of LEAD staff is to determine the immediate cause of the individual’s drug or prostitution activity on the street. In addition, the case worker will survey a wide range of factors that might contribute to ongoing encounters with law enforcement. Such factors include, but are not limited to: chemical dependency (alcohol and other drugs), mental health problems, lack of housing, prior legal involvement and/or gang involvement, lack of previous employment, and lack of education. LEAD funding and staffing may be used to address any factor or set of factors driving the participant to engage in problematic drug activity at the street level.

If an individual completes the initial screening, but affirmatively refuses or fails, within a reasonable time period, to complete the follow-up intake assessment, the LEAD social service provider will notify the King County Prosecuting Attorney’s office and/or the Seattle City Attorney, depending on which office has jurisdiction over the case. The appropriate office may then decide to file a criminal charge in, and prosecute, the offense that was initially diverted to LEAD.

**Individual Intervention Plan (IIP).** Once any acute needs have been addressed, the case manager will work with each participant in one or more meetings to design an Individual Intervention Plan, which will form both the action plan for the individual and a key element of program evaluation. As noted above, the plan may include assistance with housing, treatment, education, job training, job placement, licensing assistance, small business counseling, child care or other services. The outreach worker/case manager will follow up with the individual to implement the intervention plan.
Although many elements of the intervention plan will be client-identified and -driven, and though participation is voluntary, the IIP will draw on the professional expertise of the case manager. If the case manager identifies needs for treatment or other services, she will either provide referrals to appropriate programs with available capacity (see discussion below of non-displacement principle) or procure needed services using project funding. In cases where chemical dependency or mental health services are needed, project participants will be asked to sign release of information forms allowing the case manager to consult with other professionals and with LEAD partners.

Withdrawal of services. Receipt of ongoing services is conditioned on the participant making, in the judgment of LEAD program staff, good use of the resources provided, and good progress toward reducing the harm his drug-involved behavior has brought to the community and himself. The possibility that services might be withdrawn should not be invoked lightly, but does act as a powerful motivator for participants to take the opportunity seriously and make good use of LEAD resources.

Regular staffing sessions with partners. Monthly, LEAD program staff will conduct a staffing meeting that includes the key partners in LEAD-Belltown: community advisory representatives, the Seattle Police Department, the King County Prosecutor’s Office, the City Attorney’s Office, and at least during the demonstration period, the LEAD coordinators housed at The Defender Association. LEAD partners will use the staffing meetings to share information about program participants’ situation and progress; to discuss possible withdrawal of program support from participants who are not making effective use of the opportunity; to discuss referral criteria, program capacity and compliance with the protocol; and to focus the attention of LEAD program staff and SPD in particular areas viewed with concern by community representatives.

Community report back. The LEAD team will periodically reach out to Belltown residents, businesses and community leaders to provide informational updates about LEAD operations and to receive feedback on areas of focus.

Goal of self-sufficiency; no time limit. IIPs will be designed to maximize the odds of a participant being able to achieve self-sufficiency independent of program funding at some point in the relatively near term. For some, this may entail a plan for vocational or higher education or achieving a GED; for some, it may involve job placement; for those who are not likely to be able to support themselves through work, it may entail applications for SSI and/or GAU.

Since the objective is actually securing changes in individual behavior, there will be no a priori limit on the time period in which an individual can receive services. The test, rather, is simply whether, in the judgment of LEAD staff, the participant is continuing to make good use of the resources LEAD is dedicating to him.

Core principles. Core principles of the intervention approach include:
• **A harm reduction philosophy.** Participants will be engaged where they are; they will not be penalized or denied services if they do not achieve abstinence. The goal is to reduce as much as possible the harm done to themselves and to the surrounding community through problematic drug activity. Again, some or all services may be withdrawn participants whom LEAD staff feel are not making progress toward reducing the harm caused by their behavior.

• **A non-displacement principle.** Because the objective is to increase safety and order for the community as a whole, it is unhelpful to achieve success for an individual program participant by bumping her up a wait list for scarce services, while necessarily bumping another community member who needs the same services further down the list. Where existing programs have unused capacity, and where they are appropriate fits for participants’ identified needs, LEAD staff will know about and use those resources. However, LEAD program funding will be used to purchase or access additional resources that would not otherwise be available to this population.

• **Community transparency and accountability.** It is essential that community stakeholders and public safety leaders be able to participate in regular staffing meetings, have access to program performance reports, and have excellent access to program staff to suggest areas where outreach could usefully be concentrated. Community confidence that pre-booking diversion is a reasonable way to accomplish the goal of improving public safety is essential to the viability of the program.

• **Resources allocated primarily to client services.** Approximately half of all program funding should be allocated to purchase services for clients.
SEATTLE’S LAW ENFORCEMENT ASSISTED DIVERSION PROGRAM: LESSONS LEARNED FROM THE FIRST TWO YEARS*

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EXECUTIVE SUMMARY

Seattle’s Law Enforcement Assisted Diversion (LEAD) program is the first known pre-booking diversion program for people arrested on narcotics and prostitution charges in the United States. Launched in October 2011, LEAD is the product of a multi-year collaboration involving a wide range of organizations, including The Defender Association’s Racial Disparity Project, the Seattle Police Department, the ACLU of Washington, the King County Prosecuting Attorney’s Office, the Seattle City Attorney’s office, the King County Sheriff’s Office, Evergreen Treatment Services, the King County Executive, the Washington State Department of Corrections, and others.

This report draws on a number of data sources to provide an overview of LEAD’s principles and operations, and to distill important lessons about what has – and has not – worked well in the first two years of LEAD’s operations. The hope is that identification of these lessons will be useful to those interested in replicating LEAD in other jurisdictions or in enhancing its operations in Seattle. After briefly describing LEAD’s principles and operations, the report identifies key “lessons learned.” These are presented in four different categories: getting started; training; communication; and the transformation of institutional relationships. Each of these lessons is briefly described below.

GETTING STARTED

Lesson 1: Cooperation is Possible even where Adversarial Relationships Exist. Cooperation among a broad range of organizations in LEAD is possible despite a history of adversarial relations as well as on-going disagreements.

Lesson 2: Collaboration is Possible Even among Organizations with Diverse Priorities. In Seattle, LEAD stakeholders possess varied priorities and motivations. LEAD stakeholders have nonetheless been able to identify common ground, and a productive collaboration has ensued.

Lesson 3: Early Recruitment of Essential Partners is Key. The identification and recruitment of key organizational partners is an essential first step. These actors include an effective project
manager. This project manager plays several crucial functions, including: recruiting key partners; garnering of political support from elected officials; securing funding and working with funders; trouble-shooting; and facilitating communication between stakeholders.

Lesson 4: Think Carefully About How to Elicit the Support and Participation of Police Officers. One of the most significant challenges for LEAD stakeholders in Seattle has been eliciting officer buy-in despite strong support from police leadership for LEAD. Sergeants play a crucial role in this process. Focus groups are a useful tool for conveying information and eliciting feedback from officers, but must be carefully managed.

Lesson 5: Allocate Time to Develop Consensus around an Appropriate Protocol. Development of the LEAD protocol was a difficult and time-consuming process, but ultimately enabled stakeholders to reach consensus on a number of difficult decisions. This process enhanced trust and respect among stakeholders.

TRAINING

Lesson 6: Provide Training for Social Service Providers. Working as a case manager for LEAD involves many novel challenges even for seasoned counselors with extensive experience in chemical dependency treatment generally and harm reduction programs specifically. Anticipating and addressing some of these challenges in training programs would be helpful.

Lesson 7: Identify and Train a Legal Services Provider. It is important to find a legal service provider who is flexible, creative and resourceful enough to help address LEAD clients’ myriad civil legal needs. Develop tools that enable case managers to quickly identify pending legal matters that may derail their therapeutic endeavors.

Lesson 8: Recognize the Need for On-Going Training and Dialogue with Line Officers. The process of obtaining and maintaining officer support for harm reduction programs such as LEAD is best conceived as an on-going project rather than a short-term intervention.
COMMUNICATION

Lesson 9: Recognize the Importance of Regular Work Group and Policy Meetings. These meetings facilitate collaborative problem solving, which is an essential component of LEAD and one of its most transformative features.

Lesson 10. Develop Additional Methods of Communication and Information Sharing. As productive as the work and policy group meetings are, they do not ensure that all communication needs are met. Additional methods for sharing information are necessary.

THE TRANSFORMATION OF INSTITUTIONAL RELATIONSHIPS

Lesson 11. LEAD’s Collaborative Model Transforms Institutional Relationships, Creating New Opportunities and Challenges. Participation in LEAD has challenged entrenched thinking and fundamentally altered institutional relationships. The transformation of worldviews and organizational relationships has created a new willingness to contemplate and, in some cases, pursue meaningful criminal justice reforms. The development of collaborative relationships among LEAD stakeholders also poses some risks. These risks underscore the need to clarify boundaries and expectations.

The report concludes by identifying a number of opportunities and challenges associated with the expansion of LEAD. Although these are especially pressing matters for Seattle LEAD stakeholders, they are also likely relevant to people considering replicating LEAD in other jurisdictions. On the one hand, the expansion of LEAD creates the possibility of reaching more people who are struggling with extreme poverty and addiction, potentially alleviating the suffering these conditions cause to themselves and others. It also has the potential to expand a collaborative, problem solving dialogue that has already proven to be transformative. On the other hand, the expansion of LEAD poses important challenges, including facilitating communication across a growing number of community partners. Moreover, if unaddressed, existing capacity constraints such as the paucity of appropriate and affordable housing and treatment programs threaten to limit the efficacy of LEAD. Developing strategies for addressing these capacity constraints is imperative to ensure the long-term success of LEAD.
INTRODUCTION

Seattle’s Law Enforcement Assisted Diversion (LEAD) program is the first known pre-booking diversion program for people arrested on narcotics and prostitution charges in the United States. Under LEAD, eligible low-level drug and prostitution offenders are no longer subject to prosecution and incarceration, but are instead diverted to community-based treatment and support services. Launched in October 2011, LEAD is the product of a multi-year collaborative effort involving a broad coalition of organizations.

The creation and implementation of LEAD marks a dramatic shift in Seattle’s approach to drug markets. Like most urban police agencies, the Seattle Police Department (SPD) relied heavily on conventional drug war tactics in recent decades; in fact, the city’s drug arrest rate was comparatively high.¹ Yet these aggressive enforcement tactics did not eradicate open-air drug markets, particularly in the downtown area, and the persistence of visible drug activity triggered significant community pressure to “do something” about drugs. At the same time, the racially disparate impact of the SPD’s drug enforcement practices was the subject of lengthy, complex and time-consuming litigation. By the late 2000s, no one was satisfied with the status quo, including the SPD itself. As Sergeant Sean Whitcomb, then-spokesman for the Seattle Police Department, put it, “officers are frustrated arresting the same people over and over again. We know it’s not working.”² Others agreed. As Lisa Daugaard, then-Director of the Racial Disparity Project,³ recently recalled, “virtually everybody involved in our local justice system

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¹ In the year 2000, for example, the drug arrest rates for all cities and for cities with populations over 250,000 were 630 and 911 per 100,000 residents, respectively (see FBI, Crime in the United States, Section IV, Table 31 (available at http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2000/00sec4.pdf). In Seattle, however, the drug arrest rate was 976 per 100,000 residents (author’s calculations of data on file). Although Seattle’s white arrest rate was not unusually high, the black drug arrest rate was (see Katherine Beckett, Race and Drug Law Enforcement in Seattle, 2008, Tables 1 and 10 (available online: http://faculty.washington.edu/kbeckett/report/).
³ The Racial Disparity Project is a grant-funded project of The Defender Association.
was frustrated with the status quo and felt like it wasn’t delivering the kinds of outcomes we wanted to see.”\textsuperscript{4}

For years, adversarial relations between the SPD and its critics had stymied dialogue about how to improve drug law enforcement. In 2005, however, this impasse was broken, at least temporarily. This turn of events came about during a meeting in which Racial Disparity Project staff members were discussing the possibility of continuing its selective enforcement litigation with representatives from the Seattle Police Department, the King County Prosecuting Attorney’s Office and the Seattle Mayor’s office. At one point during the discussion, then-Narcotics Captain Steve Brown turned to Ms. Daugaard and asked: “What if we all agreed to do something different in regards to drug enforcement – what would that be?” Although the litigation continued for several more years, Captain Brown’s question, along with an invitation from the King County Prosecutor to Racial Disparity Project staff to work together to identify a better way to address the problems associated with drug market activity, spawned an ambitious effort to do exactly that.

The collaboration that ensued resulted in the creation and implementation of LEAD in October 2011. By diverting low-level drug and sex offenders into intensive, community-based social services that are guided by harm reduction principles, LEAD seeks to reduce the neighborhood and individual-level harm associated with Seattle’s drug and sex markets – as well as criminal justice expenditures and the injury associated with conventional enforcement practices. The initiation of LEAD was the result of a cooperative effort between an unusual coalition of organizations, including The Defender Association’s Racial Disparity Project, the Seattle Police Department, the ACLU of Washington, the King County Prosecutor’s Office, the Seattle City Attorney’s office, the King County Sheriff’s Office, Evergreen Treatment Services, the King County Executive, the Washington State Department of Corrections, neighborhood leaders and advisory boards, and others.

This purpose of this report is to identify key “lessons learned” by LEAD stakeholders over the first two years of operations. The hope is that identification of these lessons will be useful to those interested in replicating LEAD in other jurisdictions or in enhancing its operations in Seattle. Although LEAD will necessarily be tailored to local circumstances and customs wherever it is adopted, it is likely that lessons learned in Seattle with nevertheless be illuminating. A variety of data sources were collected and analyzed in order to identify these lessons. These include: observations of LEAD-affiliated SPD and DOC officers and sergeants, as well as case managers, as they conducted LEAD-related work; review of foundational documents, including LEAD’s Memorandum of Understanding, protocol, concept paper, and others; observation of the LEAD operations work group and policy group meetings; and interviews with a wide range of LEAD stakeholders and participants. (A list of the people interviewed for this report is provided in Appendix A). These interviews were digitally recorded, then transcribed and analyzed.\(^5\) These data were collected and analyzed during the summer and fall of 2013.\(^6\)

This report draws on these data sources to provide an overview of LEAD’s principles and operations, and to distill important lessons about what has – and has not – worked well in the first two years of LEAD’s operations. To orient the discussion, Part I briefly describes LEAD’s founding principles and methods of operation. Part II then identifies key “lessons learned” regarding the creation and implementation of LEAD. These “lessons” are presented in several sub-sections: getting started; training; communication; and the transformation of institutional relationships. The conclusion offers some additional observations about the opportunities and challenges associated with the expansion of LEAD.

In some cases, the lessons described were learned because a particular idea or course of action has, according to stakeholders, worked out quite well. In other cases, the lessons are based on

\(^{5}\) Most early organizers and many LEAD stakeholders were interviewed for this report. Six interviews with LEAD clients were also conducted. Upon reflection, however, it became clear that these clients had been in the program for either a relatively long time (i.e. more than 18 months) or only a very limited time (i.e. 2-4 weeks). As a result, they are not representative of all LEAD clients. For this reason, their views were not systematically incorporated in this report. Follow up research would usefully deepen our understanding of LEAD client experiences.

\(^{6}\) One follow-up interview with an SPD sergeant was conducted in March of 2014.
participants’ observations of what did not work well. In reflecting on these successes and challenges, LEAD participants and stakeholders offered a range of valuable insights about the creation, implementation and operation of LEAD.

PART I: LEAD PRINCIPLES AND OPERATIONS

Even after stakeholders agreed to work together to create a new approach to low-level drug enforcement, it took several years to develop the program that is now known as LEAD. Beginning in 2008, Racial Disparity Project (RDP) staff sought the input and participation of a broad coalition of legal and political organizations in their quest to identify and institutionalize an alternative approach to drug enforcement. Although these stakeholders – and in some cases, former adversaries – did not have identical motivations for participating in the creation of LEAD, they nonetheless developed consensus around a core set of fundamental principles. These principles are articulated in a Memorandum of Understanding that was signed in fall of 2010, and include the following:

- Booking, prosecuting, and jailing individuals committing low-level drug offenses has had limited effectiveness in improving public safety and public order;
- LEAD seeks to improve public safety and reduce crime;
- Interventions that connect low-level drug offenders with services may cost less and be more successful at reducing future criminal behavior than processing these individuals through the criminal justice system.

Although LEAD was originally conceived as a pre-arrest diversion program for low-level drug offenders, stakeholders expanded the potential client population to include sex workers in order to ensure significant participation by women who suffer from addiction and/or extreme poverty. This appears to have been successful, as approximately half of all LEAD clients are female.
Early in the process, LEAD stakeholders also selected a particular neighborhood – Belltown – to be the site of LEAD’s initial two-year, pilot program. Long home to significant outdoor drug activity, Belltown is a mixed residential and commercial neighborhood on the north end of Seattle’s downtown core in which many homeless and unstably housed people co-mingle with increasingly large numbers of condominium owners, high-end shoppers and nightlife patrons. Dozens of social service providers and several drug “hot spots” are also located in the area. This precarious mix produced significant community agitation for enhanced policing in the years leading up to the creation of LEAD. When presented with LEAD as an option, residents and community organizers welcomed the program to the neighborhood, where it has now been operating for more than two years.

The first two years of LEAD’s operation in Belltown were designed as a pilot project that would be subject to a systematic outcome evaluation. In order to generate a comparison group against whom LEAD clients could be assessed, certain days and times were designated as “green light” shifts during which police referrals to LEAD could be made. Conversely, LEAD referrals were not made during “red light” shifts. An outcome evaluation will compare the experiences of people arrested during “red light shifts” with those of LEAD clients.

LEAD partners also spent significant time developing a protocol to guide program operations. This protocol lays out the procedures by which police officers refer people to LEAD and by which LEAD clients are engaged by social service providers. Each of these processes is briefly described below.

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7 LEAD operations have also begun in the Skyway neighborhood in unincorporated King County. However, these operations are unfolding on a smaller scale than in Belltown. This report focuses primarily on LEAD operations and experiences in Belltown.

8 Interview with then-Seattle Police Department Captain Steve Brown, July 22, 2013.

9 Interview with Lisa Daugaard, then-Director of the Racial Disparity Project, June 21, 2013.

10 LEAD organizers recognize that the long-term viability of the program will depend on evidence that the program achieves key benefits. An outcome evaluation team is in the process of comparing LEAD participants with non-referred narcotics and prostitution arrestees on a number of metrics, including: levels of participation in drug and criminal activity; cost-savings to local criminal justice, health, and social service systems; participants’ ability to attain housing, jobs, and education; mental and physical health and well-being; and recidivism.
POLICE REFERRAL TO LEAD

When an eligible individual is arrested for a low-level drug offense (either possession of a controlled substance or sale of small amounts of narcotics for subsistence purposes) or for prostitution in Belltown, a trained police officer may elect to refer that individual to a LEAD case manager instead of booking the arrested individual into jail. However, per the protocol agreed upon by LEAD stakeholders, not every low-level drug offender is eligible for LEAD. Specifically, individuals arrested under the following circumstances are presumptively ineligible for LEAD:11

- The amount of drugs involved exceeds 3 grams (except where an individual has been arrested for delivery of or possession with intent to deliver marijuana, or possession, delivery or possession with intent to deliver prescription controlled substances (pills); in such cases, officers will consider the other criteria listed here without reference to the amount limitation);
- The individual does not appear amenable to diversion and social service intervention;
- The suspected drug activity involves delivery or possession with intent to deliver (PWI), and there is reason to believe the suspect is dealing for profit above a subsistence income;
- The individual appears to exploit minors or others in a drug dealing enterprise;
- The individual is suspected of promoting prostitution; and/or
- The individual has disqualifying criminal history, including any conviction for Murder I or II, Arson I or II, Robbery I, Assault I, kidnapping, VUFA I, or any sex offense (or attempt of any of these crimes) at any time; or any conviction for a domestic violence offense, Robbery II, Assault II or III, Burglary I or II, or VUFA II within the past ten years.

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In Seattle, LEAD stakeholders elected to allow participating officers to retain a high degree of discretion over the referral process. For example, even individuals with more serious criminal backgrounds can be referred to LEAD post-booking at the recommendation of the arresting officer. And although certain criminal convictions render an arrestee presumptively ineligible for LEAD, SPD officers may or may not elect to refer those who are eligible for LEAD to the program. The rationale for granting officers this degree of discretion is that they possess uniquely deep knowledge about the people they regularly encounter, and are therefore best situated to determine if someone is in a position to benefit from LEAD and can safely work with case managers in relatively private settings.\textsuperscript{12}

LEAD stakeholders made another key early decision, namely, to also allow officers to refer people to LEAD via a “social contact” rather than an arrest. A social contact referral occurs when an officer encounters someone they know is engaged in drug or prostitution activity in the neighborhood served by LEAD. If LEAD had only authorized arrest referrals, officers would have had to wait until they had probable cause to arrest the individual in question in order to refer them to LEAD. Early on, however, Captain Brown anticipated that officers would prefer not have to wait until the opportunity to arrest such persons presented itself in order to make a referral. As a result of the resulting amendment of the protocol, officers may now refer people known to be engaging in drug or prostitution activity to LEAD case managers without first making an arrest. However, these “social contact referrals” can only be made for individuals with prior documented involvement in drugs (possession or selling) or prostitution in the relevant neighborhood.\textsuperscript{13}

In an arrest referral, a police officer arrests a low level offender during a “green light” shift and contacts a LEAD case manager, who then goes to the police precinct to conduct an initial screening with the potential LEAD client. In most cases, the police officer relinquishes custody of the referred person as soon as a caseworker arrives. Although the arrested individual has been referred to LEAD rather than booked into jail, the arresting officer nonetheless sends the

\textsuperscript{12} Interview with Ian Goodhew, Deputy Chief of Staff, King County Prosecuting Attorney’s Office, June 28, 2013.

\textsuperscript{13} Interview with Lisa Daugaard, then-Director of the Racial Disparity Project, June 21, 2013.
arrest record to the Seattle City Attorney’s office (responsible for prosecuting misdemeanor crimes) or to the King County Prosecutor (responsible for prosecuting felony offenses). These offices maintain the authority to decide whether to charge the arrested person. However, the presumption is that charges will not be filed as long as the individual completes both an initial screening and a full intake assessment with LEAD case managers within 30 days of the referral.

SOCIAL SERVICE PROVISION

LEAD stakeholders recognized the importance of hiring case managers who are accustomed to working in an intensive and “hands on” manner with their clients. LEAD stakeholders refer to this orientation as the “guerilla approach” to social work, highlighting case managers’ willingness to do everything from tracking down recalcitrant clients in dark alleys to accompanying them as they complete paperwork, keep appointments, and apply for services and housing. LEAD stakeholders also sought case managers who are comfortable with a harm reduction philosophy. That is, LEAD case managers are trained to meet their clients “where they are at,” to help their clients identify their personal goals through motivational interviewing and other techniques, and to support their clients as they endeavor to achieve those goals. Abstinence may or may not be among their clients’ objectives, especially in the short term. With these priorities in mind, LEAD contracted with Evergreen Treatment Services, a nonprofit addiction treatment services provider, to hire caseworkers to provide intensive case management for LEAD clients. As of December 2013, LEAD employs six full time case managers. These service providers’ caseloads are comprised exclusively of LEAD clients.

Upon referral from an SPD officer, referred persons meet with a LEAD case manager who conducts an initial intake assessment and endeavors to connect the client with services that address his or her most acute needs. If the referral was made via arrest, the case manager conducts this assessment in the precinct itself. After this assessment, the referred person is free to leave, but is asked to return to the LEAD office to complete the intake interview. Once the referred person does so, she or he is a LEAD “client.” If the referred person does not return to

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14 Interview with Lisa Daugaard, then-Director of the Racial Disparity Project, June 21, 2013.
complete the intake assessment within 30 days, the relevant prosecuting attorney’s office may elect to file charges associated the arrest that triggered diversion.

Following the initial intake assessment, case managers work with their clients to create an individual intervention plan. Each individual intervention plan is tailored to the client’s particular needs and goals, and may include “assistance with housing, treatment, education, job training, job placement, licensing assistance, transportation, small business counseling, child care or other services.” Dedicated LEAD funds are used to pay for these services, although public resources are also accessed wherever it is possible to do so without displacing other people in need. LEAD’s protocol emphasizes the importance of attaining “immediate access to needed services for program participants, rather than referral to a waiting list, in order to maximize the likelihood of participant success.” LEAD stakeholders emphasize that immediate access to services helps to ensure that offenders are not simply arrested and released with a meaningless referral to service providers.\(^{15}\)

Several core operating principles guide LEAD’s provision of social services. First, LEAD adheres to a non-displacement principle, which means that LEAD clients never move to the top of a waiting list for social services simply by virtue of being a LEAD client. For example, if a LEAD client seeks methadone treatment, private LEAD monies will be used to pay for that treatment until sufficient time has passed that the LEAD client emerges at the top of the waiting list for publicly funded methadone treatment. This non-displacement principle was adopted to maximize the likelihood that LEAD will benefit the community as a whole, not just individual program participants.

Second, LEAD follows a harm reduction approach, which, according to the LEAD protocol, means “a focus on individual and community wellness, rather than an exclusive focus on sobriety, by immediately addressing the participant’s drug activity and any other factors driving

\(^{15}\) Interview with Ron Jackson, former Executive Director, Evergreen Treatment Services, June 24, 2013. Although a substantial portion of LEAD resources are devoted to client services, LEAD partners have come to realize that more than 50% of their resources are needed to ensure that LEAD provides adequate case management services.
his/her problematic behavior, even if complete abstinence from drug use is not immediately achieved.” That is, the harm reduction model assumes that overcoming drug addiction is a long and arduous process, that setbacks are to be expected, and that meaningful improvements may occur in the absence of abstinence. Moreover, the emphasis is on assisting clients in identifying their own goals and supporting them as they work to meet those goals.  

Consistent with this harm reduction orientation, continued and ongoing participation in LEAD does not require abstinence. Rather, the hope is that by engaging clients, helping them to identify and articulate their own goals, and providing emotional, practical and financial support as clients work toward those goals, LEAD clients will cause less harm to themselves and to others than they would absent LEAD’s intervention. Moreover, LEAD participants’ eligibility for services and benefits are not time delimited. As the LEAD protocol explains, individual intervention programs are “designed to maximize the odds of a participant being able to achieve self-sufficiency independent of program funding at some point in the relatively near term.” However, if LEAD program staff finds that the participant is not making good use of the resources provided, services may be withdrawn.

The LEAD protocol does not authorize any formal or punitive sanctions for “non-compliance.” Although the offices King County Prosecuting Attorney’s Office and the Seattle Attorney’s office retain their authority to file charges against LEAD participants for past crimes or crimes they commit while in LEAD, prosecutors have committed to working in cooperation with LEAD, which means exercising their discretion to not bring charges against LEAD participants where doing so will enhance LEAD’s efficacy. At regularly held work group meetings, law enforcement officers, case managers and prosecutors share information about LEAD clients so that each of these actors make informed decisions in matters pertaining to LEAD clients. In particular, these meetings were useful to prosecutors weighing whether to file charges LEAD clients acquired subsequent to their enrollment in LEAD.

**SUMMARY**

LEAD seeks to improve public safety and public order by reducing drug use, drug selling, and the

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16 Ibid.
quality-of-life problems associated with open-air drug and sex markets. By referring clients to case managers rather than booking them into jail, and by providing intensive case management services and resources that create meaningful opportunities for those struggling with addiction and extreme poverty, LEAD seeks to prevent arrests from leading to additional criminal justice intervention. The hope is that the program will not only reduce the individual and community harms associated with drug activity and the injury caused by criminal conviction and incarceration, but also provide an alternative model for social service provision which, by virtue of being more cost effective than the formal justice system, has the potential to reach far more people.

PART II: LESSONS LEARNED

Much has been learned in the process of creating and implementing the first known pre-booking diversion program for people arrested on drug and prostitution charges in the United States. While stakeholders express significant enthusiasm about LEAD’s present and future, plans have been revised, things have not always gone according to plan, and much has been learned. Below, I identify a number of important “lessons learned.” These lessons are presented in four sections: getting started; training; communication; and the transformation of institutional relationships.

GETTING STARTED

Lesson 1: Cooperation is Possible even where Adversarial Relationships Exist

LEAD stakeholders emphasized that cooperation in LEAD was and continues to be possible despite a history of adversarial relations (as well as on-going disagreements and diverse priorities). As noted previously, selective enforcement litigation brought by the Racial Disparity Project engendered significant animosity among LEAD partners throughout the 2000s. Police officers and officials described feeling personally offended and discouraged as a result of this litigation. As then-Captain Brown put it, “she [Lisa Daugaard] didn't understand why the cops seemed to take it personal. My response was, ‘This is personal. You’re accusing us of racism.
That’s a big deal.” Prosecutors also indicated that the litigation was extremely burdensome for their office. As King County Prosecuting Attorney Dan Satterberg explained, “it was being litigated very aggressively and we were required to sit through dozens of depositions of high-ranking police brass, and even those who weren’t so high-ranking…. it was very time-consuming. A lot of time and a lot of money had been spent, and it was very frustrating.” For their part, attorneys with the Racial Disparity Project were exasperated by the fact that the litigation did not appear to be altering drug enforcement practices.

Given this backdrop, it is quite surprising that LEAD stakeholders have been able to work collaboratively to develop and implement LEAD. According to stakeholders, participants’ willingness to keep communicating, put the past behind them, and search for common ground made cooperation under these circumstances possible. As Alison Holcomb, Criminal Justice Policy Director for the ACLU of Washington, explained,

> It had to be [then-Captain] Steve Brown asking that question [about alternatives to the drug war] and [RDP Director] Lisa [Daugaard] hearing that. Because what happened is that there was a line of communication that survived between the Defender Association and Seattle Police Department. Without that, LEAD never would have happened.

Maintaining communication and searching for common ground were thus essential to the creation of LEAD. As then-Lieutenant Deanna Nollette of the Seattle Police Department put it:

> Traditionally we have definitely been on opposite side of most issues. . . . The planning has been interesting in that it has forced us to look at our expectations and look at the way we analyze things and to be able to discuss it with people who have a completely different way of analyzing things. Initially there was a lot more emotion behind it. And now we have come to see some commonality. . . . In the process of talking to people we realized we have the same goals and desires in what we wanted to accomplish.

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17 Interview with then-Captain Steve Brown, July 22, 2013.
18 Interview with Dan Satterberg, King County Prosecuting Attorney, June 28, 2013.
19 Interview with Alison Holcomb, Criminal Justice Police Director, ACLU of Washington, June 27, 2013.
Stakeholders’ early commitment to a consensus model was a crucial component of this process. Early on, LEAD participants recognized that because participation in LEAD is entirely voluntary, adopting a consensus model would compel LEAD partners to work toward consensus and thereby reduce the likelihood that they would “leave” LEAD. Respect for the various institutional and political limits within which each of the participating organizations works and the decision to allow each stakeholder to maintain their professional autonomy in their decision-making processes also helped establish trust among diverse stakeholders.

**Lesson 2: Collaboration is Possible Even among People with Diverse Motivations**

In Seattle, litigation-fatigue, the fiscal and institutional costs of the drug war, and growing recognition that conventional drug war tactics were unproductive motivated the creation of LEAD. Indeed, LEAD stakeholders are now united in the belief that conventional drug enforcement tactics are costly and ineffective. As Dan Satterberg, King County Prosecuting Attorney, put it, “I’ve been around long enough to know that the processing of individuals through the court system and punishing people for being addicted to drugs doesn’t make a whole lot of sense.”

Despite emerging consensus on this point, the LEAD stakeholders have had – and continue to have – diverse priorities and motivations. For the Racial Disparity Project, the main motivation for organizing the program that became LEAD was concern about the harm disproportionately imposed on Seattle residents of color as a result of conventional enforcement practices. Law enforcement officials had a different set of motivations, namely, to develop less costly drug enforcement strategies that promote public safety and the perception of it. For elected officials, supporting LEAD provided a way to respond to business and resident concerns about public safety, but in a compassionate manner that did not alienate service providers and

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21 Ibid.
22 Interview with Lisa Daugaard, then-Director of the Racial Disparity Project, June 21, 2013.
23 Interview with then-Captain Steve Brown, July 22, 2013.
supporters of the homeless.\textsuperscript{24} For the ACLU, the primary motivation was still different. As Alison Holcomb explained,

\begin{quote}
The ACLU’s motivation behind all of this is that if we can establish that other approaches besides treating drug use as a crime can be at least as effective and hopefully cheaper than all of the expense that goes with putting them into the criminal justice system, by marshaling the evidence that this is possible, we will build a foundation upon which we can argue for decriminalizing substance use and substance abuse altogether.\textsuperscript{25}
\end{quote}

LEAD stakeholders thus possess varied priorities and diverse motivations. Despite these differences, stakeholders were able and willing to identify common ground and a productive collaboration has ensued. Compromising wherever possible helps make this collaboration successful. One key illustration is the Racial Disparity Project’s willingness to recognize that reducing racial disproportionality may not be publicly identified as the main purpose of LEAD. As Lisa Daugaard recounted,

\begin{quote}
So we had this four hour meeting to establish the goal of LEAD, literally four hours - we brought food because we knew it was going to be hard. And we emerged from that with the agreed goal of reducing individual recidivism and, when taken to scale, having an impact on community wide public order. That seems so simple, but it wasn’t simple. In the end, that goal was articulated much more in the terms of our traditional adversaries than in our terms. The [stated] goal was not more justice or more humanity or reduced racial disparity, but that was okay… we had to really let go of a style of engaging racial equality that requires that you say the word race constantly and that you constantly foreground that that is the goal.\textsuperscript{26}
\end{quote}

By working toward consensus and by compromising where possible, LEAD stakeholders have thus been able to transcend the limits imposed by a history of adversarial relations and diverse motivations.

\textsuperscript{24} Interviews with Seattle City Attorney Pete Holmes, July 2, 2013, and then-Seattle Mayor Mike McGinn, July 5, 2013.
\textsuperscript{25} Interview with Alison Holcomb, Criminal Justice Police Director, ACLU of Washington, June 27, 2013.
\textsuperscript{26} Interview with Lisa Daugaard, then-Director of the Racial Disparity Project, June 21, 2013.
Lesson 3: Early Identification of a Project Manager and Recruitment of Essential Partners is Essential

There is a broad consensus among Seattle LEAD stakeholders that the identification and recruitment of key organizational partners was an essential first step. These early partners include city and county prosecutors, as well as city and county law enforcement agencies. Indeed, several stakeholders noted that having prosecutors and law enforcement from both jurisdictions on board is politically advantageous for all. Stakeholders also suggested that the involvement of public defenders, civil libertarians, racial justice organizations (or any other groups that have been actively involved in drug policy reform efforts) is also important, although the particular organizations this will include may vary across jurisdictions. Similarly, identification of an appropriate social service provider – one in a position to train case managers in intensive case management techniques and familiar with harm reduction ideas and practices – is essential. Finally, many stakeholders emphasized the importance of identifying an appropriate civil legal service provider (or providers) who can coordinate with case managers as well as prosecutors. Legal service providers will need to be equipped to assist LEAD clients with a broad range of legal needs and issues – everything from protection orders, legal financial obligations, child support orders, child custody issues, driver’s licenses, and more.

Early identification and recruitment of key partners in law enforcement and service provision, as well as among elected officials, is thus essential. Successful recruitment and retention of key partners, in turn, presumes the existence of an organization that is able and willing to serve as program manager. Among LEAD stakeholders, there is a broadly shared sense that having an effective project manager is absolutely critical. This project manager plays several crucial functions, including:

- Recruiting key organizational partners, as described above;
- Garnering political support from elected officials.
- Securing funding and working with funders;
- Maintaining communication and positive relations among stakeholders;

27 In Seattle, LEAD employed a Lyman Fellow to conduct this work for the first two years.
• Trouble-shooting; and
• Facilitating communication between stakeholders, especially law enforcement, and neighborhood groups.

In addition to recruiting key partners, facilitating communication amongst them, and seeking funding, the project manager plays an important role in securing neighborhood and community support. To initiate dialogue with community members, LEAD organizers hosted a series of focus groups before launching the program. These included business owners, social service providers, and Belltown residents. The focus groups served as a means to both disseminate information about LEAD and gather feedback from community members. As Lisa Daugaard explained, eliciting support from the neighborhood was not especially difficult given the widespread perception that conventional tactics had failed miserably:

So really, people wanted investment in the neighborhood, they want tangible demonstration that people cared. They wanted tangible demonstration that their problems were being taken seriously, and weirdly, LEAD was the manifestation of that. It was as if we were validating their public safety issues by giving you this program, which is the opposite reaction of the one that you would imagine, you know, “Oh, its hug-a-thug and its stepping back.” And we were like, “No, no, no, it stepping forward. This is doing more, not less.” And they recognized that.28

At the same time that they sought community support for LEAD, stakeholders were careful not to oversell the program:

We were very committed to building limited expectations... we have trained the Belltown Community Council on principles of harm reduction, such as people do not get clean overnight, and any approach that assumes that that's what's going to happen is not going to be very effective. People do engage over time in better behaviors, better for you, better for them, when you meet them where they are at. This is empirically true. And that idea, which feels so radical... turns out it resonates with most people's known experience with somebody in their family or somebody else. They know that people relapse; they know that it's a long

28 Interview with Lisa Daugaard, then-Director of the Racial Disparity Project, June 21, 2013.
process. And you don’t just give up on the person because they took another drink or whatever. So we were not selling snake oil.29

In addition to building neighborhood support – and realistic expectations – the Racial Disparity Project, acting as project manager, took active steps to ensure on-going support for LEAD from elected officials. The participation of elected officials in LEAD, in turn, led stakeholders to make sure to speak publicly about LEAD (once it existed) as a collaborative effort, and stakeholders agreed that this commitment has been honored. Here, Lisa Daugaard explains why LEAD partners agreed to commit to this principle:

A lot of the partners who were necessary to this effort are elected officials, and if the program went badly they could hand it off to somebody else like it was really his program, that stupid thing, you know. And if it went well they could try to claim credit for it, and that would destabilize the whole thing... So we made this rule that it doesn’t belong to anybody - no one could claim that it was all theirs. Everybody is supposed to acknowledge their partnership with these other entities when they talk about it... And, you know, they [elected officials] should be able to use it politically. If it’s popular they should get credit for being part of it, but they need to use it in a way that honors the fact that if it were just them it would never have happened.... So that was really important in in terms of relationship building.30

As Project Manager, Racial Disparity Project staff often served as trouble-shooter when tensions arose between participating organizations. For example, while SPD officers were increasingly frustrated at being required to arrest an addicted person in order to help her get housed or into treatment, other LEAD stakeholders strongly preferred that LEAD remain an arrest referral program both for evaluation purposes and to ensure that it remained relevant in other jurisdictions still enthusiastic about making drug arrests. To help resolve this matter, RDP staff met separately with each key stakeholder to ensure that the decision-making meeting on this issue did not result in one of the partners withholding consensus, forcing a crisis that might have threatened the program. In the end, an increase in social contact referrals was approved,

29 Ibid.
30 Ibid.
with a renewed commitment to ensuring there was a sufficient cohort of arrest referrals to make a viable evaluation of outcomes for that group possible.

Early identification and recruitment of key partners in law enforcement and service provision, as well as among elected officials, is thus key to getting LEAD off the ground. Successful recruitment and retention of key partners, in turn, presumes the existence of an organization that is able and willing to serve as program manager.

Lesson 4: Think Carefully About how to Elicit the Support and Participation of Police Officers

One of the most significant challenges for LEAD stakeholders in Seattle has been eliciting officer buy-in. This has been difficult despite strong support from police leadership for LEAD. Securing the willing participation of line officers is especially challenging because LEAD’s harm reduction approach asks officers to consider refraining from arresting someone whom they believe to be in violation of drug laws and to refer them instead to a program that does not require abstinence. Moreover, officers who do make referrals often continue to see LEAD clients who are still “on the streets.” The idea that people can remain in the program even if they are “hanging out” downtown and actively using drugs is anathema to many officers. As then-Lieutenant Deanna Nollette explained,

> Our view initially going in to LEAD was, you get this opportunity, you blow it, you’re done. You go to jail, you get charged, we prosecute.... It was an interesting conversation, in that [the service providers] were saying no, that [relapse] is part of recovery. . . . We are not going to force people to stop using. They can continue to use. We are looking at reducing their illegal behavior. That is a really hard thing for cops to get their head around.³¹


LEAD stakeholders were aware that eliciting officer support would be challenging. The fact that LEAD organizers targeted officers who worked in proactive police units and were understood to be “hard chargers” intensified the challenge. Ian Goodhew, Deputy Chief of Staff in the King County Prosecutor’s Office, identified two rationales for the decision to seek the participation of these “hard chargers:”
Captain Brown was the one who really pushed the concept of “If we’re going to do this, we’re not going to do it with the community service officers and the softies. We’re going to do it with the hard guys – because if they buy into this, anybody will buy into it.” They go out and they do buy busts and they arrest people and they’re not into community. I mean, they’re nice. They’re professional. They do their jobs. But they wear all black and they are kind of are paramilitary. And they’re very hierarchical and organized and disciplined and if they were going to buy in, others would too. But for me, I just wanted the officers who knew the streets the best... I wanted the guys who we knew were doing something out on the street and who really knew the people.32

In an effort to secure the support of these “hard chargers,” stakeholders conducted a focus group with officers from the relevant units. The idea was to provide an opportunity for LEAD organizers to explain the program and to allay any misconceptions about it. At the same time, organizers wanted to hear officers’ honest reactions to the program and ideas about how to improve it. They were also committed to responding to officers’ suggestions where feasible and appropriate.

LEAD stakeholders uniformly indicated that the use of the focus group technique was invaluable. As Lisa Daugaard put it,

> It [having focus groups with officers] is essential. It is the most valuable tool that we have used and I would never try to do any major police practices reform without it.... Because the worst that’s going to happen is they’re going to say “this is not going to work.” They may be right, and you sure as hell want to know now what they are going to actually do with this policy before you roll it out and have the opportunity to fix it if they are correct. And even if they are not correct, you want to know what they think about it so that you can engage that thinking in the training.33

Ian Goodhew of the King County Prosecutor’s Office noted that the execution of the focus group was flawed in some ways (see below) but agreed that it was nonetheless quite useful:

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32 Interview with Ian Goodhew, Deputy Chief of Staff, King County Prosecuting Attorney’s Office, June 28, 2013.

33 Interview with Lisa Daugaard, then-Director of the Racial Disparity Project, June 21, 2013.

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But I could see in the room that there were some [officers] that were like, “Okay, you’re going to let us have a say.” And ultimately, that group came up with like 16 changes or recommendations and the committee agreed to 12 of them or 13 of them, but we held strong on some others. And [the sergeant of the relevant unit] has always told me that that the fact that they got some say in what the protocol would look like was huge.34

Numerous stakeholders confirmed that revisions were made to the protocol in response to officer feedback. For example, officers expressed a strong preference for having the referral option that came to be known as “social contract referral,” and this feedback ultimately led organizers to revise the LEAD protocol.

On the other hand, police officers’ accounts of the utility of these focus groups ranged from mixed to sharply negative. Some officers and sergeants agreed that the focus group provided a useful opportunity for dialogue and the exchange of information. In these groups, too, officers noted that some of their critiques and suggestions had resulted in concrete changes to the protocol. For example, this sergeant commented that the fact that officers got “a say” in how the program would work enhanced police cooperation:

*I think they were trying to come up with some criteria on how it was going to be implemented. And that was really hard, but we were given a lot of leeway on who we chose to allow to go in [to LEAD]. And I think if that had been taken away from us, I think you would not have gotten as much cooperation.*35

However, the fact that command staff and LEAD organizers observed the discussion from behind a one-way mirror was an issue for many, including this sergeant:

*And then we got corralled into this room with a one-way mirror, and it was clear that there was somebody on the other side... And they had a professional moderator that we never met, and they were asking very specific questions, and they asked for honest feedback. I think the people behind the glass – I heard that they got a lot of out of it... they heard questions and answers that they were not expecting. But for the people involved, they felt like they were blindsided, like*

34 Interview with Ian Goodhew, Deputy Chief of Staff, King County Prosecuting Attorney’s Office, June 28, 2013.
35 Focus group interview with SPD sergeants involved in LEAD, September 4, 2013.
we’re these lab rats and like we’re not going to recognize that that’s a one-way mirror... .

In other discussion groups, officers complained bitterly about organizers’ decision to allow command staff to observe the discussion from behind a one-way mirror, and felt that their feedback was taken seriously. Officers in this unit also resented the fact that they were not “primed” for the discussion, and that the primary LEAD organizer who was asking for their cooperation was also the main architect of litigation which, they believed, targeted them individually. As two officers in this unit put it:

**Officer 1:** We had a cattle call where everybody was brought into a room over there and they told us who LEAD is. Basically why and how it became LEAD due to the racial profiling thing... That because we racially profile people, so we’re going to do this LEAD program.... So that's the first thing we heard of it.

**KB:** Is that how everybody recalls it?

**Officer 2:** It was a settlement... They said that based on the racial profiling – I think there were seventeen people sued in the department for racial profiling which we were involved in, and they basically said, “Obviously you guys are going out and targeting certain people. These people need help.” It was kind of ironic that we’re the guys who were going out there and supposedly violating rights and racially profiling people, yet we’re coming to you guys because you actually know who on the street needs help. So it wasn’t well received initially.

**Officer 1:** No. Because I don’t agree with the premise of how it was explained to me, that we’re racial profilers. Now you’re coming to us to help with your program, that’s kind of a big burr on our side.

Officers’ mixed reactions to the focus groups suggest a number of lessons about maximizing the utility of focus group interventions with line officers whose participation in LEAD is sought:

- It may be best to have organizers with non-adversarial histories with the police request and initiate these dialogues;
- Although focus groups are a useful tool that can stimulate dialogue, preparing

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36 Ibid.
37 Focus group interview with SPD officers, July 24, 2013.
people for them ahead of time is appreciated;

- Creating a situation in which command staff and/or LEAD organizers attempt to clandestinely observe focus group discussions with officers is not a recipe for success. Instead, have command staff and LEAD organizers directly observe these discussions.

The results of the focus group interviews conducted in the summer and fall of 2013 indicate that the degree to which officers “bought-in” to LEAD varied significantly across units. In two of the four relevant squads, DOC and SPD officers mainly expressed cautious optimism about LEAD and appreciation for their sergeants’ leadership and involvement with the program. Indeed, officers from these two units make a significant number of referrals and have not infrequently elected to call LEAD caseworkers instead of re-arresting a LEAD participant. In two other SPD units, however, reactions were notably less positive, and in one of these units, officer buy-in appeared to be almost completely absent.

It is not entirely clear why officers’ reactions to LEAD were so varied at the time the focus groups were conducted. However, several sergeants and officers noted that officers who expressed the most discomfort with LEAD were in a unit that lacked a sergeant at the time that LEAD was being designed and implemented. The sergeant who eventually became the supervisor of this unit agreed that the prior absence of a functioning sergeant was highly consequential:

[The unit] didn’t have a sergeant who had been providing them with information and doing the messaging. And they [the officers] were clearly frustrated, because I don’t think they felt as if their opinions were heard as this program was designed, and I don’t think that there was a very consistent or thorough sell job to them. So I felt like I had a lot of catch-up to do. I mean, understanding that the program was going to happen, and was happening, and we needed to be on-board with it. I had to do my best to try to start over, tell them, “This is where we are, and this is what we’re doing. This is what I want…” That was a steep hill to climb.38

38 Focus group interview with SPD sergeants involved in LEAD, September 4, 2013.
More generally, a number of officers stressed the importance of the role played by sergeants in informing officers about the program and conveying officer’ concerns to LEAD organizers. As one officer put it:

*Among officers generally, there's some confusion in the program about whether people can people get (re)arrested and still be on the program. But I would say that we have a very good understanding. And, again, I think that it goes back to our supervisor. It’s a priority for him, you know. So he makes sure that we understand it. The sergeant is key.*

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These accounts suggest an additional lesson, namely:

- Make sure that the sergeants who supervise units that will make LEAD referrals are in a position to train officers and share officer feedback about the program as LEAD is designed and implemented.

It is worth noting that attitudes have changed markedly among officers in the unit that initially expressed little support for LEAD. Alarmed by the tenor of the focus group conversation, I requested and received officers’ permission to share their concerns with LEAD organizers shortly after I conducted the focus group. In follow up meetings, the officers, LEAD organizers and then-Interim SPD Chief Jim Pugel had an open and extended conversation about the officers’ concerns. I requested a follow up interview with the sergeant of the unit in question to ascertain whether this conversation had altered officers’ perceptions of and attitudes toward LEAD.

In this interview,40 the sergeant of the unit in question indicated that the officers “were pleasantly surprised” by LEAD organizers’ receptivity and openness. Although officers remain concerned about the fact that LEAD clients are allowed to return to the area in which they were arrested, they understand that this is the unavoidable consequence of the spatial concentration of social services in the downtown area. The sergeant also noted that LEAD organizers were able to address and allay several misconceptions about LEAD. For example, prior to this

39 Focus group interview with SPD officers involved in LEAD, September 23, 2013.
40 Interview with SPD sergeant, March 17, 2014.
meeting, the officers believed that prosecutors never filed charges that LEAD clients acquired after becoming a LEAD client, and therefore that LEAD functioned as a “get out of jail free” card. LEAD organizers clarified that although prosecutors do not file charges for the arrest that triggered diversion, they sometimes do file subsequent charges when they perceive that doing so will facilitate rather than hinder LEAD clients’ therapeutic progress. According to the sergeant, this clarification was helpful because officers now understand that LEAD is not necessarily a “get out of jail free card” and that the time and energy they spend completing the paperwork on such arrests is not pointless. The fact that officers’ attitudes regarding LEAD have, according to their sergeant, improved notably as a result of dialogue underscores the importance of maintaining on-going communication with line officers (see Lesson 8 below).

**Lesson 5: Allocate Time to Develop Consensus around an Appropriate Protocol**

Numerous stakeholders emphasized that the development of the LEAD protocol was a difficult and time-consuming process, but one that ultimately enabled stakeholders to reach consensus on a number of difficult decisions – and to establish mutual trust and respect. In Seattle, a number of tricky questions were debated for some time. These included:

- Whether to include sex workers and perpetrators of other “victimless” crimes;
- Whether to include drug dealers who were not addicted to narcotics, and, if so, how to delimit this category;
- What eligibility requirements should exist;
- Whether to allow “social contact” referrals;
- How to delineate the geographic boundaries in which LEAD would operate;
- How prosecutorial charging decisions will be handled;
- Whether the group would work on the consensus model.

Discussions of these topics raised complex issues, and were therefore difficult and protracted. For example, the decision to allow social contact referrals engendered significant misgivings, particularly among those affiliated with the ACLU. Alison Holcomb explained the ACLU’s concern about adding the social contact referral option this way:
At the ACLU, we want to be able to say, “You can just decriminalize. You can change this law. And this was somebody who was actually committing a crime.” If they’re not committing the crime, it’s hard for you to argue that you’re anything more than a social service, and it doesn’t necessarily argue actual criminal justice cost savings.⁴¹

In the end, Seattle stakeholders responded to SPD input and made the decision to allow social contact referrals but to clearly distinguish them from arrest referrals so that their efficacy can be analyzed separately in the outcome evaluation. Stakeholders’ willingness to be flexible and seek common ground allowed the group to develop consensus around this compromise.

Although the particulars of the operational decisions that need to be made will likely vary across jurisdictions, it is clear that the development of consensus around a shared protocol is essential for the effective functioning of the program. And as several stakeholders also noted, the process also enabled the establishment of trust and mutual respect among LEAD stakeholders. As one King County Prosecutor, Mary Barbosa, put it:

*I think taking our time coming up with the protocol was really important. To really have your folks within the stakeholder agencies identified, and have them a part of it, and cultivate those relationships before you start doing the active case management, which can be stressful. It is important to get that base established before you actually put it into play.*⁴²

In short, although development of the operations protocol is a challenging undertaking, the collaborative nature of the process lays the foundation for future success in a number of ways.

**TRAINING**

**Lesson 6: Provide Training for Service Providers**

As the previous discussion made evident, LEAD organizers anticipated that eliciting officer support for LEAD would be complex. They therefore took active steps to elicit officer feedback and train officers in both harm reduction ideas and the mechanics of making LEAD referrals.

⁴¹ Interview with Alison Holcomb, Criminal Justice Police Director, ACLU of Washington, June 27, 2013.
⁴² Interview with Mary Barbosa, Chair of the Felony Trial Unit in the King County Prosecuting Attorney’s Office, August 6, 2013.
However, organizers did not anticipate some of the trickier issues that case managers would face, in part because they contracted with an agency (Evergreen Treatment Services) that is experienced with harm reduction programs and ideas and recruited case managers who expressed comfort with the “guerilla” approach to social work that was described previously. Lisa Daugaard recounted how, at the urging of DOC staff, LEAD stakeholders came to realize

...that we needed to do comparable talking to and training with the case managers because in a way this is as weird a thing to do for them as it was for officers... We assumed that the case managers would be flexible and that they would just figure out how to work with officers, and when that wasn’t going very well, we were like, “You know what? We needed to train the case managers, too.”

Indeed, working as a case manager for LEAD involved many novel challenges even for seasoned social workers with extensive experience in chemical dependency treatment generally and harm reduction programs specifically. In particular, collaborating with police officers puts case managers in unusual and often complicated situations. As one supervisor at Evergreen Treatment Services put it,

We had some trepidation about entering into a more formal relationship with the police. Because our whole program – we work with people who are engaged constantly in illegal activities. And so we didn’t want to represent ourselves as being part of the police, or aligned with police, because we really want them to know that we are there to advocate for them in solving their problems.43

Collaborating with police officers posed a variety of challenges for case managers. For example, the fact that case managers are asked to share information about their clients with officers in work group meetings raised a number of questions for case managers. This was done in order to ensure that prosecutor’s decisions about whether to file charges that LEAD clients acquired after enrolling in LEAD were well-informed and well-timed. Nonetheless, the process of disclosure raised complex issues for case managers:

There is this whole thing about people sitting at the table and sharing information, but it’s very confidential. Because remember, we’re building a

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43 Focus group interview with LEAD case management supervisors, September 22, 2013.
relationship with the client. They're beginning to trust us. But we have to talk about that client to a lot of people. And sometimes information that we may share could 'cause them to maybe get arrested. People in that group – police officers – could go back and act on that information that I shared about my client. That would really just tear down anything I've built with that client. But I think that nobody wanted to see that happen and eventually everybody came back to the table and said, you know, "Let's go back and agree that we can't do that. We can't do that. There's a lot involved." Not only the case manager's safety if they think you've snitched on them – there's just a lot of issues that we had to look at as a group because it has to work for all of us.  

In addition, case managers expressed concern that they would lose their clients’ trust if they were seen as being too close to the police. The perception that LEAD is a program for “snitches” compounded this difficulty:

Case Manager 1: I get concerned for the clients because word on the street is that – and I've heard this from a handful of my clients, so I can only base it on my experience – word on the street is LEAD clients are snitches.

Case Manager 2: They all say that – it's a snitch program.

Case Manager 3: We've had people turn us down because of that.

Case Manager 1: Yeah. We've had people say “I don't want to be in the Snitch Program.”

KB: Why do they think that?

Case Manager 1: Because they [LEAD clients] get arrested and they walk out of the precinct.

Collaborating with the police thus raised several unique and complex issues for case managers. At the same time, case managers came to appreciate the clinical opportunities that this collaboration afforded them. As this case manager explained,

In the very beginning it was very tumultuous... But just like in any relationship, we've grown. And I think utilizing all systems can be very helpful. Sometimes we can't get our hands on the client, and it's tough to engage them when they're

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44 Focus group interview with LEAD case managers, July 23, 2013.  
45 Ibid.
ripping and running. But the cops are like, “We got 'em”... You know, DOC has programs that they can utilize – 'cause sometimes clients need to be mandated to do things. We can't mandate them to do things. If they're mandated to do something but they have the support of the case manager, it will be more successful. And then the program will actually end up being beneficial to them.  

Another case manager reiterated the idea that the police-case manager collaboration can be highly productive:

*I like the way they play the bad cop and we get to be the good cop. And come and pick them up when they [officers] have them in the alley. Or when they're getting picked up on the second arrest. And you get to make that decision, and the client knows that. The cops make them very aware of that – they're being the bad cop. But that also opens the door to build a better relationship with a client who's been less engaged in services and just kind of doing it their way... So, yeah, I think it’s good – took some ironing out, but it’s a good relationship to maintain, definitely.*

Thus, although case managers conveyed a sense that their collaboration with the police was ultimately fruitful and worthwhile, it nonetheless meant that case managers faced a number of complicated issues that could usefully be foregrounded and explored in training sessions. Conducting outreach and educational efforts with people who are likely to encounter LEAD clients regarding the programs operations may also help to dispel the myth that LEAD is a “snitch program.”

Ironically, the fact that LEAD case managers were able to spend program monies to obtain needed services and goods for their clients also posed novel and interesting challenges for case managers, all of whom were unused to having private resources at their disposal. As one case manager explained,

*In the beginning there was this mind frame of: "We have all this money. Throw the money at it." And we've had a learning curve and learned that access to the*
money is nice, but you just don’t throw money at the fire. ‘Cause we’ve lived with burned money.\textsuperscript{48}

Case managers reported that figuring out how to effectively use resources to support and reinforce client initiative while also managing client expectations and maintaining clients’ commitment to following through was difficult:

I would agree with everybody: it’s nice to have the money to provide the resources, but the expectations of the clients – because they seem to know we have the money somehow – makes it difficult at times too. Where you’re trying to get them to follow through it can be a challenge.

Case managers reported feeling better equipped to make decisions about when and how to spend program monies over time, though these decisions remained inherently difficult. As this case manager explained:

We started out taking people down to Ross and buying clothes. Because our first thinking was, “Okay, these people are homeless. They’re dirty. They need clothes.” We put them in a motel; get them a nice couple sets of clothes. And what we discovered is that they sell the clothes and they come back and they need more. So we quickly learned that’s not the answer… I am not saying we won’t purchase new items – like if a person needs work clothing, we’re glad to do that. Or people doing treatment, we try to buy them the things they need. And when we put people in a motel, we put them in there with some hygiene items and a little bit of groceries. Now I see it [money] as a real valuable tool to use to engage our client and give that client some incentive to move forward. But it is a fine line.\textsuperscript{49}

In the end, case managers agreed that access to funds significantly enhanced their capacity to provide useful services such as mental health services for their clients:

Another thing I do like about the money is that otherwise, a lot of the mental health services that are available to our clients – I call them "Cattlemen's Health Services." They’re not like what privileged people have access to. But with the money, I can call up, make an appointment with the therapist, and see them the next week. With the Cattlemen’s services, you gotta go with 1,000 other people,

\textsuperscript{48} Ibid.
\textsuperscript{49} Ibid.
get stamped, meet with this case manager. Then you won't see a psychiatrist for six weeks. The nice thing about having the money – I can call the therapist and say, “Hey, I'm going to private pay for this person to come.” And you can give them that same access that any other privileged person would have. And I think that helps, because mental health is a big barrier to a lot of our clients.\textsuperscript{50}

In sum, although case managers appreciated the opportunities that financial resources create for their clients, their ability to access these resources also meant making difficult decisions that might have been usefully addressed in early training programs.

Even with access to resources, caseworkers had a more difficult time finding housing for their clients than they anticipated. Although having resources did create some housing opportunities, money did not solve all housing-related dilemmas, as this case manager explained:

\begin{quote}
I would say another benefit [of having program resources] is that clean and sober housing costs money. So if a client gets out of treatment and they're in recovery, the benefit is you pay the $400 and put them in clean and sober housing. So that's really nice... But sometimes it's difficult to find the housing outside of clean and sober living because of criminal history. Criminal history is big.\textsuperscript{51}
\end{quote}

While case managers agreed that their clients’ criminal records were important barriers to housing, they also noted that there is a more general lack of affordable housing suitable for clients who are still using drugs:

\begin{quote}
We know we're not in the business of just paying for someone's ride for eternity either. And that's why our clients are a challenge to house because they're not as compromised as, say, the REACH clients who have social security income and are disabled, and can qualify for all this existing housing within the city for that's set aside. But they [LEAD clients] are not as high functioning as to be able to hold a job and pay rent. So they're in this kind of in-between limbo stage where they're higher functioning, but can't work because of their addiction. But they're not
\end{quote}

\textsuperscript{50} Ibid.
\textsuperscript{51} Ibid.
disabled and they don't qualify for the existing housing. There's no housing for active addicts that don't have jobs, that aren't disabled.\(^{52}\)

When asked how they were responding to these challenges, case managers made clear that they are continually seeking out housing opportunities for their clients, but that these are often difficult to generate. Strategies for addressing these housing challenges could also usefully be anticipated and addressed in early training programs.

**Lesson 7: Identify and Train a Legal Services Provider**

Many stakeholders emphasized the importance of identifying an effective legal service provider. As one case manager explained,

*One of the great things about LEAD was the work that Isabel [the legal service provider] did for our clients – it helped out tremendously. I had a client that was looking at a year and a half in jail. And Isabel and I worked hard with the prosecutor who was at the other end, and we fought tooth and nail, but we did it in a very cordial way and professional way. The client didn't end up seeing any jail time. And he's been clean and sober for the past year, and he's been housed, and he hasn't picked up one new criminal violation. A lot of our clients just have a regular public defender – and because public defenders are overwhelmed constantly they're usually getting a plea. But when you had somebody like Isabel as a liaison, who was also a lawyer, speaking with that public defender, I think it made that public defender have more accountability towards that client. And then me as a case manager there as well.... And all the public defenders are like, “Wow, you have a lot of support. You have a lot of people.” And I noticed that benefited our clients so much.*

In Seattle, provisions were made to provide legal services to clients for the first two years, although the range of civil legal services that would be needed by LEAD clients was not fully appreciated until the program was up and running. As Isabel Bussarakum, legal service provider with the Racial Disparity Project, explained:

*Even though in LEAD the criminal case is diverted, we imagined that this population has a lot of [criminal] legal issues, and we've found that to be quite true... many of the LEAD participants have other existing criminal cases that you*  

\(^{52}\) Ibid.
either represent them on, or just help them with - reminding them of court hearings, sending their public defender an email saying they’re in this great program – all those things can be helpful. And then in addition to the criminal cases they have, I found a lot of LEAD participants have a whole host of civil legal issues that they’re dealing with, most often related to the fact that they’ve been in poverty for so long.\textsuperscript{53}

One challenge, therefore, is simply finding a legal service provider who is flexible, creative and resourceful enough to help address LEAD clients’ myriad legal needs. Another challenge is developing tools that enable case managers to quickly identify pending legal matters that may derail their therapeutic endeavors. As Ms. Bussarakum explained:

\begin{quote}
Another thing that would be great is for us to come up with better trainings, or materials, for the case managers... In their intake materials, could they incorporate some questions that would help them spot things. Although I know that their intake assessment is so long as it is that they would be reluctant to do that. ‘Cause there are times I think when they have to – it takes them like three meetings with the client to get through that assessment. But one of the difficulties is to try and think through how can we better spot legal issues, ‘cause the vast majority of time, the participant doesn’t spot the legal issue themselves, or they do, but once they do it has like already become a huge problem for them.\textsuperscript{54}
\end{quote}

Other important tasks related to the provision of legal services include:

- Establishing a viable system of communication between social and legal service providers such that this information is readily shared;
- Establishing a means by which the legal service provider(s) become(s) aware of warrants and new charges, and works collaboratively and proactively with case managers and prosecutors to address these issues.

\textsuperscript{53} Interview with Isabel Bussarakum, then Lyman Fellow with the Racial Disparity Project, July 31, 2013.
\textsuperscript{54} Ibid.
Lesson 8: Recognize the Need for On-Going Training and Dialogue with Line Officers

Officers who were asked to make LEAD referrals went through a series of training sessions. These sessions included discussions with case managers about harm reduction principles. Several of the officers noted that they found these sessions to be very helpful. As one officer explained:

*When we had the meeting with the counselors, what really helped me is when they said, "You need to understand that they're not going to immediately become clean and sober, productive citizens. It took them years to get where they are, and there's going to be a lot of failure and everything." So that helped me understand that this was going to take a while...*  

However, many officers remain concerned about the fact that LEAD does not require abstinence, and that LEAD clients are not terminated from the program for spending time on the streets in the neighborhood in which they were arrested. Numerous officers conveyed their disapproval of the fact that clients are not terminated from the program if they are known to be using drugs or remain in the area in which they were arrested. As one unenthusiastic officer put it:

*I mean, largely it's the same people [who were already referred to LEAD] that we see out there. So they'll get kicked out the door and then we'll go back out and you'll see them right back in the same area again. Doing the exact same thing. Which is, you know, that's the definition of insanity. And that kind of takes the wind out of your sails as well because you're not curbing the problem.*

It appears, then, that the need for dialogue and education about harm reduction principles with line officers is best conceived as an on-going project rather than as a one-time intervention. Although police sergeants and command staff who attended work group meetings did become more familiar and comfortable with harm reduction ideas over time, in Seattle, most line officers did not initially attend those meetings. As a result, they were not exposed to conversations in which harm reduction ideas were expressed and affirmed. More importantly, they did not hear case managers’ reports about LEAD clients who did not achieve sobriety and

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55 Focus group interview with SPD officers involved in LEAD, September 16, 2013.
56 Focus group interview with SPD officers involved in LeAD, July 24, 2013.
other life improvements for some time – but ultimately did so. As one of the few officers who did regularly attend work group meetings explained,

*It’s always the brass and the sergeants who attend [the workgroup meetings]. But how about having line officers come to the meetings, so they can hear the success stories of folks that are being successful in the program? So that way they understand that all that paperwork they did and letting the guy go was, you know, in the end, it was good. The outcome was positive.*

As noted previously, the research conducted for this report triggered an intervention by LEAD organizers with SPD officers who, at the time of their initial focus group, were unenthusiastic about LEAD (see Lesson 4 above). In response, LEAD organizers now encourage officers to attend work group meetings when they can. LEAD organizers and the sergeant of the unit in question agree that the participation of line officers in the regular work group meetings is productive and useful for all attending parties.

This history suggests several additional “lessons”, namely:

- Have officers attend LEAD work group meetings on a rotating basis to deepen their understanding of harm reduction ideas and practices, and to provide additional information about LEAD clients;
- Develop a means by which client “success stories” can be shared with those participating in work group meetings as well as other referring officers.

**COMMUNICATION**

**Lesson 9: Recognize the Importance of Regular Operations and Policy Meetings**

Collaborative problem solving is an essential component of LEAD, and one of its most transformative features. LEAD’s policy coordinating group is its governing body, and is comprised of representatives from a broad range of organizations, including the Seattle Police Department, the Seattle City Attorney and King County Prosecutor’s offices, the Racial Disparity

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57 Focus group interview with DOC and SPD officers affiliated with the Neighborhood Corrections Initiative, August 8, 2013.
Project, the ACLU of Washington, Evergreen Treatment Services, the King County Sheriff’s office, and the Department of Corrections. At regularly held policy group meetings, high-level representatives from these organizations assess LEAD’s progress and consider a variety of programmatic issues. These monthly meetings afford an opportunity for individuals who would not ordinarily work together to share information and collaboratively solve problems.

LEAD also regularly holds regular work group meetings. In these meetings, caseworkers describe the progress (or lack thereof) of their LEAD clients and members of other organizations – especially law enforcement and prosecutors’ offices – provide their own input about those same individuals. Because many LEAD participants have extensive and ongoing legal problems, these sessions allow prosecutors, legal service providers, case managers and police officers to work together to solve some of the legal problems that LEAD clients face. In addition, the sharing of information was useful to case managers seeking to assess the veracity of their clients’ self-presentation.

The work group meetings also ensure that prosecutor’s filing decisions regarding LEAD clients’ prior or subsequent cases are based on up-to-date information about the clients’ status. Prosecutors often sought to ensure that their filing decisions did not interfere with clients’ therapeutic progress. For example, if a LEAD client was about to enter a drug treatment program, the prosecutor would likely refrain from filing charges at that time in order to avoid interrupting the client’s recovery. In addition, coordination meant that prosecutors were informed about LEAD clients who were not engaging in the case management process. As Mary Barbosa, Chair of the Felony Trial Unit at the King County Prosecutor’s Office, explained,

*We [prosecutors] have the discretion [to make filing decisions] but it’s actually been a very collaborative process. We filed some of them, some of them even with the urging of the case manager. Like, ”I can’t get her attention... She came in once, she did enough to get herself in LEAD and keep her case from being filed, but then I haven’t seen her.” And the police are saying: “Oh, we see her all the
time downtown.” And so, you know, “Yep, let’s just file on her and get her attention, and, you know, reengage her.” We do that all the time.⁵⁸

Stakeholders consistently identified the collaborative nature of the policy and work group meetings as one of the most beneficial aspects of LEAD. As Ian Goodhew of the King County Prosecutor’s office put it, “Once people start talking with each other instead of talking about each other or only talking to other people who they always agree with, things change.” A supervisor with Evergreen Treatment Services echoed this sentiment: “Sitting at the table together in a work group, and developing those personal relationships, it kind of moved us out of that “us and them” kind of thing, into, ‘How do we work together to serve this person?’” Regular dialogue, sharing of information and collaborative problem solving thus has broad and transformative effects as well as practical utility.

Lesson 10. Develop Additional Methods of Communication and Information Sharing

As productive as many LEAD stakeholders find the work and policy group meetings to be, these meetings do not, in and of themselves, ensure that all communication needs are met. One reason for this is that most line officers did not regularly attend the work group sessions. As noted earlier, it seems likely that this contributed to officers’ unfamiliarity and discomfort with harm reduction ideas; it also meant that line officers did not consistently receive updates about LEAD clients they had referred to the program, some of which would likely have enhanced their confidence in the harm reduction approach. In addition, although sergeants attending the meetings were well-informed, case managers were often unable to obtain information from officers who may have valuable insights and information about their clients.

In addition, many officers expressed a desire to create a system by which information could be shared between case managers and officers. As one officer put it:

It’s the follow up that’s very frustrating, ‘cause once they’re in the program and they’re meeting with a case worker, if we happen to run into them on the street, I want to be able to get a hold of the case worker so I can find out, “What’s going

⁵⁸ Interview with Mary Barbosa, Chair of the Felony Trial Unit at the King County Prosecuting Attorney’s Office, August 6, 2013.
on with this person. I know you did the initial intake, what are the goals? What are the plans?” You know. And it’s frustrating when we have the body right there, but we can’t get a hold of anyone.59

A supervisor at Evergreen Treatment Services indicated that she was aware of officers’ desire to be able to contact case managers and obtain access to up-to-date information about LEAD clients, but highlighted the cultural and practical issues this raised:

I think it kind of is another illustration of the different kind of culture – this conversation around the fact that the police want to be able to get a hold of us at any moment, at any time of day, and expect a response. I mean, that is what they do, right? But that isn’t what we do. I'm always working with case managers to – ‘cause our clients are always in crisis, right? And a lot of it's self-defined crisis, and there's this expectation that “you respond to me.” So I always work with case managers, saying we don't have to react to that crisis. But here we are getting calls from police officers who are like, “So and so is in the alley smoking crack, and you need to be down here right now.” And it’s like, “Yeah, so and so's been in the alley for the last twenty years smoking crack. And us coming down here at 6:00 a.m., or responding to your call, that's not what we do…” Eventually we're going to figure out how to do group texting, because that is the key. I mean, really, it becomes a technological fix. We’ll see.

Because it is difficult for advisory board members to attend work group meetings during the day, work group meetings also did not ensure adequate communication and information sharing between LEAD organizers and members of the Belltown Community Advisory Board, as Lisa Daugaard noted:

The advisory process is very important. But the boards themselves are not as functional as we would have hoped because people have said they just cannot come to meetings during the daytime. So we are, in Belltown, broadening out that process to be more e-mail based – we will provide updates and people can send in their thoughts about problem areas and stuff directly to Deanna [then- Lt. Nollette], and that will go directly to the social contact prioritization process. So it’s just become a more flexible conversation.

In short, although the work and policy group meetings have been highly productive, establishing additional means of communication is also useful. The particular needs of groups

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59 Interview with officers affiliated with the Neighborhood Corrections Initiative, August 8, 2013.
who are unable to attend the work group meetings should be addressed through the development of such mechanisms.

THE TRANSFORMATION OF INSTITUTIONAL RELATIONSHIPS

Lesson 11. LEAD’s Collaborative Model Transforms Institutional Relationships, Creating New Opportunities and Challenges

LEAD’s collaborative model transforms institutional relationships in ways that create both exciting opportunities for collaboration and reform as well as the need to clarify boundaries and set clear limits. Many stakeholders noted that their assumptions about, and relationships with, other organizations have been upended as a result of their participation in LEAD. As one supervisor at Evergreen Treatment Services put it:

The transformation of our relationship with the police has been one of the more surprising pieces to me about the kind of distance that we’ve been able to come... I think I talked about last time my first experience meeting with SPD, where we did a training... When they all walked in, I just thought, “Oh, no, this is not going to be pretty.” They were all big and tall and angry looking and mostly white and male and they all had guns strapped to their sides. And I just thought, “Whoa.” Especially thinking – we’re dealing with issues of racial disparity here. I mean, over half of our clients at this point are African American. And I’m thinking, “And we’re developing a relationship with these people? This is going to be a challenge.” And it has been challenging in many ways. But, the distance that we’ve come is enormous. I’m walking down the street the other day in Belltown and I have police officers waving and saying hello and that kind of stuff. A year and a half ago I wouldn’t ever have believed I’d be talking to a police officer in Belltown. Are you kidding me?

Ian Goodhew from the King County Prosecuting Attorney’s Office also observed that LEAD had transformed institutional relationships – and challenged entrenched ways of thinking:

Whatever you think about LEAD as a program, by doing it what we’ve managed to do is cause policy makers who used to think they never agreed on anything to talk to each other and realize that ... we do agree on a few things. And as [then-

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60 Focus group interview with LEAD supervisors, September 22, 2013.
Interim SPD Chief Pugel always says in his talk on LEAD, it’s not only the fact that he or SPD has a relationship with the defender association now or the racial disparity project or the ACLU. It’s that he has a relationship with me now… So even within the criminal justice system, the people are talking to each other and agencies have relationships with each other where they didn’t before. We were just robots putting our widgets on the conveyor belt that was going through, thinking everything was fine, and even that has changed. But it will create odd alliances. It will create odd relationships. It will bolster what should be strong relationships that may be aren’t. And it will make you think about another person or agency or institution’s perspectives on the issues. And once people start talking with each other instead of talking about each other, anything is possible.

In fact, many stakeholders noted with surprise the frequency with which they and other LEAD participants have begun to adopt the position of their former adversaries. As one case manager observed:

Case Manager: In the beginning we would go to the [work group] meetings and we felt like we were on trial ourselves. Because they’re [the police] were coming at it, “Well, this person was down here doing this. And so what are you doing about it?” And, you know – ”we just need to arrest that person.” And we’re like, “Wait. We’re working with this person and we know what some of the reasons are that that person might be out there. We want an opportunity to engage them and try to get them away from that.” But everybody was just totally on different wavelengths. And it took a lot of blood, sweat, and tears to sit down and try to shift the thinking for some of the officers. You know, they aren’t social workers. They don’t see it this way. And we’re not law enforcement. We’re not punitive. We’re harm reduction. That’s two different worlds. That’s like east and west trying to come together. And the fact that we’re coming up on our second year and – nothing’s perfect, but everybody’s still here. And people have shifted. Even us, as social workers, we’ve shifted our way of thinking.

KB: How so?

Case Manager: Asking the cops to go get people arrested. [Laughter] 61

Ian Goodhew of the King County Prosecuting Attorney’s Office also noted the strange role reversals that increasingly occurred among LEAD stakeholders:

61 Focus group interview with LEAD case managers, July 23, 2013.
The funny thing is you’ll have case managers arguing now for the officers to go out and arrest someone because they can’t get the person’s attention. And the officers are like, “I don’t want to arrest Bob. We’ve arrested him a bunch of times before.” Or Lisa [Daugaard] is arguing a position that sounds very prosecutorial and I’m arguing a position that’s very defense-oriented.62

The transformation of perspectives and institutional relationships has thus been illuminating and rewarding for LEAD stakeholders. But it has had broader effects as well. Specifically, the transformation of worldviews and relationships has created a new willingness to contemplate and, in some cases, pursue other meaningful criminal justice reforms. Here, Lisa Daugaard describes one example:

So part of what’s happened is that all of our partners are going around all these places talking at all these conferences together. They just went to this international policing conference in Vilnius in Lithuania, and Kris [LEAD Program Director at the at the Public Defender Association] and [then-Lieutenant] Deanna [Nollette] went. And in Europe, of course, there are some safe injection sites. And so Deanna has become converted. She’s like, “That makes sense. What we should do is we should have one in Ballard, one in all these different neighborhoods so that it would help downtown.” So the way in which ideas are sort of hopping, it is like contagion is happening now in a very accelerated form... they are now talking to other people about ideas that are very foreign to domestic law enforcement.

When asked if LEAD had inspired his office to undertake other reforms, Dan Satterberg, King County Prosecuting Attorney, provided this example:

We have a program here in my office now called the "180 Program," which is a juvenile diversion program. We had 350 kids go through it last year, and it’s for people who have had their first or second misdemeanor arrest. The kids are between 12 and 17, and we deal with youthful bad choices by bringing them to a workshop at Zion Preparatory School on a Saturday for four hours. And there they meet with people from the community that they grew up in, and they had chaos in their lives, and maybe they were in gangs, and maybe they went to prison. These people have credibility with the kids and talk about their choices and the consequences, and they try to hook them up with some positive things to

62 Interview with Ian Goodhew, Deputy Chief of Staff, King County Prosecuting Attorney’s Office, June 28, 2013.
do. So, you know, there are a lot of complicated issues in our society and they’re not all solved by a trip to the courtroom or prison.

In sum, many stakeholders reported that their perspectives and relationships had changed dramatically as a result of their participation in LEAD, and these transformative processes enhanced openness to additional policy reform ideas. At the same time, several stakeholders mentioned that although pleasant and productive, the development of collegial relationships among former adversaries also created certain risks that require careful management. For example, LEAD stakeholders observed that openness to alternative perspectives and reform ideas can be politically risky for both themselves and for other LEAD stakeholders. Recognition of this has led some stakeholders to try to provide institutional support for other stakeholders wherever possible.

The development of collaborative relationships among LEAD stakeholders also underscored the need to set clear boundaries and expectations. As Lisa Daugaard explained,

*Early on, there were some lawyers in my office who made a public records request for something in the prosecutor’s office that the prosecutor’s office did not want to produce it. And Ian called me and he was like, “Can we meet?” Like, “Can we take care of this?” And I looked at it and I had an impulse... I had the same impulse Ian did, which was, “God, I don’t want alienate them. I want to help them. I like him and I like them.” And all of a sudden I realized, “No, I have to stop there. This has nothing to do with our partnership. This is us [public defenders] doing the job that we have to do.” So we met and we had a conversation about expectations and we agreed that “We are not asking one another to do anything different than we normally do except insofar as we have explicitly agreed to accomplish the shared goal,” which again, anyone can walk away from if it doesn’t meet their needs. We need to be that way to maintain credibility with our own constituencies... just because this is fun for us, collaboration is not always the right way...I mean some of our process relies on adversarial development of positions, and we need to protect that.*

**CONCLUSION: OPPORTUNITIES AND CHALLENGES AHEAD**

A pre-booking diversion program based on harm reduction principles, LEAD represents bold and promising alternative to conventional drug war tactics. It also represents an alternative to
simply doing less enforcement, which might reduce criminal justice expenditures but does not have the potential to reduce the harm and suffering associated with addiction and open air drug markets. In this context, the City of Seattle recently elected to allocate additional public monies to enable the expansion of LEAD throughout the downtown area. LEAD stakeholders recognized that expanding LEAD creates exciting opportunities as well as challenges, each of which briefly described below.

**OPPORTUNITIES ASSOCIATED WITH EXPANSION**

Among police officers, the primary attraction of expanding LEAD is the possibility of being liberated from existing geographic constraints and therefore able to refer more clients to the program. As these officers pointed out, many eligible LEAD candidates are geographically mobile and spend much of their time outside of Belltown:

*Officer 1: We’re dealing with the same people... that just are moving...*

*Officer 2: Moving back and forth.*

*Officer 1: Yeah, yeah. So it [expansion] just eliminates that barrier.*

*Officer 2: Yeah.*

*Officer 1: Right now, they go to Victor Steinbrueck Park - whoops, we’re out of the box. They use all their drugs at Freeway Park – whoops we’re out of the box...*

*Officer 2: We would definitely get more clients that way [with expansion]. For sure. ‘Cause there’d be a ton in the ID and down in Pioneer Square. Pioneer Square could definitely use the services.*

For these officers, then, LEAD expansion primarily meant geographic expansion; they were enthusiastic about this possibility because it would enhance their capacity to make appropriate LEAD referrals. Many other stakeholders also expressed excitement at the idea of being able to bring more clients into LEAD.

