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MEMORANDUM

TO: Judge Armstrong, Judge Robinson, Judge Gain, Judge Hilyer, Barry Mahoney

FROM: Mark Larson & Dan Clark

SUBJECT: King County Criminal Caseflow Management Project

We received a copy of the documents dated March 20, 2009 prepared by Barry Mahoney from JMI. We appreciate the time and effort that has gone into his and your work on this project. This project is important to us, but we must also ensure that any new plan reflects our values as an office. This memo is not designed to replace the information we shared with you on February 20, 2009. Those documents correctly identify our central concerns. The purpose of this letter is to identify issues with Mr. Mahoney's latest iteration of the case flow plan and to identify, on a fundamental level, where our vision and philosophies differ from those reflected in this new proposal. This memo concludes with a simple proposal that we believe addresses the court's core concerns.

A. KCPAO - A conservative filing policy coupled with the Early Plea Unit

This office has a long-standing philosophy of filing conservatively and then amending up to a charge that more fully describes the defendant's conduct if a defendant fails to take responsibility for his crime. This "conservative filing philosophy" was initiated decades ago by Chief Criminal Deputy David Boerner and Prosecuting Attorney Norm Maleng. This approach is in stark contrast to most prosecutors' offices in the country, and indeed in the state.[1] This policy is

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[1] In a discussion paper entitled "Charging and Sentencing, Where Prosecutors' Guidelines Help Both Sides", Norm Maleng wrote:

> ***Nature and number of charges.*** *The prosecutor must decide how many charges and what charges to file. It is a well settled principle that the prosecuting attorney should not overcharge to obtain a guilty plea to lesser or fewer charges. But, should a prosecutor charge every crime that is legally and factually supportable?*
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> *National prosecution standards adopted by the National District Attorneys Association acknowledge that a prosecutor should not file every possible charge. Standard 9.2 provides: "The prosecutor has the responsibility to see that the charge selected adequately describes the offense or offenses committed and provides for an adequate sentence for the offense or offenses." Likewise, Washington's law clearly expresses the tenet that prosecutors should not file all charges, rather they should file those charges which adequately label the gravamen of the defendant's conduct.*

Criminal Justice, Winter 1987, p.6.

fundamental to our office's overall philosophy and shapes our "early plea" negotiation practice which is built on the premise that an early acceptance of legal responsibility is a mitigating factor and an important efficiency for the criminal justice system.[2]

Our conservative filing policy coupled with our EPU program rewards those defendants who want to take early responsibility for their actions. It is designed to benefit the defendant who quickly says "I committed the crime, what's the best offer I can get?"

We recognize that some defendants cannot take advantage of this early offer because of legitimate questions about factual guilt or the level of their legal responsibility. For those cases, more in depth investigation may be needed. But, the fact that some such cases exist does not undermine the need for an early plea system built on the early acceptance of responsibility in the more run-of-the-mill case.

In our view, the recent JMI proposal significantly undervalues, and undermines, this long-standing philosophy. On page 4 of Barry Mahoney's 3/20/09 memorandum, he writes "[Defense lawyers] feel that they cannot ethically advise a defendant to accept a plea offer without having adequately investigated the circumstances of the alleged offense..." It is this belief that seems to drive the proposal's quest for (1) even earlier production of discovery and (2) the use of early compulsory witness interviews during which time the State is required to keep an offer open.[3]

This premise significantly flawed, and it is also antithetical to our conservative filing policies and to the very existence of an Early Plea Unit. The issue is not whether it is difficult for a defense attorney to advise their client whether to accept a deal before the lawyer has received every piece of the discovery that exists (or that may come into existence later). The issue is whether a defendant and the lawyer are together in a position to weigh the risks associated with rejecting the EPU offer. After all, the defendant is probably the *most* informed person in the entire system to make this analysis since he often knows more about the crime and its circumstances than do the police, prosecutors, or his lawyer. The notion that the current practice denies defendants and their attorneys the ability to make early, informed decisions about early plea offers is simply untrue -- as evidenced by the last 30 years of criminal practice in King County.

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[2] According to the Filing and Disposition Standards of the KCPAO:

> *Under these policies, an early plea is considered a significant mitigating factor. An early plea reduces the impact upon the criminal justice system with its limited resources. Moreover, it avoids the adverse impact of further hearings and a trial upon the victim and witnesses. An initial sentencing recommendation should reflect the benefits to all concerned of an early plea. Therefore, the initial sentence recommendation shall be conservative, in compliance with these policies and the Sentencing Reform Act, and one to which the defendant will be expected to plead guilty.*

FADS, 2005

[3] Notably, Mr. Mahoney recognized in his meetings that our office provides discovery as early and as completely as any county prosecutor's office he has seen. He also conceded that compulsory witness interviews have never been cited as a component of a "well managed" case flow system in any of his previous work.

In addition to the practical and philosophical concerns expressed above, we also oppose any proposal that would reduce our control over the decision to make or withdraw a plea offer. The right to file charges and make plea offers is solely held by the Executive Branch/Prosecuting Attorney. We do not intend to relinquish that role.

