King County Bar Association
1200 Fifth Avenue, Suite 700
Seattle, WA 98101

Bar Bulletin

KING COUNTY BAR

Yer Blues

Volume 42 • Issue 2 • $2.00
October 2023

From the Desk of the
EXECUTIVE DIRECTOR

Erasure and Rewritten History: The Importance of Acknowledging Indigenous Peoples' Day

By Christina Entrekin Coad

The second Monday in October is Indigenous Peoples' Day, a contemporary interpretation of the Columbus Day federal holiday originally enacted in 1932. How we approach this day varies: some choose to honor or celebrate, while others mourn. No matter how you experience Indigenous Peoples' Day, it is personal, and it is essential we commit to shifting our lexicon from "Columbus Day" to "Indigenous Peoples' Day."

Indigenous Peoples' Day was proposed by Indigenous people in 1977 to the United Nations as an offset to anti-Indigenous discrimination and to debunk the myth Columbus discovered America. Many of us remember the rhyme, "In 1492 Columbus sailed the Ocean Blue." This rhyme, and this version of American history I learned in school, sticks with me. I am certain that somewhere exists a photograph of me and my classmates dressed as either Indian Braves or Pilgrims, each costume fashioned from either a brown paper bag or white butcher paper. I feel a twinge of embarrassment to admit my excitement about having been dressed in a paper bag, but it seemed far better than being invisible. These retellings of history, a discovered continent, of gracious Thanksgiving hosts and their invited guests, are not only inaccurate, but are also harmful and dangerous rewritings of history.

Erasing and distorting Truth and lived experience are long-standing tactics of war, slavery, and colonization. This threat is not confined to the past but persists as a contemporary tool of oppression being exacted in American schools, libraries, and community centers. For example, Florida's new 2023 standards for social studies education include teaching, "slaves developed skills which, in some instances, could be applied for their personal benefit." I agree wholeheartedly with Congresswoman Shantell M. Brown's *Newsweek* op-ed: "what's happening in Florida is part of an ongoing, and far from new, effort across the country to erase, distort, and deceive people about Black

EXECUTIVE DIRECTOR
continued on page 3

New National Study Can Be a Catalyst for Transformational Change in Public Defense and the Criminal Legal System

By Robert C. Boruchowitz

There is a crisis in public defense, as experienced lawyers quit because the workload is crushing, and offices struggle to replace them. In some Washington counties this year, accused persons sat in jail for weeks with no lawyer at all. A new National Public Defense Workload Study makes clear that existing caseloads are far too high.[1] King County and most jurisdictions in the state are facing significant turnover in defender staff and challenges in recruiting experienced attorneys for the most complex cases.

King County can be proud of the progress it has made in improving public defense since The Defender Association was founded as the first defender office in 1969. King County and Seattle were among the first jurisdictions to set maximum caseloads for lawyers.

But the caseload limits, which now are required by a state supreme court rule, including 150 per year per lawyer for felonies, were based on National Advisory Commission standards that are 50 years old. The practice has changed dramatically, and defenders now must understand a variety of technology and forensic evidence that did not exist when the standards were developed. They must digest terabytes of digital data and review hours of police video camera footage. The new Study identified these changes as well as the

PUBLIC DEFENSE
continued on page 10

I · N · S · I · D · E

PUBLIC DEFENSE

continued from page 1

need to review "cell phone data, and social media data; the increasing use of forensic evidence; and the expanding scope of a criminal defense lawyer's obligations, such as advising clients on the collateral consequences that attend criminal convictions."

Sentences have become longer, and as less serious cases have become diverted out of the criminal legal system into alternatives, caseloads are more difficult because the percentage of complex cases has increased.

The old standards presumed that a lawyer could do an "average" misdemeanor in about five hours and an "average" felony case in about 13 hours. There was no distinction between a first offense "joy riding" and a multicount homicide. The new study, which took more than a year, informed by 17 other studies from around the country and based on the analysis of 33 experienced defense attorneys, found that "low severity" felonies require 35 hours of attorney time, and "low severity" misdemeanor cases require 13.8 hours. This means that a lawyer doing only low-level felonies could not do more than about 47 felonies a year.