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63 Interview with SPD and DOC officers affiliated with the Neighborhood Corrections Initiative, August 8, 2013.
Some further noted that the creation of a new organization and collaborative dialogue – the Center City Initiative – in which LEAD stakeholders play a leading part has the potential to facilitate a substantively important dialogue among groups that have rarely communicated or collaborated with each other in the past. A supervisor at Evergreen Treatment Services put it this way:

_The thing that seems most positive about it is in the similar way that the LEAD process has taken these very disparate groups and brought them together in a conversation that’s really moving us forward, in terms of the relationships on the ground and system wide... Up till now you had the police and you’ve had human service providers. They point fingers at each other... and business groups point fingers at both. So really bringing the business association and the community and law enforcement and the service providers to the table so that all are there, and everyone has ownership over the same problem, to me that alone is a tremendous step forward... ‘Cause if the business association also feels some ownership for this, it's not just the police have to go fix it and they're not doing a good job, or the social service providers are doing it wrong, then I think it does have some possibility to get to a real place._

**CHALLENGES ASSOCIATED WITH EXPANSION**

Even as they expressed enthusiasm about the prospect of serving more clients, LEAD stakeholders also identified a number of key challenges associated with its expansion. The first of these challenges centers on the practical question of how to maintain communication in the context of growth. Indeed, a number of stakeholders expressed concern about how to maintain communication, build relationships and establish trust among stakeholders when LEAD expands to include the West Precinct as a whole. Isabel Bussarakum of the Racial Disparity Project articulated the concern about maintaining communication this way:

_But I guess one thing I’d say is that – and I think most everyone you’ll talk to will say this – one of the reasons LEAD works well is because of our operational work group meetings. And if there’s a way to replicate that when LEAD expands, I think that would be key, to make sure there are some face-to-face meetings where all the different stakeholders can come together and share their_
knowledge and build relationships. ‘Cause it’s really that process that helps us to work together well. So I don’t know how they envision scaling that process up for bigger operation, but if there are ways to break it up into different divisions or I don’t know what. But I think it’d be important to have.65

Many LEAD participants with expertise in service provision also expressed the concern that existing capacity constraints are an important impediment to the success of any social service intervention, and that this will become even more relevant as LEAD expands. Several supervisors with Evergreen Treatment Services put it this way:

Supervisor 1: The last time we met you asked about what we thought the biggest challenge was, and [name of colleague] talked about [knowing how to spend] the LEAD money. And I think that is really challenging. But I feel like the biggest challenge is the limited resources. I mean, the resources just don’t exist. There is not enough housing…. We have the money and we don’t have any place to pay to put people. Nobody wants a whole bunch of active drug users from Belltown. We have the money and we can’t – there isn’t appropriate treatment for, you know, a prostitute that has a crack habit. It doesn’t exist.

Supervisor 2: Even if they’re clean and sober, to find permanent housing, when they have felonies, that ain’t easy.

Supervisor 1: Paying the rent. Most of our population – either you can get a job full-time, enough to make a $700 a month rent ’cause that’s what it costs, right? Even in a cheap, cheap, cheap place would be $700 anywhere in Tukwila. Either you make enough money – like really $2,000 a month, which is way above poverty line, right? You have to be able to make that income. Or you have to be so highly vulnerable and needy that you fit a special population to get one of these subsidized special housing – Housing First units. Everybody in the middle – which is 90 percent of the LEAD clients – they are never going to be well enough to earn an income to go pay their own rent. They’re always going to need a subsidy. And the subsidies are prioritized for people that are sicker than they are.66

65 Interview with Isabel Bussarakum, then-Lyman Fellow with the Racial Disparity Project, July 31, 2013.
66 Focus group interview with LEAD supervisors, September 22, 2013.
Ron Jackson of Evergreen Treatment Services echoed this concern about structural and capacity constraints:

*RJ*: When it’s all said and done, we’re limited by the resources in the community. We can’t get somebody into housing if housing doesn’t exist. We can’t get them into addiction treatment if there’s no capacity for addiction treatment. We can’t get them mental health services if they’re – you get the point.

*KB*: Yes.

*RJ*: So here we are... The capacity is not growing. We could employ an army of case managers, but when it’s all said and done if those case managers are not getting their clients access to the services that are going to have positive influence on their life, they’re not going to be affected. It’s not just being good at building therapeutic alliance with the homeless person... they’ve still got to deliver something.

*KB*: Where are the places you’re finding a shortage of capacity most acute?

*RJ*: Mental health centers, that’s the most acute. The methadone treatment system. I mean, you know, we have statutory limitations on the number of patients we can have in a clinic at any given time.

*KB*: So you would have to open more clinics to...

*RJ*: Yes, and those clinics are going to have to be outside of downtown. Kent probably. You know, the methadone clinics are about as popular as nuclear waste dumps. Everybody recognizes that they’ve got to exist but nobody wants them where they live. And then housing services - we can’t put people in motel rooms indefinitely.67

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The first two years of LEAD operations have yielded many insights about how LEAD operations can be optimized. Many of these insights stem from observations about what has worked well in Seattle; others derive from stakeholders’ reflections regarding ideas and practices that have been less successful. Thus far, LEAD operations show that a broad range of stakeholders can

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67 Interview with Ron Jackson, former Executive Director, Evergreen Treatment Services, June 24, 2013.
collaborate to institutionalize meaningful drug policy reforms despite a history of adversarial relations and diverse priorities. Moreover, this collaboration is itself a transformative and productive experience, one that appears to yield a variety of dividends, including a new openness to additional reform ideas. Expanding LEAD in Seattle and institutionalizing it elsewhere will require careful attention to several challenging tasks, namely: eliciting and maintaining officer support for this harm reduction program; establishing reliable systems of communication and information-sharing across participating organizations; and addressing structural capacity constraints that limit LEAD’s ability to meet client needs even when private resources are available. In addition, the long-term viability of LEAD will depend on identification of a sustainable revenue stream. These substantial long-term challenges notwithstanding, the first two years of LEAD’s operations provide compelling evidence that collaborative reform efforts that were unimaginable just a few years ago are, in fact, in the realm of possibility.
APPENDIX A. LEAD STAKEHOLDERS INTERVIEWED

The following people were interviewed and are identified by name in the body of this report:

- Mary Barbosa, Chair, Felony Trial Unit, King County Prosecutor's Office
- Steve Brown, former Captain, Seattle Police Department
- Isabel Bussarakum, then-Liman Fellow, Public Defender Association/Racial Disparity Project
- Lisa Daugaard, Policy Director, Public Defender Association/Racial Disparity Project
- Ian Goodhew, Deputy Chief of Staff, King County Prosecutor's Office
- Alison Holcomb, Criminal Justice Director, ACLU of Washington
- Pete Holmes, Seattle City Attorney
- Ron Jackson, former Executive Director, Evergreen Treatment Services
- Leslie Mills, Field Supervisor, Washington Department of Corrections
- Dan Satterberg, King County Prosecuting Attorney

In addition, focus groups were conducted with the following groups:

- LEAD case managers
- LEAD case management supervisors
- LEAD affiliated SPD sergeants
- SPD day bike officers
- SPD night bike officers
- SPD ACT officers
- SPD/DOC Neighborhood Corrections Initiative officers
Session 3 Reading and Resource List

**How to get your client into diversion; how to expand LEAD to other counties**

http://www.huffingtonpost.com/2014/08/28/seattle-lead-program_n_5697660.html

Keep Out of Jail Those Who Don’t Need to Be Locked Up - NY Times Feb 26 2015
http://www.nytimes.com/roomfordebate/2015/02/26/would-we-be-safer-if-fewer-were-jailed/keep-out-of-jail-those-who-dont-need-to-be-locked-up
A group of incarcerated teenage boys at the O.H. Close Youth Correctional Facility in Stockton slouch in plastic orange chairs, arms crossed, scowling at their tie-clad visitor, whose lecture will eat into their TV time.

Francis "Frankie" Guzman, a 32-year-old lawyer and recipient of a prestigious Soros Justice Fellowship to advocate for juvenile justice, gets right to the point.

"How many of you read 'Lord of the Flies'? It's like that in here, right? But which one of you is leading? Do you really want to follow that guy?"

Guzman speaks like he knows what he's talking about, and the boys, ages 14 to 17, take notice. There's a perceptible shift as they sit up a little straighter.

Guzman knows exactly what it's like to wear khaki pants every day and sleep in a cell. When he was 15, he and a friend stole a car and robbed a liquor store at gunpoint in Southern California, resulting in six years behind bars inside the California Youth Authority.

It was the culmination of a childhood defined by tragedy in East Oxnard, an enclave of farmworkers and day laborers where gangs, family and community had blended together over the generations, blurring the lines between loyalty to the street and to the self.

"Kids don't make smart decisions," Guzman said. "But ultimately, you are not the worst thing you have done. The weakest thing I did made me the strongest person I am today."

**Soros Justice Fellowship**

Guzman, given the California Department of Corrections and Rehabilitation's "Outstanding Achievement Award" in 2007, is now in high demand to speak in low-performing schools, youth lockups and juvenile justice panels around the country.
After putting himself through the UCLA School of Law with financial aid and funds from the Paul and Daisy Soros Fellowship For New Americans, in 2012 he won a coveted Soros Justice Fellowship, a two-year grant that will fund his work at the National Center for Youth Law in Oakland to study alternatives to placing youths who are first-time offenders of serious crimes in adult prisons.

He tells his audience that he's fighting on behalf of them.

"Even though tomorrow is going to be the same, if you take the attitude that you are going to treat yourself seriously, you will feel a little better. Like pennies in a jar, over time it will build," Guzman said. "You must treat yourself with kindness, even when no one else is."

After giving him a round of applause, boys line up to ask Guzman whether he can bring them college applications and books on architecture, construction and auto mechanics.

"All I think about while I'm here is when I'll get out, but he motivated me to think beyond that, to work now on what I want to be in the future," said one 19-year-old ward from Bakersfield.

'A man? What is that?'

By any measure, Guzman was not supposed to succeed. When he was 3, his parents divorced and his father abandoned the family. Two years later, his older brother Freddie shot and killed a rival who had beaten him up at a party. He was convicted of second-degree murder and sentenced to 17 years to life.

"I wanted to go to prison to be with him," Guzman said. "I used to alter my school ID and put his CDC number underneath my photo."

When he was in middle school, Guzman heard that his father was caught at the Mexican border with a lot of money and no explanation. The elder Guzman was sent to federal prison on a trafficking charge, Guzman said.

His mother, who worked long hours cleaning homes in upscale Malibu about 30 miles away, routinely reminded her son to do right and "act like a man."

A crack cocaine epidemic was in full swing in his "La Colonia" neighborhood, and the older men who should have been role models were instead victimizing younger men, robbing them to fuel their addictions. Guzman and his friends began acting tough to ward off attack.

"I'd say to my mother, 'A man? What is that? Point to one!'"

In high school, Guzman became increasingly distracted from his studies, until his GPA dwindled to 0.8. Shortly after, he was expelled, in connection with a fight in the boys' restroom he says he didn't join.
**Armed robbery at age 15**

Two weeks later, Guzman and a friend took two ski masks from a Kmart, stole a car from the parking lot, drove to a liquor store with guns they bought on the street, and then pointed them at the clerk. They made off with $300. Guzman was 15.

Their getaway lasted just 30 minutes. By then, a squad car had caught up to them and pulled them over.

"Our crime was in broad daylight. I already had $350 in my pocket from installing septic systems with my uncle. It was so, so stupid," Guzman said.

He was operating on co-dependency kid logic, he said, and it was his undoing.

When the friend first proposed the crime, Guzman initially protested. "But when he said he was going to do it without me, I thought, man, if something happens to him ... I had better go and watch his back."

The judge sentenced Guzman to 15 years in the California Youth Authority facility in Whittier. Guzman earned his high school diploma as an inmate - twice. Once he passed the equivalency exam in his first year, he continued to go to classes so he could learn more. While he was on the inside, his favorite uncle died at 38 after a long addiction to alcohol and heroin. In the same year, his best friend died after rival gang members stabbed him 15 times in the neck.

Guzman was released after three years for good behavior, but once back in his old neighborhood, he went to parties where he drank alcohol and socialized with gang members - both of which are violations of parole - and he was sent him back to the Youth Authority for another year.

At 19, Guzman was released again and found work assembling mini-blinds in a factory and fetching shopping carts at Sam's Club. They were dead-end jobs, and Guzman didn't want to "fade into wallpaper." He kept hearing his uncle's words: "Work with your brain, not your body, because your brain will never give out on you."

Guzman quit and enrolled at Oxnard College, the local community college. He walked on campus and saw a sight he'd never seen before: A Latino man in a suit. It was the dean. Guzman stared, transfixed. He told himself right then that he would wear a suit one day, too.

Guzman threw himself into sociology and English classes. He joined student government and was sent to leadership conferences to places he'd never been: Portland, Ore., Florida, Chicago. He got a job in PACE, the Program for Accelerated Education, mentoring adults returning to school at night.

Then his old neighborhood came back to haunt him. When a friend of Guzman's was arrested for robbing a store, Guzman was implicated and jailed. Although he was
released two months later after parole officials determined Guzman was innocent, by then Guzman had lost his job and his student government position and fallen too far behind in his classes to salvage the semester.

Guzman was ashamed. He became depressed and gave up on himself, with predictable consequences. Soon after, he was pulled over and arrested for driving under the influence of alcohol. He was sent back to the California Youth Authority for two more years. He had just turned 23.

Back in a cell, Guzman this time had a better understanding of what he had sacrificed. He enrolled in drug counseling classes, took a job in the package warehouse and was elected by his fellow inmates to serve as their grievance counselor.

Frees ward from solitary

Guzman discovered he enjoyed being an advocate. When a fellow ward was beaten by guards and quietly placed in solitary confinement, Guzman said, the boy was able to scream through the pipes to the cell above that he was in pain. Guzman insisted on having access to "the hole," and threatened to report obstructionist guards to administrators. Guzman was overjoyed when the boy was removed from solitary and given medical treatment.

When Guzman was released again at 24, he decided that six years total behind bars was enough. He was done with Oxnard.

"The place was killing me," he said. So Guzman did the unthinkable. He applied for admission to UC Berkeley. "I thought, aim ridiculously high, because what's the point in setting the bar low and then failing?" He got into the four UC schools he applied to, but chose Berkeley based on its reputation. At the time, he couldn't have pointed to it on a map.

But he got there, maintained a 3.2 grade-point average, and found a public policy internship at the Greenlining Institute, leading a petition drive to freeze state tuition increases. The job entailed high-power meetings with education officials. He bought his first suit.

After graduation, he found work in Oakland, assisting John O'Toole, the director of the National Center for Youth Law.

Law school support

"I have supervised about 500 law students, many of them are talented and come from privileged backgrounds," O'Toole wrote in a reference letter for Guzman. "Frankie is among the top 10 in terms of a combination of intellectual capacity, leadership potential and strength of character."

It took Guzman two more years to work up the nerve to apply to law school. UCLA
said yes. Once there, he served as president of the La Raza Law Students Association, and Pacific regional director of the National Latino Law Students Association. With each new title, he acquired more pride, and more suits.

"It's fair to say few law students have to deal with things Frankie has to on a daily basis," said UCLA law Professor Sharon Dolovich, who helped Guzman set up a student legal team to counsel his older brother, now 43 and still in prison, through the parole process. "It's a credit to his grit and determination and the admissions offices at various institutions of higher learning who recognized his potential."

Nearly 50 people showed up for his 2012 law school graduation, including some of his old friends from back home. His mother, who is disabled now from years of cleaning, and two sisters - one who works at Subway and the other who is raising three children - were in the front row. Guzman hosted a catered party on the quad for the La Raza students, with mariachis, paid for with $6,000 collected through La Raza fundraisers.

"It was the best day of my life," he said.

'Moral character' test

Until Wednesday, Jan. 30. That's when Guzman found out, after a 14-month delay, that he'd finally passed the final, "moral character" portion of the California State Bar. In fall 2012, he passed the written exam, but when he checked a box on his application indicating he had prior convictions, he triggered an intense moral character review of his application to practice law. Guzman submitted 19 letters of recommendation in a process that for most applicants is a straightforward background check. As he waited for the outcome, he worried every day that he wouldn't be considered good enough.

"When I got the news, it felt a little strange," Guzman said. "I'm conditioned to being in the hustle, the grind and always jumping over the next big obstacle. Now there are no more hurdles."

That same day, Guzman won his first case - an administrative hearing for a girl expelled for fighting in a San Francisco public school. He argued that the girl had not been receiving the special education services to which she was entitled.

"I can't believe it's really happening," Guzman said. "I didn't run toward a goal, I ran from danger. Success was an afterthought. All I knew was what I didn't want."

*Meredith May is a San Francisco Chronicle staff writer. E-mail: mmay@sfchronicle.com*
Recent developments in law and science affirm what we have long known: Young people are not miniature adults. Since 2010, the United States Supreme Court has reiterated this common sense conclusion in three separate cases, all of which rejected the application of an adult standard to youth who transgress the law. (Graham v. Florida, 2010; JDB. v. North Carolina, 2011; and Miller v. Alabama, 2012).

The juvenile justice system was indeed founded more than a century ago on the premise that children require a different system to effectively hold them accountable and to redirect them from crime. In 1899, the nation’s first “juvenile court” was created in Chicago specifically to separate transgressing youth from the adult criminal justice system, and to create a more rehabilitative system for young people (Deitch, Barstow, Luckens, & Reyna, 2009; American Bar Association, n.d.).

But since the creation of the juvenile court, policies and practices that deviate from the original rehabilitative goals of the juvenile justice system have proliferated. The 1980s and 1990s were marked by a wave of efforts in many states to return youth to the punitive adult system (Addison & Addie, 2012; Fagan & Liberman, 2007). From 1990 to 2004, the number of youth held nationwide in adult jails and prisons increased by 208 percent (Fagan, 2008).

Currently, about 250,000 children each year are prosecuted, sentenced, or incarcerated as adults in the United States (Arya, 2011). African American and Latino youth suffer most from policies that allow youth to be sentenced as adults – they are disproportionally punished in the adult justice system, and are more likely to be sentenced to adult prisons (Hartney & Silvia, 2007; Daugherty, 2011). In California, an estimated 6,500 individuals are incarcerated in an adult prison for a crime they committed under the age of eighteen (Fair Sentencing for Youth, 2013). And roughly 1,000 children are subject to the adult criminal justice system in California every year.

California provides a perfect example of a state that in recent decades intensified its punitive treatment of justice-involved youth. California provides a perfect example of a state that in recent decades intensified its punitive treatment of justice-involved youth.

Violence and Juvenile Crime Prevention Act,” also known as Proposition 21. This allowed children as young as 14 to be tried in the adult system in California and added several crimes for which youth could be charged as adults. Prop 21 also allowed prosecutors instead of judges to decide whether a youth should be tried as an adult.

After the passage of Prop 21, the average number of youth charged as adults skyrocketed in California. From 2003 to 2010, California’s rates of prosecutorial direct file – cases in which the prosecutor makes the decision to file a case in adult instead of juvenile court – approximately doubled (Males & Teji, 2012).

The Myth of the “Superpredators”

The widely held myth that juvenile crime was increasing, and that it accounted for most of the nation’s crime, fueled the nation’s reversion to treating youth as adults. In the 1990s, this myth was advanced by several prominent researchers who believed the upcoming generation of youth would include a large group of “super-predators” that would generate a dramatic increase in national crime rates (Campaign for Youth Justice [CFYJ], 2007). This belief influenced public opinion, making it easier for people to support the idea of treating youth as adults, and led to passage of many state
responsive to their needs. Their behaviors are not fixed, and their values are not yet solidified (Scott & Steinberg, 2008b; Deitch et al., 2009).

Recent state and federal court rulings have relied on the research showing that adolescents are different than adults to strike down on constitutional grounds criminal justice practices that fail to account for these differences. For example, in the United States Supreme Court’s 2012 decision in Miller v. Alabama (2012), Justice Kagan wrote, “[Children] are constitutionally different from adults for purposes of sentencing . . . Juveniles have diminished culpability and greater prospects for reform.” Applying this reasoning, the Court invalidated mandatory life without parole sentences for youth under the age of eighteen at the time of their crimes.

These same principles compel the conclusion that all young people who violate the law are more effectively treated and held accountable in an age-appropriate system of justice.

The Harms of Prosecuting Youth as Adults

The practice of prosecuting youth in the adult system is not only ineffective, it is harmful – to the youth who need positive and age-appropriate redirection, and to society.

The majority of youth who come in contact with the justice system, moreover, do not commit serious offenses, with nearly half of them appearing in the system only once (National Research Council, 2013). Research furthermore shows that most youth offenders naturally “age out” of delinquent behavior as they transition from adolescence and early adulthood to more mature adulthood (Loeber, Farrington, & Petechuk, 2013).

In short, the crime predictions of the 1990s that led to the expanded use of the adult system for youth have been proven untrue. And our system of youth justice has eroded over the past several decades to what it was at the turn of the century when young offenders were seen and treated as if they were “miniature adults.”

Adolescent Development and Youth Justice

Research consistently finds that treating youthful offenders as adults is inappropriate, detrimental to their development, and ineffective as a deterrent to crime (Peerman, Daugherty, Hoornstra, & Beydler, 2014; Redding, 2010). Recent studies have shown that adolescents experience significant psychological change and brain development that affect their ability to react appropriately to certain situations (Arya, Ryan, Sandoval, & Kudma, 2007; Scott & Steinberg, 2008a). While intellectually similar to adults, adolescents are more likely to act impulsively, more susceptible to peer influence, and are prone to risky experimentation as a part of their identity formation. Teenage impulsiveness and experimentation can lead to negative and sometimes criminal behaviors that do not necessarily reflect deficiencies of character, but rather their stage of development (Scott & Steinberg, 2008a).

Though the developing minds and identities of young people lead to risky and sometimes criminal behavior, their formative stage of development also makes them more responsive to positive influences and capable of change. Youth are especially capable of learning, growing, and changing when placed in positive, age-appropriate settings that are
of all inmate-on-inmate sexual violence in adult prison are youth victims

66% of sexually abused youth were victimized more than once
79% of sexually abused youth were physically forced into sexual contact
28% of sexually abused youth were injured after the incident

When youth are placed in adult facilities, moreover, they are disproportionately likely to be victims of sexual abuse. The Bureau of Justice Statistics reported that in 2005 and 2006, although youth only made up 1 percent of adult jail inmates, they accounted for 21 percent of victims of inmate-on-inmate sexual violence (Beck, & Harrison, 2006). Similarly, a 2013 DOJ study found that out of the youth who were sexually abused, 66 percent were physically forced into sexual contact, and 28 percent were injured after the incident (Beck et al., 2010). Additionally, a study found that youth are five times more likely to be sexually assaulted and two times more likely to be beaten by staff in adult facilities than in juvenile facilities (Mulvey & Schubert, 2012). The National Prison Rape Elimination Commission Report concluded that juveniles confined with adults are probably most vulnerable to sexual assault of all confined populations, and that girls confined in adult facilities are at especially high risk of assault by staff. The lack of needed programs and services for youth in adult facilities compounds the risk of harm.

One case that was instrumental in influencing Congress to pass the Prison Rape Elimination Act (PREA), a case that is not atypical, is that of Rodney Hulin. In 1996, Rodney was a 16-year-old boy from Texas who was sentenced to adult prison for setting a dumpster on fire. While in prison, he was repeatedly raped in his cell (The Prison Rape Reduction Act of 2002: Hearing before the Committee, 2002). After Rodney was raped once, he requested to be sent to another facility. His request was denied and he was assaulted several more times. Rodney sent a note to the warden of the facility begging to be moved:

“I have been sexually and physically assaulted several times, by several inmates. I am afraid to go to sleep, to shower, and just about everything else. I am afraid that when I am doing these things, I might die at any minute. Please sir, help me”

(The Prison Rape Reduction Act of 2002: Hearing before the Committee, 2002).

His plea went unanswered, and Rodney committed suicide in his cell at age 17. Rodney is only one of the many youth who are victims of sexual abuse in adult facilities. As the National Rape Elimination Commission reported, “More than any other group of incarcerated persons, youth incarcerated with adults are probably at the highest risk for sexual abuse” (CFYJ, 2014).

In September 2014, Zachery Proper killed himself in his cell after being sentenced to 35-80 years in adult prison. Zachery was charged and sentenced as an adult at 13 years old for killing his grandparents. According to reports, Zachery was also a good student, a member of his school’s football team, and enjoyed swimming, camping and canoeing with his family. But Zachery was also a victim of childhood abuse and suffered from depression (Levick, 2014).

The negative effects of an adult conviction extend beyond the physical and psychological damages inflicted in prison. Youth sentenced in the adult system experience lifelong consequences associated with an adult record (Mauer & Chesney-Lind, 2010; Legal Action Center, 2004). The Vera Institute of Justice estimates that youth with an adult criminal record will earn an average of $61,691 less over the course of a lifetime due to lost employment opportunities (Henrichson & Levshin, 2011).

And punishing youth as adults does not make the community safer. In fact, evidence suggests that it decreases public safety. Studies have shown that youth tried in adult criminal courts have higher recidivism rates than when they are tried in juvenile courts (Redding, 2003). The experience of being tried in an adult courtroom alone may induce feelings of injustice, lead youth to internalize criminal identities, and exacerbate delinquency tendencies (Redding, 2010). An analysis of recidivism rates for 12- to 18-year-olds found that youth who received adult sentences were 2.3 times more likely to be rearrested and 4.9 times more likely to recidivate than those who received juvenile sanctions (Mason & Chang, 2001). Similarly, the Centers for Disease Control and Prevention recommends against using transfer mechanisms as a tool to reduce violence, concluding that generally, transfer of youth to adult courts increases rather than prevents violence (McGowan et al., 2007).
Racial Inequities in Adult Court Prosecutions

Youth of color are more likely to suffer the damaging consequences of prosecution in the adult system. African American and Latino youth are overrepresented at every stage of the juvenile justice system, and are more likely than white youth to be tried as adults (Hartney & Silvia, 2007). Black youth represent just 17 percent of youth in the general population, but are 30 percent of youth who are arrested, and 62 percent of youth who are prosecuted in adult courts. They are 9 times more likely to be sentenced to adult prison than white youth (CFYJ, 2012). Latino youth are 43 percent more likely than white youth to be transferred to the adult system, and 40 percent more likely to serve time in adult prison (Arya et al., 2009). These disparities are not explained by differences in criminal behavior, and suggest trends of accumulated disadvantage, where youth of color are treated more harshly at each decision point in the juvenile justice system – from arrest to sentencing (Hartney & Silvia, 2007).

Youth of color in California are sentenced to the adult system at rates shockingly out of proportion with their share of the youth population. While black youth were only 6 percent of California’s adolescent population (ages 10 – 19) in 2012 (California Department of Finance, 2014) they were more than a quarter (26%) of youth given adult court dispositions (California Department of Justice, 2012). Juvenile judges were more likely to find black and Latino youth unfit and transfer them to the adult system. More than three-quarters (80%) of fitness hearings for Latino youth and more than 75 percent of fitness hearings for black youth resulted in transfer to the adult system, while just over half (58.3%) of fitness hearings for white youth resulted in transfer (California Department of Justice, 2012).

Recent Progress

There have been some encouraging policy and law changes in recent years reversing the trend to treat transgressing youth as adults. As noted earlier, there have been three United States Supreme Court decisions in the span of just four years that reverse criminal practices and sentences that do not account for the differences between adolescents and adults. At the state level, since 2006, 23 states have passed laws to keep youth from being tried as adults and placed in adult facilities (Daugherty, 2013). Additionally, 11 states have passed laws that limit youth from being placed in adult jails and prisons. Eight states, including California, have changed mandatory minimum sentencing for youth being tried as adults. Four states have given juvenile courts more power to transfer cases of those youth filed on as adults back to the juvenile court system (Daugherty, 2013). Colorado and Indiana passed legislation limiting the offenses for which prosecutors could directly file juvenile cases in adult court, and Colorado eliminated the use of direct file entirely for youth ages 14 and 15 (Daugherty, 2013). Five states also expanded the use of “reverse waiver” or “reverse transfer” hearings, which allow judges to consider moving cases filed in adult court back to juvenile court for youth under 18 (Arya, 2011; Daugherty, 2013).

Two recent law changes in California reflect considerable progress in reversing the damaging trend of treating youth as adults. SB 9, enacted in 2012, provides most individuals sentenced to life without the possibility of parole who were under the age of 18 at the time of their crime the opportunity to petition their sentencing court for a new sentence. Because this legislation is also retroactive, it provides roughly 227 youth offenders sentenced to die in an adult prison the ability to petition for their parole (Duda, 2011). One year after the passage of SB 9, the California Legislature followed up with SB 260. Signed into law in 2013, SB 260 creates a new parole procedure for youth sentenced as adults who were under 18 at the time of their crime. This new procedure requires the state Board of Parole Hearings to review the cases of these youth sentenced to more than 15 years in prison and to give “great weight” to the fact that they were children when they committed their crime. SB 260 gives about 1,500 California prisoners who committed their crimes as minors and who served at least 15 years by January 2014 the ability to petition for early parole hearings (Thompson, 2013).

These changes represent a slow yet positive trend to eliminate the imposition of adult punishment on youth. But there is still much work to do. The brain science, the research on the detrimental effects of the adult system on youth, the racially discriminatory use of the practice, and the negative effect on public safety all make it clear that we need to completely reverse the ill-conceived trend of prosecuting youth as adults.
Policy Recommendations for California:

California should ultimately end the practice of prosecuting youth in adult courts. Toward that goal, we recommend the following changes in law:

1. **Eliminate Direct File.** Proposition 21 gave prosecutors broad discretion to file juvenile cases in adult courts, without a fitness hearing. It also expanded mandatory direct file provisions. Use of direct file has caused the rates of youth prosecution in the adult system to skyrocket, led to significant geographic disparities in adult court prosecution, and has had no measurable impact on public safety. Discretionary direct file is vulnerable to prosecutor abuse of power. Both mandatory and discretionary direct files should be disallowed.

2. **Collect and Publish Better Data.** California law does not currently require the collection of comprehensive information about the prosecution and incarceration of youth in the adult system in California. The collection of data and reporting on the number of youth held in state prisons who were under 21 at the time of their offense should be statutorily required. In addition, the Department of Justice should be mandated to collect and report on the number and outcomes of fitness hearings in juvenile courts, the number and outcomes of direct files, and the number and outcomes of all cases where youth are tried in adult court, all cross-referenced with gender, age, and race of the defendant and county of prosecution. Information on youth charged as adults prior juvenile adjudication history should also be reported.

3. **Restrict Judicial Waivers.** Approximately 25 percent of youth sent to the adult system in California in 2011 were a result of a judicial waiver after a “fitness” hearing. But of the youth who faced fitness hearings, an alarming 75 percent were waived to the adult court. Laws should be enacted prohibiting the use of judicial waivers for all first-time offenders. Additionally, presumptions regarding fitness hearings for youth charged as adults should be changed. Youth should be presumed fit to remain in the juvenile court and have to be found unfit by the court. Moreover, the rule that youth must be found fit in all of the five current criteria of the fitness hearings should be changed so that they must be found fit by a majority of the factors.


References:

Deitch, M., Barstow, A., Luckens, L., & Reyna, R. (2009). From time out to hard time: Young children in the adult criminal justice system. Austin, TX: The University of Texas at Austin, LBJ School of Public Affairs.


References:


Supreme Court of the United States

SYLLABUS

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader.


PADILLA v. KENTUCKY

CERTIORARI TO THE SUPREME COURT OF KENTUCKY

No. 08–651. Argued October 13, 2009—Decided March 31, 2010

Petitioner Padilla, a lawful permanent resident of the United States for over 40 years, faces deportation after pleading guilty to drug-distribution charges in Kentucky. In postconviction proceedings, he claims that his counsel not only failed to advise him of this consequence before he entered the plea, but also told him not to worry about deportation since he had lived in this country so long. He alleges that he would have gone to trial had he not received this incorrect advice. The Kentucky Supreme Court denied Padilla postconviction relief on the ground that the Sixth Amendment’s effective-assistance-of-counsel guarantee does not protect defendants from erroneous deportation advice because deportation is merely a “collateral” consequence of a conviction.

Held: Because counsel must inform a client whether his plea carries a risk of deportation, Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether he is entitled to relief depends on whether he has been prejudiced, a matter not addressed here. Pp. 2–18.

(a) Changes to immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms have expanded the class of deportable offenses and limited judges’ authority to alleviate deportation’s harsh consequences. Because the drastic measure of deportation or removal is now virtually inevitable for a vast number of noncitizens convicted of crimes, the importance of accurate legal advice for noncitizens accused of crimes has never been more important. Thus, as a matter of federal law, deportation is an integral part of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes. Pp. 2–6.
Syllabus

(b) Strickland v. Washington, 466 U. S. 668, applies to Padilla’s claim. Before deciding whether to plead guilty, a defendant is entitled to “the effective assistance of competent counsel.” McMann v. Richardson, 397 U. S. 759, 771. The Supreme Court of Kentucky rejected Padilla’s ineffectiveness claim on the ground that the advice he sought about deportation concerned only collateral matters. However, this Court has never distinguished between direct and collateral consequences in defining the scope of constitutionally “reasonable professional assistance” required under Strickland, 466 U. S., at 689. The question whether that distinction is appropriate need not be considered in this case because of the unique nature of deportation. Although removal proceedings are civil, deportation is intimately related to the criminal process, which makes it uniquely difficult to classify as either a direct or a collateral consequence. Because that distinction is thus ill-suited to evaluating a Strickland claim concerning the specific risk of deportation, advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. Pp. 7–9.

(c) To satisfy Strickland’s two-prong inquiry, counsel’s representation must fall “below an objective standard of reasonableness,” 466 U. S., at 688, and there must be “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,” id., at 694. The first, constitutional deficiency, is necessarily linked to the legal community’s practice and expectations. Id., at 688. The weight of prevailing professional norms supports the view that counsel must advise her client regarding the deportation risk. And this Court has recognized the importance to the client of “[p]reserving the . . . right to remain in the United States” and “preserving the possibility of” discretionary relief from deportation. INS v. St. Cyr, 533 U. S. 289, 323. Thus, this is not a hard case in which to find deficiency: The consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect. There will, however, undoubtedly be numerous situations in which the deportation consequences of a plea are unclear. In those cases, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry adverse immigration consequences. But when the deportation consequence is truly clear, as it was here, the duty to give correct advice is equally clear. Accepting Padilla’s allegations as true, he has sufficiently alleged constitutional deficiency to satisfy Strickland’s first prong. Whether he can satisfy the second prong, prejudice, is left for the Kentucky courts to consider in the first instance. Pp. 9–12.

(d) The Solicitor General’s proposed rule—that Strickland should
be applied to Padilla’s claim only to the extent that he has alleged affirmative advice—is unpersuasive. And though this Court must be careful about recognizing new grounds for attacking the validity of guilty pleas, the 25 years since Strickland was first applied to ineffective-assistance claims at the plea stage have shown that pleas are less frequently the subject of collateral challenges than convictions after a trial. Also, informed consideration of possible deportation can benefit both the State and noncitizen defendants, who may be able to reach agreements that better satisfy the interests of both parties. This decision will not open the floodgates to challenges of convictions obtained through plea bargains. Cf. Hill v. Lockhart, 474 U. S. 52, 58. Pp. 12–16.

253 S. W. 3d 482, reversed and remanded.

STEVENS, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. ALITO, J., filed an opinion concurring in the judgment, in which ROBERTS, C. J., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined.
Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 08-651

JOSE PADILLA, PETITIONER v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[March 31, 2010]

JUSTICE STEVENS delivered the opinion of the Court.

Petitioner Jose Padilla, a native of Honduras, has been a lawful permanent resident of the United States for more than 40 years. Padilla served this Nation with honor as a member of the U.S. Armed Forces during the Vietnam War. He now faces deportation after pleading guilty to the transportation of a large amount of marijuana in his tractor-trailer in the Commonwealth of Kentucky.1

In this postconviction proceeding, Padilla claims that his counsel not only failed to advise him of this consequence prior to his entering the plea, but also told him that he “‘did not have to worry about immigration status since he had been in the country so long.’” 253 S. W. 3d 482, 483 (Ky. 2008). Padilla relied on his counsel’s erroneous advice when he pleaded guilty to the drug charges that made his deportation virtually mandatory. He alleges that he would have insisted on going to trial if he had not received incorrect advice from his attorney.

Assuming the truth of his allegations, the Supreme

1Padilla’s crime, like virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under 8 U.S.C. §1227(a)(2)(B)(i).
Court of Kentucky denied Padilla postconviction relief without the benefit of an evidentiary hearing. The court held that the Sixth Amendment’s guarantee of effective assistance of counsel does not protect a criminal defendant from erroneous advice about deportation because it is merely a “collateral” consequence of his conviction. *Id.*, at 485. In its view, neither counsel’s failure to advise petitioner about the possibility of removal, nor counsel’s incorrect advice, could provide a basis for relief.

We granted certiorari, 555 U. S. ___ (2009), to decide whether, as a matter of federal law, Padilla’s counsel had an obligation to advise him that the offense to which he was pleading guilty would result in his removal from this country. We agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation. Whether he is entitled to relief depends on whether he has been prejudiced, a matter that we do not address.

The landscape of federal immigration law has changed dramatically over the last 90 years. While once there was only a narrow class of deportable offenses and judges wielded broad discretionary authority to prevent deportation, immigration reforms over time have expanded the class of deportable offenses and limited the authority of judges to alleviate the harsh consequences of deportation. The “drastic measure” of deportation or removal, *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10 (1948), is now virtually inevitable for a vast number of noncitizens convicted of crimes.

The Nation’s first 100 years was “a period of unimpeded immigration.” C. Gordon & H. Rosenfield, Immigration Law and Procedure §1.2(a), p. 5 (1959). An early effort to empower the President to order the deportation of those
immigrants he “judge[d] dangerous to the peace and safety of the United States,” Act of June 25, 1798, ch. 58, 1 Stat. 571, was short lived and unpopular. Gordon §1.2, at 5. It was not until 1875 that Congress first passed a statute barring convicts and prostitutes from entering the country, Act of Mar. 3, 1875, ch. 141, 18 Stat. 477. Gordon §1.2b, at 6. In 1891, Congress added to the list of excludable persons those “who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.” Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.\(^2\)

The Immigration and Nationality Act of 1917 (1917 Act) brought “radical changes” to our law. S. Rep. No. 1515, 81st Cong., 2d Sess., pp. 54–55 (1950). For the first time in our history, Congress made classes of noncitizens deportable based on conduct committed on American soil. Id., at 55. Section 19 of the 1917 Act authorized the deportation of “any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States . . . .” 39 Stat. 889. And §19 also rendered deportable noncitizen recidivists who commit two or more crimes of moral turpitude at any time after entry. Ibid. Congress did not, however, define the term “moral turpitude.”

While the 1917 Act was “radical” because it authorized deportation as a consequence of certain convictions, the Act also included a critically important procedural protection to minimize the risk of unjust deportation: At the time of sentencing or within 30 days thereafter, the sentencing judge in both state and federal prosecutions had the power to make a recommendation “that such alien

\(^2\)In 1907, Congress expanded the class of excluded persons to include individuals who “admit” to having committed a crime of moral turpitude. Act of Feb. 20, 1907, ch. 1194, 34 Stat. 899.
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shall not be deported.” *Id.*, at 890. This procedure, known as a judicial recommendation against deportation, or JRAD, had the effect of binding the Executive to prevent deportation; the statute was “consistently . . . interpreted as giving the sentencing judge conclusive authority to decide whether a particular conviction should be disregarded as a basis for deportation,” *Janvier v. United States*, 793 F.2d 449, 452 (CA2 1986). Thus, from 1917 forward, there was no such creature as an automatically deportable offense. Even as the class of deportable offenses expanded, judges retained discretion to ameliorate unjust results on a case-by-case basis.

Although narcotics offenses—such as the offense at issue in this case—provided a distinct basis for deportation as early as 1922, the JRAD procedure was generally

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3 As enacted, the statute provided:
“That the provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence or within thirty days thereafter, . . . make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this Act.” 1917 Act, 39 Stat. 889–890.
This provision was codified in 8 U. S. C. §1251(b) (1994 ed.) (transferred to §1227 (2006 ed.)). The judge’s nondeportation recommendation was binding on the Secretary of Labor and, later, the Attorney General after control of immigration removal matters was transferred from the former to the latter. *See Janvier v. United States*, 793 F.2d 449, 452 (CA2 1986).

4 Congress first identified narcotics offenses as a special category of crimes triggering deportation in the 1922 Narcotic Drug Act. Act of May 26, 1922, ch. 202, 42 Stat. 596. After the 1922 Act took effect, there was some initial confusion over whether a narcotics offense also had to be a crime of moral turpitude for an individual to be deportable. *See Weedin v. Moy Fat*, 8 F.2d 488, 489 (CA9 1925) (holding that an individual who committed narcotics offense was not deportable because offense did not involve moral turpitude). However, lower courts eventually agreed that the narcotics offense provision was “special,” *Chung
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available to avoid deportation in narcotics convictions. See United States v. O'Rourke, 213 F. 2d 759, 762 (CA8 1954). Except for “technical, inadvertent and insignificant violations of the laws relating to narcotics,” ibid., it appears that courts treated narcotics offenses as crimes involving moral turpitude for purposes of the 1917 Act’s broad JRAD provision. See ibid. (recognizing that until 1952 a JRAD in a narcotics case “was effective to prevent deportation” (citing Dang Nam v. Bryan, 74 F. 2d 379, 380–381 (CA9 1934))).

In light of both the steady expansion of deportable offenses and the significant ameliorative effect of a JRAD, it is unsurprising that, in the wake of Strickland v. Washington, 466 U. S. 668 (1984), the Second Circuit held that the Sixth Amendment right to effective assistance of counsel applies to a JRAD request or lack thereof, see Janvier, 793 F. 2d 449. See also United States v. Castro, 26 F. 3d 557 (CA5 1994). In its view, seeking a JRAD was “part of the sentencing” process, Janvier, 793 F. 2d, at 452, even if deportation itself is a civil action. Under the Second Circuit’s reasoning, the impact of a conviction on a noncitizen’s ability to remain in the country was a central issue to be resolved during the sentencing process—not merely a collateral matter outside the scope of counsel’s duty to provide effective representation.

However, the JRAD procedure is no longer part of our law. Congress first circumscribed the JRAD provision in the 1952 Immigration and Nationality Act (INA),\(^5\) and in

\(^5\)The Act separately codified the moral turpitude offense provision and the narcotics offense provision within 8 U. S. C. §1251(a) (1994 ed.) under subsections (a)(4) and (a)(11), respectively. See 66 Stat. 201, 204,
1990 Congress entirely eliminated it, 104 Stat. 5050. In 1996, Congress also eliminated the Attorney General’s authority to grant discretionary relief from deportation, 110 Stat. 3009–596, an authority that had been exercised to prevent the deportation of over 10,000 noncitizens during the 5-year period prior to 1996, INS v. St. Cyr, 533 U. S. 289, 296 (2001). Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses. See 8 U. S. C. §1229b. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance. See §1101(a)(43)(B); §1228.

These changes to our immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.

206. The JRAD procedure, codified in 8 U. S. C. §1251(b) (1994 ed.), applied only to the “provisions of subsection (a)(4),” the crimes-of-moral-turpitude provision. 66 Stat. 208; see United States v. O’Rourke, 213 F. 2d 759, 762 (CA8 1954) (recognizing that, under the 1952 Act, narcotics offenses were no longer eligible for JRADs).

6The changes to our immigration law have also involved a change in nomenclature; the statutory text now uses the term “removal” rather than “deportation.” See Calcano-Martinez v. INS, 533 U. S. 348, 350, n. 1 (2001).

7See Brief for Asian American Justice Center et al. as Amici Curiae 12–27 (providing real-world examples).
Before deciding whether to plead guilty, a defendant is entitled to “the effective assistance of competent counsel.” *McMann v. Richardson*, 397 U. S. 759, 771 (1970); *Strickland*, 466 U. S., at 686. The Supreme Court of Kentucky rejected Padilla’s ineffectiveness claim on the ground that the advice he sought about the risk of deportation concerned only collateral matters, *i.e.*, those matters not within the sentencing authority of the state trial court.  

253 S. W. 3d, at 483–484 (citing *Commonwealth v. Frartado*, 170 S. W. 3d 384 (2005)). In its view, “collateral consequences are outside the scope of representation required by the Sixth Amendment,” and, therefore, the “failure of defense counsel to advise the defendant of possible deportation consequences is not cognizable as a claim for ineffective assistance of counsel.” 253 S. W. 3d, at 483. The Kentucky high court is far from alone in this view.  

8There is some disagreement among the courts over how to distinguish between direct and collateral consequences. See Roberts, Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process, 95 Iowa L. Rev. 119, 124, n. 15 (2009). The disagreement over how to apply the direct/collateral distinction has no bearing on the disposition of this case because, as even JUSTICE ALITO agrees, counsel must, at the very least, advise a noncitizen “defendant that a criminal conviction may have adverse immigration consequences,” post, at 1 (opinion concurring in judgment). See also post, at 14 (“I do not mean to suggest that the Sixth Amendment does no more than require defense counsel to avoid misinformation”). In his concurring opinion, JUSTICE ALITO has thus departed from the strict rule applied by the Supreme Court of Kentucky and in the two federal cases that he cites, post, at 2.

We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally “reasonable professional assistance” required under *Strickland*, 466 U. S., at 689. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

We have long recognized that deportation is a particularly severe “penalty,” *Fong Yue Ting v. United States*, 149 U. S. 698, 740 (1893); but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, see *INS v. Lopez-Mendoza*, 468 U. S. 1032, 1038 (1984), deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century, see Part I, supra, at 2–7. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders. Thus, we find it “most difficult” to divorce the penalty from the conviction in the deportation context. *United States v. Russell*, 686 F. 2d 35, 38 (CADC 1982). Moreover, we are quite confident that noncitizen defendants facing a risk of deportation for a particular offense find it even more difficult. See *St. Cyr*, 533 U. S., at 322 (“There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions”).

Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction

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is thus ill-suited to evaluating a Strickland claim concerning the specific risk of deportation. We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel. Strickland applies to Padilla’s claim.

III

Under Strickland, we first determine whether counsel’s representation “fell below an objective standard of reasonableness.” 466 U. S., at 688. Then we ask whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id., at 694. The first prong—constitutional deficiency—is necessarily linked to the practice and expectations of the legal community: “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.” Id., at 688. We long have recognized that “[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . . .” Ibid.; Bobby v. Van Hook, 558 U. S. ___, ___ (2009) (per curiam) (slip op., at 3); Florida v. Nixon, 543 U. S. 175, 191, and n. 6 (2004); Wiggins v. Smith, 539 U. S. 510, 524 (2003); Williams v. Taylor, 529 U. S. 362, 396 (2000). Although they are “only guides,” Strickland, 466 U. S., at 688, and not “inexorable commands,” Bobby, 558 U. S., at ___ (slip op., at 5), these standards may be valuable measures of the prevailing professional norms of effective representation, especially as these standards have been adapted to deal with the intersection of modern criminal prosecutions and immigration law.

The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation. National Legal Aid and Defender Assn., Performance Guidelines for Criminal Representation §6.2 (1995); G. Herman, Plea Bargaining §3.03,
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We too have previously recognized that “[p]reserving the client’s right to remain in the United States may be more important to the client than any potential jail sentence.” St. Cyr, 533 U.S., at 323 (quoting 3 Criminal Defense Techniques §§60A.01, 60A.02[2] (1999)). Likewise, we have recognized that “preserving the possibility of” discretionary relief from deportation under §212(c) of the 1952 INA, 66 Stat. 187, repealed by Congress in 1996, “would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.” St. Cyr, 533 U.S., at 323. We
expected that counsel who were unaware of the discretionary relief measures would “follo[w] the advice of numerous practice guides” to advise themselves of the importance of this particular form of discretionary relief. *Ibid.*, n. 50.

In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence for Padilla’s conviction. See 8 U. S. C. §1227(a)(2)(B)(i) (“Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States or a foreign country relating to a controlled substance . . . , other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable”). Padilla’s counsel could have easily determined that his plea would make him eligible for deportation simply from reading the text of the statute, which addresses not some broad classification of crimes but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offenses. Instead, Padilla’s counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency: The consequences of Padilla’s plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, and his counsel’s advice was incorrect.

Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it. There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios
posited by JUSTICE ALITO), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.\textsuperscript{10} But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Accepting his allegations as true, Padilla has sufficiently alleged constitutional deficiency to satisfy the first prong of \textit{Strickland}. Whether Padilla is entitled to relief on his claim will depend on whether he can satisfy \textit{Strickland}'s second prong, prejudice, a matter we leave to the Kentucky courts to consider in the first instance.

IV

The Solicitor General has urged us to conclude that \textit{Strickland} applies to Padilla’s claim only to the extent that he has alleged affirmative misadvice. In the United States’ view, “counsel is not constitutionally required to provide advice on matters that will not be decided in the criminal case . . . ,” though counsel is required to provide accurate advice if she chooses to discusses these matters. Brief for United States as Amicus Curiae 10.

Respondent and Padilla both find the Solicitor General’s proposed rule unpersuasive, although it has support among the lower courts. See, \textit{e.g.}, \textit{United States v. Couto}, 311 F. 3d 179, 188 (CA2 2002); \textit{United States v. Kwan}, 407 F. 3d 1005 (CA9 2005); \textit{Sparks v. Sowders}, 852 F. 2d 882 (CA6 1988); \textit{United States v. Russell}, 686 F. 2d 35 (CADC 1982); \textit{State v. Rojas-Martinez}, 2005 UT 86, 125 P. 3d 930, 935; \textit{In re Resendiz}, 25 Cal. 4th 230, 19 P. 3d 1171 (2001). Kentucky describes these decisions isolating an affirmative misadvice claim as “result-driven, incestuous . . . \textsuperscript{10}As JUSTICE ALITO explains at length, deportation consequences are often unclear. Lack of clarity in the law, however, does not obviate the need for counsel to say something about the possibility of deportation, even though it will affect the scope and nature of counsel’s advice.
[and] completely lacking in legal or rational bases.” Brief for Respondent 31. We do not share that view, but we agree that there is no relevant difference “between an act of commission and an act of omission” in this context. Id., at 30; Strickland, 466 U. S., at 690 (“The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance”); see also State v. Paredez, 2004–NMSC–036, 136 N. M. 533, 538–539.

A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of “the advantages and disadvantages of a plea agreement.” Libretti v. United States, 516 U. S. 29, 50–51 (1995). When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all.\textsuperscript{11} Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so “clearly satisfies the first prong of the Strickland analysis.” Hill v. Lockhart, 474 U. S. 52, 62 (1985) (White, J.,

\textsuperscript{11} As the Commonwealth conceded at oral argument, were a defendant’s lawyer to know that a particular offense would result in the client’s deportation and that, upon deportation, the client and his family might well be killed due to circumstances in the client’s home country, any decent attorney would inform the client of the consequences of his plea. Tr. of Oral Arg. 37–38. We think the same result should follow when the stakes are not life and death but merely “banishment or exile,” Delgadillo v. Carmichael, 332 U. S. 388, 390–391 (1947).
concurring in judgment).

We have given serious consideration to the concerns that the Solicitor General, respondent, and amici have stressed regarding the importance of protecting the finality of convictions obtained through guilty pleas. We confronted a similar “floodgates” concern in *Hill*, see *id.*, at 58, but nevertheless applied *Strickland* to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.\(^\text{12}\)

A flood did not follow in that decision’s wake. Surmounting *Strickland*’s high bar is never an easy task. See, e.g., 466 U.S., at 689 (“Judicial scrutiny of counsel’s performance must be highly deferential”); *id.*, at 693 (observing that “[a]torney errors . . . are as likely to be utterly harmless in a particular case as they are to be prejudicial”). Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances. See *Roe v. Flores-Ortega*, 528 U.S. 470, 480, 486 (2000). There is no reason to doubt that lower courts—now quite experienced with applying *Strickland*—can effectively and efficiently use its framework to

\(^{12}\) However, we concluded that, even though *Strickland* applied to petitioner’s claim, he had not sufficiently alleged prejudice to satisfy *Strickland*’s second prong. *Hill*, 474 U.S., at 59–60. This disposition further underscores the fact that it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland*’s prejudice prong.

Justice Alito believes that the Court misreads *Hill*, post, at 10–11. In *Hill*, the Court recognized—for the first time—that *Strickland* applies to advice respecting a guilty plea. 474 U.S., at 58 (“We hold, therefore, that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel”). It is true that *Hill* does not control the question before us. But its import is nevertheless clear. Whether *Strickland* applies to Padilla’s claim follows from *Hill*, regardless of the fact that the *Hill* Court did not resolve the particular question respecting misadvice that was before it.
separate specious claims from those with substantial merit.

It seems unlikely that our decision today will have a significant effect on those convictions already obtained as the result of plea bargains. For at least the past 15 years, professional norms have generally imposed an obligation on counsel to provide advice on the deportation consequences of a client’s plea. See, supra, at 11–13. We should, therefore, presume that counsel satisfied their obligation to render competent advice at the time their clients considered pleading guilty. Strickland, 466 U. S., at 689.

Likewise, although we must be especially careful about recognizing new grounds for attacking the validity of guilty pleas, in the 25 years since we first applied Strickland to claims of ineffective assistance at the plea stage, practice has shown that pleas are less frequently the subject of collateral challenges than convictions obtained after a trial. Pleas account for nearly 95% of all criminal convictions. But they account for only approximately 30% of the habeas petitions filed. The nature of relief secured by a successful collateral challenge to a guilty plea—an opportunity to withdraw the plea and proceed to trial—imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. Thus, a different calculus informs whether it is wise to challenge a

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13 See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 2003, p. 418 (31st ed. 2005) (Table 5.17) (only approximately 5%, or 8,612 out of 68,533, of federal criminal prosecutions go to trial); id., at 450 (Table 5.46) (only approximately 5% of all state felony criminal prosecutions go to trial).

14 See V. Flango, National Center for State Courts, Habeas Corpus in State and Federal Courts 36–38 (1994) (demonstrating that 5% of defendants whose conviction was the result of a trial account for approximately 70% of the habeas petitions filed).
guilty plea in a habeas proceeding because, ultimately, the challenge may result in a less favorable outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.

Finally, informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

In sum, we have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel. Hill, 474 U. S., at 57; see also Richardson, 397 U. S., at 770–771. The severity of deportation—“the equivalent of banishment or exile,” Delgadillo v. Carmichael, 332 U. S. 388, 390–391 (1947)—only underscores how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation. 15

15To this end, we find it significant that the plea form currently used in Kentucky courts provides notice of possible immigration conse-
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V

It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the “mercies of incompetent counsel.” Richardson, 397 U. S., at 771. To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

Taking as true the basis for his motion for postconviction relief, we have little difficulty concluding that Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether Padilla is entitled to relief will depend on whether he can demonstrate prejudice as a result thereof, a question we do not reach because it was not passed on below. See Verizon Communications Inc. v. FCC, 535 U. S. 467, 530 (2002).

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The judgment of the Supreme Court of Kentucky is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.
ALITO, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 08–651

JOSE PADILLA, PETITIONER v. KENTUCKY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

[March 31, 2010]

JUSTICE ALITO, with whom THE CHIEF JUSTICE joins, concurring in the judgment.

I concur in the judgment because a criminal defense attorney fails to provide effective assistance within the meaning of Strickland v. Washington, 466 U.S. 668 (1984), if the attorney misleads a noncitizen client regarding the removal consequences of a conviction. In my view, such an attorney must (1) refrain from unreasonably providing incorrect advice and (2) advise the defendant that a criminal conviction may have adverse immigration consequences and that, if the alien wants advice on this issue, the alien should consult an immigration attorney. I do not agree with the Court that the attorney must attempt to explain what those consequences may be. As the Court concedes, “[i]mmigration law can be complex”; “it is a legal specialty of its own”; and “[s]ome members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it.” Ante, at 11. The Court nevertheless holds that a criminal defense attorney must provide advice in this specialized area in those cases in which the law is “succinct and straightforward”—but not, perhaps, in other situations. Ante, at 11–12. This vague, halfway test will lead to much confusion and needless litigation.
I

Under *Strickland*, an attorney provides ineffective assistance if the attorney’s representation does not meet reasonable professional standards. 466 U.S., at 688. Until today, the longstanding and unanimous position of the federal courts was that reasonable defense counsel generally need only advise a client about the *direct consequences* of a criminal conviction. See, e.g., *United States v. Gonzalez*, 202 F. 3d 20, 28 (CA1 2000) (ineffective-assistance-of-counsel claim fails if “based on an attorney’s failure to advise a client of his plea’s immigration consequences”); *United States v. Banda*, 1 F. 3d 354, 355 (CA5 1993) (holding that “an attorney’s failure to advise a client that deportation is a possible consequence of a guilty plea does not constitute ineffective assistance of counsel”); see generally Chin & Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 699 (2002) (hereinafter Chin & Holmes) (noting that “virtually all jurisdictions”—including “eleven federal circuits, more than thirty states, and the District of Columbia”—“hold that defense counsel need not discuss with their clients the collateral consequences of a conviction,” including deportation). While the line between “direct” and “collateral” consequences is not always clear, see ante, at 7, n. 8, the collateral-consequences rule expresses an important truth: Criminal defense attorneys have expertise regarding the conduct of criminal proceedings. They are not expected to possess—and very often do not possess—expertise in other areas of the law, and it is unrealistic to expect them to provide expert advice on matters that lie outside their area of training and experience.

This case happens to involve removal, but criminal convictions can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess fire-
arms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. Chin & Holmes 705–706. A criminal conviction may also severely damage a defendant’s reputation and thus impair the defendant’s ability to obtain future employment or business opportunities. All of those consequences are “serious[,]” see ante, at 17, but this Court has never held that a criminal defense attorney’s Sixth Amendment duties extend to providing advice about such matters.

The Court tries to justify its dramatic departure from precedent by pointing to the views of various professional organizations. See ante, at 9 (“The weight of prevailing professional norms supports the view that counsel must advise her client regarding the risk of deportation”). However, ascertaining the level of professional competence required by the Sixth Amendment is ultimately a task for the courts. E.g., Roe v. Flores-Ortega, 528 U. S. 470, 477 (2000). Although we may appropriately consult standards promulgated by private bar groups, we cannot delegate to these groups our task of determining what the Constitution commands. See Strickland, supra, at 688 (explaining that “[p]revailing norms of practice as reflected in American Bar Association standards . . . are guides to determining what is reasonable, but they are only guides”). And we must recognize that such standards may represent only the aspirations of a bar group rather than an empirical assessment of actual practice.

Even if the only relevant consideration were “prevailing professional norms,” it is hard to see how those norms can support the duty the Court today imposes on defense counsel. Because many criminal defense attorneys have little understanding of immigration law, see ante, at 11, it should follow that a criminal defense attorney who refrains from providing immigration advice does not violate prevailing professional norms. But the Court’s opinion would not just require defense counsel to warn the client
of a general *risk* of removal; it would also require counsel in at least some cases, to specify what the removal *consequences* of a conviction would be. See *ante*, at 11–12.

The Court’s new approach is particularly problematic because providing advice on whether a conviction for a particular offense will make an alien removable is often quite complex. “Most crimes affecting immigration status are not specifically mentioned by the [Immigration and Nationality Act (INA)], but instead fall under a broad category of crimes, such as *crimes involving moral turpitude* or *aggravated felonies.*” M. Garcia & L. Eig, CRS Report for Congress, Immigration Consequences of Criminal Activity (Sept. 20, 2006) (summary) (emphasis in original). As has been widely acknowledged, determining whether a particular crime is an “aggravated felony” or a “crime involving moral turpitude ([CIMT])” is not an easy task. See R. McWhirter, ABA, The Criminal Lawyer’s Guide to Immigration Law: Questions and Answers 128 (2d ed. 2006) (hereinafter ABA Guidebook) (“Because of the increased complexity of aggravated felony law, this edition devotes a new [30-page] chapter to the subject”); *id.*, §5.2, at 146 (stating that the aggravated felony list at 8 U. S. C. §1101(a)(43) is not clear with respect to several of the listed categories, that “the term ‘aggravated felonies’ can include misdemeanors,” and that the determination of whether a crime is an “aggravated felony” is made “even more difficult” because “several agencies and courts interpret the statute,” including Immigration and Customs Enforcement, the Board of Immigration Appeals (BIA), and Federal Circuit and district courts considering immigration-law and criminal-law issues); ABA Guidebook §4.65, at 130 (“Because nothing is ever simple with immigration law, the terms ‘conviction,’ ‘moral turpitude,’ and ‘single scheme of criminal misconduct’ are terms of art”); *id.*, §4.67, at 130 (“[T]he term ‘moral turpitude’ evades precise definition”).
Defense counsel who consults a guidebook on whether a particular crime is an “aggravated felony” will often find that the answer is not “easily ascertained.” For example, the ABA Guidebook answers the question “Does simple possession count as an aggravated felony?” as follows: “Yes, at least in the Ninth Circuit.” §5.35, at 160 (emphasis added). After a dizzying paragraph that attempts to explain the evolution of the Ninth Circuit’s view, the ABA Guidebook continues: “Adding to the confusion, however, is that the Ninth Circuit has conflicting opinions depending on the context on whether simple drug possession constitutes an aggravated felony under 8 U.S.C. §1101(a)(43).” Id., §5.35, at 161 (citing cases distinguishing between whether a simple possession offense is an aggravated felony “for immigration purposes” or for “sentencing purposes”). The ABA Guidebook then proceeds to explain that “attempted possession,” id., §5.36, at 161 (emphasis added), of a controlled substance is an aggravated felony, while “[c]onviction under the federal accessory after the fact statute is probably not an aggravated felony, but a conviction for accessory after the fact to the manufacture of methamphetamine is an aggravated felony,” id., §537, at 161 (emphasis added). Conspiracy or attempt to commit drug trafficking are aggravated felonies, but “[s]olicitation is not a drug-trafficking offense because a generic solicitation offense is not an offense related to a controlled substance and therefore not an aggravated felony.” Id., §5.41, at 162.

Determining whether a particular crime is one involving moral turpitude is no easier. See id., at 134 (“Writing bad checks may or may not be a CIMT” (emphasis added)); ibid. (“[R]eckless assault coupled with an element of injury, but not serious injury, is probably not a CIMT” (emphasis added)); id., at 135 (misdemeanor driving under the influence is generally not a CIMT, but may be a CIMT if the DUI results in injury or if the driver knew that his
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license had been suspended or revoked); id., at 136 (“If there is no element of actual injury, the endangerment offense may not be a CIMT” (emphasis added)); ibid. (“Whether [a child abuse] conviction involves moral turpitude may depend on the subsection under which the individual is convicted. Child abuse done with criminal negligence probably is not a CIMT” (emphasis added)).

Many other terms of the INA are similarly ambiguous or may be confusing to practitioners not versed in the intricacies of immigration law. To take just a few examples, it may be hard, in some cases, for defense counsel even to determine whether a client is an alien, 1 or whether a particular state disposition will result in a “conviction” for purposes of federal immigration law. 2 The task of offering advice about the immigration consequences of a criminal conviction is further complicated by other problems, including significant variations among Circuit interpretations of federal immigration statutes; the frequency with

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1 Citizens are not deportable, but “[q]uestions of citizenship are not always simple.” ABA Guidebook §4.20, at 113 (explaining that U.S. citizenship conferred by blood is “‘derivative,’” and that “[d]erivative citizenship depends on a number of confusing factors, including whether the citizen parent was the mother or father, the immigration laws in effect at the time of the parents’ and/or defendant’s birth, and the parents’ marital status”).

2 “A disposition that is not a ‘conviction,’ under state law may still be a ‘conviction’ for immigration purposes.” Id., §4.32, at 117 (citing Matter of Salazar, 23 I. & N. Dec. 223, 231 (BIA 2002) (en banc)). For example, state law may define the term “conviction” not to include a deferred adjudication, but such an adjudication would be deemed a conviction for purposes of federal immigration law. See ABA Guidebook §4.37; accord, D. Kesselbrenner & L. Rosenberg, Immigration Law and Crimes §2:1, p. 2–2 (2008) (hereinafter Immigration Law and Crimes) (“A practitioner or respondent will not even know whether the Department of Homeland Security (DHS) or the Executive Office for Immigration Review (EOIR) will treat a particular state disposition as a conviction for immigration purposes. In fact, the [BIA] treats certain state criminal dispositions as convictions even though the state treats the same disposition as a dismissal”).
which immigration law changes; different rules governing the immigration consequences of juvenile, first-offender, and foreign convictions; and the relationship between the “length and type of sentence” and the determination “whether [an alien] is subject to removal, eligible for relief from removal, or qualified to become a naturalized citizen,” Immigration Law and Crimes §2:1, at 2–2 to 2–3.

In short, the professional organizations and guidebooks on which the Court so heavily relies are right to say that “nothing is ever simple with immigration law”—including the determination whether immigration law clearly makes a particular offense removable. ABA Guidebook §4.65, at 130; Immigration Law and Crimes §2:1. I therefore cannot agree with the Court’s apparent view that the Sixth Amendment requires criminal defense attorneys to provide immigration advice.

The Court tries to downplay the severity of the burden it imposes on defense counsel by suggesting that the scope of counsel’s duty to offer advice concerning deportation consequences may turn on how hard it is to determine those consequences. Where “the terms of the relevant immigration statute are succinct, clear, and explicit in defining the removal consequence[s]” of a conviction, the Court says, counsel has an affirmative duty to advise the client that he will be subject to deportation as a result of the plea. Ante, at 11. But “[w]hen the law is not succinct and straightforward . . ., a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” Ante, at 11–12. This approach is problematic for at least four reasons.

First, it will not always be easy to tell whether a particular statutory provision is “succinct, clear, and explicit.” How can an attorney who lacks general immigration law expertise be sure that a seemingly clear statutory provision actually means what it seems to say when read in
isolation? What if the application of the provision to a particular case is not clear but a cursory examination of case law or administrative decisions would provide a definitive answer? See Immigration Law and Crimes §2:1, at 2–2 ("Unfortunately, a practitioner or respondent cannot tell easily whether a conviction is for a removable offense. . . . [T]he cautious practitioner or apprehensive respondent will not know conclusively the future immigration consequences of a guilty plea").

Second, if defense counsel must provide advice regarding only one of the many collateral consequences of a criminal conviction, many defendants are likely to be misled. To take just one example, a conviction for a particular offense may render an alien excludable but not removable. If an alien charged with such an offense is advised only that pleading guilty to such an offense will not result in removal, the alien may be induced to enter a guilty plea without realizing that a consequence of the plea is that the alien will be unable to reenter the United States if the alien returns to his or her home country for any reason, such as to visit an elderly parent or to attend a funeral. See ABA Guidebook §4.14, at 111 ("Often the alien is both excludable and removable. At times, however, the lists are different. Thus, the oddity of an alien that is inadmissible but not deportable. This alien should not leave the United States because the government will not let him back in" (emphasis in original)). Incomplete legal advice may be worse than no advice at all because it may mislead and may dissuade the client from seeking advice from a more knowledgeable source.

Third, the Court’s rigid constitutional rule could inadvertently head off more promising ways of addressing the underlying problem—such as statutory or administrative reforms requiring trial judges to inform a defendant on the record that a guilty plea may carry adverse immigration consequences. As amici point out, “28 states and the
District of Columbia have already adopted rules, plea forms, or statutes requiring courts to advise criminal defendants of the possible immigration consequences of their pleas.” Brief for State of Louisiana et al. 25; accord, Chin & Holmes 708 (“A growing number of states require advice about deportation by statute or court rule”). A nonconstitutional rule requiring trial judges to inform defendants on the record of the risk of adverse immigration consequences can ensure that a defendant receives needed information without putting a large number of criminal convictions at risk; and because such a warning would be given on the record, courts would not later have to determine whether the defendant was misrepresenting the advice of counsel. Likewise, flexible statutory procedures for withdrawing guilty pleas might give courts appropriate discretion to determine whether the interests of justice would be served by allowing a particular defendant to withdraw a plea entered into on the basis of incomplete information. Cf. United States v. Russell, 686 F.2d 35, 39–40 (CADC 1982) (explaining that a district court’s discretion to set aside a guilty plea under the Federal Rules of Criminal Procedure should be guided by, among other considerations, “the possible existence of prejudice to the government’s case as a result of the defendant’s untimely request to stand trial” and “the strength of the defendant’s reason for withdrawing the plea, including whether the defendant asserts his innocence of the charge”).

Fourth, the Court’s decision marks a major upheaval in Sixth Amendment law. This Court decided Strickland in 1984, but the majority does not cite a single case, from this or any other federal court, holding that criminal defense counsel’s failure to provide advice concerning the removal consequences of a criminal conviction violates a defendant’s Sixth Amendment right to counsel. As noted above, the Court’s view has been rejected by every Federal Court
of Appeals to have considered the issue thus far. See, e.g., Gonzalez, 202 F. 3d, at 28; Banda, 1 F. 3d, at 355; Chin & Holmes 697, 699. The majority appropriately acknowledges that the lower courts are “now quite experienced with applying Strickland,” ante, at 14, but it casually dismisses the longstanding and unanimous position of the lower federal courts with respect to the scope of criminal defense counsel’s duty to advise on collateral consequences.

The majority seeks to downplay its dramatic expansion of the scope of criminal defense counsel’s duties under the Sixth Amendment by claiming that this Court in Hill v. Lockhart, 474 U. S. 52 (1985), similarly “applied Strickland to a claim that counsel had failed to advise the client regarding his parole eligibility before he pleaded guilty.” Ante, at 14. That characterization of Hill obscures much more than it reveals. The issue in Hill was whether a criminal defendant’s Sixth Amendment right to counsel was violated where counsel misinformed the client about his eligibility for parole. The Court found it “unnecessary to determine whether there may be circumstances under which erroneous advice by counsel as to parole eligibility may be deemed constitutionally ineffective assistance of counsel, because in the present case we conclude that petitioner’s allegations are insufficient to satisfy the Strickland v. Washington requirement of ‘prejudice.’” 474 U. S., at 60. Given that Hill expressly and unambiguously refused to decide whether criminal defense counsel must avoid misinforming his or her client as to one consequence of a criminal conviction (parole eligibility), that case plainly provides no support whatsoever for the proposition that counsel must affirmatively advise his or her client as to another collateral consequence (removal). By the Court’s strange logic, Hill would support its decision here even if the Court had held that misadvice concerning parole eligibility does not make counsel’s performance
objectively unreasonable. After all, the Court still would have “applied Strickland” to the facts of the case at hand.

II

While mastery of immigration law is not required by Strickland, several considerations support the conclusion that affirmative misadvice regarding the removal consequences of a conviction may constitute ineffective assistance.

First, a rule prohibiting affirmative misadvice regarding a matter as crucial to the defendant’s plea decision as deportation appears faithful to the scope and nature of the Sixth Amendment duty this Court has recognized in its past cases. In particular, we have explained that “a guilty plea cannot be attacked as based on inadequate legal advice unless counsel was not ‘a reasonably competent attorney’ and the advice was not ‘within the range of competence demanded of attorneys in criminal cases.’” Strickland, 466 U. S., at 687 (quoting McMann v. Richardson, 397 U. S. 759, 770, 771 (1970); emphasis added). As the Court appears to acknowledge, thorough understanding of the intricacies of immigration law is not “within the range of competence demanded of attorneys in criminal cases.” See ante, at 11 (“Immigration law can be complex, and it is a legal specialty of its own. Some members of the bar who represent clients facing criminal charges, in either state or federal court or both, may not be well versed in it”). By contrast, reasonably competent attorneys should know that it is not appropriate or responsible to hold themselves out as authorities on a difficult and complicated subject matter with which they are not familiar. Candor concerning the limits of one’s professional expertise, in other words, is within the range of duties reasonably expected of defense attorneys in criminal cases. As the dissenting judge on the Kentucky Supreme Court put it, “I do not believe it is too much of a burden to place
on our defense bar the duty to say, ‘I do not know.’” 253 S. W. 3d 482, 485 (2008).

Second, incompetent advice distorts the defendant’s decisionmaking process and seems to call the fairness and integrity of the criminal proceeding itself into question. See Strickland, 466 U. S., at 686 (“In giving meaning to the requirement [of effective assistance of counsel], we must take its purpose—to ensure a fair trial—as the guide”). When a defendant opts to plead guilty without definitive information concerning the likely effects of the plea, the defendant can fairly be said to assume the risk that the conviction may carry indirect consequences of which he or she is not aware. That is not the case when a defendant bases the decision to plead guilty on counsel’s express misrepresentation that the defendant will not be removable. In the latter case, it seems hard to say that the plea was entered with the advice of constitutionally competent counsel—or that it embodies a voluntary and intelligent decision to forsake constitutional rights. See ibid. (“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so under-}

Third, a rule prohibiting unreasonable misadvice regarding exceptionally important collateral matters would not deter or interfere with ongoing political and administrative efforts to devise fair and reasonable solutions to the difficult problem posed by defendants who plead guilty without knowing of certain important collateral consequences.

Finally, the conclusion that affirmative misadvice regarding the removal consequences of a conviction can give rise to ineffective assistance would, unlike the Court’s approach, not require any upheaval in the law. As the Solicitor General points out, “[t]he vast majority of the
lower courts considering claims of ineffective assistance in the plea context have [distinguished] between defense counsel who remain silent and defense counsel who give affirmative misadvice.” Brief for United States as Amicus Curiae 8 (citing cases). At least three Courts of Appeals have held that affirmative misadvice on immigration matters can give rise to ineffective assistance of counsel, at least in some circumstances. 3 And several other Circuits have held that affirmative misadvice concerning nonimmigration consequences of a conviction can violate the Sixth Amendment even if those consequences might be deemed “collateral.” 4 By contrast, it appears that no court of appeals holds that affirmative misadvice concerning collateral consequences in general and removal in particular can never give rise to ineffective assistance. In short,

3 See United States v. Kwan, 407 F. 3d 1005, 1015–1017 (CA9 2005); United States v. Couto, 311 F. 3d 179, 188 (CA2 2002); Downs-Morgan v. United States, 765 F. 2d 1534, 1540–1541 (CA11 1985) (limiting holding to the facts of the case); see also Santos-Sanchez v. United States, 548 F. 3d 327, 333–334 (CA5 2008) (concluding that counsel’s advice was not objectively unreasonable where counsel did not purport to answer questions about immigration law, did not claim any expertise in immigration law, and simply warned of “possible” deportation consequence; use of the word “possible” was not an affirmative misrepresentation, even though it could indicate that deportation was not a certain consequence).

4 See Hill v. Lockhart, 894 F. 2d 1009, 1010 (CA8 1990) (en banc) (“[T]he erroneous parole-eligibility advice given to Mr. Hill was ineffective assistance of counsel under Strickland v. Washington”); Sparks v. Souders, 852 F. 2d 882, 885 (CA6 1988) (“G]ross misadvice concerning parole eligibility can amount to ineffective assistance of counsel”); id., at 886 (Kennedy, J., concurring) (“When the maximum possible exposure is overstated, the defendant might well be influenced to accept a plea agreement he would otherwise reject”); Strader v. Garrison, 611 F. 2d 61, 65 (CA4 1979) (“[T]hough parole eligibility dates are collateral consequences of the entry of a guilty plea of which a defendant need not be informed if he does not inquire, when he is grossly misinformed about it by his lawyer, and relies upon that misinformation, he is deprived of his constitutional right to counsel”).
the considered and thus far unanimous view of the lower federal courts charged with administering *Strickland* clearly supports the conclusion that that Kentucky Supreme Court’s position goes too far.

In concluding that affirmative misadvice regarding the removal consequences of a criminal conviction may constitute ineffective assistance, I do not mean to suggest that the Sixth Amendment does no more than require defense counsel to avoid misinformation. When a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on that subject. By putting the client on notice of the danger of removal, such advice would significantly reduce the chance that the client would plead guilty under a mistaken premise.

III

In sum, a criminal defense attorney should not be required to provide advice on immigration law, a complex specialty that generally lies outside the scope of a criminal defense attorney’s expertise. On the other hand, any competent criminal defense attorney should appreciate the extraordinary importance that the risk of removal might have in the client’s determination whether to enter a guilty plea. Accordingly, unreasonable and incorrect information concerning the risk of removal can give rise to an ineffectiveness claim. In addition, silence alone is not enough to satisfy counsel’s duty to assist the client. Instead, an alien defendant’s Sixth Amendment right to counsel is satisfied if defense counsel advises the client that a conviction may have immigration consequences, that immigration law is a specialized field, that the attorney is not an immigration lawyer, and that the client should consult an immigration specialist if the client wants advice on that subject.
In the best of all possible worlds, criminal defendants contemplating a guilty plea ought to be advised of all serious collateral consequences of conviction, and surely ought not to be misadvised. The Constitution, however, is not an all-purpose tool for judicial construction of a perfect world; and when we ignore its text in order to make it that, we often find ourselves swinging a sledge where a tack hammer is needed.

The Sixth Amendment guarantees the accused a lawyer “for his defense” against a “criminal prosecution”—not for sound advice about the collateral consequences of conviction. For that reason, and for the practical reasons set forth in Part I of JUSTICE ALITO’s concurrence, I dissent from the Court’s conclusion that the Sixth Amendment requires counsel to provide accurate advice concerning the potential removal consequences of a guilty plea. For the same reasons, but unlike the concurrence, I do not believe that affirmative misadvice about those consequences renders an attorney’s assistance in defending against the prosecution constitutionally inadequate; or that the Sixth Amendment requires counsel to warn immigrant defendants that a conviction may render them removable. Statutory provisions can remedy these concerns in a more targeted fashion, and without producing
permanent, and legislatively irreparable, overkill.

* * *

The Sixth Amendment as originally understood and ratified meant only that a defendant had a right to employ counsel, or to use volunteered services of counsel. See, *United States v. Van Duzee*, 140 U. S. 169, 173 (1891); W. Beaney, *Right to Counsel in American Courts* 21, 28–29 (1955). We have held, however, that the Sixth Amendment requires the provision of counsel to indigent defendants at government expense, *Gideon v. Wainwright*, 372 U. S. 335, 344–345 (1963), and that the right to “the assistance of counsel” includes the right to effective assistance, *Strickland v. Washington*, 466 U. S. 668, 686 (1984). Even assuming the validity of these holdings, I reject the significant further extension that the Court, and to a lesser extent the concurrence, would create. We have until today at least retained the Sixth Amendment’s textual limitation to criminal prosecutions. “[W]e have held that ‘defense’ means defense at trial, not defense in relation to other objectives that may be important to the accused.” *Rothgery v. Gillespie County*, 554 U. S. ___, ___ (2008) (ALITO, J., concurring) (slip op., at 4) (summarizing cases). We have limited the Sixth Amendment to legal advice directly related to defense against prosecution of the charged offense—advice at trial, of course, but also advice at postindictment interrogations and lineups, *Massiah v. United States*, 377 U. S. 201, 205–206 (1964); *United States v. Wade*, 388 U. S. 218, 236–238 (1967), and in general advice at all phases of the prosecution where the defendant would be at a disadvantage when pitted alone against the legally trained agents of the state, see *Moran v. Burbine*, 475 U. S. 412, 430 (1986). Not only have we not required advice of counsel regarding consequences collateral to prosecution, we have not even required counsel appointed to defend against one prosecution to be

There is no basis in text or in principle to extend the constitutionally required advice regarding guilty pleas beyond those matters germane to the criminal prosecution at hand—to wit, the sentence that the plea will produce, the higher sentence that conviction after trial might entail, and the chances of such a conviction. Such matters fall within “the range of competence demanded of attorneys in criminal cases,” *McMann v. Richardson*, 397 U. S. 759, 771 (1970). See id., at 769–770 (describing the matters counsel and client must consider in connection with a contemplated guilty plea). We have never held, as the logic of the Court’s opinion assumes, that once counsel is appointed all professional responsibilities of counsel—even those extending beyond defense against the prosecution—become constitutional commands. Cf. *Cobb, supra*, at 171, n. 2; *Moran, supra*, at 430. Because the subject of the misadvice here was not the prosecution for which Jose Padilla was entitled to effective assistance of counsel, the Sixth Amendment has no application.

Adding to counsel's duties an obligation to advise about a conviction’s collateral consequences has no logical stopping-point. As the concurrence observes,

“[A] criminal conviction can carry a wide variety of consequences other than conviction and sentencing, including civil commitment, civil forfeiture, the loss of the right to vote, disqualification from public benefits, ineligibility to possess firearms, dishonorable discharge from the Armed Forces, and loss of business or professional licenses. . . . All of those consequences are ‘serious,’ . . . .” *Ante*, at 2–3 (ALITO, J., concurring in judgment).

But it seems to me that the concurrence suffers from the
same defect. The same indeterminacy, the same inability to know what areas of advice are relevant, attaches to misadvice. And the concurrence’s suggestion that counsel must warn defendants of potential removal consequences, see ante, at 14–15—what would come to be known as the “Padilla warning”—cannot be limited to those consequences except by judicial caprice. It is difficult to believe that the warning requirement would not be extended, for example, to the risk of heightened sentences in later federal prosecutions pursuant to the Armed Career Criminal Act, 18 U. S. C. §924(e). We could expect years of elaboration upon these new issues in the lower courts, prompted by the defense bar’s devising of ever-expanding categories of plea-invalidating misadvice and failures to warn—not to mention innumerable evidentiary hearings to determine whether misadvice really occurred or whether the warning was really given.

The concurrence’s treatment of misadvice seems driven by concern about the voluntariness of Padilla’s guilty plea. See ante, at 12. But that concern properly relates to the Due Process Clauses of the Fifth and Fourteenth Amendments, not to the Sixth Amendment. See McCarthy v. United States, 394 U. S. 459, 466 (1969); Brady v. United States, 397 U. S. 742, 748 (1970). Padilla has not argued before us that his guilty plea was not knowing and voluntary. If that is, however, the true substance of his claim (and if he has properly preserved it) the state court can address it on remand.1 But we should not smuggle the

1I do not mean to suggest that the Due Process Clause would surely provide relief. We have indicated that awareness of “direct consequences” suffices for the validity of a guilty plea. See Brady, 397 U. S., at 755 (internal quotation marks omitted). And the required colloquy between a federal district court and a defendant required by Federal Rule of Criminal Procedure 11(b) (formerly Rule 11(c)), which we have said approximates the due process requirements for a valid plea, see Libretti v. United States, 516 U. S. 29, 49–50 (1995), does not mention
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claim into the Sixth Amendment.