The Caseflow Management Project began as an appraisal of our county's criminal justice system that was largely laudatory, praising its leadership, collaborative problem-solving, and commitment to fair and effective case processing. [4] Even the principal criticism of the study -- an increasing time from filing to disposition -- was tempered with the observation that "...the times required for resolution of criminal cases [in King County] are generally speedier than those in other urban jurisdictions in the State of Washington and speedier than those in most other urban jurisdictions."[5] Unfortunately, what began as a collaborative effort to redress one particular problem with our criminal justice system has devolved into an opportunity for various parties to rail against certain perceived practices by our office that either do not exist, or are based upon anecdotes and singular experiences, with no explanation as to whether those anecdotes reflect a broader practice. More concerning is that this misguided attack on one of our central policies has spurred proposals that make wholesale changes to a system that was, by all accounts, performing well above average.

Equally troubling to us is the fact that these significant proposed changes are a response to data collected over a year ago. In light of the unprecedented changes that have occurred over the last year, such data is stale. The proposal ignores three significant changes to our system since that time that have undoubtedly changed the landscape: (1) the Trial Setting Focus Project -- a new PAO practice that has resulted in fewer cases set for trial, (2) changes to our Filing and Disposition Standards (FADS) that have significantly reduced the pending felony caseload and resulted in quicker dispositions of misdemeanors and low-level felonies, and (3) significant FTE attorney reductions for both the State and the defense due to severe budget cuts unprecedented in the history of our county. Each of these changes has had profound effects in our system; none is acknowledged or accounted for in the new proposal.

We accept the premise that our system can be improved, and that time to resolution could decrease. We also accept the fact that in the last few years some categories of case have taken longer to resolve than before. Putting aside the myriad of possibilities that might account for these delays, we accept that some things are moving a bit more slowly, and we are eager to remove inefficiencies were they exist. We firmly reject, however, the notion that speed is an end in itself that supersedes our obligation to seek justice and to serve the victims and citizens of this county.

This current proposal directly contradicts established court rules and case law and may put in jeopardy the obligation we have to seek just results - not simply speedy ones. When the proposal recommends suppression of evidence as a routine remedy for late discovery, inevitable re-victimization of victims to help educate defendants about plea offers, and the presumed

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[4] In "Principal Conclusions," the Conclusions and Recommendations in the August, 2008 JMI study noted that "[D]espite the recent problems with increasing delays and growing backlogs, the criminal justice system in King County functions appreciably better--more efficiently, and with greater attention to issues of fundamental fairness in the adjudication process--than the great majority of large urban jurisdictions in the U.S."

[5] 2008 JMI study at 1.

interchangeability of trial prosecutors when a motion to continue is denied despite case law authorizing such a motion, justice suffers in a significant way.

Finally, as it relates to the notion of mandatory witness interviews, we must be as clear as possible: We will not accept any plan that *requires* the State to maintain a generous plea offer while simultaneously requiring the State to produce a witness for an interview. Our rationale for this position has been explained on many levels, and in many ways. Such a policy directly intrudes on the power of the executive branch to exercise its discretion and, in the end, will thwart rather than advance attempts to bring greater efficiency to the process. On this point there can be no further discussion. It is extraordinarily frustrating that this topic continues to be raised despite our emphatic and clear position.

B. General Issues that Remain

1. Failure to recognize unique aspects of our various case types.

The current proposal suffers from the same misunderstandings about our various units as the previous proposal. Due to the unique nature of the cases processed by each unit, expectations regarding plea offers, discovery, and plea policy differ significantly. The current proposal does not take these unique characteristics into account. For example, there is a stark difference between how we extend offers in a Forgery case versus a Sexual Assault case. In our more sensitive cases (sexual assaults, homicides, etc.) all proposed pleas are discussed in detail with the victims, their families and with police agencies. Also, in virtually none of these cases is discovery complete in 14 days. Finally, and most importantly, it is especially in these cases that our conservative filing policy suggests that our only offer (if one can even be made at this juncture) would be to plead guilty as charged. Putting aside the court's lack of authority over the plea process, it is simply unrealistic to expect an offer to be made in these cases so early.

2. Requiring a defendant to set a trial date in fourteen days will significantly decrease efficiency.

The current proposal presupposes that the defendant is a rational decision maker who will very quickly understand and acquiesce to his counsel's advice specifically as it relates to speedy trial. Due to the differentiated track system, it expects defense counsel who has had no time to build rapport with their clients to insist on a lengthy speedy trial continuance within 14 days for any case beyond the most basic.

Not only is this unrealistic, it will actually result in a much larger number of complex cases getting set for trial on a very short "track." Although the system anticipates "track changes" to accommodate for the premature trial set, many significant and irrevocable events will be triggered by this event. Once a case is set for trial (even one where the parties may *expect* a later "track change") trial preparation must begin; subpoenas are prepared and served, transcriptions are made, photographs are developed and printed, forensic testing is rushed to the front of the queue, etc. Simply, the State cannot rely on the mere expectation of a later "track change;" it must make all necessary preparations for trial. Failing to completely prepare for trial at this juncture would prove too costly if a later motion to change "tracks" was denied or never made. It is because the State must extend its full resources in preparation for trial that pre-trial offers are revoked at this critical juncture.