One implication of the study is that to provide effective representation in 400 misdemeanors a year, as Washington's court rule would allow, would require more than 5500 hours of work, or 106 hours a week with no vacations, holidays, or sick leave. The study found that murder cases require 248 hours of attorney time. But King County defenders who have murder and other life sentence cases routinely represent dozens of other clients at the same time.

Most people who go to court in America go to criminal court. Overwhelmingly they are poor and disproportionately they are people of color. Although people who cannot afford a lawyer are entitled to have one provided by the government, in some jurisdictions that does not always happen, and people end up pleading guilty without a lawyer so they can get out of jail. This year, three Washington counties have had multiple months in which they were unable to assign an attorney to people charged with crimes.

In Oregon recently, a federal judge ordered that people held in the Washington County jail without a court-appointed lawyer must be released 10 days after their initial court appearance.[2] The Oregon Supreme Court is scheduled to hear argument September 19 on a writ of mandamus on the questions of whether defenders may withdraw when their caseload is excessive and whether cases should be dismissed if adequate counsel cannot be timely appointed.[3]

Often public defense lawyers have too many cases, not enough resources, and are paid less than they could make in private practice. Even though it is widely accepted that lawyers doing criminal cases need investigators, social workers, and paralegals to help provide effective representation, many public defense counsel have little or no such help.

Even though King County defenders have caseloads lower than the court rule limits, given the changes in practice since the court rule was adopted, they struggle to provide effective representation to all their clients.

In a recent *Seattle Times* op-ed, Department of Public Defense Director Anita Khandelwal and King County Councilmember Girmay Zahilay described the King County defenders' caseloads as unsustainable. They wrote, "These caseloads grow even worse daily as experienced defenders qualified to handle the most serious cases quit, leaving a smaller and smaller number of attorneys to handle those most serious cases."[4]

They added: "The situation for the shrinking number of attorneys qualified to handle the most serious offenses, such as murder or other crimes that carry a life sentence, has become even more dire."

The National Public Defense Workload Study, published September 12, was produced by an unusual coalition that spent more than a year preparing it. The RAND Corporation, the American Bar Association, the National Center for State Courts, and Lawyer Hanlon, with funding support from Arnold Ventures, prepared the study and developed recommended attorney hours per type of case.

The study has produced a series of responses from state and national organizations.

"The NPDWS study is yet another alarm indicating that we have much more work to do to make the constitutional right to counsel real for everyone," said Emma Andersson, deputy director of the American Civil Liberties Union's Criminal Law Reform Project. "In this era of mass incarceration and overcriminalization, public defenders work to challenge systemic oppression every day. Despite their essential role, public defenders are consistently undervalued. Lawmakers and decision-makers must invest in public defense systems, while simultaneously reducing mass incarceration."

The Chair of the Washington State Bar Council on Public Defense (CPD), Jason Schwarz, who is Director of the Snohomish County Office of Public Defense, said:

> The accused are entitled to an effective advocate and that means a lawyer with time and resources to help. This study underlines what

PUBLIC DEFENSE
continued on page 11

> public defenders are experiencing every day, which is a staggering increase in the number and complexity of cases….The CPD understands that overworked public defenders impact legal outcomes for the accused and the fairness of the criminal legal system.

The CPD Standards Committee has been reviewing the study and has begun developing recommendations on how to apply it to the Washington practice.

In August, the American Bar Association published revised Ten Principles of a Public Defense Delivery System. It reaffirmed that "For state criminal charges, the responsibility to provide public defense representation rests with the state; accordingly, there should be adequate state funding and oversight of Public Defense Providers."[5]

The Principles state:

> Workloads should never be so large as to interfere with the rendering of quality representation or to lead to the breach of ethical obligations. Workload standards should ensure compliance with recognized practice and ethical standards and should be derived from a reliable data-based methodology.

Citing the new national study in a footnote, the Principles state that national workload standards should never be exceeded.

The Principles continue:

> If workloads become excessive, Public Defense Providers are obligated to take steps necessary to address excessive workload, which can include notifying the court or other appointing authority that the Provider is unavailable to accept additional appointments, and if necessary, seeking to withdraw from current cases.

A few days before the National Study was released, the Washington State Association of Counties (WSAC), joined by Pacific, Lincoln, and Yakima Counties, filed suit against the State of Washington, seeking a declaratory judgment that the State's trial court public defense system violates the state and federal constitutions.[6]

The Counties seek an injunction "requiring the State to provide stable, dependable, and regular State funding sufficient to enable counties to provide constitutionally adequate and equitable trial court indigent defense services in addition to the other critical services they must provide for their residents."