The Court’s holding prevents legislation that could solve the problems addressed by today’s opinions in a more precise and targeted fashion. If the subject had not been constitutionalized, legislation could specify which categories of misadvice about matters ancillary to the prosecution invalidate plea agreements, what collateral consequences counsel must bring to a defendant’s attention, and what warnings must be given.\(^2\) Moreover, legislation could provide consequences for the misadvice, nonadvice, or failure to warn, other than nullification of a criminal conviction after the witnesses and evidence needed for retrial have disappeared. Federal immigration law might provide, for example, that the near-automatic removal which follows from certain criminal convictions will not apply where the conviction rested upon a guilty plea induced by counsel’s misadvice regarding removal consequences. Or legislation might put the government to a choice in such circumstances: Either retry the defendant or forgo the removal. But all that has been precluded in favor of today’s sledge hammer.

In sum, the Sixth Amendment guarantees adequate assistance of counsel in defending against a pending criminal prosecution. We should limit both the constitutional obligation to provide advice and the consequences of bad advice to that well defined area.

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collateral consequences. Whatever the outcome, however, the effect of misadvice regarding such consequences upon the validity of a guilty plea should be analyzed under the Due Process Clause.

\(^2\)As the Court’s opinion notes, \textit{ante}, at 16–17, n. 15, many States—including Kentucky—already require that criminal defendants be warned of potential removal consequences.
America’s Failure to Forgive or Forget in the War on Crime
A Roadmap to Restore Rights and Status After Arrest or Conviction

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American University Washington College of Law
## Collateral Damage: America’s Failure to Forgive or Forget in the War on Crime

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The National Association of Criminal Defense Lawyers (NACDL) is the preeminent organization in the United States advancing the goal of the criminal defense bar to ensure justice and due process for persons charged with a crime or wrongdoing. NACDL’s core mission is to: Ensure justice and due process for persons accused of crime ... Foster the integrity, independence and expertise of the criminal defense profession ... Promote the proper and fair administration of criminal justice.

Founded in 1958, NACDL has a rich history of promoting education and reform through steadfast support of America’s criminal defense bar, *amicus curiae* advocacy and myriad projects designed to safeguard due process rights and promote a rational and humane criminal justice system. NACDL’s approximately 10,000 direct members — and 90 state, local and international affiliate organizations totalling up to 40,000 members — include private criminal defense lawyers, public defenders, active U.S. military defense counsel, and law professors committed to preserving fairness in America’s criminal justice system. Representing thousands of criminal defense attorneys who know firsthand the inadequacies of the current system, NACDL is recognized domestically and internationally for its expertise on criminal justice policies and best practices.

The research and publication of this report was made possible through the support of individual donors and foundations to the Foundation for Criminal Justice, NACDL’s supporting organization. This report would not have been possible without support from the Foundation for Criminal Justice and the Open Society Foundations.

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This publication is available online at  
www.nacdl.org/restoration/roadmapreport
The Foundation for Criminal Justice (FCJ) is organized to preserve and promote the core values of America’s criminal justice system guaranteed by the Constitution — among them due process, freedom from unreasonable search and seizure, fair sentencing, and access to effective counsel. The FCJ pursues this goal by seeking grants and supporting programs to educate the public and the legal profession on the role of these rights and values in a free society and assist in their preservation throughout the United States and abroad.

The FCJ is incorporated in the District of Columbia as a non-profit, 501(c)(3) corporation. All contributions to the FCJ are tax-deductible. The affairs of the FCJ are managed by a Board of Trustees that possesses and exercises all powers granted to the Foundation under the DC Non-Profit Foundation Act, the FCJ’s own Articles of Incorporation, and its Bylaws.

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We are pleased to introduce this important report, which provides a blueprint for people with a criminal record to regain their full rights and privileges. We commend the National Association of Criminal Defense Lawyers for undertaking this exhaustive study of the legal and social barriers that persist long after a person has successfully completed the court-imposed sentence. It demonstrates that the stigma of conviction can be permanent even when the collateral penalties imposed by law are not. We are both pleased to have had the opportunity to share our perspectives on these issues with the Task Force at hearings in Chicago and Washington, D.C. While our political perspectives may differ, and both of us may not agree with every recommendation in this comprehensive report, we share a belief that more can be done to enable individuals with a criminal record to earn their way to a fresh start.

Both of us have dealt with the problems identified in NACDL’s report. One of us co-sponsored the Second Chance Act as a Member of Congress, and remains involved in legislative efforts to eliminate the stigma of conviction in access to housing and other public benefits. The other used the constitutional pardon power to restore rights and status to individuals who had paid their debt to society, and remains engaged as a private citizen in efforts to increase public understanding of the role forgiveness plays in the justice system. As a result of our experiences, we have come to appreciate how facilitating reintegration contributes to public safety and strong communities, and to a general perception that the legal system is fairly administered. We believe that our nation would be well-served by reforming policies and practices that can convert even one adverse encounter with the law into a permanent Mark of Cain. We therefore join in NACDL’s call for a national conversation about how this goal can best be accomplished.

**Danny K. Davis**  
*Congressman, Illinois, 7th District*

**Robert L. Ehrlich, Jr.**  
*Former Governor of Maryland, 2003-07*
First and foremost, NACDL is extremely grateful to the more than 150 witnesses who testified at the Task Force hearings. They generously gave their time and travelled great distances to provide the Task Force with their expertise and personal stories. Although they expressed varying points of view, reflecting various perspectives on the criminal justice system, each embraces a passion for justice and is dedicated to ensuring public safety while supporting the need for the restoration of rights and status. Many others contributed to this comprehensive project in myriad ways. NACDL gratefully acknowledges the following individuals and institutions.

This project would not have been possible without the unwavering support of the Trustees of the Foundation for Criminal Justice (FCJ); the NACDL Board of Directors; FCJ President Gerald B. Lefcourt; NACDL President Jerry J. Cox; and NACDL Past Presidents Jim E. Lavine, Lisa M. Wayne and Steven D. Benjamin.

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Transcript Digests

The six hearings generated thousands of pages of transcripts that were digested by Columbia Law School students in New York. The Task Force is indebted to Madeline Kurtz, Director of Public Interest Professional Development at Columbia Law School, who helped identify students to digest transcripts. The following students digested transcripts for the cities designated: Talia Epstein (Chicago and portions of Miami); Shimeng Cheng (portions of Miami); Nicholas Matuschak (Cleveland); Sharyn Broomhead and Brian Hooven (San Francisco); Kate Mollison and Anne Silver (New York); and Joo Young Seo (Washington, DC).

Institutional & Staff Contributions

The institutions and staff of various Task Force members were instrumental in assisting with the project in numerous ways. They include: Lauren Winston-McPherson, Executive Assistant to Task Force Co-Chair Rick Jones, for coordinating Rick’s schedule, participating in hearings, and coordinating Columbia Law Students; American University Law School Research Fund and American University Washington College of Law Dean Claudio M. Grossman for supporting the work of Professor Jenny Roberts on this project; Kathryn Wilson and Ashley Ahlholm, Dean’s Fellows for Professor Jenny Roberts at American University Washington College of Law, for their significant research assistance with the report; Professor Rebecca Green, Professor of the Practice of Law at William & Mary Law School, for her insightful comments on criminal records reform; and Josh Gaines, Law Office of Margaret Love, for cite-checking the report.

Finally, an undertaking of this magnitude necessitates the dedication and commitment of numerous members of the NACDL staff, including: Tom Chambers, Deputy Executive Director, for coordinating financial support for the project; Tamara Kalacevic, Director of Events, for coordinating accommodations for the Task Force members; Obaid Khan and Elsa Ohman, National Affairs Assistants, for reaching out to witnesses, staffing hearings, and cite editing; Ivan Dominguez, Director of Public Affairs & Communications; Tiffany M. Joslyn, Counsel for White Collar Crime Policy; and Quintin Chatman, Editor of The Champion magazine, for their expert editing of the report; Catherine Zlomek, Art Director, for the layout and design of the report; Vanessa Antoun, Senior Resource Counsel, for staffing and providing assistance to the Task Force at the San Francisco hearing; Doug Reale, Manager for Strategic Marketing & Sales, for his technical video expertise and assistance with hearing site logistics; Steven Logan, Manager for Information Services, for the project website and survey design; Nelle Sandridge, Member Services Assistant, for her support during the Washington, DC hearings; and Angelyn C. Frazer, State Legislative Affairs Director and project staff to the Task Force, for report editing and overall coordination of the project.
Policies and practices that at one moment seem prudent and logical can over time have imprudent and illogical consequences. While much has been written about the adverse impact of mass incarceration, another less obvious but equally devastating development has accompanied the escalation of criminal prosecution: the proliferation of collateral consequences. A vast, half-hidden network of legal penalties, debarments, and disabilities that arise not from the penal laws but from ancillary statutes and regulations now stigmatizes the 65 million people in this country who have a criminal record. Worse, a growing obsession with background checking and commercial exploitation of arrest and conviction records makes it all but impossible for someone with a criminal record to leave the past behind.

These collateral consequences, whether based on specific legal provisions or the general discrimination they encourage, have produced untold collateral damage in the war on crime. Collateral consequences affect jobs and licenses, housing, public benefits, voting rights, judicial rights, parental rights, the right to bear arms, immigration status, and even volunteer opportunities. Each individual consequence may have seemed prudent and logical when enacted, but their overall effect is to consign millions to second-class status.

Traditionally, criminal defense lawyers and their clients part ways after a case ends at the trial level or, in some cases, after an appeal of a conviction. In an age of collateral consequences, however, that paradigm is no longer valid. The defense lawyer cannot effectively represent a client without an awareness of the collateral consequences that may ensue. But even that may not be enough.

In 2011, NACDL’s leadership recognized that the defense bar could no longer remain silent about the multitude of legal and social obstacles that confront clients long after their case is concluded and their sentence served. Acting together, NACDL President Jim Lavine and President-Elect Lisa Wayne impaneled the Task Force on the Restoration of Rights and Status After Conviction to study the magnitude of the problem and articulate a solution. An overarching goal was to identify laws and policies that will dismantle the functional exile to which convicted persons are consigned in American society.

On the occasion of her installation as NACDL president in August 2011, Lisa Wayne said that “we must determine how to tear down the barriers that have turned hundreds of thousands of convicted persons into a permanent underclass,” and urged the Task Force “to search far and wide throughout the country to find out what works, what does not work, and what we can do to find a solution to the problem.” This report is the product of that effort.

Responding to the challenge it was given, the Task Force did indeed search far and wide. Its members took testimony from more than 150 witnesses over the course of two years at public hearings conducted in six cities (a complete list
of witnesses is provided in Appendix B to this report. They reviewed case law, studies, statutes, and model standards; made numerous site visits (a complete list of which is provided in Appendix C to this report); and engaged in countless hours of discussion and analysis. Finally, they distilled the findings into a report that is intended to provide the entire profession, lawmakers and society with a roadmap to the restoration of rights and status after arrest or conviction.

After an extensive period for review, NACDL’s Board of Directors formally adopted the report and recommendations on March 8, 2014, at its midwinter meeting in New Orleans, Louisiana.

The work of this Task Force was strongly supported by NACDL’s Board of Directors and has been funded by the Foundation for Criminal Justice with crucial support provided by the Open Society Foundations. The project was conducted by eight outstanding criminal defense lawyers from across the country, reflecting an array of practice settings: Lawrence S. Goldman, Elissa B. Heinrichs, Rick Jones, Margaret Colgate Love, Penelope S. Strong, Geneva Vanderhorst, Christopher A. Wellborn, and Vicki H. Young. Professor Jenny Roberts of the American University Washington College of Law served as the
The Foundation for Criminal Justice and NACDL proudly offer this report and its conclusions and recommendations for consideration by all who have an interest or a role in shaping the nation’s criminal justice system, secure in the knowledge that it reflects the highest aspirations of the criminal defense bar to advocate for the dignity and humanity of every individual.

Norman L. Reimer  
Executive Director, NACDL

A Roadmap to Restore Rights and Status After Arrest or Conviction
Collateral damage occurs in any war, including America’s “War on Crime.” Ironically, our zealous efforts to keep communities safe may have actually destabilized and divided them. The vast expansion of the nation’s criminal justice system over the past 40 years has produced a corresponding increase in the number of people with a criminal record. One recent study estimated that 65 million people — one in four adults in the United States — have a criminal record. At the same time, the collateral consequences of conviction — specific legal restrictions, generalized discrimination and social stigma — have become more severe, more public and more permanent. These consequences affect virtually every aspect of human endeavor, including employment and licensing, housing, education, public benefits, credit and loans, immigration status, parental rights, interstate travel, and even volunteer opportunities. Collateral consequences can be a criminal defendant’s most serious punishment, permanently relegating a person to second-class status. The obsession with background checking in recent years has made it all but impossible for a person with a criminal record to leave the past behind. An arrest alone can lead to permanent loss of opportunity. The primary legal mechanisms historically relied on to restore rights and status — executive pardon and judicial expungement — have atrophied or become less effective.

It is time to reverse this course. It is time to recognize that America’s infatuation with collateral consequences has produced unprecedented and unnecessary collateral damage to society and to the justice system. It is time to celebrate the magnificent human potential for growth and redemption. It is time to move from the era of collateral consequences to the era of restoration of rights and status.

NACDL recommends a broad national initiative to construct a legal infrastructure that will provide individuals with a criminal record with a clear path to equal opportunity. The principle that individuals have paid their debt to society when they have completed their court-imposed sentence should guide this initiative. At its core, this initiative must recognize that individuals who pay their debt are entitled to have their legal and social status fully restored.

Until recently, defense lawyers have not regarded avoiding and mitigating collateral consequences as part of their responsibility to the client. This has changed, in part because of court decisions recognizing collateral consequences as an integral part of the criminal case, and in part because of the increasing social and economic significance of collateral consequences themselves. As a result, in 2011 NACDL established a Task Force on Restoration of Rights and Status After Conviction to inquire into how existing restoration mechanisms are actually functioning and to determine how they can be improved. The Task Force conducted extensive hearings in six different major American cities in five distinct regions of the country over more than two years and took testimony from more than 150 wit-
nesses. The result is this report and the following comprehensive recommendations for reform.

I. The United States should embark on a national effort to end the second-class legal status and stigmatization of persons who have fulfilled the terms of a criminal sentence.

The three branches of government, on the federal, state and local levels, should undertake a comprehensive effort to promote restoration of rights and status after conviction. This is a major effort that requires a multifaceted approach. It should include enactment of laws to circumscribe or repeal existing collateral consequences and a resolve to stop enacting new ones. More fundamentally, government entities, the legal profession, the media and the business community must promote a change in the national mindset to embrace concepts of redemption and forgiveness, including a public education campaign to combat erroneous and harmful stereotypes and labels applied to individuals who have at one point or another committed a crime. As a cornerstone of this movement, the United States and its states and territories should establish a “National Restoration of Rights Day” to recognize the need to give individuals who have successfully fulfilled the terms of a criminal sentence the opportunity to move on with their lives.

Defender organizations and offices, as well as individual defense attorneys and the legal profession as a whole, have an important role to play in this effort. They should propose and support efforts to repeal collateral consequences and to enact effective ways to relieve any remaining collateral consequences. They should participate in efforts to catalogue collateral consequences and make them available in a form that is useful and educational to lawyers, courts, government agencies, researchers, and the public at large. These entities should work to change the way people with a criminal record are depicted in the media and discourage the use of disparaging labels such as “felon,” “criminal” and “ex-con” that reinforce fear-inducing stereotypes and perpetuate discriminatory laws and policies. They should participate in efforts to educate the public about the broad range of conduct that can result in conviction and the harmful effects of permanently burdening those who are convicted. Further, they should support efforts to provide equal opportunity to people with a criminal record, including in their own employment policies and practices.
II. All mandatory collateral consequences should be disfavored and are never appropriate unless substantially justified by the specific offense conduct.

Legislatures should not impose a mandatory collateral consequence unless it has a proven, evidence-based public safety benefit that substantially outweights any burden it places on an individual’s ability to reintegrate into the community. This means that most mandatory collateral consequences should be repealed, including the loss of voting and other civil and judicial rights, which serve no public safety purpose at all. For those few mandatory consequences that can be justified in terms of public safety, sentencing courts should be authorized to relieve them on a case-by-case basis at sentencing and while a person is under sentence. Any mandatory consequence that is not relieved should automatically terminate upon completion of an individual’s court-imposed sentence unless the government can prove a public safety need for its continued application.

III. Discretionary collateral consequences should be imposed only when the offense conduct is recent and directly related to a particular benefit or opportunity.

Where a decision-maker is authorized but not required to deny or revoke a benefit or opportunity based upon a conviction, it should do so only where it reaches an individualized determination that such action is warranted based upon the facts and circumstances of the offense. States and the federal government should develop and enforce clear relevancy standards for considering a criminal record by discretionary decision-makers, requiring them to consider the nature and gravity of the conduct underlying the conviction, the passage of time since the conviction and any evidence of post-conviction rehabilitation. Administrative agencies should be required to specify and justify the types of convictions that may be relevant in their particular context, and to publish standards that they will apply in determining whether to grant a benefit or opportunity. Benefits and opportunities should never be denied based upon a criminal record that did not result in conviction.
IV. Full restoration of rights and status should be available to convicted individuals upon completion of sentence.

After completing their sentence, individuals should have access to an individualized process to obtain full restoration of rights and status, either from the executive or from a court, by demonstrating rehabilitation and good character. This relief process should be transparent, accountable and accessible to all regardless of means. Standards for relief should be clear and attainable, high enough to make relief meaningful, but not so high as to discourage deserving individuals. A pardon or judicial certificate should relieve all mandatory collateral consequences, and decision-makers should give full effect to a pardon or judicial certificate where a collateral consequence is discretionary. Jurisdictions should give their residents with convictions from other jurisdictions access to their relief procedures, and should also give effect to relief granted by other jurisdictions.

V. Congress and federal agencies should provide individuals with federal convictions with meaningful opportunities to regain rights and status, and individuals with state convictions with mechanisms to avoid collateral consequences imposed by federal law.

Congress should expand non-conviction dispositions for federal crimes, and federal prosecutors should be encouraged to offer them wherever appropriate. Individuals convicted of federal crimes should have an accessible and reliable way of regaining rights and status through the courts or a reinvigorated federal pardon process. Congress should limit access to and use of federal criminal records through judicial expungement, set-aside or certificates of relief from disabilities.

Congress should authorize state and federal courts to dispense with mandatory collateral consequences arising under federal law. By the same token, state legislatures should provide individuals with federal convictions a way to avoid consequences arising under state law. Federal courts and agencies should recognize and give effect to state relief.
Federal agencies should provide incentives to public and private employers to offer equal opportunity to persons with a criminal record. The federal government should fund research into whether relief mechanisms help individuals reintegrate into society and reduce recidivism.

**VI. Individuals charged with a crime should have an opportunity to avoid conviction and the collateral consequences that accompany it.**

To avoid harmful and unnecessary collateral consequences, diversion and deferred adjudication should be available for all but the most serious crimes, and prosecutors and courts should be encouraged to use these alternatives. Non-conviction dispositions should be sealed or expunged and should never trigger collateral consequences. Decision-makers should be barred from asking about or considering such dispositions.

Collateral consequences should be taken into account at every stage of the case by all actors in the criminal justice system. Defense lawyers should advise clients about them and explore opportunities to avoid them through creative plea bargaining and effective sentencing advocacy. Prosecutors should structure charges and negotiate pleas to enable defendants to avoid collateral consequences that cannot be justified. Courts should ensure that defendants are advised about applicable collateral consequences before accepting guilty pleas, and should take collateral consequences into account at sentencing.

**VII. Employers, landlords and other decision-makers should be encouraged to offer opportunities to individuals with criminal records, and unwarranted discrimination based on a criminal record should be prohibited.**

Government at all levels should find creative ways to give employers, landlords, and other decision-makers affirmative incentives to offer opportunities to those with criminal records. There should be meaningful tax credits for hiring or housing those with criminal records and free bonding to provide insurance for any employee dishonesty. Decision-makers should be eligible for immunity
from civil liability relating to an opportunity or benefit given to an individual with a criminal record if they are in compliance with federal, state and local laws and policies limiting the use of criminal records and with standards governing the exercise of discretion in decision-making. Jurisdictions should enact clear laws prohibiting unwarranted discrimination based upon an individual’s criminal record, and should provide for effective enforcement and meaningful review of discrimination claims.

VIII. Jurisdictions should limit access to and use of criminal records for non-law enforcement purposes and should ensure that records are complete and accurate.

State repositories, court systems and other agencies that collect criminal records should have in place mechanisms for ensuring that official records are complete and accurate, and should facilitate opportunities for individuals to correct any inaccuracies or omissions in their own records. Records must be provided in a form that is easy to understand and that does not mislead. Records that indicate no final disposition one year after charges are filed should be purged from all records systems. The FBI must ensure that information relating to state relief, such as expunged and sealed records, is reflected in its criminal record repository.

State and federal authorities should limit access to their central repositories to those with a legitimate need to know. Court records should be available only to those who inquire in person, in order to balance public access to records with privacy concerns for individuals with a criminal record, and access to online court system databases should be strictly limited. Law enforcement records (non-judicial) should never be publicly disseminated. Criminal records that do not result in a conviction should be automatically sealed or expunged, at no cost to their subject. Jurisdictions should prohibit non-law enforcement access to conviction records after the passage of a specified period of time, depending upon the nature and seriousness of the offense, and should authorize courts to prohibit access in cases where it is not automatic. Any exceptions should be justified in terms of public safety, and persons who disclose records in violation of limitations on access should be subject to substantial civil penalties.

Employers and other decision-makers should be prohibited from asking about or considering a criminal record to which access has been limited by law or court order. For accessible records, decision-makers should comply with applicable relevance and non-discrimination standards. Employers should also be prohibited from inquiring about an applicant’s criminal record until after a contingent offer of employment has been made.
EXECUTIVE SUMMARY

Jurisdictions should never sell criminal records and should strictly regulate private companies that collect and sell records. Federal law should prohibit credit reporting agencies from disclosing records of closed cases that did not result in conviction, and convictions that are more than seven years in the past. States should enact their own restrictions on credit reporting companies to the extent permitted by federal preemption. Jurisdictions should provide for effective enforcement of laws governing credit reporting agencies.

IX. Defense lawyers should consider avoiding, mitigating and relieving collateral consequences to be an integral part of their representation of a client.

Defense counsel should consider avoiding and mitigating collateral consequences to be an integral part of their representation of a client, both at and after sentencing. If post-sentence representation is not feasible, defense counsel should refer clients to organizations or individuals that can provide such representation. Agencies that fund indigent defense services should fund representation in connection with restoration of rights and status.

X. NACDL will initiate public education programs and advocacy aimed at curtailing collateral consequences and eliminating the social stigma that accompanies conviction.

NACDL resolves to use all of its resources, particularly the dedication of its members who are on the front lines fulfilling the mandates of the Sixth Amendment, to implement the preceding nine principles. The nation’s criminal defense bar must be in the vanguard of the effort to make the full restoration of rights and status a reality for all who successfully fulfill the terms of a sentence. NACDL and the defense community will lead efforts to repeal or modify existing collateral consequences that cannot be justified in terms of public safety, to avoid enacting any additional ones, and to implement meaningful restoration procedures both during and after the conclusion of the criminal case.
This report is the result of the work of the Task Force on Restoration of Rights and Status After Conviction, established by NACDL Past Presidents Jim Lavine and Lisa Wayne in 2011. The Task Force heard testimony from more than 150 witnesses at hearings in Chicago, Miami, Cleveland, San Francisco, New York, and Washington, DC. Witnesses included individuals with criminal records, defense attorneys, state and federal judges, prosecutors, social scientists, re-entry professionals, probation and correctional personnel, employers, background screening companies, a congressman, a former governor, and local, state and federal officials. In connection with its hearings, members of the Task Force also participated in site visits. The Task Force also reviewed a wide range of studies, reports, and articles on various restoration and relief mechanisms, and on collateral consequences more generally. See Appendices B and C for a complete list of witnesses and sites visited. The transcripts of those hearings are available on NACDL’s website at www.nacdl.org/restoration/roadmapreport.

Throughout the hearings, the Task Force engaged in discussions about the testimony and direction of the report. Professor Jenny Roberts assumed primary drafting responsibility for this report. Multiple drafts were discussed and revised through a collaborative process with the Task Force and NACDL’s staff and Board of Directors. On March 8, 2014, the NACDL Board of Directors adopted the Task Force draft report and recommendations.

Throughout the report, terminology is used to describe individuals who have a conviction on their record. NACDL subscribes to the principle that people with convictions should not be referred to as “criminals,” “convicts,” “offenders,” “ex-cons,” or other disparaging labels. However, uses of these terms are retained in direct quotations from witnesses that appear in the report in order to ensure the accuracy of the quote.

Types of Collateral Consequences:

Mandatory consequences apply automatically as a matter of law, regulation or policy, without regard to the individual or the circumstances of the conviction. Some mandatory consequences end when a person’s sentence ends, some end after a specified number of years, and others apply indefinitely. Automatically losing the right to vote because of a felony conviction is a mandatory consequence that generally ends upon release from prison or completion of sentence.

Discretionary consequences are those an agency or official is authorized but not required to impose based on conduct underlying a conviction. An example is denial or revocation of a real estate license based upon a finding by the licensing board that an individual convicted of fraud lacks “good moral character.”

Continued on next page
Legal avenues for relief from the adverse effects of arrest or conviction come in many forms and variations, with a corresponding lack of clarity and consistency from jurisdiction to jurisdiction. Frequently, one jurisdiction has no mechanism for dealing with convictions obtained or relief granted in another, making it difficult for a convicted person to move from one state to another. Relief mechanisms by the same name differ from state to state in terms of applicable procedures and eligibility criteria as well as in substantive effect. For example, “expungement” of a criminal record can mean anything from actual destruction of the record in one state to mere limitations on its use in another. A pardon may or may not restore firearms rights, and may or may not be given effect by a sister state. Certificates may recognize “good conduct,” “rehabilitation” or “employability.”

The “Definitions of Key Terms” provided in Appendix A of this report offers general working definitions of the common terms and phrases referenced here and many others used throughout this report.

Informal consequences ("stigmatization") are policies and practices based on social custom and cultural attitude, as opposed to law or formal policy. Although frequently unwritten, they can be just as harmful as restrictions that are formally adopted and enforced. For example, someone unable to find a private landlord willing to rent him an apartment is suffering the informal consequences of conviction; his family also suffers the economic and psychological impact of this stigma.3

Types of Relief Mechanisms

Avoidance mechanisms allow an individual to avoid a conviction in the first place. For example, diversion or deferral of judgment may lead to dismissal of the charges upon successful completion of any conditions.

Automatic restoration mechanisms are legislatively or administratively determined points in time after which a particular collateral consequence terminates. An example is the automatic restoration of the right to vote upon release from prison or completion of sentence.

Individual restoration mechanisms include pardon, expungement or sealing of a record, and certificates of good conduct or restoration of rights. Some of these mechanisms are consequence-specific such as a court-ordered restoration of firearms rights or certificate of employability, while others apply generally to lift all or most legal restrictions, such as a pardon.

Systemic relief mechanisms operate outside of the individual case to place general limits on consideration of conviction in allocating benefits or opportunities. They may be procedural (e.g., ban-the-box policies or limitations on liability) or substantive (“business necessity” under Title VII).
In 2004, Martha Stewart went to federal prison for five months after being convicted of obstructing justice and making false statements to federal investigators. Even before she finished her short sentence, the groundwork was being laid for her redemption. One conservative columnist wrote, “Stewart is paying her dues. As she prepares her comeback, there is simply no reason for anyone to attempt to deny her right to leave her troubles in the past and start anew.” Although her conviction barred her from serving on a board or as an executive for any public company for five years, she returned to work immediately upon release from prison. Within two years, her company returned to profitability. By 2011, Stewart was back on the company’s board of directors and, in 2012, returned as chairperson.

Michael Vick had a similarly soft landing. In 2009, as soon as he finished 23 months in prison for running a dogfighting ring, the National Football League lifted Vick’s suspension. The Philadelphia Eagles immediately signed him, with Eagles Coach Andy Reid noting: “I’m a believer that as long as people go through the right process, they deserve a second chance. . . . He’s proven he’s on the right track.” Eagles President Joe Banner added, “Everybody we talked to said the same thing, that he was remorseful and that he had gone through an incredible transformation, that he was basically good at heart. We heard this over and over again from people who felt he deserved a second chance.” While the Eagles were undoubtedly motivated by more than compassion, their decision received praise from President Obama himself, who telephoned Eagles owner Jeff Lurie to commend the team for doing “something on such a national stage that showed . . . faith in giving someone a second chance after such a major downfall.”

Leaving her troubles in the past and starting anew. Good at heart. On the right track. Showing faith in giving someone a second chance. These expressions certainly apply to the many individuals with convictions who testified at the Task Force hearings. Yet Jessica Chiappone could not volun-
teer at her children’s school because of a conviction that was 15 years in her past. Darrell Langdon needed a dedicated attorney, a sympathetic judge, and media attention to persuade school officials, 25 years after his drug possession conviction, to let him return to his longtime work as a boiler room engineer. Mr. C, a business executive who learned crisis management during his military service, was turned away from volunteer work with the American Red Cross because of a minor fraud conviction. Brenda Aldana trained as a dental assistant while in federal prison for a drug crime, and pursued this work when first released, but could not risk the cost and time of an additional program given the likelihood that the licensing board would deny the exemption she would later need based on her criminal record. Jennifer Smith received a deferred adjudication on a shoplifting charge in New York and lost out on a job offer from a bank as a result — under federal law the bank could not hire her, even though the charges against her were eventually dismissed.

These individuals encountered just a few of the approximately 45,000 laws and rules in U.S. jurisdictions that restrict opportunities and benefits in one way or another based upon a conviction (or, in Jennifer Smith’s case, charges that were dismissed).

“These don’t want you to roll out the red carpet to us. We want to make sure that when we do our time, our past doesn’t dictate our future…. I think that when you go 18 years without getting into trouble…. that shows something about me, my character and what I’m truly about.”

Ralph Martin, President & CEO, RKRM Consulting (Miami Day 1 at 20-24)

Brenda Aldana, Jessica Chiappone, Jennifer Smith, Mr. C., and Darrell Langdon are not alone in suffering a different fate than Martha Stewart or Michael Vick. More than one in four adults in the United States — some 65 million people — has a rap sheet. And this is a conservative estimate. There are 14 million new arrests every year. More than 19 million people have felony convictions, and millions more have been convicted of less serious crimes. The nation’s shameful incarceration rate — 2.2 million adults currently in jail or prison — is the highest in the world.

Branding so many millions of people with this “Mark of Cain” has new and dangerous meaning in the electronic age. Arrest and conviction records are no longer pieces of paper that sit in court clerks’ files, accessible only by a trip to the local courthouse. Instead, they are usually on publicly available websites, open to all viewers who care to search. These technological advances have led to widespread background checking by employers, landlords, and others, even when not required by law. A recent survey showed that 92 percent of responding employers perform criminal background checks on at least some job candidates, and 73 percent perform checks on all job candidates. This means that a minor marijuana possession conviction, one of the most common misdemeanors, can follow a person for the rest of his life. Charges that are never prosecuted, or are eventually dismissed, live on in the digital world. Some law enforcement agencies actually sell arrest records, and the private data companies buying them or getting them from public sites have proliferated, profiting from the misery of innocent and convicted people. Even with conviction records, the well-documented failure of states to record when charges are dismissed or records sealed, and the failure of private data companies to keep accurate records, hurt millions of individuals.

The Disparate Racial and Ethnic Impact of Collateral Consequences

The troubling confluence of overcriminalization and ever-expanding collateral consequences in the electronic era has not affected all people equally. Poor and minority communities, where residents are policed most heavily and where zero-tolerance policing practices have led to skyrocketing num-
bers of minor quality of life arrests, bear the brunt of the nation’s criminalization obsession. The pervasiveness of these policies is highlighted most dramatically when considering minor drug offenses. In 2010, of the 1,717,064 drug arrests in the United States, more than half were for marijuana, the overwhelming majority of which were for possession.29 While these numbers alone are shocking, the enormous disparities that exist between arrest rates for black and white Americans is even more telling — the black arrest rate is 716 per 100,000 while the white arrest rate is 192 per 100,000, despite the fact that both populations use marijuana at similar rates across all age groups.30 These troubling differentials extend far beyond arrest. New York City Probation Commissioner Vincent Schiraldi, discussing “amazing levels of disparity” in the nation’s corrections systems, stated, “We have a good system — but it’s the one that white kids get, which diverts kids out of the system and retains the few who really need to be in prison[.]”31

African-Americans and Hispanics also bear the brunt of consequences that follow a criminal record, even a minor misdemeanor record. Collateral consequences are disproportionately leveled against communities of color and are overly punitive, stripping many of the right to vote, denying people public benefits, and making housing and work considerably harder to find.

In a compelling demonstration of the unfairness of this racial disparity, the documentary project *We Are All Criminals*, based in Minnesota where one in four people have criminal records, looks at the other 75 percent, “those of us who have had the luxury of living without an official reminder of a past mistake” and “opportunities to move on and move up.”32 On the website www.weareallcriminals.com, participants describe crimes they committed for which they were never caught, ranging from drug possession and

**A Criminal Record Hits Black Job Seekers Harder Than White Job Seekers**

A recent large-scale study found that men with a drug felony conviction were 50 percent less likely than men without a record to get a callback or job offer for an entry-level job that required no previous experience and no college degree. Most significantly, black applicants suffered this “criminal record penalty” twice as often as white applicants. The study authors found that “[t]his interaction between race and criminal record is large and statistically significant, which indicates that the penalty of a criminal record is more disabling for black job seekers than whites.”33 In addition, evidence of the “persistent effect of race on employment opportunities” using matched pairs of testers applying for employment in the Milwaukee area found: “Blacks are less than half as likely to receive consideration by employers, relative to their white counterparts, and black non-offenders fall behind even whites with prior felony convictions.”34

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“[W]e look at crime in a very different way than most traditional criminologists because we know there are a lot of antecedents to crime. We know that people are not born criminals. We know that anybody can be defined as a criminal, depending on whether or not they’ve been caught. . . . We won’t ask for a show of hands because we know that there are many people who are professionals today, who had they . . . gotten caught, would be defined as a criminal. We don’t think that the criminal act defines your total person. We don’t think that a person who commits a crime is a bad person, but simply a person who did something not so good.”

Dr. Divine Pryor, Executive Director, Center for NuLeadership on Urban Solutions (NYC Day 3 at 275-76)
sale to felony theft to sexual misconduct. These individuals, many of whom “benefited from belonging to a class and race that is not overrepresented in the criminal justice system,” were allowed to move on with their lives, and they are now able to work as engineers, lawyers, corrections professionals, bank tellers, and teachers.

The situation has reached crisis proportions. A study of arrest rates among youth in the United States noted how arrests can lead to immediate and long-term negative consequences. Using data gathered from 1997 to 2008, the study found that 49 percent of black men, 44 percent of Hispanic men and 38 percent of white men will be arrested by age 23.35

**Are We Really a Nation of Criminals?**

Are millions in the United States inherently bad people, undeserving of the chance to move beyond their past? NACDL, whose members interact daily with individuals accused of crimes in courtrooms all over the nation, does not believe that is the case. After all, who are all these people with criminal records? They are our friends and neighbors, and sometimes ourselves. They are family members and families of our co-workers. The brute force of our criminal justice system, and the severe consequences that await people as they try to move on from the system, hurts us all. It is time to confront the notion that a person with a criminal conviction is somehow different from the rest of us, our families, and our communities. We must move away from fear and hesitation and towards forgiveness and providing people the opportunity to move on by restoring their rights and status.

The easiest solution to this urgent problem would be to end the punishment for the crime once the sentence has been served, by simply ending all collateral consequences and letting people move on with their lives. But formal and informal collateral consequences are deeply embedded in the nation’s laws, regulations, policies, and culture. And millions of people in the United States are struggling, right now, to live their daily lives in the face of these existing obstacles.

**The U.S. Lags Far Behind Other Countries In Restoration of Rights and Status**

As the United States struggles to compete with other nations in the rapidly changing global workplace, a unique obsession with labeling people as “criminals” is leading the country down a dangerous moral and economic path. Other countries criminalize less, incarcerate less, and let people fully re-enter and participate in civic and daily life after a conviction. In Europe, prisoners can vote,36 and many countries extend criminal record confidentiality protections into a person’s adulthood.37 The Netherlands, France, Germany, and Spain have strict policies that limit the amount of information available in criminal records and limit access to these files.38 And although employers in Spain can ask applicants to disclose their criminal record, Professor James Jacobs testified, “It’s very, very rare that a private employer asks.” Further, “there are . . . no disabilities that come with a criminal record, at least with respect to private employment.”39 In a stark illustration of the different way that European countries balance individual privacy and the public’s right to access data from the United States, Europe has a “right to be forgotten” movement.40
A Roadmap to Restore Rights and Status After Arrest or Conviction

It is time to move on from the age of mass incarceration and overcriminalization, away from the stigmatization produced by what might be a one-time adverse encounter with the justice system, and into a new era of restoring the rights and status of individuals with criminal records.

**Giving People the Opportunity to Move Beyond a Criminal Record Enhances Public Safety and Saves Money**

“When has helping someone turn their life around been considered being soft on crime?”

Ralph Martin, President & CEO, RKRM Consulting

Witness after witness at the Task Force hearings — from law enforcement officials and legislators to employment specialists and individuals with criminal records — testified about how restoring a person’s rights and status and letting a person move beyond a conviction will reduce recidivism and thus increase public safety.

Consistent research shows that the ability to earn a living is the best way to keep someone from committing another crime. Yet setting up impenetrable barriers for those with convictions undermines public safety. Alameda County DA Nancy O’Malley, who chairs the California Sex Offender Management Board, told the Task Force, “We want people to not commit more crimes, and we don’t want to have more victims of crimes. So it’s in all of our best interests to help people stay or get into a position where they have the ability to be successful when they’re out of an incarceration facility.”

Relief from the consequences of a criminal record is currently made up of a patchwork of approaches that are sometimes inconsistent and often irrational, with wide variations between states and even within a particular state. The United States desperately needs, and NACDL urges the nation to adopt, a coherent national approach to the restoration of rights and status after a conviction. It must include the repeal of mandatory consequences that ignore individual circumstances; strict limits on discretionary disqualifications so they are used only when the conviction is closely related to the opportunity at issue; legal mechanisms that formally and legally restore rights and opportunities; and innovations and inducements to incentivize employers, landlords and other decision-makers to give individuals with convictions a chance.

“[l]Individuals have to have a sense of finality with respect to the offense that they committed. They have to be able to put it behind them if they’re ever going to move on with their lives.”

Sam Morison, former Staff Attorney, Office of the Pardon Attorney, U.S. Department of Justice (DC Day 2 at 228-29)
“[W]hat is the cost-benefit analysis when we don’t provide opportunities to individuals, when we simply judge people based on these past criminal convictions? . . . If we don’t provide them with real opportunities for gainful legitimate employment, we are putting people in positions where they may have to make other choices.”

Nicole Austin-Hillery, Director and Counsel of the Washington Office of the Brennan Center for Justice (DC Day 3 at 159, 162)

Wayne Rawlins, a community justice and economic development consultant, testified, “A person that can get a job, that can pay taxes, that can feel vested in the community is less likely to reoffend than someone that doesn’t.” However, he noted, “the state of Florida has divested ex-felons and ex-offenders from feeling invested in community and society.” Bill Evans, who has worked in Florida law enforcement for 30 years, says that helping people with convictions become productive members of society “is a public safety issue. . . . If your only skill sets were not the most law-abiding jobs in the world but you really wanted to change in your heart, if you got released and you still couldn’t take care of yourself and feed your children, would you go ahead and go back to those things you were doing that would have put some fast money in your pocket or would you sit there and continue to let your children go hungry?”

The cost savings of allowing people to earn an honest living and keeping them out of jail or prison is staggering. For example, in 2012 Ohio spent more than $49,000 to incarcerate each person in its criminal justice system. A study involving 40 states revealed that the total taxpayer cost in 2010 ranged from a low of $76 million in Maine to a high of well over $3 billion in New York and Texas. As Deputy Attorney General James Cole stated in a recent speech: “We have a greater percentage of our population in prison than any other industrialized country, and the cost to maintain this is unsustainable.” For every person who can hold a job rather than sit in jail or prison, a state saves not only the cost of incarceration but also benefits from increased tax revenues and the individual’s increased earnings.

When Ronald Davis became chief of police for East Palo Alto, a city once called “the murder capital of the United States,” he believed police departments should be sending parolees back to prison to keep people safe. A series of events led Davis to change his approach, and he soon embraced “the idea of redemption” and the need for law enforcement to help remove unnecessary barriers to rehabilitation and a law-
abiding life. This led Davis to seek the passage of legislation creating a day center, run by the police department, where participants could earn $10 an hour working for the California Department of Transportation and get other services. This effort was successful, and Davis testified about how homicides went down by half and recidivism rates plummeted in East Palo Alto in the years after the implementation of this program. He also described one change he “didn’t foresee happening”:

The legitimacy of the police department changed. Instead of being just a tool of oppression that would incarcerate mass numbers of these young men of color, these people saw the officer as part of a holistic response to treatment, to making peoples’ lives better. . . . [W]hat we’re seeing is that it’s a very effective crime fighting strategy. It goes to the police legitimacy, it goes to the community’s trust inside the police department, it goes to giving people an option, it goes to families because a lot of these young men we’re talking about have kids.

In every jurisdiction the Task Force visited, law enforcement officials were coming to similar conclusions. Vincent Schiraldi was the commissioner of the New York City Probation Department, which supervises 25,000 people on probation. He testified about the central role a probation department can play in advancing public safety by giving individuals with criminal records a second chance. The department’s probation officers work with anyone under their supervision who wants and is eligible for a Certificate of Relief from Disabilities under New York law, which judges can issue to lift employment barriers. “You’re supposed to get your [Certificate] out of the box so you can cut hair legally, and so you can be a security guard and the hundreds of other things you . . . can’t do if you don’t have it,” said Schiraldi.

Gary Mohr, who directs Ohio’s Department of Rehabilitation and Correction, testified that “at the end of my time, I want to be measured by recidivism rate[s].” His vision for his agency is to “reduce recidivism among those people that we touch, that includes our 50,000 inmates, our 30,000 on parole, and another 40 to 50,000 offenders that we are working with.” Using evidence-based practices to get there, Mohr supported Ohio’s move to divert thousands of individuals convicted of low-level felonies from state prison to community supervision, where they can get the services needed to overcome employment and other barriers. For Mohr, it simply does not make sense to bar for life someone convicted of a felony from a job like the unarmed guarding of a vacant building, without considering the particular person’s situation. This is particularly important where “1.9 million or 17 percent of Ohio’s population has been convicted of a felony or misdemeanor that . . . carr[ies] some collateral consequences or sanctions.” Mohr thus supported the 2011 Ohio law creating a Certificate of Achievement and Employability, which offers individuals relief from Ohio’s many mandatory employment and licensing bars, so that their applications can be considered on the merits. Shortly after testifying at the Task Force’s Cleveland hearings, Mohr described the “great feeling” he had signing Certificates, noting how they are “one of our first steps to address collateral consequences for offenders who are trying to make a better life for themselves and their families once they’ve paid their debt to society.”

This report focuses on legal avenues of relief from the barriers to full participation in society for those with a criminal record. Before any reform effort in this area can be successful, the nation must first come to grips with the insurmountable barriers faced by people with criminal records and how these barriers actually hurt public safety. This means stepping back to take a bird’s eye view of the full web of consequences that entrap people just trying to get on with their lives. The bleak view should convince legislators and policy-makers that, absent firm evidence that a particular consequence significantly improves public safety and is narrowly tailored to achieve its purpose, the consequence should be repealed.
The Need for Data-Driven Decision-Making

“We actually know virtually nothing about the effectiveness of these different restoration of rights mechanisms for individuals . . . seeking to improve their lives,” noted Charles Loeffler, a postdoctoral scholar at the University of Chicago Crime Lab.65

As with criminal laws and procedures, legislators often enact conviction-based barriers, in the form

Collateral Damage: America’s Failure to Forgive or Forget in the War on Crime
of collateral consequences, based on a single, high-profile incident or a desire to look tough on crime rather than careful consideration of data showing that the barrier will advance (or harm) public safety. Professor Al Blumstein, testifying about laws that ban a person from a right or benefit for their entire life, stated: “The statutes get enacted when somebody did something heinous and then, as a response, the legislature doesn’t think of the subtle tension between the social benefits of providing job opportunities and the private risks of employers or the social or the public risk of someone doing something.” He described how “legislative bodies . . . have lots of knee-jerk responses, which show up as a forever rule.”66 Since many of these “forever” rules are retroactive, they apply to employees who have been in a job for many years, who will then suddenly lose that job because of an old, often irrelevant, criminal record.

Instead of such knee-jerk reactions, there must be evidence-based decisions to determine which consequences actually advance rather than harm public safety and which relief and restoration mechanisms are most effective. Data is particularly important for emotionally laden issues, such as laws imposing barriers to re-entry for individuals convicted of sex offenses. Nancy O’Malley, Alameda County DA and chair of the California Sex Offender Management Board, noted how most people are sexually abused by someone they know and how residency restrictions for those convicted of sex offenses do little to address this reality. She testified that “[n]obody wanted to hear about the humanity of who’s behind the registration. And so . . . we held ourselves out as the experts who could help educate and bring that evidence-based information to legislators.”67

Since collateral consequences are not intended to be punishment, legislators should support them only if there is solid data demonstrating a strong public safety benefit for such a barrier that outweighs obstacles to reintegration. Professors Alfred Blumstein and Kiminori Nakamura testified that their research shows how a conviction becomes less relevant the older it is, and eventually reaches a point where an employer takes no greater risk hiring that person than any other person. For example, one data point demonstrated that once a person with a prior conviction has been arrest-free for 3.8 years, that person’s risk of recidivism drops to the same or lower level than the risk of arrest in the general population.68 At the Task Force’s DC hearings, Justice Department official Amy Solomon, who Co-Chairs the Federal Interagency Re-entry Council Working Group, testified that “research sponsored by our National Institute of Justice shows that people who stay out of trouble for just a few years are largely indistinguishable from the general population in terms of their odds of another arrest.”69 Such evidence might also guide states in deciding when to limit access to and use of criminal records, for example in sealing conviction records after a certain number of years. Indeed, Massachusetts is one state that has already done this.70

State and federal governments should fund studies on the effectiveness of different avenues of relief from a criminal conviction to see what works and what does not. For example, there should be an examination of whether sealing minor conviction records, combined with banning commercial distribution of those records, prevents the discrimination that individuals with such records currently experience. Mark Myrent, Research Director for the Illinois Criminal Justice Information Authority, stressed the need to “get data from the agencies to try to do an assessment of the impact of these [licensing and employment] restrictions, how many people are employed in these restricted positions, how many people have applied, how many people have been turned down because of the restrictions, how many have applied for various forms of relief, how many have made attempts to appeal that decision, either administratively or in court.”71 New York City Probation Commissioner Vincent Schiraldi raised a similar issue after describing how much time his officers spend helping probationers get Certificates of Relief from Disabilities: “Do I know whether getting somebody a certificate of relief is a better use of my time than these other practices with a lot of evidence? . . . I don’t know the answer to that question. I don’t know if civil sealing would be worth it . . . Somebody’s got to research that because if we don’t, it’s never going to be on the list for these new probation commissioners to do.”72
I. The United States should embark on a national effort to end the second-class legal status and stigmatization of persons who have fulfilled the terms of a criminal sentence.

- The three branches of government, on the federal, state and local levels, should undertake a comprehensive effort to promote the restoration of rights and status after conviction.

- This major effort should include enactment of legal mechanisms to circumscribe or repeal the collateral consequences of conviction and a resolve to stop enacting new consequences.

- Government entities, the legal profession, the media, and the business community must promote a change in the national mindset to embrace the concepts of redemption and forgiveness, including a public education campaign to combat erroneous and harmful notions about individuals with convictions.

- The United States and its states and territories should enact legislation establishing a “National Restoration of Rights Day” to recognize the need to give individuals who have successfully fulfilled the terms of a criminal sentence the opportunity to move on with their lives.

- To support this campaign, defender organizations and offices, individual attorneys and the legal profession as a whole should:
  
  ◆ propose and support efforts to repeal collateral consequences and to enact effective ways to relieve any remaining collateral consequences;
  
  ◆ participate in efforts to catalogue collateral consequences and make them available in a form that is useful and educational to lawyers, courts, government agencies, researchers, and the public at large;
  
  ◆ work to change the way people with a criminal record are depicted in the media and discourage the use of disparaging labels such as “felon” and “criminal” that reinforce fear-inducing stereotypes and perpetuate discriminatory laws and policies;
  
  ◆ participate in efforts to educate the public about the broad range of conduct that can result in conviction, and the harmful effects of permanently burdening those who are convicted; and
  
  ◆ support efforts to provide equal opportunity to people with a criminal record, including in their own employment policies and practices.
As an overarching and guiding principle for the work that must be done to combat the nation’s collateral consequences crisis, there must be a profound sea change in the national mindset regarding individuals with convictions. As a matter of morality, the United States cannot justify saddling convicted persons with life-altering consequences that extend beyond the fulfillment of the terms of sentence. As a matter of practicality, the country must recognize the harm inflicted upon individuals, families, and society generally by collateral consequences, some of them imposed for life, that make it impossible for individuals with a criminal record to function as productive members of society. As a matter of law, the United States must protect against intentional or unintentional discrimination against poor people and people of color, who suffer disproportionately under the heavy burden of collateral consequences that effectively extend the criminal sentence long after it should have ended.

As Luz Norwood, the manager of a vocational training program for inmates returning to the community in Florida, explained:

“[W]e need a] re-education process not only of the offender, but of the employer. It’s just telling them over and over again what the person’s skills are, what an offender can offer. Forget the word ‘offender.’ Look at this person as an applicant. Because there but for the Grace of God, [go] you or I. It’s that simple. We have to show more compassion and educate the community.”

Collateral consequences are additional punishments, most of which bear no relationship to the crime. They reach into every imaginable area of life. A decorated veteran who is not yet a citizen can be deported for a misdemeanor drug conviction. A mother supporting four children can never work in a bank because of a shoplifting arrest that was dismissed. A 75-year-old man with a public

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**Language Matters: “Person With a Criminal Conviction,” Not “Felon” or “Criminal”**

“Walmart is hiring a lot from us,” testified Luz Norwood, who helps find work for individuals involved in the criminal justice system at Transition in Florida. But, she noted, “They call it a community jobs program because Walmart will never call it an offender jobs program.”

The labels “criminal,” “felon,” and even “ex-offender” define a person by one act and perpetuate negative stereotypes and societal prejudice against individuals with criminal records. It is tempting to use shortcuts to categorize people, but the disability rights, immigration reform, and other movements teach the importance of recognizing the humanity of the person behind the label.

One central component of restoration of rights and status efforts must be to encourage the press, advocates, and the public to avoid labels and instead use phrases that describe a person’s attributes or experiences, such as “individual with a conviction,” “person with a criminal record,” or, when speaking of convicted persons as a group, “members of the affected community.”
urination conviction in California can never live in public housing and will be on a public sex offense registry for the rest of his life. In the employment arena, as Mark Myrent, research director of Illinois’ Criminal Justice Information Authority, described it, “[t]here is confusing complexity to all these restrictions that becomes rather nightmarish for both ex-offenders as well as employers.” He testified how “criminal history restrictions on employment have really proliferated over many years by many entities. And there is not any single place where they’re really catalogued in one place where we can get our finger on that. Typically, they’re spread over numerous chapters of state laws. They’re buried in agency rules, lost in obscure agency policy memos as well.” In addition to these formal collateral consequences, people convicted of a crime face informal discrimination from employers, landlords, and neighbors who equate contact with the criminal justice system with poor character. A major national effort currently underway to inventory all collateral consequences in state laws and regulations — reflected at www.abacollateralconsequences.org — has identified more than 45,000 separate collateral consequences currently in existence.

While NACDL recognizes that restrictions on convicted persons may be appropriate where there is a demonstrable nexus between a recent crime and a specific benefit or opportunity, even in those situations society needs to provide avenues for discretionary relief.

**Recommendation**

**II. All mandatory collateral consequences should be disfavored and are never appropriate unless substantially justified by the specific offense conduct.**

- Legislatures should not impose a mandatory collateral consequence unless its public safety benefit substantially outweighs its burden on an individual’s ability to reintegrate into the community.

- For mandatory consequences that can be justified in terms of public safety, sentencing courts should be authorized to relieve them on a case-by-case basis at sentencing and while a person is under sentence.

- Any mandatory consequence that is not relieved should automatically terminate upon completion of an individual’s court-imposed sentence unless the government can prove a public safety need for its continued application.

State and federal laws and policies have hundreds of mandatory collateral consequences that automatically flow from a conviction without regard to the individual or the circumstances of the conviction. For example, in Virginia there are 146 mandatory consequences affecting employment, ranging from ineligibility to work for the state lottery to ineligibility to hold a notary commission, and 345 mandatory consequences overall. In Ohio, there are at least 533 mandatory consequences, affecting areas ranging from contracting to child care to driving a truck.

NACDL urges jurisdictions to follow Attorney General Eric Holder’s recommendation that states “evaluate ther[e] collateral consequences . . . to determine whether those that impose burdens on individuals convicted of crimes without increasing public safety should be eliminated.” Such an analysis will likely reveal many mandatory consequences that do not have a demonstrated public safety purpose, supporting NACDL’s recommendation that most mandatory collateral consequences be repealed.
Although repeal of most mandatory consequences is preferable, NACDL recognizes that there are currently millions of individuals suffering under the burden of thousands of mandatory consequences. For this reason, state legislatures and Congress should pass relief-at-sentencing laws, giving the sentencing judge authority to remove any mandatory collateral consequence. As Beth Johnson, staff attorney at Cabrini Green Legal Services, described it in her testimony to the Task Force, “instead of legislature[s] amending each and every statute to have a waiver, you have one law that allows a court to waive any barrier.” The Uniform Collateral Consequences of Conviction Act (UCCCA) adopted in 2009 contains such a relief-at-sentencing process, as does the recent revision of the sentencing articles of the Model Penal Code (MPC). NACDL commends both of these law reform efforts to state legislatures and to Congress.

New York has had a relief-at-sentencing law for many years, but other states are now following suit. For example, in 2013, the Colorado legislature gave its judges the power to enter an “Order of Collateral Relief” to “relieve a defendant

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### Repealing Harmful Collateral Consequences

“In Ohio we found a large number of sanctions that take driver’s licenses away [based on convictions] that have nothing to do with driving... It’s tough enough to get a job, I can only imagine trying to get a job without a driver’s license.”

Gary Mohr, Director, Ohio Department of Rehabilitation and Correction (Cleveland Hearing Day 2 at 390)

Many collateral consequences are put into place in the name of public safety, on the dubious theory that impairing the rights of individuals with a conviction will keep them from committing other crimes. But collateral consequences usually do not advance, and may actually hurt, public safety by setting up barriers to reintegration and full participation in society after a conviction. Unless a consequence has a proven, evidence-based public safety benefit that substantially outweighs any burden it places on an individual’s ability to reintegrate into the community, it should be taken off the books. Congress and federal agencies should lead the way, repealing laws, regulations and policies that set up unnecessary and harmful bars based on a criminal record. The federal government can also encourage reform of state laws, regulations and policies by directing existing federal resources to states that reduce harmful barriers and by withholding resources from those that do not.

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### An Unfair Mandatory Public Housing Ban

Congress should reconsider federal law’s mandatory, lifetime disqualification from public housing for any person who is required to be on a sex offense registry for his or her entire life. This mandatory federal consequence depends on the state registration law, and so is unfairly harsh in states that put more individuals on lifetime registration. In California, every person on the registry is on for life, meaning that those convicted of public urination in California are barred for life from public housing while those convicted of more serious violent offenses are not.
of any collateral consequences of the conviction, whether in housing or employment barriers or any other sanction or disqualification that the court shall specify, including but not limited to statutory, regulatory, or other collateral consequences that the court may see fit to relieve that will assist the defendant in successfully completing probation or a community corrections sentence.” Colorado judges may order this collateral relief at sentencing when it is consistent with the applicant’s rehabilitation; would improve the applicant’s likelihood of successful reintegration into society; and is in the public’s interest. The judge has the power at any time to “enlarge, limit, or circumscribe the relief previously granted,” or to revoke it if the person is later convicted again. At the Task Force’s New York hearings, several witnesses testified about that state’s Certificate of Relief from Disabilities, which allows the judge to lift mandatory barriers to employment and licensing. At the Cleveland hearing, Federal District Judge Dan Polster, who supervises the re-entry court in his district, testified that he would welcome the authority to relieve certain collateral consequences at sentencing, including in particular the restrictions on eligibility for public housing.

These approaches put mandatory consequences where they belong: at sentencing. They put the power of relief into the hands of the person who is considering the appropriate punishment: the judge.

Voting and Other Civil Rights Should Never Be Taken Away

An estimated 5.8 million Americans are denied the right to vote because of a felony conviction. Three quarters are no longer incarcerated and a disproportionate number of disenfranchised Americans are members of minority communities. In three states alone—Florida, Kentucky, and Virginia — this shameful vestige of the Jim Crow laws means that more than one in five African-Americans is denied the right to vote. Even where voting rights are restored automatically upon release from prison or completion of sentence, convicted people are frequently unaware of this fact and continue to believe they are disenfranchised.

The denial of voting rights, testified Dorsey Nunn, executive director of Legal Services for Prisoners with Children, “forces me to ask the question: Am I a citizen or not? And I shouldn’t be wrestling with that particular question years after my conviction and years after completion of my sentence.”

A criminal conviction should never lead to the loss of voting rights. Taking away someone’s right to vote because they were convicted of a crime does not serve any non-punitive, regulatory purpose, such as making society safer or protecting against voter fraud. Maine and Vermont have allowed prisoners to vote by absentee ballot for years. Other states should encourage this civic engagement as an important part of the re-entry process. Misguided disenfranchisement laws are just one more example of how this nation is “Out of Step With the World,” an aptly-titled study revealing that “[a]most half of European countries allow all incarcerated people to vote while others disqualify only a small number of prisoners from the polls.”

Millions of individuals are also ineligible for jury service and to hold public office based on a conviction. These rights should never be suspended beyond any period of incarceration, except perhaps for convictions directly related to breach of the public trust.

The Mandatory Loss of the Right to Bear Arms Should Be Significantly Circumscribed

Under federal law and the laws of most states, a felony conviction results in the mandatory loss of an individual’s right to possess a firearm and am-
munition. While there are surely circumstances when someone otherwise entitled to possess a firearm should lose that right for at least some period of time, the current approach sweeps far too broadly. As with other mandatory bars, the lack of a nexus between the prior criminal conduct and the risk of harm renders the blanket firearm ban particularly onerous and reveals it as punitive. For example, there is no evidence that prohibiting an individual with a fraud conviction from possessing a firearm advances public safety. Indeed, if that individual needs a firearm for his or her livelihood, the inability to continue in that line of work impairs that person’s ability to be a productive member of society. In some parts of the country, firearms are relied upon to put food on the table.

Along with voting and civil rights, firearms dispossession stands out as a unique restriction on a right that has been given constitutional protection by the Supreme Court. Firearm consequences are particularly severe because failure to comply is a separate and independent criminal offense. Under federal law, so-called felon in possession violations are punishable by up to 10 years in prison. Under the laws of many states, convicted individuals may regain firearms rights from a court or an administrative agency. State relief, however, is not always honored in a sister state and may not relieve the person of federal law restrictions.

As Professor James Jacobs described it, with respect to relief from this serious consequence, “the states are all over the map.”

“If you were to say that a previously convicted person should not be disabled from exercising their Second Amendment rights and if that were to become an accepted proposition, then a lot of other things would seem like they would easily follow. Well, if they are responsible enough to possess firearms, they’re certainly responsible enough to work in pesticide areas.”

Professor James Jacobs, NYU School of Law (NY Day 3 at 154)

**Recommendation**

**III. Discretionary collateral consequences should be imposed only when the offense conduct is recent and directly related to a particular benefit or opportunity.**

- Where a decision-maker is authorized but not required to deny or revoke a benefit or opportunity based upon a conviction, it should do so only where it reaches an individualized determination that such action is warranted based upon the facts and circumstances of the offense.

- States and the federal government should develop and enforce clear relevancy standards for considering a criminal record by discretionary decision-makers, requiring them to consider the nature and gravity of the conduct underlying the conviction, the passage of time since the conviction, and any evidence of post-conviction rehabilitation.

- Administrative agencies should be required to specify and justify the types of convictions that may be relevant in their particular context, and to publish standards that they will apply in determining whether to grant a benefit or opportunity.

- Benefits and opportunities should never be denied based upon a criminal record that did not result in conviction.
Witness after witness testified about the difficulties individuals with criminal records face in the employment and housing markets. Yet a job and a stable home are critical factors in reducing recidivism. 101 Everett Gillison, deputy mayor for public safety and chief of staff for the mayor of Philadelphia, described several city job training initiatives for individuals with convictions. He told the Task Force a story that highlights what employers can gain by giving people a chance:

"I had a guy who started in our cooking class that we did . . . [with] ShopRite . . . [who’s been a] great partner. . . . They didn’t even take the $10,000 [tax] credit. They were doing it because they said it’s the right thing to do. The guy . . . passed a safe food handling course, got his certificate, had a flair for cooking, put him through another course. He ended up graduating from that. . . . He was making $9 an hour. He left that, and he got promoted [and] promoted. . . . He’s now the head chef at the local university, and they know he’s a returning citizen, but they didn’t care because he had the skills." 102

Almost all employers require some or all job applicants to undergo a criminal background check. 103 Employers ask potential employees about their criminal history to manage the risk that employees will fail to perform adequately or engage in misconduct; employers also worry about being liable for negligent hiring. NACDL appreciates this concern and recognizes that federal, state and local laws sometimes require an employer to run a background check.

Individuals with criminal convictions are not a class that is protected by fair employment laws in most jurisdictions. However, decision-makers may not consider an applicant’s criminal convictions in a way that has disparate impact based on factors that are prohibited, such as race, sex and ethnicity. Because restrictive policies based upon arrest and conviction have long been held to disproportionately affect racial minorities, 104 decision-makers must take extra care when considering the weight to give an applicant’s criminal record.

The laws of more than half the states provide that a conviction should be disqualifying only if it is directly related to the benefit or opportunity at issue. 105 The Uniform Collateral Consequences of Conviction Act provides that before a decision-maker imposes a discretionary disqualification, it should “undertake an individualized assessment” to determine whether the facts of the offense are
“substantially related to the benefit or opportunity at issue.”\textsuperscript{106} NACDL believes that decision-makers should never disqualify an individual from any benefit or opportunity except pursuant to such an individualized inquiry, using fair and functional standards.

Employers, occupational licensing boards, housing officials, and private landlords often lack guidance on how to properly exercise their discretion to consider a person’s criminal record. For example, a state regulatory board might be authorized to deny an occupational license or certificate to applicants who lack “good moral character” or are “unfit or unsuited” to engage in the occupation or profession. Mark Myrent, Research Director for the Illinois Criminal Justice Information Authority, testified that Illinois state agencies do not have a uniform standard for exercising their discretion in considering an applicant’s criminal record. Instead, each agency’s personnel department sets its own standard. And that standard might come from an email that a personnel director sent three years ago. In addition, Myrent noted, “In some instances, it’s a completely subjective decision where there aren’t specific offenses that are delineated, but it’s more of a determination of . . . moral turpitude or something along those lines.”\textsuperscript{107}

NACDL recognizes that in limited circumstances there may be a clear relationship between a recent conviction and the particular benefit or opportunity sought, making discretionary consideration of a person’s criminal conviction appropriate. However, jurisdictions should have two things in place that help ensure the fair, individualized exercise of discretion in a way that does not unlawfully discriminate on the basis of prohibited factors, and that encourage decision-makers to give equal consideration to individuals with records. First, each should have clear, published standards to guide decision-makers, whether in state law or in more specific guidance from administrative agencies specifying the types of convictions that may be relevant in particular specialized areas. And second, each should have rules or policies that prohibit consideration of non-relevant criminal history and effective mechanisms to enforce them. (See Recommendation VII, below).

\textbf{Jurisdictions Should Have Clear Relevancy Standards for Discretionary Decision-Makers}

Two recent, important publications have addressed standards for employers conducting criminal history checks, both recommending discretionary consideration of a person’s conviction only when highly relevant to the job, license, or housing and when such consideration advances public safety. In 2012, the U.S. Equal Employment Opportunity Commission (EEOC) issued “Enforcement Guidance on the Use of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964.”\textsuperscript{108} In 2013, three advocacy organizations co-published “Best Practices Standards: The Proper Use of Criminal Records in Hiring,” which seeks to “help employers properly weigh adverse personal history to find those applicants who will contribute most to the productivity of the organization.”\textsuperscript{109} NACDL adopts — and slightly adapts — the recommendations of the Best Practices Standards Report, which incorporate the EEOC Guidance. These recommendations counsel employers and background checking companies to:

\begin{itemize}
  \item Consider only convictions and pending prosecutions highly relevant to the application by looking at the nature of the conviction, the time elapsed since the offense, and the nature of the job held or sought.
  \item Consider only convictions recent enough to indicate significant risk and apply a presumption of a non-substantial relationship between a conviction and an opportunity after a determined period of time.
  \item Refrain from asking about criminal records on application forms, postponing any inquiry until a provisional offer is made.
  \item Use only qualified Consumer Reporting Agencies (CRAs), which are regulated by the Fair Credit Reporting Act and required to “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates” to conduct record checks.
\end{itemize}
 Require CRAs to report only recent, relevant convictions where full name and other identifiers match the applicant; confirm all information from online databases with the original source; seek the current disposition of all relevant information; and report all charges related to a single incident as a single entry to avoid confusion.

 Provide applicants the opportunity to challenge the CRA’s report.

 Consider evidence of rehabilitation from the applicant, including the applicant’s current age and the time elapsed since conviction; facts and circumstances surrounding the conviction, sentence, and parole release; number of other convictions; age at the time of conviction; pre- and post-conviction employment history (including post-conviction performance of the same type of work without incidents of criminal conduct); post-conviction education, training, and alcohol or substance abuse program completion; references; post-conviction bonding for employment under a federal, state, or local bonding program; and family stability and responsibilities.

 Minimize conflicts of interest by decision-makers by training human resources staff and maintaining a diversity program.

 Although the Best Practices Standards Report and EEOC Guidance do not discuss the effect to be given relief such as pardon or certificates of good conduct, those may give the applicant a presumption of suitability for the benefit or opportunity despite any criminal history. New York is one state whose law incorporates such a presumption where the discretionary decisions of public agencies and private employers are concerned.110

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**Best “Ban-the-Box” Practices**

Many public and private employers require people to check a box on an initial application disclosing whether they have any convictions, and some even ask about arrests. Thanks to this little box, most people with a criminal record do not even get a foot in the door. They never even get an interview. The box discourages many people with convictions from applying. But 10 states and more than 50 cities and counties now recognize that this is a bad way to do business and that it harms the local economy.111 These jurisdictions have taken the initiative and banned the box asking about criminal history, postponing any inquiry until a later stage in the process. Some jurisdictions have extremely limited “ban-the-box” policies that apply only to state employment and allow government interviewers to ask about criminal history as early as the first interview. Best “ban-the-box” practices do more. They do the following:

- Apply statewide
- Apply to both public and private employers
- Prohibit criminal history questions until the employer extends a conditional job offer
- Have standards limiting criminal history inquiries to recent convictions with a business necessity nexus to the job

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- Pair the ban with immunity from negligent hiring for employers who follow the rules
- Encompass landlords as well as employers

In 2013, the EEOC endorsed ban-the-box policies in its guidance for considering arrest and conviction records in employment decisions. In California, former East Palo Alto Police Chief and Interim Mayor Ronald Davis supported a bill to ban-the-box statewide, because it “allows people with a conviction history to compete fairly for employment without compromising safety and security on the job.” In New York City, even though the Department of Probation has an exemption from the state’s “ban-the-box” law, Commissioner Vincent Schiraldi followed the policy “for all our non-public safety jobs, which we have a lot of, secretaries, . . . IT people.” The agency also requires its vendors to ban the box, hire from the neighborhoods where probationers come from, and hire “credible messengers.” Schiraldi testified that this approach means “that a lot of the people in our vendor pool have priors.” In 2013, Target, the nation’s second largest retailer, banned the box on its employment applications. Private employers need to follow Target’s lead and stop asking about criminal history on initial applications, even when not required to do so by law.

Public and Private Housing Should Be Reopened to Individuals With Convictions

“Not only are you restricted from government housing, but there are numerous homeowners’ associations that include that provision in their bylaws. . . . Basically, [a conviction] would prevent you from renting or even owning a house if you have not had your civil rights restored.”

Desmond Meade, President, Florida Rights Restoration Coalition.

David Rosa administers the permanent supportive housing program at St. Leonard’s Ministries in Chicago. He discussed the importance of stable housing for individuals with convictions and the obstacles they face getting that housing. Because of highly restrictive public housing policies, his organization has “had individuals who couldn’t stay with their grandmother on the premises even though they wanted to go there to look after her . . . [T]hey couldn’t do that because of fear that [housing officials] would kick their grandmother out.” Rosa, who has been out of prison since 1999, was turned down for several apartments until “[s]omeone came and talked for me to a landlord, and they gave me the opportunity to have my first apartment . . . I was ecstatic to have my own place. Now, I own my own home.”
Public housing consists of Section 8 vouchers for private housing and public housing units. Both are governed by federal law and regulation, but local Public Housing Authorities (PHAs) administer these programs and enjoy enormous discretion to set policy and make decisions in individual cases. Federal housing law currently requires PHAs to impose mandatory, lifetime bans on access to public housing in two circumstances: (1) for individuals convicted of producing methamphetamine at a housing authority property and (2) for individuals subject to a lifetime sex offense registry. PHAs must also deny an application if any household member was evicted from public housing based on “drug-related criminal activity” during the past three years, although there is limited discretion to lift this denial.

Federal regulations also authorize local PHAs to evict or deny housing when any household member is or within a “reasonable time” of application has been engaged in (1) drug-related activity; (2) violent criminal activity; or (3) “[o]ther criminal activity which may threaten the health, safety, or right to peaceful enjoyment of the premises by other residents or persons residing in the immediate vicinity” or threaten the owner or others working on the premises.

These regulations grant PHAs broad discretion to bar entire households even when no one in the household has been convicted of a crime, making standards for and limits on discretion particularly important. Roberta Meyers, director of the National HIRE Network, testified how “[i]t’s haphazard. The policies differ all across the country. You can go housing authority by housing authority, and you’ll have a different policy.”

NACDL recommends the following to help open up public housing and protect against unlawful discrimination:

- **HUD should issue uniform national standards to PHAs about how to weigh a conviction record, including evidence of rehabilitation, in order to allow greater access to public housing.** The eight points for general standards for discretionary decision-makers described above should apply to landlords and housing officials as well as to employers and licensing boards. In addition, private landlords and PHAs must comply with the Fair Housing Act and other federal housing laws, applicable state housing law, and Department of Housing and Urban Development (HUD) regulations and policies. HUD’s Office of Fair Housing and Equal Opportunity and the Department of Justice should fully enforce any disparate impact or other housing complaints under applicable laws.

- **HUD should end its “One Strike Policy,”** which gives PHAs discretion to evict or deny housing to an entire household if any household member or guest violates local policy, even if the rest of the household is unaware of that member’s violation.

- **Local PHAs should heed HUD’s recent reminders that PHAs have broad discretion to allow individuals with convictions and their families into public housing in appropriate cases.** Pamela Lawrence, a public housing revitalization specialist and grant manager at HUD, testified that in 2011 and 2012, HUD sent letters to all PHAs to remind them that they had broad discretion to extend housing to more individuals (although these letters also noted the two mandatory bars to public housing). Even so, she noted the persistent problem of misinformation at the local level. “Locally, the communication that goes to applicants and housing advocates is that Federal Government disallows us from leasing to criminals who have misdemeanors and felon[ies],” she stated. So it is “key that you understand where the authority lies when attempting to try to influence new policy for admissions and evictions as it relates to those with criminal histories.”
“[Landlords] need to be mindful about what . . . information they’re asking about; what are they looking for, first, and then not make some snap judgment that anyone with a felony, we don’t want to talk to. That makes no sense given the number of people who have had a conviction in the United States. You’re cutting out a huge part of your potential market who may be very good, responsible tenants.”

Rebecca E. Kuehn, vice president and senior regulatory counsel for Core Logic’s “SafeRent” tenant screening company (SF Day 1 at 109)

In the area of private housing, there is much work to be done. Rebecca E. Kuehn, vice president and senior regulatory counsel at Core Logic, a large data company that performs background checks, testified about her company’s nationwide “SafeRent” tenant screening company. SafeRent clients “do criminal background checks to . . . look . . . for history of violent crimes, drug-related crimes, and sex-offender status. . . . [T]hey are interested in frequency, recency, and severity.” One important service that her company provides is to “filter out anything except for what you’re looking for. In other words, if we find a felony that meets your criteria, we will report that. But if it’s a misdemeanor or another type of charge that doesn’t meet your criteria, that won’t get conveyed to the local rental office so that you

Best Public Housing Practices in New Orleans and New York City

Some local public housing authorities (PHAs) are recognizing the unfairness and damage done to families when policies are too restrictive towards individuals with convictions. They are finally starting to follow HUD’s repeated suggestions that they make their local housing policies less restrictive. There are now 24 PHAs with programs that serve individuals with convictions in different ways, including transitional living to reunite women with their children, policies that allow people with a conviction to live with their families already in public housing, and a few places that set aside units for new leases for individuals with convictions.127

A recent Housing Authority New Orleans (HANO) policy announced that “[o]ther than the two federally required categories, no applicant [for housing] will be automatically barred from receiving housing assistance because of his or her criminal background . . . . We are taking the necessary steps to . . . make sure that those with criminal activity in their past who now seek productive lifestyles have a shot at a new beginning.” HANO also banned the box asking about criminal convictions on its own employment applications and has opened up its procurement process in a similar manner.128

In late 2013, the New York City Housing Authority (NYCHA), which houses more than 400,000 residents, announced a two-year pilot program to allow 150 people coming out of prison to return to or enter public housing with their families. The program requires participants to work with social service providers to find jobs, get necessary substance abuse counseling, and meet other needs.129 While this very small program cannot fully address an enormous problem in New York City, it is a promising development on the public housing front.
don’t have a risk, which is a legitimate concern, that your local rental officer is engaging in 
their own judgment based on what they see as 
a criminal record.”

To help open up private housing and protect 
against unlawful discrimination, private land-
lords should follow the general standards for 
discretionary decision-makers described above, 
including the use of federally regulated Credit 
Reporting Agencies for any background 
checks. Although not currently required to do 
so by law, landlords should notify applicants 
before taking any adverse action based on a 
criminal record, and should give the applicant 
an opportunity to correct any errors and pro-
vide evidence of suitability despite the 
record. Further, housing advocates should 
make people aware of the Consumer Financial 
Protection Bureau’s list of screening companies 
that provide free reports to consumers, so indi-
viduals can correct any errors on those reports 
before applying for housing.

**Recommendation**

**IV. Full restoration of rights and status should be available to 
convicted individuals upon completion of sentence.**

- After completion of their sentence, individuals should have access to an individualized 
  process to obtain full restoration of rights and status either from the executive or from a 
  court by demonstrating rehabilitation and good character.

- The relief process should be transparent and accountable, and accessible to those with-
  out means.

- Standards for relief should be clear and attainable, high enough to make relief mean-
  ingful but not so high as to discourage deserving individuals.

- A pardon or judicial certificate should relieve all mandatory collateral consequences, and 
  decision-makers should give full effect to a pardon or judicial certificate where a collateral 
  consequence is discretionary.

- A jurisdiction should give its residents with convictions from other jurisdictions access to 
  its relief procedures and recognize relief granted by other jurisdictions.

“[E]ven if we assume that legislators and judges and prosecu-
tors are all acting in good faith, . . . we still are going to have a 
need for the pardon power because there are still going to be 
mistakes that are made. There are still going to be circumstances 
where we look back in hindsight and say, well, maybe that made 
sense when it was done, but with the passage of time, with the 
change of circumstances, that’s something we ought revisit.”

Sam Morison, former staff attorney, Office 
of the Pardon Attorney, U.S. Department of Justice
“[Certificates of relief from disabilities] should be presumptive at sentencing. If the prosecutor wants to raise an objection, they’re more than . . . welcome to. I’m sure that that actually would be very seriously taken into consideration. . . . People would get [certificates] by the boatloads if they were presumptive, but right now, because the burden is on the defendant, they’re just not getting them a lot at sentencing.”

New York City Probation Commissioner Vincent Schiraldi

Yet the pardon process has atrophied in many jurisdictions, and nowhere more lamentably than at the presidential level. For jurisdictions with meaningful certificate laws, individuals do not seek them enough, judges do not grant them enough, and decision-makers do not rely on them enough to give opportunities to qualified individuals with convictions.

The Pardon Process Should Be De-Politicized so That Pardons Are Granted in Appropriate Cases

Every jurisdiction allows individuals to seek restoration through a pardon process. Some also have certificates to relieve particular consequences or to demonstrate good conduct. These case-specific restoration avenues vary greatly from jurisdiction to jurisdiction, and the Task Force heard testimony about many different forms of such individual relief. As Sam Morison, former staff attorney in the Department of Justice’s Office of the Pardon Attorney, testified, “There has to be some practical mechanism somewhere for people to get relief. We simply have . . . this growing body of people, hundreds of thousands, maybe millions by now, who are suffering under potentially lifetime disabilities without any real practical mechanism in many cases for getting relief from those disabilities. That’s not a sustainable situation.”

For a restoration avenue with so little likelihood of actual relief, the pardon application process can be onerous and complicated. It took Johnnie Jenkins, who now works as a township employment manager in Lake County, Illinois, seven years to finally get a pardon from Illinois Gov. Blagojevich, though she was one of the lucky ones. As current Gov. Pat Quinn’s general counsel testified, former Gov. Blagojevich left a backlog of 2,500 pardon applications. Committed to eliminating the backlog, Gov. Quinn had acted on over 1,500 petitions during the first two years of his term.
NACDL recommends that the state and federal pardon processes be made more transparent and accountable, and that grants be made generously pursuant to clear standards:

- The pardon process, at both the presidential and gubernatorial levels, should be handled by an independent executive office and staffed by attorneys with diverse backgrounds and professional experience.

- Pardons should be considered an integral part of the criminal justice system, and should be used to offer relief and restoration of rights to individuals demonstrating need for such relief.

- In the many states and the federal system where pardons are rarely if ever granted, the pardoning authority should reinvigorate the pardon process and grant pardons to deserving individuals.

**Two Successful Approaches to the Pardon Process**

Former Maryland Gov. Robert Ehrlich testified about his success in normalizing the pardon process in Maryland through ground rules and guidelines. “We only took referrals from the Maryland Parole Commission,” explained Ehrlich. “I had five lawyers, direct reports to me, in the Office of Counsel, Governor’s Counsel. I fully had two and a half of those folks on a daily basis devoted to this project, to clemency, to commutations and pardons. . . . We established a process . . . of monthly meetings. I would be presented with 30 to 40 petitions a month.” Governor Ehrlich attributed his successful use of the pardon power to a non-political commission for petition consideration, a regular monthly review process, and open communication with the press. He observed that “voluminous pardons with very little notice at the end of [the gubernatorial or presidential] term typically end up in really bad [press] stories and tend to tarnish your legacy as an executive as well.” Instead, Ehrlich was “able to de-politicize [pardons] at the very beginning of the process by stating a policy which read ‘we will only take referrals from the Parole Commission.’ So you had that first level and no bypass. So everybody knew that’s where they had to begin.”

Connecticut takes a different approach and vests the power to grant pardons in an administrative agency rather than the governor. In 2004, the state legislature delegated this power to the Connecticut Board of Pardons and Paroles. Chairperson Erika Tindill described the Board’s structure: “There are currently five pardons officers in the unit. I have a manager in the unit . . . and they process, give or take, 1,000 applications a year.” With “about a 50 percent grant rate,” Connecticut successfully uses an administrative agency to grant relief.
All Jurisdictions Should Offer Certificates of Relief from Collateral Consequences

Although the pardon power clearly needs reform and reinvigoration, it is unrealistic to expect pardons to function as a primary avenue of relief from a conviction. Several states have recently joined New York in enacting certificates of relief administered through the courts or the correctional system, including Illinois, North Carolina and Ohio.149 The Uniform Collateral Consequences of Conviction Act also provides a comprehensive “Certificate of Restoration of Rights,” which lifts most mandatory collateral consequences and also serves to signify a person’s good conduct for a significant period of time after completion of sentence.150 All jurisdictions should offer this type of comprehensive post-sentence relief from collateral consequences, however it is denominated. Certificates should be available for all convictions and should have clear, objective eligibility standards. Jurisdictions establishing or reviewing a certificate law or program must consider such key elements as: Who qualifies? What, if any, waiting period is there after conviction or the completion of sentence? In addition to lifting specific legal disabilities, what does this relief signify about the recipient’s character?

Which institution is best suited to grant certificates — the judiciary, the correctional system, or both? NACDL believes that certificates can best address the problem of mandatory consequences and stigmatization where relief comes from the courts, as the case of Darrell Langdon (discussed above at page 22) illustrates.151 During the Task Force hearings, judges from the state and federal bench testified that they believed restoration of rights was an appropriate function for courts.152 The role of the courts in granting relief from collateral consequences is highlighted in the recent revisions of the sentencing articles of the Model Penal Code.153Defense counsel in criminal cases should make clients aware of any available certificate, and should help clients seek them at sentencing or, if possible, thereafter. The federal government, states, and localities that fund indigent defense should make funding available for representation in connection with certificates. Judges at sentencing should make defendants aware of available certificates and should grant them to eligible defendants unless the government objects and there is good cause to deny the certificate. In addition, prison officials should provide information on restoration of rights mechanisms upon an inmate’s release from prison, as should officials overseeing parole, supervised release, and probation. Further, there should be no fees for certificates. Employers and other decision-makers should not be permitted to ask about any conviction where a certificate has been granted, and credit reporting companies should not be permitted to report them.