The costs to the victims can be even more significant. Victims are subjected to traumatic interviews that could have been avoided, and they suffer the associated trauma of mentally preparing for an impending trial date that will ultimately be continued many times more than if the defendant been allowed to remain on the case setting calendar before deciding if a trial was necessary.

C. Specific Issues Related to Mr. Mahoney's Latest Proposal

We were disappointed with the following aspects of the proposal drafted by Mr. Mahoney. The page numbers refer to the latest iteration drafted by Mr. Mahoney.

1. Page 1: The statistics used to identify that a problem exists were collected over a year ago. Since that time we have implemented new practices that have improved early resolution of cases. We have also implemented new FADS that have significantly changed the number and type of cases our office files. The "Why a New Approach is Needed" section does not address this. We have already seen a significant change in the statistics as a result of the Trial Setting Focus Project and the FADS changes, the latter having only been in effect since October of 2008. Notably, fewer felony investigations are being referred to the PAO and fewer felonies are being filed. At the same time, the nature of the existing caseload has changed with the remaining cases being more serious and frankly, more time consuming to resolve, whether by plea or trial. We should, at a minimum, use up-to-date data in any reform effort. It would be even better to first allow the system to adjust to the significant changes that the PAO has effected upon the system, to determine whether any additional reform is even necessary.

2. Page 2: "The prosecutor's initial plea offer will ordinarily remain open through Plea or Trial Confirmation Hearing." As explained above, this is an executive function and not a judicial function. The State will decide when to extend offers, and for how long they will remain open. Obviously it is to our own benefit to have a predictable EPU. To that end we are drafting a user's guide to our EPU that will hopefully dispel many of the unfounded beliefs that defense counsel seem to hold. One issue we plan to clarify is the effect various investigative actions by the defense will have on our EPU offer, and a mechanism for defense to seek our preapproval for such investigation without impacting the State's offer.

3. Page 2: Witness interviews. See above for this discussion.

4. Page 2: "Continuances will be only for good cause and limited in length." The case law and court rules already say this; no further elaboration is needed. Any disparity between this policy and the law will only spawn needless litigation.

5. Page 3-4: "If discovery or an offer is not made, the State must provide the reasons for the delay, and the court will make an appropriate order." It has long been held that courts are forbidden from participating in plea negotiations. This rule has been codified in Washington law as well. See RCW 9.94A.421 "Plea agreements -- Discussions -- Contents of agreements" ("The court shall not participate in any discussions under this section.") As for discovery, our policy is to disclose it as soon as we receive it.

6. Page 4: Use of protective orders concerning witness interviews. We do not understand this proposal but it should be moot in light of our position on witness interviews.

7. Page 5: Discussion of evidentiary motions. As per a previous discussion (omitted from this proposal) we would oppose the setting any testimonial motion that is not dispositive and does not also require the defendant to proceed by stipulated trial prior to the testimonial motion.

8. Page 5: If forensic tests are not yet completed, set date by which they must be completed or use will be precluded. This is not a discovery issue, as parties cannot turn over results of tests that have not been completed. The proposed rule would invite litigation (e.g. constitutionality, effect of continuance of trial date, exceptions for good cause). Investigation of every crime continues until both parties rest. Testing may be performed in response to new issues raised (e.g. by defense experts, new witnesses) or when comparison samples are acquired. Admissibility is an issue for the trial judge. Suppression is not ordinarily a remedy even for late disclosure of discovery, because truth is valued over strict adherence to deadlines.

9. Page 5: Identify any audio-visual needs. This appears to have been cut and pasted from another county's proposal. This issue was never raised in King County.

10. Page 6: Trial Management Conference; confirm voir dire, opening, jury instructions, AV needs… In King County each judge handles these issues prior to trial. This may have been cut and pasted from another county's report as well.

11. Page 6: "Backlog Reduction" – We do not believe this is necessary. Our numbers show significant improvement from even one year ago.

D. A Limited But More Effective Proposal

There are suggestions in the JMI report that we endorse and that defense counsel would likely endorse as well. Three changes are all that are necessary to significantly address the concerns voiced by the court and the JMI report. They cost nothing to implement and improvement would be seen immediately.

1. Have a judge sit through the entire case setting calendar for every case. Due to the volume, it may be necessary that this responsibility be shared among a few judges.
2. Draft orders when needed at case setting that set forth the expectations for the various parties to complete by the next hearing date.
3. Assign "complex" cases to a management judge to help monitor the case progress.

This proposal increases judicial management and differentiates complex cases from non-complex cases. We believe that these incremental changes would provide a foundation upon which we can begin to monitor progress. If problems still persist, we can address those at a future date.