According to the complaint, Washington's system of delegating trial court indigent defense obligations to the counties "denies indigent defendants equal access to justice." The lawsuit alleges the State has failed to provide counties with adequate and reliable funding. It also alleges that state limits on counties' authority to raise tax revenue leave counties unable to raise funds to cover court-appointed criminal defense costs.

The lawsuit asks the Court to declare the State's indigent defense system unconstitutional and require that the State provide counties consistent and stable funding for indigent defense.

So, what can we do about this crisis? The op-ed authors urged, "we must invest in more of the kinds of solutions voters support: diversion programs for lower-level offenses and more evidence-based strategies for reducing crime, like supportive housing, community-based accountability, and mental health and addiction recovery infrastructure."

These approaches are consistent with recommendations from other experts, including The Sentencing Project, which recently issued a report recommending that prosecutors not prosecute certain non-violent, non-public safety offenses and emphasizing that community-based approaches can prevent crime. They added, "For offenses which cannot be moved out of the criminal legal system altogether, early short-term diversion programs, which connect individuals to services or rehabilitative programming as early as prior to first court appearance, can offer an alternative to the harms associated with more prolonged court-involvement[.]"[7]

The Sentencing Project cited a study of more than 60,000 nonviolent misdemeanor cases in Boston that found that non-prosecution of a non-violent misdemeanor resulted in a 53% reduction in the likelihood of a new criminal complaint and a 60% reduction in the number of new criminal complaints, over the next two years, compared to individuals subject to standard case processing.[8]

The new National Public Defense Workload Study can serve as a catalyst for legislators, criminal defense lawyers, prosecutors, judges, corrections officials, former defender clients, and representatives of community groups to begin serious discussions both about how to reduce the number of cases in the system and to increase public defense resources, including more state funding.

Washington State Bar Association President Hunter Abell described the work of the Council on Public Defense as critically important:

> Fleshing out standards that will support the state's constitutional obligation to provide 'adequate' legal counsel to anyone facing a criminal charge. What we are talking about here is how long a person might have to wait to get their day in court, and the quality of their defense. Those are among the foundations of criminal justice.

Without transformational change soon, the erosion of public defense, which is critical to preserving the fairness and integrity of the criminal legal system, could lead to delays in adjudication, wrongful convictions, and a complete collapse of respect for the law and the courts. ■

Robert C. Boruchowitz is Professor from Practice and Director of The Defender Initiative, Seattle University School of Law. He is an emeritus member of the WSBA Council on Public Defense and was Director of The Defender Association for 28 years.

1 Pace, Nicholas M., Malia N. Brink, Cynthia G. Lee, and Stephen F. Hanlon, *National Public Defense Workload Study*. Santa Monica, CA: RAND Corporation, 2023. https://www.rand.org/pubs/research_reports/RRA2559-1.html.

2 Conrad Wilson, "Federal judge to order release from jail for anyone denied an attorney in Washington County," Oregon Public Broadcasting, August 15, 2023, at https://www.opb.org/article/2023/08/15/federal-judge-orders-release-from-jail-anyone-denied-attorney-washington-county-oregon/.

3 *Public Defender of Marion County, Inc. v. Izell Guajardo-McClinton*, calendar at https://www.courts.oregon.gov/courts/appellate/go/Pages/sc-calendar.aspx.

4 "Our public defender system is at the breaking point," *Seattle Times*, August 15, 2023, available at https://www.seattletimes.com/opinion/our-public-defender-system-is-at-the-breaking-point/.

5 *ABA Ten Principles of a Public Defense Delivery System*, August 2023, available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-603-public-def-principles-2023.pdf.

6 Press release at https://wsac.org/washingtons-counties-file-suit-against-the-state-of-washington/. The complaint is available at https://wsac.org/wp-content/uploads/2023/09/Complaint-for-Declaratory-and-Injunctive-Relief.pdf.

7 "Safety Beyond Sentencing," by Liz Komar and Nicole D. Porter, August 3, 2023, available at https://www.sentencingproject.org/policy-brief/safety-beyond-sentencing/.

8 Agan, A., Doleac, J., & Harvey, A. (2021). *Misdemeanor prosecution*. National Bureau of Economic Research.