“It would be appropriate for there to be end of parole ceremonies, where you say to the parolee congratulations, you finished your term of parole... Here is your voting certificate, if you’re in a jurisdiction where you can’t vote while you’re on parole. Here is something. Here’s your family. Here’s your applause. You did it. You’re back. . . . There’s a graduation. . . . [T]he restoration of status as programmatic and policy and a sort of symbolic activity . . . is very important.”

John Jay College President
Jeremy Travis (NY Day 1 at 79-81)

Jurisdictions should carefully consider the best way to promote certificates, so that people know about them, officials grant them, and decision-makers take them into consideration when deciding whether to offer a person with a conviction an opportunity or benefit. For example, Jorge Montes, former chair of the Illinois Prisoner Review Board, testified that while there have never been many certificates granted in Illinois, the numbers dropped to only 10 in a period of two years once they were moved from the Review Board to the courts. Montes believes this drop took place in part because courts “are not in the business of promoting these things,” and will not “promote the certificates the way the Prisoner Review Board used to promote...
them.” On the other hand, Montes pointed out, “The court’s imprimatur on something is a lot more powerful.”

Several witnesses suggested that a ceremony to mark the occasion of the end of a criminal case might be appropriate. Jurisdictions might consider the granting of a certificate as a time to hold such a ceremony. Glenn Martin, vice president of the Fortune Society and a person with a conviction, testified how sentencing serves to remind us “that being found guilty of a crime in the U.S. is met not only with direct punishment meted out by the courts but also coupled with a deliberate devaluation of one’s civil status. Unfortunately, we have no similar ceremony post-conviction to return people to their prior role as full-fledged citizens.”

Recommendation

V. Congress and federal agencies should provide individuals with federal convictions with meaningful opportunities to regain rights and status, and individuals with state convictions with mechanisms to avoid collateral consequences imposed under federal law.

- Congress should expand diversion and deferred adjudication options that result in dismissal of federal charges after completion of all conditions, and federal prosecutors should be encouraged to offer them wherever appropriate.

- Individuals convicted of federal crimes should have an accessible and reliable way of regaining rights and status through enactment of a federal judicial certificate that relieves consequences of a federal conviction and through reinvigoration of the federal pardon process.

- Congress should enact meaningful record-sealing laws, modeled after successful state sealing and expungement laws.

- Congress should authorize federal courts to dispense with mandatory collateral consequences arising under federal law that apply to individuals with federal convictions. Congress should authorize state courts to grant relief from mandatory federal collateral consequences. By the same token, state legislatures should provide individuals with federal convictions a way to avoid consequences arising under state law.

- Federal courts and agencies should recognize and give the same effect to relief granted by state courts and executive officials as state authorities give that relief.

- Federal agencies should provide incentives to encourage private employers and state agencies to offer equal opportunity to persons with a criminal record.

- The federal government should fund research into the ways that various avenues of relief are or are not working to help individuals reintegrate into society and lower recidivism rates.

This nation’s collateral consequences crisis is a civil rights problem in need of a coordinated national solution. Presidents Barack Obama and George W. Bush have spoken up in support of giving people a second chance. Attorney General Eric Holder has been consistent in his support for reducing barriers to re-entry. In a 2014 speech, the attorney general emphasized how “we must never hesitate . . . to enable those who have paid their debts to society to become productive cit-
izens; to make our criminal justice expendi-
tures as smart and productive as possible; and
to ensure that 21st century challenges can be
met with 21st century solutions.”

These officials must go beyond speeches and
act to help individuals avoid unnecessary con-
victions and collateral consequences and gain
the restoration of their rights and status. There
has been some recent positive movement, par-
ticularly at the federal agency level. For ex-
ample, in 2011 the attorney general assembled a
Cabinet-level Interagency Re-entry Council to
promote a federal effort aimed at reintegration
of individuals returning from prison back into
their communities.159 Amy Solomon, who co-
chiefs the Re-entry Council’s staff-level work-
ing group, testified at the Task Force’s District
of Columbia hearings, and described the
Council’s efforts “to remove the federal barri-
ers to re-entry, barriers to employment and
housing and federal benefits such as food as-
ssistance, TANF [cash assistance], veterans ben-
efits and Social Security.”160 Some federal
agencies have encouraged employers and pub-
lic housing officials to put less emphasis on an
individual’s criminal record.161 Yet there is still
much work to be done with respect to the hun-
dreds of federal laws, regulations and policies
that set up harmful barriers for individuals with
criminal records.

In addition, federal officials must turn their at-
tention to the federal criminal justice system,
which lacks viable avenues of relief from a fed-
eral conviction. Individuals with federal, mil-
itary, and District of Columbia Code convictions
have even more limited access to relief from col-
lateral consequences than individuals with state
convictions. Unlike many state systems, there is
no expungement, sealing, or certificate of relief
from disabilities for federal and military convic-
tions, or even for non-conviction records.

Presidential pardons, the only avenue for relief
from federal convictions, are rarely granted. Pres-
ident Obama has approved less than four
percent of pardon applications he has acted on.162
The current presidential pardon system must be
reformed so it sets a national example and offers
applicants a true chance at mitigation of our
harsh federal sentencing laws. Sam Morison, a
former staff attorney in the U.S. Department of
Justice’s Office of the Pardon Attorney, testified
that the real problem is not political, but inheres
in the culture of the Justice Department’s pardon
program. “It’s not that this [pardon] is too risky,
[that] it can’t be done. . . . It’s really a cultural
problem. If we tell ourselves we can’t do it, it be-
comes a self-fulfilling prophecy.”163 The inade-
quacies of the current system can be addressed
either by creating a new procedure within the
White House to review and process pardons or
by undertaking major reforms if the procedures
remain within the Department of Justice. As this
report went to press, the Obama administration
announced a clemency initiative that will provide
an opportunity for the commutation of sentences
for those whose sentences would be shorter
today, due to changes in statutory law, charging
policy or case law. Significantly, however,
as worthy as this initiative may be, it does not address restoration of rights. As Deputy Attorney General James Cole made clear, sentencing commutations do not amount to pardons or forgiveness. Congress must expand opportunities for relief and restoration by giving sentencing judges the power to relieve collateral consequences at sentencing and by creating a federal certificate of relief from disabilities.

Kemba Smith, whose sentence was commuted by President Clinton in 2000, has faced numerous barriers, including difficulty finding housing. Asked what she would say in a face-to-face meeting with President Obama or Attorney General Holder about the federal pardon process, Smith told the Task Force: “I would basically say how . . . we want to feel whole.” Further, “we should all believe in redemption, and once a person has served their time, proved themselves to society above and beyond . . . people [should] . . . be able to move forward and have a clean slate. I think that people should be afforded that opportunity.”

Legislating Forgetting and Encouraging Forgiving in the Electronic Era

Many people who testified before the Task Force grappled with the complexities and difficulties of having so many people in the United States with some type of criminal record in this electronic age. Some preferred an approach that legislated forgetting, such as sealing and expungement of records and prohibitions on employer inquiry about non-recent convictions. Others saw this as a lost cause in an era where technology allows no secrets, and urged an approach that encourages individuals to acknowledge their past but move beyond it, seeking forgiveness and demonstrating redemption.

“All the evidence points to the fact that time matters. People age out of crime, and there’s a certain point where a person is no longer a threat. . . . And after a certain period of time, the record shouldn’t exist. It just should not exist. It’s the easiest solution. It doesn’t require people to have compassion or forgive. . . . [I]t requires them to not have the information, and if they don’t have the information, they can’t make decisions based on it. If the research proves that that’s a safe thing to do, it’s the easiest thing to do. I think expungement after a period of time is the way to go.”

Vivian Nixon, executive director, College & Community Fellowship

“I’m firmly in the camp of forgiveness as opposed to forgetfulness. I’m a technologically aware person. Forgetfulness just can’t work. There are too many holes in the dam. We can’t plug them all. It just won’t work.”

Stephen Johnson Grove, deputy director of policy, Ohio Justice and Policy Center
“[T]here has to be sealing and expungement of convictions that are remote in time. The research tells us that these convictions do not predict a person’s likelihood to engage in crime. . . . [O]ur clients tell us . . . unless people are told they have to forget, forgiveness is an illusion.”

Ann Jacobs, director of the prisoner reentry institute, John Jay College of Criminal Justice

“I always liked the idea of expungement after a certain period of time. I think the forgetting is more important than the forgiving. Do you know what I mean? I mean, nobody is asked to forgive anybody, but to forget so that the person can get on with their life.”

Judge Matthew D’Emic, New York State Supreme Court

“You can’t legislate what’s in people’s hearts in the first instance, but when you force people to deal with each other and accept people based on reality instead of preconceived notions, over the course of generations, you do, in fact, provide the mechanism to change hearts. So it’s a long process, but if we legislate forgetting, we might get to a place where our grandchildren can forgive.”

Judy Conti, federal advocacy coordinator, National Employment Law Project

“The people that we’re talking about and trying to help, they’re sort of in between forgetfulness and forgiveness as well. I think there are a lot of people, if you sort of sit down and talk with them will say, you know, that wasn’t me 15 years ago, here’s who I am now, judge me by this standard, don’t judge me by that standard. . . . I think for some people, it’s not an element of forgiveness. . . . [T]hey’re not that personal. They want to just move forward from this point forward. So it’s a really interesting framework, forgetfulness versus forgiveness, but it’s a very complicated question once you get down to talking to people, and I think . . . there’s not a clear answer.”

Peter Willner, senior policy analyst, Center for Court Excellence

“I maintain that everything has a philosophical beginning. We practice many forms of religion in our country, but to a large extent, we are a Christian nation. . . . But at the base of Christianity is this concept of redemption. I mean at the base of it is the idea that there can be redemption. . . . If we have this redemptive notion, then it would say to me is that we believe that people can be transformed.”

Congressman Danny K. Davis, Illinois
Recommendation

VI. Individuals charged with a crime should have an opportunity to avoid conviction and the collateral consequences that accompany it.

- Diversion and deferred adjudication should be available for all but the most serious crimes, and prosecutors and courts should be encouraged to use them.

- Successfully completed diversion and deferred adjudication conditions result in an eventual non-conviction disposition, and non-conviction dispositions should never trigger any collateral consequences.

- Sealing or expungement should be available for all successfully diverted or deferred prosecutions, and decision-makers should be barred from asking about or using these non-convictions.

- Where avoidance of a conviction is not feasible, all parties should take collateral consequences into account at every stage of the case:
  - Defense lawyers should advise clients charged with a crime about potentially applicable collateral consequences and assist them in exploring opportunities to avoid them through creative plea bargaining and effective sentencing advocacy;
  - Prosecutors should structure charges and negotiate pleas to allow defendants to avoid severe collateral consequences that serve no public safety purpose; and
  - Courts should ensure that defendants have been advised about applicable collateral consequences before any guilty plea or trial, and should take collateral consequences into account at sentencing.

The best way to relieve a person of the many harsh consequences of a criminal conviction is to avoid the conviction in the first place. There are far too many charges brought in the nation’s criminal courts, and far too many individuals with criminal records in this country. While there is great need for reform at the policing level to stem this flood into courts at its inception, once a case is in court, individuals should have the opportunity to avoid a conviction by satisfying appropriate conditions.

There are two general ways to avoid a conviction once charges are filed. Diversion or deferred prosecution is usually controlled by the prosecutor and involves a pre-plea agreement with conditions of fulfillment. A deferred adjudication may or may not require an up-front guilty plea, with the judgment or execution of the judgment suspended to give the defendant an opportunity to complete terms of probation. Successful completion of either diversion or deferred adjudication conditions generally leads to dismissal.
of the charges, and thus no conviction. Another approach is to “knock down” a felony conviction to a misdemeanor upon successful completion of probation, as California has permitted for many years with its so-called “wobbler” offenses (Cal. Penal § 17(b)(1) and (b)(3)), and as Colorado and Indiana have recently made a part of their new relief schemes (Colo. Rev. Stat. § 18-1.3-103.5 and Ind. Stat. § 35-50-2-7(d)). However, dismissal does not always mean the defendant can seal or expunge the record, and even where sealing or expungement is available, it is not generally automatic.

“[W]e shouldn’t discuss, think about, imagine remedies for convictions without first looking at, acknowledging, asking how the conviction came to be in the very first place. . . . If there were no conviction in the first place, there would be no problem with what to do after the conviction.”

Professor Steve Zeidman, CUNY Law School

Although most states have some form of diversion or deferred adjudication (but not the federal criminal justice system, other than for a first misdemeanor drug possession), many are limited in the types of charges that qualify. Such mechanisms should be more broadly available to more defendants. Further, prosecutors and judges must make greater use of existing diversion and deferral mechanisms to give more individuals the opportunity to earn an eventual dismissal. It is significant that in recent reforms addressing collateral consequences, many have expanded the menu of non-conviction options.

Judge Paul Biebel, who presides over the Criminal Division of the Cook County Circuit Court in Illinois, explained why his jurisdiction’s “delayed not guilty” approach actually offers more structure than a conviction, and the benefit of giving individuals relief from collateral consequences. Under this approach, a defendant is “on supervision, maybe [with] some conditions for a year, and at the end of the year, you’ve done what they said, it’s a not guilty, the case is dropped, but it’s expungeable, it’s not a conviction.” By contrast, Judge Biebel stated, “In that very same case, if that magic word, supervision, wasn’t used and you had a $20 fine, you had a straight conviction, and I can’t give you the [expungement] relief.”

Model Legislation: A new Colorado law authorizes prosecutors to establish pretrial diversion for all but specified serious sex offenses, where successful completion means dismissal and no conviction. The law’s stated purpose is “to ensure defendant accountability while allowing defendants to avoid the collateral consequences associated with criminal charges and convictions.”

Another Colorado law requires judges to reduce low-level felony drug convictions to a misdemeanor conviction if the defendant successfully completes probation and meets other statutory conditions. The legislature described the law as a way “to reduce the significant negative consequences of [a] felony conviction” and to provide “an additional opportunity for those drug offenders who may not otherwise have been eligible for or successful in other statutorily created programs that allow the drug offender to avoid a felony conviction, such as diversion or deferred judgment.” Of course, Colorado prosecutors and judges have to use these laws in order to fulfill their intended purpose.
A Cautionary Tale About Diversion

Deferred or diverted charges or prosecutions may still lead to certain consequences, even where state law does not treat the deferred charge as a conviction. For example, courts have found that “a first-time simple drug possession offense expunged under a state rehabilitative statute is a conviction” under federal immigration law, meaning that it can still lead to mandatory deportation. Even some “youthful offender” adjudications have been deemed “convictions” for immigration law purposes. In some states, convictions that are “set aside” may still be considered for such things as recidivist sentencing statutes or driver’s license suspension. For example, under federal banking law, a misdemeanor shoplifting charge that is dismissed under a diversionary statute without any admission of guilt can result in a 10-year ban from any type of employment — from a teller to a janitor to a third-party vendor — at any bank or other FDIC-insured employer. Such was the case of Jennifer Smith, who sued the bank for rescinding the employment offer. While her lawsuit was unsuccessful, Federal District Judge Jack Weinstein criticized both her defense lawyer for failing to warn about the consequence of accepting diversion and the option of applying for a waiver of the employment bar, and the federal law that frustrated her “second chance for a lawful life.”

Recommendation

VII. Employers, landlords and other decision-makers should be encouraged to offer opportunities to individuals with criminal records, and unwarranted discrimination based on a criminal record should be prohibited.

- There should be meaningful tax credits for hiring or housing those with convictions.
- There should be free bonding to provide insurance covering employee dishonesty for those who hire individuals with convictions.
- Decision-makers should be immune from negligent hiring liability relating to an opportunity or benefit given to an individual with a conviction if they are in compliance with federal, state, and local laws and policies limiting the use of criminal records and with standards governing the exercise of discretion in decision-making.
- Jurisdictions should enact clear laws prohibiting unwarranted discrimination based upon an individual’s criminal record, and should provide for effective enforcement and meaningful review of discrimination claims.

Jim Andrews, who owns Felony Franks and other Chicago businesses, hires many people with criminal records because he sees the benefit of offering such opportunities. He testified about the work ethic of individuals with criminal records and how they “work harder. They have to prove themselves to society. They come in. They work very hard to prove themselves.” Government at all levels must find creative ways to give employers, landlords and other decision-makers affirmative incentives to offer opportunities to those with convictions.
Decision-Makers That Make Responsible Hiring Decisions and Comply with Laws Limiting Access to and Use of Criminal Records Should Be Immune from Negligent Hiring Liability

Luz Norwood was asked if giving employers immunity from negligent hiring liability would help her re-entry program place people. “That is the first issue that we get” from employers, she testified, stating that immunity “would be another tool. Absolutely.”185

Some employers are concerned about being sued for negligent hiring if they hire individuals with criminal records. Landlords and other decision-makers may have similar concerns. There is no evidence that such lawsuits are common, and indeed they appear to be quite rare.186 However, to take this obstacle off the table, decision-makers who follow non-discrimination and any other applicable law, regulations or policies for the exercise of discretion and limiting the access to and use of criminal records should be immune from negligent hiring and other liability for offering an opportunity or benefit to an individual with a criminal record. A number of states already offer different versions of such immunity.187

Employers Who Hire or House Individuals with Convictions Should Get Meaningful Tax Incentives and Bonding for Insurance Purposes

The federal government currently offers the Work Opportunity Tax Credit, up to $2,400 per employee, to employers hiring a person convicted of a felony who is recently released from prison.188 There is also a federal bonding program providing insurance for employee dishonesty to similarly encourage employers to offer opportunities.189

Several states and localities also offer tax incentives and bonding to employers hiring people with criminal records. For example, Carol Morris testified about the Re-entry Employment Service Program she managed for the state of Illinois. It offers tax incentives and bonding for insurance for employers who hire individuals with convictions, and does outreach and education to employers and individuals with convictions.190

However, the Task Force heard testimony from Everett Gillison, deputy mayor for public safety and chief of staff for the mayor of Philadelphia, that many employers do not take immediate advantage of tax and other hiring incentives.191 Tax incentives must be meaningful to attract employers and data must be collected to see if they are working to open up more opportunities for applicants with criminal histories. If so, federal, state, and local governments should extend these incentives to private landlords who offer housing to individuals with convictions. Any tax or bonding incentive should be available only to those in full compliance with federal, state, and local laws and policies limiting the use of criminal records and with standards governing the exercise of discretion in discretionary decision-making.

Jurisdictions Should Prohibit Discrimination Based on an Individual’s Criminal History and Effectively Enforce Such Prohibitions

Only four states have comprehensive laws prohibiting discrimination against individuals with criminal records in licensing and in public and private employment. New York, Wisconsin and Hawaii include these prohibitions in their fair employment law; Pennsylvania does not, however, have any mechanism for administrative enforcement of its law, leaving enforcement to the courts through any lawsuits filed.192

Patricia Warth, co-director of justice strategies at the Center for Community Alternatives, testified that “since the early 1970s, New York State has led the nation in enacting and implementing legislation and polices that discourage employers from discriminating against people with past criminal justice involvement.”193 A variety of
New York laws combine to:

- Prohibit employers and licensing agencies from rejecting an applicant based on a conviction unless there is either a direct relationship between the conviction and the specific job or license sought or granting the license or employing the person would involve an unreasonable risk to property or the safety of individuals. The “direct relationship” test is set out in eight factors related to the applicant, the job duties and the conviction.  

- Allow a limited “safe harbor” against negligent hiring claims for employers who document their compliance with the law. 

- Prohibit employers from asking about or considering applicants’ sealed arrests or conditionally sealed convictions.  

- Offer Certificates of Relief from Disabilities and Certificates of Good Conduct that relieve mandatory barriers to employment and create a presumption of rehabilitation under the state fair employment practices law.  

- Offer state law protections that supplement federal Fair Credit Reporting Act protection for individuals when an employer relies on a private background checking company to take an adverse action. 

“So we’re fortunate to be in a state [New York] that has these protections that most states do not enjoy,” testified Sally Friedman, the legal director of the Legal Action Center. “The challenge, of course, is in the enforcement, and I think that employer awareness of the laws has improved in the last few years, especially since a law was created to require employers to give employees copies of the law. But the law is routinely violated, and employers sometimes have explicit policies about not hiring people with felony convictions or other types of convictions.”

In addition to including provisions like those listed above from New York, non-discrimination laws should include civil penalties for any violation and should be rigorously enforced by an appropriately funded agency. For example, the EEOC recently filed lawsuits against the automaker BMW for its blanket exclusion of employees with criminal records and against Dollar General for revoking a job offer to a woman convicted of drug possession. In both cases, the EEOC alleges that the companies improperly used criminal background checks to bar potential employees, resulting in a disparate impact on African-American applicants.

Finally, non-discrimination laws should clearly prohibit discretionary decision-makers from inquiring about or considering a non-conviction record.

**Recommendation**

**VIII. Jurisdictions should limit access to and use of records for non-law enforcement purposes and should ensure that records are complete and accurate.**

**Accuracy of Records**

- State repositories, court systems and other agencies that collect criminal records should have in place mechanisms for ensuring that official records are complete and accurate, and should facilitate opportunities for individuals to correct any inaccuracies or omissions in their own records.

- Records must be provided in a form that is easy to understand and that does not mislead.

- Records that indicate no final disposition one year after charges are filed should be purged from all records systems.
Access to Records

- The FBI must ensure that information relating to state relief, such as expunged and sealed records, is reflected in its criminal record repository.

- State and federal authorities should limit access to their central repositories to those with a legitimate need to know.

- Court records should be available only to those who inquire in person, in order to balance public access to records with privacy concerns for individuals with a criminal record, and access to online court system databases should be strictly limited.

- Law enforcement records (non-judicial) should never be publicly disseminated.

- Criminal records that do not result in a conviction should be automatically sealed or expunged, at no cost to their subject.

- Jurisdictions should prohibit non-law enforcement access to conviction records after the passage of a specified period of time, depending upon the nature and seriousness of the offense, and should authorize courts to prohibit access in cases where it is not automatic. Any exceptions should be justified in terms of public safety, and persons who disclose records in violation of limitations on access should be subject to substantial civil penalties.

Use of Records

- Employers and other decision-makers should be prohibited from asking about or considering a criminal record to which access has been limited by law or court order.

- Employers should be prohibited from inquiring about an applicant’s criminal record until after they make a contingent offer of employment.

- For accessible records, decision-makers should follow applicable standards for the exercise of discretion and non-discrimination laws in considering any relevant and recent criminal records.

Data Company Regulation

- Jurisdictions should never sell criminal records and should strictly regulate private companies that collect and sell records.

- Federal law should be amended to prohibit credit reporting agencies from reporting any record of a closed case that did not result in conviction, or any record of a conviction that is more than seven years in the past.

- States should enact their own restrictions on credit reporting companies to the extent permitted by federal pre-emption.

- Jurisdictions should provide for effective enforcement of laws governing credit reporting agencies.

Criminal records are everywhere, and they are not just used for law enforcement purposes or to check someone’s prior criminal history for charging or sentencing decisions. Some state court systems put them online.201 Large private data companies use them to do background checks for employers and landlords.202 A variety of “mugshot” websites post arrest photos and information and then charge individuals seeking to take down erroneous records.203 With a few clicks, people can view photos of those on the sex offense registry in their zip code through a state website204 or can get on a commercial site to run a quick check on someone they want to date.205

Yet many of these sources have incorrect information about a person’s record, and they are also sometimes used for unlawful purposes. To protect individuals from these problems, and to help
people move beyond their convictions, in this section NACDL offers a number of recommendations to promote accuracy in as well as limits on accessing, using, and selling criminal records.

This country’s long tradition of constitutional protections surrounding full and open access to court proceedings and records further complicates the matter. But there is a balance that can and should be struck between the public’s right to know about an individual’s criminal record and society’s interest in allowing people to move on and protecting those whose arrests never lead to a conviction. Jurisdictions should develop policies that limit access to and use of criminal history records for non-law enforcement purposes in a manner that balances the public’s right of access to information against the government’s interest in encouraging successful reintegration of individuals with records and individuals’ privacy interests.

Official Records Must Be Complete, Accurate and Easy to Understand

With approximately one in four adults in the United States having an arrest or conviction record, the implications of the various uses of these records are enormous. Yet the FBI’s criminal record repository, which with 70 million unique sets of fingerprint files is “the largest biometric database in the world . . . and is the most comprehensive single source of criminal history data in the United States,” is notoriously inaccurate and incomplete. About half of the records in the FBI database “are incomplete and fail to provide information on the final outcome of an arrest.” The FBI database was used for almost 17 million background checks for employment and licensing in 2012 and, with more than 1,600 state laws mandating FBI background checks, this number is sure to remain high. State criminal record repositories, which the FBI uses to compile its data, are only somewhat better, with state rates for reporting final dispositions on an arrest record ranging from 60 percent to 80 percent.

As an important new report noted, “The failure to update records to reflect the outcome of a case following the report of an arrest is hardly inconsequential.” Approximately one in three felony arrests never lead to a conviction. For individuals who are eventually convicted, “nearly 30 percent were convicted of a different offense than the one for which they were originally charged, often a lesser misdemeanor conviction.” Finally, there are cases that were “overturned on appeal, expunged, or otherwise resolved in favor of the worker without ever being reflected on the FBI rap sheet.”

Indeed, a number of witnesses described such problems. NYC Probation Commissioner Vincent Schiraldi testified about how cleaning up rap sheets is important for individuals under his department’s supervision: “Stuff is on there that people didn’t get convicted of. They go to court with four felonies. They get convicted of one misdemeanor. All four felonies are still on their rap sheet. . . . Either a clerk didn’t do what they were supposed to do or DCJS didn’t do what they were supposed to do. I don’t even care who’s at fault, though. We’re just trying to come out the other end with a clean, correct rap sheet.” Ron Tonn, chief operating officer of the North Lawndale Employment Network in Illinois, when asked whether his organization’s clients are ever victims of faulty background checks, stated that it “happens all the time.” The re-entry collaborative that he works with is thus recommending “more strict enforcement of the guidelines that govern those private organizations that conduct background checks and make them accountable for false information or illegal or improperly disclosed information when that handicaps somebody in their job search.” Rebecca E. Kuehn, vice president and senior regulatory counsel at Core Logic, testified about her company’s nationwide “SafeRent” tenant screening company. While Kuehn’s company, unlike some others, gets records directly from court-houses around the nation, she noted that “[t]he real challenge for SafeRent [and] for anybody who deals in criminal records is that there seems to be an uneven availability of [expungement and sealing] orders and an uneven updating of the criminal records themselves where expungements are affected.” In addition, the company will pick up — and thus pass on to landlords — in-
formation about a pardon, a Certificate of Relief from Disabilities, or another similar certificate only if that “information is captured within the criminal record system as associated with the consumer and is available within the public record,” meaning that it must be on the same docket as the original charges and conviction.216

“[T]here is a simple and effective solution to the serious problems with the FBI database: clean up the records before they are sent to the agencies that rely on them to make hiring and licensing decisions.”

Wanted: Accurate FBI Background Checks for Employment at 7 (National Employment Law Project 2013)

There is some movement towards change. Two bills introduced in Congress in 2013 seek to reform how the FBI collects and shares criminal record information, recognizing the major problems caused when employers doing background checks get inaccurate or overbroad information.217 The Fairness and Accuracy in Employment Background Checks Act aims to clean up incomplete FBI background checks for employment. For example, the FBI would have to remove from its database any arrests that are more than a year old that do not have a disposition reported, as well as “non-serious” juvenile and adult offenses. Supporters of the Act note how the FBI is able to quickly track down incomplete records when conducting background checks for firearms purchases.218 Although firearms checks end with the first disqualifying conviction while mandatory employment back-ground checks require more complete inquiry, there is much to commend in this bill that would bring more accuracy and efficiency into the FBI records system. Also introduced in 2013, the Accurate Background Check Act would require the FBI to find missing information on past arrests for individuals applying to work in the federal government.219

Limiting Access: Sealing or Expungement Should Be Available for All Non-Conviction and Some Conviction Records

In the electronic era, it is difficult, if not impossible, to truly hide arrest and conviction records from public view. Even if a person’s court record is sealed, his mug shot may be on the Internet. Even if an arrest was never prosecuted, the local newspaper story of that arrest may come up in a Google search. Still, limiting access to criminal records through sealing or expungement rules can be of great benefit to individuals seeking equal opportunities in employment, housing, education, and other core areas. For example, if an individual has a sealed misdemeanor conviction and is in a jurisdiction that successfully regulates credit reporting agencies (CRAs) so that they remove sealed records from their databases, employers will not see that sealed record when they run a criminal background check through a CRA or when they directly check court records. That individual will then have an equal opportunity to compete for that job. This example illustrates how several sources of regulation are needed to make limited access to records meaningful.

Using a dictionary definition, when a record is expunged, it is destroyed; when it is sealed, it is not publicly accessible. However, in almost every state “expunged” records are still on the books and available at least to law enforcement and sometimes even to the public.220 Since these terms are variously defined in different states, it is important to read the relevant statute closely to determine whether and to what extent a particular record is truly withheld from public view or destroyed. Beth Johnson, an attorney at Cabrini-Green Legal Aid in Chicago, told the
Task Force how Illinois’ sealing statute offers limited relief to her clients: “Any agency that by law has to conduct a background check has access to a sealed record. And even in Illinois, if your conviction is pardoned, they say you can expunge it, but it’s only sealed. It is still released to anyone that does a fingerprint-based background check.”

Despite these thorny issues relating to sealing and expungement, several states have recently considered or passed laws that limit access to records, including conviction records, through some type of sealing or expungement. For example, the chief justice of New York State’s high court, in his 2014 State of the Judiciary address, announced:

I will shortly be submitting legislation to make New York’s criminal history record policies fairer and more rational. First, the proposed legislation will expunge, by operation of law, a misdemeanor conviction of an individual who has not been re-arrested within 7 years from the date of such conviction. Second, it will permit a court, upon application and in the interest of justice, to expunge a non-violent felony conviction if the applicant has no previous felony convictions and has not been re-arrested within 10 years of the date of the felony conviction or release from incarceration, whichever is later. This expungement will result in the sealing of all court and related law enforcement records.

Many states limit access to conviction records. Twenty-two state laws provide some way to expunge a variety of misdemeanor convictions and a limited number of felonies — often non-violent, non-serious, felonies. Eight other states allow certain records to be sealed. Though any limit on access to criminal records is significant to individuals with records, most current laws require applicants to wait for years, often more than 10 years after completing a felony sentence without obtaining any new charges, before the applicant can apply to have the record expunged or sealed. Four jurisdictions limit eligibility for expungement based on the age of the applicant when the offense was committed.

Indiana’s Significant New Law Limiting Access to and Use of Criminal Records, Including Conviction Records

In 2013, the Indiana Legislature enacted a comprehensive scheme offering significant protections for individuals with criminal records. Under the new Indiana law, non-convictions and most conviction records are eligible for expungement, which imposes strict limits on the use to which the records can be put. In addition, once expunged, non-conviction and misdemeanor records are sealed from public view. Eligibility waiting periods range from one year (for non-conviction records) to five years (for misdemeanors and less serious felonies) to eight or 10 years (for more serious felonies). The only felony convictions not eligible for expungement are those involving serious violence, official misconduct, human or sex trafficking, or sex crimes. The term “expungement” is somewhat misleading, as felony records are marked “expunged” but “remain public records.” But importantly, any expunged conviction — whether hidden from public view or not — is subject to a number of protections in Indiana, including prohibitions against discrimination based on the conviction, with criminal penalties for such discrimination; prohibitions against asking a person about an expunged record, although it is permissible to ask about an arrest, which is highly problematic; full restoration of all civil rights, including firearm rights under state law; protections from liability for decision-makers in lawsuits alleging negligence; and prohibitions on credit reporting agencies publishing expunged records. The procedures for expungement are relatively straightforward, and the court system has posted sample expungement petitions online.
“In the last 10 years, I have done approximately 40,000 expungements or sealings in chambers. We hear them every day in my court. We have two afternoon calls on Tuesdays and Thursdays every week where other judges hear these. . . . And I tell you this: I am rigorous in my examination of these people.”

Presiding Judge Paul Biebel, Cook County Circuit Court, Criminal Division.

Congressman Danny Davis, who represents Illinois’ 7th District, told the Task Force that he has “testified for a number of people who have been trying to get their records expunged. And some of the things for which they were tried, convicted, and have a record are just unbelievable.” Davis told the story of a “young woman who has a doctoral degree from the University of Illinois, and she had gotten into an altercation on behalf of her boyfriend at a football game, and she couldn’t get a teaching certificate because she had a conviction and she couldn’t do a lot of things. And she was one of the brightest people that I’ve known, and rational, logical, but she and her boyfriend had gotten into this altercation with the security guard at a football game, and they were charged with disturbing the peace.”

Ohio State Senator Shirley Smith, explaining legislation she introduced that would allow expungement of multiple felonies, “[w]hen they’ve paid that time, I expect that they should come out and become a citizen, a normal citizen, but that’s not what happens.”

The presumption of innocence is a bedrock principle in the American criminal justice system. Without a conviction, a judge cannot impose a sentence. Similarly, a case that is closed without a conviction should end the matter of any collateral consequence. There are no strong practical or political objections to closing off non-conviction records from public view.

Non-conviction records should be:

- Automatically sealed or expunged upon the conclusion of the matter, with no need to apply or to pay a fee; and
- Inaccessible to non-law enforcement entities except with a court order, and not subject to inquiry for any purpose. Further, law enforcement access to non-conviction records should be strictly limited to instances where there is a substantial public safety need for the information.

Non-conviction records include: arrests that never become criminal charges; charges that are dismissed before or after a plea or trial; juvenile delinquency adjudications; and convictions that are vacated or reversed on appeal and not reprosecuted.
Although sealing and expungement may or may not be sufficient to allow individuals effective relief from a conviction, they are an important part of a necessarily multi-faceted approach.

There are also law enforcement records that are not official court records, such as sheriff’s booking photos. These should never be made publicly available through online databases.

Limiting Use: Use of Criminal Records Should Be Limited Whether or Not Access Has Been Limited

If a criminal record is inaccessible under a jurisdiction’s law or a court order, then employers and other decision-makers should be prohibited from asking about it or considering it, unless specifically authorized by law. For example, under Illinois law expunged or sealed records “may not be considered by any private or public entity in employment matters, certification, licensing, revocation of certification or licensure, or registration.” There are exceptions for public school employment as well as employment for which a background check is required by state or federal law.239

Even when records are accessible under the relevant law, decision-makers should follow applicable standards of relevance and the requirements of non-discrimination laws in considering any criminal records (standards of relevance for discretionary decision-makers are set out in detail in Recommendation III).

Regulating Access: Jurisdictions Should Never Sell Criminal Records and Should Strictly Regulate Private Companies That Collect and Sell Records

There are essentially two types of private companies that collect and publish criminal records. Large data collection companies generally run background checks for employers, landlords and other entities that are required or allowed to consider a criminal record. These companies are regulated by the Fair Credit Reporting Act (FCRA) as Consumer Reporting Agencies. Many of these data brokers have their own databases that they fail to update by removing expunged or sealed cases. These databases must be tightly regulated, with the goals of accuracy, transparency and better enforcement of the law. The second type of company, so-called “mug shot websites,” are operated by private entities that gather information from a variety of publicly available sources, including law enforcement agency sales and Freedom of Information Act requests. While restrictions on

Requiring Data Companies to Update Their Records Regularly to Omit Those That Have Been Expunged

The Administrative Office for Pennsylvania Courts has a unique approach to pushing data brokers to remove expunged cases from their databases. While Pennsylvania takes the unfortunate step of selling its records to bulk data companies, it makes updating a term of the contract. Pennsylvania also provides the industry with a list of expunged cases. While some brokers have ignored these lists, Pennsylvania’s approach is a step forward in the fight to keep records accurate and current.243 A pending bill in Texas would create a list of database companies so that notices of expungements can be directed to them.244 Some of the more responsible data-resellers refresh their databases periodically by downloading court data in full on a regular basis. This helps ensure that expunged records don’t reappear. Courts should require anyone who gets bulk data from them to follow this practice and should impose penalties against those that fail to do so.
these types of websites raise some unresolved constitutional questions.\textsuperscript{240} there are nonetheless steps that can be taken to limit their harmful effect.

“Florida law clearly states that most juvenile records are confidential, including juvenile arrest records. Unfortunately . . . [the] Florida Department of Law Enforcement has taken the wrong position that the statute that applies to them allows them . . . not only to release the record, but to charge for the record. . . . A misdemeanor charge, you could actually, right now, purchase every juvenile record for 24 bucks in the state of Florida, even if it was a seven-year old, even if it was dismissed. It doesn’t matter. You can get the record.”

Carlos Martinez, Public Defender for Miami-Dade County (Miami Day 1 at 150)

Courts, law enforcement, and central record repositories should not sell any criminal records, although they might collect administrative fees to cover costs of maintaining records from those who are allowed access based on a legitimate need to know about a record. Jurisdictions should ban the sale or dissemination of any arrest records, except for law enforcement purposes, and should strictly enforce such bans.\textsuperscript{242}

“[I]t was only a matter of time before the Internet found a way to monetize the humiliation that came with an arrest.”

New York Times article discussing “mugshot” websites\textsuperscript{241}

The Fair Credit Reporting Act, which regulates Consumer Reporting Agencies (CRAs) that sell criminal records, should be amended to reinstate a bar on reporting convictions that are more than seven years old; delete the provision allowing CRAs to report arrest records within seven years; and prohibit CRAs from reporting any conviction that lacks a final disposition. The Federal Trade Commission and the Consumer Financial Protection Bureau, which both enforce the FCRA, should strengthen enforcement efforts. States without a fair credit reporting law should enact one and enforce it against companies providing criminal background information.

Recommendation

\textbf{IX. Defense lawyers should consider avoiding, mitigating and relieving collateral consequences to be an integral part of their representation of a client.}

- Avoiding, mitigating and relieving collateral consequences at every stage of a criminal case should be an integral part of a defense lawyer’s representation of a client.

- Defense lawyers should assist clients in obtaining relief from the court at sentencing and during the period of the sentence.

- Defense counsel should advise clients about available post-sentence relief, and wherever feasible they should assist clients in seeking such relief.

- If representation is not feasible, defense counsel should refer clients seeking post-sentence relief to organizations or individuals that can provide such representation.

- Agencies that fund indigent defense services should make resources available for representation in connection with seeking restoration of rights and status.
“I've had a lot of conversations with public defenders and other criminal defense attorneys who do not think re-entry is their work and don't see why it’s so important. . . To be a really good criminal defense attorney, you need to know what the re-entry consequences are.”

Eliza Hersh, Director, Clean Slate Practice, East Bay Community Law Center

Defense counsel have both an opportunity and an obligation to help clients avoid or mitigate collateral consequences at the front end of the criminal process and to relieve them at the end of the process. In order to optimize defense counsel’s role, NACDL recommends the following:

To Help Clients Avoid and Mitigate Collateral Consequences, Counsel Must First Understand Which Consequences Apply to Which Convictions

Bar associations and defender organizations and offices should sponsor, and counsel should participate in, trainings and continuing legal education about collateral consequences. Counsel should also make use of available resources that compile information on potential collateral consequences. For example, the American Bar Association maintains a National Inventory of Collateral Consequences that can be accessed online, and state websites list requirements for occupational licenses. Counsel should use this data when advising about collateral consequences that may matter to the client. Dennis Terez, the federal public defender for the Northern District of Ohio, testified to the importance of using his state’s collateral consequences database when counseling clients: “That tool is huge, in that in a glance you can see, at least on a state level, . . . what that conviction will mean to that person’s life.”

Defense Counsel Should Fully Advise Clients about All Potentially Applicable Collateral Consequences Well in Advance of Plea Negotiations, And Should Discuss Available Relief after Conviction

“[W]e would like those people who stand behind us and argue for our liberties and our rights to tell us as much of the truth . . . they know. . . . [T]he decisions that we’re making when we’re standing beside you to take a bargain . . . not only impact the amount of time that we serve, it impacts the rest of our entire lives. It impacts our children’s lives, and it impacts our grandchildren’s lives.”

Dorsey Nunn, Executive Director, Legal Services for Prisoners with Children

Nellie King, president of the Florida Association of Criminal Defense Lawyers, stressed the importance of discussing the consequences of a plea, especially those related to immigration, early: “I have asked the public defender in our circuit on this issue of deportation, since they’re the first people that come in contact with these folks, to . . . [inform individuals that] you do have rights and that your immigration consequences can be affected by anything you say and do in this building and after you walk out of it.”

Counseling must also include the longer term
consequences of any conviction, particularly in the area of employment where many clients may not be aware of the myriad formal and informal barriers based on a criminal record. This counseling process must include explaining to clients that a time-served plea is not without consequence. Kionne McGhee, a defense attorney in Florida, explained that “[i]f you get credit for time served on a felony charge without even serving a day in jail, you’ve essentially lost your civil rights here within the state of Florida because that is a conviction without serving one day in jail. . . . Individuals who simply, because [] they didn’t want to miss work, they decided to take a simple plea of credit time served, which in the end has come back to haunt them tremendously.”

Defense Counsel Should Assist Clients in Obtaining Relief from the Court at Sentencing and During the Period of the Sentence

Counsel should advise clients about available post-sentence relief, including sealing, expungement, certificates of relief or good conduct, and pardon. Whenever feasible they should assist clients in seeking such relief. If representation is not feasible, they should refer clients seeking post-sentence relief to organizations or individuals that can provide such representation.

“I would like to . . . reinforce the notion [that the] front-end players have to take responsibility for what’s happening to people on the back end, and we can’t think that it’s just the responsibility of probation and parole.”

April Frazier Camara, Director, Community Re-entry Program, D.C. Public Defender Service

Defense Counsel Should Assist Clients in Cleaning up Erroneous Or Incomplete Criminal Records and in Sealing And Expunging Eligible Records

Carey Haughwout, the public defender for Palm Beach County, recommended conducting a needs analysis of convicted clients so that they can work toward rehabilitative next steps while incarcerated. She also helped create a system “in each of the public defender offices so [that] they can get warrants withdrawn, clean up records, [and] figure out what needs to be done so that when [an individual] walk[s] out of the doors, they really can feel that they are free.”

Jurisdictions Should Extend the Right to Counsel to Indigent Defendants Charged with Any Crime, as All Levels of Conviction Can Result in Serious Collateral Consequences

Adam Monreal, chair of the Prisoner Review Board for the state of Illinois, testified about the far-reaching consequences of not having access to counsel: “Many people who have never been involved in the criminal justice system plead guilty to minor misdemeanors without ever consulting an attorney and are unaware of the legal consequences surrounding that conviction. Many people believe that they can pay a fine or plead guilty for the time served, believing that they are done with the criminal justice system. Unfortunately, they are awakened to the harsh realities concerning their conviction and their criminal record.” Similarly, Steve Zeidman, a professor and director of the Criminal Defense Clinic at CUNY School of Law, testified that serious collateral consequences can “flow from misdemeanor convictions, even from convictions on reduced charges, whether they’re called violations or offenses. . . . [It] seems to me [this] is the greatest problem concerning post-conviction rights and status. It’s true the majority of these
cases do not involve jail or prison. So you’re not talking about re-entry in that way, but they impact people’s lives.”

**The Federal Government, States and Localities That Fund Indigent Defense Services Should Make Resources Available for Representation in Connection with Restoration Of Rights and Status**

Vincent N. Schiraldi, New York City’s probation commissioner, testified about the importance of Certificates of Relief from Disabilities in allowing individuals to obtain jobs and become licensed: “This is completely roulette. If you’re lucky enough to have a lawyer that pays attention to this, you may get one. If you’re lucky enough to have a judge that’s sort of on it, you get one. . . . If you don’t get it out of the chute, you have to go back to court. . . .”

Cook County Circuit Court Presiding Judge Paul Biebel testified: “I do know the [public defender] is not involved in the expungement process because it’s a civil entity, and they can’t by statute in Illinois do that.”

Other states, including California, permit public defenders to assist with the restoration process.

Aleem Raja, deputy public defender for the city and county of San Francisco, testified that the city funded his office’s “Clean Slate” program because it agreed that facilitating re-entry and employment for released prisoners would be a net financial gain. If there is any law or policy disallowing defender office involvement in the restoration process, or limiting funding for such involvement, defenders should challenge it for violating the Sixth Amendment right to counsel and the principles set out in *Padilla v. Kentucky*.

Defender offices also should collect data related to avenues of relief from convictions, relief representation and client demand, and the effect of barriers to relief and the restoration of rights and status.

**Recommendation**

**X. NACDL will initiate public education programs and advocacy aimed at curtailing collateral consequences and eliminating the social stigma that accompanies conviction.**

NACDL resolves to use all of its resources, particularly the dedication of its members who are on the front lines fulfilling the mandates of the Sixth Amendment, to implement the preceding nine principles. The nation’s criminal defense bar must be in the vanguard of the effort to make the full restoration of rights and status after conviction a reality for all who successfully fulfill the terms of a sentence. NACDL’s leadership on this issue will include engaging with the bar to ensure that all actors in the system, including defense counsel, prosecutors and judges, recognize that they have a duty to promote the restoration of rights and status. This effort will also include proposing new, and refining existing, professional standards of practice and ethical rules.

After more than three decades of enormous growth in America’s highly punitive criminal justice system, the nation is starting to appreciate the many short- and long-term problems produced by overcriminalization and mass incarceration. People from all walks of life and across the political spectrum — liberal, conservative, activists, law enforcement, corrections officials, labor unions, and others — are coming together to call for reform of the nation’s criminal justice system. Policy-makers at the state and federal levels are reconsidering current charging and sentencing practices in an attempt to be “right on crime” or “smart on crime.” Slowly and through the misfortune of millions of individuals and families, the United States is recognizing that “success” in the criminal justice system must be defined as “improving public safety without needless social costs.”
NACDL and the defense community will help create and lead a national movement to be smart and right about what happens after the criminal case ends, working to repeal or modify collateral consequences that serve no justifiable public safety purpose and to ensure accessible, effective avenues of relief from conviction-related legal disabilities and stigma. The media has highlighted stories of people unfairly denied jobs because of a dated arrest record or faced with deportation because of a decades-old misdemeanor conviction. Legislators have started to act, passing the Second Chance Act in 2008 to fund agencies and organizations that help people returning home after incarceration. Two 2013 bills seek major reform in the way the FBI collects and shares criminal record information. States all over the nation — from Georgia to Colorado to New York — have passed or are considering legislation to deal with the crisis created by massive numbers of individuals whose criminal records have made them second class citizens. NACDL will work to see these and other similar reform measures enacted throughout the country to realize America’s promise as the land of second chances.
Overcriminalization and overincarceration tell only part of the story of the “War on Crime.” Through this destructive war, the nation has also systemically demonized individuals with convictions, branding them as “criminals” who must be relegated to second-class citizenship long after their sentence ends. This troubling trend has resulted in thousands of laws, regulations and policies at the federal, state and local levels that require or allow employers, licensing agencies, landlords, and other decision-makers to discriminate against applicants with criminal records. In addition, the thick web of barriers to work, housing, education, and other aspects of daily life falls particularly heavily upon, and unfairly discriminates against, people and communities of color.

The United States is not a nation of criminals, and most collateral consequences do not advance public safety. Instead, they serve only to perpetuate a kind of societal alienation that undermines public safety. The fact is that denying individuals with criminal records the opportunity to move on and move up makes recidivism more likely, and so hurts the nation as a whole. It is also profoundly unfair. The United States must solve the collateral consequences crisis in order to compete with other nations in the rapidly changing global workplace. It is the smart thing to do and it is the right thing to do.

The United States is a nation of individuals subjected to the collateral consequences of the failed “War on Crime,” but there is a way out of this quagmire. The best solution for this crisis is to stop punishing people after they have fulfilled their sentence in the criminal case. Punishment should end when the terms of a criminal sentence are fulfilled. Ideally, collateral consequences should be repealed, but, until that happens, there must be a coherent national approach to the restoration of rights and status after conviction. For individuals trying to live with a criminal record, and for society’s own good, there must be simple, widely available ways to get relief from the lingering effects of an adverse encounter with the justice system in order to fully and productively participate in society. NACDL will help lead this reform effort by enthusiastic promotion of the recommendations in this report.
I. The United States should embark on a national effort to end the second-class legal status and stigmatization of persons who have fulfilled the terms of a criminal sentence.

- The three branches of government, on the federal, state and local levels, should undertake a comprehensive effort to promote restoration of rights and status after conviction. This effort should include enactment of laws to circumscribe or repeal existing collateral consequences and a resolve to stop enacting new ones.

- Government entities, the legal profession, the media, and the business community must promote a change in the national mindset to embrace concepts of redemption and forgiveness, including a public education campaign to combat erroneous and harmful stereotypes and labels applied to individuals who have at one point or another committed a crime.

- The United States and its states and territories should establish a “National Restoration of Rights Day” to recognize the need to give individuals who have successfully fulfilled the terms of a criminal sentence the opportunity to move on with their lives.

- Defender organizations and the legal profession as a whole should propose and support efforts to repeal collateral consequences and to enact effective ways to relieve any remaining collateral consequences. They should participate in efforts to catalogue collateral consequences and make them available in a form that is useful and educational to lawyers, courts, government agencies, researchers, and the public at large.

- The legal profession should work to change the way people with a criminal record are depicted in the media and discourage the use of disparaging labels such as “felon” and “criminal” that reinforce fear-inducing stereotypes and perpetuate discriminatory laws and policies.

- Members of the legal profession should participate in efforts to educate the public about the broad range of conduct that can result in conviction and the harmful effects of permanently burdening those who are convicted. Further, they should support efforts to provide equal opportunity to people with a criminal record, including in their own employment policies and practices.

II. All mandatory collateral consequences should be disfavored and are never appropriate unless substantially justified by the specific offense conduct.

- Legislatures should not impose a mandatory collateral consequence unless it has a proven, evidence-based public safety benefit that substantially outweights any burden it places on an individual’s ability to reintegrate into the community.

- Most mandatory collateral consequences should be repealed, including the loss of voting and other civil and judicial rights, which have no public safety purpose at all.

A Roadmap to Restore Rights and Status After Arrest or Conviction
For those few mandatory consequences that can be justified in terms of public safety, sentencing courts should be authorized to relieve them on a case-by-case basis at sentencing and while a person is under sentence.

Any mandatory consequence that is not relieved should automatically terminate upon completion of an individual’s court-imposed sentence unless the government can prove a public safety need for its continued application.

III. Discretionary collateral consequences should be imposed only when the offense conduct is recent and directly related to a particular benefit or opportunity.

Where a decision-maker is authorized but not required to deny or revoke a benefit or opportunity based upon a conviction, it should do so only where it reaches an individualized determination that such action is warranted based upon the facts and circumstances of the offense.

States and the federal government should develop and enforce clear relevancy standards for considering a criminal record by discretionary decision-makers, requiring them to consider the nature and gravity of the conduct underlying the conviction, the passage of time since the conviction, and any evidence of post-conviction rehabilitation.

Administrative agencies should be required to specify and justify the types of convictions that may be relevant in their particular context, and to publish standards that they will apply in determining whether to grant a benefit or opportunity.

Benefits and opportunities should never be denied based upon a criminal record that did not result in conviction.

IV. Full restoration of rights and status should be available to convicted individuals upon completion of sentence.

After completion of their sentence, individuals should have access to an individualized process to obtain full restoration of rights and status, either from the executive or from a court, by demonstrating rehabilitation and good character.

The relief process should be transparent and accountable, and accessible to those without means. Standards for relief should be clear and attainable, high enough to make relief meaningful but not so high as to discourage deserving individuals.

A pardon or judicial certificate should relieve all mandatory collateral consequences, and decision-makers should give full effect to a pardon or judicial certificate where a collateral consequence is discretionary.

Jurisdictions should give their residents with convictions from other jurisdictions access to their relief procedures, and should also give effect to relief granted by other jurisdictions.

V. Congress and federal agencies should provide individuals with federal convictions with meaningful opportunities to regain rights and status, and individuals with state convictions with mechanisms to avoid collateral consequences imposed by federal law.

Congress should expand non-conviction dispositions for federal crimes, and federal prosecutors should be encouraged to offer them wherever appropriate.

Individuals convicted of federal crimes should have an accessible and reliable way of regaining rights and status, through the courts or through reinvigoration of the federal pardon process.

Congress should provide for limiting access to and use of federal criminal records, through judicial expungement, set-aside, or certificates of relief from disabilities.

Congress should authorize state and federal
courts to dispense with mandatory collateral consequences arising under federal law.

- State legislatures should provide individuals with federal convictions a way to avoid consequences arising under state law.

- Federal courts and agencies should recognize and give effect to state relief.

- Federal agencies should provide incentives to public and private employers to offer equal opportunity to persons with a criminal record. The federal government should fund research into whether relief mechanisms help individuals reintegrate into society and reduce recidivism.

**VI. Individuals charged with a crime should have an opportunity to avoid conviction and the collateral consequences that accompany it.**

- Diversion and deferred adjudication should be available for all but the most serious crimes, and prosecutors and courts should be encouraged to use them.

- Non-conviction dispositions should be sealed or expunged and never trigger collateral consequences. Decision-makers should be barred from asking about or considering them.

- Collateral consequences should be taken into account at every stage of the case by all actors in the criminal justice system.

- Defense lawyers should advise clients about collateral consequences and explore opportunities to avoid them through creative plea bargaining and effective sentencing advocacy.

- Prosecutors should structure charges and negotiate pleas to enable defendants to avoid collateral consequences that cannot be justified.

- Courts should ensure that defendants have been advised about applicable collateral consequences before accepting a guilty plea, and should take collateral consequences into account at sentencing.

**VII. Employers, landlords and other decision-makers should be encouraged to offer opportunities to individuals with criminal records, and unwarranted discrimination based on a criminal record should be prohibited.**

- Government at all levels should find creative ways to give employers, landlords and other decision-makers affirmative incentives to offer opportunities to those with convictions. There should be meaningful tax credits for hiring or housing those with convictions and free bonding to provide insurance for any employee dishonesty.

- Decision-makers should be immune from negligent hiring liability relating to an opportunity or benefit given to an individual with a conviction if they are in compliance with federal, state, and local laws and policies limiting the use of criminal records and with standards governing the exercise of discretion in decision-making.

- Jurisdictions should enact clear laws prohibiting unwarranted discrimination based upon an individual’s criminal record, and should provide for effective enforcement and meaningful review of discrimination claims.

**VIII. Jurisdictions should limit access to and use of criminal records for non-law enforcement purposes and should ensure that records are complete and accurate.**

- State repositories, court systems and other agencies that collect criminal records should have in place mechanisms for ensuring that official records are complete and accurate, and should facilitate opportunities for individuals to correct any inaccuracies or omissions in their own records. Records must be provided in a form that is easy to understand and that does not mislead.

- Records that indicate no final disposition one year after charges are filed should be purged.
from all records systems. The FBI must ensure that information relating to state relief, such as expunged and sealed records, is reflected in its criminal record repository.

- State and federal authorities should limit access to their central repositories to those with a legitimate need to know. Court records should be available only to those who inquire in person, in order to balance public access to records with privacy concerns for individuals with a criminal record, and access to online court system databases should be strictly limited. Law enforcement records (non-judicial) should never be publicly disseminated.

- Criminal records that do not result in a conviction should be automatically sealed or expunged, at no cost to their subject.

- Jurisdictions should prohibit non-law enforcement access to conviction records after the passage of a specified period of time, depending upon the nature and seriousness of the offense, and should authorize courts to prohibit access in cases where it is not automatic. Any exceptions should be justified in terms of public safety, and persons who disclose records in violation of limitations on access should be subject to substantial civil penalties.

- Employers and other decision-makers should be prohibited from asking about or considering a criminal record to which access has been limited by law or court order. For accessible records, decision-makers should comply with applicable relevance and non-discrimination standards.

- Employers should be prohibited from inquiring about an applicant’s criminal record until after a contingent offer of employment has been made.

- Jurisdictions should never sell criminal records and should strictly regulate private companies that collect and sell records.

- Federal law should prohibit credit reporting agencies from disclosing records of closed cases that did not result in conviction, and convictions that are more than seven years in the past. States should enact their own restrictions on credit reporting companies to the extent permitted by federal preemption. Jurisdictions should provide for effective enforcement of laws governing credit reporting agencies.

IX. Defense lawyers should consider avoiding, mitigating and relieving collateral consequences to be an integral part of their representation of a client.

- Defense counsel should consider avoiding and mitigating collateral consequences as an integral part of their representation of a client, both at and after sentencing. If post-sentence representation is not feasible, defense counsel should refer clients to organizations or individuals that can provide such representation.

- Agencies that fund indigent defense services should fund representation in connection with restoration of rights and status.

X. NACDL will initiate public education programs and advocacy aimed at curtailing collateral consequences and eliminating the social stigma that accompanies conviction.

- NACDL resolves to use all of its resources, particularly the dedication of its members who are on the front lines fulfilling the mandates of the Sixth Amendment, to implement the preceding nine principles. The nation’s criminal defense bar must be in the vanguard of the effort to make the full restoration of rights and status a reality for all who successfully fulfill the terms of a sentence.

- NACDL and the defense community will lead efforts to repeal or modify existing collateral consequences that cannot be justified in terms of public safety, to avoid enacting any additional ones, and to implement meaningful restoration procedures both during and after the conclusion of the criminal case.
**Background check:** See Criminal background check.

**Ban-the-box:** A policy, generally of a state or a municipal government, calling for employers to eliminate the “box” that asks applicants for employment to disclose a criminal record, postponing this inquiry to a later stage in the hiring process.

**Business necessity:** The showing an employer must make in order to defeat a claim of unlawful discrimination under Title VII of the Civil Rights Act of 1964. Under EEOC Enforcement Guidance, an employer may show “business necessity” by using validated standards, a “targeted” screen, and an individualized assessment of an applicant’s qualifications.

**Certificate of good conduct or relief from disabilities:** A form of relief from collateral consequences generally issued by a court or corrections agency, which may result in general dispensation from all collateral consequences or may have a more limited purpose and effect. Certificates of employability are targeted to employment consequences, while certificates of restoration of rights may address only civil rights.

**Clemency:** See Executive clemency.

**Collateral consequence:** A penalty, disability or disadvantage that is authorized or required by state or federal law or local ordinance as a direct result of an individual’s conviction but is not part of the sentence ordered by the court.

**Commutation of sentence:** A form of executive clemency that reduces the sentence imposed by the court. As distinguished from a pardon, it does not imply forgiveness or absolve the individual from other consequences of the crime.

**Credit reporting agency (or consumer reporting agency):** Commercial vendors of criminal history records and other information about individuals’ backgrounds, whose methods of collection and dissemination are regulated by federal and state law.

**Criminal background check:** The process of collecting and reporting some or all of an individual’s criminal history records from various sources, including courts and criminal record repositories.

**Criminal history records:** Law enforcement and court records of arrest and subsequent disposition of a criminal case can be made available to the public through a variety of sources, including individual court records, state-level criminal record repositories and private commercial vendors (including credit reporting agencies), correctional agencies, and police blotters. Different laws and policies for the collection, use and dissemination of criminal records may apply to each of these sources and vary by jurisdiction.
Criminal record repository: A central storage location of criminal history records, often maintained by the state police and often in electronic form. All states and the federal government, through the FBI, have central criminal record repositories.

Deferred adjudication or deferred sentencing: An authorized disposition of criminal charges intended to avoid conviction and collateral consequences, which may or may not require a guilty plea. Upon successful completion of a court-imposed term of probation, the charges are dismissed and any plea is vacated. Like diversion or deferred prosecution, it is intended as a means of avoiding conviction and collateral consequences.

Discretionary collateral consequence: A collateral consequence that a civil court, or administrative agency or official is authorized, but not required, to impose on grounds related to an individual’s conviction.

Diversion or deferred prosecution: A pre-plea disposition of criminal charges that is generally controlled by the prosecutor, which results in dismissal of charges if an individual satisfies certain agreed-upon conditions. Like deferred adjudication or deferred sentencing, it is intended as a means of avoiding conviction and collateral consequences.

EEOC Enforcement Guidance: Issued in 2012, the Equal Employment Opportunity Commission Guidance reaffirms that an employer’s use of an individual’s criminal record in making employment decisions may violate Title VII, requires individualized determinations, and the guidance sets forth “best practices” for making those determinations.

Executive clemency: The range of actions that may be taken by a chief executive or, in some jurisdictions, an administrative agency to reduce or eliminate the punishment imposed as a result of a criminal conviction.

Expungement: Generally, a court-administered process for closing public access to criminal records that ranges from limited shielding to actual destruction. It may involve an individualized determination or be automatic, and is frequently used interchangeably with the term “sealing.” Law enforcement agencies generally retain access to sealed records.

Fair Credit Reporting Act: A federal or state statute that regulates credit reporting agencies in the collection and dissemination of criminal history records.

Informal collateral consequences: Policies and practices based on social custom and cultural attitude, as opposed to law or formal policy. Although frequently unwritten, they can be just as harmful as restrictions that are formally adopted and enforced. The term actualizes the social stigmatization visited upon those with a criminal record.

Mandatory collateral consequences: A collateral consequence that applies automatically by operation of law or rule with no determination of its applicability and appropriateness in individual cases.

Negligent hiring: A common law or statutory tort that involves employer liability for negligence in hiring or retaining someone who injures a customer or co-worker.
**Non-conviction record:** Any court record that relates to an individual’s arrest and subsequent experience in the criminal justice system that did not result in a conviction. It may include dispositions such as a dismissal of charges, reversal or acquittal, or set-side.

**Pardon:** A form of executive clemency that absolves the pardoned individual from some or all of the consequences of a crime. A pardon may be full or conditional but generally implies forgiveness of the crime. In some jurisdictions a pardon may lead to judicial expungement of the record.

**Post-sentence relief:** Any form of relief from the consequences of conviction during or after the term of the court-imposed sentence.

**Protected class:** Under non-discrimination laws, any class of persons whose characteristics afford them protection from unwarranted adverse treatment based upon their membership in the class, including racial and ethnic minorities and women. Persons with a criminal record are generally not recognized as a protected class.

**Rap sheet:** An official description of a person’s criminal record.

**Recidivism:** The repetition of criminal behavior after punishment, generally used to measure the rate at which individuals are rearrested for crime after a prior conviction.

**Re-entry:** The return to society after a period of incarceration.

**Relief mechanisms:** Mechanisms for relief from collateral consequences discussed in this report include dispositions that avoid a conviction such as deferred adjudication; legislative mechanisms that provide for automatic termination of a collateral consequence after a specified period of time; individual restoration mechanisms such as pardon or expungement that usually involve an individualized determination of rehabilitation or other basis for relief; and systemic relief mechanisms that place general procedural or substantive limits on consideration of conviction in allocating benefits and opportunities.

**Restoration of rights:** A term that generally refers to a limited form of relief from collateral consequences involving restoration of specified civil and judicial rights, which may or may not include the right to bear arms. *See also* Restoration of rights and status.

**Restoration of rights and status:** As used throughout this report, this signifies a fuller form of relief from collateral consequences that generally restores the convicted person to full legal rights and removes the stigma of conviction. A full and unconditional pardon is typically the fullest form of relief available, though certain forms of judicial relief may also accomplish this return to the full rights of citizenship.

**Sealing:** A court-administered process for closing public access to criminal records that differs from jurisdiction to jurisdiction. It may be automatic or involve an individualized determination, and is frequently used interchangeably with the term “expungement.” Law enforcement agencies generally retain access to sealed records.

**Set-aside:** A form of judicial relief that, when entered post-conviction, has the effect of vacating the record of conviction. A set-aside generally restores the person to full rights of citizenship lost as a result of conviction.

**Stigmatization or Stigma:** See Informal collateral consequences.

*A Roadmap to Restore Rights and Status After Arrest or Conviction*
**Affected Community**

Ronald R. Acevedo, Of Counsel, Scoppetta Seiff Kretz & Abercrombie  
(_New York, Day 2_)

Jumaani Bates, Business Services Manager,  
North Lawndale Employment Network  
(_Chicago, Day 2_)

Cleveland Bell, Executive Director,  
Riverside House  
(_Miami, Day 1_)

Mr. C., Business Executive  
(_San Francisco, Day 2_)

Lamont Carey, Spoken Word Artist,  
Filmmaker, Author, and Speaker  
(_DC, Day 2_)

Jessica Chiappone, Vice President, Florida Rights Restoration Coalition  
(_Miami, Day 1_)

Mansfield Frazier, Executive Director,  
Neighborhood Solutions, Inc.  
(_Cleveland, Day 1_)

Lamont Garrison, Personal Trainer, Radio Co-Host (wrongfully convicted)  
(_DC, Day 2_)

Marcia Grant, Assistant Project Manager, Opa Locka Community Development Corporation  
(_Miami, Day 2_)

Charles Gunnell, Volunteer, What It Takes  
(_Cleveland, Day 1_)

Kimberly Haven, Director of Public Policy and Advocacy at Out for Justice, Founder and Co-Director of the Maryland Justice Reinvestment Initiative  
(_DC, Day 2_)

Charles Ice, Solvent Recycler, and featured in the documentary “The Dhamma Brothers”  
(_Chicago, Day 2_)

Johnnie Jenkins, Employment Manager,  
Waukegan Illinois Township  
(_Chicago, Day 2_)

Darrell K. Langdon, Sr., Engineer,  
Chicago Public Schools  
(_Chicago, Day 1_)

Glenn Martin, Vice President,  
Fortune Society  
(_New York, Day 2_)

Ralph Martin, President & CEO, RKRM Consulting, Inc.  
(_Miami, Day 1_)

Desmond Meade, President, Florida Rights Restoration Coalition  
(_Miami, Day 1_)

Dorsey Nunn, Executive Director, Legal Services for Prisoners with Children  
(_San Francisco, Day 1_)

Dr. Divine Pryor, Executive Director, Center for NuLeadership on Urban Solutions  
(_New York, Day 3_)

Wayne Rawlins, Community Justice and Economic Development Consultant  
(_Miami, Day 1_)

Armani Smith, Kemba Smith’s son, college student  
(_DC, Day 3_)

Kemba Smith, Founder of the Kemba Smith Foundation (granted clemency by President Clinton)  
(_DC, Day 3_)

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_Collateral Damage: America’s Failure to Forgive or Forget in the War on Crime_
Jose Torres, Judicial and Medical Terminology Spanish Language Interpreter (Cleveland, Day 1)

Brenda Valencia Aldana, Administrative Assistant, Girls Advocacy Project (Miami, Day 2)

Patricia Williams, Receptionist, St. Leonard’s Ministries (Chicago, Day 2)


Jesse Wiese, Criminal Justice Policy Specialist, Prison Justice Fellowship (New York, Day 2)

Ken Woods, Former Doctor and Registrant (San Francisco, Day 2)

### Background/Record Check Organizations

Frank Campbell, CEO of Highland Strategies, LLC (DC, Day 3)

Rebecca E. Kuehn, Vice President and Senior Regulatory Counsel, Core Logic (San Francisco, Day 1)

Montserrat Miller, Partner, Arnall, Golden, Gregory (Privacy and Consumer Regulatory, Immigration, and Government Affairs Practice Groups) (DC, Day 3)

### Legal Aid/Policy Advocacy

Janice Bellucci, State Organizer/President, California Reform Sex Offender Laws (San Francisco, Day 2)

Judi Conti, Federal Advocacy Coordinator, National Employment Law Project (DC, Day 1)

Edgardo Cortes, Director of the Advancement Project Voting Rights Campaign (DC, Day 3)

Julie Ebenstein, Policy & Advocacy Counsel, American Civil Liberties Union of Florida (Miami, Day 2)

Maurice Emsellem, Policy Co-Director, National Employment Law Project (San Francisco, Day 1)

Linda Evans, Organizer, Legal Services for Prisoners with Children (San Francisco, Day 1)

Michael Faithful, Equal Justice Works Fellow at Advancement Project, Senior Member of Virginia Rights Restoration Program (DC, Day 3)

Sally Friedman, Legal Director, Legal Action Center (New York, Day 1)

Elizabeth Gaynes, Executive Director, Osborne Association (New York, Day 3)

Molly Gill, Government Affairs Counsel, Families Against Mandatory Minimums (FAMM) (DC, Day 3)

Janet Ginzberg, Senior Staff Attorney, Community Legal Services in Philadelphia, Employment Unit (DC, Day 3)

Eliza Hersh, Director & Supervising Attorney, Clean Slate Practice, East Bay Community Law Center (San Francisco, Day 1)

Nicole Austin-Hillery, Director and Counsel of the Washington Office of the Brennan Center for Justice (DC, Day 3)

Ann Jacobs, Director, Prisoner Reentry Institute, John Jay College (New York, Day 2)
Beth Johnson, Staff Attorney, Cabrini Green Legal Aid
(Chicago, Day 1)
Roberta Meyers, Director, National HIRE Network, Legal Action Center
(New York, Day 1)
Dorsey Nunn, Executive Director, Legal Services for Prisoners with Children
(San Francisco, Day 1)
Hilary Shelton, Director of the NAACP’s Washington Bureau, Senior Vice President for Policy and Advocacy
(DC, Day 3)
Kimberly Thomas Rapp, Executive Director, Lawyers’ Committee for Civil Rights of the San Francisco Bay Area
(San Francisco, Day 1)
Dante Trevisani, Attorney and Equal Justice Works Fellow
(Miami, Day 1)
Patricia Warth, Co-Director of Justice Strategies, Center for Community Alternatives
(New York, Day 2)
Judy Whiting, General Counsel, Community Service Society
(New York, Day 2)
Mariko Yoshihara, Political Director, California Employment Lawyers Association
(San Francisco, Day 2)

Community-Based Service Provider

Joel Botner, Program Director, Faith Works Reentry Program
(New York, Day 3)
Cecilia Denmark, Bridges of America
(Miami, Day 1)
Reverend Charles Dinkins, Hosanna Community Church
(Miami, Day 1)
Bob Dougherty, Executive Director, St. Leonard’s Ministries
(Chicago, Day 2)
Roger Ehmen, Director of Community Reentry and Employment Center, Westside Health Authority
(Chicago, Day 2)
William Evans, Facility Director, Turning Point Bridge Work Release Facility
(Miami, Day 1)
Reverend Valerie Everett, Lutheran Social Services
(Chicago, Day 2)
John Fallon, Senior Program Manager, Corporation of Supportive Housing
(Chicago, Day 2)
Deacon Edgardo Farias, Archdiocese of Miami Detention Ministry
(Miami, Day 1)
David Freedman, Executive Director, Transition, Inc.
(Miami, Day 1)
Illya McGee, Vice President, Oriana House, Inc.
(Cleveland, Day 2)
Luz Norwood, Workforce Program Supervisor, Transition, Inc.
(Miami, Day 1)
Iana A. Patterson, Facility Director, Broward County Bridge TC/ Work Release Center
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Wayne Rawlins, Community Justice and Economic Development Consultant
(Miami, Day 1)
David Rosa, Administrator, St. Leonard’s Ministries
(Chicago, Day 2)
Newton Sanon, President and CEO, OIC of Broward County, REXO-Project Second Chance
(Miami, Day 2)
Charles See, Executive Director, Community Reentry Program, Cleveland
(Cleveland, Day 1)
Ellen Shores, Director, Community Reentry Institute (Cleveland, Day 1)
Patricia Williams, Receptionist, St. Leonard’s Ministries (Chicago, Day 2)

**Defense**

April Frazier Camara, Director of the Community Reentry Program, D.C. Public Defender Service (DC, Day 3)
Carey Haughwout, Public Defender for Palm Beach County (Miami, Day 2)
Nellie King, President, Florida Association of Criminal Defense Lawyers (Miami, Day 1)
Carlos J. Martinez, Public Defender for Miami Dade County (Miami, Day 1)
Kionne McGhee, Defense Attorney (Miami, Day 2)
Aleem Raja, San Francisco Public Defender Office, Clean Slate Director (San Francisco, Day 1)
G. Terez, Federal Public Defender, Northern District of Ohio (Cleveland, Day 2)

**Legislative/Executive Agency**

Todd A. Cox, Director of the Office of Communications and Legislative Affairs, EEOC (DC, Day 2)
Congressman Danny K. Davis, 7th District of Illinois (Chicago, Day 1)
Natalia Delgado, Associate General Counsel, Office of the Governor of Illinois (Chicago, Day 2)
Marty Gelfand, Senior Counsel, Office of Congressman Dennis J. Kucinich (Cleveland, Day 1)
Everett Gillison, Deputy Mayor for Public Safety and Chief of Staff for the Mayor of Philadelphia, Office of the Mayor of Philadelphia (New York, Day 2)

**Employer/Employment**

Jim Andrews, Owner, Felony Franks (Chicago, Day 2)
Jumaani Bates, Business Services Manager, North Lawndale Employment Network (Chicago, Day 2)

Lonnie Coplen, Project Manager, Director of Sustainability, McKissack & McKissack (New York, Day 2)
Steven Hyman, Partner, McLaughlin & Stern (New York, Day 2)
Johnnie Jenkins, Employment Manager, Waukegan Illinois Township (Chicago, Day 2)
Gary R. Siniscalco, Partner, Employment Law, Orrick, formerly employed by EEOC (San Francisco, Day 2)
Ron Tonn, COO, North Lawndale Employment Network (Chicago, Day 2)
Doug Wigdor, Founding Partner, Thompson Wigdor LLP (New York, Day 3)
Pam Lawrence, Public Housing Revitalization Specialist and Grant Manager, HUD  
(DC, Day 2)

Dr. Gabriela Lemus, Senior Advisor and Director of the Office of Public Engagement, Department of Labor  
(DC, Day 2)

Vicki Lopez Lukis, Government and Public Affairs Consultant, former Chairman of Governor Jeb Bush’s Ex-Offender Task Force  
(Miami, Day 2)

Philip Maier, NYC Regional Director, Public Employment Relations Board  
(New York, Day 3)

Mary McCarty, Former Palm Beach Commissioner  
(Miami, Day 2)

Carol Morris, Statewide Program Manager, Illinois Department of Employment Security  
(Chicago, Day 1)

Wendy Prudencio, Special Assistant for Policy Development, NY State Department of Labor  
(New York, Day 3)

John Schomberg, General Counsel, Office of the Governor of Illinois  
(Chicago, Day 2)

Melanie Scotto, Assistant Special Counsel, NY Department of Labor  
(New York, Day 3)

Senator Shirley Smith, 21st District, Ohio State Senate  
(Cleveland, Day 2)

Amy Solomon, Senior Advisor to the Assistant Attorney General, Office of Justice Programs, U.S. Department of Justice, Co-chair of the Federal Interagency Reentry Council Working Group  
(DC, Day 2)

Bobby Vassar, Chief Counsel for the Minority, Subcommittee on Crime, Terrorism and Homeland Security, House Judiciary Committee  
(DC, Day 2)

**Pardons**

The Honorable Robert L. Ehrlich, Jr., Senior Counsel in the Government Advocacy and Public Policy Practice Group, King & Spalding, former Governor of Maryland  
(DC, Day 2)

Greg Massoni, Consultant with the Government Advocacy and Public Policy Practice Group, King & Spalding, former Press Secretary to Governor Ehrlich  
(DC, Day 2)

Sam Morison, Appellate Defense Counsel, Department of Defense, former Staff Attorney in the Office of the Pardon Attorney  
(DC, Day 2)

Erika Tindill, Chair, Connecticut Board of Pardons and Paroles  
(New York, Day 2)

**Judiciary**

Judge Harold Baer, U.S. District Judge, Southern District of New York  
(New York, Day 2)

Judge Paul Biebel, Presiding Judge, Cook County Circuit Court, Criminal Division  
(Chicago, Day 1)

Judge Matthew J. D’Emic, 2nd Judicial District (Criminal Term), New York State Supreme Court  
(New York, Day 3)

Judge Dan Polster, U.S. District Judge, Northern District of Ohio  
(Cleveland, Day 2)

Judge Nancy Margaret Russo, Cuyahoga County Common Pleas Court (Ohio)  
(Cleveland, Day 2)
Law Enforcement/Parole and Probation

Robert Ambroselli, Deputy Director, Division of Adult Parole Operations, California Department of Corrections and Rehabilitation (San Francisco, Day 2)

Kris Baumann, Head of the D.C. Police Union, Police Officer with the Metropolitan Police Department in Washington, D.C. (DC, Day 2)

Ronald Davis, Police Chief and Interim City Manager, East Palo Alto (San Francisco, Day 1)

Cedric Hendricks, Associate Director, Court Services and Offender Supervision Agency (DC, Day 2)

Tamara Jackson, Coordinator; Wayne-Holmes Reentry Coalition, Your Human Resource Center (Cleveland, Day 1)

Angela Jimenez, Deputy Commissioner, Department of Corrections and Community Supervision (New York, Day 3)

Terry Tribe-Johnson, Re-Entry Coordinator, Summit County (Cleveland, Day 1)

Gary Mohr, Director, Ohio Department of Rehabilitation and Correction (Cleveland, Day 2)

Adam Monreal, Chair, Prisoner Review Board (Chicago, Day 2)

Jorge Montes, Attorney, Former Chair, Illinois Prisoner Review Board (Chicago, Day 1)

Vincent N. Schiraldi, Commissioner, NY Department of Probation (New York, Day 3)

Prosecution

Nancy O’Malley, Alameda County District Attorney and Chair, California Sex Offender Management Board (San Francisco, Day 1)

Lance Ogiste, Counsel to the District Attorney of Kings County (Brooklyn), New York (New York, Day 3)

Diane Smilanick, Assistant Prosecuting Attorney, Cuyahoga County (Ohio) (Cleveland, Day 1)

Social Science/Academia

Esta Bigler, Director, Labor and Employment Law Programs, Cornell School of Industrial and Labor Relations (New York, Day 2)

Al Blumstein, Professor of Criminology, Carnegie-Mellon (Cleveland, Day 2)

Alec P. Boros, Ph.D., Research Manager, Oriana House, Inc. (Cleveland, Day 2)

Ronnie Dunn, Associate Professor Urban Studies, Maxine Goodman Levin College of Urban Affairs, Cleveland State University (Cleveland, Day 2)

Jim Jacobs, Warren E. Burger Professor of Law, New York University Law School (New York, Day 3)

Stephen Johnson Grove, Deputy Director, Ohio Justice Policy Center (Cleveland, Day 2)

June Kress, Executive Director, Council for Court Excellence (DC, Day 1)

Mark Myrent, Director of Research, Illinois Criminal Justice Information Authority (Chicago, Day 1)
Charles Loeffler, Postdoctoral Scholar, University of Chicago Crime Lab (Chicago, Day 1)

John Maki, Executive Director, John Howard Association of Illinois (Chicago, Day 2)

Kiminori Nakamura, Assistant Professor, Department of Criminology and Criminal Justice, University of Maryland (Cleveland, Day 2)

Vivian Nixon, Executive Director, College & Community Fellowship (New York, Day 3)

Dr. Divine Pryor, Executive Director, Center for NuLeadership on Urban Solutions (New York, Day 3)

Mark Schlakman, Director of Florida State University’s Center for the Advancement of Human Rights and former Special Counsel on Clemency to Governor Lawton Chiles, Jr. (Miami, Day 1)

Amy Shlossberg, Researcher, Fairleigh Dickinson University (New York, Day 2)

Dr. Faye S. Taxman, University Professor, Criminology, Law & Society Department of George Mason University, Director of the Center for Advancing Excellence (DC, Day 2)

Jeremy Travis, President, John Jay College of Criminal Justice (New York, Day 1)

Peter Willner, Senior Policy Analyst, Council for Court Excellence (DC, Day 1)

Steve Zeidman, Professor of Law and Director, Criminal Defense Clinic Director, CUNY School of Law (New York, Day 1)
The Task Force visited facilities in several cities to examine re-entry programs and services. The Task Force would like to thank the following individuals for facilitating these visits:

**Chicago — Bob Dougherty**, Executive Director of the St. Leonard Ministries, for providing the Task Force with breakfast and a tour of the facility.

**Ohio — The Honorable Nancy Margaret Russo**, Cuyahoga County Common Pleas Court, for opening her court to members of the Task Force; **Maria Nemec**, LICDC, Board Administrator of the Cuyahoga Corrections Planning Board, for providing data on the Cuyahoga County Re-entry Court; **Illya McGhee**, Vice President of Correctional Programs in Cuyahoga County, and **Ms. Nicky Roberts**, Program Coordinator of North Star Neighborhood Reentry Resource Center, for coordinating a tour of the North Star Reentry Resource Center; and **Mike Randle**, Program Director for the Judge Nancy R. McDonnell Community Based Correctional Facility (CBCF), for coordinating a tour of the CBCF.

**San Francisco — Carol Kizziah**, Community Relations Manager of the Delancey Street Foundation, for hosting the Task Force and providing a tour of the Delancey Street Foundation.

**New York — Max Lindeman**, Senior Director of the Academy at The Fortune Society, for escorting the Task Force members on a tour of The Castle at The Fortune Society (The Castle); **John Runowicz**, Executive Assistant at The Fortune Society, for facilitating the appearance of **Glenn Martin** at the Task Force’s New York hearings; and residents of The Castle **Richard Cobbs, Ervin Hunt**, and **William Olivo**, for allowing the Task Force members full access to their apartments and for leading a tour of the residential rooftop garden.
Rick Jones (Co-Chair) — Rick Jones is the executive director and a founding member of the Neighborhood Defender Service of Harlem. He is a distinguished trial lawyer with more than 25 years’ experience in complex multi-forum litigation. Rick is a lecturer in law at Columbia Law School, where he teaches the criminal defense externship and a trial practice course. He is also on the faculty of the National Criminal Defense College in Macon, Ga., and is frequently invited to lecture on criminal justice issues throughout the country. Rick currently serves as secretary of the NACDL. He has previously served NACDL as a two-term member of the board of directors, parliamentarian, and co-chair of both the Indigent Defense Committee and the Special Task Force on Problem-Solving Courts. Rick is a member of the New York State Bar Association Criminal Justice Section Executive Committee and the inaugural steering committee of the National Association for Public Defense. He also sits on the boards of the New York State Defenders Association and the Sirius Foundation and serves on the Editorial Board of the Amsterdam News.

Vicki H. Young (Co-Chair) — Vicki H. Young, a criminal defense attorney throughout her career, is Of Counsel to the Law Offices of Ephraim Margolin in San Francisco. She has a broad criminal defense practice in both federal and state courts, and also devotes significant time to the defense of the indigent. Her practice experience runs the gamut from capital defense to post-conviction litigation to attorney discipline matters. Vicki has served as a director of NACDL and has a long record of service to many other bar groups, including the California Attorneys for Criminal Justice. Vicki is also the 2012 recipient of NACDL’s Robert C. Heeney Award.

Lawrence S. Goldman — Lawrence S. Goldman was the 44th president of the NACDL. Prior to his appointment, he was Secretary, Treasurer, First and Second Vice President and President-Elect. A Life Member of NACDL, he received the Robert C. Heeney Award in 1998. A veteran criminal defense lawyer of 30-plus years, he is a past president of the New York State Association of Criminal Defense Lawyers (NYSACDL) and the New York Criminal Bar Association.

Elissa B. Heinrichs — Elissa B. Heinrichs is a partner at Cevallos & Wong, LLP in Newtown, Pa., where she represents criminal defendants in state courts throughout Eastern Pennsylvania and parents in juvenile court proceedings following the removal of their children arising from allegations of abuse and neglect. Elissa’s legal career includes stints as legislative counsel to New York Assemblyman Vito Lopez and counsel in the New York City Comptroller’s Office, as well as serving as an assistant district attorney in the Bucks County District Attorney’s Office. She also clerked for King’s County Criminal Court Judge Wayne Saitta. Elissa is active in many bar associations, and has been recognized by Thomson Reuters and Pennsylvania Magazine with the Pennsylvania Rising Star Award, and by the Bucks County Bar Association with the Arthur B. Walsh, Jr. Pro Bon Publico Award.
Margaret Colgate Love — Margaret Love practices law in Washington, DC, specializing in executive clemency and restoration of rights, and sentencing and corrections policy. She has written and lectured widely on the collateral consequences of a criminal conviction, and is co-author of the treatise *Collateral Consequences of Criminal Convictions: Law, Policy and Practice* (NACDL/West 2013). Ms. Love chaired the drafting committee for the ABA Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, served as ABA liaison to the Uniform Law Commission’s Collateral Consequences project, and directed the NIJ-funded ABA collateral consequences compilation effort. Before establishing her private practice in 1998, Ms. Love served in the U.S. Justice Department for 20 years, from 1978 to 1997, including as U.S. Pardon Attorney (1990-97).

Penelope S. Strong — Penelope Strong is a lifelong criminal and civil rights practitioner, based in Billings, Mont., but with a Midwest upbringing and background. With over 31 years of criminal justice experience, she has represented in both criminal and civil courts the disenfranchised and downtrodden of our society. Currently, Native Americans represent a large sector of her clients. She is the former chief public defender for Yellowstone County and was a first assistant public defender in Wisconsin. She has also litigated with the Montana ACLU and the National Prison Project in achieving prison reform in Montana.

Geneva Vanderhorst — Geneva Vanderhorst has her own criminal defense practice in Washington, DC. Primarily, she represents persons accused of criminal offenses on the Felony II, Accelerated Felony Trial, Mental Health Court, Domestic Violence Court, Community Court, Drug Court, Traffic and general misdemeanor calendars. Prior to opening her practice, she was a Judicial Law Clerk in D.C. Superior Court, a Dean Scholar Instructor at George Mason University School of Law (GMUSL) and a Howard T. Brooke Fellow in the Office of the Public Defender in Alexandria, Va. Ms. Vanderhorst is a graduate of Old Dominion University, where she was named among the “Who’s Who Among American College Students.” She is the current Chair of NACDL’s Diversity Task Force. She also serves as Vice President of the D.C. Association of Criminal Defense Lawyers and a board member of the Superior Court Trial Lawyers Association. She is also a former president of the Charlotte E. Ray American Inns of Court.

Christopher A. Wellborn — Christopher Wellborn, a longtime NACDL member, practices in Rock Hill, S.C. He is a past president of the York County Bar Association and the South Carolina Association of Criminal Defense Lawyers, an NACDL affiliate that he helped found. Chris has also served as chair of the Criminal Law Section of the South Carolina Bar Association. M.

Jenny Roberts (Reporter) — Jenny Roberts is a professor of Law at American University, Washington College of Law and co-director of the Criminal Justice Clinic. Her research focuses on the regulation of actors in the criminal justice system through constitutional law, statute, rules of professional responsibility, professional standards, and culture. Her articles have been cited by the U.S. Supreme Court, a number of state high courts and lower federal courts, and in numerous briefs to the Supreme Court and other courts. She is co-author of the treatise *Collateral Consequences of Criminal Convictions: Law, Policy and Practice* (NACDL/West 2013). Prof. Roberts is co-president of the Clinical Legal Education Association, the nation’s largest association of law teachers, and sits on the board of the Mid-Atlantic Innocence Project. She previously taught at Syracuse University and in NYU’s Lawyering Program. Prior to teaching, Prof. Roberts was a senior research fellow at NYU Law School’s Center for Research in Crime & Justice, a public defender in Manhattan, and a law clerk in the Southern District of New York.
1. All witnesses are identified by the title they held at the time they testified.

2. The Nat’l Emp’t Law Project, 65 Million Need Not Apply: The Case for Reforming Criminal Background Checks for Employment at 27 n.2 (March 2011), available at http://www.nelp.org/page/-/65_Million_Need_Not_Apply.pdf?nocdn=1. The 65 million figure was derived from a 2008 Bureau of Justice Statistics survey showing “there were 92.3 million people with criminal records on file with the states, including those individuals fingerprinted for serious misdemeanors and felony arrests.” Id. (citing U.S. Bureau of Justice Statistics, Survey of State Criminal History Information Systems, 2008 at Table 1 (Oct. 2009)). This number was then reduced by 30 percent to “account for individuals who may have records in multiple states and other factors.” Id. The estimate that one in four Americans has a criminal record is “consistent with a Department of Justice finding that about ‘30 percent of the Nation’s adult population’ has a state rap sheet.” Id. (citing U.S. Dept. of Justice Office of the Attorney General, The Attorney General’s Report on Criminal History Background Checks 51 (June 2006)); see also Robert Brame, Michael G. Turner, Raymond Paternoster & Shawn D. Bushway, Cumulative Prevalence of Arrest From Age 8 to 23 in a National Sample, PEDIATRICS, Jan. 2012, at 21-27 (reporting that almost one-third of American adults by age 23 have been arrested for adult or juvenile offenses, not including minor traffic offenses).


7. Martha Stewart Back at Work, NBC News (March 5, 2005), available at http://www.nbcnews.com/id/7078053/ns/business-us_business/t/martha-stewart-back-work/#Uwvdlx4XVdqA (“A beaming Martha Stewart returned to work on Monday, blowing a kiss and waving as she arrived to speak to cheering employees.”).


16. San Francisco Task Force Hearing Transcript Day 2 at 382, available at www.nacdl.org/restoration/roadmapreport [hereinafter SF]. Although he can take a tour of the White House, Mr. C. cannot enter his own business’s hospitality units because they are at an airport.
17. See Miami Day 2 at 488-90; Telephone conversation with Brenda Aldana (Feb. 21, 2014) for further details on Miami hearing testimony (notes on file with NACDL). In 2011, Florida decoupled civil rights restoration from employment restrictions in state jobs that require certification and state occupational and professional licenses. Before that, individuals
needed the governor to act to lift these restrictions. However, Florida remains at the bottom of the barrel in terms of voting rights, with long waiting periods before a person can even apply for the pardon or restoration of rights to be granted to regain civil rights lost as a result of a felony conviction. Floridians must also get such restoration to deal with barriers in many non-state jobs and licensing, such as a law license. Margaret Love, NACDL Restoration of Rights Project, Nat’l Ass’n of Criminal Defense Lawyers, Chart #5 (Consideration of Criminal Record in Licensing and Employment), available at https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/Consideration_of_Criminal_Record_in_Licensing_And_Employment.pdf [hereinafter Love, NACDL Rights Restoration Project].


20. See note 2, supra.


25. Genesis 4:14-16 (“Behold, You have driven me this day from the face of the ground; and from Your face I will be hidden, and I will be a vagrant and a wanderer on the earth, and whoever finds me will kill me.’ And the Lord said unto him, ‘Therefore whosoever slayeth Cain, vengeance shall be taken on him sevenfold.’ And the Lord set a mark upon Cain, lest any finding him should kill him. Then Cain went out from the presence of the Lord. . . .”).


28. See Recommendation VIII of this report, discussing criminal records reform.

29. ACLU Marijuana Report at 37 (of the 1,717,064 drug arrests in the United States in 2010, 889,133, or 52 percent were for marijuana, and 784,021, or 46 percent were for marijuana possession).


32. We Are All Criminals, available at http://www.weareallcriminals.com/about/.


37. Testimony of Vincent Schiraldi, NYC Day 3 at 28.

38. See Miranda Boone, Judicial Rehabilitation in the Netherlands: Balancing Between Safety and Privacy, 3 European J. Probation 63, 66-68 (2011) (describing how the Netherlands strictly limits access to criminal records and allows private employers only to review a “Conduct Certificate,” which has limited information about a person’s criminal history); Martine Herzog-Evans, Judicial Rehabilitation in France: Helping with the Desisting Process and Acknowledging Achieved Desistance, 3 European J. Probation 4, 7-8 (2011) (describing how French criminal records are divided into three “bulletins,” with access to each bulletin strictly limited); Christine Morgenstern, Judicial Rehabilitation in Germany — The Use of Criminal Records and the Removal of Recorded Convictions, 1 European J. Probation 1, 25-27 (2011) (describing how the German “registry,” which contains a person’s comprehensive criminal history, is not available to private individuals and how a “certificate of conduct” can be requested by employers but includes only limited criminal history information); James B. Jacobs & Elena Larrauri, Are Criminal Convictions a Public Matter? The USA and Spain, 14 Punishment & Society 3, 11 (2012) (noting how in Spain, “[t]he vast majority of penal judgments, unless they involve a notorious case widely reported in the media, never become known”); see also Testimony of James Jacobs, NYC Day 3 at 160 (describing how in Spain, trials are open to the public but the judgment itself is not announced in open court and published opinions are stripped of identifying information so that “they have no connection to the defendant”).

39. NYC Day 3 at 161.


41. Miami Day 1 at 62.


43. SF Day 1 at 148.

44. Miami Day 1 at 28.

45. Miami Day 1 at 95-96.


47. Christian Henrichson & Ruth Delaney, Ctr. on Sentencing and Corr., The Price of Prisons: What Incarceration Costs Taxpayers 8, figure 3 (July 20, 2012), available at http://www.versa.org/sites/default/files/resources/downloads/Price_of_Prisons_updated_version_072512.pdf. This study included “prison costs outside the corrections budget [that] fall under three categories: (1) costs that are centralized for administrative purposes, such as employee benefits and capital costs; (2) inmate services funded through other agencies, such as education and training programs; and (3) the cost of underfunded pension and retiree health care plans.” Id. at 3. The full price of prisons to taxpayers — including costs that fell outside the corrections budgets — was $39 billion, $5.4 billion more than the states’ aggregate corrections department spending, which still totaled a staggering $33.5 billion. Id. at 6.


50. SF Day 1 at 155. Mr. Davis was interim city manager and chief of police for the city of East Palo Alto when he testified at the Task Force’s San Francisco hearings. In November 2013, Davis was appointed director of the Office of Community Oriented Policing Services (COPS), part of the U.S. Department of Justice. See Meet the Director, Community Oriented Policing Services, U.S. Department of Justice, available at http://www.cops.usdoj.gov/default.asp?Item=2305.
and Recidivism: Does an Old Criminal Record Predict Future Offending?

53 CRIME & DELINQUENCY 64 (2007) (analyzing juvenile and adult aggregate data for 670 males born in 1942 and finding that the risk of these males recidivating approximates that of a person without a criminal record after seven years); Megan C. Kurlychek et al., Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?, 5 CRIMINOLOGY & PUB. POL’Y 483 (2006) (studying Philadelphia police records to conclude that six to seven years after an initial arrest, re-arrest risk of individuals studied was approximately the same as that of someone who has never been arrested).

51. SF Day 1 at 153-56. Davis did not claim that the re-entry center caused these results.

52. SF Day 1 at 155-56, 159.

53. NYC Day 3 at 19.

54. Cleveland Day 2 at 382.

55. Cleveland Day 2 at 388.

56. Cleveland Day 2 at 386-87; see also OHIO REV. CODE ANN. §§ 2961.21-.24 (Certificates are available to eligible individuals who complete various programs and have good behavior while incarcerated or on supervision.). Importantly, issuance of a Certificate “constitutes a rebuttable presumption that the person’s criminal convictions are insufficient evidence that the person is unfit for the license or certification in question.” OHIO REV. CODE ANN. § 2961.23.


58. See ILLINOIS PUBLIC ACT 96-0593, originally signed in 2009 and amended in 2012 (20 ILCS 5000).


62. Chicago Day 1 at 96.


65. Chicago Day 1 at 84-85 (“Does expungement allow individuals to gain employment, housing, child custody? It almost certainly does, but how often does it, and how effectively does it allow that? We don’t know. We could look at something like criminal case sealing, which is another important remedy here in Illinois as well as elsewhere, and say does it, you know, facilitate productive participation in society. Again, we’re not sure.”).

66. Cleveland Day 2 at 366. Mark Myrent, research director for the Illinois Criminal Justice Information Authority, similarly testified that “the laws that are passed oftentimes are reactionary. Th[is] may be . . . the result of a particular incident where someone was harmed, and then a law gets passed that these people need to be looked at more closely prior to hiring.” Chicago Day 1 at 114-15. There is, however, hope for change. For example, under a Colorado law enacted in 2013, the General Assembly must determine “[w]hether the agency through its licensing or certification process imposes any disqualifications on applicants based on past criminal history and, if so, whether the disqualifications serve public safety or commercial or consumer protection interests.” COLO. REV. STAT. § 24-34-104(9)(b)(VIII.5). To implement this program, the department of regulatory agencies must prepare an analysis including “data on the number of licenses or certifications that were denied, revoked, or suspended based on a disqualification and the basis for the disqualification.” Id. Any proposal to regulate a new profession or occupation must include “[a] description of any anticipated disqualifications on an applicant for licensure, certification, relicensure, or recertification based on criminal history and how the disqualifications serve public safety or commercial or consumer protection interests.” COLO. REV. STAT. § 24-34-104.1(2)(f); see also id. at (4)(b)(IV) (factors to be considered in deciding whether regulation is necessary include “Whether the imposition of any disqualifications . . . based on criminal history serves public safety or commercial or consumer protection interests”).

67. SF Day 1 at 193, 210 (discussing individuals convicted of sex offenses in California and non-gradation of registry); see also Testimony of Pamela Lawrence, public housing revitalization specialist and grant manager at the Department of Housing and Urban Development, Washington, DC, Task Force Hearing Transcript Day 2 at 26, available at www.nacdl.org/restoration/roadmapreport [hereinafter DC] (“We’re challenged. . . by the lack of housing-specific data, trend analysis, and research, and we welcome any information you can provide around housing barriers, recidivism, re-entry, and housing models that are working.”).

68. Cleveland Day 2 at 344; see also Alfred Blumstein & Kiminori Nakamura, ‘Redemption’ in an Era of Widespread Criminal Background Checks, NAT’L INST. OF JUSTICE (June 1, 2010), available at http://www.nij.gov/journals/263/pages/redemption.aspx; Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement, 53 CRIME & DELINQUENCY 64 (2007) (analyzing juvenile and adult aggregate data for 670 males born in 1942 and finding that the risk of these males recidivating approximates that of a person without a criminal record after seven years); Megan C. Kurlychek et al., Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?, 5 CRIMINOLOGY & PUB. POL’Y 483 (2006) (studying Philadelphia police records to conclude that six to seven years after an initial arrest, re-arrest risk of individuals studied was approximately the same as that of someone who has never been arrested).

69. DC Day 2 at 7.
88

Collateral Damage: America’s Failure to Forgive or Forget in the War on Crime

71. Chicago Day 1 at 95.
72. NYC Day 3 at 29-30.
73. Miami Day 1 at 100.
74. Miami Day 1 at 89.
76. Miami Day 1 at 72, 115. Norwood went on to describe how her organization had four job fairs last year. “Two, I call[ed] an ‘offender job fair’; not one employer showed up. The other two were community job fairs. I had more employers than I had chairs for.” Miami Day 1 at 115.
77. “Language has been one of the first battlegrounds” among disabled people in objections to the way they are portrayed in media and popular culture. “[P]erson with a disability’ (or ‘who is deaf,’ or ‘who has cognitive disabilities’) is preferable “since it emphasizes the individual before the condition.” Joseph P. Shapiro, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 32-33 (1993); see also Paul Colford, ‘Illegal Immigrant’ No More, ASSOCIATED PRESS: THE DEFINITIVE SOURCE (April 2013), available at http://blog.ap.org/2013/04/02/illegal-immigrant-no-more.
78. Margaret Colgate Love, What’s in a Name? A Lot, When the Name is “Felon,” THE CRIME REPORT (March 13, 2012), available at http://www.thecrimerreport.org/viewpoints/2012-03-whats-in-a-name-a-lot-when-the-name-is-felon; see also Testimony of Jeremy Travis, NYC Day 1 at 94 (“We have language problems that get in the way a lot. We label people. . . . [T]he use of the words inmate or offender. . . becomes problematic. I was very careful a moment ago to say incarcerated individual. I’m finding myself increasingly just to make a point to use the words our fellow citizens who are in prison. So there are messaging issues that are really powerful. There are messaging opportunities that are really powerful.”). This report uses words like “offender” or “felon” only in quotes from witnesses or sources.
79. See VA. CODE ANN. § 18.2-471; § 47.1-4; see also NATIONAL INVENTORY OF COLLATERAL CONSEQUENCES, available at http://www.abacollateralconsequences.org (showing 146 mandatory consequences relating to employment in search of Virginia database).
82. Chicago Day 1 at 142.
84. MODEL PENAL CODE: SENTENCING § 6x.04(b) (Council Draft No. 4, Sept. 25, 2013) (on file with NACDL) [hereinafter MPC Sept. 2013 Draft].
86. The statute has a number of exceptions for jobs in education, law enforcement, and other sensitive areas. See Love, NACDL Rights Restoration Project, Colorado profile, available at https://www.nacdl.org/uploadedFiles/files/resource_center/2012_restoration_project/state_narr_co.pdf.
87. Testimony of Patricia Warth, NYC Day 2 at 41-48; Testimony of Roberta Meyers, NYC Day 1 at 11; see also N.Y. CORRECTION LAW §§ 701(1) and 703-a(1), which both state that a certificate may be granted to “relieve an eligible offender of any forfeiture or disability, or to remove any bar to employment, automatically imposed by law by reason of his conviction.”
91. SF Day 1 at 10-11; see also Testimony of Lamont Carey, spoken word artist, filmmaker, and author, DC Day 2 at 303 (“So for me, once I realized that I had the power to vote, that immediately made me feel more powerful. I began to express myself verbally and when I go into that booth.”); Testimony of Wayne Rawlins, community justice and economic development consultant, Miami Day 1 at 28-29 (“You know what is a fundamental [right] to an American? Power of the vote. And when you take that away from a person, you’ve pretty much left them hopeless.”).
PERSONS, Standard 19-2.6(a) (3d ed., June 2004), available at (“Jurisdictions should not impose the following collateral sanctions: (a) deprivation of the right to vote, except during actual confinement”).


94. See, e.g., 18 U.S.C. § 922(g); CAL. PENAL CODE § 29800. Some misdemeanor convictions, most notably those meeting the definition of a crime of domestic violence, also result in a loss of firearms rights. See, e.g., 18 U.S.C.A. § 921(a)(20)(A); 11 Del. Code §1448 (loss of rights for conviction for “crime of violence involving physical injury to another”).

95. 18 U.S.C. §§ 922(g), 924(a)(2).


98. NYC Day 3 at 155. For a full explanation of the various issues relating to the loss of firearms rights and avenues for restoration of those rights, see MARGARET COLGATE LOVE, JENNY ROBERTS & CECELIA KLINGELE, COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS: LAW, POLICY AND PRACTICE §§ 2:29-37 & Appendix A (NACDL/West 2013).

99. Cleveland Day 1 at 173-75.

100. Cleveland Day 1 at 208.

101. OFFICE OF THE DEPUTY MAYOR FOR PUB. SAFETY, CITY OF PHILADELPHIA, ECONOMIC BENEFITS OF EMPLOYING FORMERLY INCARCERATED INDIVIDUALS IN PHILADELPHIA 5 (Sept. 2011), available at http://economyleague.org/files/ExOffenders_-_Full_Report_FINAL_revised.pdf (“Connecting the formerly incarcerated to employment has been shown to reduce recidivism and results in three different types of positive economic impacts: (1) increased earnings, (2) increased tax revenues from employment, and (3) avoided costs in the form of avoided spending on criminal justice agencies, social services, and government cash transfers, as well as prevented victim costs.”).

102. NYC Day 2 at 263.

103. See SOC’Y FOR HUMAN RES. MGMT., BACKGROUND CHECKING: CONDUCTING CRIMINAL BACKGROUND CHECKS 3 (2010), available at http://www.shrm.org/Research/SurveyFindings/Articles/Pages/BackgroundCheckCriminalChecks.aspx. (describing survey where 92 percent of responding employers performed criminal background checks on some or all job candidates, and 73 percent performed checks on all job candidates).


106. UCCA, § 8.

107. Chicago Day 1 at 110-11.


110. N.Y. CORRECTION LAW § 753(2).


112. EEOC GUIDELINES.


117. Miami Day 1 at 232.
118. Chicago Day 2 at 330, 290.
120. 24 C.F.R. § 960.204(a).
121. 24 C.F.R. § 982.553.
123. NYC Day 1 at 15.
126. DC Day 2 at 19-20.
127. Testimony of Pamela Lawrence, public housing revitalization specialist and grant manager at the Department of Housing and Urban Development, DC Day 2 at 22; see also Testimony of Linda Evans, staff attorney with Legal Services for Prisoners with Children, SF Day 1 at 41-42 (describing “Moms Program” and “Pops Program” run by Oakland, public housing authority that gave public housing to men and women otherwise ineligible due to drug-related felony convictions).
130. SF Day 1 at 88-89.
131. SF Day 1 at 90-91.
132. SF Day 1 at 105.
133. SF Day 1 at 92.
134. DC Day 2 at 231-32.
135. NYC Day 3 at 26-27.
136. DC Day 2 at 228.
141. The Obama administration recently called upon the bar to help identify individuals with low level, non-violent convictions serving unduly harsh sentences who should be considered for clemency. While this is a positive development from a Justice Department that has shown great reluctance to recommend any type of clemency, the commutation of a sentence will not ameliorate the collateral consequences that individuals will face when released from prison. Further, the administration specifically distinguished this commutation initiative from the granting of pardons or forgiveness, which is the type of federal action that would truly allow individuals with low-level convictions to move on with their lives. See Remarks as Prepared for Delivery by Deputy Attorney General James Cole at the New York State Bar Association Annual Meeting, U.S. DEPT’ OF JUSTICE, available at http://www.justice.gov/iso/opa/dag/speeches/2014/dag-speech-140130.html.
142. Chicago Day 1 at 59.
143. Chicago Day 2 at 430-31.
144. Testimony of John Schomberg, Chicago Day 2 at 192-93.
145. DC Day 2 at 86.
146. DC Day 2 at 87.
147. DC Day 2 at 96-97.
148. NYC Day 2 at 163.
149. See also LOVE, ROBERTS & KLINGELE, COLLATERAL CONSEQUENCES § 7:23.
150. UCCCA § 11.

152. See, e.g., testimony of Federal District Court Judge Dan Polster, Cleveland Day 2 at 501-07.

153. MPC, Sept. 2013 draft, § 6x.06.

154. Chicago Day 1 at 34-35.

155. Chicago Day 1 at 47.

156. NYC Day 2 at 63. Jesse Wiese, who has a criminal record and recently graduated from law school, spoke of the importance of having a ceremony when individuals are beginning the re-entry process — as important to rehabilitation, as a recognition of violation of trust, serving penance, and welcoming back and restoring membership. NYC Day 2 at 157.

157. See U.S. DEP’T OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 5 (Aug. 2013) available at http://www.justice.gov/ag/smart-on-crime.pdf (stating how “the consequences of a criminal conviction can remain long after someone has served his or her sentence . . ., making a proper transition into society difficult” and recommending that “[i]f the rules imposing collateral consequences are found to be unduly burdensome and not serving a public safety purpose, they should be narrowly tailored or eliminated.”).


160. DC Day 2 at 8.


163. DC Day 2 at 232.

164. DC Day 3 at 322-23.

165. NYC Day 3 at 46-7.

166. Cleveland Day 1 at 135.

167. NYC Day 2 at 47.

168. NYC Day 3 at 45-46.

169. DC Day 1 at 74-75.

170. DC Day 1 at 75-76.

171. Chicago Day 1 at 16-17.

172. LOVE, ROBERTS & KLINGELE, COLLATERAL CONSEQUENCES § 7:22.

173. NYC Day 1 at 24 (noting how “the crisis of the consequences of convictions on people’s lives rarely seems to lead to discussions about the entry point of the problem, the underlying conviction itself, and that inquiry is the how and why of the underlying conviction.”).


175. Chicago Day 1 at 60.


177. COLO. REV. STAT. § 18-1.3-103.5.

178. Id.


181. See, e.g., MO. REV. STAT. § 610.140(7) (allowing expunged convictions to be used to enhance subsequent sentences, and to be given predicate effect).


“The ACD [adjournment in contemplation of dismissal] process is designed to avoid persons charged with minor offenses being permanently designated as criminals. It provides a second chance for a lawful life. The federal statute mandated the defendant bank’s refusal to hire plaintiff because of a shoplifting prosecution that was nullified by an ACD. Otherwise, it would have employed her. The federal statute and its administration should be revised to bring them into line with the highly laudable state policy.”

865F. Supp. 2d at 300.
184. Chicago Day 2 at 533.
185. Miami Day 1 at 113-15.
186. See Testimony of Esta Bigler, NYC Day 2 at 182-83 (“Our results show . . . negligent hiring cases do not occur frequently enough for any employer to be worried about them. So this is the big sell about negligent hiring, that they do not occur, and it is not a reason to discriminate based on criminal records. It certainly should not be the primary reason to conduct background checks by 55 percent of the employers.”).
187. See, e.g., COLO. REV. STAT. § 8-2-201(b) (providing negligent hiring protection for convictions not “directly related” to employment or that have been sealed or pardoned); 730 ILL. COMP. STAT. 5/5-5.5-15(f) (issuing negligent hiring protection where employer relied on certificate of relief from disabilities).
191. NYC Day 2 at 237, 251, 262.
193. See Patricia Warth written testimony submitted to Task Force, posted at www.nacdl.org/restoration/roadmapreporrt.
194. N.Y. CORRECTION LAW § 752. For other state laws with model multi-factor tests to determine if there is any direct relationship between a conviction and the employment sought, see MINN. STAT. § 364.03 (governing public employment and occupational licensing); VA. CODE ANN. § 54.1-204 (governing applications for “a license, certificate or registration to practice, pursue, or engage in any regulated occupation or profession”).
195. N.Y. EXECUTIVE LAw § 296(15) (“there shall be a rebuttable presumption in favor of excluding from evidence the prior incarceration or conviction of any person, in a case alleging that the employer has been negligent in hiring or retaining an applicant or employee, or supervising a hiring manager, if after learning about an applicant or employee’s past criminal conviction history, such employer has evaluated the factors set forth in section seven hundred fifty-two of the correction law, and made a reasonable, good faith determination that such factors militate in favor of hire or retention of that applicant or employee.”).
196. N.Y. EXECUTIVE LAw § 296(16).
197. N.Y. CORRECTION LAw § 753.
198. Know the Law, Employers, N.Y. DEP’T OF LABOR, available at http://www.labor.ny.gov/careerservices/ace/employers.shtml (“All types of criminal records and background checks may contain errors. When you are considering denying employment based on a background check, you should, at a minimum: (1) provide the applicant with a copy of the background check received, and (2) give the applicant an opportunity to identify and correct background errors or otherwise explain what is listed on the background check.”). But cf. Testimony of Judy Whiting, NYC Day 2 at 176 (“So not only are background check companies required to make sure their records are accurate and up-to-date, but federal law requires that if an employer is going to use a background check, a commercial background check, in whole or in part to make an employment decision or take an adverse employment action, they have to give the person the background check in advance of doing the deed and give the person a chance to look at the thing . . . but employers almost never do that.”).
199. NYC Day 1 at 18.


206. There is a presumed right of access to criminal and civil court records. See, e.g., Nixon v. Warner Communications, Inc., 435 U.S. 589, 597-98 (1978) (“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”). However, “the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes” and can “weigh[] the interests advanced by the parties in light of the public interest and the duty of the courts in exercising that power. Id. at 598, 602; see also United States v. Rosenthal, 763 F.2d 1291 (11th Cir. 1985) (“[W]hile the presumption in favor of common-law right of access must always be kept in mind, trial court may properly balance this right against important competing interests, including whether records are sought for such illegitimate purposes as to promote public scandal or gain unfair commercial advantage.”) (emphasis added).

207. LOVE, ROBERTS & KLINGELE, COLLATERAL CONSEQUENCES § 5:5.

208. Testimony of Frank Campbell, DC Day 3 at 222.


212. Wanted report at 12.

213. NYC Day 3 at 22-23.

214. Chicago Day 2 at 426-27.

215. SF Day 1 at 96.

216. SF Day 1 at 98.

217. Representative Bobby Scott (D-VA) introduced the Fairness and Accuracy in Employment Background Checks Act, which aims to clean up incomplete FBI background checks for employment. Fairness and Accuracy in Employment Background Checks Act of 2013, HR 2865, 113th Cong. (2013), available at https://www.govtrack.us/congress/bills/113/hr2865/text.


220. See, e.g., IND. CODE § 35-38-9-7(b) (records of more serious felonies “remain public records” after expungement, although they must be “clearly and visibly marked or identified as being expunged”).

221. Chicago Day 1 at 142-43.


225. Id.

226. See N.M. STAT. ANN. § 30-31-28(D); N.C. GEN. STAT. §§ 15A-145 et seq.; W. VA. CODE § 61-11-26; WIS. STAT. § 973.015.

227. Chicago Day 1 at 24-27.


229. Id.

230. Id. at § 35-38-9-7(b).

231. Id. at § 35-38-9-10(a) through (g).
232. **Ind. Code § 24-4-18-6(a).**
234. Chicago Day 1 at 19-20.
235. Cleveland Day 2 at 379.
236. Chicago Day 2 at 438.
237. The Department of Labor, in offering $26 million in grant funds to improve long-term labor market prospects of youth in the juvenile justice system, required that grants must include a diversion and/or expungement component. [Press Release, U.S. Dep’t of Labor, U.S. Department of Labor Announces Availability of Nearly $26 Million in Grants to Help Juvenile Offenders Gain the Skills Necessary to Enter the Workplace (April 1, 2013), available at http://www.dol.gov/opa/media/press/opa/OPA20130591.htm.]
239. **20 Ill. Comp. Stat. 2630/12(a).**
240. Compare Gene Policinski, ‘Mug shot’ Sites Pose First Amendment Dilemma, First Amendment Ctr., available at http://www.firstamendmentcenter.org/mug-shot-sites-posing-first-amendment-dilemma (“There’s the rub: Those public-spirited companies like Mugshots.com suddenly turn self-serving in demanding from $99 to $399 to take down a photo. Critics call the practice ‘unfair’ or ‘extortion.’ But given that the postings are done by private companies, not public officials, legal cures proposed thus far seem as bad as the ailment.”) with Jillian Stonecipher, Florida Bill Targets “Mugshot Websites,” Hits Crime Reporting, Digital Media Law Project (Feb. 21, 2013), available at http://www.dmtp.org/blog/2013/Florida-bill-targets-%E2%80%9Cmugshot-websites%E2%80%9D-hits-crime-reporting (“Unlike many organizations that file [Freedom of Information Act] requests and provide the open records to the public, mugshot websites do not seek to provide a public service. Instead, these sites exploit laws created to protect open government and free speech for the same reason they exploit people trying to get their mugshots removed- to make a profit. Even staunch free speech advocates recognize that these mugshot companies are, at the very least, distasteful.”). Although Freedom of Information Act litigation involves statutory rather than constitutional principle, there are also different approaches to the release of mugshots on this basis. Compare Karantalis v. Dept. of Justice, 635 F.3d 497 (2011) (affirming U.S. Marshall Service’s determination that it must withhold mugshot to protect individual from unwarranted invasion on his privacy interests, where there was no overriding public interest in accessing the shot) with Detroit Free Press v. Dept. of Justice, 73 F.3d 93, 97 (6th Cir. 1996) (holding that, in some circumstance, booking photographs must be disclosed to the media upon FOIA request even if doing so does not serve a law enforcement purpose).
242. See, e.g., Utah Code Ann. 1953 § 17-22-30 (Utah law stating that “A sheriff may not provide a copy of a booking photograph in any format to a person requesting a copy of the booking photograph if: (a) the booking photograph will be placed in a publication or posted to a website; and (b) removal of the booking photograph from the publication or website requires the payment of a fee or other consideration.”).
245. SF Day 1 at 230-32.
246. For example, the National Association of Criminal Defense Lawyers hosted a “Collateral Consequences Conference & Midwinter Meeting” in March 2014. See https://www.youtube.com/watch?v=rsS3r9P9DPw (video presentation).
249. Cleveland Day 2 at 521.
250. Miami Day 1 at 216-17.
251. Miami Day 2 at 355-56.
252. DC Day 3 at 141.
253. Miami Day 2 at 328.
254. Chicago Day 2 at 196.
255. NYC Day 1 at 26-27.
256. NYC Day 3 at 20-21.
257. Chicago Day 1 at 46.
258. Cal. Penal § 4852.08.
259. SF Day 1 at 29.
a626-11e3-84d4-e59b1709222c_story.html; Testimony of NYC Probation Commissioner Vincent Schiraldi, NYC Day 3 at 17-30;


265. Representative Bobby Scott (D-VA) introduced the Fairness and Accuracy in Employment Background Checks Act, which aims to clean up incomplete FBI background checks for employment. Fairness and Accuracy in Employment Background Checks Act of 2013, HR 2865, 113th Cong. (2013), available at https://www.govtrack.us/congress/bills/113/hr2865. Representative Keith Ellison (D-MN) introduced the Accurate Background Check (ABC) Act, which would require the FBI to do everything within its power to find any missing information on past arrests for Americans applying to work in the federal government. ABC Act of 2013, HR 2999, 113th Cong., available at https://www.govtrack.us/congress/bills/113/hr2999.

This publication is available online at www.nacdl.org/restoration/roadmapreport
PER CURIAM—Lorraine Netherton was convicted of second degree murder. The trial court erroneously imposed a firearm sentence enhancement based on the jury’s “deadly weapon” finding. Because one or more of her appellate counsel misapprehended who was representing Netherton at a critical stage of her direct appeal, Netherton lost the opportunity to obtain reversal of the firearm enhancement under *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008) (*Recuenco III*), and *State v. Williams-Walker*, 167 Wn.2d 889, 901-02, 225 P.3d 913 (2010). We reverse the Court of Appeals on the basis of ineffective assistance of appellate counsel and remand to the trial court for resentencing.

**FACTS**

In 1993, a jury convicted Netherton of second degree murder, additionally finding by special verdict that Netherton was armed with a “deadly weapon” when she
committed the crime. The trial court imposed a firearm sentence enhancement based on that finding.


On remand, the Court of Appeals did not stay Netherton's appeal pending this court's decision on remand in *Recuenco*. The court also did not ask for supplemental briefing on *Recuenco* II. Furthermore, Netherton's counsel in the Court of Appeals and her counsel in this court apparently did not confer on the status of Netherton's appeal in light of the ongoing *Recuenco* litigation, evidently because one or both of them thought they were no longer working on the case.


In January 2008, Netherton filed a timely personal restraint petition in the Court of Appeals, reasserting her challenge to the firearm enhancement and arguing
among other things that appellate counsel was ineffective in not briefing the issues then pending before this court in the *Recuenco* case and in failing to advise her to file a petition for review. This court issued its final decision in *Recuenco* three months later, holding that imposition of a firearm enhancement when only a deadly weapon has been charged and found by the jury can never be harmless. *Recuenco* III, 163 Wn.2d 428.

The Court of Appeals ultimately dismissed Netherton’s personal restraint petition as frivolous, holding that the firearm enhancement was sustainable despite *Recuenco* III and that therefore appellate counsel was not ineffective. Netherton, with the assistance of new counsel, then filed the current motion for discretionary review in this court.\(^1\) While Netherton’s motion was pending, this court elaborated on the principles announced in *Recuenco* III, holding that imposition of a firearm enhancement based on a jury’s deadly weapon finding is reversible even when the State alleged a firearm enhancement in the information and the jury was instructed on the use of a firearm. *Williams-Walker*, 167 Wn.2d at 901-02.

We granted Netherton’s motion for discretionary review only on the issue of whether appellate counsel was ineffective with respect to the firearm enhancement and referred the matter to the superior court for an evidentiary hearing. The superior court appointed counsel to represent Netherton, and after the hearing, the court entered findings of fact and relayed them to this court.

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\(^1\) Netherton also filed a motion for discretionary review of a Court of Appeals order denying her motion to have a panel of judges review her personal restraint petition. Mot. for Discretionary Review, *In re Pers. Restraint of Netherton*, No. 84035-1 (Dec. 4, 2009). That motion for discretionary review was consolidated under this motion for discretionary review.
ANALYSIS

To prevail on a claim of ineffective assistance of appellate counsel, Netherton must demonstrate the merit of any legal issue appellate counsel raised inadequately or failed to raise and also show she was prejudiced. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 314, 868 P.2d 835 (1994). Netherton’s challenge to her firearm enhancement would have been meritorious under *Recuenco III*, 163 Wn.2d 428, and *Williams-Walker*, 167 Wn.2d 889, had the issue been preserved before her judgment became final in 2007. It was not. The Court of Appeals did not stay her appeal pending *Recuenco III*, and counsel did not move for a stay or urge Netherton to file a petition for review after the Court of Appeals affirmed the firearm enhancement. Thus, Netherton can no longer rely directly on *Recuenco III* and *Williams-Walker* because both decisions were issued after her judgment and sentence became final, and neither is retroactively applicable to previously final judgments. *In re Pers. Restraint of Eastmond*, 173 Wn.2d 632, 272 P.3d 188 (2012); *In re Pers. Restraint of Jackson*, 175 Wn.2d 155, 161, 283 P.3d 1089 (2012).

The superior court on referral from this court found that the failure to preserve the firearm enhancement issue for further appellate review was primarily caused by a misunderstanding as to who represented Netherton after this court remanded the case to the Court of Appeals. That misunderstanding effectively left Netherton unrepresented in the Court of Appeals. If experienced counsel was actively working on the appeal at that stage, Netherton would have moved for a stay in the Court of Appeals pending *Recuenco III*, which the Court of Appeals likely would have granted. And had the appeal been stayed, the Court of Appeals likely would have decided the case in light of *Recuenco III* to Netherton’s benefit.
But even if the Court of Appeals would not have reversed the firearm enhancement under *Recuenco* III, we are confident Netherton would have sought review of the decision in this court. Because Netherton’s petition for review would have coincided with our consideration of *Williams-Walker*, we likely would have stayed Netherton’s case pending that decision, and under that decision, she would have been entitled to relief. In these unusual circumstances, Netherton has demonstrated that she was prejudiced by appellate counsel’s failure to assist her in preserving the firearm enhancement issue pending *Recuenco* III and *Williams-Walker*.

The Court of Appeals is reversed and the case is remanded to the trial court with directions to vacate the firearm enhancement and resentence Netherton in accordance with this opinion.²

² Netherton is indigent. Her motion for appointment of counsel in this court is granted by separate order. RAP 16.15(h); RAP 15.4.
LAFLER v. COOPER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT


Respondent was charged under Michigan law with assault with intent
to murder and three other offenses. The prosecution offered to dis­
miss two of the charges and to recommend a 51-to-85-month sentence
on the other two, in exchange for a guilty plea. In a communication
with the court, respondent admitted his guilt and expressed a will­
ingness to accept the offer. But he rejected the offer, allegedly after
his attorney convinced him that the prosecution would be unable to
establish intent to murder because the victim had been shot below
the waist. At trial, respondent was convicted on all counts and re­
ceived a mandatory minimum 185-to-360-month sentence. In a sub­
sequent hearing, the state trial court rejected respondent's claim that
his attorney's advice to reject the plea constituted ineffective assis­
tance. The Michigan Court of Appeals affirmed, rejecting the ineffec­
tive-assistance claim on the ground  that respondent knowingly and
intelligently turned down the plea offer and chose to go to trial. Re­
spondent renewed his claim in federal habeas. Finding that the state
appellate court had unreasonably applied the constitutional effective­
assistance standards laid out in Strickland v. Washington, 466 U. S.
668, and Hill v. Lockhart, 474 U. S. 52, the District Court granted a
conditional writ and ordered specific performance of the original plea
offer. The Sixth Circuit affirmed. Applying Strickland, it found that
counsel had provided deficient performance by advising respondent of
an incorrect legal rule, and that respondent suffered prejudice be­
cause he lost the opportunity to take the more favorable sentence of­
fered in the plea.

Held:

1. Where counsel's ineffective advice led to an offer's rejection, and
where the prejudice alleged is having to stand trial, a defendant must
show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the actual judgment and sentence imposed. Pp. 3–11.

(a) Because the parties agree that counsel’s performance was deficient, the only question is how to apply Strickland’s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial. Pp. 3–4.

(b) In that context, the Strickland prejudice test requires a defendant to show a reasonable possibility that the outcome of the plea process would have been different with competent advice. The Sixth Circuit and other federal appellate courts have agreed with the Strickland prejudice test for rejected pleas adopted here by this Court. Petitioner and the Solicitor General propose a narrow view—that Strickland prejudice cannot arise from plea bargaining if the defendant is later convicted at a fair trial—but their reasoning is unpersuasive. First, they claim that the Sixth Amendment’s sole purpose is to protect the right to a fair trial, but the Amendment actually requires effective assistance at critical stages of a criminal proceeding, including pretrial stages. This is consistent with the right to effective assistance on appeal, see, e.g., Halbert v. Michigan, 545 U. S. 605, and the right to counsel during sentencing, see, e.g., Glover v. United States, 531 U. S. 198, 203–204. This Court has not followed a rigid rule that an otherwise fair trial remedies errors not occurring at trial, but has instead inquired whether the trial cured the particular error at issue. See, e.g., Vasquez v. Hillery, 474 U. S. 254, 263. Second, this Court has previously rejected petitioner’s argument that Lockhart v. Fretwell, 506 U. S. 364, modified Strickland and does so again here. Fretwell and Nix v. Whiteside, 475 U. S. 157, demonstrate that “it would be unjust to characterize the likelihood of a different outcome as legitimate ‘prejudice,’ ” Williams v. Taylor, 529 U. S. 362, 391–392, where defendants would receive a windfall as a result of the application of an incorrect legal principle or a defense strategy outside the law. Here, however, respondent seeks relief from counsel’s failure to meet a valid legal standard. Third, petitioner seeks to preserve the conviction by arguing that the Sixth Amendment’s purpose is to ensure a conviction’s reliability, but this argument fails to comprehend the full scope of the Sixth Amendment and is refuted by precedent. Here, the question is the fairness or reliability not of the trial but of the processes that preceded it, which caused respondent to lose benefits he would have received but for counsel’s ineffective assistance. Furthermore, a reliable trial may not foreclose relief when counsel has failed to assert rights that may have
altered the outcome. See Kimmelman v. Morrison, 477 U. S. 365, 379. Petitioner’s position that a fair trial wipes clean ineffective assistance during plea bargaining also ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials. See Missouri v. Frye, ante, at ___. Pp. 4–11.

2. Where a defendant shows ineffective assistance has caused the rejection of a plea leading to a more severe sentence at trial, the remedy must “neutralize the taint” of a constitutional violation, United States v. Morrison, 449 U. S. 361, 365, but must not grant a windfall to the defendant or needlessly squander the resources the State properly invested in the criminal prosecution, see United States v. Mechanik, 475 U. S. 66, 72. If the sole advantage is that the defendant would have received a lesser sentence under the plea, the court should have an evidentiary hearing to determine whether the defendant would have accepted the plea. If so, the court may exercise discretion in determining whether the defendant should receive the term offered in the plea, the sentence received at trial, or something in between. However, resentencing based on the conviction at trial may not suffice, e.g., where the offered guilty plea was for less serious counts than the ones for which a defendant was convicted after trial, or where a mandatory sentence confines a judge’s sentencing discretion. In these circumstances, the proper remedy may be to require the prosecution to reoffer the plea. The judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea, or leave the conviction undisturbed. In either situation, a court must weigh various factors. Here, it suffices to give two relevant considerations. First, a court may take account of a defendant’s earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here to decide as a constitutional rule that a judge is required to disregard any information concerning the crime discovered after the plea offer was made. Petitioner argues that implementing a remedy will open the floodgates to litigation by defendants seeking to unsettle their convictions, but in the 30 years that courts have recognized such claims, there has been no indication that the system is overwhelmed or that defendants are receiving windfalls as a result of strategically timed Strickland claims. In addition, the prosecution and trial courts may adopt measures to help ensure against meritless claims. See Frye, ante, at ___. Pp. 11–14.

3. This case arises under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), but because the Michigan Court of Appeals’ analysis of respondent’s ineffective-assistance-of-counsel claim was contrary to clearly established federal law, AEDPA presents no bar to relief. Respondent has satisfied Strickland’s two-part test.
The parties concede the fact of deficient performance. And respondent has shown that but for that performance there is a reasonable probability he and the trial court would have accepted the guilty plea. In addition, as a result of not accepting the plea and being convicted at trial, he received a minimum sentence 3½ times greater than he would have received under the plea. As a remedy, the District Court ordered specific performance of the plea agreement, but the correct remedy is to order the State to reoffer the plea. If respondent accepts the offer, the state trial court can exercise its discretion in determining whether to vacate respondent’s convictions and resentence pursuant to the plea agreement, to vacate only some of the convictions and resentence accordingly, or to leave the conviction and sentence resulting from the trial undisturbed. Pp. 14–16.


KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, and in which ROBERTS, C. J., joined as to all but Part IV. ALITO, J., filed a dissenting opinion.
JUSTICE KENNEDY delivered the opinion of the Court.

In this case, as in Missouri v. Frye, ante, p. ___, also decided today, a criminal defendant seeks a remedy when inadequate assistance of counsel caused nonacceptance of a plea offer and further proceedings led to a less favorable outcome. In Frye, defense counsel did not inform the defendant of the plea offer; and after the offer lapsed the defendant still pleaded guilty, but on more severe terms. Here, the favorable plea offer was reported to the client but, on advice of counsel, was rejected. In Frye there was a later guilty plea. Here, after the plea offer had been rejected, there was a full and fair trial before a jury. After a guilty verdict, the defendant received a sentence harsher than that offered in the rejected plea bargain. The instant case comes to the Court with the concession that counsel’s advice with respect to the plea offer fell below the standard of adequate assistance of counsel guaranteed by the Sixth Amendment, applicable to the States through the Fourteenth Amendment.

I

On the evening of March 25, 2003, respondent pointed a gun toward Kali Mundy’s head and fired. From the rec-
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Ord, it is unclear why respondent did this, and at trial it was suggested that he might have acted either in self-defense or in defense of another person. In any event the shot missed and Mundy fled. Respondent followed in pursuit, firing repeatedly. Mundy was shot in her buttock, hip, and abdomen but survived the assault.

Respondent was charged under Michigan law with assault with intent to murder, possession of a firearm by a felon, possession of a firearm in the commission of a felony, misdemeanor possession of marijuana, and for being a habitual offender. On two occasions, the prosecution offered to dismiss two of the charges and to recommend a sentence of 51 to 85 months for the other two, in exchange for a guilty plea. In a communication with the court respondent admitted guilt and expressed a willingness to accept the offer. Respondent, however, later rejected the offer on both occasions, allegedly after his attorney convinced him that the prosecution would be unable to establish his intent to murder Mundy because she had been shot below the waist. On the first day of trial the prosecution offered a significantly less favorable plea deal, which respondent again rejected. After trial, respondent was convicted on all counts and received a mandatory minimum sentence of 185 to 360 months’ imprisonment.

In a so-called Ginther hearing before the state trial court, see People v. Ginther, 390 Mich. 436, 212 N. W. 2d 922 (1973), respondent argued his attorney's advice to reject the plea constituted ineffective assistance. The trial judge rejected the claim, and the Michigan Court of Appeals affirmed. People v. Cooper, No. 250583, 2005 WL 599740 (Mar. 15, 2005) (per curiam), App. to Pet. for Cert. 44a. The Michigan Court of Appeals rejected the claim of ineffective assistance of counsel on the ground that respondent knowingly and intelligently rejected two plea offers and chose to go to trial. The Michigan Supreme Court denied respondent’s application for leave to file an
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The United States Court of Appeals for the Sixth Circuit affirmed, 376 Fed. Appx. 563 (2010), finding “[e]ven full deference under AEDPA cannot salvage the state court’s decision,” id., at 569. Applying Strickland, the Court of Appeals found that respondent’s attorney had provided deficient performance by informing respondent of “an incorrect legal rule,” 376 Fed. Appx., at 570–571, and that respondent suffered prejudice because he “lost out on an opportunity to plead guilty and receive the lower sentence that was offered to him.” Id., at 573. This Court granted certiorari. 562 U. S. ___ (2011).

II

A

Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process. Frye, ante, at 8; see also Padilla v. Kentucky, 559 U. S. ___, ___ (2010) (slip op., at 16); Hill, supra, at 57. During plea negotiations defendants are “entitled to the effective assis-
tance of competent counsel.” *McMann v. Richardson*, 397 U. S. 759, 771 (1970). In *Hill*, the Court held “the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel.” 474 U. S., at 58. The performance prong of *Strickland* requires a defendant to show “that counsel’s representation fell below an objective standard of reasonableness.” 474 U. S., at 57 (quoting *Strickland*, 466 U. S., at 688). In this case all parties agree the performance of respondent’s counsel was deficient when he advised respondent to reject the plea offer on the grounds he could not be convicted at trial. In light of this concession, it is unnecessary for this Court to explore the issue.

The question for this Court is how to apply *Strickland*’s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial.

B

To establish *Strickland* prejudice a defendant must “show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.*, at 694. In the context of pleas a defendant must show the outcome of the plea process would have been different with competent advice. See *Frye*, ante, at 12 (noting that *Strickland*’s inquiry, as applied to advice with respect to plea bargains, turns on “whether ‘the result of the proceeding would have been different’” (quoting *Strickland*, supra, at 694)); see also *Hill*, 474 U. S., at 59 (“The . . . ‘prejudice,’ requirement . . . focuses on whether counsel’s constitutionally ineffective performance affected the outcome of the plea process”). In *Hill*, when evaluating the petitioner’s claim that ineffective assistance led to the improvident acceptance of a guilty plea, the Court required the petitioner to show “that there is a reasonable probability that, but for counsel’s
errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial.” *Ibid.*

In contrast to *Hill*, here the ineffective advice led not to an offer’s acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged. In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer’s terms would have been less severe than under the judgment and sentence that in fact were imposed. Here, the Court of Appeals for the Sixth Circuit agreed with that test for *Strickland* prejudice in the context of a rejected plea bargain. This is consistent with the test adopted and applied by other appellate courts without demonstrated difficulties or systemic disruptions. See 376 Fed. Appx., at 571–573; see also, *e.g.*, *United States v. Rodriguez Rodriguez*, 929 F. 2d 747, 753, n. 1 (CA1 1991) (per curiam); *United States v. Gordon*, 156 F. 3d 376, 380–381 (CA2 1998) (per curiam); *United States v. Day*, 969 F. 2d 39, 43–45 (CA3 1992); *Beckham v. Wainwright*, 639 F. 2d 262, 267 (CA5 1981); *Julian v. Bartley*, 495 F. 3d 487, 498–500 (CA7 2007); *Wanatee v. Ault*, 259 F. 3d 700, 703–704 (CA8 2001); *Nunes v. Mueller*, 350 F. 3d 1045, 1052–1053 (CA9 2003); *Williams v. Jones*, 571 F. 3d 1086, 1094–1095 (CA10 2009) (per curiam); *United States v. Gaviria*, 116 F. 3d 1498, 1512–1514 (CADC 1997) (per curiam).

Petitioner and the Solicitor General propose a different, far more narrow, view of the Sixth Amendment. They contend there can be no finding of *Strickland* prejudice arising from plea bargaining if the defendant is later convicted at a fair trial. The three reasons petitioner and
the Solicitor General offer for their approach are unpersuasive.

First, petitioner and the Solicitor General claim that the sole purpose of the Sixth Amendment is to protect the right to a fair trial. Errors before trial, they argue, are not cognizable under the Sixth Amendment unless they affect the fairness of the trial itself. See Brief for Petitioner 12–21; Brief for United States as Amicus Curiae 10–12. The Sixth Amendment, however, is not so narrow in its reach. Cf. Frye, ante, at 11 (holding that a defendant can show prejudice under Strickland even absent a showing that the deficient performance precluded him from going to trial). The Sixth Amendment requires effective assistance of counsel at critical stages of a criminal proceeding. Its protections are not designed simply to protect the trial, even though “counsel’s absence [in these stages] may derogate from the accused’s right to a fair trial.” United States v. Wade, 388 U. S. 218, 226 (1967). The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel’s advice. This is consistent, too, with the rule that defendants have a right to effective assistance of counsel on appeal, even though that cannot in any way be characterized as part of the trial. See, e.g., Halbert v. Michigan, 545 U. S. 605 (2005); Evitts v. Lucey, 469 U. S. 387 (1985). The precedents also establish that there exists a right to counsel during sentencing in both noncapital, see Glover v. United States, 531 U. S. 198, 203–204 (2001); Mempa v. Rhay, 389 U. S. 128 (1967), and capital cases, see Wiggins v. Smith, 539 U. S. 510, 538 (2003). Even though sentencing does not concern the defendant’s guilt or innocence, ineffective assistance of counsel during a sentencing hearing can result in Strickland prejudice because “any amount of [additional] jail time has Sixth Amendment significance.” Glover, supra,
at 203.

The Court, moreover, has not followed a rigid rule that an otherwise fair trial remedies errors not occurring at the trial itself. It has inquired instead whether the trial cured the particular error at issue. Thus, in \textit{Vasquez v. Hillery}, 474 U. S. 254 (1986), the deliberate exclusion of all African-Americans from a grand jury was prejudicial because a defendant may have been tried on charges that would not have been brought at all by a properly constituted grand jury. \textit{Id.}, at 263; see \textit{Ballard v. United States}, 329 U. S. 187, 195 (1946) (dismissing an indictment returned by a grand jury from which women were excluded); see also \textit{Stirone v. United States}, 361 U. S. 212, 218–219 (1960) (reversing a defendant’s conviction because the jury may have based its verdict on acts not charged in the indictment). By contrast, in \textit{United States v. Mechanik}, 475 U. S. 66 (1986), the complained-of error was a violation of a grand jury rule meant to ensure probable cause existed to believe a defendant was guilty. A subsequent trial, resulting in a verdict of guilt, cured this error. See \textit{id.}, at 72–73.

In the instant case respondent went to trial rather than accept a plea deal, and it is conceded this was the result of ineffective assistance during the plea negotiation process. Respondent received a more severe sentence at trial, one 3½ times more severe than he likely would have received by pleading guilty. Far from curing the error, the trial caused the injury from the error. Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.

Second, petitioner claims this Court refined \textit{Strickland}’s prejudice analysis in \textit{Fretwell} to add an additional requirement that the defendant show that ineffective assistance of counsel led to his being denied a substantive or
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procedural right. Brief for Petitioner 12–13. The Court has rejected the argument that Fretwell modified Strickland before and does so again now. See Williams v. Taylor, 529 U. S. 362, 391 (2000) (“The Virginia Supreme Court erred in holding that our decision in Lockhart v. Fretwell, 506 U. S. 364 (1993), modified or in some way supplanted the rule set down in Strickland”); see also Glover, supra, at 203 (“The Court explained last Term [in Williams] that our holding in Lockhart does not supplant the Strickland analysis”).

Fretwell could not show Strickland prejudice resulting from his attorney’s failure to object to the use of a sentencing factor the Eighth Circuit had erroneously (and temporarily) found to be impermissible. Fretwell, 506 U. S., at 373. Because the objection upon which his ineffective-assistance-of-counsel claim was premised was meritless, Fretwell could not demonstrate an error entitling him to relief. The case presented the “unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry.” Ibid. (O’Connor, J., concurring). See also ibid. (recognizing “[t]he determinative question—whether there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different—remains unchanged” (internal quotation marks and citation omitted)). It is for this same reason a defendant cannot show prejudice based on counsel’s refusal to present perjured testimony, even if such testimony might have affected the outcome of the case. See Nix v. Whiteside, 475 U. S. 157, 175 (1986) (holding first that counsel’s refusal to present perjured testimony breached no professional duty and second that it cannot establish prejudice under Strickland).

Both Fretwell and Nix are instructive in that they demonstrate “there are also situations in which it would be unjust to characterize the likelihood of a different
outcome as legitimate ‘prejudice,’” *Williams*, *supra*, at 391–392, because defendants would receive a windfall as a result of the application of an incorrect legal principle or a defense strategy outside the law. Here, however, the injured client seeks relief from counsel’s failure to meet a valid legal standard, not from counsel’s refusal to violate it. He maintains that, absent ineffective counsel, he would have accepted a plea offer for a sentence the prosecution evidently deemed consistent with the sound administration of criminal justice. The favorable sentence that eluded the defendant in the criminal proceeding appears to be the sentence he or others in his position would have received in the ordinary course, absent the failings of counsel. See Bibas, Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection, 99 Cal. L. Rev. 1117, 1138 (2011) (“The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less a bargain”); see also *Frye*, *ante*, at 7–8. If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.

It is, of course, true that defendants have “no right to be offered a plea . . . nor a federal right that the judge accept it.” *Frye, ante*, at 12. In the circumstances here, that is beside the point. If no plea offer is made, or a plea deal is accepted by the defendant but rejected by the judge, the issue raised here simply does not arise. Much the same reasoning guides cases that find criminal defendants have a right to effective assistance of counsel in direct appeals even though the Constitution does not require States to provide a system of appellate review at all. See *Evitts*, 469
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U. S. 387; see also Douglas v. California, 372 U. S. 353 (1963). As in those cases, “[w]hen a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution.” Evitts, supra, at 401.

Third, petitioner seeks to preserve the conviction obtained by the State by arguing that the purpose of the Sixth Amendment is to ensure “the reliability of [a] conviction following trial.” Brief for Petitioner 13. This argument, too, fails to comprehend the full scope of the Sixth Amendment’s protections; and it is refuted by precedent. Strickland recognized “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” 466 U. S., at 686. The goal of a just result is not divorced from the reliability of a conviction, see United States v. Cronic, 466 U. S. 648, 658 (1984); but here the question is not the fairness or reliability of the trial but the fairness and regularity of the processes that preceded it, which caused the defendant to lose benefits he would have received in the ordinary course but for counsel’s ineffective assistance.

There are instances, furthermore, where a reliable trial does not foreclose relief when counsel has failed to assert rights that may have altered the outcome. In Kimmelman v. Morrison, 477 U. S. 365 (1986), the Court held that an attorney’s failure to timely move to suppress evidence during trial could be grounds for federal habeas relief. The Court rejected the suggestion that the “failure to make a timely request for the exclusion of illegally seized evidence” could not be the basis for a Sixth Amendment violation because the evidence “is ‘typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.’” Id., at 379 (quoting Stone v. Powell, 428 U. S. 465, 490 (1976)). “The constitutional
rights of criminal defendants,” the Court observed, “are granted to the innocent and the guilty alike. Consequently, we decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt.” 477 U. S., at 380. The same logic applies here. The fact that respondent is guilty does not mean he was not entitled by the Sixth Amendment to effective assistance or that he suffered no prejudice from his attorney’s deficient performance during plea bargaining.

In the end, petitioner’s three arguments amount to one general contention: A fair trial wipes clean any deficient performance by defense counsel during plea bargaining. That position ignores the reality that criminal justice today is for the most part a system of pleas, not a system of trials. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. See Frye, ante, at 7. As explained in Frye, the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences. Ibid. (“It is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process”).

C

Even if a defendant shows ineffective assistance of counsel has caused the rejection of a plea leading to a trial and a more severe sentence, there is the question of what constitutes an appropriate remedy. That question must now be addressed.

Sixth Amendment remedies should be “tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.” United States v. Morrison, 449 U. S. 361, 364 (1981). Thus, a remedy must “neutralize the taint” of a constitu-
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tional violation, id., at 365, while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution. See *Mechanik*, 475 U. S., at 72 (“The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences”).

The specific injury suffered by defendants who decline a plea offer as a result of ineffective assistance of counsel and then receive a greater sentence as a result of trial can come in at least one of two forms. In some cases, the sole advantage a defendant would have received under the plea is a lesser sentence. This is typically the case when the charges that would have been admitted as part of the plea bargain are the same as the charges the defendant was convicted of after trial. In this situation the court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel’s errors he would have accepted the plea. If the showing is made, the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between.

In some situations it may be that resentencing alone will not be full redress for the constitutional injury. If, for example, an offer was for a guilty plea to a count or counts less serious than the ones for which a defendant was convicted after trial, or if a mandatory sentence confines a judge’s sentencing discretion after trial, a resentencing based on the conviction at trial may not suffice. See, e.g., *Williams*, 571 F. 3d, at 1088; *Riggs v. Fairman*, 399 F. 3d 1179, 1181 (CA9 2005). In these circumstances, the proper exercise of discretion to remedy the constitutional
injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed.

In implementing a remedy in both of these situations, the trial court must weigh various factors; and the boundaries of proper discretion need not be defined here. Principles elaborated over time in decisions of state and federal courts, and in statutes and rules, will serve to give more complete guidance as to the factors that should bear upon the exercise of the judge’s discretion. At this point, however, it suffices to note two considerations that are of relevance.

First, a court may take account of a defendant’s earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here to decide as a constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made. The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial.

Petitioner argues that implementing a remedy here will open the floodgates to litigation by defendants seeking to unsettle their convictions. See Brief for Petitioner 20. Petitioner’s concern is misplaced. Courts have recognized claims of this sort for over 30 years, see supra, at 5, and yet there is no indication that the system is overwhelmed by these types of suits or that defendants are receiving windfalls as a result of strategically timed Strickland claims. See also Padilla, 559 U. S., at ___ (slip op., at 14) (“We confronted a similar ‘floodgates’ concern in Hill,” but
a “flood did not follow in that decision’s wake”). In addition, the “prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction.” *Frye*, ante, at 10. See also *ibid.* (listing procedures currently used by various States). This, too, will help ensure against meritless claims.

III

The standards for ineffective assistance of counsel when a defendant rejects a plea offer and goes to trial must now be applied to this case. Respondent brings a federal collateral challenge to a state-court conviction. Under AEDPA, a federal court may not grant a petition for a writ of habeas corpus unless the state court’s adjudication on the merits was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. §2254(d)(1). A decision is contrary to clearly established law if the state court “applies a rule that contradicts the governing law set forth in [Supreme Court] cases.” *Williams* v. *Taylor*, 529 U.S. 362, 405 (2000) (opinion for the Court by O’Connor, J.). The Court of Appeals for the Sixth Circuit could not determine whether the Michigan Court of Appeals addressed respondent’s ineffective-assistance-of-counsel claim or, if it did, “what the court decided, or even whether the correct legal rule was identified.” 376 Fed. Appx., at 568–569.

The state court’s decision may not be quite so opaque as the Court of Appeals for the Sixth Circuit thought, yet the federal court was correct to note that AEDPA does not present a bar to granting respondent relief. That is because the Michigan Court of Appeals identified respondent’s ineffective-assistance-of-counsel claim but failed to apply *Strickland* to assess it. Rather than applying
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Strickland, the state court simply found that respondent’s rejection of the plea was knowing and voluntary. Cooper, 2005 WL 599740, *1, App. to Pet. for Cert. 45a. An inquiry into whether the rejection of a plea is knowing and voluntary, however, is not the correct means by which to address a claim of ineffective assistance of counsel. See Hill, 474 U. S., at 370 (applying Strickland to assess a claim of ineffective assistance of counsel arising out of the plea negotiation process). After stating the incorrect standard, moreover, the state court then made an irrelevant observation about counsel’s performance at trial and mischaracterized respondent’s claim as a complaint that his attorney did not obtain a more favorable plea bargain. By failing to apply Strickland to assess the ineffective-assistance-of-counsel claim respondent raised, the state court’s adjudication was contrary to clearly established federal law. And in that circumstance the federal courts in this habeas action can determine the principles necessary to grant relief. See Panetti v. Quarterman, 551 U. S. 930, 948 (2007).

Respondent has satisfied Strickland’s two-part test. Regarding performance, perhaps it could be accepted that it is unclear whether respondent’s counsel believed respondent could not be convicted for assault with intent to murder as a matter of law because the shots hit Mundy below the waist, or whether he simply thought this would be a persuasive argument to make to the jury to show lack of specific intent. And, as the Court of Appeals for the Sixth Circuit suggested, an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance. Here, however, the fact of deficient performance has been conceded by all parties. The case comes to us on that assumption, so there is no need to address this question.

As to prejudice, respondent has shown that but for counsel’s deficient performance there is a reasonable
probability he and the trial court would have accepted the guilty plea. See 376 Fed. Appx., at 571–572. In addition, as a result of not accepting the plea and being convicted at trial, respondent received a minimum sentence 3½ times greater than he would have received under the plea. The standard for ineffective assistance under Strickland has thus been satisfied.

As a remedy, the District Court ordered specific performance of the original plea agreement. The correct remedy in these circumstances, however, is to order the State to reoffer the plea agreement. Presuming respondent accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed. See Mich. Ct. Rule 6.302(C)(3) (2011) (“If there is a plea agreement and its terms provide for the defendant’s plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may . . . reject the agreement”). Today’s decision leaves open to the trial court how best to exercise that discretion in all the circumstances of the case.

The judgment of the Court of Appeals for the Sixth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.
SCALIA, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 10–209

BLAINE LAFLER, PETITIONER v. ANTHONY COOPER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March 21, 2012]

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, and with whom THE CHIEF JUSTICE joins as to all but Part IV, dissenting.

“If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.” Ante, at 9.

“The inquiry then becomes how to define the duty and responsibilities of defense counsel in the plea bargain process. This is a difficult question. . . . Bargaining is, by its nature, defined to a substantial degree by personal style. . . . This case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects . . . .” Missouri v. Frye, ante, at 8.

With those words from this and the companion case, the Court today opens a whole new field of constitutionalized criminal procedure: plea-bargaining law. The ordinary criminal process has become too long, too expensive, and unpredictable, in no small part as a consequence of an intricate federal Code of Criminal Procedure imposed on the States by this Court in pursuit of perfect justice. See
SCALIA, J., dissenting

Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Cal. L. Rev. 929 (1965). The Court now moves to bring perfection to the alternative in which prosecutors and defendants have sought relief. Today’s opinions deal with only two aspects of counsel’s plea-bargaining inadequacy, and leave other aspects (who knows what they might be?) to be worked out in further constitutional litigation that will burden the criminal process. And it would be foolish to think that “constitutional” rules governing counsel’s behavior will not be followed by rules governing the prosecution’s behavior in the plea-bargaining process that the Court today announces “is the criminal justice system,” Frye, ante, at 7 (quoting approvingly from Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992) (hereinafter Scott)). Is it constitutional, for example, for the prosecution to withdraw a plea offer that has already been accepted? Or to withdraw an offer before the defense has had adequate time to consider and accept it? Or to make no plea offer at all, even though its case is weak—thereby excluding the defendant from “the criminal justice system”?

Anthony Cooper received a full and fair trial, was found guilty of all charges by a unanimous jury, and was given the sentence that the law prescribed. The Court nonetheless concludes that Cooper is entitled to some sort of habeas corpus relief (perhaps) because his attorney’s allegedly incompetent advice regarding a plea offer caused him to receive a full and fair trial. That conclusion is foreclosed by our precedents. Even if it were not foreclosed, the constitutional right to effective plea-bargainers that it establishes is at least a new rule of law, which does not undermine the Michigan Court of Appeals’ decision and therefore cannot serve as the basis for habeas relief. And the remedy the Court announces—namely, whatever the state trial court in its discretion prescribes, down to and including no remedy at all—is unheard-of and quite ab-
surd for violation of a constitutional right. I respectfully dissent.

I

This case and its companion, Missouri v. Frye, ante, p. ___, raise relatively straightforward questions about the scope of the right to effective assistance of counsel. Our case law originally derived that right from the Due Process Clause, and its guarantee of a fair trial, see United States v. Gonzalez-Lopez, 548 U. S. 140, 147 (2006), but the seminal case of Strickland v. Washington, 466 U. S. 668 (1984), located the right within the Sixth Amendment. As the Court notes, ante, at 6, the right to counsel does not begin at trial. It extends to “any stage of the prosecution, formal or informal, in court or out, where counsel’s absence might derogate from the accused’s right to a fair trial.” United States v. Wade, 388 U. S. 218, 226 (1967). Applying that principle, we held that the “entry of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a ‘critical stage’ at which the right to counsel adheres.” Iowa v. Tovar, 541 U. S. 77, 81 (2004); see also Hill v. Lockhart, 474 U. S. 52, 58 (1985). And it follows from this that acceptance of a plea offer is a critical stage. That, and nothing more, is the point of the Court’s observation in Padilla v. Kentucky, 559 U. S. ___, ___ (2010) (slip op., at 16), that “the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel.” The defendant in Padilla had accepted the plea bargain and pleaded guilty, abandoning his right to a fair trial; he was entitled to advice of competent counsel before he did so. The Court has never held that the rule articulated in Padilla, Tovar, and Hill extends to all aspects of plea negotiations, requiring not just advice of competent counsel before the defendant accepts a plea bargain and pleads guilty, but also the advice of competent counsel before the defendant rejects a
plea bargain and stands on his constitutional right to a fair trial. The latter is a vast departure from our past cases, protecting not just the constitutionally prescribed right to a fair adjudication of guilt and punishment, but a judicially invented right to effective plea bargaining.

It is also apparent from *Strickland* that bad plea bargaining has nothing to do with ineffective assistance of counsel in the constitutional sense. *Strickland* explained that “[i]n giving meaning to the requirement [of effective assistance], . . . we must take its purpose—to ensure a fair trial—as the guide.” 466 U. S., at 686. Since “the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial,” *United States v. Cronic*, 466 U. S. 648, 658 (1984), the “benchmark” inquiry in evaluating any claim of ineffective assistance is whether counsel’s performance “so undermined the proper functioning of the adversarial process” that it failed to produce a reliably “just result.” *Strickland*, 466 U. S., at 686. That is what *Strickland*’s requirement of “prejudice” consists of: Because the right to effective assistance has as its purpose the assurance of a fair trial, the right is not infringed unless counsel’s mistakes call into question the basic justice of a defendant’s conviction or sentence. That has been, until today, entirely clear. A defendant must show “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Id.*, at 687. See also *Gonzalez-Lopez*, *supra*, at 147. Impairment of fair trial is how we distinguish between unfortunate attorney error and error of constitutional significance.1

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1 Rather than addressing the constitutional origins of the right to effective counsel, the Court responds to the broader claim (raised by no one) that “the sole purpose of the Sixth Amendment is to protect the right to a fair trial.” *Ante*, at 6 (emphasis added). Cf. Brief for United States as Amicus Curiae 10–12 (arguing that the “purpose of the Sixth
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To be sure, Strickland stated a rule of thumb for measuring prejudice which, applied blindly and out of context, could support the Court’s holding today: “The defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U. S., at 694. Strickland itself cautioned, however, that its test was not to be applied in a mechanical fashion, and that courts were not to divert their “ultimate focus” from “the fundamental fairness of the proceeding whose result is being challenged.” Id., at 696. And until today we have followed that course.

In Lockhart v. Fretwell, 506 U. S. 364 (1993), the deficient performance at issue was the failure of counsel for a defendant who had been sentenced to death to make an objection that would have produced a sentence of life

Amendment right to counsel is to secure a fair trial” (emphasis added)); Brief for Petitioner 12–21 (same). To destroy that straw man, the Court cites cases in which violations of rights other than the right to effective counsel—and, perplexingly, even rights found outside the Sixth Amendment and the Constitution entirely—were not cured by a subsequent trial. Vasquez v. Hillery, 474 U. S. 254 (1986) (violation of equal protection in grand jury selection); Ballard v. United States, 329 U. S. 187 (1946) (violation of statutory scheme providing that women serve on juries); Stirone v. United States, 361 U. S. 212 (1960) (violation of Fifth Amendment right to indictment by grand jury). Unlike the right to effective counsel, no showing of prejudice is required to make violations of the rights at issue in Vasquez, Ballard, and Stirone complete. See Vasquez, supra, at 263–264 (“[D]iscrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review”); Ballard, supra, at 195 (“[R]everse error does not depend on a showing of prejudice in an individual case”); Stirone, supra, at 217 (“Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error”). Those cases are thus irrelevant to the question presented here, which is whether a defendant can establish prejudice under Strickland v. Washington, 466 U. S. 668 (1984), while conceding the fairness of his conviction, sentence, and appeal.
imprisonment instead. The objection was fully supported by then-extant Circuit law, so that the sentencing court would have been compelled to sustain it, producing a life sentence that principles of double jeopardy would likely make final. See id., at 383–385 (Stevens, J., dissenting); Bullington v. Missouri, 451 U. S. 430 (1981). By the time Fretwell's claim came before us, however, the Circuit law had been overruled in light of one of our cases. We determined that a prejudice analysis “focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable,” would be defective. Fretwell, 506 U. S., at 369. Because counsel's error did not “deprive the defendant of any substantive or procedural right to which the law entitles him,” the defendant's sentencing proceeding was fair and its result was reliable, even though counsel's error may have affected its outcome. Id., at 372. In Williams v. Taylor, 529 U. S. 362, 391–393 (2000), we explained that even though Fretwell did not mechanically apply an outcome-based test for prejudice, its reasoning was perfectly consistent with Strickland. “Fretwell's counsel had not deprived him of any substantive or procedural right to which the law entitled him.” 529 U. S. at 392.2

2Kimmelman v. Morrison, 477 U. S. 365 (1986), cited by the Court, ante, at 10–11, does not contradict this principle. That case, which predated Fretwell and Williams, considered whether our holding that Fourth Amendment claims fully litigated in state court cannot be raised in federal habeas “should be extended to Sixth Amendment claims of ineffective assistance of counsel where the principal allegation and manifestation of inadequate representation is counsel's failure to file a timely motion to suppress evidence allegedly obtained in violation of the Fourth Amendment.” 477 U. S., at 368. Our negative answer to that question had nothing to do with the issue here. The parties in Kimmelman had not raised the question “whether the admission of illegally seized but reliable evidence can ever constitute ‘prejudice’ under Strickland”—a question similar to the one presented here—and
Those precedents leave no doubt about the answer to the question presented here. As the Court itself observes, a criminal defendant has no right to a plea bargain. *Ante*, at 9. “[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial.” *Weatherford v. Bursey*, 429 U. S. 545, 561 (1977).

Counsel’s mistakes in this case thus did not “deprive the defendant of a substantive or procedural right to which the law entitles him,” *Williams*, supra, at 393. Far from being “beside the point,” *ante*, at 9, that is critical to correct application of our precedents. Like *Fretwell*, this case “concerns the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not inform the inquiry,” 506 U. S., at 373 (O’Connor, J., concurring); he claims “that he might have been denied ‘a right the law simply does not recognize,’” *id.*, at 375 (same). *Strickland*, *Fretwell*, and *Williams* all instruct that the pure outcome-based test on which the Court relies is an erroneous measure of cognizable prejudice. In ignoring *Strickland’s* “ultimate focus . . . on the fundamental fairness of the proceeding whose result is being challenged,” 466 U. S., at 696, the Court has lost the forest for the trees, leading it to accept what we have previously rejected, the “novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty.” *Weatherford*, supra, at 561.

the Court therefore did not address it. *Id.*, at 391 (Powell, J., concurring in judgment); see also *id.*, at 380. *Kimmelman* made clear, however, how the answer to that question is to be determined: “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect,” *id.*, at 374 (emphasis added). “Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial . . . will be granted the writ,” *id.*, at 382 (emphasis added). In short, *Kimmelman’s* only relevance is to prove the Court’s opinion wrong.
Novelty alone is the second, independent reason why the Court's decision is wrong. This case arises on federal habeas, and hence is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Since, as the Court acknowledges, the Michigan Court of Appeals adjudicated Cooper's ineffective-assistance claim on the merits, AEDPA bars federal courts from granting habeas relief unless that court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U. S. C. §2254(d)(1). Yet the Court concludes that §2254(d)(1) does not bar relief here, because "[b]y failing to apply Strickland to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law." Ante, at 15. That is not so.

The relevant portion of the Michigan Court of Appeals decision reads as follows:

"To establish ineffective assistance, the defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. With respect to the prejudice aspect of the test, the defendant must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable.

"Defendant challenges the trial court's finding after a Ginther hearing that defense counsel provided effective assistance to defendant during the plea bargaining process. He contends that defense counsel failed to convey the benefits of the plea offer to him and ignored his desire to plead guilty, and that these fail-
ures led him to reject a plea offer that he now wishes to accept. However, the record shows that defendant knowingly and intelligently rejected two plea offers and chose to go to trial. The record fails to support defendant’s contentions that defense counsel’s representation was ineffective because he rejected a defense based on [a] claim of self-defense and because he did not obtain a more favorable plea bargain for defendant.” People v. Cooper, No. 250583 (Mar. 15, 2005), App. to Pet. for Cert. 45a, 2005 WL 599740, *1 (per curiam) (footnote and citations omitted).

The first paragraph above, far from ignoring Strickland, recites its standard with a good deal more accuracy than the Court’s opinion. The second paragraph, which is presumably an application of the standard recited in the first, says that “defendant knowingly and intelligently rejected two plea offers and chose to go to trial.” This can be regarded as a denial that there was anything “fundamentally unfair” about Cooper’s conviction and sentence, so that no Strickland prejudice had been shown. On the other hand, the entire second paragraph can be regarded as a contention that Cooper’s claims of inadequate representation were unsupported by the record. The state court’s analysis was admittedly not a model of clarity, but federal habeas corpus is a “guard against extreme malfunctions in the state criminal justice systems,” not a license to penalize a state court for its opinion-writing technique. Harrington v. Richter, 562 U. S. ___, ___ (2011) (slip op., at 13) (internal quotation marks omitted). The Court’s readiness to find error in the Michigan court’s opinion is “inconsistent with the presumption that state courts know and follow the law,” Woodford v. Visciotti, 537 U. S. 19, 24 (2002) (per curiam), a presumption borne out here by the state court’s recitation of the correct legal standard.

Since it is ambiguous whether the state court’s holding
was based on a lack of prejudice or rather the court’s factual determination that there had been no deficient performance, to provide relief under AEDPA this Court must conclude that both holdings would have been unreasonable applications of clearly established law. See Premo v. Moore, 562 U. S. ___ (2011) (slip op., at 7). The first is impossible of doing, since this Court has never held that a defendant in Cooper’s position can establish Strickland prejudice. The Sixth Circuit thus violated AEDPA in granting habeas relief, and the Court now does the same.

III

It is impossible to conclude discussion of today’s extraordinary opinion without commenting upon the remedy it provides for the unconstitutional conviction. It is a remedy unheard-of in American jurisprudence—and, I would be willing to bet, in the jurisprudence of any other country.

The Court requires Michigan to “reoffer the plea agreement” that was rejected because of bad advice from counsel. Ante, at 16. That would indeed be a powerful remedy—but for the fact that Cooper’s acceptance of that reoffered agreement is not conclusive. Astoundingly, “the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed.” Ibid. (emphasis added).

Why, one might ask, require a “reoffer” of the plea agreement, and its acceptance by the defendant? If the district court finds (as a necessary element, supposedly, of Strickland prejudice) that Cooper would have accepted the original offer, and would thereby have avoided trial and conviction, why not skip the reoffer-and-reacceptance minuet and simply leave it to the discretion of the state.
trial court what the remedy shall be? The answer, of course, is camouflage. Trial courts, after all, regularly accept or reject plea agreements, so there seems to be nothing extraordinary about their accepting or rejecting the new one mandated by today’s decision. But the acceptance or rejection of a plea agreement that has no status whatever under the United States Constitution is worlds apart from what this is: “discretionary” specification of a remedy for an unconstitutional criminal conviction.

To be sure, the Court asserts that there are “factors” which bear upon (and presumably limit) exercise of this discretion—factors that it is not prepared to specify in full, much less assign some determinative weight. “Principles elaborated over time in decisions of state and federal courts, and in statutes and rules” will (in the Court’s rosy view) sort all that out. Ante, at 13. I find it extraordinary that “statutes and rules” can specify the remedy for a criminal defendant’s unconstitutional conviction. Or that the remedy for an unconstitutional conviction should ever be subject at all to a trial judge’s discretion. Or, finally, that the remedy could ever include no remedy at all.

I suspect that the Court’s squeamishness in fashioning a remedy, and the incoherence of what it comes up with, is attributable to its realization, deep down, that there is no real constitutional violation here anyway. The defendant has been fairly tried, lawfully convicted, and properly sentenced, and any “remedy” provided for this will do nothing but undo the just results of a fair adversarial process.

IV

In many—perhaps most—countries of the world, American-style plea bargaining is forbidden in cases as serious as this one, even for the purpose of obtaining testimony that enables conviction of a greater malefactor, much less
for the purpose of sparing the expense of trial. See, e.g., World Plea Bargaining 344, 363–366 (S. Thaman ed. 2010). In Europe, many countries adhere to what they aptly call the “legality principle” by requiring prosecutors to charge all prosecutable offenses, which is typically incompatible with the practice of charge-bargaining. See, e.g., id., at xxii; Langbein, Land Without Plea Bargaining: How the Germans Do It, 78 Mich. L. Rev. 204, 210–211 (1979) (describing the “Legalitätsprinzip,” or rule of compulsory prosecution, in Germany). Such a system reflects an admirable belief that the law is the law, and those who break it should pay the penalty provided.

In the United States, we have plea bargaining a-plenty, but until today it has been regarded as a necessary evil. It presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense; and for guilty defendants it often—perhaps usually—results in a sentence well below what the law prescribes for the actual crime. But even so, we accept plea bargaining because many believe that without it our long and expensive process of criminal trial could not sustain the burden imposed on it, and our system of criminal justice would grind to a halt. See, e.g., Alschuler, Plea Bargaining and its History, 79 Colum. L. Rev. 1, 38 (1979).

Today, however, the Supreme Court of the United States elevates plea bargaining from a necessary evil to a constitutional entitlement. It is no longer a somewhat embarrassing adjunct to our criminal justice system; rather, as the Court announces in the companion case to this one, “it is the criminal justice system.” Frye, ante, at 7 (quoting approvingly from Scott 1912). Thus, even though there is no doubt that the respondent here is guilty of the offense with which he was charged; even though he has received the exorbitant gold standard of American justice—a full-dress criminal trial with its innumerable
Scalia, J., dissenting

constitutional and statutory limitations upon the evidence that the prosecution can bring forward, and (in Michigan as in most States) the requirement of a unanimous guilty verdict by impartial jurors; the Court says that his conviction is invalid because he was deprived of his constitutional entitlement to plea-bargain.

I am less saddened by the outcome of this case than I am by what it says about this Court’s attitude toward criminal justice. The Court today embraces the sporting-chance theory of criminal law, in which the State functions like a conscientious casino-operator, giving each player a fair chance to beat the house, that is, to serve less time than the law says he deserves. And when a player is excluded from the tables, his constitutional rights have been violated. I do not subscribe to that theory. No one should, least of all the Justices of the Supreme Court.

* * *

Today’s decision upends decades of our cases, violates a federal statute, and opens a whole new boutique of constitutional jurisprudence (“plea-bargaining law”) without even specifying the remedies the boutique offers. The result in the present case is the undoing of an adjudicatory process that worked exactly as it is supposed to. Released felon Anthony Cooper, who shot repeatedly and gravely injured a woman named Kali Mundy, was tried and convicted for his crimes by a jury of his peers, and given a punishment that Michigan’s elected representatives have deemed appropriate. Nothing about that result is unfair or unconstitutional. To the contrary, it is wonderfully just, and infinitely superior to the trial-by-bargain that today’s opinion affords constitutional status. I respectfully dissent.

ALITO, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 10–209

BLAINE LAFLER, PETITIONER v. ANTHONY COOPER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[March 21, 2012]

JUSTICE ALITO, dissenting.

For the reasons set out in Parts I and II of JUSTICE SCALIA’s dissent, the Court’s holding in this case misapplies our ineffective-assistance-of-counsel case law and violates the requirements of the Antiterrorism and Effective Death Penalty Act of 1996. Respondent received a trial that was free of any identified constitutional error, and, as a result, there is no basis for concluding that respondent suffered prejudice and certainly not for granting habeas relief.

The weakness in the Court’s analysis is highlighted by its opaque discussion of the remedy that is appropriate when a plea offer is rejected due to defective legal representation. If a defendant’s Sixth Amendment rights are violated when deficient legal advice about a favorable plea offer causes the opportunity for that bargain to be lost, the only logical remedy is to give the defendant the benefit of the favorable deal. But such a remedy would cause serious injustice in many instances, as I believe the Court tacitly recognizes. The Court therefore eschews the only logical remedy and relies on the lower courts to exercise sound discretion in determining what is to be done.

Time will tell how this works out. The Court, for its part, finds it unnecessary to define “the boundaries of proper discretion” in today’s opinion. Ante, at 13. In my view, requiring the prosecution to renew an old plea offer
would represent an abuse of discretion in at least two circumstances: first, when important new information about a defendant’s culpability comes to light after the offer is rejected, and, second, when the rejection of the plea offer results in a substantial expenditure of scarce prosecutorial or judicial resources.

The lower court judges who must implement today’s holding may—and I hope, will—do so in a way that mitigates its potential to produce unjust results. But I would not depend on these judges to come to the rescue. The Court’s interpretation of the Sixth Amendment right to counsel is unsound, and I therefore respectfully dissent.
MISSOURI v. FRYE

CERTIORARI TO THE COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT


Respondent Frye was charged with driving with a revoked license. Because he had been convicted of the same offense three times before, he was charged, under Missouri law, with a felony carrying a maximum 4-year prison term. The prosecutor sent Frye’s counsel a letter, offering two possible plea bargains, including an offer to reduce the charge to a misdemeanor and to recommend, with a guilty plea, a 90-day sentence. Counsel did not convey the offers to Frye, and they expired. Less than a week before Frye’s preliminary hearing, he was again arrested for driving with a revoked license. He subsequently pleaded guilty with no underlying plea agreement and was sentenced to three years in prison. Seeking postconviction relief in state court, he alleged his counsel’s failure to inform him of the earlier plea offers denied him the effective assistance of counsel, and he testified that he would have pleaded guilty to a misdemeanor had he known of the offer. The court denied his motion, but the Missouri appellate court reversed, holding that Frye met both of the requirements for showing a Sixth Amendment violation under Strickland v. Washington, 466 U. S. 668. Specifically, the court found that defense counsel had been ineffective in not communicating the plea offers to Frye and concluded that Frye had shown that counsel’s deficient performance caused him prejudice because he pleaded guilty to a felony instead of a misdemeanor.

Held:

1. The Sixth Amendment right to effective assistance of counsel extends to the consideration of plea offers that lapse or are rejected. That right applies to “all ‘critical’ stages of the criminal proceedings.” Montejo v. Louisiana, 556 U. S. 778, 786. Hill v. Lockhart, 474 U. S. 52, established that Strickland’s two-part test governs ineffective-
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assistance claims in the plea bargain context. There, the defendant had alleged that his counsel had given him inadequate advice about his plea, but he failed to show that he would have proceeded to trial had he received the proper advice. 474 U. S., at 60. In Padilla v. Kentucky, 559 U. S. ___, where a plea offer was set aside because counsel had misinformed the defendant of its immigration consequences, this Court made clear that “the negotiation of a plea bargain is a critical” stage for ineffective-assistance purposes, id., at ___, and rejected the argument made by the State in this case that a knowing and voluntary plea supersedes defense counsel’s errors. The State attempts to distinguish Hill and Padilla from the instant case. It notes that Hill and Padilla concerned whether there was ineffective assistance leading to acceptance of a plea offer, a process involving a formal court appearance with the defendant and all counsel present, while no formal court proceedings are involved when a plea offer has lapsed or been rejected; and it insists that there is no right to receive a plea offer in any event. Thus, the State contends, it is unfair to subject it to the consequences of defense counsel’s inadequacies when the opportunities for a full and fair trial, or for a later guilty plea albeit on less favorable terms, are preserved. While these contentions are neither illogical nor without some persuasive force, they do not suffice to overcome the simple reality that 97 percent of federal convictions and 94 percent of state convictions are the result of guilty pleas. Plea bargains have become so central to today’s criminal justice system that defense counsel must meet responsibilities in the plea bargain process to render the adequate assistance of counsel that the Sixth Amendment requires at critical stages of the criminal process. Pp. 3–8.

2. As a general rule, defense counsel has the duty to communicate formal prosecution offers to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to this rule need not be addressed here, for the offer was a formal one with a fixed expiration date. Standards for prompt communication and consultation recommended by the American Bar Association and adopted by numerous state and federal courts, though not determinative, serve as important guides. The prosecution and trial courts may adopt measures to help ensure against late, frivolous, or fabricated claims. First, a formal offer’s terms and processing can be documented. Second, States may require that all offers be in writing. Third, formal offers can be made part of the record at any subsequent plea proceeding or before trial to ensure that a defendant has been fully advised before the later proceedings commence. Here, as the result of counsel’s deficient performance, the offers lapsed. Under Strickland, the question then becomes what, if any, prejudice resulted from the
breach of duty. Pp. 8–11.

3. To show prejudice where a plea offer has lapsed or been rejected because of counsel’s deficient performance, defendants must demonstrate a reasonable probability both that they would have accepted the more favorable plea offer had they been afforded effective assistance of counsel and that the plea would have been entered without the prosecution’s canceling it or the trial court’s refusing to accept it, if they had the authority to exercise that discretion under state law. This application of Strickland to uncommunicated, lapsed pleas does not alter Hill’s standard, which requires a defendant complaining that ineffective assistance led him to accept a plea offer instead of going to trial to show “a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” 474 U. S., at 59. Hill correctly applies in the context in which it arose, but it does not provide the sole means for demonstrating prejudice arising from counsel’s deficient performance during plea negotiations. Because Frye argues that with effective assistance he would have accepted an earlier plea offer as opposed to entering an open plea, Strickland’s inquiry into whether “the result of the proceeding would have been different,” 466 U. S., at 694, requires looking not at whether the defendant would have proceeded to trial but at whether he would have accepted the earlier plea offer. He must also show that, if the prosecution had the discretion to cancel the plea agreement or the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented. This further showing is particularly important because a defendant has no right to be offered a plea, see Weatherford v. Bursey, 429 U. S. 545, 561, nor a federal right that the judge accept it, Santobello v. New York, 404 U. S. 257, 262. Missouri, among other States, appears to give the prosecution some discretion to cancel a plea agreement; and the Federal Rules of Criminal Procedure, some state rules, including Missouri’s, and this Court’s precedents give trial courts some leeway to accept or reject plea agreements. Pp. 11–13.

4. Applying these standards here, the Missouri court correctly concluded that counsel’s failure to inform Frye of the written plea offer before it expired fell below an objective reasonableness standard, but it failed to require Frye to show that the plea offer would have been adhered to by the prosecution and accepted by the trial court. These matters should be addressed by the Missouri appellate court in the first instance. Given that Frye’s new offense for driving without a license occurred a week before his preliminary hearing, there is reason to doubt that the prosecution would have adhered to the agreement or that the trial court would have accepted it unless they were re-
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311 S. W. 3d 350, vacated and remanded.

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined.
Justice Kennedy delivered the opinion of the Court.

The Sixth Amendment, applicable to the States by the terms of the Fourteenth Amendment, provides that the accused shall have the assistance of counsel in all criminal prosecutions. The right to counsel is the right to effective assistance of counsel. See Strickland v. Washington, 466 U. S. 668, 686 (1984). This case arises in the context of claimed ineffective assistance that led to the lapse of a prosecution offer of a plea bargain, a proposal that offered terms more lenient than the terms of the guilty plea entered later. The initial question is whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected. If there is a right to effective assistance with respect to those offers, a further question is what a defendant must demonstrate in order to show that prejudice resulted from counsel's deficient performance. Other questions relating to ineffective assistance with respect to plea offers, including the question of proper remedies, are considered in a second case decided today. See Lafler v. Cooper, post, at 3–16.
In August 2007, respondent Galin Frye was charged with driving with a revoked license. Frye had been convicted for that offense on three other occasions, so the State of Missouri charged him with a class D felony, which carries a maximum term of imprisonment of four years. See Mo. Rev. Stat. §§302.321.2, 558.011.1(4) (2011).

On November 15, the prosecutor sent a letter to Frye’s counsel offering a choice of two plea bargains. App. 50. The prosecutor first offered to recommend a 3-year sentence if there was a guilty plea to the felony charge, without a recommendation regarding probation but with a recommendation that Frye serve 10 days in jail as so-called “shock” time. The second offer was to reduce the charge to a misdemeanor and, if Frye pleaded guilty to it, to recommend a 90-day sentence. The misdemeanor charge of driving with a revoked license carries a maximum term of imprisonment of one year. 311 S. W. 3d 350, 360 (Mo. App. 2010). The letter stated both offers would expire on December 28. Frye’s attorney did not advise Frye that the offers had been made. The offers expired. Id., at 356.

Frye’s preliminary hearing was scheduled for January 4, 2008. On December 30, 2007, less than a week before the hearing, Frye was again arrested for driving with a revoked license. App. 47–48, 311 S. W. 3d, at 352–353. At the January 4 hearing, Frye waived his right to a preliminary hearing on the charge arising from the August 2007 arrest. He pleaded not guilty at a subsequent arraignment but then changed his plea to guilty. There was no underlying plea agreement. App. 5, 13, 16. The state trial court accepted Frye’s guilty plea. Id., at 21. The prosecutor recommended a 3-year sentence, made no recommendation regarding probation, and requested 10 days shock time in jail. Id., at 22. The trial judge sentenced Frye to three years in prison. Id., at 21, 23.
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Frye filed for postconviction relief in state court. Id., at 8, 25–29. He alleged his counsel’s failure to inform him of the prosecution’s plea offer denied him the effective assistance of counsel. At an evidentiary hearing, Frye testified he would have entered a guilty plea to the misdemeanor had he known about the offer. Id., at 34.

A state court denied the postconviction motion, id., at 52–57, but the Missouri Court of Appeals reversed, 311 S. W. 3d 350. It determined that Frye met both of the requirements for showing a Sixth Amendment violation under Strickland. First, the court determined Frye’s counsel’s performance was deficient because the “record is void of any evidence of any effort by trial counsel to communicate the Offer to Frye during the Offer window.” 311 S. W. 3d, at 355, 356 (emphasis deleted). The court next concluded Frye had shown his counsel’s deficient performance caused him prejudice because “Frye pled guilty to a felony instead of a misdemeanor and was subject to a maximum sentence of four years instead of one year.” Id., at 360.

To implement a remedy for the violation, the court deemed Frye’s guilty plea withdrawn and remanded to allow Frye either to insist on a trial or to plead guilty to any offense the prosecutor deemed it appropriate to charge. This Court granted certiorari. 562 U. S. ___ (2011).

II

A

It is well settled that the right to the effective assistance of counsel applies to certain steps before trial. The “Sixth Amendment guarantees a defendant the right to have counsel present at all ‘critical’ stages of the criminal proceedings.” Montejo v. Louisiana, 556 U. S. 778, 786 (2009) (quoting United States v. Wade, 388 U. S. 218, 227–228 (1967)). Critical stages include arraignments, postindict-

With respect to the right to effective counsel in plea negotiations, a proper beginning point is to discuss two cases from this Court considering the role of counsel in advising a client about a plea offer and an ensuing guilty plea: *Hill v. Lockhart*, 474 U. S. 52 (1985); and *Padilla v. Kentucky*, 559 U. S. ___(2010).

*Hill* established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*. See *Hill, supra*, at 57. As noted above, in Frye’s case, the Missouri Court of Appeals, applying the two part test of *Strickland*, determined first that defense counsel had been ineffective and second that there was resulting prejudice.

In *Hill*, the decision turned on the second part of the *Strickland* test. There, a defendant who had entered a guilty plea claimed his counsel had misinformed him of the amount of time he would have to serve before he became eligible for parole. But the defendant had not alleged that, even if adequate advice and assistance had been given, he would have elected to plead not guilty and proceed to trial. Thus, the Court found that no prejudice from the inadequate advice had been shown or alleged. *Hill, supra*, at 60.

In *Padilla*, the Court again discussed the duties of counsel in advising a client with respect to a plea offer that leads to a guilty plea. *Padilla* held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the immigration consequences of the conviction. The Court made clear that “the negotiation of a plea bargain is a critical phase of litiga-
tion for purposes of the Sixth Amendment right to effective assistance of counsel.” 559 U. S., at ___ (slip op., at 16). It also rejected the argument made by petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel. Cf. Brief for Respondent in Padilla v. Kentucky, O. T. 2009, No. 08–651, p. 27 (arguing Sixth Amendment’s assurance of effective assistance “does not extend to collateral aspects of the prosecution” because “knowledge of the consequences that are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea”).

In the case now before the Court the State, as petitioner, points out that the legal question presented is different from that in Hill and Padilla. In those cases the claim was that the prisoner’s plea of guilty was invalid because counsel had provided incorrect advice pertinent to the plea. In the instant case, by contrast, the guilty plea that was accepted, and the plea proceedings concerning it in court, were all based on accurate advice and information from counsel. The challenge is not to the advice pertaining to the plea that was accepted but rather to the course of legal representation that preceded it with respect to other potential pleas and plea offers.

To give further support to its contention that the instant case is in a category different from what the Court considered in Hill and Padilla, the State urges that there is no right to a plea offer or a plea bargain in any event. See Weatherford v. Bursey, 429 U. S. 545, 561 (1977). It claims Frye therefore was not deprived of any legal benefit to which he was entitled. Under this view, any wrongful or mistaken action of counsel with respect to earlier plea offers is beside the point.

The State is correct to point out that Hill and Padilla concerned whether there was ineffective assistance leading to acceptance of a plea offer, a process involving a formal court appearance with the defendant and all coun-
Before a guilty plea is entered the defendant’s understanding of the plea and its consequences can be established on the record. This affords the State substantial protection against later claims that the plea was the result of inadequate advice. At the plea entry proceedings the trial court and all counsel have the opportunity to establish on the record that the defendant understands the process that led to any offer, the advantages and disadvantages of accepting it, and the sentencing consequences or possibilities that will ensue once a conviction is entered based upon the plea. See, e.g., Fed. Rule Crim. Proc. 11; Mo. Sup. Ct. Rule 24.02 (2004). Hill and Padilla both illustrate that, nevertheless, there may be instances when claims of ineffective assistance can arise after the conviction is entered. Still, the State, and the trial court itself, have had a substantial opportunity to guard against this contingency by establishing at the plea entry proceeding that the defendant has been given proper advice or, if the advice received appears to have been inadequate, to remedy that deficiency before the plea is accepted and the conviction entered.

When a plea offer has lapsed or been rejected, however, no formal court proceedings are involved. This underscores that the plea-bargaining process is often in flux, with no clear standards or timelines and with no judicial supervision of the discussions between prosecution and defense. Indeed, discussions between client and defense counsel are privileged. So the prosecution has little or no notice if something may be amiss and perhaps no capacity to intervene in any event. And, as noted, the State insists there is no right to receive a plea offer. For all these reasons, the State contends, it is unfair to subject it to the consequences of defense counsel’s inadequacies, especially when the opportunities for a full and fair trial, or, as here, for a later guilty plea albeit on less favorable terms, are preserved.
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The State’s contentions are neither illogical nor without some persuasive force, yet they do not suffice to overcome a simple reality. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 5.22.2009, http://www.albany.edu/sourcebook/pdf/t5222009.pdf (all Internet materials as visited Mar. 1, 2012, and available in Clerk of Court’s case file); Dept. of Justice, Bureau of Justice Statistics, S. Rosenmerkel, M. Durose, & D. Farole, Felony Sentences in State Courts, 2006-Statistical Tables, p. 1 (NCJ226846, rev. Nov. 2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf; Padilla, supra, at ___ (slip op., at 15) (recognizing pleas account for nearly 95% of all criminal convictions). The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours “is for the most part a system of pleas, not a system of trials,” Lafler, post, at 11, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. “To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.” Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992). See also Barkow, Separation of Powers and the Criminal Law, 58 Stan. L. Rev. 989, 1034 (2006) (“[ Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for
bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial” (footnote omitted)). In today’s criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.

To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties. In order that these benefits can be realized, however, criminal defendants require effective counsel during plea negotiations. “Anything less . . . might deny a defendant ‘effective representation by counsel at the only stage when legal aid and advice would help him.’” Massiah, 377 U. S., at 204 (quoting Spano v. New York, 360 U. S. 315, 326 (1959) (Douglas, J., concurring)).

B

The inquiry then becomes how to define the duty and responsibilities of defense counsel in the plea bargain process. This is a difficult question. “The art of negotiation is at least as nuanced as the art of trial advocacy and it presents questions farther removed from immediate judicial supervision.” Premo v. Moore, 562 U. S. ___, ___ (2011) (slip op., at 8–9). Bargaining is, by its nature, defined to a substantial degree by personal style. The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel’s participation in the process. Cf. ibid.

This case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects,
however. Here the question is whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both.

This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.

Though the standard for counsel’s performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides. The American Bar Association recommends defense counsel “promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney,” ABA Standards for Criminal Justice, Pleas of Guilty 14–3.2(a) (3d ed. 1999), and this standard has been adopted by numerous state and federal courts over the last 30 years. See, e.g., Davie v. State, 381 S. C. 601, 608–609, 675 S. E. 2d 416, 420 (2009); Cottle v. State, 733 So. 2d 963, 965–966 (Fla. 1999); Becton v. Hun, 205 W. Va. 139, 144, 516 S. E. 2d 762, 767 (1999); Harris v. State, 875 S. W. 2d 662, 665 (Tenn. 1994); Lloyd v. State, 258 Ga. 645, 648, 373 S. E. 2d 1, 3 (1988); United States v. Rodriguez Rodriguez, 929 F. 2d 747, 752 (CA1 1991) (per curiam); Pham v. United States, 317 F. 3d 178, 182 (CA2 2003); United States ex rel. Caruso v. Zelinsky, 689 F. 2d 435, 438 (CA3 1982); Griffin v. United States, 330 F. 3d 733, 737 (CA6 2003); Johnson v. Duckworth, 793 F. 2d 898, 902 (CA7 1986); United States v. Blaylock, 20 F. 3d 1458, 1466 (CA9 1994); cf. Diaz v. United States, 930 F. 2d
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The prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or fabricated claims after a later, less advantageous plea offer has been accepted or after a trial leading to conviction with resulting harsh consequences. First, the fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations. Second, States may elect to follow rules that all offers must be in writing, again to ensure against later misunderstandings or fabricated charges. See N. J. Ct. Rule 3:9–1(b) (2012) (“Any plea offer to be made by the prosecutor shall be in writing and forwarded to the defendant’s attorney”). Third, formal offers can be made part of the record at any subsequent plea proceeding or before a trial on the merits, all to ensure that a defendant has been fully advised before those further proceedings commence. At least one State often follows a similar procedure before trial. See Brief for National Association of Criminal Defense Lawyers et al. as Amici Curiae 20 (discussing hearings in Arizona conducted pursuant to State v. Donald, 198 Ariz. 406, 10 P. 3d 1193 (App. 2000)); see also N. J. Ct. Rules 3:9–1(b), (c) (requiring the prosecutor and defense counsel to discuss the case prior to the arraignment/status conference including any plea offers and to report on these discussions in open court with the defendant present); In re Alvernaz, 2 Cal. 4th 924, 938, n. 7, 830 P. 2d 747, 756, n. 7 (1992)
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(encouraging parties to “memorialize in some fashion prior to trial (1) the fact that a plea bargain offer was made, and (2) that the defendant was advised of the offer [and] its precise terms, . . . and (3) the defendant’s response to the plea bargain offer”); Brief for Center on the Administration of Criminal Law, New York University School of Law as Amicus Curiae 25–27.

Here defense counsel did not communicate the formal offers to the defendant. As a result of that deficient performance, the offers lapsed. Under Strickland, the question then becomes what, if any, prejudice resulted from the breach of duty.

C

To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel’s deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. Cf. Glover v. United States, 531 U. S. 198, 203 (2001) (“[A]ny amount of [additional] jail time has Sixth Amendment significance”).

This application of Strickland to the instances of an uncommunicated, lapsed plea does nothing to alter the standard laid out in Hill. In cases where a defendant complains that ineffective assistance led him to accept a plea offer as opposed to proceeding to trial, the defendant will have to show “a reasonable probability that, but for
counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Hill*, 474 U. S., at 59. *Hill* was correctly decided and applies in the context in which it arose. *Hill* does not, however, provide the sole means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations. Unlike the defendant in *Hill*, Frye argues that with effective assistance he would have accepted an earlier plea offer (limiting his sentence to one year in prison) as opposed to entering an open plea (exposing him to a maximum sentence of four years’ imprisonment). In a case, such as this, where a defendant pleads guilty to less favorable terms and claims that ineffective assistance of counsel caused him to miss out on a more favorable earlier plea offer, *Strickland*’s inquiry into whether “the result of the proceeding would have been different,” 466 U. S., at 694, requires looking not at whether the defendant would have proceeded to trial absent ineffective assistance but whether he would have accepted the offer to plead pursuant to the terms earlier proposed.

In order to complete a showing of *Strickland* prejudice, defendants who have shown a reasonable probability they would have accepted the earlier plea offer must also show that, if the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented. This further showing is of particular importance because a defendant has no right to be offered a plea, see *Weatherford*, 429 U. S., at 561, nor a federal right that the judge accept it, *Santobello* v. *New York*, 404 U. S. 257, 262 (1971). In at least some States, including Missouri, it appears the prosecution has some discretion to cancel a plea agreement to which the defendant has agreed, see, e.g., 311 S. W. 3d, at 359 (case below); Ariz. Rule Crim. Proc. 17.4(b) (Supp. 2011). The Federal
Rules, some state rules including in Missouri, and this Court’s precedents give trial courts some leeway to accept or reject plea agreements, see Fed. Rule Crim. Proc. 11(c)(3); see Mo. Sup. Ct. Rule 24.02(d)(4); Boykin v. Alabama, 395 U. S. 238, 243–244 (1969). It can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences. So in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain. The determination that there is or is not a reasonable probability that the outcome of the proceeding would have been different absent counsel’s errors can be conducted within that framework.

III

These standards must be applied to the instant case. As regards the deficient performance prong of Strickland, the Court of Appeals found the “record is void of any evidence of any effort by trial counsel to communicate the [formal] Offer to Frye during the Offer window, let alone any evidence that Frye’s conduct interfered with trial counsel’s ability to do so.” 311 S. W. 3d, at 356. On this record, it is evident that Frye’s attorney did not make a meaningful attempt to inform the defendant of a written plea offer before the offer expired. See supra, at 2. The Missouri Court of Appeals was correct that “counsel’s representation fell below an objective standard of reasonableness.” Strickland, supra, at 688.

The Court of Appeals erred, however, in articulating the precise standard for prejudice in this context. As noted, a defendant in Frye’s position must show not only a reasonable probability that he would have accepted the lapsed plea but also a reasonable probability that the prosecution
would have adhered to the agreement and that it would have been accepted by the trial court. Frye can show he would have accepted the offer, but there is strong reason to doubt the prosecution and the trial court would have permitted the plea bargain to become final.

There appears to be a reasonable probability Frye would have accepted the prosecutor’s original offer of a plea bargain if the offer had been communicated to him, because he pleaded guilty to a more serious charge, with no promise of a sentencing recommendation from the prosecutor. It may be that in some cases defendants must show more than just a guilty plea to a charge or sentence harsher than the original offer. For example, revelations between plea offers about the strength of the prosecution’s case may make a late decision to plead guilty insufficient to demonstrate, without further evidence, that the defendant would have pleaded guilty to an earlier, more generous plea offer if his counsel had reported it to him. Here, however, that is not the case. The Court of Appeals did not err in finding Frye’s acceptance of the less favorable plea offer indicated that he would have accepted the earlier (and more favorable) offer had he been apprised of it; and there is no need to address here the showings that might be required in other cases.

The Court of Appeals failed, however, to require Frye to show that the first plea offer, if accepted by Frye, would have been adhered to by the prosecution and accepted by the trial court. Whether the prosecution and trial court are required to do so is a matter of state law, and it is not the place of this Court to settle those matters. The Court has established the minimum requirements of the Sixth Amendment as interpreted in Strickland, and States have the discretion to add procedural protections under state law if they choose. A State may choose to preclude the prosecution from withdrawing a plea offer once it has been accepted or perhaps to preclude a trial court from rejecting
a plea bargain. In Missouri, it appears “a plea offer once accepted by the defendant can be withdrawn without recourse” by the prosecution. 311 S. W. 3d, at 359. The extent of the trial court’s discretion in Missouri to reject a plea agreement appears to be in some doubt. Compare id., at 360, with Mo. Sup. Ct. Rule 24.02(d)(4).

We remand for the Missouri Court of Appeals to consider these state-law questions, because they bear on the federal question of Strickland prejudice. If, as the Missouri court stated here, the prosecutor could have canceled the plea agreement, and if Frye fails to show a reasonable probability the prosecutor would have adhered to the agreement, there is no Strickland prejudice. Likewise, if the trial court could have refused to accept the plea agreement, and if Frye fails to show a reasonable probability the trial court would have accepted the plea, there is no Strickland prejudice. In this case, given Frye’s new offense for driving without a license on December 30, 2007, there is reason to doubt that the prosecution would have adhered to the agreement or that the trial court would have accepted it at the January 4, 2008, hearing, unless they were required by state law to do so.

It is appropriate to allow the Missouri Court of Appeals to address this question in the first instance. The judgment of the Missouri Court of Appeals is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*
JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

This is a companion case to Lafler v. Cooper, post, p. ___. The principal difference between the cases is that the fairness of the defendant's conviction in Lafler was established by a full trial and jury verdict, whereas Frye's conviction here was established by his own admission of guilt, received by the court after the usual colloquy that assured it was voluntary and truthful. In Lafler all that could be said (and as I discuss there it was quite enough) is that the fairness of the conviction was clear, though a unanimous jury finding beyond a reasonable doubt can sometimes be wrong. Here it can be said not only that the process was fair, but that the defendant acknowledged the correctness of his conviction. Thus, as far as the reasons for my dissent are concerned, this is an a fortiori case. I will not repeat here the constitutional points that I discuss at length in Lafler, but I will briefly apply those points to the facts here and comment upon a few statements in the Court's analysis.

* * *

Galin Frye's attorney failed to inform him about a plea offer, and Frye ultimately pleaded guilty without the benefit of a deal. Counsel's mistake did not deprive Frye of any substantive or procedural right; only of the oppor-
tunity to accept a plea bargain to which he had no enti-
tlement in the first place. So little entitlement that, had
he known of and accepted the bargain, the prosecution
would have been able to withdraw it right up to the point
that his guilty plea pursuant to the bargain was accepted.
See 311 S. W. 3d 350, 359, and n. 4 (Mo. App. 2010).

The Court acknowledges, moreover, that Frye’s convic-
tion was untainted by attorney error: “[T]he guilty plea
that was accepted, and the plea proceedings concerning it
in court, were all based on accurate advice and informa-
tion from counsel.” Ante, at 5. Given the “ultimate
focus” of our ineffective-assistance cases on “the funda-
mental fairness of the proceeding whose result is being
(1984), that should be the end of the matter. Instead,
here, as in Lafler, the Court mechanically applies an
outcome-based test for prejudice, and mistakes the possi-
bility of a different result for constitutional injustice. As
I explain in Lafler, post, p. ___ (dissenting opinion), that
approach is contrary to our precedents on the right to
effective counsel, and for good reason.

The Court announces its holding that “as a general rule,
defense counsel has the duty to communicate formal offers
from the prosecution” as though that resolves a disputed
point; in reality, however, neither the State nor the Solici-
tor General argued that counsel’s performance here was
adequate. Ante, at 9. The only issue was whether the in-
adequacy deprived Frye of his constitutional right to a
fair trial. In other cases, however, it will not be so clear
that counsel’s plea-bargaining skills, which must now
meet a constitutional minimum, are adequate. “[H]ow to
define the duty and responsibilities of defense counsel in
the plea bargain process,” the Court acknowledges, “is a
difficult question,” since “[b]argaining is, by its nature,
defined to a substantial degree by personal style.” Ante, at
8. Indeed. What if an attorney’s “personal style” is to
establish a reputation as a hard bargainer by, for example, advising clients to proceed to trial rather than accept anything but the most favorable plea offers? It seems inconceivable that a lawyer could compromise his client’s constitutional rights so that he can secure better deals for other clients in the future; does a hard-bargaining “personal style” now violate the Sixth Amendment? The Court ignores such difficulties, however, since “[t]his case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects.” *Ante*, at 8. Perhaps not. But it does present the necessity of confronting the serious difficulties that will be created by constitutionalization of the plea-bargaining process. It will not do simply to announce that they will be solved in the sweet by-and-by.

While the inadequacy of counsel’s performance in this case is clear enough, whether it was prejudicial (in the sense that the Court’s new version of *Strickland* requires) is not. The Court’s description of how that question is to be answered on remand is alone enough to show how unwise it is to constitutionalize the plea-bargaining process. Prejudice is to be determined, the Court tells us, by a process of retrospective crystal-ball gazing posing as legal analysis. First of all, of course, we must estimate whether the defendant would have accepted the earlier plea bargain. Here that seems an easy question, but as the Court acknowledges, *ante*, at 14, it will not always be. Next, since Missouri, like other States, permits accepted plea offers to be withdrawn by the prosecution (a reality which alone should suffice, one would think, to demonstrate that Frye had no entitlement to the plea bargain), we must estimate whether the prosecution would have withdrawn the plea offer. And finally, we must estimate whether the trial court would have approved the plea agreement. These last two estimations may seem easy in the present case, since Frye committed a new infraction
before the hearing at which the agreement would have been presented; but they assuredly will not be easy in the mine run of cases.

The Court says “[i]t can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences.” Ante, at 13. Assuredly it can, just as it can be assumed that the sun rises in the west; but I know of no basis for the assumption. Virtually no cases deal with the standards for a prosecutor’s withdrawal from a plea agreement beyond stating the general rule that a prosecutor may withdraw any time prior to, but not after, the entry of a guilty plea or other action constituting detrimental reliance on the defendant’s part. See, e.g., United States v. Kuchinski, 469 F. 3d 853, 857–858 (CA9 2006). And cases addressing trial courts’ authority to accept or reject plea agreements almost universally observe that a trial court enjoys broad discretion in this regard. See, e.g., Missouri v. Banks, 135 S. W. 3d 497, 500 (Mo. App. 2004) (trial court abuses its discretion in rejecting a plea only if the decision “is so arbitrary and unreasonable that it shocks the sense of justice and indicates a lack of careful consideration” (internal quotation marks omitted)). Of course after today’s opinions there will be cases galore, so the Court’s assumption would better be cast as an optimistic prediction of the certainty that will emerge, many years hence, from our newly created constitutional field of plea-bargaining law. Whatever the “boundaries” ultimately devised (if that were possible), a vast amount of discretion will still remain, and it is extraordinary to make a defendant’s constitutional rights depend upon a series of retrospective mind-readings as to how that discretion, in prosecutors and trial judges, would have been exercised.

The plea-bargaining process is a subject worthy of regulation, since it is the means by which most criminal convictions are obtained. It happens not to be, however, a
subject covered by the Sixth Amendment, which is con-
cerned not with the fairness of bargaining but with the
fairness of conviction. “The Constitution . . . is not an all-
purpose tool for judicial construction of a perfect world;
and when we ignore its text in order to make it that, we
often find ourselves swinging a sledge where a tack ham-
mer is needed.” Padilla v. Kentucky, 559 U. S. ___, ___
(2010) (SCALIA, J., dissenting) (slip op., at 1). In this case
and its companion, the Court’s sledge may require the
reversal of perfectly valid, eminently just, convictions. A
legislature could solve the problems presented by these
cases in a much more precise and efficient manner. It
might begin, for example, by penalizing the attorneys
who made such grievous errors. That type of sub-
constitutional remedy is not available to the Court, which
is limited to penalizing (almost) everyone else by reversing
valid convictions or sentences. Because that result is
inconsistent with the Sixth Amendment and decades of
our precedent, I respectfully dissent.
Session 4 Reading and Resource List
How to help your client with post sentencing issues before and after sentencing


http://www.abacollateralconsequences.org/agreement/?from=/search/?jurisdiction=48
[cid:image001.png@01D051A8.D260F6F0]
http://www.abacollateralconsequences.org/search/?jurisdiction=48
[cid:image002.png@01D051A8.D260F6F0]
Public Defense Supervisor’s

First Biannual Report

Eileen Farley
WSBA No. 9264
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Eileen Farley, the Court-Designated Supervisor, submits this First Biannual Report, pursuant to the Court’s December 4, 2013, Memorandum of Decision (ECF No. 325) and February 24, 2014, Order and Stipulation Regarding Selection of Public Defense Supervisor (ECF No. 353).

**INTRODUCTION**

This Report describes the progress that the cities of Mount Vernon and Burlington (“the Cities”) and their public defense firm, Mountain Law, PLLC, have made toward building a strong, Constitutionally sufficient public defense system.

Since my appointment as Public Defense Supervisor became effective on April 1, 2014, I have met with all supervisors, attorneys, and staff at Mountain Law, and with most employees of the Cities and Skagit County whose duties touch on the criminal justice system. I have also observed approximately ten days of court proceedings, four jury trials, and toured the Skagit County Jail. I have suggested options to improve the quality of public defense, as well as the management of criminal cases as this impacts the quality of public defense.

In my discussions with Mountain Law and with public officials and employees, I have stressed that the positive changes that have now begun must be institutionalized to assure that they will continue after my appointment ends; Case reports summarizing defense services provided, cases assigned, hours of work performed, and quality of services are useless if no responsible official digests the information and is able to act in a timely manner to protect the integrity of public defense services.

My goals include (1) providing the Cities with tools to assess the qualifications required of a law firm providing public defense services, (2) suggesting contract terms, and (3) institutionalizing a methodology for evaluating and monitoring the quality of services provided on an ongoing basis. The latter is, in part, a response to a request from counsel for the Cities, Scott Snyder, who is working with the Cities and with the Washington Association of Cities as they move toward compliance with the Standards for Indigent Defense effective October 1, 2012, and Standard 3.4 ¶ 3, Caseload Limits effective January 1, 2015.
While many issues remain to be addressed, I commend the Cities for their professional approach, for their recognition that change is essential, and for their repeated intention to “make things right.”

REPORT

I. Public Defense Services in the Cities of Mount Vernon and Burlington.

The Court’s Memorandum of Decision required the Cities to “re-evaluate their existing contract for the provision of public defense in light of the Court’s findings and ensure that the document encourages and is [in] no way antithetical to a public defense system that allows for private attorney/client communications at the outset of the relationship and the ability to follow up as appropriate.” ECF 325 at 18:17-19.

Indigent defendants in the Cities are now primarily represented by attorneys from Mountain Law, a five-attorney public defense law firm, and by a three-attorney conflict panel. This First Report will focus on Mountain Law, access to counsel, and other issues related to access to the Cities’ courts.

Mountain Law’s Managing Partner, Michael Laws, was admitted to the Washington State Bar Association in 2000. He worked for seven years in the District Court and Felony Units of the Office of the Yakima County Prosecuting Attorney. From 2004-2008, he was also the primary Judge Pro Tempore for Yakima Municipal Court. In 2008, Mr. Laws joined the office of the Yakima City Attorney.

In 2009, Mr. Laws and three other former prosecutors, as the firm Baker, Lewis, Schwisow & Laws, were awarded the Everett Municipal Court public defense contract. In 2012, Mountain Law, a sister firm to Baker, Lewis, was awarded the Mount Vernon and Burlington Municipal Court public defense contracts.

In addition to Mr. Laws, Mountain Law has four staff attorneys. The most experienced of these attorneys has practiced law for just two years, and the newest was admitted to the Bar in September 2014. Mr. Laws describes the attorneys as a diverse group, with immigration and
tribal law experience. Mountain Law also has two full-time office assistants and a full-time investigator. The office assistants, the investigator, and one of the attorneys speak Spanish.

Mountain Law is essentially a paperless office, using a case management system called defenderData. Attorneys have Surface tablets which they use to access electronic client files. When I observed the attorneys in court on busy calendars, there seemed to be adequate WiFi for the tablets to work well for that purpose.

The Cities’ Contract for Indigent Defense Services, effective December 30, 2013, requires Mountain Law to have a full-time investigator on staff and adopts -- in advance of their effective date -- the caseload limits for misdemeanors that will be required as of January 2015 by the Washington State Supreme Court. The Contract sets an internal caseload standard of 320 misdemeanors for five attorneys, in order to assure that they have sufficient time to satisfy requests related to my duties as Supervisor and to represent clients on probation matters arising from cases in which the previous public defense firm appeared. The contract provides that attorneys agree to “devote…full effort to the performance of this agreement and will undertake no private practice of law that would impede their ability to perform under this agreement or reduce the case count available to each attorney.” Contract for Indigent Defense Services, Article 2 Compensation. The Contract also requires attorneys to maintain contemporaneous case records of time spent, though not tasks performed, and increases the compensation paid to the firm.

These contractual changes are positive, and Mountain Law appears to be compliant. Mr. Laws advises me that in 2013, he represented a client in a now concluded matter, and in 2014 two staff attorneys provided pro bono representation in other matters not heard in the Cities’ municipal courts. I recommend that attorney caseloads be shifted so that Michael Laws, as Managing Attorney, carries far fewer cases, allowing him to provide better supervision of the other attorneys and to develop an adequate training program. I also recommend the contract include a provision that the public defense provider reports time spent on work unrelated to work under the contract. This provision should apply to attorneys, staff and the investigator.
A. Training.

In the past nine months, Mountain Law has lost two of its four staff attorneys to county public defender offices. Those attorneys had been employed at Mountain Law for approximately two years -- roughly comparable to the time a staff attorney in a county public defense office would spend in the misdemeanor unit before rotating into a felony unit or other division.

County public defense offices, with their broader range of practice areas, are able to profit from the time and energy invested in training new staff attorneys likely to remain with those offices for considerably longer than two years. To compensate for the disruption caused by the predictable departures of staff attorneys after relatively short tenures, Mountain Law requires a robust internal training program, as well as access to training offered by groups such as the Washington Association of Criminal Defense Lawyers (“WACDL”) and Washington Defender Association (“WDA”). Mountain Law also requires a supervisor who is committed to training and working with new attorneys and who has adequate time to do so.

Mr. Laws is a member of both WACDL and WDA, and in 2014, Mountain Law itself joined WDA as an “office member,” allowing attorneys and investigators to attend WDA’s trainings at no cost.

WDA provides access to: a Technical Assistance Attorney who responds to staff attorney questions and develops advisories related to misdemeanor practice; an Immigration Project, which responds to questions about the immigration consequences of criminal convictions; and a “list serve” for attorneys with misdemeanor defense practices.

In July 2014, Mountain Law sent one of its attorneys to the two-week National Criminal Defense College in Macon, Georgia. In August, Mountain Law attorneys attended a WACDL training on voir dire and cross-examination conducted by Mark Mestel and Jeff Robinson. And in September, Mr. Robinson conducted a training on developing the theme of a case for Mountain Law attorneys and the Cities’ conflict panel in the Mount Vernon Municipal courtroom. In October 2014, most of the attorneys will be attending a training offered by WDA about taking difficult cases to trial.
During the summer of 2014, Mr. Laws began work on a training manual for new staff attorneys. He has provided me with successive drafts, and I expect to work with him on the manual in the coming months.

The Cities should include in all public defense contracts the requirement that public defense offices develop and make available for review an attorney and staff training manual or manuals.

The Cities should also require public defense attorneys (both staff attorneys and assigned counsel) to earn at least 10 Continuing Legal Education (“CLE”) credits per year in areas relevant to misdemeanor defense practice. Compliance of a public defense agency should be documented annually by providing the Cities with a list of all trainings attended by attorneys and staff during the contract year. Documentation of compliance by assigned counsel should be a condition of their continued qualification to serve.

With respect to Mountain Law, I further recommend: (1) Mountain Law should complete the training manual and require that it be studied and utilized as a resource on an ongoing basis; (2) Mountain Law should develop training procedures to be followed with all new hires and attorneys and staff should continue to attend trainings in areas relevant to its practice; and (3) Mountain Law should explore use of applications that will expand the ability of Surface tablets or other computing devices to create useful trial notebooks.

B. Reports

Mr. Laws sends monthly Excel reports to the Cities showing the number of cases to which each staff attorney was assigned that month. The August 2014 report showed that, year-to-date, each attorney was assigned 20-30 cases per month.

The caseload standards adopted by the Washington Supreme Court effective January 2015 assume that an attorney will be assigned no more than 400 misdemeanor and/or probation cases per year -- an average of 33 cases per month. (The 400 case per year standard drops to 300 if a jurisdiction “weights” cases or probation matters as more or less than one; the Cities do not weight cases.)
All of the staff attorneys at Mountain Law met the caseload standard from January 1 through July 31, 2014. However, one attorney, who has now left the office, would have exceeded the lower standard set by the Contract for Indigent Defense Services if she had continued at the rate she was assigned cases in the first eight months of 2014.

The monthly Excel reports also include information provided by staff attorneys about the number of cases by charge each attorney closed, Dispositions (Plea as charged, Plea to Lesser, Dismissed, Withdrew, Conflict, etc.), and attorney hours per case. Hours reported per case vary considerably, usually dependent on whether cases went to trial or clients failed to appear. Dispositions include outcomes ranging from dismissals to pleas as charged. As of September, the report will include a list of jury trials and substantive motions filed. As now revised, the monthly Excel reports will provide useful measures of the work being done by staff attorneys.

As noted above, the data set forth in Mountain Law’s monthly Excel reports is collected by staff attorneys. Public defense staff attorneys, particularly those in high volume misdemeanor practices, usually maintain adequate file notes, but are far less diligent about data entry. For example, one Mountain Law staff attorney had multiple jury trials during the first half of 2014, gaining several acquittals. The monthly report for jury trials first shown to me, however, listed her as having had only one bench trial. In recent months, Mr. Laws has emphasized the importance of entering case information fully and accurately.

At my request, Mr. Laws has included a category on the monthly reports capturing non-case-related time, including attorney and staff training, observing in court, and reviewing case files. Reporting only information related to staff attorney time spent on individual cases gives the Cities an incomplete picture of the time and work necessary to build a strong public defense office.

Mr. Laws provides administrative and IT support to the office; compiles and revises reports requested by the Cities and by me; is responsible for training and supervision, as well as personnel issues; has developed an office web page; and is writing the office training manual. In
addition to these responsibilities, Mr. Laws assigned himself an average of 20 cases a month through the end of August.

Mr. Laws should make training and supervising attorneys and staff a top priority. Mr. Laws should significantly reduce the number of cases he assigns to himself so long as the staff attorneys remain within the caseload standard set by the Washington Supreme Court.

Mountain Law should continue to explore the most effective, efficient, and accurate way for the office to collect and report data. Accurate data collection and reporting is a key to the measurement of work volume and quality. My next Report will include the results of this data collection.

The Cities should review the contract with Mountain Law to allow the managing attorney to maintain a caseload of no more than 30% of the maximum caseload standard. The Cities should include in future contracts a reporting requirement for time spent supervising and training new attorneys and other administrative duties.

City Review of Reports

In September 2014, at my request, Mr. Laws and I had several meetings with City representatives to discuss whether his reports provide them with useful data in an easily understood format. As a result of the meetings, Mr. Laws revised the reports to make them more comprehensible and helpful.

The Cities, Mr. Laws and I also agreed on a set of “data points” to be collected in the future by Mountain Law and other entities to assess the Cities’ criminal justice systems. Compiling and considering this will be a long-term project, but will give the Cities a useful snapshot of how their criminal justice system is functioning.

The first set of data points is intended to help the Cities assess the capacity and timeliness of its criminal justice system, and particularly the public defense system. This information would include:

- Time from incident date to filing charges;
- Time from filing charges to assignment of counsel;
• Time from assignment of counsel to conflicts check;
• Time from assignment of counsel to first attorney/client meeting;
• Time from filing of Notice of Appearance/Request for Discovery to date discovery provided; and
• Time from filing to case resolution.

The second set of data points is intended to help the Cities to assess how they are spending their criminal justice resources, including public defense resources. This information would include:

• Number of cases filed and primary charge in each;
• Number of cases filed by officers directly with the court by citation;
• Number of cases filed by the City Attorney after review of officers reports; and
• Number of cases, if any, waiting to be filed (backlog).

The final set of data points is intended to give the Cities benchmarks to assist in assessing the quality of public defense services. This information would include:

• Number of cases assigned to an attorney each month, with a year-to-date total;
• Number of closed cases in which expert services were requested;
• Number of closed cases in which interpreter services were requested;
• Number of closed cases in which an investigator was used;
• Number of closed cases in which substantive motions were filed;
• Number of closed cases which were tried to a jury or in which charges were dismissed/significantly reduced on the day of trial;
• Number of cases which were resolved by dismissal of the charges, significant reduction in charges or dismissal of other cases and plea on the remaining case(s);
• Number of appeals and/or writs; and
• Number of attorney hours per closed case.

Many of the above data points relating to cases are already being captured or can relatively easily be added (e.g., discovery requested/provided). Other data points will require discussions with others in the criminal justice system.

The Cities should work to capture the data points identified above to monitor the capacity of their criminal justice system and the work of public defense providers. Mountain Law should
continue to work to refine its reports based in part on discussions with the Cities. Finally, Mountain Law and the Cities should communicate regularly with each other about the information collected and its significance.

C. Interactions with Clients in Court and in Client Meetings

Defendants held in-custody make a preliminary appearance on a 7 a.m. calendar five mornings a week. The Burlington and Mount Vernon Municipal Courts each schedule two jury trial days per month. Burlington Municipal Court schedules three additional days per month for out-of-custody hearings. Mountain Vernon schedules four days per month for such hearings. Every Tuesday afternoon, the two courts share an in-custody calendar in a Jail courtroom.

Since my appointment, I have obtained and reviewed several transcripts of proceedings, observed four jury trials and numerous court calendars, as well as several client meetings. After one of the jury trials, I met with the attorney to discuss the case. After a second trial, Mr. Laws and I met with the attorney to discuss the case. I have kept Mr. Laws generally apprised of when I will be in Mount Vernon/Burlington and let him know in advance when I will be coming to the Mountain Law office.

During my court observations, the Mountain Law staff attorneys interacted with their clients, stood with them at the podium, and in most cases, appear to have met with them before court. The attorneys were professional and courteous and generally seemed prepared. Where attorney and clients appeared not to have met before the hearings, this probably was because clients had not kept appointments. (See Access to Counsel-Screening discussion below.)

During my observation of attorney/client meetings at the Mountain Law office and in the Jail, the lawyers appeared to have reviewed the charging document and discovery beforehand. Two were a second or third attorney/client meeting. In all the client meetings, staff attorneys reviewed the available options clearly stating that whether to proceed to trial or accept the prosecutor’s offer was the client’s decision.

Often, as in one attorney/client meeting I observed, what a lawyer feels is important to the case and must discuss with the client and what a client feels is important and wants to discuss
is a source of tension, if not overt conflict. This is particularly common for new attorneys. The training manual should include a section on how to interact in order to build connections and trust with clients.

Confidential Meeting Spaces

The Burlington Municipal Court and the Mount Vernon Municipal Court share one-story buildings with the city’s police department. Access to the police departments and the courts is through common entrances at the front of each building. This layout creates potential conflicts between court activities and police activities, including confidential attorney/client communications in the hallways outside the courtroom.

In Burlington, a small room within the Burlington courtroom is available for client conferences. However, this room has a solid door, which makes it difficult to hear when cases are called and -- since attorneys are effectively isolated -- raises some personal security concerns. Two rooms outside the Burlington courtroom are used on court days for screening, and by a Mountain Law office assistant who opens new client files.

Recently, the Burlington Clerk advised the City Administrator that client discussions may be picked up by the microphone on the podium at the front of the courtroom even when the attorney and client are seated at counsel table and have muted the microphone on the table.

In Mount Vernon, the only room outside the courtroom is used for screening, and the hallway is across a small lobby from the counter for the police department.

The Cities should create confidential meeting spaces in the area of the courtroom. For example, fabric covered office “cubes” could be set up in the Burlington courtroom and in the large room outside the Mount Vernon courtroom.

II. Access to Counsel

A. Communication with In-Custody Clients

The Skagit County Jail is a largely windowless brick building located in downtown Mount Vernon. Originally built to house 84 inmates, it was expanded in the 1980s to house 150 inmates. The Jail has been routinely over capacity by as much as 50%, housing over 200
inmates in a space originally built for less than half that many. The Jail building also houses the office of the Skagit County District Court Clerk and district court courtrooms.

The Jail has three attorney rooms shared by the Skagit County Office of Assigned Counsel screener, the Skagit County Public Defenders, Mountain Law attorneys, assigned counsel, private counsel, counselors, experts conducting mental health examinations and other professionals. Three isolation rooms also serve as protective custody units where inmates can be held for up to 23 hours per day. During my visit, the Jail was clean, the staff professional, and the Jail relatively quiet. However, the Jail struggles to provide a safe environment for inmates who suffer from mental illness, have gang ties, have been convicted of sex offenses, or who are gay. There is little room for educational programs or exercise.

Skagit County residents recently approved a tax to build a new Jail. The Cities agreed to waive the portion of the tax they were entitled to receive in exchange for “free” Jail beds in the future. Until the new Jail is built, the County is seeking to ease overcrowding by sending inmates to the Chelan County Jail.

Since my appointment, Mountain Law has asked the Skagit County Jail to improve the ability of its staff attorneys to meet with their clients. The Jail has responded promptly to those requests and the following should not be considered criticism of the Jail’s management or staff. The duty to raise access issues lies with the attorneys providing indigent defense services, and the responsibility to include appropriate resolution of such issues lies with the Cities in their agreements with Skagit County.

1. Phone Access

At the time I was appointed, in-custody Mountain Law clients were unable to call their attorneys free of charge and without being recorded. Shortly after my appointment, Mountain Law asked for, and the Jail promptly provided, a free of charge “do not record” line to Mountain Law for its clients. Mountain Law staff maintain a log of calls from the Jail including information about the call.
Mountain Law should continue to maintain the phone log, and the supervising attorney should review the log regularly to see that staff attorneys have responded timely to calls.

While the current Jail is in use and as the new Jail is being built, the Cities’ agreement with the County should require that defendants charged in the Municipal Courts continue to have the ability to call their attorneys free of charge and without being recorded. The Cities’ public defense contracts should require the public defense firm to accept a free, “do not record” phone line.

2. Written Communications to Mountain Law

Until recently, clients held in the Jail used a “kite” (written note) form, which advised them their communications would be confidential but in fact they were not. Mr. Laws has revised the form to clearly state in English and Spanish that communications contained on the “kite” are not confidential. The form gives clients the phone number for the office and says they may call Mountain Law free of charge. The revised form, which also now incorporates changes recommended by the Skagit County Office of Public Defense, has been given to the Jail with a request that it be used in place of the existing, inaccurate form.

The Cities’ agreements with the County should include a requirement that the Jail provide defendants with a form that accurately advises them whether written communications are confidential.

The Cities should include in their public defense contracts a requirement that the public defense firm must: (1) review Jail forms to assure they accurately advise clients whether written communications are confidential; (2) maintain client complaints in a log as well as in the client’s file; and (3) follow up on complaints within three court days.

3. Mountain Law Clients Transferred to Out-of-County Jails

Mountain Law has contacted the Chelan County Jail to determine what information is provided to its clients held there about how to contact their Mountain Law attorneys and to assure that the Mountain Law office phone number is included on a “do not record list.” The Cities have agreed to reimburse Mountain Law for collect calls it accepts from the Chelan Jail.
Mr. Laws plans to visit the Chelan Jail during the next few weeks to see what information has been posted advising Mountain Law clients about how to call their attorneys.

The Cities’ agreements with the County should include a provision that if the Skagit County Jail transfers a municipal defendant out of county, the Skagit Jail will make arrangements or assist with arrangements to provide easy and confidential phone communications between municipal defendants and their appointed counsel. The Cities should include in their public defense contracts a requirement that the public defense firm and appointed counsel will, upon learning that clients are being held in an out-of-county Jail, determine what arrangements have been made to allow clients to maintain confidential communications with their attorneys and shall advise the Cities if no such arrangements are in place.

4. 7 a.m. In-Custody Jail Calendar and Tuesday Afternoon Jail Calendar

City and County defendants booked into Jail make a first appearance at 7 a.m. on a calendar held in a courtroom in the Jail. At this calendar, the court makes a decision whether to release or hold defendants and suspects.

At 7 a.m., the entry to the entire building is locked and not staffed. Persons seeking to be admitted to the courtroom must press a doorbell near the front door where a small notice, in English only, advises early morning callers to ring the bell and ask to be admitted. When I attended the calendar, a corrections officer in the upper floor of the Jail, speaking over an intercom, asked whether I was there for the Jail calendars and remotely opened the door when I answered that I was.

Before 2014, defense counsel and prosecutors did not appear on the 7 a.m. calendar; County Prosecutors and City Attorneys still do not appear. The Skagit County Public Defender began staffing the calendar earlier this year, reportedly over an objection from the prosecutor, and Mountain Law now also appears on the calendar. The Skagit County Public Defender and Mountain Law are in discussions about sharing responsibility for the calendar.


The Cities should assess whether the access afforded to the 7 a.m. court hearings is sufficient to satisfy Article 1, § 10, and whether it provides appropriate public access, particularly for non-English speakers. The Cities’ agreements with the County should include provisions that court sessions are open to the public, without undue barriers to access and should define the guidelines followed by Jail corrections officers when determining whether to admit, or more importantly deny, a member of the public access to the 7 a.m. court proceedings.

In addition to the 7 a.m. calendar, in-custody defendants appear at 1 p.m. every Tuesday afternoon for arraignment, pre-trial orders and motions for release. Mountain Law staff attorneys appear with clients whom they have been appointed to represent.

In-custody defendants appearing for arraignment appear without appointed counsel and, if released, are ordered to return for screening at a future out-of-custody court date. Defendants held in-custody are automatically appointed a public defender without being screened.

On August 26, 2014, a defendant appeared for arraignment on the 1 p.m. in-custody calendar. According to the citation filed with the court, he was charged with Disorderly Conduct because he walked in traffic and hit a fire truck with his fists when it came to a stop. The citation indicated that the firefighters were concerned the defendant had “medical problems” and that he was camping in the courtyard of a building.

The court orally advised the defendant of some of his rights, though not the right to a speedy trial or the burden of proof, and the defendant indicated he would like an attorney. The court advised the defendant that a public defender would be appointed and that his case would be set three weeks away on September 16, 2014, at the Mount Vernon Municipal Court. The defendant then decided the matter was “taking too long” and asked to plead guilty. It is not clear that the defendant understood that he was not going to be held on the charge or what his custody status was, and during the plea colloquy that followed, the defendant was not certain of his exact age. The judge completed the guilty plea form, including the defendant’s statement of the
factual basis for the pleas, advised the defendant that there would be no sentencing recommendation from the City Attorney, and noted this on the plea form, which the defendant signed.

After accepting the plea, the judge asked the City Attorney for his “comments on sentencing.” The City Attorney then recommended 10 days in Jail and a $400 fine. The judge asked the defendant if he had anything he wished to say. The defendant replied “No, I don’t think that I---“, but was cut off by the judge before he finished. The judge sentenced the defendant to 10 days in Jail and a $400 fine. (See August 26, 2014, Transcript of Proceedings from City of Mount Vernon v. Ensley, Mount Vernon Municipal Court, Skagit County, Case No. MC0030676, attached as Exhibit 1 to this Report.)

Washington Criminal Rule of Limited Jurisdiction (“CrRLJ”) 3.1(a)(1) provides that the right to a lawyer accrues as soon as feasible after a defendant has been arrested, appears before a committing magistrate or is formally charged, whichever occurs earliest. CrRLJ 3.2.1(e)(1) requires the court, pursuant to the provisions of CrRLJ 3.1, to provide for a lawyer at the preliminary appearance.

The Cities should provide counsel for defendants at arraignment and preliminary appearance, regardless of whether they have been screened. The Cities should make every effort, through their City Attorneys, to provide copies of all discovery and probable cause affidavits to defense counsel in advance of arraignment and preliminary appearance calendars.

B. Out-of-Custody Clients

1. Screening Process in Place and Proposed

Out-of-custody defendants must pass through a “screening” before a public defender is appointed. The Cities asked me to review the screening process.

The court or its designee, using the standards contained in Title 10, 10.101 of the Revised Code of Washington, must determine indigency. RCW 10.101.020. If an indigency determination cannot be made before the defendant’s first appearance, the court may provisionally appoint counsel. RCW 10.101.020(4). Although the Burlington and Mount
Vernon Municipal Courts have not formally designated the Cities as the entities responsible for screening, the Cities have hired, trained and paid the present screener.

To apply for appointment of counsel, out-of-custody defendants are required to appear in person before a judge at the time scheduled for their arraignment. Because the Cities’ courts are part-time, this means there are only three days a month in Burlington Municipal Court and four days a month in Mount Vernon Municipal Court when defendants may apply for counsel.

I observed several out-of-custody arraignment calendars in which every defendant appearing without counsel (and this was almost all the defendants) was asked by the judge if he or she would like the assistance of counsel. All answered “Yes.” The judge then referred the defendants to the Cities’ screener located outside the courtroom and told them to return to court at a stated future date.

Defendants booked into Jail and released from custody may not apply for counsel until, after their release from Jail, they appear on one of these out-of-custody calendars.

In a recent case, a defendant appeared and was released from the Jail calendar on September 5, 2014. Counsel was not appointed, even though a Mountain Law attorney was in the courtroom and had spoken with her. The defendant was ordered to appear on the out-of-custody calendar on September 16, which would be her first opportunity to be screened for counsel.

CrRLJ 4.7 allows a city up to 21 days before being required to provide discovery. Even if counsel was appointed on September 16 and entered a Notice of Appearance that same day, the defendant faced a potential lag of a month before she and her attorney would be able to have a substantive conversation about the evidence relied upon by the City as the basis of its charge.

The Washington State Office of Public Defense noted in January 2014 that the practice of deferring the opportunity to apply for appointed counsel until the arraignment date “can delay not only the appointment of counsel and but [sic] also can postpone critical court proceedings.” Determining and Verifying Indigency for Public Defense, 15 (Wash. State Office of Public Def., Jan. 6, 2014) (citing CrR 4.1(d) and CrRLJ 4.1(d)).
These problems are exacerbated when, as in the case of Mount Vernon and Burlington Municipal Courts, a court permits a defendant to apply for counsel on only three or four days a month and only after a hearing. The practice of requiring defendants to appear in court to ask for a lawyer, then delaying their arraignment so that they can be screened, rather than letting them be screened before court, also consumes scarce court time.

During my observation of the screener employed by both Cities, she was professional, spoke easily to defendants in Spanish or English as needed, and treated defendants with courtesy. As soon as she assigned a defendant to Mountain Law, she referred the defendant to a Mountain Law staff person, also bilingual, seated in another part of the screening area. The Mountain Law staff person, using a computer with access to the Mountain Law case management system and attorney calendars, promptly opened a client file and scheduled an appointment with an attorney. Clients left the courthouse with an appointment, the attorney’s business card and a handout giving directions to the Mountain Law office in a file provided by Mountain Law—but without having been arraigned at the “arraignment hearing” at which they had been ordered to appear.

After discussions with the Cities about how the above-described process limited the opportunity for clients to apply for a public defender and created inefficiencies, the Cities agreed to ask the County Office of Assigned Counsel (“OAC”) to resume screening clients.

After some hesitation and discussion with me, the OAC indicated it was willing to work with the Cities again. However, during a conference call with the judges in late September when they were asked to formally designate OAC as its screener, in addition to the screener now present on court days, they expressed concern that too many alternatives for screening would create “more opportunities to fail” for defendants and screening would drop.

The judges proposed as an alternative that in-custody defendants continue to have counsel appointed automatically and that Mountain Law be provisionally appointed to represent all defendants who were cited and released, booked and released, or released from the Jail after a first appearance. Such defendants would be given a card telling them that Mountain Law had been appointed to represent them and to call Mountain Law’s office before their next court date.
The cards would be given to defendants by arresting officers and available in the Jail and the court clerk’s offices. Defendants would also be able to call the screener on a cell phone and be screened. The screening process now available on the three or four days a month when arraignments are held would continue as is.

The Cities should put in place the court’s proposed screening process and should print and distribute cards to the municipal police departments, the court clerks and the Jail. After six months, the Cities should verify distribution of the cards by asking Mountain Law to survey clients about whether they received the cards and were able to reach the screener for a phone interview. The Cities should assess whether the combined approach offered by the district court provides adequate access to appointed counsel at all critical stages.

The Cities should discuss with the court making the screener available on court days before the arraignment and sending notices to defendants that if they want to ask for appointed counsel, they may apply before their court hearing. The Cities should provide counsel for defendants at arraignments, regardless of whether they have been screened. The Cities should make every effort, through their City Attorneys, to provide copies of all discovery and probable cause affidavits to defense counsel to be reviewed in advance, or at minimum on the day of arraignment so that defendants may consult with counsel before appearing.

2. **Screening Forms and Information Provided to Clients at Screening**

The screener employed by both Cities uses a “Client Interview and Appointment of Counsel” form the Cities have provided. The form is given to Mountain Law when counsel is appointed. The “Client Interview” form includes spaces to note whether a defendant may have mental health or immigration issues, DOC holds, as well as other “miscellaneous information.” Defendants found “able to contribute” to the cost of counsel were required to sign promissory notes, in which they agree to pay $350 as the cost of appointed counsel. This payment amount was used during a period when the probable cost of public defense counsel to the Cities was less than $350.
I raised this issue with Mount Vernon Special Projects Administrator Eric Stendahl and City Administrator Bryan Harrison. After discussion, they agreed that collecting payments from those few defendants who are able to pay is not cost-efficient for the Cities. In the future, defendants will not be asked to sign promissory notes. They also agreed to determine what amounts, if any, should be refunded to defendants who paid the City more than the actual cost for the assistance of assigned counsel.

3. Screening Facilities

As noted above, the Burlington Municipal Court and the Mount Vernon Municipal Courts each share one-story buildings with each City’s respective police departments, and access to the courts and police departments is through a common entrance. The Cities do not use the Skagit County District Court courtrooms, other than the Jail courtroom where in-custody calendars are held. In Mount Vernon, the courtroom is also used for city council meetings. Both Cities have taken care that the appearance of the courtrooms is dignified and well maintained.

In Burlington, two rooms outside the courtroom are used on court days for screening and for a Mountain Law staff person. The rooms are undecorated and a neutral setting.

In Mount Vernon, the screener and staff person on court days share a large room that is also used for overflow from city council meetings and as a training room for the Mount Vernon Police Department. Originally the room was decorated with photos of police training—target shooting and police officers emerging from patrol cars with guns drawn. After discussion with the City representative about the need for a neutral setting for screening, particularly since the court is affirmatively directing defendants to go to the screening room, the photos were removed—although a Mount Vernon Civilian police academy banner remains.

The Cities should review the spaces used for court proceedings and court-related matters to ensure that the settings are neutral in character.
III. Courtrooms and Clerks’ Offices

A. Court Records.

All of my questions directed to the clerks’ offices were met with courtesy and promptly answered. Nothing discussed below should be seen as criticism of any of the clerk’s office employees.

Each court’s clerk’s office is located next to the courtroom in a building shared by the court and police department. Clerks in Mount Vernon are employees of the County. At least two speak Spanish as well as English. Clerks in Burlington are City employees. Dockets, court files and audio recordings of proceedings in the City courtrooms for all cases are maintained in the clerks’ offices next to the courtrooms. According to the transcriptionist preparing records of proceedings that I have ordered from the municipal courtrooms, there are difficulties with the audibility of the Mount Vernon recordings. In one case, the transcriptionist returned a CD of the trial record because only the judge and City attorney’s voices were recorded. Voir dire, the defense attorney and the defense attorney’s questions of witnesses were inaudible. (See October 7, 2014, Declaration of Transcriber, City of Mount Vernon v. Valdez, Mount Vernon Municipal Court, Skagit County, Case No. MC0029700, attached as Exhibit 2 to this Report.)

Audio records of courtroom proceedings for in-custody cases heard in the Jail are maintained in the Skagit County District Court Clerk’s office located in the Jail/district courthouse/clerks’ office complex.

In both municipal and district courts anyone requesting court records must complete a form that states, in part:

I agree that the information provided will not be used for any commercial purpose by myself or [sic] by any organization I represent. I will protect the information from access by anyone who may use it for commercial purposes.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Skagit County District and Municipal Request for Information Form, available at http://www.skagitcounty.net/DistrictCourt/Documents/request_for_information.doc.
In addition, the clerks of one court now include in email notices of the next day’s court calendars a footer stating:

CONFIDENTIALITY STATEMENT

CONFIDENTIALITY NOTICE: The information in this E-Mail message and any attachment's, is privileged and confidential. It is intended only for the use of the recipient above named. If you have received this message in error, please note that any review, dissemination, distribution or copying of this communication is prohibited. In addition, please reply to this communication so that we can avoid any inadvertent messages to you in the future.

When I asked the office of the District Court clerk, located in the Jail/district courthouse/clerks’ office complex, to see the file for a Burlington defendant, the clerk first asked if I was an attorney, and then if I was the attorney “of record.” The discussion went no further because I was directed to the Burlington courthouse where the actual file was maintained.

Based on the foregoing, the Cities should discuss with the district court the responsibility for, and the requirements of courts in which municipal cases are heard, appropriately creating, keeping, and providing public access to court records. In particular the Cities should:

- Ensure that the forms used in the clerks’ offices accurately state any obligation that may lawfully be required of a member of the public requesting a copy of a court record;
- Ensure that municipal court records maintained in the Office of the Skagit County District Court clerk are readily available to the public;
- Ensure that all forms used are available in both English and Spanish. (One court recently revised its continuance/pretrial form but has not made it available in Spanish);
- Determine whether the municipal courts have the capacity to include the audio record of proceedings involving municipal defendants in the Jail; and
- Ensure that systems/processes used for creating court records function adequately for that purpose.

B. Language Access Plan.

RCW 2.43.090 requires all state trial courts to develop a language access plan that includes:

- Procedures for notifying court users of the right to and availability of interpreter services. Such information shall be prominently displayed in
the courthouse in the five foreign languages that census data indicates are predominant in the jurisdiction.

RCW 2.43.090(1)(c).

When I first saw the Mount Vernon Municipal Court, it did not display the multi-language poster advising clients of their right to and the availability of interpreters, which is easily available from the Administrative Office of the Courts. The poster was displayed in the Burlington courtroom, but located on a side wall at the front of the courtroom, where it could not be read, or at least easily be read, by defendants sitting in the courtroom or standing at the podium.

When I pointed out my concern to Mr. Stendahl of Mount Vernon, he promptly obtained the poster and had it prominently displayed near the clerk’s office on a wall just outside the entrance to the courtroom. He also obtained larger signage, in both English and Spanish, directing defendants to the temporary space where the screener works.

When I pointed out my concern to Mr. Harrison of Burlington, he promptly had the poster displayed on the wall immediately inside the courtroom near the entrance to the courtroom. Signage directing defendants to the room where the screener works is small but a courteous Burlington Municipal Court volunteer directs defendants, as they leave the courtroom, to the temporary space where the screener works.

The Cities should discuss with the district court the responsibility for and the requirements of a language access plan. In particular, the Cities should determine whether the municipal courts have in place a Language Access Plan in compliance with RCW 2.43.090 and required in order for a jurisdiction to be eligible for reimbursement for costs of interpreters. (According to the Administrative Office of the Courts, Mount Vernon Municipal Court is allocated $2,758 for FY 2014-2015 under the interpreter pass through program; Burlington Municipal Court does not participate in the program.)

IV. Complaint Process

The Court’s Memorandum of Decision directs me to establish a policy for public defenders to respond to all client contacts and complaints (including Jail kites), including the
length of time within which a response must occur, to review any and all client complaints obtained from any source and the public defenders response, and to establish a process for clients to pursue a complaint if the Public Defense Supervisor fails to resolve it to the client’s satisfaction.

A. Process Now in Place and Proposed Process

When the screener finds a defendant eligible for appointed counsel, she also hands him or her two forms. The first is a “Public Defender Complaint Form” and the second is captioned “READ THIS NOTICE YOU HAVE IMPORTANT RIGHTS AS A CLIENT OF THE PUBLIC DEFENDER”. Form and Notice available at www.mountvernonwa.gov/DocumentCenter (follow “City Services” hyperlink; then follow “Public Defender Services” hyperlink).

The “Public Defender Complaint Form” is generic and asks that general complaints about public defense be sent to the Project Manager in Mount Vernon and the City Administrator for Burlington. The second form states: (1) if the public defender has refused to meet or (2) if the defendant did not understand a plea agreement or entered into one involuntarily, he or she should bring those complaints to the respective City within 15 days of the refusal to meet or involuntary plea. In their “Rules of the City Complaint Process,” the City promises that if a defendant believes his or her plea was not knowing and voluntary, “the City will ask the prosecutor to file a motion to vacate your plea of guilty within 30 days of receipt of your complaint. That motion may not be supported by the public defender. That motion may not be granted by the court.”

Mr. Laws noted that the forms set an unfortunate tone with which to begin the attorney-client relationship. He suggested, and after discussion the Cities agreed, that a better approach would be to provide defendants with a form asking neutrally about the defendant’s experience with the screening process, the representation provided and the defendant’s experience with the court.

The City representatives told me that the form was created upon advice of counsel. Based on my meetings with the City representatives, I believe they want to know if public
defenders are refusing to meet with their clients, regardless of whether the defendants notified the City within 15, 16 or 90 days after such refusal, if any.

The Cities have agreed, subject to this Court’s approval of the proposed process, that the screener will provide each defendant with a “Comment” Form. The proposed Form is attached as Exhibit 3 to this Report. The Form will advise defendants that any comments about the screening process, public defense and/or their experience in the municipal court may be sent to the Public Defense Supervisor. Comments may be sent on the Form, which can be folded into a pre-addressed letter, to the Public Defense Supervisor or left in a locked mailbox at the respective City Halls. Alternately, comments may be sent to an email account to which only the Public Defense Supervisor has access. Finally, comments may be left in a voice mailbox to which only the Public Defense Supervisor has access. The Supervisor will respond to comments and/or complaints within three business days. The Comment Form and contact information will also be included on the Cities’ websites, which will be linked to the website Mountain Law is now constructing. I support the above approach as a first step. The Cities will need to identify who will be responsible for this process when my appointment ends.

B. Complaints Received to Date

To date I have received five complaints. Two complaints did not relate in any way to public defense. A third complaint was from private counsel, who asserted that her private client should never have been appointed a public defender. The attorney has not responded to the follow-up email I sent her. A fourth complaint, made by a defendant’s mother, involved a member of the assigned counsel panel. The defendant has not responded to my voice message, but even if he does not, I expect to speak with the attorney.

The fifth complaint involved a member of the Mountain Law firm. The attorney realized that he had missed a speedy trial issue and told his client about it. The client asked for new counsel and her case was re-assigned to a member of the assigned counsel panel. The defendant told me she has remained unsatisfied with the result, thinking her case should have been
dismissed. I have spoken with Mountain Law, and the office has done a training for the attorneys about speedy trial issues.

V. Future Steps and Conclusion

The next six months, prior to my Second Report, will be spent building on the steps described in the preceding sections and beginning work on the other responsibilities included in the Court’s Memorandum of Decision.

A. Training

The training manual should be completed and Mountain Law should have in place a procedure for training newly-hired attorneys, staff, and the investigator. The office should explore training options for its investigator and whether the duties of the office staff should be expanded to include development of a list of social service resources, such as alcohol and drug treatment agencies, to be made available to clients. The need for a supervising attorney will require discussion with the Cities of what revisions, if any, are required under the terms of the Contract for Indigent Defense Services.

B. Reports and City Review of Reports

The Cities and Mountain Law should begin collection of information not now being collected but which are identified as useful data points in the earlier section of this Report. The Cities should continue discussions with the Supervisor regarding the most effective way to provide for the ongoing duty to assess its criminal justice system, and its public defense providers in particular. The long-term goal will be to use this information to develop the quality assurance terms to be included in a public defense contract and a tool to assess the quality of public defense services provided without intruding on the attorney-client privilege.

C. Complaint Process

The Cities should put into effect the external Complaint Process, if approved. I will work with Mountain Law to formalize how it responds to and documents complaints from clients made directly to the office.
D. Assigned Counsel

The public defense system includes a panel of attorneys who have agreed to accept cases in which Mountain Law may not provide representation because of a conflict of interest. The quality assurance terms to be included in a public defense services contract apply to conflict panel attorneys and the tools developed for the assessment of public defense services can be refined for use when assessing the quality of conflict panel attorneys without intruding on the attorney-client privilege.

CONCLUSION

The Cities have made a commitment to build a strong, Constitutionally sufficient public defense system. I look forward to continuing to work with them, and with Mountain Law, in the next six months.
House Judiciary Workgroup on Misdemeanor Public Defense Costs in Washington State

Report and Findings

December 2014
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Executive Summary

Many cities and counties have expressed concern about funding public defense services in municipal and district courts following the adoption of the Washington Supreme Court’s Standards for Indigent Defense (Standards), which set maximum public defense attorney caseload limits. For many cities and counties the caseload limits will necessitate hiring more attorneys in 2015 to comply with the limit of 400 (or 300 case weighted) assignments. Other cities and counties face the possibility of increased contract fees to retain attorneys to work in their courts. In response, the House Judiciary Committee created a workgroup on public defense costs. The workgroup was tasked with examining:

2. Current public defense costs, and revenue generated by misdemeanor courts.
3. The impacts and additional costs associated with implementing the Supreme Court Standards.
4. Alternative case resolutions that may mitigate costs.
5. Caseloads, costs and revenues for each misdemeanor court in the state.

Another factor contributing to the cost of misdemeanor defense services is the December 2013 ruling of the U.S. District Court in Wilbur v. City of Mount Vernon, et.al. The cities of Mount Vernon and Burlington were ordered to pay over $2 million in attorney fees and make substantial improvements in public defense because their services deprived indigent defendants of their Sixth Amendment right to the assistance of counsel.

Highlights of the workgroup report include:

Data Collection. A survey was developed by the workgroup and sent to all cities and counties to calculate the statewide cost of misdemeanor public defense. The responses reflected the wide range in population size of the jurisdictions and the variations in the provision of indigent defense services.

Impacts of Standards. While many jurisdictions have been preparing for the implementation of the misdemeanor caseload standards for several years by adjusting their staffing and pay rates, some jurisdictions have not addressed the issues and may have to substantially increase their budgets in 2015 to comply with the Standards.

Costs Associated with Misdemeanor Public Defense. While most states are primary funders of indigent defense services, virtually all costs for trial-level criminal public defense in Washington are borne by municipalities and counties. The State provides funding that covers 2.1% of all estimated statewide city public defense expenses and 4.4% of county public defense expenses. State funding is distributed to a limited number of cities that are selected through the grant process in RCW 10.101.080. All counties are eligible for, and 38 counties historically have received, state funding based on the formula in RCW 10.101.070.

Revenue Generated by Misdemeanor Courts. The lack of uniform reporting by the local jurisdictions makes it difficult to accurately determine the revenue generated by municipal and district courts.
**Alternative Case Resolution.** In an attempt to mitigate the cost of providing indigent defense services, many cities and counties have experimented with pre-filing diversion programs and post-filing disposition alternatives. Other cost reduction strategies adopted by some courts include prosecutorial pre-filing review of case referrals and regular reductions of certain misdemeanors to infractions.

Following its data gathering and analysis, the workgroup established 11 findings and five recommendations. Findings reflect the diverse nature of misdemeanor courts in Washington, including a lack of uniform comprehensive data gathering and reporting. Likewise, local funding levels for misdemeanor public defense vary greatly, and at the time they were surveyed, many jurisdictions were uncertain how Supreme Court Standards and a recent federal court decision would impact their budgets. Most jurisdictions provide misdemeanor public defense through contracts with private attorneys.

Recommendations include implementing statewide uniform tracking for public defense appointments and costs, further research into alternative case resolutions, and continued monitoring of the impact of public defense Standards in local jurisdictions.
Introduction

Public defense services in Washington’s courts are administered and largely funded by county and city governments. Each city and county operates its own autonomous public defense organization, which allows for a variety of structures and different models of providing services. Each of these structures shares the same fundamental goal — providing constitutionally required defense representation -- but maintains a variety of administrative practices and funding levels. Since 1989 RCW 10.101.030 has required each jurisdiction to adopt local standards that ensure indigent defendants’ constitutional right to effective representation.1 Significant developments in recent years have established specific criteria that must be followed, which noticeably impact public defense services, particularly in misdemeanor cases.

In 2012 the Washington Supreme Court adopted the Standards for Indigent Defense2 (Supreme Court Standards) which establish various requirements for public defense attorneys. Among these, the Court requires all attorneys with public defense cases to adhere to caseload limits, so that they have sufficient time to effectively represent their clients.3 Felony and juvenile caseload limits became effective in October 2013. However, because many misdemeanor public defense attorneys statewide had been operating with caseloads exceeding the Supreme Court’s limits, local jurisdictions expressed the need for additional time to prepare and budget for the change in practice. As a result, the Court delayed implementation of misdemeanor caseload standards to January 2015.

Additionally, in December 2013, the U.S. District Court of the Western District of Washington ruled decisively against the cities of Mount Vernon and Burlington in Wilbur v. City of Mount Vernon, et.al. The Wilbur decision held the cities liable under 42 U.S.C. §1983 for systemic flaws that deprived indigent criminal defendants of their Sixth Amendment right to the assistance of counsel. The decision imposed injunctive relief as well as plaintiffs’ attorneys’ fees in the amount of $2.2 million, in addition to the amounts spent on defending the cities.4 The Wilbur decision has had a substantial impact in Washington, as many cities and counties are using it as a guide for making improvements to public defense. Furthermore, Wilbur appears to be having a national impact, as seen in the recent settlement agreement in Hurrel-Harring v. New York, 15 N.Y.3d 8 (2010). In this case, the New York State Court of Appeals recognized a cognizable claim for state relief based on allegations that New York’s county-based

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1 While the statute did not dictate specific language, it directed local governments to address certain issues and recommended that “The standards endorsed by the Washington state bar association for the provision of public defense services should serve as guidelines to local legislative authorities in adopting standards.”
3 All attorneys appointed to represent indigent defendants are required by court rule to file quarterly certifications affirming their compliance with the Supreme Court Standards, including adherence to caseload limits. An example certification form is found in Appendix H.
4 See Appendix F for a description of the Wilbur decision.
public defense system was inadequate to ensure the constitutional right to counsel, and the state recently agreed to pay more than $3.5 million to improve defense in five of the state’s 62 counties.

In response to these developments, Washington cities and counties are now carefully evaluating their public defense delivery systems, and planning for changes to better align their programs with the Standards and the Wilbur decision. Such changes in most jurisdictions will have budgetary impacts.

The request to form this workgroup followed the failure of legislation (SB 6249, HB 2497) that would have financed some of the projected costs for adhering to caseload standards by increasing legal financial obligations imposed on defendants. On March 13, 2014 the Washington House Judiciary Committee Chair and Ranking Member requested that the Washington State Office of Public Defense (OPD) convene an interim workgroup to examine the cost of misdemeanor public defense in Washington’s courts of limited jurisdiction. (See Appendix A.) The small workgroup, composed of stakeholders of various interest groups, was charged with the following:

1. Examine the cost of misdemeanor public defense in Washington’s courts of limited jurisdiction.
2. Create an inventory of current public defense costs in the misdemeanor courts, and revenue generated by these courts.
3. Address potential impacts and additional costs associated with implementing the Supreme Court Standards.
4. Address best practices for alternative case resolution that may mitigate costs.
5. To the extent practicable, provide an individualized analysis for each misdemeanor court in the state.
### The Misdemeanor Public Defense Costs Workgroup

The Judiciary Committee asked OPD to convene a “small core workgroup consisting of at least two representatives each of county and city associations, misdemeanor judges, public defenders, and prosecutors.” The professional associations representing each stakeholder group nominated the following representatives to serve on the workgroup.

<table>
<thead>
<tr>
<th>Member Name</th>
<th>Appointed By</th>
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<tbody>
<tr>
<td>The Honorable Sam Meyer, Thurston County District Court</td>
<td>District and Municipal Court Judges Association</td>
</tr>
<tr>
<td>The Honorable Rebecca Robertson, Federal Way Municipal Court</td>
<td>District and Municipal Court Judges Association</td>
</tr>
<tr>
<td>Joanne Moore, Director, OPD</td>
<td>Office of Public Defense Advisory Committee</td>
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<tr>
<td>Helen Anderson, Professor, UW School of Law</td>
<td>Office of Public Defense Advisory Committee</td>
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<tr>
<td>Candice Bock, Government Relations Advocate</td>
<td>Association of Washington Cities</td>
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<tr>
<td>Garmon Newsom II, Senior Assistant City Attorney, City of Renton</td>
<td>Association of Washington Cities</td>
</tr>
<tr>
<td>Arthur “Pat” Fitzpatrick, Deputy City Attorney, City of Kent</td>
<td>Association of Washington Cities</td>
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<tr>
<td>Tami Perdue, Chief Prosecuting Attorney, City of Kent</td>
<td>Association of Washington Cities</td>
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<tr>
<td>Kathy Knox, Director of the City of Spokane Public Defender</td>
<td>Washington Defender Association</td>
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<td>Daniel McGreevy, Contract Public Defender, City of Bellingham</td>
<td>Washington Defender Association</td>
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<tr>
<td>Brian Enslow, Senior Policy Director</td>
<td>Washington State Association of Counties</td>
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<td>Greg Banks, Island County Prosecuting Attorney</td>
<td>Washington Association of Prosecuting Attorneys</td>
</tr>
<tr>
<td>Denis Tracy, Whitman County Prosecuting Attorney</td>
<td>Washington Association of Prosecuting Attorneys</td>
</tr>
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The group met in person five times and one time telephonically. The early meetings were co-chaired by Joanne Moore and Pat Fitzpatrick. The latter meetings were co-chaired by Joanne Moore and Candice Bock. OPD employees provided staff support to the workgroup.

II. Data Collection

Lack of Pre-Existing Statewide Data on Public Defense Misdemeanor Cases and Costs: In Washington State all criminal and juvenile offender public defense services are coordinated and funded at the local level. Municipalities are responsible for ensuring public defense representation in the city-level prosecution of misdemeanor offenses, and counties oversee public defense for county-level prosecution of felonies, misdemeanors and juvenile offender cases. Because of the decentralized nature of public defense, there is no central repository of complete public defense data. While some information is available from OPD through its public defense improvement program established by RCW 10.101.050-080, it represents only a small segment of the state’s municipalities. In addition, the Judicial Information System (JIS), which serves as the case management system for courts statewide, does not identify whether cases have public defense representation.

Survey Planning and Design: The workgroup determined that the best way to assemble information on statewide public defense costs was by sending out a web-based survey. It was anticipated that not all jurisdictions would respond, but that the information gathered would become the building blocks from which to identify statewide trends. Workgroup members recommended that survey respondents have the option of answering anonymously due to concerns with the recent Wilbur litigation. The survey tool allowed staff to identify whether a particular jurisdiction had responded, but intentionally did not tie responses to individual responders, unless affirmatively authorized by the jurisdiction.

Over the course of two meetings the workgroup discussed, reviewed, and agreed upon the questions for the survey. (See Appendix D for the version sent to city administrators.) The questions in the survey were designed to gather data on public defense costs, case assignments, anticipated financial impact of the mandatory caseload limits, and included some questions on local practices. The survey was not intended to be an evaluative tool for measuring the quality or effectiveness of local public defense services. Web links to the city survey were emailed to city managers and mayors. Links to the county survey were emailed to each county’s designated staff responsible for overseeing public defense services or contracts. After responses were received, AWC and OPD staff followed up with additional jurisdictions that had not responded to the survey or that had responded with partial information. In result, responses from 74 cities and 24 counties provided financial information for purposes of evaluating the anticipated financial impact of the forthcoming misdemeanor caseload limits.
Demographic Profile of City Survey Responders: A wide variety of cities responded to the survey. One survey question requested responders to categorize themselves as urban, suburban, or rural. Fifty-eight cities responded to the question, and as illustrated in Table 1, 43% identified themselves as suburban, 20% identified as urban, and 36% identified as rural.

Seventy-three city responders identified their population size by the range presented in Table 2. To determine whether the survey responders were representative of cities statewide based on population size, their population sizes were compared against population data maintained by the Washington State Office of Financial Management (OFM). To further evaluate the representative quality of the responding cities, OPD staff consulted the Caseloads Reports maintained by the Administrative Office of the Courts (AOC), which reported 186 municipalities had criminal filings in 2013. This allowed the population of cities in the survey to be compared with the population of cities statewide that had criminal filings in 2013.

Table 2 shows the percentage of all Washington cities in each population range, compared with the percentage of city survey responders in each population range. Overall, it appears that the survey responders tend to represent Washington cities based on population size. The one grouping for which the survey appears to have a markedly lower representation is the city population range of 0 – 15,000. One possible explanation for the lower response rate from these cities is that they utilize a relatively small amount of public defense services, and therefore were less likely to respond to the survey. However, such assumption is not intended to undervalue the financial impact smaller cities may bear with the 2015 implementation of misdemeanor public defense attorney caseload limits.

Forty-two city survey responders identified the total number of misdemeanors filed in
their courts in 2013. These answers were grouped into ranges, and the percentage of responders in each range was compared with statewide data on municipal courts from the AOC Caseloads Reports. As it did with population, this comparison was made to determine whether the survey results fairly represented jurisdictions based on the quantity of misdemeanor filings. Table 3 shows results similar to the population comparison. The survey responders are underrepresented in the category of 400 or fewer misdemeanor filings per year. However, for the other identified groupings, the survey responders appear to be similar.

Some misdemeanor courts appoint public defense attorneys to a small percentage of defendants, while others appoint public defense attorneys in the majority of all misdemeanor criminal filings. Survey responders were asked to report the total number of misdemeanor cases filed in 2013, and the number of cases that public defense attorneys were appointed to. These results provide a description of the indigency rates of jurisdictions responding to the survey. The data collected cannot be compared to statewide averages, because data on public defense appointments are not available through the courts’ case management system. As shown in Table 4, a fairly even number of cities responding to the survey report public defense appointment rates in all ranges from 30% to 90%. Only two of the cities responding to the survey had public defense appointment rates of less than 20%. The average indigency rate for all cities came to 61%.

Demographic Profile of County Survey Responders: Twenty-four of Washington’s thirty-nine counties responded to the misdemeanor costs survey. Some county responders chose to remain anonymous. As seen in Table 5 the survey responders fairly represented the counties statewide by population size, though counties with smaller populations are somewhat underrepresented.

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5 For more information on trial courts’ application of indigency screening laws, see OPD’s 2014 report, Determining and Verifying Indigency for Public Defense, found at: www.opd.wa.gov/documents/0185-2014_Determining_Indigency.pdf
6 RCW 10.101.010 and 020 define “indigent” and establish procedures and criteria to be used in determining whether a person qualifies for a public defense attorney.
Similar to cities, the counties that responded to the survey were grouped based on the number of misdemeanor criminal filings in district courts. The percentage of each grouping among survey responders was compared with the counties statewide to determine whether the responding counties were representative of counties statewide. All district courts with 4,000 or more misdemeanor filings in 2013 participated in the survey.

The average public defense appointment rate appears to be lower in county survey responders than city survey responders. As seen in Table 7 the majority of counties responding to the survey had public defense appointment rates in the area of 40% to 60%. Only one county reported that public defense attorneys were appointed in 90% to 100% of misdemeanor cases in 2013.

**Public Defense Delivery Systems**: Cities and counties, which are primarily responsible for administering and funding trial level criminal public defense services in Washington, use a variety of attorney employment models. Among city survey responders and as illustrated in Table 8, most cities (78%) contract with individual attorneys, firms, and/or non-profit organizations for attorneys to deliver public defense services. Seventeen percent of survey responders indicated that they contract with another city or county to provide public defense services. Not identified in this group, however, is whether the contracted city/county has an in-house public defense agency, or contracts with attorneys and firms. Only two cities indicated that they do not maintain contracts, and instead assign public defense cases to attorneys on a local “list.” One responding city has a staffed public defender office, and one city maintains an hourly contract with

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Table 6

**Counts Grouped by Misdemeanor Filings 2013**

<table>
<thead>
<tr>
<th>Number of Counties</th>
<th>Survey Responders (n=22)</th>
<th>Statewide (n=39)</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 - 400</td>
<td></td>
<td></td>
</tr>
<tr>
<td>400 - 2000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2000 - 4000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4000 Plus</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 7

**2013 Public Defense Appointment Rate of County Survey Responders**

<table>
<thead>
<tr>
<th>% of Misdemeanor Cases with Public Defense Appointments</th>
</tr>
</thead>
<tbody>
<tr>
<td>20% - 30%</td>
</tr>
<tr>
<td>30% - 40%</td>
</tr>
<tr>
<td>40% - 50%</td>
</tr>
<tr>
<td>50% - 60%</td>
</tr>
<tr>
<td>60% - 70%</td>
</tr>
<tr>
<td>70% - 80%</td>
</tr>
<tr>
<td>80% - 90%</td>
</tr>
<tr>
<td>90% - 100%</td>
</tr>
</tbody>
</table>

Table 8

**City Public Defense Service Models**

- Contract with another city or county, 12
- Attorneys appointed from a list, 2
- Staffed public defender office, 1
- Hourly contract with non-profit agency, 57
a nonprofit agency. These findings are illustrated in Table 8.

The breakdown of public defense service models is different in counties, as seen in Table 9. Thirteen counties have county government public defense agencies. These agencies most commonly consist of attorneys and other staff—supervisors, investigators, social workers, paralegals, administrative assistants, etc. In addition, they typically contract with private attorneys for conflict and overflow cases. Four counties contract with nonprofit public defense offices which, similar to government public defense agencies, handle the majority of public defense cases. Two counties employ coordinators to specialize in public defense and oversee contract attorney work. The remaining 20 counties contract with attorneys for public defense services or appoint attorneys as needed from a panel list.

Table 9  County Public Defense Service Models

<table>
<thead>
<tr>
<th>County government public defense agency</th>
<th>Contract with nonprofit public defense office</th>
<th>Public Defense Coordinator</th>
<th>Contracts or List Appointments</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### III. Impacts Associated with Standards

The Supreme Court Standards for Indigent Defense limit full-time public defense attorneys’ caseloads to 400 misdemeanors per year or 300 misdemeanors per year in jurisdictions that adopt a numerical case-weighting system. Currently many public defense attorneys’ caseloads fall under this limit, while many do not. Moreover, in the Wilbur decision Judge Lasnick identified a list of local regulatory practices that Mount Vernon and Burlington should put into in place to ensure defendants’ right to counsel. These practices include supervisory oversight, detailed data reporting, and active use of investigators and expert witnesses. While some jurisdictions have already built these components into their public defense systems, many have not.

The city and county surveys asked responders to identify whether the new misdemeanor public defense attorney caseload limits will impact local budgets. Where responders indicated that there would be a fiscal impact, they were invited to provide an explanation. As illustrated in Table 10 the majority of cities
indicated that caseload limits will likely create an adverse financial impact. Forty-four cities (59.5%) answered that there would be an adverse financial impact, eighteen cities (24.3%) reported that there would not, and twelve cities (15.2%) were unsure. A smaller portion of counties anticipated an adverse financial impact. Eleven counties (45.8%) answered there would be an impact, 11 counties answered that there would not, and two counties (8.3%) were unsure.

### Table 10

<table>
<thead>
<tr>
<th>Cities: Whether the Caseload Limits will Have an Adverse Financial Impact (n=74)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
</tr>
<tr>
<td>No</td>
</tr>
<tr>
<td>Maybe</td>
</tr>
</tbody>
</table>

### Table 11

<table>
<thead>
<tr>
<th>Counties: Whether the Caseload Limits will Have an Adverse Financial Impact (n=24)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
</tr>
<tr>
<td>No</td>
</tr>
<tr>
<td>Maybe</td>
</tr>
</tbody>
</table>

It is important to note that the survey was distributed in June 2014, with follow-up reminders sent in July and August. At that time most cities and counties had not completed their budgets for 2015, and many responders were unsure or vague as to what the anticipated financial impact may be. A survey distributed later in the year may have yielded different results. A survey conducted in future years reasonably could be expected to provide more informed responses.

The data submitted in the survey were grouped and analyzed based on the jurisdictions that anticipated a fiscal impact versus those that did not. The data were evaluated using various factors to identify whether any specific practices could serve as an indicator of whether jurisdictions are more or less likely to face a fiscal impact. However, no such single qualifier appeared.

For example, the groupings were evaluated based on public defense expenditures. In the cities that provide public defense through contracted attorneys and firms, the average amount paid per public defense case in 2013 was $209 (this figure primarily includes attorney compensation, but also includes related costs such as investigators and experts). However, there was no significant difference in per case costs between groups that did and did not identify a fiscal impact due to caseload limits.

The survey asked responders to identify local practices resulting in alternative case resolutions, as opposed to traditional criminal case processing. Such practices include pre-file diversion, regularly reducing certain misdemeanor charges to infractions, and prosecutorial review of police charges prior to filing in court. The survey showed no strong correlation between jurisdictions that engage in such practices, and whether they expect to face financial challenges with the new attorney caseload limits. The majority of the cities that reported engaging in such practices (27 out of 37) also anticipated needing to increase public defense expenses due to the caseload limits.
The public defense appointment rate, however, appears to bear some relationship with whether cities anticipate facing budget increases due to misdemeanor caseload limits. Fifty-eight responding cities provided sufficient information to determine their public defense appointment rate in 2013. Of those cities that anticipated a fiscal impact, their average appointment rate was 62%. Conversely the appointment rate of cities not anticipating a fiscal impact was 50%.

Such a difference, however, did not appear among the county responders. The average public defense appointment rate for misdemeanors filed in county district courts was 60% among counties that identified a fiscal impact, and 57% among counties that anticipated no fiscal impact.

At this point, it is difficult to come to any reasonable conclusions about the characteristics of jurisdictions that anticipate fiscal difficulties due to the upcoming caseload limits, versus those that do not. What the survey illustrates, however, is that jurisdictions of all sizes and economic levels anticipate implementing change of some degree in their public defense delivery systems. A more comprehensive analysis regarding the fiscal impact could likely be accomplished after the caseload limits take effect.

IV. Misdemeanor Public Defense Expenses Prior to Mandatory Caseload Limits

The Cost of Misdemeanor Public Defense for Cities and Counties Prior to Mandatory Caseload Limits:
The survey answers, coupled with other information maintained by OPD, help identify the approximate cost of misdemeanor public defense statewide in 2013. While these figures do not likely reflect the expenses that will be incurred after mandatory misdemeanor caseload limits begin in January 2015, the figures provide a baseline understanding of public defense costs prior to the rule taking effect. Based on the following extrapolation processes, it is estimated that statewide public defense costs for misdemeanors in 2013 was $51,155,452.

Among the cities that answered the survey, their cumulative public defense expenses totaled $19.6 million. The cost per case was determined by dividing this amount by the number of public defense cases these jurisdictions reported in 2013. The average cost per case, however, was largely different among jurisdictions that have or contract with city/county public defense agencies, compared to those that contract with attorneys or firms. The higher cost for city/county public defense agencies, $582 per case, is attributable to the fact that most agencies are at or near the caseload limits, and maintain in-house resources such as supervisors, investigators, social workers, and legal assistants. The average per-case amount spent in cities that do not have or use public defense agencies is $209. Based on this information, the workgroup estimates
that the cumulative amount paid for public defense services in all municipal courts in 2013 was $28,155,452.

Only 19 counties responding to the survey provided information on public defense costs, so staff consulted additional resources to bolster the available data. Each year 38 counties submit applications to OPD for public defense improvement funding available pursuant to RCW 10.101.050. These applications provide data on public defense costs, public defense appointments, and other information. Based on the information submitted by applying counties, it is estimated that statewide county misdemeanor public defense expenses in 2013 were approximately $23,000,000.

**State Funding for Public Defense:** In 2005 the Washington Legislature passed legislation now codified at RCW 10.101.050-080, which makes state funds available “to counties and cities for the purpose of improving the quality of public defense services.” As specified in RCW 10.101.080, 10% of the appropriated amount is available to cities through a competitive grant process, and the remainder is allocated to counties using the formula in RCW 10.101.070 which accounts for population size and felony filings. At current funding levels, this amounts to approximately $600,000 for cities and $5,400,000 for counties. The county portion is used for multiple case types, not just misdemeanors. With the exception of these state funds, the cost of trial-level public defense in criminal cases is borne by the cities and counties.

The city portion of state grant funding currently covers only 2.1% of municipal court public defense costs statewide. Counties provide public defense representation in many case types – misdemeanors, felonies, juvenile offender cases, civil commitments, etc. Based on information collected by OPD, the estimated total that counties pay for all public defense costs is $123,941,336. State funding provided through Chapter 10.101 RCW accounts for 4.4% of those expenses. The overall estimated cost of public defense in both municipal and county courts is $152,096,788. State funding provided through Chapter 10.101 RCW covers 3.9% of that amount.

**The Cost of Delivering Public Defense Services:**

RCW 10.101.030 enumerates the various topics local public defense standards must address, including administrative expenses and support services. Most cities and counties contract with attorneys and law firms for public defense services in misdemeanor cases. While some of these firms dedicate their practice exclusively to public defense, many combine public defense and privately retained work. In addition, many attorneys and firms contract with multiple jurisdictions for public defense work. The compensation received from these contracts, or combination of contracts, provide the funds for overhead expenses as well as attorneys' take-home pay.

A survey administered by OPD shows that the average business expenses (not including take-home wages) for public defense attorneys in 2013 was $43,577.

In 2013, prior to mandatory misdemeanor caseload limits, state funds available through RCW 10.101 paid 2.1% of all municipal public defense expenses, and 4.4% of all county public defense expenses.
OPD surveyed contract public defense attorneys statewide to better ascertain the current level of overhead expenses. (See survey in Appendix E.) Forty-one law offices located in 19 counties responded to the survey and provided sufficient information for cost analysis. While 32 responders were solo practitioners, others were firms ranging from two to 10 attorneys.

The survey asked the contract attorneys to report their costs in four categories: malpractice insurance, non-attorney staff expenses, attorney benefits, and all other expenses. These figures do not include attorneys’ take-home pay or other public defense related costs paid by a jurisdiction such as investigators, experts, and interpreters. As outlined in Table 12, below, the survey found average annual overhead costs per attorney of $43,137.

Table 12  **Survey Responses on Business Expenses (Not Including Wages) Associated with Public Defense**

<table>
<thead>
<tr>
<th>Description</th>
<th>Cost Range (Per Attorney)</th>
<th>Mean (Per Attorney)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Malpractice Insurance</strong></td>
<td>$400 - $5000</td>
<td>$1,656</td>
</tr>
<tr>
<td><strong>Staff Expenses</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Compensation</td>
<td>$0 - $63,000</td>
<td>$9,893</td>
</tr>
<tr>
<td>• Benefits (insurance &amp; retirement)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• L &amp; I premiums</td>
<td>$0 - $23,333</td>
<td>$5,016</td>
</tr>
<tr>
<td>• Federal taxes</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Attorney Benefits</strong></td>
<td>$3,600 - $70,000</td>
<td>$26,572</td>
</tr>
<tr>
<td>• Medical Insurance</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Dental Insurance</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Retirement</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>All Other Expenses</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Office rent</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Utilities</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Telephone &amp; Internet</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Electronic equipment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Other equipment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Office supplies</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Attorney self-employment taxes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Attorney L &amp; I premiums</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Corporation and partnership taxes</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Bar dues</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Training</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Mileage</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Total Business Expenses</strong></td>
<td>$6,400 - $99,600</td>
<td>$43,137</td>
</tr>
</tbody>
</table>
V. Revenue

The House Judiciary Committee requested that the workgroup provide an inventory of public defense costs in the misdemeanor courts, and revenue generated by these courts. The Administrative Office of the Courts (AOC) maintains data on statewide criminal filings. According to AOC’s Caseloads of the Courts of Washington (Caseloads Report) for 2013, all district and municipal courts listed in Appendix B reported misdemeanor criminal filings in 2013. The table in Appendix B includes four categories of data for each jurisdiction with a municipal or district Court. The chart provides the number of misdemeanors filed, the local revenue generated by the city or county from court fines and penalties, overall court expenses, and misdemeanor public defense costs.

VI. Alternative Case Resolution

The House Judiciary Committee asked that the workgroup “address best practices for alternative case resolution that may mitigate costs.” The following section serves to illustrate various alternative case resolution practices currently used in Washington’s trial courts. However, the listed alternative case resolution practices should not necessarily be considered best practices, as the workgroup did not have sufficient resources to make this determination.

Cities and counties are mitigating the increased costs associated with caseload limits by implementing practices that reduce public defense case assignments. The conventional manner of processing criminal cases requires significant investment by attorneys, judges, court staff, law enforcement, corrections and many others. Yet many misdemeanors charged each year arise from non-violent offenses and involve defendants with little or no criminal history. To protect public safety yet better economize scarce public resources, many jurisdictions are utilizing diversion programs and practices, and using prosecutorial review of police charges. Appendix C shows a listing of city and county survey responders that reported using alternative case resolution practices.

7 The AOC also maintains statewide data on court revenue. However, this source was not used for this report because the AOC local revenue totals reflect the combined total of the local revenue and the portion paid to the state.

8 Deferred prosecutions, regulated by RCW 10.05.010 are not included in this section because of (1) the narrow scope of cases to which they apply; and (2) the fact that the requirements call for active oversight by criminal defense attorneys, and therefore generally have little impact on the reduction of caseloads.

Therapeutic court cases share many characteristics with diversion programs. However, they are not categorized as diversion programs in this report because they involve intensive court system oversight and consume a large degree of court resources, while diversion program activities occur largely outside of the court.
Diversion Programs

Courts today are increasingly looking to community-based alternatives to address the root causes of criminality and target defendants whose offenses are better addressed by community intervention than criminal sanction. “A body of developing research suggests that these approaches can reduce crime, promote better victim services, and enhance public trust in the justice system.”9 A diversion program survey conducted by the National Association of Pretrial Services Agencies found that while few programs track recidivism data, of those that do, recidivism rates were quite low: the median recidivism rates for participants for new felonies was 5%; for new misdemeanors was 12%; and for serious traffic offenses was 1%.10

For purposes of analyzing diversion in the context of public defense representation and court resources, it is important to distinguish between “pre-file” and “post-file” diversion programs. In pre-file diversion programs eligible candidates are invited to participate before charges are filed in court. Upon successful completion of program requirements, no criminal charges are filed in court. This provides a unique opportunity for persons with little or no criminal history to keep a clean record. Because participation arises at this preliminary stage before charges are filed, which is before the right to counsel attaches, court expenses are avoided and jurisdictions are not required to provide public defense representation.

In post-file diversion defendants are invited to participate after charges have been filed, and successful completion results in the dismissal or reduction of charges. Most courts statewide offer some type of post-file court alternative, whether by formal program, or stipulated orders of continuance. Because post-file court alternative activities occur after charges have been filed in court, indigent defendants are entitled to public defense representation throughout the duration of their participation. Therefore, even if these cases require less attorney time and fewer resources, they must be incorporated into a public defense attorney’s caseload. In jurisdictions that opt to use a case weighting system for calculating caseloads, these cases may qualify for lower case weights.11

Many cities and counties utilize their probation departments to administer post-file court alternative programs. Some, however, also use them for pre-file diversion thereby reducing the number of cases filed in court. The City of Bellevue’s probation department oversees a pre-file diversion program for

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10 Id. at 16.
11 Standard 3.6 of the Supreme Court Standards for Indigent Defense states “Representation of a person in a court of limited jurisdiction on a charge which, as a matter of regular practice in the court where the case is pending, can be and is resolved at an early stage of the proceeding by a diversion, a reduction to an infraction, stipulation on continuance, or other alternative noncriminal disposition that does not involve a finding of guilt... should be weighted as at least 1/3 of a case.”
first-time offenders arrested for shoplifting and referred by the prosecutor. Upon successful program completion, the case is not prosecuted. Similarly, the City of Yakima contracts with Yakima County for probation services, and in May 2013 they implemented a pre-file diversion program for qualifying participants. A Yakima City Prosecutor screens charges for potential diversion candidates, who typically are persons with no criminal background facing non-violent charges such as shoplifting, driving offenses, or minor in possession. They are sent a letter inviting them to participate in diversion in lieu of filing their charges in court. The participation fee is less than $50.

At least two private agencies partner with county prosecutors to deliver formal diversion services, and the fees are paid by program participants. Friendship Diversion is a 501(c)(3) non-profit organization which has provided pre-file and post-file diversion services to Washington courts since the late 1960s. Between 1998 and 2012, Friendship Diversion collected $3,966,988 in victim restitution, and $534,737 in court fees. Its rate of program completion demonstrates that a substantial number of cases are being handled without conventional court processing. Table 12 shows the number of successfully completed pre-file and post-file formal diversion program participants in 2011 and 2012.

Table 12  **Friendship Diversion Successful Program Completions 2011 - 2012**

<table>
<thead>
<tr>
<th>Diversion Type</th>
<th>Jurisdictions</th>
<th>Cases Completed in 2011 and 2012</th>
<th>Successful Completion Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pre-File</td>
<td>Thurston, Jefferson, Grant, Clallam</td>
<td>572 Misdemeanors</td>
<td>70.3%</td>
</tr>
<tr>
<td></td>
<td>Thurston, Clallam, Jefferson</td>
<td>1,534 Misdemeanors and Felonies</td>
<td>78.4%</td>
</tr>
</tbody>
</table>

BounceBack, another non-profit monitoring and counseling firm, has provided pre-file diversion services to Washington prosecutors since 2001 for persons accused of unlawful issuance of a bank check, which is categorized as a felony or gross misdemeanor, depending on the check amount. BounceBack works directly with the check writer to obtain restitution for the full amount of the check and provide financial training. Successful completion of the program commonly results in charges not being filed. According to the Spokane County Prosecuting Attorney’s Office, in 2011 merchant restitution through BounceBack was $47,462.

A drawback to privately administered diversion programs is that the clients must pay the program participation fees. These fees vary depending on location and Friendship Diversion’s pre-file diversion fees for misdemeanors range from $300 to $650, although payment on a sliding-fee scale may be available to qualifying participants. In light of other outstanding court fees, fines, and restitution, this additional expense creates a barrier for public defense eligible indigent clients.

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**Prosecutorial Review of Charges**

Many jurisdictions are transitioning from the practice of law enforcement officers directly filing misdemeanor charges in court, to instead referring the matters to prosecutors for their review. The prosecutor determines whether there is sufficient probable cause for the matter to be filed in court, what charges are appropriate, whether the matter would be better handled through a pre-file diversion or other program, and/or whether the matter should not be charged in the interests of justice. Prosecutorial review of charges takes advantage of prosecutors’ legal expertise, along with their discretionary authority, and efficiently utilizes the resources triggered by filing cases in court.

Prosecutorial review of charges requires additional time of prosecuting attorneys. If prosecutorial review results in fewer criminal filings, this increased government cost can likely be offset by the reduced costs accompanying reduced court and public defense caseloads. For example, in mid-2013 the City of Yakima implemented prosecutorial review of criminal charges. Table 13 shows a comparison of Yakima Municipal Court’s criminal filings for January through June of the past three years. The number of criminal filings has dropped from 2,719 to 1,456. Many of the screened-out filings were handled as pre-filing diversions instead of criminal cases.

**Regular Reduction of Certain Misdemeanors to Infractions**

Another common practice that impacts public defense workloads is the routine reduction of certain qualifying misdemeanors to infractions prior to appointment of a public defender. Most jurisdictions, under qualifying circumstances, commonly reduce certain misdemeanors to infractions early in the case’s process. This occurs most commonly with Driving with License Suspended in the 3rd Degree for defendants with limited criminal or driving history. The practices vary from jurisdiction to jurisdiction. When these regular reductions occur after public defense representation has begun, quick case resolutions become part of a public defense attorney’s caseload, and must be counted. When they occur earlier in the process prior to the public defense appointment, however, they need not be counted. Many jurisdictions offer an “attorney of the day” where a public defense attorney is available on an arraignment calendar to provide general explanations of rights and options to persons facing infraction offers.

The described practices for alternative case resolution result in fewer cases being filed in court, and correspondingly, fewer public defense appointments. However, apart from the reduction in resources,

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13 Caseload information obtained from the AOC Caseloads Reports.
they are designed to more quickly and effectively address the alleged criminal behavior, particularly with persons with little or no criminal history, and concentrate criminal justice system resources in appropriate cases where public safety is a concern.
V. Findings

1. The data collected for this survey reflected costs during 2013, prior to implementation of mandatory misdemeanor caseload limits, and prior to the Wilbur decision. Substantial local improvements to public defense funding and administration have occurred in 2014 and are expected to continue in 2015.

2. The state needs a comprehensive data collection mechanism to track public defense appointments and trends.

3. The fact that the workgroup had difficulty discerning significant trends is indicative of the diversity of the misdemeanor court system.

4. At the time they were asked to respond to the workgroup’s survey, many cities and counties had not yet reached conclusions on how to address the 2015 misdemeanor caseload limits.

5. In 2013 state funding provided through Chapter 10.101 RCW accounted for 2.1% of statewide municipal public defense expenses, and 4.4% of county public defense expenses. This was the only state funding provided for trial level criminal public defense.

6. Cities and counties are increasingly using a variety of case resolution mechanisms, which provide varying levels of cost savings.

7. Adequately resourced full-service courts require significant general fund investment.

8. The Supreme Court’s Standards for Indigent Defense and emerging litigation have caused local governments to invest greater resources in public defense, but resources are limited.

9. The majority of jurisdictions contract with attorneys and firms to represent indigent misdemeanor defendants. Furthermore, the majority of indigent misdemeanor defendants statewide are represented by private attorneys that contract with cities and counties to provide public defense services.

10. Attorneys that contract for public defense services have overhead expenses which should be accounted for in their compensation. Attorneys responding to a survey demonstrated a range of non-salary business expenses from $6,400 - $99,600, depending on location, staff, and rent. Their business expenses average in 2013 was $43,577.

11. The survey of city and county administrators measured funding for public defense and did not evaluate the quality of representation. The results show that local funding levels differ. In 2013, prior to implementation of caseload limits, per case expenses (which include attorney compensation, investigators, and other related expenses) ranged from $27.37 per case to $1,078. The average was $235 per case.
V. **Recommendations**

1. Public defense appointments should be tracked uniformly statewide and incorporated into the design of the Judicial Information System and its successors.

2. Public defense costs should be tracked uniformly statewide using the BARS codes in the Local Government Financial Reporting System (LGFRS).

3. Because the workgroup lacked sufficient time and resources to effectively research best practices for alternative case resolutions that may mitigate public defense costs, this issue should be further studied.

4. The effects of the Supreme Court’s caseload limits on public defense should continue to be monitored for purposes of evaluating the required resources, and the impact on the quality of public defense services.

5. Given the existing low level of state funding and the increased costs identified to date, the State should increase the funding levels to cities and counties for public defense.
Appendices

Appendix A  House Judiciary Committee Letter Requesting Workgroup
Appendix B  2013 Filings, Revenue, Court Costs, and Misdemeanor Public Defense Costs by Court of Limited Jurisdiction
Appendix C  Alternative Case Resolution Practices among Survey Respondents
Appendix D  City Misdemeanor Public Defense Costs Survey
Appendix E  Public Defense Attorney Non-Wage Business Expenses Survey
Appendix F  Wilbur v. City of Mount Vernon Summary
Appendix G  Washington Supreme Court Standards for Indigent Defense
Appendix H  Public Defense Attorney Certification Form
Appendix A – House Judiciary Committee Letter Requesting Workgroup

March 13, 2014

Joanne Moore, Director
Washington State Office of Public Defense
711 Capitol Way S., Ste. 106
P.O. Box 40957
Olympia, WA 98504-0957

RE: House Judiciary Committee Request for Misdemeanor Public Defense Review

Dear Ms. Moore:

As you know, many Washington cities and counties believe they face significant new costs for public defense services, particularly with the January 2015 implementation of misdemeanor attorney caseload standards required by the Supreme Court’s Standards for Indigent Defense. This past legislative session the House Judiciary Committee heard compelling testimony that local governments need new revenue authority to adequately fund public defense in the misdemeanor courts. We also heard examples of some intriguing local reforms that are expected to mitigate impacts on public defense.

The Judiciary Committee would like to be able to consider a more comprehensive statewide analysis of these issues in the 2015 legislative session. To that end, we respectfully request that the Office of Public Defense (OPD) convene an interim work group to examine the cost of misdemeanor public defense in Washington’s courts of limited jurisdiction. Recognizing the short time frame involved, we recommend a relatively small core work group consisting of at least two representatives each of county and city associations, misdemeanor judges, public defenders, and prosecutors. We expect there are others who will be very interested in the topic and hope you will structure your discussions in a way that other voices will be included in the dialogue.

In addition to an inventory of current public defense costs in the misdemeanor courts and revenue generated by these courts, we would like your analysis to also address potential impacts associated with implementing the Standards for Indigent Defense, including additional costs associated with misdemeanor attorney caseload standards as well as best practices for alternative case resolution that may mitigate costs. To the extent practicable, it would be helpful to see an individualized analysis for each misdemeanor court in the state.
We welcome periodic updates on your progress and look forward to receiving a report of your findings in time for our fall Committee Assembly meeting, which is not yet scheduled but typically occurs in late November or early December.

Best regards,

Laurie Jinkins, Chair,
House Judiciary Committee

Jay Roehe, Ranking Member
House Judiciary Committee

cc: Association of Washington Cities
    Washington State Association of Counties
    District and Municipal Judges Association
    Washington Association of Prosecuting Attorneys
    Washington Defender Association
Appendix B - 2013 Filings, Revenue, Court Costs, and Misdemeanor Public Defense Costs by Court of Limited Jurisdiction

The following Table provides four categories of information:

1. **Criminal Cases Filed**: This first column reflects the total number of misdemeanor criminal cases filed in each court in 2013. The statewide Judicial Information System (JIS) used by court staff to track case information does not distinguish public defense cases, which complicates efforts to determine how many of these cases were assigned to public defense counsel. However, data from the city and county surveys show that an average of 60% of misdemeanor defendants qualify for public defense services. Sixty percent of all criminal filings listed in Appendix B come to 214,487 cases that were handled by public defense attorneys in 2013.

2. **Revenue Information from Local Government Financial Reporting System (LGFRS)**: The LGFRS is maintained by the Washington State Auditor’s Office. Local governments submit annual financial data to the State Auditor, and categorize expenses based on Budgeting, Accounting and Reporting System (BARS) Codes. The amounts listed in the table in Appendix B are revenue from court fines and penalties. This amount is the local share and does not include the portions remitted to the State.

3. **Court Expenses**: To gain a more complete picture for each listed city and county, the expenses associated with operating a court were included. Court expenses include the expenses for court services, and do not include the cost of public defense or prosecution. The figures included in this chart are taken from the LGFRS.

4. **Public Defense Costs**: Two sources provide insight to the cost of delivering public defense services. Because each source had data from a limited number of jurisdictions, both were included in the table in Appendix B.

   - **LGFRS**: When cities and counties report costs to LGFRS, there is a designated BARS Code for Indigent Defense, with subcategories for Felony, Misdemeanor, Juvenile, and Civil Commitments. However, not all jurisdictions use the BARS codes uniformly. The table includes misdemeanor public defense costs as reported to LGFRS.

   - **Information Submitted to OPD**: OPD has two sources for information from some jurisdictions on misdemeanor public defense costs. First, the survey administered to local jurisdictions for purposes of informing this workgroup included a question on the amount spent on misdemeanor indigent defense in 2013. Additionally, many cities and most counties applied to OPD for public defense improvement funds under Chapter 10.101 RCW, and the application asks for the amount spent in 2013 on indigent defense by case type. The far right column of Appendix B includes the cost information submitted to OPD by either of these two methods.
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### Appendix C – Alternative Case Resolution Practices among Survey Responders

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<th>Pre-File Diversion</th>
<th>Reduce to Infractions before Public Defense Appointment</th>
<th>Prosecutorial Review of Charges Before Filing in Court</th>
<th>Other</th>
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Appendix D – City Misdemeanor Public Defense Costs Survey

Municipal Public Defense Survey for the House Judiciary Committee

Thank you for taking this survey

Beginning in 2015, the Standards for Indigent Defense establish that public defense attorneys should limit their misdemeanor caseloads to 400 cases per year, or 300 “case weights” per year. The Washington House Judiciary Committee has requested the Office of Public Defense (OPD) to convene a work group to research the cost of public defense and how the new caseload standards may financially impact courts of limited jurisdiction.

The Work Group (consisting of judges, prosecutors, public defense attorneys, city representatives and county representatives) has designed the following survey to gather public defense data from every court of limited jurisdiction. Your answers to this survey will be instrumental in reaching a more comprehensive understanding of misdemeanor public defense costs. Unless you chose to provide identifying information, your responses to this survey will be anonymous.

If you do not have all of the information available to answer the questions on this survey, you may save the survey and return to it at a later time. If you cannot answer all the questions, please still provide us as much information as you have available. All answers will be helpful.

Please complete this survey by JULY 18. If you have questions about the survey, or need additional time to complete it, please contact OPD staff: Katrin.Johnson@opd.wa.gov, 360-586-3164 ext. 108; or Kathy.Kunyama@opd.wa.gov, 360-586-3164 ext. 114.

General Information

1. City (optional):

2. City Population:
   - □ 0 - 5,000
   - □ 5,000 - 15,000
   - □ 15,000 - 30,000
   - □ 30,000 - 50,000
   - □ 50,000 - 75,000
   - □ 75,000 - 120,000
   - □ 125,000 - 200,000
   - □ 200,000 or higher

3. Would you categorize your city as:
   - □ Rural
   - □ Suburban
   - □ Urban
Municipal Public Defense Survey for the House Judiciary Committee

4. Name, email & phone number of person(s) to contact for further clarification on survey answers (optional):

5. How are public defense services arranged in your city? (Check all that apply.)
   - Contract with attorneys, law firm(s), and/or non-profit agency
   - Contract with another city or county
   - The court appoints from a list of private attorneys
   - Other (please specify)

Public Defense Expenses

6. What was the approximate total cost for PUBLIC DEFENSE SERVICES in your city in 2013? (This would include, for example, attorney compensation, investigators, experts, etc.)

7. The Supreme Court Standards for Indigent Defense state that a full-time caseload consists of being appointed to, in one calendar year:
   - 150 felonies or
   - 400 misdemeanors (or 300 misdemeanor case weights) or
   - 250 juvenile offender cases or
   - 250 civil comment cases in a calendar year,
   - or having 80 open dependency cases.

   If any attorney has a mixture of case types, these standards should be applied proportionately to determine a full caseload.

   Do you estimate that there might be any changes in your jurisdiction's public defense expenses in 2015 as a result of attorneys adhering to the caseload limits?
   - Yes
   - Maybe
   - No
## Estimated Changes in Expenses

8. What changes in expenses do you estimate, and why? (We understand that most jurisdictions are still calculating these figures. Please provide your best estimate.)

## Filings and Public Defense Representation

9. Total number of new misdemeanor cases filed in 2013:

10. Approximate number of new misdemeanor cases assigned to public defense attorneys in 2013:

11. When public defense attorneys are assigned to misdemeanor cases, do they continue representation throughout the client's probationary period as well?

- Yes
- No, representation ends at or shortly after sentencing.
- I don't know.

Other (please specify)

12. In your city, do public defense attorneys appear at preliminary appearance calendars?

- Yes, in-custody only
- Yes, out-of-custody only
- Yes, both in and out-of-custody
- No

Other (please specify)
13. In your city, do public defense attorneys appear at arraignment hearings?

- Yes, in-custody only
- Yes, out-of-custody only
- Yes, both in and out-of-custody
- No
- Other (please specify)

Resolution of Misdemeanor Charges

14. Is your city using, or will it use any of the following practices for resolution of misdemeanor charges? (Check all that apply.)

- Relicensing program before misdemeanor charges are filed in court.
- Relicensing program after misdemeanor charges are filed in court.
- Diversion of certain offenses before charges are filed in court, or before the defendants are screened for public defense representation.
- Diversion or Stipulated Orders of Continuance after the charges have been filed and counsel is appointed.
- Regular reduction of certain misdemeanors to infractions before the defendants are screened for public defense representation.
- Prosecutorial review of charges before filing in court.
- Other (please specify)

15. Do you anticipate a reduction in misdemeanor cases assigned to public defense attorneys in 2014 or 2015?

- Yes
- Maybe
- No

Estimated Reduction
16. How much of a reduction do you estimate? Please describe the changes you expect to see.

### Funding for Public Defense

17. Are there local plans for making changes to public defense funding in 2015?
- Yes
- I'm not sure
- No

### Funding for Public Defense

18. What funding changes are anticipated for public defense in 2015?

### Recruiting/Retaining Services
19. Does your city have any difficulties recruiting and/or retaining public defense services?
   - Yes
   - I'm not sure
   - No
   Other (please specify)

**Recruiting/Retaining Services**

20. What are the reasons for those difficulties in recruiting/retaining public defense services?

21. Is there any other information you would like to share about misdemeanor public defense services in your city and the forthcoming caseload limits?

**Thank You**

Thank you for taking time to participate in this survey. You are welcome to come back to the survey by July 18, 2014, in case you need to modify any answers.

If you have any questions, please contact Kathy.Kuriyama@opd.wa.gov, 360-586-3164 ext. 114; or Katrin.Johnson@opd.wa.gov, 360-586-3164 ext. 108.
Appendix E – Public Defense Attorney
Non-Wage Business Expenses Survey

The Cost of Doing Business as a Contract Public Defense Attorney

The Purpose of this Survey

Recent developments in public defense - namely, the Supreme Court's caseload limits and the Wilbur decision from the U.S. District Court - have prompted many local governments to re-examine their public defense services. One primary area they are trying to address is attorney compensation, which includes wages and overhead expenses.

A workgroup of multiple stakeholders has been convened at the request of the House Judiciary Committee to look into these issues. An important part to this research is knowing how much it costs to run a law office that delivers public defense services.

This anonymous survey is intended specifically for attorneys who contracted for public defense services in 2013. This survey is not intended for attorneys who are employed at County/City public defense agencies. However, private attorneys who contract with such agencies (e.g. conflict cases) are highly encouraged to participate in this survey.

Please take a few minutes to provide your best estimates to these questions. The data collected from this survey will be extremely helpful in explaining to the Legislature and local governments that contract amounts aren’t solely wages.

1. In 2013 were you employed as a staff attorney at a city or county public defense agency?

   (For this question, the term "agency" would also include non-profit public defense agencies such as those in Clallam, King, Snohomish, and Chelan counties.)

   Yes - I was employed as a staff attorney at a county or city agency all year.
   No - I was not employed as a staff attorney at a county or city agency
   I was only employed as a staff attorney at a county or city agency for part of the year.

2. In which county is your law firm located?

   [Input field]
### The Cost of Doing Business as a Contract Public Defense Attorney

3. Approximately how many public defense cases did your firm handle in 2013?

<table>
<thead>
<tr>
<th>Category</th>
<th>Number</th>
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<tbody>
<tr>
<td>Misdemeanors</td>
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<td>Felonies</td>
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<td>Juvenile Offender Cases</td>
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<td>Commitments</td>
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<tr>
<td>Other</td>
<td></td>
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</tbody>
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4. How many FTE attorneys were in your firm in 2013?

("FTE" refers to full-time equivalent. Two attorneys working half-time would equal one FTE.)

5. In 2013, how many FTE attorneys in your firm worked exclusively on public defense?

6. In 2013, approximately how much did your firm gross for public defense work?

7. In 2013, approximately what was your attorneys' total take-home pay for public defense work? (If your firm had more than one attorney, this would be the cumulative amount of all attorneys' take-home pay.)
The Cost of Doing Business as a Contract Public Defense Attorney

8. In 2013, approximately how much did your firm pay in the following categories? These expenses apply to all firm activities, not just public defense.

- Medical and Retirement Benefits for All Attorneys
- Malpractice Insurance for All Attorneys
- Non-Attorney Staff Salaries
- Taxes & Benefits
- All Other Expenses (rent, utilities, phone, equipment, attorney taxes, attorney L & L, business taxes, bar dues, training, travel, etc.)

9. Please type any other comments or information you’d like to share regarding public defense compensation and overhead expenses:

Thank You

Thank you for taking time to complete this survey. If you have any follow-up questions, please contact Katrin.Johnson@opd.wa.gov or Kathy.Kuriyama@opd.wa.gov.

Thank You

Thank you for taking time to answer this survey, but it is specifically intended for attorneys in for-profit private firms that contracted for public defense services.

However, we still appreciate your insight. If you'd like to share other thoughts on public defense costs and compensation, please enter them below.
Appendix F – Wilbur v. City of Mount Vernon Summary

In December of 2013, U.S. District Court Judge Robert Lasnik found that the public defense system of the Skagit County cities of Mount Vernon and Burlington deprived indigent persons who face misdemeanor criminal charges of their fundamental right to assistance of counsel.

Filed in 2011, the class action suit (Wilbur v. City of Mount Vernon) challenged the cities’ public defense system for systematically failing to provide meaningful assistance of counsel as required by the U.S. and Washington constitutions. A two-week trial in the case was held in June 2013, with additional briefing submitted in August.

The suit asserted that:
- **The cities knew the public defense attorneys’ caseloads were excessive for many years.** At the time of filing the suit, the cities knew that part-time public defenders were handling thousands of cases per year.
- **The public defense attorneys failed to reasonably investigate the charges filed against their clients.** During an eight month period in 2012, they utilized an investigator only four times.
- **The public defense attorneys failed to spend sufficient time on their clients’ cases, effectively forcing defendants to accept plea deals.** Prior to the suit, the public defenders routinely spent less than 30 minutes on a case.
- **The cities failed to provide any meaningful oversight of the public defense system.** The cities argued they had no obligation to monitor or supervise the contract system.

Judge Lasnik found that the system was broken to such an extent that “the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned.” In its ruling, the court found that the cities’ public defenders had excessively high caseloads, rarely provided an opportunity for the accused to confer with them in a confidential setting, rarely engaged in investigations or researched possible legal defenses, and overall failed to meaningfully represent their clients. Further, it found that city officials made deliberate choices that directly led to the deprivation of rights and failed to monitor or evaluate the system, turning a blind eye to its obvious problems.

The court concluded that the defense services for indigent clients amounted to little more than a “meet and plead” system. As Judge Lasnik wrote, “The appointment of counsel was, for the most part, little more than a formality, a stepping stone on the way to a case closure or plea bargain having almost nothing to do with the individual indigent defendant.” The court required the cities to hire a supervisor to ensure their defense system complies with constitutional standards, and the court kept jurisdiction over the case for three years while reforms proceed.

The Wilbur decision was cited extensively by the U.S. Department of Justice in a Statement of Interest filed in the recently settled New York State case, Hurrell-Harring v State of New York, 15 N.Y.3d 8 (2010).

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14 The suit was pursued by ACLU-WA staff attorneys, cooperating attorneys of Perkins Coie LLP; of Terrell Marshall Daudt & Willie PLLC; and of The Scott Law Group, PS.
Indigent defendants in five New York counties filed suit alleging a claim similar to the claim in *Wilbur*, that the indigent defense systems in their counties have functioned to deprive them and other similarly situated indigent defendants of constitutionally and statutorily guaranteed representational rights. The case recently settled with the State of New York agreeing to pay over $3.5 million for improvements to the indigent defense systems in those five counties and over $5 million in attorney’s fees. The changes agreed to by the State are similar to those ordered by Judge Lasnik in *Wilbur*.

Judge Lasnik ordered the defendant cities of Mount Vernon and Burlington to enhance their defense services to indigent defendants appearing in the municipal courts. The cities cannot assume the delivery of effective representation of their contracted attorneys. The cities must insure that their courts are meeting minimum standards of legal representation. The court highlighted the following areas as necessary for providing effective representation to indigent defendants:

1. **Access to counsel** – Counsel is provided for all indigent defendants at every stage of the criminal proceeding. Access to counsel includes the provision of resources necessary to investigate and try a case.
   a. Investigative services
   b. Expert funding
2. **Confidentiality** – Private meeting space should be provided at or near courthouse for attorney-client communication. Attorneys must have an office or private meeting space to go over case options with defendant.
3. **Documentation** – Cities must monitor the level of compliance of contract attorneys with the Indigent Defense Standards as well as:
   a. Number of cases assigned to attorney
   b. Number of pretrial motions filed by attorney
   c. Number of cases tried
   d. Qualifications to try cases
   e. Training hours
   f. Time spent with client
4. **Complaint process** – Cities required to develop a procedure and demand contract attorneys to also have a complaint procedure to handle grievances made by defendants.
Appendix G – Washington Supreme Court Standards for Indigent Defense

Preamble

The Washington Supreme Court adopts the following Standards to address certain basic elements of public defense practice related to the effective assistance of counsel. The Certification of Appointed Counsel of Compliance with Standards Required by CrR 3.1/CrRLJ 3.1/JuCR 9.2 references specific “Applicable Standards.” The Court adopts additional Standards beyond those required for certification as guidance for public defense attorneys in addressing issues identified in State v. A.N.J., 168 Wash.2d 91 (2010), including the suitability of contracts that public defense attorneys may negotiate and sign. To the extent that certain Standards may refer to or be interpreted as referring to local governments, the Court recognizes the authority of its Rules is limited to attorneys and the courts. Local courts and clerks are encouraged to develop protocols for procedures for receiving and retaining Certifications.

Standard 1. Compensation

[Reserved.]

Standard 2. Duties and Responsibilities of Counsel

[Reserved.]

Standard 3. Caseload Limits and Types of Cases

Standard 3.1. The contract or other employment agreement shall specify the types of cases for which representation shall be provided and the maximum number of cases which each attorney shall be expected to handle.

Standard 3.1 adopted effective October 1, 2012

Standard 3.2. The caseload of public defense attorneys shall allow each lawyer to give each client the time and effort necessary to ensure effective representation. Neither defender organizations, county offices, contract attorneys, nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation. As used in this Standard, “quality representation” is intended to describe the minimum level of attention, care, and skill that Washington citizens would expect of their state’s criminal justice system.

Standard 3.2 adopted effective October 1, 2012

Standard 3.3. General Considerations. Caseload limits reflect the maximum caseloads for fully supported full-time defense attorneys for cases of average complexity and effort in each case type specified. Caseload limits assume a reasonably even distribution of cases throughout the year.
The increased complexity of practice in many areas will require lower caseload limits. The maximum caseload limit should be adjusted downward when the mix of case assignments is weighted toward offenses or case types that demand more investigation, legal research and writing, use of experts, use of social workers, or other expenditures of time and resources. Attorney caseloads should be assessed by the workload required, and cases and types of cases should be weighted accordingly.

If a defender or assigned counsel is carrying a mixed caseload including cases from more than one category of cases, these standards should be applied proportionately to determine a full caseload. In jurisdictions where assigned counsel or contract attorneys also maintain private law practices, the caseload should be based on the percentage of time the lawyer devotes to public defense.

The experience of a particular attorney is a factor in the composition of cases in the attorney’s caseload.

The following types of cases fall within the intended scope of the caseload limits for criminal and juvenile offender cases in Standard 3.4 and must be taken into account when assessing an attorney’s numerical caseload: partial case representations, sentence violations, specialty or therapeutic courts, transfers, extraditions, representation of material witnesses, petitions for conditional release or final discharge, and other matters that do not involve a new criminal charge.

**Definition of case.** A case is defined as the filing of a document with the court naming a person as defendant or respondent, to which an attorney is appointed in order to provide representation. In courts of limited jurisdiction multiple citations from the same incident can be counted as one case.

Standard 3.3 adopted effective October 1, 2012

**Standard 3.4. Caseload Limits.** The caseload of a full-time public defense attorney or assigned counsel should not exceed the following:

- 150 Felonies per attorney per year; or
- 300 Misdemeanor cases per attorney per year or, in jurisdictions that have not adopted a numerical case weighting system as described in this Standard, 400 cases per year; or
- 250 Juvenile Offender cases per attorney per year; or
- 80 open Juvenile Dependency cases per attorney; or
- 250 Civil Commitment cases per attorney per year; or
- 1 Active Death Penalty trial court case at a time plus a limited number of non-death-penalty cases compatible with the time demand of the death penalty case and consistent with the professional requirements of Standard 3.2; or
36 Appeals to an appellate court hearing a case on the record and briefs per attorney per year. (The 36 standard assumes experienced appellate attorneys handling cases with transcripts of an average length of 350 pages. If attorneys do not have significant appellate experience and/or the average transcript length is greater than 350 pages, the caseload should be accordingly reduced.)

Full time Rule 9 interns who have not graduated from law school may not have caseloads that exceed twenty-five percent (25%) of the caseload limits established for full-time attorneys.


_Standard 3.5. Case Counting._ Attorneys may not engage in a case weighting system, unless pursuant to written policies and procedures that have been adopted and published by the local government entity responsible for employing, contracting with, or appointing them. A weighting system must:

A. recognize the greater or lesser workload required for cases compared to an average case based on a method that adequately assesses and documents the workload involved;

B. be consistent with these Standards, professional performance guidelines, and the Rules of Professional Conduct;

C. not institutionalize systems or practices that fail to allow adequate attorney time for quality representation;

D. be periodically reviewed and updated to reflect current workloads; and

E. be filed with the State of Washington Office of Public Defense.

Cases should be assessed by the workload required. Cases and types of cases should be weighted accordingly. Cases which are complex, serious, or contribute more significantly to attorney workload than average cases should be weighted upward. In addition, a case weighting system should consider factors that might justify a case weight of less than one case.

Notwithstanding any case weighting system, resolutions of cases by pleas of guilty to criminal charges on a first appearance or arraignment docket are presumed to be rare occurrences requiring careful evaluation of the evidence and the law, as well as thorough communication with clients, and must be counted as one case.

Standard 3.5 adopted effective October 1, 2012

_Standard 3.6. Case Weighting._ The following are some examples of situations where case weighting might result in representations being weighted as more or less than one case. The listing of specific examples is not intended to suggest or imply that representations in such situations should or must be weighted at more or less than one case, only that they may be, if established by an appropriately adopted case weighting system.
A. Case Weighting Upward. Serious offenses or complex cases that demand more-than-average investigation, legal research, writing, use of experts, use of social workers, and/or expenditures of time and resources should be weighted upward and counted as more than one case.

B. Case Weighting Downward. Listed below are some examples of situations where case weighting might justify representations being weighted less than one case. However, care must be taken because many such representations routinely involve significant work and effort and should be weighted at a full case or more.

i. Cases that result in partial representations of clients, including client failures to appear and recommencement of proceedings, preliminary appointments in cases in which no charges are filed, appearances of retained counsel, withdrawals or transfers for any reason, or limited appearances for a specific purpose (not including representations of multiple cases on routine dockets).

ii. Cases in the criminal or offender case type that do not involve filing of new criminal charges, including sentence violations, extraditions, representations of material witnesses, and other matters or representations of clients that do not involve new criminal charges. Noncomplex sentence violations should be weighted as at least 1/3 of a case.

iii. Cases in specialty or therapeutic courts if the attorney is not responsible for defending the client against the underlying charges before or after the client’s participation in the specialty or therapeutic court. However, case weighting must recognize that numerous hearings and extended monitoring of client cases in such courts significantly contribute to attorney workload and in many instances such cases may warrant allocation of full case weight or more.

iv. Cases on a criminal or offender first appearance or arraignment docket where the attorney is designated, appointed, or contracted to represent groups of clients on that docket without an expectation of further or continuing representation and which are not resolved at that time (except by dismissal). In such circumstances, consideration should be given to adjusting the caseload limits appropriately, recognizing that case weighting must reflect that attorney workload includes the time needed for appropriate client contact and preparation as well as the appearance time spent on such dockets.

v. Representation of a person in a court of limited jurisdiction on a charge which, as a matter of regular practice in the court where the case is pending, can be and is resolved at an early stage of the proceeding by a diversion, reduction to an infraction, stipulation on continuance, or other alternative noncriminal disposition that does not involve a finding of guilt. Such cases should be weighted as at least 1/3 of a case.

Standard 3.6 adopted effective October 1, 2012

Related Standards

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Defense Function std. 4-1.2 (3d ed. 1993)

ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES std. 5-4.3 (3d ed. 1992)

Standard 4. Responsibility of Expert Witnesses

[Reserved.]

Standard 5. Administrative Costs

Standard 5.1. [Reserved.]

Standard 5.2.
A. Contracts for public defense services should provide for or include administrative costs associated with providing legal representation. These costs should include but are not limited to travel; telephones; law library, including electronic legal research; financial accounting; case management systems; computers and software; office space and supplies; training; meeting the reporting requirements imposed by these standards; and other costs necessarily incurred in the day-to-day management of the contract.

B. Public defense attorneys shall have (1) access to an office that accommodates confidential meetings with clients and (2) a postal address, and adequate telephone services to ensure prompt response to client contact.

Standard 5.2 adopted effective October 1, 2012

Standard 6. Investigators

Standard 6.1. Public defense attorneys shall use investigation services as appropriate.

Standard 6.1 adopted effective October 1, 2012

Standards 7-12 [Reserved.]

Standard 13. Limitations on Private Practice

Private attorneys who provide public defense representation shall set limits on the amount of privately retained work which can be accepted. These limits shall be based on the percentage of a full-time caseload which the public defense cases represent.

Standard 13 adopted effective October 1, 2012

Standard 14. Qualifications of Attorneys

Standard 14.1. In order to assure that indigent accused receive the effective assistance of counsel to which they are constitutionally entitled, attorneys providing defense services shall meet the following minimum professional qualifications:

A. Satisfy the minimum requirements for practicing law in Washington as determined by the Washington Supreme Court; and

B. Be familiar with the statutes, court rules, constitutional provisions, and case law relevant to their practice area; and

C. Be familiar with the Washington Rules of Professional Conduct; and

D. Be familiar with the Performance Guidelines for Criminal Defense Representation approved by the Washington State Bar Association; and
E. Be familiar with the consequences of a conviction or adjudication, including possible immigration consequences and the possibility of civil commitment proceedings based on a criminal conviction; and

F. Be familiar with mental health issues and be able to identify the need to obtain expert services; and

G. Complete seven hours of continuing legal education within each calendar year in courses relating to their public defense practice.

Standard 14.1 adopted effective October 1, 2012

Standard 14.2. Attorneys' qualifications according to severity or type of case:\newpage

A. Death Penalty Representation. Each attorney acting as lead counsel in a criminal case in which the death penalty has been or may be decreed and which the decision to seek the death penalty has not yet been made shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. At least five years’ criminal trial experience; and

iii. Have prior experience as lead counsel in no fewer than nine jury trials of serious and complex cases which were tried to completion; and

iv. Have served as lead or co-counsel in at least one aggravated homicide case; and

v. Have experience in preparation of mitigation packages in aggravated homicide or persistent offender cases; and

vi. Have completed at least one death penalty defense seminar within the previous two years; and

vii. Meet the requirements of SPRC 2.\footnote{Attorneys working toward qualification for a particular category of cases under this standard may associate with lead counsel who is qualified under this standard for that category of cases.}

\footnote{Attorneys working toward qualification for a particular category of cases under this standard may associate with lead counsel who is qualified under this standard for that category of cases.}

SPRC 2

APPOINTMENT OF COUNSEL

At least two lawyers shall be appointed for the trial and also for the direct appeal. The trial court shall retain responsibility for appointing counsel for trial. The Supreme Court shall appoint counsel for the direct appeal. Notwithstanding RAP 15.2(f) and (h), the Supreme Court will determine all motions to withdraw as counsel on appeal.

A list of attorneys who meet the requirements of proficiency and experience, and who have demonstrated that they are learned in the law of capital punishment by virtue of training or experience, and thus are qualified for appointment in death penalty trials and for appeals will be recruited and maintained by a panel created by the Supreme Court. All counsel for trial and appeal must have demonstrated the proficiency and commitment to quality representation which is appropriate to a capital case. Both counsel at trial must have five years’ experience in the practice of criminal law (and) be familiar with and experienced in the utilization of expert witnesses and evidence, and not be presently serving as appointed counsel in another active trial level death penalty case. One counsel must be, and both may be, qualified for appointment in capital trials on the list, unless circumstances exist such that it is in the defendant’s interest to appoint otherwise qualified counsel learned in the law of capital punishment by virtue of training or experience. The trial court shall make findings of fact if good cause is found for not appointing list counsel.

At least one counsel on appeal must have three years’ experience in the field of criminal appellate law and be learned in the law of capital punishment by virtue of training or experience. In appointing counsel on appeal, the Supreme Court will consider the list, but will have the final discretion in the appointment of counsel.
The defense team in a death penalty case should include, at a minimum, the two attorneys appointed pursuant to SPRC 2, a mitigation specialist, and an investigator. Psychiatrists, psychologists, and other experts and support personnel should be added as needed.

B. Adult Felony Cases—Class A. Each attorney representing a defendant accused of a Class A felony as defined in RCW 9A.20.020 shall meet the following requirements:
   i. The minimum requirements set forth in Section 1; and
   ii. Either:
      a. has served two years as a prosecutor; or
      b. has served two years as a public defender; or two years in a private criminal practice; and
   iii. Has been trial counsel alone or with other counsel and handled a significant portion of the trial in three felony cases that have been submitted to a jury.

C. Adult Felony Cases—Class B Violent Offense. Each attorney representing a defendant accused of a Class B violent offense as defined in RCW 9A.20.020 shall meet the following requirements.
   i. The minimum requirements set forth in Section 1; and
   ii. Either:
      a. has served one year as a prosecutor; or
      b. has served one year as a public defender; or one year in a private criminal practice; and
   iii. Has been trial counsel alone or with other counsel and handled a significant portion of the trial in two Class C felony cases that have been submitted to a jury.

D. Adult Sex Offense Cases. Each attorney representing a client in an adult sex offense case shall meet the following requirements:
   i. The minimum requirements set forth in Section 1 and Section 2(C); and
   ii. Has been counsel alone of record in an adult or juvenile sex offense case or shall be supervised by or consult with an attorney who has experience representing juveniles or adults in sex offense cases.

E. Adult Felony Cases—All Other Class B Felonies, Class C Felonies, Probation or Parole Revocation. Each attorney representing a defendant accused of a Class B felony not defined in Section 2(C) or (D) above or a Class C felony, as defined in RCW 9A.20.020, or involved in a probation or parole revocation hearing shall meet the following requirements:
   i. The minimum requirements set forth in Section 1, and
   ii. Either:
      a. has served one year as a prosecutor; or
      b. has served one year as a public defender; or one year in a private criminal practice; and
   iii. Has been trial counsel alone or with other trial counsel and handled a significant portion of the trial in two criminal cases that have been submitted to a jury; and
iv. Each attorney shall be accompanied at his or her first felony trial by a supervisor if available.

F. **Persistent Offender (Life Without Possibility of Release) Representation.** Each attorney acting as lead counsel in a “two strikes” or “three strikes” case in which a conviction will result in a mandatory sentence of life in prison without parole shall meet the following requirements:
   i. The minimum requirements set forth in Section 1;\(^{17}\) and
   ii. Have at least:
      a. four years’ criminal trial experience; and
      b. one year’s experience as a felony defense attorney; and
      c. experience as lead counsel in at least one Class A felony trial; and
      d. experience as counsel in cases involving each of the following:
         1. Mental health issues; and
         2. Sexual offenses, if the current offense or a prior conviction that is one of the predicate cases resulting in the possibility of life in prison without parole is a sex offense; and
         3. Expert witnesses; and
         4. One year of appellate experience or demonstrated legal writing ability.

G. **Juvenile Cases—Class A.** Each attorney representing a juvenile accused of a Class A felony shall meet the following requirements:
   i. The minimum requirements set forth in Section 1, and
   ii. Either:
      a. has served one year as a prosecutor; or
      b. has served one year as a public defender; or one year in a private criminal practice; and
   iii. Has been trial counsel alone of record in five Class B and C felony trials; and
   iv. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor, if available.

H. **Juvenile Cases—Classes B and C.** Each attorney representing a juvenile accused of a Class B or C felony shall meet the following requirements:
   i. The minimum requirements set forth in Section 1; and
   ii. Either:
      a. has served one year as a prosecutor; or

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\(^{17}\) RCW 10.101.060(1)(a)(iii) provides that counties receiving funding from the state Office of Public Defense under that statute must require “attorneys who handle the most serious cases to meet specified qualifications as set forth in the Washington state bar association endorsed standards for public defense services or participate in at least one case consultation per case with office of public defense resource attorneys who are so qualified. The most serious cases include all cases of murder in the first or second degree, persistent offender cases, and class A felonies.”
b. has served one year as a public defender; or one year in a private criminal practice, and
iii. Has been trial counsel alone in five misdemeanor cases brought to a final resolution; and
iv. Each attorney shall be accompanied at his or her first juvenile trial by a supervisor if available.

I. Juvenile Sex Offense Cases. Each attorney representing a client in a juvenile sex offense case shall meet the following requirements:
   i. The minimum requirements set forth in Section 1 and Section 2(H); and
   ii. Has been counsel alone of record in an adult or juvenile sex offense case or shall be supervised by or consult with an attorney who has experience representing juveniles or adults in sex offense cases.

J. Juvenile Status Offenses Cases. Each attorney representing a client in a “Becca” matter shall meet the following requirements:
   i. The minimum requirements as outlined in Section 1; and
   ii. Either:
      a. have represented clients in at least two similar cases under the supervision of a more experienced attorney or completed at least three hours of CLE training specific to “status offense” cases; or
      b. have participated in at least one consultation per case with a more experienced attorney who is qualified under this section.

K. Misdemeanor Cases. Each attorney representing a defendant involved in a matter concerning a simple misdemeanor or gross misdemeanor or condition of confinement, shall meet the requirements as outlined in Section 1.

L. Dependency Cases. Each attorney representing a client in a dependency matter shall meet the following requirements:
   i. The minimum requirements as outlined in Section 1; and
   ii. Attorneys handling termination hearings shall have six months’ dependency experience or have significant experience in handling complex litigation.
   iii. Attorneys in dependency matters should be familiar with expert services and treatment resources for substance abuse.
   iv. Attorneys representing children in dependency matters should have knowledge, training, experience, and ability in communicating effectively with children, or have participated in at least one consultation per case either with a state Office of Public Defense resource attorney or other attorney qualified under this section.

M. Civil Commitment Cases. Each attorney representing a respondent shall meet the following requirements:
   i. The minimum requirements set forth in Section 1; and
   ii. Each staff attorney shall be accompanied at his or her first 90 or 180 day commitment hearing by a supervisor; and
iii. Shall not represent a respondent in a 90 or 180 day commitment hearing unless he or she has either:

   a. served one year as a prosecutor; or
   
   b. served one year as a public defender; or one year in a private civil commitment practice, and
   
   c. been trial counsel in five civil commitment initial hearings; and

iv. Shall not represent a respondent in a jury trial unless he or she has conducted a felony jury trial as lead counsel; or been co-counsel with a more experienced attorney in a 90 or 180 day commitment hearing.

N. Sex Offender “Predator” Commitment Cases. Generally, there should be two counsel on each sex offender commitment case. The lead counsel shall meet the following requirements:

   i. The minimum requirements set forth in Section 1; and
   
   ii. Have at least:

      a. Three years’ criminal trial experience; and
      
      b. One year’s experience as a felony defense attorney or one year’s experience as a criminal appeals attorney; and
      
      c. Experience as lead counsel in at least one felony trial; and
      
      d. Experience as counsel in cases involving each of the following:

         1. Mental health issues; and
         
         2. Sexual offenses; and
         
         3. Expert witnesses; and
         
         e. Familiarity with the Civil Rules; and
         
         f. One year of appellate experience or demonstrated legal writing ability.

   Other counsel working on a sex offender commitment case should meet the minimum requirements in Section 1 and have either one year’s experience as a public defender or significant experience in the preparation of criminal cases, including legal research and writing and training in trial advocacy.

O. Contempt of Court Cases. Each attorney representing a respondent shall meet the following requirements:

   i. The minimum requirements set forth in Section 1; and
   
   ii. Each attorney shall be accompanied at his or her first three contempt of court hearings by a supervisor or more experienced attorney, or participate in at least one consultation per case with a state Office of Public Defense resource attorney or other attorney qualified in this area of practice.
P. **Specialty Courts.** Each attorney representing a client in a specialty court (e.g., mental health court, drug diversion court, homelessness court) shall meet the following requirements:

i. The minimum requirements set forth in Section 1; and

ii. The requirements set forth above for representation in the type of practice involved in the specialty court (e.g., felony, misdemeanor, juvenile); and

iii. Be familiar with mental health and substance abuse issues and treatment alternatives.

*Standard 14.2 adopted effective October 1, 2012*

*Standard 14.3. Appellate Representation.* Each attorney who is counsel for a case on appeal to the Washington Supreme Court or to the Washington Court of Appeals shall meet the following requirements:

A. The minimum requirements as outlined in Section 1; and

B. Either:

i. has filed a brief with the Washington Supreme Court or any Washington Court of Appeals in at least one criminal case within the past two years; or

ii. has equivalent appellate experience, including filing appellate briefs in other jurisdictions, at least one year as an appellate court or federal court clerk, extensive trial level briefing, or other comparable work.

C. Attorneys with primary responsibility for handling a death penalty appeal shall have at least five years’ criminal experience, preferably including at least one homicide trial and at least six appeals from felony convictions, and meet the requirements of SPRC 2.

*RALJ Misdemeanor Appeals to Superior Court:* Each attorney who is counsel alone for a case on appeal to the Superior Court from a court of limited jurisdiction should meet the minimum requirements as outlined in Section 1, and have had significant training or experience in either criminal appeals, criminal motions practice, extensive trial level briefing, clerking for an appellate judge, or assisting a more experienced attorney in preparing and arguing a RALJ appeal.

*Standard 14.3 adopted effective October 1, 2012*

*Standard 14.4. Legal Interns.*

A. Legal interns must meet the requirements set out in APR 9.

B. Legal interns shall receive training pursuant to APR 9, and in offices of more than seven attorneys, an orientation and training program for new attorneys and legal interns should be held.

*Standard 14.4 adopted effective October 1, 2012*
Appendix H – Public Defense Attorney Certification Form

[ ] Superior Court  [ ] Juvenile Department
[ ] District Court  [ ] Municipal Court

For

[ ] CITY OF  [ ] COUNTY OF _______________________

STATE OF WASHINGTON

CERTIFICATION BY:

[NAME], [WSBA#]

FOR THE:

[1ST, 2ND, 3RD, 4TH] CALENDAR QUARTER OF [YEAR]

The undersigned attorney hereby certifies:

1. Approximately _____% of my total practice time is devoted to indigent defense cases.

2. I am familiar with the applicable Standards adopted by the Supreme Court for attorneys appointed to represent indigent persons and that:
   a. **Basic Qualifications:** I meet the minimum basic professional qualifications in Standard 14.1.
   b. **Office:** I have access to an office that accommodates confidential meetings with clients, and I have a postal address and adequate telephone services to ensure prompt response to client contact, in compliance with Standard 5.2.
   c. **Investigators:** I have investigators available to me and will use investigative services as appropriate, in compliance with Standard 6.1.
   d. **Caseload:** I will comply with Standard 3.2 during representation of the defendant in my cases. [Effective October 1, 2013 for felony and juvenile offender caseloads; effective January 1, 2015 for misdemeanor caseloads: I should not accept a greater number of cases (or a proportional mix of different case types) than specified in Standard 3.4, prorated if the amount of time spent for indigent defense is less than full time, and taking into account the case counting and weighting system applicable in my jurisdiction.]
   e. **Case Specific Qualifications:** I am familiar with the specific case qualifications in Standard 14.2, Sections B-K and will not accept appointment in a case as lead counsel unless I meet the qualifications for that case. [Effective October 1, 2013]

_________________________________________  _____________________
Signature, WSBA#  Date
Commentary on the Model Misdemeanor Case Weighting Policy

In 2012 the Washington Supreme Court adopted the Standards for Indigent Defense (Standards). These are essential to providing quality representation for all public defense clients statewide. Caseload size and composition are critical because they ensure that attorneys have sufficient time to communicate with each client and carefully prepare every case. Along those lines, the Court set caseload limits so that attorneys have enough time to fulfill their legal and ethical obligations for each client. For misdemeanor cases, an attorney may accept appointment to a maximum of 400 new cases each year. Or, if the county/city adopts a case weighting system, an attorney’s caseload may consist of a maximum of 300 weighted credits per year.
Caseload limits reflect the maximum caseloads for fully supported full-time defense attorneys for cases of average complexity and effort in each case type specified. Caseload limits assume a reasonably even distribution of cases throughout the year.

**What is Case Weighting?**

Attorney caseloads include a wide variety of clients, charges, and situations. While each case is unique, data show that attorneys tend to spend, on average, more time on cases with complex charges (e.g. DUI or domestic violence) and less time on cases with less complex charges (e.g. driving with licenses suspended in the 3rd degree). A case weighting system assigns higher and lower time values or weighted credits to cases based on the amount of time that is typically required to provide effective representation.

Even in cases with simple charges, however, public defense attorneys must meet the basic requirements for providing effective assistance of counsel. Attorneys must, for example:

- interview the client and communicate throughout the case,
- carefully review evidence,
- conduct necessary investigations,
- obtain records,
- prepare for court appearances, and
- assess consequences of conviction.

Client communication is one of the most important factors for effective assistance, and is required for all clients, including those who have language barriers, mental health issues, or cognitive or developmental disabilities. In appropriate circumstances, attorneys must also conduct legal research, draft and file motions, prepare other legal documents and undertake other tasks, such as interviewing witnesses and visiting the scene of the offense.

**Advantages and Disadvantages of Case Weighting**

Case weighting, which is done by assigning ‘weighted credits’ to specific case types based on a formal time study, may be employed at the option of a local government. Alternatively, attorneys can count each assigned case up to a maximum of 400 cases per year. Case weighting requires additional attorney administrative work in tracking case credits. However, it may be a helpful method to allocate attorney caseloads reflecting case types commonly charged in a court. Because a case weighting policy has already pre-identified the average amount of time required for representing various case types, attorney time keeping is expected to be minimal.

---

**Jurisdictions that will benefit most from misdemeanor case weighting are those with a higher concentration of simple offenses, probation violations, and cases that regularly resolve in early non-criminal dispositions.**
Since weighted credits are proportional to the average amount of time spent on a case, less complex cases have fewer weighted credits. Therefore, courts with a high volume of less complex charges may be able to assign a higher number of cases to public defense attorneys under a case weighting system. On the other hand, complex cases tend to require more time to properly defend. Case weighting can ensure that an attorney with a highly complex caseload has a smaller number of cases, and more time to dedicate to each one. Courts with many sentence violation hearings find that case weighting permits the assignment of fewer weighted credits to them, compared to counting them as a regular case under the 400-case caseload. In addition, fewer weighted credits can be assigned to case types that, as a matter of regular court practice, often result in non-criminal sanctions at an early stage of the proceedings. These include routine reductions to infractions or diversions.

Deciding Whether to Case Weight
Each local government has discretion to decide whether to measure public defense caseloads by 300 weighted credits per year, or 400 non-weighted cases. When a case weighting policy is used, the Standards set out certain requirements. One requirement, for example, is assessing and documenting the time required for defending different case types.

Many cities and counties that may wish to explore whether case weighting would help manage public defense caseloads, do not have the resources to conduct a data-driven assessment. For that reason, the Supreme Court ordered the Washington State Office of Public Defense (OPD) to perform a statewide attorney time study and create this model misdemeanor case weighting policy.

Time Study Findings
The OPD Model Misdemeanor Case Weighting Policy (Model Policy) was developed after tracking public defense attorney time over a period of twenty weeks in fifteen different courts of limited jurisdiction throughout the state. Also, pre-existing data collected from two different courts was included in the study. The existing data was conformed to the new time study data so that the two data sets could be merged. Specific charge types were analyzed and average attorney times for each specific charge type was determined. The results showed that attorneys consistently spent more/less time on certain charge types. This information forms the basis for the weighted credit values provided in the Model Policy.

Data reflecting attorney work in more than three thousand misdemeanor cases revealed that attorneys with a 400-case caseload spend, on average, 4.5 hours per case. The 4.5 hour finding validates that...
1,800 hours, on average, are spent annually on case representation for a full-time public defense attorney (400 cases time 4.5 hours per case equals 1,800 attorney hours spent on case representation)¹.

The findings of the study are set forth in the Table below:

### Average Attorney Time Spent by Criminal Charge Category

<table>
<thead>
<tr>
<th>Criminal Charge Category</th>
<th>Average Attorney Hours Spent by Charge Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alcohol Related Offenses (excluding DUI)</td>
<td>3.0 hours</td>
</tr>
<tr>
<td>Assault (not Domestic Violence)</td>
<td>6.0 hours</td>
</tr>
<tr>
<td>Criminal Trespass 1 or 2</td>
<td>4.5 hours</td>
</tr>
<tr>
<td>Disorderly Conduct (excluding Indecent Exposure)</td>
<td>3.0 hours</td>
</tr>
<tr>
<td>Domestic Violence – Assault and Reckless Endangerment</td>
<td>9.0 hours</td>
</tr>
<tr>
<td>DUI and Physical Control</td>
<td>9.0 hours</td>
</tr>
<tr>
<td>DWLS 1&lt;sup&gt;st&lt;/sup&gt; and 2&lt;sup&gt;nd&lt;/sup&gt; Degree</td>
<td>4.5 hours</td>
</tr>
<tr>
<td>DWLS 3&lt;sup&gt;rd&lt;/sup&gt; Degree</td>
<td>3.0 hours</td>
</tr>
<tr>
<td>Harassment</td>
<td>9.0 hours</td>
</tr>
<tr>
<td>Hit and Run-Attended and Unattended</td>
<td>4.5 hours</td>
</tr>
<tr>
<td>Malicious Mischief</td>
<td>4.5 hours</td>
</tr>
<tr>
<td>Obstructing a Public Servant</td>
<td>4.5 hours</td>
</tr>
<tr>
<td>Racing</td>
<td>6.0 hours</td>
</tr>
<tr>
<td>Reckless Driving</td>
<td>6.0 hours</td>
</tr>
<tr>
<td>Simple Traffic Offenses (e.g. No Valid Driver’s License)</td>
<td>3.0 hours</td>
</tr>
<tr>
<td>Theft/Shoplifting</td>
<td>4.5 hours</td>
</tr>
<tr>
<td>Violation of a Protection Order/No Contact Order/Restraining Order</td>
<td>4.5 hours</td>
</tr>
<tr>
<td>Weapons Related Offenses</td>
<td>6.0 hours</td>
</tr>
<tr>
<td>Other Unlisted Misdemeanors</td>
<td>4.5 hours</td>
</tr>
</tbody>
</table>

¹ This finding is consistent with other time studies such as the Spangenberg Project Report: *King County, Washington Public Defender Case Study – Final Report* (2010).

² Hundreds of misdemeanor charges arise in courts of limited jurisdiction based on statutes and municipal codes. In creating this policy, similar charges requiring approximately the same amount of work time have been grouped into the categories in this table. Examples of charges under each category can be found in Appendix A.
Using 1,800 attorney hours spent on case representation per year, 6.0 attorney hours was calculated for a “weighted credit.” The 6.0 attorney hours “weighted credit” was calculated by dividing 1,800 attorney hours by 300 weighted credits per year. A conversion table was developed to assist attorneys and public defense administrators in calculating a weighted caseload. An example of how the attorney hours were converted to weighted credits is shown in the Table below:

### Hours / Weighted Credit Conversion Table

<table>
<thead>
<tr>
<th>Attorney Hours Spent by Charge Category</th>
<th>Weighted Credits</th>
</tr>
</thead>
<tbody>
<tr>
<td>9.0 hours</td>
<td>1.5 credits</td>
</tr>
<tr>
<td>6.0 hours</td>
<td>1.0 credits</td>
</tr>
<tr>
<td>4.5 hours</td>
<td>0.75 credits</td>
</tr>
<tr>
<td>3.0 hours</td>
<td>0.5 credits</td>
</tr>
</tbody>
</table>

A complete table listing the charge categories with their corresponding case weights can be found in Appendix B following the Model Policy Template.

**Model Policy Template**

As directed by the Washington Supreme Court, the Washington State Office of Public Defense (OPD) has developed this model misdemeanor case weighting policy consistent with the Standards for Indigent Defense, incorporating the results of the time study. As noted earlier, case weighting is an optional approach to calculating attorney caseloads, and the Model Policy serves as a tool to help local public defense systems determine whether to case weight. In addition, it demonstrates a policy that is consistent with the Standards. The Model Policy was drafted in template form. The accompanying instructions will assist in filling-out specific portions of the template.

For additional assistance, please contact an OPD Public Defense Services Manager. Katrin Johnson is at 360-586-3164 ext. 108 or Katrin.Johnson@opd.wa.gov. Kathy Kuriyama is at 360-586-3164 ext. 114 or Kathy.Kuriyama@opd.wa.gov.
The purpose of the OPD Model Misdemeanor Case Weighting Policy (Model Policy) is to provide a template to demonstrate a case weighting policy consistent with the Supreme Court Standards for Indigent Defense (Standards). The Model Policy was drafted in template form, so it can easily be customized. Most of the language in the Model Policy can apply to any public defense misdemeanor caseload.

To customize the Model Policy, review the items listed below, and edit the template accordingly:

<table>
<thead>
<tr>
<th>Section in Model Policy</th>
<th>Description of Customization</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title</td>
<td>Insert city or county name.</td>
</tr>
<tr>
<td>2.D.</td>
<td>Insert reference to local ordinance, court rule, and/or any other local regulatory documents that are relevant to this policy.</td>
</tr>
<tr>
<td>3.A.</td>
<td>Insert name, title, office, and/or whatever information is appropriate for identifying the local government administrator with authority over public defense services.</td>
</tr>
<tr>
<td>6.C.</td>
<td><strong>Routine Early Non-Criminal Resolutions:</strong> In some courts there are pre-selected categories of charges which, when a case meets a set of requirements, are regularly reduced to infractions, diverted, or are resolved in some other non-criminal manner. For example, DWLS-3 charges may be reduced to infractions when the defendant has a limited number of prior offenses. When local practices routinely utilize such early, non-criminal resolution of criminal charges (as opposed to making such an offer on the morning of trial or some other late stage in the case), the practice can be described in section 6.C. on pages 12-13 as taking no fewer than one-third of a case.³ If certain case categories are regularly resolved in this manner, identify them and describe the conditions that regularly result in early non-criminal resolution. Those charges may then be added to the <strong>Routine Early Non-Criminal Resolutions</strong> chart. If the court does not engage in such practices, delete all language in section 6.C pages 12-13.</td>
</tr>
</tbody>
</table>
| 6.E.                    | **Sentence Violations and Other Non-Charge Representations:** Standard 3.6(B)(ii) states that sentence violations and other non-charge representations must be weighted at a

³ Standard 3.6(B)(v) states that representation on charges which, as a matter of regular practice, are resolved at an early stage of the proceeding by a non criminal resolution should be weighted at least one-third of a case.
minimum of one-third of a case. Because the time required to represent clients in sentence violations greatly varies from court to court, in some courts a higher value may be appropriate.

### Adjustments for Local Factors:

Public defense attorneys in all jurisdictions work with the same statutes and state court rules. They also are required to spend sufficient time on client communication, case preparation, and court appearances. Therefore, there is a significant degree of similarity in the work done by public defenders from court to court. However, each court experiences some local factors that uniquely impact the time spent on public defense. Local factors may be charge specific, such as aggressive prosecution of certain offenses. Local factors may also be general, such as long waits for public defense attorneys at regular court calendars.

Local factors and practices should be examined to determine whether they, overall, substantially increase or reduce attorney time spent on public defense cases.

**Where local factors substantially increase the time** required for delivery of quality public defense services, the weighted credits provided in this model policy can be increased.

**Where local factors substantially decrease the time** required for delivery of quality public defense services, the weighted credits of section 6.A., on pages 11-12, can be decreased by no more than 0.05 credits.

Downward adjustments may not be made to other categories of Section 6.

In consultation with OPD, public defense attorneys, judicial officers, and local government administrators have identified the following as potential local factors that increase the amount of time required for public defense representation:

- Long periods of time waiting for cases to be called in court;
- Long periods of time waiting for access to clients at jail;
- Long travel time to court, jail, crime scenes, or other meetings associated with representation;
- The scheduling of court appearances;
- Absence of access to technology;
- Therapeutic court cases, which tend to require a significantly higher number of court appearances;
- Disproportionately high number of limited English proficient clients; and
- Disproportionately high number of clients with mental illness.

Examples of local factors that have been identified as reducing attorney time include:

- Court calendars or dockets dedicated to public defense cases, resulting in reduced attorney waiting time; and
- Utilization of systemically used technology that demonstrably saves public defense
attorney time. Examples include electronic discovery and video-conferencing of incarcerated clients for confidential attorney communications.

If a case weighting policy *increases* weighted credits due to local factors in section 7.B on page 13, provide a concise description identifying the relevant local factors and the specific reasons justifying the deviation, and the increase in weighted credit values.

If a case weighting policy *decreases* weighted credits due to local factors in section 7.B on page 13, provide a concise description in this section identifying the relevant local factors and the specific reasons justifying the decrease. In addition, identify the amount of deviation in the weighted credit values (a maximum of 0.05 fewer credits) that has been made.
1. Purpose

This policy implements a system for weighting public defense cases for purposes of certifying to public defense misdemeanor caseloads pursuant to the Washington Supreme Court’s Standards for Indigent Defense. This policy recognizes that appropriate case weighting allows reasonable workloads for public defense attorneys consistent with applicable rules and standards.

2. Applicable Court Rules, Regulations, and Standards

   A. Washington State Rules of Professional Conduct
   B. Criminal Rules for Courts of Limited Jurisdiction
   C. Washington Supreme Court Standards for Indigent Defense (Standards)
   D. [Insert reference to local ordinance, court rule, and/or other local applicable authority.]

3. Definitions

   A. Administrator: the designated supervisor of public defense services: [insert identification information].
   B. Case: the filing of a document with the court naming a person as defendant or respondent, to which an attorney is appointed in order to provide representation.
      i. In courts of limited jurisdiction multiple citations from the same incident can be counted as one “case.”
      ii. The number of counts in a single cause number does not affect the definition of a “case.”
      iii. When there are multiple charges or counts arising from the same set of facts, the weighted credit will be assigned based on the most serious charge.
   C. Case Weighting: the process of assigning a numerical value, or “weighted credit,” to specific types of cases that recognizes the greater or lesser attorney workload required for those cases compared to an average case.
   D. Caseload: the complete array of cases in which an attorney represents or provides service to clients.
E. **Docket /Calendar:** a grouping of filings where a public defense attorney is designated to represent indigent defendants without an expectation of further or continuing representation. Examples include, but are not limited to, first appearance calendars and arraignment calendars.

F. **Full Time:** working approximately forty hours per week. It is presumed that a “full-time” public defense attorney spends approximately 1,800 hours annually on case representation. It is expected that other work time is spent on administrative activities, attending CLEs, participating in professional associations or committees, and spending time on vacation, holiday, or sick leave.

G. **Local Factors:** practices, characteristics, or challenges that are unique to the delivery of public defense in a given jurisdiction, and that substantially impact the time required for effective delivery of public defense services.

H. **Non-Charge Representations:** matters where public defense attorneys represent clients who are eligible for public defense representation for matters that do not involve the filing of new criminal charges. Examples include, but are not limited to, sentence violations, extraditions, and representations of material witnesses.

I. **Partial Representations:** situations where clients are charged with crimes, but representation is either cut short at early stages of the case, or begins significantly later. Such situations include, but are not limited to, client failures to appear, preliminary appointments in cases in which no charges are filed, withdrawals or transfers for any reason, or limited appearances for a specific purpose.

J. **Public Defense Attorney:** a licensed attorney who is employed or contracted to represent indigent defendants. “Public Defense Attorney” also refers to a licensed attorney who is list-appointed to represent indigent defendants on a case-by-case basis.

K. **Weighted Credit:** one weighted credit represents a type of case which, on average, requires six hours of attorney time.

4. **Misdemeanor Caseload Limits**

As provided in the Washington Supreme Court Standards for Indigent Defense, the caseload of a full-time public defense attorney should not exceed 300 misdemeanor weighted credits per year, which is equivalent to the time spent on 400 average misdemeanor cases per year. The caseload of a full-time Rule 9 intern who has not graduated from law school may not exceed 75 misdemeanor weighted credits per year.

5. **General Considerations**

A. Caseload limits reflect the maximum caseloads for fully supported full-time defense attorneys for cases of average complexity and effort.
B. Caseload limits are set to ensure that all public defense attorneys have adequate time to provide quality representation.

C. Caseload limits assume a reasonably even distribution of cases throughout the year.

D. If the public defense attorney is carrying a mixed caseload with non-misdemeanor cases, the attorney’s caseload should be calculated proportionately by case type, as provided in the Standards.

E. If the public defense attorney also maintains a private law practice, the public defense caseload should be proportionate to the percentage of work time the attorney devotes to public defense.

F. If the attorney provides public defense services in multiple courts, the combination of cases from all courts are used for caseload calculations.

6. Weighted Credits

A. Weighted Credits by Criminal Charge Category.

The weighted credits to be assigned by criminal charge category are in the Table of Weighted Credits by Charge Category found on the following table:

<table>
<thead>
<tr>
<th>Criminal Charge Categories⁴</th>
<th>Weighted Credits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alcohol Related Offenses (excluding DUI)</td>
<td>0.50 credits</td>
</tr>
<tr>
<td>Assault (not Domestic Violence)</td>
<td>1.0 credit</td>
</tr>
<tr>
<td>Criminal Trespass 1 or 2</td>
<td>0.75 credits</td>
</tr>
<tr>
<td>Disorderly Conduct (excluding Indecent Exposure)</td>
<td>0.50 credits</td>
</tr>
<tr>
<td>Domestic Violence - Assault, Reckless Endangerment</td>
<td>1.5 credits</td>
</tr>
<tr>
<td>DUI and Physical Control</td>
<td>1.5 credits</td>
</tr>
<tr>
<td>DWLS 1st and 2nd Degree</td>
<td>0.75 credits</td>
</tr>
<tr>
<td>DWLS 3rd Degree</td>
<td>0.50 credits</td>
</tr>
<tr>
<td>Harassment</td>
<td>1.5 credits</td>
</tr>
<tr>
<td>Hit and Run-Attended and Unattended</td>
<td>0.75 credits</td>
</tr>
<tr>
<td>Malicious Mischief</td>
<td>0.75 credits</td>
</tr>
<tr>
<td>Obstructing a Public Servant</td>
<td>0.75 credits</td>
</tr>
<tr>
<td>Racing</td>
<td>1.0 credit</td>
</tr>
</tbody>
</table>

⁴ Hundreds of misdemeanor charges arise in courts of limited jurisdiction based on statutes and municipal codes. In creating this policy, similar charges requiring approximately the same amount of work time have been grouped into the categories in this table. Examples of charges under each category can be found in Appendix A.
<table>
<thead>
<tr>
<th>Offense</th>
<th>Weight</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reckless Driving</td>
<td>1.0</td>
</tr>
<tr>
<td>Simple Traffic Offenses (e.g. No Valid Driver’s License)</td>
<td>0.50</td>
</tr>
<tr>
<td>Theft/Shoplifting</td>
<td>0.75</td>
</tr>
<tr>
<td>Violation of a Protection Order/No Contact Order/Restraining Order</td>
<td>0.75</td>
</tr>
<tr>
<td>Weapons Related Offenses</td>
<td>1.0</td>
</tr>
<tr>
<td>Other Unlisted Misdemeanors</td>
<td>0.75</td>
</tr>
</tbody>
</table>

It is important to remember that in all cases, even those with fewer weighted credits and those that may be resolved by routine non-criminal resolutions such as diversion or reduction to an infraction, an appointed public defense attorney must first meet the basic requirements for providing effective assistance of counsel, such as interviewing and fully communicating with the client, carefully reviewing the evidence, obtaining records, investigating as appropriate, and preparing for court.

B. Guilty Pleas at First Appearance or Arraignment

As required by Standard 3.5, resolution of cases by pleas of guilty to criminal charges at a first appearance or arraignment hearing are presumed to be rare occurrences requiring careful evaluation of the evidence and the law, as well as thorough communication with clients. Therefore, if the attorney is appointed, these guilty pleas must be valued as one case.

C. Routine Early Non-Criminal Resolutions

This only applies to public defense attorneys in courts that regularly resolve cases at an early stage by non-criminal disposition. If applicable, see the Instruction Guide for details on completing this section. If not applicable, remove this portion. When an attorney is appointed to represent clients facing charges that, by local practice, are resolved at an early stage by diversion, reduction to an infraction, stipulated order of continuance, or other alternative non-criminal disposition that does not involve a finding of guilt, Standard 3.6(B)(v) permits the attorney to count them at no less than 1/3 of a case.

<table>
<thead>
<tr>
<th>Routine Early Non-Criminal Resolutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charge #1</td>
</tr>
<tr>
<td>Charge #2</td>
</tr>
</tbody>
</table>
D. **Partial Representation:**

A partial representation is counted based on the amount of time that an attorney has spent on the case. Each hour of work is assigned 0.17 weighted credits, up to the maximum weighted credits normally assigned for the case type.

E. **Sentence Violations and Other Non-Charge Representation:**

As stated in Standard 3.6(B)(ii) sentence violations and other non-charge representations may be counted as no fewer credits than one-third of a case. [See Instruction Guide]

F. **Dockets / Calendars:** Cases on a criminal first appearance or arraignment docket where the attorney is designated, appointed, or contracted to represent groups of clients without an expectation of further or continuing representation and which are not resolved at that time (except by dismissal or amendment to an infraction) are not counted individually. Instead, the attorney’s hours needed for appropriate client contact, preparation, and court time are calculated as a percentage of the net annual hours of work time, and then applied to reduce the attorney’s caseload. Each hour of such docket time is assigned 0.17 weighted credits.

7. **Adjustments**

A. **Case-Specific Adjustments:** Because credits are assigned to cases based on an average amount of time needed for each charge type, ordinary deviations in how complex a case is or how long it takes do not justify an adjustment to a case’s credit value. It is assumed that attorneys will receive a mix of cases of varying complexity and effort, ending with a combination of cases that closely approximates a full-time caseload. However, an attorney may request that the weighted credit be adjusted upward for any particular case that involves substantially more work. Examples may include cases where a client’s competency is litigated, extraordinarily long trials, or cases that go to jury trial more than once. Weighted credits may not be adjusted downward unless pursuant to the process identified in 7.B.

B. **Local Factors:** [The following paragraph only applies to public defense attorneys in courts that have local factors impacting the time required for public defense as described in section 7.B of the Instruction Guide. If applicable, see the Instruction Guide for details on completing this section. If not applicable, remove this portion.] Due to the following circumstances, this policy deviates from the Model Misdemeanor Case Weighting Policy by making adjustments to weighted credits as follows:

[\_Insert text here \_]
## Appendix A: Charge Category Examples

<table>
<thead>
<tr>
<th>Charge Categories</th>
<th>Examples of Charges Included</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alcohol Related Offenses</td>
<td>Drinking in Public, Park Violation/Alcohol, Minor in Possession of Alcohol, Serving Minor</td>
</tr>
<tr>
<td>Assault/Simple Assault (not domestic violence)</td>
<td>Assault in the 4th Degree, Strangulation</td>
</tr>
<tr>
<td>Criminal Trespass 1 or 2</td>
<td>Trespass 1st Degree, Trespass Building, Trespass on Posted Public Property</td>
</tr>
<tr>
<td>Disorderly Conduct (Excluding Indecent Exposure)</td>
<td>Public Nuisance, Excessive Noise, Breach of Peace, Urinating in Public, Fighting, Pedestrian Interference</td>
</tr>
<tr>
<td>Domestic Violence Related Offenses</td>
<td>DV Assault, DV Reckless Endangerment</td>
</tr>
<tr>
<td>DUI or Physical Control</td>
<td>Operating Vessel While Intoxicated, Minor Operate Vehicle After Consuming Alcohol</td>
</tr>
<tr>
<td>DWLS 1st and 2nd Degree</td>
<td>Driving with a Suspended License First and Second Degree</td>
</tr>
<tr>
<td>DWLS 3rd Degree</td>
<td>Driving with a Suspended License Third Degree</td>
</tr>
<tr>
<td>Harassment</td>
<td>Stalking, Cyberspace Stalking, Telephone Harassment, Harassment Threaten Property, DV Harassment</td>
</tr>
<tr>
<td>Hit and Run-Attended and Unattended</td>
<td>Hit and Run Unattended Vehicle/Property, Hit and Run Accident/Injury, Hit and Run Bike/Pedestrian</td>
</tr>
<tr>
<td>Malicious Mischief</td>
<td>Graffiti, Property Destruction</td>
</tr>
<tr>
<td>Obstructing a Public Servant</td>
<td>Hindering Police, Obstructing Liquor Officer</td>
</tr>
<tr>
<td>Racing</td>
<td>Racing Vehicles</td>
</tr>
<tr>
<td>Reckless Driving</td>
<td>Reckless Driving</td>
</tr>
<tr>
<td>Simple Traffic Offenses</td>
<td>No Valid Driver License, Fail to Transfer Title Within 45 days, Trip Permit Violation</td>
</tr>
<tr>
<td>Theft/Shoplifting</td>
<td>Identity Theft, Theft of Rental/Lease Property</td>
</tr>
<tr>
<td>Violation of a Protection Order / No Contact Order / Restraining Order</td>
<td>Protection Order Violation, Restraining Order Violation, No Contact Order Violation</td>
</tr>
<tr>
<td>Weapons Related Offenses</td>
<td>Possession of a Dangerous Weapon, Aiming or Discharging Firearm, Carrying Concealed Pistol Without Permit</td>
</tr>
</tbody>
</table>
# Appendix B -- Case Weighting Summary Chart

## Criminal Charge Categories

<table>
<thead>
<tr>
<th>Charge Category</th>
<th>Weighted Credits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alcohol Related Offenses (excluding DUI)</td>
<td>0.50 credits</td>
</tr>
<tr>
<td>Assault (not Domestic Violence)</td>
<td>1.0 credit</td>
</tr>
<tr>
<td>Criminal Trespass 1 or 2</td>
<td>0.75 credits</td>
</tr>
<tr>
<td>Disorderly Conduct (excluding Indecent Exposure)</td>
<td>0.50 credits</td>
</tr>
<tr>
<td>Domestic Violence - Assault, Reckless Endangerment</td>
<td>1.5 credits</td>
</tr>
<tr>
<td>DUI and Physical Control</td>
<td>1.5 credits</td>
</tr>
<tr>
<td>DWLS 1st and 2nd Degree</td>
<td>0.75 credits</td>
</tr>
<tr>
<td>DWLS 3rd Degree</td>
<td>0.50 credits</td>
</tr>
<tr>
<td>Harassment</td>
<td>1.5 credits</td>
</tr>
<tr>
<td>Hit and Run-Attended and Unattended</td>
<td>0.75 credits</td>
</tr>
<tr>
<td>Malicious Mischief</td>
<td>0.75 credits</td>
</tr>
<tr>
<td>Obstructing a Public Servant</td>
<td>0.75 credits</td>
</tr>
<tr>
<td>Racing</td>
<td>1.0 credit</td>
</tr>
<tr>
<td>Reckless Driving</td>
<td>1.0 credit</td>
</tr>
<tr>
<td>Simple Traffic Offenses (e.g. No Valid Driver’s License)</td>
<td>0.50 credits</td>
</tr>
<tr>
<td>Theft/Shoplifting</td>
<td>0.75 credits</td>
</tr>
<tr>
<td>Violation of a Protection Order/No Contact Order/Restraining Order</td>
<td>0.75 hours</td>
</tr>
<tr>
<td>Weapons Related Offenses</td>
<td>1.0 credit</td>
</tr>
<tr>
<td>All Other Unlisted Misdemeanors</td>
<td>0.75 credits</td>
</tr>
</tbody>
</table>

## Resolution Categories

<table>
<thead>
<tr>
<th>Category</th>
<th>Weighted Credits</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sentence Violations and Other Non Charge Representations</td>
<td>No less than 1/3 of a case</td>
</tr>
<tr>
<td>Early Non-Criminal Resolution per Regular Practice:</td>
<td>No less than 1/3 of a case</td>
</tr>
<tr>
<td>This only applies to jurisdictions that use this practice.</td>
<td></td>
</tr>
<tr>
<td>Charge #1</td>
<td>*</td>
</tr>
<tr>
<td>Charge #2 (insert additional lines if necessary)</td>
<td>*</td>
</tr>
</tbody>
</table>

## Guilty Plea to Criminal Charge at Arraignment or First Appearance Hearing:

Equals 1 case pursuant to Standard 3.5

## Partial Representations, and Dockets/Calendars

<table>
<thead>
<tr>
<th>Activity</th>
<th>Credits for Case Weighting</th>
</tr>
</thead>
<tbody>
<tr>
<td>One hour of attorney case work</td>
<td>0.17 credits</td>
</tr>
</tbody>
</table>
# Racial Privilege Survey

Score “4” if the statement is always true for you  
Score “3” if the statement is frequently true for you  
Score “2” if the statement is sometimes true for you  
Score “1” if the statement is rarely true for you  
Score “0” if the statement is never true for you

<table>
<thead>
<tr>
<th>Because of my race or skin color...</th>
<th>Score</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. I can be in the company of people of my race most of the time.</td>
<td></td>
</tr>
<tr>
<td>2. If I should need to move, I can be pretty sure of renting or purchasing housing in an area I can afford and in which I would want to live.</td>
<td></td>
</tr>
<tr>
<td>3. I can be pretty sure that my neighbors in such a location will be neutral or pleasant to me.</td>
<td></td>
</tr>
<tr>
<td>4. I can go shopping alone most of the time, pretty well assured that I will not be followed or harassed.</td>
<td></td>
</tr>
<tr>
<td>5. I can turn on the television or open the front page of the paper and see people of my race widely and positively represented.</td>
<td></td>
</tr>
<tr>
<td>6. When I am told about our national heritage or about “civilization,” I am shown that people of my race made it what it is.</td>
<td></td>
</tr>
<tr>
<td>7. I can be sure that my children will be given curricular materials that testify to the existence of their race.</td>
<td></td>
</tr>
<tr>
<td>8. I can go into a bookshop and count on finding the writing of my race represented; into a supermarket and find the staple food which fit with my cultural traditions; into a hairdresser’s shop and can find someone who can do my hair.</td>
<td></td>
</tr>
<tr>
<td>9. I can arrange to protect my children most of the time from people who might mistreat them because of their race.</td>
<td></td>
</tr>
<tr>
<td>10. When I apply for a job or go to work I don’t have to worry about the style of my hair or my headscarf influencing other people’s perceptions as to whether or not I can do the job.</td>
<td></td>
</tr>
<tr>
<td>11. I can swear and dress in secondhand clothes, or not answer letters, without having people attribute these choices to the bad morals, poverty or illiteracy of my race.</td>
<td></td>
</tr>
<tr>
<td>12. Whether I use checks, credit cards, or cash, I can count on my skin color not working against the appearance that I am financially reliable.</td>
<td></td>
</tr>
<tr>
<td>13. I can do well in a challenging situation without being called a credit to my race.</td>
<td></td>
</tr>
<tr>
<td>14. When I attend outside events representing my organization I can be pretty certain that people will not be suspicious of me or question me to prove that I am who I say I am.</td>
<td></td>
</tr>
</tbody>
</table>

over
15. I am never asked to speak for all the people of my racial group. 

16. I can remain oblivious to the language and customs of persons of color without feeling, from people of my race, any penalty for such oblivion. 

17. I can criticize our government and talk about how much I fear its politics and behavior without being seen as a racial outsider. 

18. I can be pretty sure that if I ask to talk to “the person in charge,” I will be facing a person of my race. 

19. If I am the person in charge, I don’t receive looks of surprise or confusion and I don’t experience comments of disbelief. 

20. If a police officer pulls me over, I can be sure I haven’t been singled out because of my race. 

21. I can conveniently buy posters, postcards, picture books, greeting cards, and children’s magazines featuring people of my race. 

22. I can take a new job and be fairly certain that I won’t hear comments that imply I got the position because of my race. 

23. I can go home from most meetings or organizations I belong to feeling somewhat tied-in, rather than isolated, out-of-place, outnumbered, invisible feared, or hated. 

24. I can take a job or attend college with an affirmative action employer without having co-workers or colleagues suspect that I was hired or admitted because of my race. 

25. If my day, week, or year is going badly, I do not have to do any mental work trying to figure out whether my race played a role in it. 

26. I can be sure that if I need legal or medical help, my race will not work against me. 

27. I can submit my resume to any organization and not worry that my name will be a barrier in getting an interview for the position I seek. 

28. I can worry about racism without being seen as self-interested or self-seeking. 

29. I can comfortably avoid, ignore, or minimize the impact of racism on my life. 

30. I can choose blemish cover or bandages in “flesh” color and have them more or less match my skin. 

**Total Score:** 

Adapted from Peggy McIntosh, White Privilege and Male Privilege: A Personal Account of Coming to See Correspondence through Work in Women’s Studies (1988) 

And adapted from Beyond Diversity: A Strategy for De-Institutionalizing Racism and Improving Student Achievement (2001-2002) 

Cultures Connecting, LLC 
www.culturesconnecting.com
Defense submits this memorandum of law regarding the scope and purpose of jury selection. Because part of the defense theory in this case is an assertion that [REDACTED], the defense must be allowed to voir dire prospective jurors on any biases, prejudices or preconceptions related to prostitution.
A. **Voir Dire Must Be Of Sufficient Scope and Duration For The Parties To “Learn The State Of Mind Of Prospective Jurors”**

Both the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment right to trial mandate that an accused receive “a fair trial in a fair tribunal” before a panel of “impartial, indifferent jurors.” *Groppi v. Wisconsin*, 400 U.S. 505, 507-08 (1971). Voir dire is the process by which impartial and indifferent jurors are selected. *State v. Momah*, 167 Wn. 2d 140 (2009).

“Voir dire plays a critical function in assuring the criminal defendant that his *constitutional* right to an impartial jury will be honored. Without an adequate voir dire the trial judge’s responsibility to remove prospective jurors who will not be able impartially to follow the court’s instructions and evaluate the evidence cannot be fulfilled.” *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion). Hence, “[t]he exercise of [the trial court’s] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness.” *Aldridge v. United States*, 283 U.S. 308, 310 (1931).


A proper voir dire ensures an impartial jury by allowing parties “to ascertain whether the juror has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried.” *Connors v. United States*, 158 U.S. 408, 413 (1895). CrR 6.4(b) provides that,

A voir dire examination shall be conducted for the purpose of discovering any basis for challenge for cause and for the purpose of gaining knowledge to enable an intelligent exercise of peremptory challenges. … The judge and counsel may then ask the prospective jurors questions touching their qualifications to serve as jurors in the case, subject to the supervision of the court as appropriate to the facts of the case.

The purpose of voir dire is to “is to enable the parties to learn the state of mind of the prospective jurors, so that they can know whether or not any of them may be subject to a challenge for cause, and determine the advisability of interposing their peremptory
challenges.” State v. Laureano, 101 Wn. 2d 745, 758, 682 P.2d 889 (1984) (quoting State v. Tharp, 42 Wn. 2d 494, 499-500, 256 P.2d 482 (1953)). The scope of voir dire permitted by the court should be “coextensive with this purpose.” State v. Frederiksen, 40 Wn. App. 749, 752, 700 P.2d 369 (1985). While reasonable limits on voir dire examination fall within the court’s discretion, “the defendant should be permitted to examine prospective jurors carefully, ‘and to an extent which will afford him every reasonable protection.” Id. (citing Laureano, 101 Wn. 2d at 757). Thus, questioning must be sufficiently specific to allow the parties to make informed challenges. The duration of voir dire too must be sufficient to allow the parties to uncover any hidden bias. “More important than speedy justice is the recognition that every defendant is entitled to a fair trial before 12 unprejudiced and unbiased jurors. Not only should there be a fair trial, but there should be no lingering doubt about it.” State v. Davis, 141 Wn. 2d. 798, 824–35 (2000) (quotations and citations omitted).

B. Successful Voir Dire Requires Questioning Specific to the Issues of the Case

In Morgan v. Illinois, 504 U.S. at 734, the United States Supreme Court rejected the argument that “general fairness” and “‘follow the law” type questions are adequate to detect bias in prospective jurors. In Frederiksen, 40 Wn. App. at 754, Division I noted that three situations “require specific voir dire questions because of a real possibility of prejudice.”

(1) when the case carries racial overtones; (2) when the case involves other matters (e.g., the insanity defense) concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias in law yet significantly skew deliberations in fact; and (3) when the case involves other forms of bias and distorting influence which have become evident through experience with juries (e.g., the tendency to overvalue official government agents’ testimony).
Id. (citing United States v. Jones, 722 F.2d 528, 529 (9th Cir. 1983), and People v. Williams, 29 Cal.3d 392, 174 Cal.Rptr. 317, 325, 628 P.2d 869 (1981)) (emphasis added).

The court in Frederiksen went on to explain that case-specific voir dire is appropriate in other scenarios too, so long as the defendant demonstrates “a reasonable possibility of prejudice, i.e., that the proposed question was ‘reasonably calculated to discover an actual and likely source of prejudice, rather than pursue a speculative will-o-the-wisp.’” Id. at 756 (quoting Jones, 722 F.2d at 530). Such specific questioning is particularly appropriate where the issue about which counsel wishes to ask may affect a prospective jurors willingness to hold the State to its burden. Id. at 755.

The Frederiksen court’s discussion makes clear that case-specific questions are often required to detect bias. Courts in other jurisdictions also have recognized that adequate voir dire requires questioning necessarily must reference some of the specifics of the case. For example, in State v. Clark, 981 S.W.2d 143, 146-48 (Mo. 1998), the Missouri State Supreme Court reversed a conviction because defense counsel was not allowed to ask questions relating to the age of the victim. The court explained that “[v]oir dire requires the revelation of some portion of the facts of the case” and if the parties are not allowed to voir dire on “critical facts” – those facts “with substantial potential for disqualifying bias” – then it will be impossible to discover bias. Id. When the trial could prevent counsel from asking case-specific questions, the opportunity to voir dire prospective jurors becomes “meaningless.”

In United States v. Napoleone, 349 F.2d 350 (3d Cir. 1965), the court reversed a conviction because the court did not permit questioning on how jurors would feel about
evidence that the defendant told lies in the course of his employment as a private investigator. The court explained,

Since the crux of the defense was that while the defendant had lied concerning the purposes of his investigation he had not presented himself as “an employee of the Veterans Administration,” he had the right to have prospective jurors questions as to whether they had such a moral or ethical repugnance toward liars and lying that the could not evaluate his testimony “objectively and fairly.”

People v. Coffman, 96 P.3d 30, 96 (Cal. 2004) (affirming “the principle that either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence …”).

The court in United States v. Johnson, 366 F. Supp. 2d 822 (N.D. Iowa 2005), a death penalty case, conducted a careful analysis of the question of whether case-specific questions are permissible during voir dire. The court noted that it is improper for parties to attempt to get jurors to speculate about how they would vote on a specific set of facts or to “precommit” to a certain verdict. However, the court concluded that “case-specific questions are appropriate – indeed, necessary – during voir dire of prospective jurors to allow the parties to determine the ability of jurors to be fair and impartial in the case actually before them, not merely in some ‘abstract’ death penalty case.” Id. at 850 (emphasis in original).1 The court noted that case-specific questions fall within a spectrum and divided them into five categories:

“Abstract” questions. Abstract questions that probe a prospective juror’s beliefs without reference to specific features of the case, such as a questions about whether a juror

would be able to consider evidence in a murder case impartially, are always permissible. Id. at 835.

**Defendant’s status questions.** The court in *Johnson* concluded that it was appropriate to ask questions “about the defendant’s status separate and independent of the alleged crime.” Id. at 836-837. A party should always be allowed to ask questions designed to determine whether the defendant’s status would be a source of bias, particularly when the defendant is the member of a protected class, as is the case with race, gender, national origin, religion etc. See *United States v. Daily*, 139 F.2d 7 (7th Cir. 1943) (noting that the trial court correctly allowed the counsel to inquire whether any prospective jurors harbored prejudice against Jehovah’s Witness); *United States v. Bear Runner*, 502 F.2d 908 (8th Cir. 1974) (holding that “probing questions” were appropriate to determine bias related to defendant’s status a Native American).

**“Case-categorization” questions.** The court in *Johnson* concluded that it is often appropriate to probe whether prospective jurors harbor prejudice towards certain kinds of cases. *Johnson*, 366 F. Supp. 2d at 837-40. For example, in *United States v. Flores*, 63 F.3d 1342, 1356 (5th Cir. 1996), the court held that it was appropriate for the prosecutor to have asked a prospective juror questions about whether the juror would be willing to impose the death penalty if he learned that the victim had been dealing drugs. See also *Green v. Johnson*, 160 F.3d 1029, 1036 (5th Cir. 1998) (prosecutor allowed to ask jurors if they could impose death penalty in felony murder case if predicate felony was unsuccessful or if defendant was an aider and abettor rather than the gunman).

This type of questioning overlaps with Frederiksens’ second category – matters about which the community is known to harbor strong feelings – which as been interpreted
to include “firearms, and underage drinking and drug use.” State v. Brady, 116 Wn. App. 143, 148, P.3d 1258 (2003). See also Lurding v. United States, 179 F.2d 419 (6th Cir. 1950) (wagering); State v. Miller, 88 P.2d 526 (1939) (intoxicants); Webb v. Commonwealth, 314 S.W.2d 543, 544 (Ky. 1958) (“The refusal of the right to examine the jurors on their views concerning patricide and self-defense was error.”)

Case-specific questions. The court in Johnson, 366 F. Supp. 2d 840, 848-50, concluded that there are situations in which it is appropriate to ask questions “involving stated facts … that might actually be at issue in the case that jurors would hear.” These questions may be necessary, for example, to “measure a prospective juror’s ability to follow the law.” Id. at 843. Similarly, in Green v. Johnson, 160 F.3d 1036-37, the court held that it was appropriate for the prosecutor to try to determine whether prospective jurors understood the difference between “deliberate” and “intentional” acts by asking a series of hypothetical questions similar to the facts of the case.

In Washington, Frederiksen recognized that it is appropriate to ask specific questions to probe “forms of bias and distorting influence which have become evident through experience with juries,” such as juror’s tendency over- or undervalue certain kinds of evidence. See also State v. Finch, 746 S.W.2d 607, 613 (Mo. App. 1988) (reversing conviction because defense counsel was not allowed to ask prospective jurors whether they automatically would believe the testimony of a complaining witness in a sexual assault trial merely because she said someone had tried to rape her). Allowing prospective jurors to hear some of the facts of the case before or during voir dire is consistent with CrR 6.4(b), which provides that “[t]he judge shall initiate the voir dire examination by identifying the
parties and their respective counsel and by briefly outlining the nature of the case.”
(Emphasis added.)

“Stake-out” questions. Questions that seek to have jurors commit themselves to a particular course of action or that are designed to indoctrinate jurors are not allowed during voir dire, of course. These questions must be distinguished from permissible case-specific questions that directed at determining jurors’ ability to follow to the law and/or their willingness to be impartial. The court in Johnson, 366 F. Supp. 845 recognized the difficulty in drawing a clear line between permissible “case-specific” questions and impermissible “stake-out” questions, but suggested that three factors should be considered: 1) whether the question asks a juror to “speculate or pre-commit” to how he or she might vote based on particular fact, 2) whether the question seeks to “discover in advance” what a jurors decision will be “under a certain state of the evidence” and 3) whether the question seeks to “indoctrinate [jurors] regarding potential issues.” As the court in Johnson, 366 F. Supp. 2d at 849, pointed out, lawyers conducting voir dire can ask case-specific questions by prefacing any facts with “If the evidence shows…,” and can avoid asking jurors to speculate about what their verdict should be by farming the question in terms of whether or not the prospective jury “could fairly consider” the evidence.

C. Because Evidence Of Bias May Be Circumstantial Or Revealed Indirectly, Parties Must Be Permitted To Employ Proven Means Of Detecting Latent Bias

Voir dire must include questions that identify bias even where jurors are reluctant to admit they cannot be fair. City of Cheney v. Grunewald, 55 Wn. App. 807, 811 (1989), identified a line of questioning which assists the parties and the trial judge in determining whether a juror is impliedly biased. During voir dire in Grunewald, a juror said that he had
strong feelings and experience regarding drunk driving, yet added that he could be fair in a DUI trial. However, the juror agreed to his latent bias when asked:

“If you were in [the defendant’s] place today, would you want six jurors with your frame of mind? Would you feel that he would get a fair trial with six jurors with your frame of mind right now?”

The juror responded, “I don’t think so.” Id. The Supreme Court reversed the conviction because this juror should have been stricken for cause, as his statement evidenced an inability to try the DUI case fairly.

D. Jurors Must Not Be Inappropriately Rehabilitated

The Court should not try to rehabilitate a juror who has expressed bias through additional questioning. Statements or questions such as “but do you think you could follow the instructions given to you by the court” are not enough for proper rehabilitation.

“One of the myths arising from the folklore surrounding jury selection is that a juror who has made answers which would otherwise disqualify him by reason of bias or prejudice may be rehabilitated by being asked whether he can put aside his personal knowledge, his views, or those sentiments and opinions he has already, and decide the case instead based solely on the evidence presented in court and the court’s instructions. This has come to be referred to in the vernacular as the ‘magic question.’”

Montgomery v. Commonwealth, Ky., 819 S.W.2d 713, 716 (1991). “Mere agreement to a leading question asking whether the jurors will be able to disregard what they have previously read or heard is not enough to discharge the court’s obligation to provide a neutral jury.” Id. There are “no magic words” in regards to juror rehabilitation because it does not matter that a juror claims that they will give the defendant a fair trial. Id. It is the probability of bias or prejudice that matters. Id.; see also Irvin v. Dowd, 366 U.S. 717, 728 (1961); United States v. Wood, 299 U.S. 123, 146 (1936) (“Impartiality is not a technical conception. It is a state of mind”).
In *State v. Fire*, 100 Wn. App. 722, 728–29, 998 P.2d 362 (2000), rev’d on other grounds, 145 Wn.2d 152 (2001), the court held that the trial court judge’s peremptory rehabilitation of a juror was inadequate. The court held that a juror’s admission that “it was possible that his strong feelings about this kind of case [involving a sex assault on a child] could affect his determination of guilt or innocence” was an indication of actual bias. The juror had said that he would “probably give children a higher credibility factor than an adult.” *Id.* The prosecutor attempted to rehabilitate the juror by asking the juror

PROSECUTOR: And you - if you were given instructions on what that means and the other instructions, you would follow the instructions as given to you by the Court?

JUROR: Yes.

PROSECUTOR: But you do have some strong feelings about the case, but you'd still follow the law?

JUROR: Yes.

*Id.* at 724. This attempt to rehabilitate the jury was inadequate. The Court of Appeals held that the juror should have been stricken despite his promises to be fair. The Court stated, “[j]ust as most potential jurors will not respond affirmatively if asked, ‘Are you biased?’ few will fail to respond affirmatively to a leading question asking whether they can be fair and follow instructions.” *Id.* (citations omitted).

Leading questions in rehabilitation are especially damaging when they come from the court. The trial judge has a unique position and stature in the potential juror’s mind. Such questions unduly pressure a juror to take a position contrary to what is truly honest. Furthermore, these questions violate the appearance of fairness. The trial judge, who has to decide challenges for cause, would appear to be taking a partisan position if the judge were
to lead a juror towards rehabilitation. This could be construed as supporting a particular challenge for cause or supporting the objection to it. Hence, the Defense is asking this Court to agree that it will not lead any potential jurors during an attempt to rehabilitate.

DATED this ____ day of ____________, 2015.

Respectfully submitted,

____________________________________
NAME
Attorney for ______________________
IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON, )
 )
Plaintiff, )
 )

v. )
)

CHRISTOPHER MONFORT, )
 )
Defendant. )
 )

NO. 09-1-07187-6 SEA

DEFENDANT'S MOTION TO STRIKE NOTICE
OF SPECIAL SENTENCING PROCEEDINGS
AND REQUEST FOR EVIDENTIAL HEARING
WHERE SOCIAL SCIENCE STUDIES ESTABLISH
IMPLICIT BIAS AFFECTS JURORS DEATH
PENALTY DECISIONS IN VIOLATION OF THE
STATE AND FEDERAL CONSTITUTIONS

MOTION

COMES NOW, the defendant, Christopher Monfort, by and through his attorneys of record,
Carl Luer, Todd Gruenhagen and Stacey MacDonald, and moves this Court to strike the Notice of
Special Sentencing Proceedings as social science studies have established that implicit social
cognition, specifically implicit racial bias, affects jurors' death penalty decisions when a black
defendant is alleged to have murdered a white victim. Any decision to impose the death penalty if
made with either explicit or implicit racial bias, violates Mr. Monfort's right to be free from cruel

defendant's motion to strike the notice of special sentencin
and unusual punishment. It is clear that “stark racial disparities define America’s relationship with
the death penalty.”

This motion is brought under the Eighth Amendment and the Fourteenth Amendment Equal
Protection and Due Process Clauses of the United States Constitution, and Article 1, sect. 3, 14 and
22 (Amend 10) of the Washington State Constitution, as well as the caselaw cited within this
motion and attached appendices.

DATED this 13th day of August, 2014.

[Signature]
Attorney for Defendant
Carl Luer, WSBA # 16365
Todd Gruenhagen, WSBA#12340
Stacey MacDonald, WSBA #35394

CASE HISTORY

Christopher Monfort is charged one count of arson in the first degree and one count of
attempted murder arising from allegedly firebombing the Charles Street Maintenance yard on
October 22, 2009. He is also charged with one count of aggravated murder for the death of Seattle
Police Officer Timothy Brenton and a count of attempted murder against Officer Britt Sweeney,
Brenton’s partner from October 31, 2009. From November 6, 2009, Mr. Monfort is charged with
attempted murder of Sgt. Gary Nelson for allegedly attempted to shoot Sgt. Nelson when Mr.

1 See Justin D. Levinson, Robert J. Smith & Danielle M. Young, Devaluing Death: An Empirical Study of Implicit
Racial Bias on Jury-Eligible Citizens in Six Death Penalty States. February 19, 2013. (Appendix A)
Monfort was contacted in the parking lot of the Terrace Apartments during the investigation into the murder of Officer Brenton.

On December 7th, 2012, this Court conducted an evidentiary hearing on The Capital Jury Project and heard testimony from Dr. Wanda Foglia regarding the findings of the Capital Jury Project ("CJP"). That testimony, as it relates to racial disparities, is incorporated by reference into this motion.²

Mr. Monfort is bi-racial and identifies as black. Officer Timothy Brenton was white. The State is seeking the death penalty for Mr. Monfort. Trial is scheduled to begin on August 13, 2014 with pretrial motions.

ISSUE

Mr. Monfort's right to be free from cruel and unusual punishment is violated when he is facing the death penalty as a black defendant accused of killing a white police officer and where social science studies have established that jurors in capital cases make their sentencing decisions while under the influence of implicit racial bias and that black defendants convicted of murdering white victims are 82% more likely to receive a death sentence based on this implicit racial bias.

INTRODUCTION

The Motion is organized in the following sections.

1. Race and the Death Penalty Historically
2. Current Law Relating to Race and the Death Penalty
   a. Capital Jurors and the Life and Death Decision
   b. Race and the Death Penalty Decision in Application
   c. Social Science Studies Regarding Race and the Death Penalty Decision

² Dr. Wanda Foglia's power point of her testimony is incorporated by reference and can be found in the Court records at ECR #596.
d. Implicit Social Cognition and Implicit Racial Bias

e. Risk for Arbitrary and Capricious Death Penalty Decisions

3. Motion for Evidentiary Hearing

I. RACE AND THE DEATH PENALTY HISTORICALLY

A central feature of the death penalty in the United States has been its long standing historical biased use. "Prior the Civil War, all Southern States provided by law that slaves -- and sometimes free Negroes as well -- should be sentenced to death for crimes punishable by lesser penalties when whites committed them." See Stuart Banner, The Death Penalty: An American History, 140-42 (2002). After the abolition of slavery, discrimination against the free blacks and biracial individuals was formalized and perpetuated by the "Black Codes" and the ongoing use of the death penalty for crimes committed by African Americans, while White men received lesser punishments. See Randall Kennedy, Race, Crime and the Law, 84-85 (1997). (Colonial slave codes had permitted masters to kill their refractory slaves with impunity while "correcting" them.) See also A. Leon Higginbotham Jr., In the Matter of Color: Race and the American Legal Process - The Colonial Period at 189-190, 253-54. (1978) (When the killing of slaves was punished at all, it was lightly punished.)

Senator Howard, introducing the Fourteenth Amendment in the Senate said that: "This abolishes all class legislation in the State and does away With the injustice of subjecting one caste of persons to a code not Applicable to another. It prohibits the handing of a black man for a Crime for which the white man is not to be hanged.

See Cong. Globe, 39th Cong., 1st Sess. 2766 (May 23, 1866). The aim of the Amendment was, as explained to the House by Thaddeus Stevens:

Whatever law punishes a white man for a crime shall punish the black man
In precisely the same way...Whatever law protects the white man shall

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Afford equal protection to the black man.

See Cong. Globe, 39th Cong., 1st Sess. 2459 (May 8, 1866). America has had a long history with racial disparities in criminal justice and punishment. We have had a sordid history with lynching and extra-legal lynching. It is unsurprising that those southern states with a history of lynching and extra-legal lynching are called the "death belt" in modern times and taken together account for over 90% of all executions since 1976. See Charles J. Ogletree, Black Man's Burden: Race and the Death Penalty in America, 81 Or. L. Rev. 15, 18-19 (2002).

II. CURRENT LAW RELATING TO RACE AND THE DEATH PENALTY

"Death, in its finality, differs from life imprisonment more than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment." Woodson v. North Carolina, 428 U.S. at 305, 96 S. Ct. at 2991. By seeking the death penalty, the state has announced its intention to kill Mr. Monfort. This Court has the responsibility to determine whether or not Mr. Monfort can be provided a trial that comports with the standards set forth by the Constitutions of the State of Washington and the United States of America.

"[T]he methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged.... The Court thus fulfills, rather than disrupts, the scheme of separation of powers by closely scrutinizing the imposition of the death penalty, for no decision of a society is more deserving of 'sober second thought'"

McCleskey v. Kemp, 481 U.S. at 343, 107 S.Ct. at 1793-1794 (J. Brennan, dissenting) citing,

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishment." Article 1, Section 14 of the Washington State Constitution also prohibits the infliction of "cruel punishment." Justice Douglas wrote "It is also settled that the proscription of cruel and unusual punishments forbids the judicial imposition of them as well as their imposition by the legislature." 408 U.S. at 241. citing Weems v. United States, 217 U.S. 349, 30 S. Ct. 544 (1910). "It is also said in our opinions that the proscription of cruel and unusual punishments 'is not fastened to the obsolete, but may acquire new meaning as public opinion becomes enlightened by a humane justice.'" Id at 242. Where there is a risk within a sentencing scheme for the possibility of "arbitrary and capricious" sentencing decisions it is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment and Art. 1, Section 14.

In Furman, the United States Supreme Court struck down the death penalty and concluded that the death penalty was so irrationally imposed that any particular death sentence could be presumed excessive in violation of the Eighth Amendment prohibition. Furman v. Georgia, 408 US. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972). As the Furman Court found, "the generality of a law inflicting capital punishment is one thing. What may be said of the validity of a law on the books, and what may be done with the law in its application do, or may, lead to quite different conclusions." Furman, 408 U.S. 238, 242. (Emphasis added). A few years later in Gregg, the Court adopted safeguards and requirements that they believed would protect against arbitrary sentencing decisions when they are applied.
a. **Capital Jurors and The Life or Death Decision**

The United States Supreme Court has continuously held that when a jury fails to follow its mandates a death sentence is unconstitutionally arbitrary. See e.g. Woodson v. North Carolina, 428 U.S. 280, 302, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976) ("vesting of standardless sentencing power in the jury violates the Eighth and Fourteenth Amendments"); Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 398 (1980)(capital jury’s sentencing discretion must be channeled by clear and objective standards which provide specific and detailed guidance for the jury and render the capital sentencing process one that can be rationally reviewed). Washington State adopted these United States Supreme Court holdings in State v. Bartholomew, 101 Wn. 2d 631, 638 P. 2d 1079 (1984); State v. Rupe, 101 Wn. 2d 664, 709-710, 683 P. 2d 571 (1984); State v. Campbell, 103 Wn. 2d 1, 691 P.2d 929 (1984).

"Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Furman, 428 U.S at 189, 96 S. Ct. at 2932. “Thus, ‘while some jury discretion still exists, the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application.” Id., 428 U.S. at 198, 96 S. Ct. at 2936. When challenging the application of a death penalty scheme, the question is “at what point does that risk become constitutionally unacceptable.” Turner v. Murray, 476 U.S. 28, 36, n. 8, 106 S.Ct. 1683, 1688, n. 8, 90 L. Ed. 2d 27 (1986).

b. **Race and the Death Penalty Sentencing Decision**

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Race cannot play any role in the capital jury's decision-making. "In a capital sentencing proceeding before a jury, the jury is called upon to make a highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves." Turner v. Murray, 476 U.S. 28, 33, 106 S. Ct. 1683, 90 L.Ed.2d 27 (1986)(further citation omitted)

Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected...[A] juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief in deciding whether the petitioner's crime involved the aggravating factors... Such a juror might also be less favorably inclined toward petitioner's evidence of mental disturbance as a mitigating circumstance. More subtle, less consciously held racial attitudes could also influence a juror's decision... Fear of blacks, which could easily be stirred up by the violent facts of Petitioner's crime, might include a juror to favor the death penalty.

Turner, 476 U.S. at 34-35.

[We are convinced that such discretion gives greater opportunity for racial prejudice to operate than is present when the jury is restricted to fact-finding...[A]s we see it, the risk of racial bias at sentencing hearings is of an entirely different order, because the decision that sentencing jurors must make involve far more subjective judgments than when they are deciding guilt or innocence.

Id. at 33-34, 36, 38.

Safeguards must be followed to minimize the risk of race infecting the capital sentencing decision. For this reason, a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias.

Turner v. Murray, supra. State v. Davis, 141 Wn. 2d 798, 824-25, 10. P.3d 977 (2000)(the state and federal constitutional rights to due process and a fair trial guarantee the right to question prospective jurors about racial bias or prejudice.) However, even with the ability to voir dire on
race, there is still an inherent risk that jurors will not be forthcoming regarding their bias or will be unaware of their bias as it may be implicit racial bias. Such a risk of a capital sentencing being made where there is implicit racial bias, violates the Eighth Amendment and art. 1, Sects 14, 22.

In the Saintcalle case, Justice Wiggins discusses about the reality of implicit bias when it comes to race and jurors in criminal trials:

"...the problem is that racism itself has changed. It is now socially unacceptable to be overtly racist. Yet we all live our lives with stereotypes that are ingrained and often unconscious, implicit biases that endure despite our best efforts to eliminate them. Racism now lives not in the open but beneath the surface—in our institutions and our subconscious thought processes—because we suppress it and because we create it anew through cognitive processes that have nothing to do with racial animus."

State v. Saintcalle, 178 Wash.2d at 46.(emphasis in original).

c. Scientific Social Studies on Race and the Death Penalty

Social scientists have been conducting scientific, method based research into the two questions of how juries go about making their decisions and what impact the capital voir dire process has on the capital jury group's decision making dynamic for the last forty years. Since Witherspoon, the United States Supreme Court has periodically been presented with studies by litigants who hoped to shed light on the particular legal issue before the court based on this research.

In the past, the Court has rejected these studies. Initially this evidence was rejected because the field of study was too new and there was insufficient data to support the relief being sought.

See, Witherspoon v. Illinois, supra, 391 U.S. at 517 (the three studies offered to support the claim that death qualified juries were guilt prone juries is rejected as "too tentative and fragmentary" to support per se constitutional ruling).
However, as the scientific research in the field has gained acceptance it started to get rejected by the Court because it did not address the question of how “actual jurors sworn under oath apply the law to the facts of an actual case involving the fate of an actual capital defendant.” *Lockhart v. McCree*, 476 U.S. 162, 171, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986). In essence, the Court said data from artificial jurors in artificial settings, is unpersuasive even when drawn from scientifically sound and statistically valid mathematical equations. *See McCleskey v. Kemp*, 481 U.S. 279, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (studies showing race influences capital decision making does not answer the question of how jurors eligible for service in *McCleskey’s* case were influenced by racial considerations when they were sworn under oath). Similarly, in *State v. Brown*, 132 Wn. 2d 529, 940 P. 2d 546 (1997) *cert denied*, 523 U.S. 1007 (1998), the Washington State Supreme Court declined to revisit the issue, choosing to rely on its earlier decision in *State v. Hughes*, 106 Wn. 2d 176, 721 P.2d 902 (1986), which in turn relied upon *Lockhart v. McCree*. *Brown*, at 599-600.

In response to *McCleskey*, social scientists have conducted extensive research involving interviews with actual jurors from actual cases. The CJP researched the decision-making of actual capital jurors. Their interviews chronicle the juror’s experiences and decision making over the course of the actual trial, identify at which points various influences come into play, and reveal the ways in which jurors reach their final sentencing decisions.

The responses of the CJP jurors illustrates the existing evidence of how race still influences who gets the death penalty in this country. The CJP found that whether the jury venire was made up of all white jurors or a mix of white and black jurors affected the outcome of whether or not to impose a death sentence. Specifically, the studies found that all-white juries were not as inclined to
consider mitigation as black jurors in interracial cases. The study also determined that where the
cases involved interracial, i.e. black defendants and white victims, the likelihood of a death sentence
was highest than any other race combination.

In addition to the CJP, the United States General Accounting Office (GAO) did a review of
prior research and showed that 82% of the studies indicate that defendants were more likely to get
the death penalty if the victim was white. The GAO review, as well as other research, has found
that the death penalty is also more likely when the defendant is black, and especially when the
defendant is black and the victim is white.

The McCleskey Court relies heavily on the “rule [that has been] that constitutional
guarantees are met when “the mode [for determining guilt or punishment] itself has been surrounded
with safeguards to make it as fair as possible.” McCleskey 481 U.S. at 313, 107 S. Ct. at 1179,
citing Singer v. United States, 380 U.S. at 35, 85 S. Ct. at 790. They continue on to state that “where
the discretion that is fundamental to our criminal process is involved, we decline to assume that
what is unexplained is invidious.” Id. However, here with the findings of the CJP, it is not
unexplained. In fact, the scientific research proves the fact that the safeguards are being ignored and
are not protecting against arbitrary and capricious decisions.

In Washington State, Dr. Katherine Beckett from the University of Washington conducted a
study, drafting the report “The Role of Race In Washington State Capital Sentencings 1981-2012”.

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4 Id; David C. Baldus et al., Equal Justice and the Death Penalty: A Legal and Empirical Analysis (1990); and Samuel R.
In this study she looked race in how capital cases were charged and also at race in how juries made sentencing decisions. Dr. Beckett discovered that:

The results indicate that prosecutors sought death sentences in a larger proportion (33.9%) of aggravated murder cases involving white defendants than they did in cases involving black (26.8%) or other (23.5%) defendants. However, juries imposed death in a larger share (16.1%) of cases involving black defendants than they did in cases involving white defendants (12.4%) or other defendants (7.8%). Moreover, the death penalty has been retained in a larger proportion of cases involving black defendants (7.1%) than it has in cases involving white (4.5%) or other (2%) defendants.

The over-representation of black defendants among those sentenced to death is especially striking given that prosecutors were more likely to seek death in cases involving white defendants. Based on these figures, we can calculate that juries imposed death in 36.6% of the cases involving white defendants, but 60% of the cases involving black defendants, in which prosecutors sought the death penalty.

Role of Race in Washington Study, pg 11-12. Dr. Beckett found in terms of race and juror sentencing in Washington that:

The results show that prosecutors sought death in a slightly larger share of cases involving a white defendant and white victim (30%) and cases involving a black defendant and white victim (28%) than in cases involving a black defendant and black victim (25%). However, a death sentence was imposed in a larger proportion of cases involving black defendants than of cases involving white defendants—regardless of the race of the victim. Interestingly, the death penalty has been retained in a notably larger share (8%) of cases involving a black defendant and white victim than in cases involving other racial configurations.

Id at 11-12. (Emphasis added) See William J. Bowers, *Crossing Racial Boundaries: A Closer Look at the Roots of Racial Bias in Capital Sentencing When the Defendant is Black and the Victim in White* (We found conspicuous evidence of racial influence in sentencing in the critical

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5 see also Williams J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post–Furman Capital Statutes*. Crime and Delinquency (1980)(demonstrating racial disparities in capital sentencing under the Gregg-approved statutes of Georgia, Florida, Texas and Ohio.) David C. Baldus et al., *Equal Justice and the Death Penalty: A Legal and Empirical Analysis* (1990)(a rigorous demonstration of the influence of race on sentencing outcomes in black-

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black-defendant/white-victim cases in which Turner warned of the dangers of both conscious and unconscious racism in the Juror’s decision making). (Appendix B); See also, “Racism and the Execution Chamber” Matt Ford, The Atlantic, June 23, 2014,6 (The article reports that “the national death-row population is roughly 42 percent black, while the U.S. population overall is only 13.6 percent black, according to the latest census.”)

In this case, Mr. Monfort is a black male and Officer Timothy Brenton, the victim, was white. Mr. Monfort, in Washington State, has an 8% higher chance of being sentenced to death because of the racial combination in his case. Race is an issue in this capital case. The data informs us that in the context of this case, race will contribute to a greater likelihood of imposition of a death sentence and that is a violation of Mr. Monfort’s rights under the Eighth Amendment and art 1, sect 14, 22 of the Washington State constitution.

d. Implicit Social Cognition and Implicit Racial Bias

Since 2005, studies on implicit bias have emerged rapidly in various areas of law. It has been observed by legal commentators that racial discrimination in America has “evolved from intentional and overt to unintentional and covert.” Justin D. Levinson, Huajian Cai & Danielle Young, Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test. (2010). (Appendix C).

Social scientists have demonstrated over the twenty-five years that “many Americans harbor implicit racial biases that frequently conflict with their self-reported racial attitudes. These biases manifest automatically and without conscious awareness in a variety of basic circumstances, such as when people

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categorize information, remember facts and make decisions.

Justin D. Levinson, *Race, Death, and the Complicitous Mind.* (Appendix D); See also Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decision Making and Misremembering,* pg 354. (2004)("have illustrated that racial attitudes and stereotypes are both automatic and implicit. That is people possess attitudes and stereotypes over which they have little or no "conscious, intentional control.") (Appendix E)


One particularly interesting characteristic of implicit racial attitudes is that they frequently diverge from explicit racial attitudes. That is, people who display strong implicit biases are often not the same people who demonstrate strong explicit biases... “Even those who consciously renounce prejudice have been shown to have implicit or automatic biases that conflict with their nonprejudicial values.

Levinson, *Forgotten Racial Equality,* supra at 360. Thus, even if jurors with clearly explicit bias are being removed from serving on capital cases in voir dire, it doesn’t stop the jurors from considering race in making their decisions in both phases, where jurors are unconscious of any implicit racial bias they have.
In fact, merely cueing racial categories can lead to biased behaviors. For example, in one study subjects were primed by being shown a picture of a “black face” or “white face” and told it was a cue to them that an object would be shown next. The subjects were to identified the objects as quickly as possible. The study found that the subjects when primed with a picture of a black face, led to quicker identification of weapons and misidentification of tools as weapons. Verses when primed with a white face, which led to quicker identification of tools and slower identification of weapons. See Innocent Until Primed, supra. Other social science studies found that blacks defendants are associated with guilt and white defendants are associated with not guilty. “Black defendants may be implicitly associated with the construct of guilt that underlies the presumption of innocence before a trial even begins. Id, supra at pg 2. See also Justin D. Levinson, Huajian Cai, & Danielle Young, Guilty By Implicit Racial Bias: The Guilty/Not Guilty Implicit Test Association (2010). (Appendix C)

One of the male jurors, while stating that he was not concerned with the defendant returning to society if not given the death penalty, went on to say that he “pack[ed]” a gun for a week afterwards.

Bowers, Crossing Racial Boundaries at 1521.

Implicit racial bias can manifest itself in judicial proceedings and decision making by biased memories, misremembering of the evidence in racially biased ways and distorting case facts in ways racially biased ways. Id at 353. Jurors and Judges misremember facts of the case because of implicit racial bias. “Results also show that susceptibility to misremembering facts based on race cannot be attributed to more overly racist people — those who were susceptible to racial misremembering sometimes embraced less explicit racial attitudes.” See Justin D. Levinson,

Specifically in capital cases the death qualification process of voir dire can prime and elicit implicit racial biases in most capital jurors. See Justin D. Levinson, Race, Death, and the Complicitous Mind, supra. at 603. “Race-neutral line of questioning acts as an indirect prime that triggers stereotypes of African Americans, including criminality, dangerousness, and guilt...which become activated during the death qualification process and subsequently affect the way jurors process information, deliberate and render verdicts when African Americans are on trial.” Id at 619.

When we are asking prospective jurors about their ability to consider the death penalty, it is the death penalty that automatically triggers the racial associations as historically, “when we think about the death penalty, we think in part, in race-tinged pictures – of black victims lynched by white mobs, of black defendants condemned by white juries, of slave codes and public hangings.” Stuart Banner, Traces of Slavery: Race and the Death Penalty in Historical Perspective at 97.

In Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States, Professor Levinson did a study to test the effects of implicit bias on the death penalty, which included studying 445 jury eligible citizens in six leading death penalty states: Alabama, Arizona, California, Florida, Oklahoma and Texas. What his study found was that there

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were two types of implicit racial bias in capital jurors. That the jurors had implicit biases regarding ethnicity, i.e. they generally preferred white over black individuals. And that the jurors placed higher value on white victims then they did on black victims. See (Appendix A). Essentially, jurors were more likely to associate black defendants' with stereotypes including dangerousness, laziness and criminality. Due to the higher value jurors placed on white victims, they were more inclined to punish defendants who murdered white victims more severely than they would defendants who murdered black victims.

e. *It is the Risk of an Imposition of an Arbitrary Death Penalty Decision that Matters*

Since *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972) the Court has been concerned with the risk of the imposition of an arbitrary sentence, rather than the proven fact of one. *Furman* held that the death penalty may not be imposed under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. *Godfrey v. Georgia*, 446 U.S. at 427, 100 S. Ct. at 1764. See also *Caldwell v. Mississippi*, 472 U.S. 320, 343, 105 S. Ct. 2633, 2647 (1985)(“a death sentence must be struck down when the circumstances under which it has been imposed 'creat[e] an unacceptable risk that the death penalty[may have been] meted out “arbitrarily or capriciously” or through “whim or mistake.”")

As Justice Brennan stated in his dissent in *McCleskey*:

The Court’s “emphasis on risk acknowledges the difficulty of divining the jury’s motivation in an individual case. In addition, it reflects the fact that concern for arbitrariness focuses on the rationality of the system as a whole, and that a system that features a significant probability that sentencing decisions are influenced by impermissible considerations cannot be regarded as rational.

As we said in *Gregg v. Georgia*, 428 U.S. at 200, 96 S. Ct. at 2937, ‘the petitioner looks to the sentencing system as a whole (as the Court did in Furman and we do today).”

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a constitutional violation is established if a plaintiff demonstrates a 'pattern of arbitrary and capricious sentencings.' Id at 195 n. 46, 96 S. Ct. at 2935 n 46."

McCleskey, 481 U.S. at 323, 107 S. Ct. at 1783-1784.

We see clearly in other cases that have come before the Supreme Court that it is the risk associated with an arbitrary and capricious sentencing decision which has invalidated a State's death penalty sentencing scheme. See Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L. Ed. 2d 944(1976)(The Court struck down the petitioner's sentence because the vagueness of the statutory definition of heinous crimes created a risk that prejudice or other impermissible influences might have infected the sentence decision.)(emphasis added); Roberts v. Louisiana, 428 U.S. 325, 96 S. Ct. 3001 (1976) and Woodson v. North Carolina, 428 U.S. 280, 96 S. Ct. 2978(1976)(The Court struck down the death sentences in part because mandatory impositions of the death penalty created the risk that a jury might rely on arbitrary consideration in deciding which persons should be convicted of capital crimes.)(emphasis added); Stringer v. Black, 503 U.S. 222, 112 S. Ct. 1130, 117 L. Ed. 2d 367 (1992)(the presence of a vague aggravator in the weighing process created a greater risk of arbitrariness)(emphasis added); Shafer v. South Carolina, 532 U.S. 36, 54-55, 121 S. Ct. 1263, 149 L. Ed. 2d 178(2001)(a capital jury's choice to sentence someone to death should never be premised upon false, misleading, or inaccurate beliefs because such erroneous beliefs have the effect of forcing the jury to choose death); accord State v. Bartholomew, 101 Wn. 2d 631, 683 P.2d 1079 (1984); State v. Rupe, 101 Wn. 2d 664, 709-10, 683 P. 2d 571 (1984); State v. Campbell, 103 Wn. 2d 1, 691 P. ed 929 (1984)(adopting the United States Supreme Court's holdings).

Mr. Monfort only needs to establish that there is a risk, in his case, that the jury may return a death sentence arbitrarily based on implicit racial considerations and biases of which the jurors

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themselves may not be aware. Mr. Monfort does not need to prove in his case that he will be
sentenced to death based on race, but that he is at risk for such an outcome. Such a risk of
imposition of an arbitrary sentence does not comport with the requirements set out by the United
States Supreme Court.

Furman stands for the imperative that a penalty phase of a capital case shall not be allowed
when the institution itself is so fundamentally flawed. 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d
346 (1972). Furthermore, the fact that capital punishment is a law in Washington state, “does not
diminish the fact that capital punishment is the most awesome act that a State can perform. The
judiciary’s role in this society counts for little if the use of governmental power to extinguish life
does not elicit close scrutiny.” McCleskey, 481 U.S. at 342, 107 S. Ct. at 1793(J. Brennan,
dissenting)

III. REQUEST FOR EVIDENTIARY HEARING

The social science studies on implicit cognition are being offered as evidence on how jurors
in capital trials are affected by implicit racial biases in their decision making, in violation of the
Eighth Amendment and Article 1, Sections 14, 22 to the United States and Washington State
constitutions. Because studies in this area are still relatively new, it is necessary that Professor
Justin Levinson testify before this court to clearly explain the current social science/legal issues,
answer questions the court may have and assist defense counsel in making a complete record on this
issue. Defense anticipates that an evidentiary hearing in this matter will take no more than one day
of pretrial motions. Currently the court and counsel have carved out five weeks of pretrial motions,
so finding time for an evidentiary hearing should not be an issue.
CONCLUSION

“In determining the guilt of a defendant, a State must prove its case beyond a reasonable doubt. That is, we refuse to convict if the chance of error is simply less likely than not. Surely, we should not be willing to take a person’s life if the chance that his death sentence was irrationally imposed is more likely than not.” McCleskey, 481 U.S. at 328, 107 S. Ct. at 1786 (J. Brennan, dissenting). The social science studies have shown that implicit racial bias is a reality of capital trials. As such, there is a significant valid risk that Mr. Monfort would get the death penalty based on his race, such a result does not comport with our federal and state constitutions. As there is no way to fix implicit racial bias in jurors, the Notice for Special Sentencing Proceedings to seek the death penalty against Mr. Monfort should be dismissed. Should the court not dismiss the notice of special sentencing against Mr. Monfort, the court should ensure that the jury impaneled to sit in judgment in Mr. Monfort’s case includes African American jurors.

Respectfully submitted this 13th day of August 2014.

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F. Danielle Young, Justin D. Levinson & Scott Sinnett, *Innocent Until Primed: Mock Jurors' Racially Biased Response to the Presumption of Innocence.*
Potential Implications of Implicit Bias and Trial Process-Related Solutions

Justin D. Levinson
October 3, 2014

The following list has been created in preparation for testimony on October 6, 2014. It is an initial response to Judge Kessler’s interest in discussing ways to limit the potential impact of implicit racial bias at trial. Some of the suggestions stand alone, yet others are alternative. For example, if death qualification will not be allowed beyond asking whether a juror would be able to follow the law and judge’s instructions, there would be no reason to consider the suggestion that the trial be bifurcated.

**Limit victim impact testimony:** This suggestion comes from our data that people associate Black with Valueless and White with Valuable. Avoiding ways to reinforce these implicit associations could potentially help lessen the unintentional effects of the race-of-victim. For example, elaborate videos set to music, based upon what we know about priming, could reinforce or strengthen race-of-victim effects. Limiting victim impact testimony would also be supported by research showing that there are significant differences such that the pain of in-group members is felt more than the pain of out-group members.

**Prohibit Animal References:** Research has linked the number of animal references (in particular, references linked to “ape”, such as brute, barbaric, claw, crawl, etc.) used to describe a crime and Black defendant with death penalty outcome—the more animal references, the more likely that death is the outcome. This was based on an archival study of twenty years of capital cases in Pennsylvania (Goff et al., 2008)

**No Death Qualification:** To respond to the various problems with death qualification, including that it increases the racial biases (and decreases the racial and gender diversity) of the final panel relative to the venire, death qualification might not be conducted. Although jurors must all be asked whether they can follow the judge’s instructions on the law, it’s not clear that they need to be specifically death qualified.

**Bifurcate the Jury:** As our New York University Law Review article described, death qualified jurors have been found to harbor higher levels of both implicit and explicit (self-reported) racial biases. Similarly, researchers have found that the even process of death qualifying itself can affect (in concerning ways) the way the jury acts. Although I am not testifying as a legal expert related to the Constitution in this case, I don’t know of any Constitutional prohibition on using bifurcated juries (and in fact, I believe these
happen fairly frequently when there is a remanded appeal relating to the sentencing phase of a capital case. Although I believe that my research results call into question the constitutionality of death qualification altogether, and would therefore advocate for leaving all otherwise-qualified jurors on the jury, I acknowledge that it would at least lessen the bias in the guilt phase if death qualification were avoided. Although there may seem to be an initial increase in resources by bifurcating, there are more than corresponding benefits in racial bias reduction, as well as lessening the burden on the jury.

**Rehabilitate “Witherspoon Excludable” Jurors, Including Through the Use of Case-Specific Facts:**

Although the better suggestion is to remove death qualification altogether (I don’t actually think I’ve seen the Supreme Court require it), in order to keep the racial biasing of it out and the diversity of the venire intact, at the least there might be a shared commitment between the court and the attorneys that jurors who initially express concern regarding giving the death penalty ought not be immediately removed. The purpose of this would be to maintain less racial bias on the final venire. One way to potentially go about this process would be by allowing defense counsel (the judge could also perform this task) to disclose to the venire members the alleged facts of the crime. Making the crime come to life will allow jurors to give more accurate responses, and in a case with a police officer victim, it might allow for few jurors to be removed (and therefore reduce the racial biasing of the jury through death qualification).

**Make the presumption of innocence “come alive”:** This suggestion is in response to my (with D. Young and S. Sinnett) recent research on the presumption of innocence and priming attention for Black faces. There are a variety of ways to potentially respond to the biasing effects of implicit bias in this instruction, including various ways to make the presumption of innocence “come alive.” One thing that other judges have done, for example, includes “meeting” the defendant in front of the jury and declare him to be not guilty, as no evidence has been presented (as this is at the beginning of the trial) to meet the prosecution’s burden. This suggestion is modeled directly on the practice of United States District Court Judge Mark Bennett (ND-Iowa), which I have spoken to him about in detail (and would be happy to summarize). If you are interested in learning from him directly as to how Judge Bennett does this, I know he frequently receives inquiries from other judges and is happy to share.

**Enhance Scrutiny of Peremptory and For Cause Challenges during Voir Dire:** Research indicates that jury exclusion decisions can be based on race, but this is either unacknowledged by the decision-maker, or the decision-maker may actually be unaware of perpetuating this bias (those making the proven race-based decisions tend to cite race-irrelevant reasons). A large literature critiques the effectiveness of Batson in addressing these pretexts, and enhancing the judicial scrutiny with which purportedly race-neutral challenges are made would help ameliorate potential impacts of implicit bias in jury selection.
Race Masking of Potential Jurors’ Questionnaire Responses: In the event a first round of jury venire removals will be done by consent before they are personally questioned, potential jurors’ racial and demographic information could be removed. In federal death cases, the government performs a similar race-masking procedure when deciding whether to seek death for defendants. It would not be difficult to implement such a process in the first stage of death qualification (if the court indeed death qualifies). This would be at least somewhat more likely to preserve the diversity of the jury and remove a small opportunity for bias.

Allow attorneys to ask about potential jurors’ explicit (self-report) racial preferences: If death qualification will be preserved for this trial, counsel should be allowed to ask prospective jurors about their explicit (self-reported) racial biases, perhaps in the initial questionnaire (to be follow-up in voir dire, as relevant). This suggestion is based upon our data indicating that explicit bias, in addition to implicit bias, matters. We found that death qualified jurors had higher levels of both kinds of bias. Thus, questioning jurors to determine whether there are unacceptably high levels of racial bias, seems warranted. Including a simple measure of self-reported bias on the initial questionnaire would allow this question to be raised selectively during voir dire and discussed as necessary.
SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF KING

STATE OF WASHINGTON,
Plaintiff,

v.

CRISTOPHER MONFORT,
Defendant

NO. 09-1-07187-6 SEA
DECLARATION OF JUSTIN LEVINSON

DECLARATION

Pursuant to RCW 9A.72.085, Justin Levinson, J.D., LLM, certifies as follows:

1) I am over the age of eighteen and competent to testify to the matters contained in
this Declaration.

2) I am a Professor of Law at the University of Hawaii William S. Richardson School
of Law and Director of the Culture and Jury Project. I am an expert in the field of
implicit bias and the law and in psychological decision-making in the legal system.

3) In 2008, I founded the Culture and Jury Project, an interdisciplinary and
international research collaboration devoted to facilitating the study of human decision-
making in the law. I am currently collaborating with scholars in China, Japan, and
Korea, as well as domestically in the United States.
4) I have conducted research in the area of cognitive social bias and written on my findings. I have served as lead editor of *Implicit Racial Bias Across the Law*, a volume that was published by Cambridge University Press in 2012 (co-edited by Robert J. Smith). I have written extensively and conducted social scientific experiments on implicit bias in the legal field. See *my CV (Attachment A)*

5) Social scientists have demonstrated over the twenty-five years that many Americans harbor implicit racial biases that frequently conflict with their self-reported racial attitudes. These biases manifest automatically and largely without conscious awareness in a variety of basic circumstances, such as when people categorize information, remember facts and make decisions. Implicit racial attitudes diverge frequently from explicit racial attitudes.

6) Biases can be driven by "attitudes" and "stereotypes" that we have about social categories and social groups. "An attitude is an association between some concept (such as a social group) and an evaluative valence, either positive or negative."1 "A stereotype is an association between a concept (in this case a social group) and a trait."2

7) In our paper *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, we noted that racial discrimination in America has "evolved from intentional and overt to unintentional and covert."

8) Social science studies have illustrated that racial attitudes and stereotypes are both automatic and implicit. People possess attitudes and stereotypes over which they have little

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1 Jerry Kang, Judge Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony Greenwald, Justin Levinson, Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. Rev 1124, 1128 (2012)
2 Id.
conscience control. Individuals may not be consciously aware of the biases themselves or of the impact these biases may have on the individual’s decision making and behaviors.

9) Social science research suggests that automatic activations of racial stereotypes might play a critical role in explaining the racial disparities in the criminal justice system.

10) The Implicit Association Test (“IAT”) examines an individual’s implicit associations by measuring their response speed utilizing a computerized test.\(^3\) “It asks participants to categorize information as quickly as possible, and then calculates a participant’s reaction time (in milliseconds) and accuracy in completing the categorization tasks.”\(^4\)

11) One well-known IAT examines people’s implicit associations and attitudes with “Good and Bad” and “Black and White”. People are given pictures depicting target social group members (Black and White) and are told to match those with representing attitudes (Good and Bad) as fast as they could. The results of this study, which has been conducted with hundreds of thousands of participants, establishes that the vast majority of Americans are quicker to pair Good with White and Bad with Black.\(^5\)

12) One particularly interesting characteristic of implicit racial attitudes is that they frequently diverge from explicit racial attitudes. That is, people who display strong implicit biases are often not the same people who demonstrate strong explicit biases.

13) Merely cueing racial categories can lead to biased behaviors. This phenomenon is known as “priming.”

14) Black defendants may be implicitly associated with the legal construct of guilt before a trial even begins.

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15) Implicit racial bias can manifest itself in judicial proceedings in a variety of ways, including: unintended consequences of certain processes (such as death qualification); priming triggered by jury instructions (such as those regarding the presumption of innocence); juror misremembering of evidence in racially biased ways; skewed evaluation of ambiguous case facts (triggered by defendant’s group membership); and the automatic association (by jurors) between Black defendants and the concept of “Guilty”.

16) Results also show that susceptibility to misremembering facts based on race cannot be attributed to more overly racist people – in a study I conducted on implicit memory bias, those who were susceptible to racial misremembering sometimes embraced less biased explicit (self reported) racial attitudes.

17) Specifically in capital cases, the death qualification process of voir dire can remove jurors with lower levels of implicit and explicit (self reported) racial bias, a phenomenon that is directly tied to the disproportionate removal of women and people of color through the death qualification process.

18) In Innocent until Primed: Mock Jurors’ Racial Biased Response to the Presumption of Innocence, I explored empirically, with my collaborators, how presumption of innocence jury instructions, rather than ensuring a fair trial, may be counterintuitively priming attention to black men. In this study, sixty-one jury eligible, ethnically diverse student participants were seated in groups of up to six in a moot courtroom. The mock-jurors were told about a crime that was committed and were shown a video in which a white United States District Court Judge read a series of jury instructions that either included the presumption of innocence and reasonable doubt instructions or instructions of similar length but different language and content.

See Brian Nosek et al., Harvesting Implicit Group Attitudes and Beliefs from a Demonstration Website, 6 Group
Immediately after receiving the jury instructions, the participants completed a study known as a "dot probe task." This task involves quickly viewing two faces, one Black and one White, which quickly flash and then disappear from a computer screen. Immediately after the faces disappear, a gray dot appears in equal frequency behind one of the faces. Participants were instructed to indicate, as quickly as possible, the side of the screen in which the dot appeared. The study found that the "presumption of innocence instructions induced attentional bias. Specifically, individuals presented with presumption of innocence instructions had faster responses to Black, compared to White faces in a dot-probe task." The results, considered in connection with prior studies that involved priming and racial attention, could indicate that the presumption of innocence triggers guilty stereotypes about Black men.

19) In Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering, I analyzed how jurors and judges may suffer from implicit memory biases that threaten fairness in the trial process. I conducted an empirical study that investigated whether implicit racial bias affects how mock jurors remember legal facts. To do so, I asked mock-juror study participants to read the facts of legal stories, briefly distracted their attention, and then quizzed their memoires of the facts. The actors' race served as the independent variable. The mock jurors either read about a Caucasian, a Hawaiian, or an African American man who had taken part in a physical altercation. The results of the study demonstrate that the race a criminal defendant can act implicitly to cause people to misremember a case's facts in racially biased ways. When the actor in the case was African American, mock jurors were more likely to remember aggressive
facts than when the actor was Caucasian or Hawaiian. The results further show that
susceptibility to misremembering facts based on race could not be attributed to overtly
racist people. Interestingly, mock-jurors' (self reported) explicit bias levels did not
predict their memory errors, supporting the conclusion that the errors were generated on
an implicit level.

20) In *Devaluing Death: An Empirical Study of Implicit Racial Bias on Jury-Eligible Citizens in Six Death Penalty States*, my collaborators and I conducted a study to test the
effects of implicit bias on the death penalty. The study included 445 jury eligible citizens
in six leading death penalty states: Alabama, Arizona, California, Florida, Oklahoma and
Texas, and generated several interesting findings. Most fundamentally, the mock capital
jurors exhibited two distinct types of implicit racial bias: First, the jurors displayed
implicit racial stereotypes, i.e. they generally associated white individuals with positive
stereotypes (diligence, morality) and black individuals with negative stereotypes
(dangerousness, laziness, and criminality). Second, the mock jurors associated White
with worth and Black with worthless, raising the question of whether value of life
judgments in capital cases may be biased. Building on these findings, we compared the
implicit and explicit (self-reported) bias levels of death qualified mock jurors and jurors
who would be unwilling to sentence a defendant to death. We found that death qualified
jurors displayed higher levels of implicit and explicit bias than jurors who would be
excluded. Furthermore, these findings were largely explained by the fact that jurors of
color were disproportionately excluded by the death qualification process. That is, death
qualification excluded the very jurors who are not only traditionally underrepresented on

capital juries, but also who were the least racially biased. Finally, we found that mock
jurors' implicit bias levels did predict some of their life and death decisions. Implicit
value of life biases predicted life and death decisions when a defendant was Black, and
explicit racial biases predicted life and death decisions when a victim was White.

21) I have also conducted several other studies of implicit racial bias in the criminal
justice system, including a study that found that mock jurors implicitly associate Black
with guilty and white with not guilty (using an IAT), as well as a study showing that
mock jurors judged ambiguous evidence as more probative of guilty after they were
shown a photo of a dark-skinned perpetrator (compared to a lighter-skinned perpetrator).

I hereby certify under penalty of perjury under the laws of the State of Washington the
foregoing is true and correct.

10/6/14 Seattle, WA
Date and Place signed

Justin Levinson