

# CRIMINAL INVESTIGATION & ADJUDICATION

## COMMITTEE REPORT

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In September 2015, Chief Justice Mark Martin convened the North Carolina Commission on the Administration of Law and Justice (NCCALJ), a sixty-five member, multidisciplinary commission, requesting a comprehensive and independent review of North Carolina's court system and recommendations for improving the administration of justice in North Carolina. The Commission's membership was divided into five Committees: (1) Civil Justice, (2) Criminal Investigation and Adjudication, (3) Legal Professionalism, (4) Public Trust and Confidence, and (5) Technology. Each Committee independently made recommendations within its area of study.

This is the report of the Criminal Investigation and Adjudication Committee. To access the full report of the NCCALJ, including all five of the Committee reports, visit [www.nccalj.org](http://www.nccalj.org).

# CRIMINAL INVESTIGATION & ADJUDICATION COMMITTEE REPORT

*This report contains recommendations for the future direction of the North Carolina court system as developed independently by citizen volunteers. No part of this report constitutes the official policy of the Supreme Court of North Carolina, of the North Carolina Judicial Branch, or of any other constituent official or entity of North Carolina state government.*

## EVIDENCE-BASED RECOMMENDATIONS TO IMPROVE THE STATE'S CRIMINAL JUSTICE SYSTEM

### COMMITTEE CHARGE & PROCEDURES

The Criminal Investigation and Adjudication Committee of the North Carolina Commission on the Administration of Law and Justice (NCCALJ) was charged with identifying areas of concern in the state's criminal justice system and making evidence-based recommendations for reform. Starting with a comprehensive list of potential areas of inquiry, the Committee narrowed its focus to the four issues identified below. Its inquiry into these issues emphasized data-driven decision-making and a collaborative dialogue among diverse stakeholders. The Committee was

composed of representatives from a broad range of stakeholder groups and was supported by a reporter. When additional expertise was needed on an issue, the Committee formed subcommittees (as it did for Juvenile Reinvestment and Indigent Defense) or retained outside expert assistance from nationally recognized organizations (as it did for Criminal Case Management and Pretrial Justice).

The Committee met nine times. The subcommittee on Indigent Defense met four times; the

subcommittee on Juvenile Reinvestment met twice. Commissioners heard from interested persons and more than thirty state and national experts and judicial officials. The Committee chair, reporter, and subcommittee members gave presentations to and sought feedback on the Committee's work from a variety of groups, including for example, the N.C. Sheriffs' Association, N.C. Senior Resident Superior Court Judges, N.C. Chief District Court Judges, N.C. Police Chiefs, and the governing body of the N.C. Police Benevolent Association. In addition to support from the Committee reporter, NCCALJ

staff, the North Carolina Administrative Office of the Courts' Research and Planning Division, the National Center for State Courts (NCSC), and the North Carolina Sentencing Policy and Advisory Commission provided data and research. The Committee prepared an interim report, which was presented to the public in August 2016 for online feedback and in-person comments at four public meetings held around the state. That feedback was considered by the Committee in formulating its final recommendations. For more detail on all of the Committee's recommendations, please see the attached Appendices noted below.

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## RECOMMENDATIONS

The Criminal Investigation and Adjudication Committee of the North Carolina Commission on the Administration of Law and Justice makes the following evidence-based recommendations to improve the state's criminal justice system:

- **JUVENILE REINVESTMENT**

As detailed in Appendix A, the Committee recommends that North Carolina raise the juvenile age to eighteen for all crimes except violent felonies and traffic offenses. Juvenile age refers to the cut-off for when a child is adjudicated in the adult criminal justice system versus the juvenile justice system. Since 1919, North Carolina's juvenile age has been set at age sixteen; this means that in North Carolina sixteen- and seventeen-year-olds are prosecuted in adult court. Only one other state in the nation still sets the juvenile age at sixteen. Forty-three states plus the District of Columbia set the juvenile age at eighteen; five states set it at seventeen. The Committee found,

among other things, that the vast majority of North Carolina's sixteen- and seventeen-year-olds commit misdemeanors and nonviolent felonies; that raising the age will make North Carolina safer and will yield economic benefit to the state and its citizens; and that raising the age has been successfully implemented in other states, is supported by scientific research, and would remove a competitive disadvantage that North Carolina places on its citizens.

In addition to recommending that North Carolina raise the juvenile age, the Committee's proposal includes a series of recommendations designed to address concerns that were raised by prosecutors and law enforcement officials and were validated by evidence. These recommendations include, for example, requiring the Division of Juvenile Justice to provide more information to law enforcement officers in the field, providing victims with a right to review certain decisions by juvenile court counselors, and implementing technological upgrades so that prosecutors can have meaningful access to an individual's juvenile record. Importantly, the

Committee’s recommendation is contingent upon full funding. The year-long collaborative process that resulted in this proposal also resulted in historic support from other groups, including the North Carolina Sheriffs’ Association, the North Carolina Association of Chiefs of Police, the North Carolina Police Benevolent Association, the North Carolina Chamber Legal Institute, the John Locke Foundation, and Conservatives for Criminal Justice Reform. Additionally, this issue has received significant public support. Of the 178 comments submitted on it during the NCCALJ public comment period, 96% supported the Committee’s recommendation to raise the age.

- **CRIMINAL CASE MANAGEMENT**

The Committee recommends that North Carolina engage in a comprehensive criminal case management reform effort, as detailed in the report prepared for the Committee by the National Center for State Courts (NCSC) and included as Appendix B. Article I, section 18 of the North Carolina Constitution provides that “right and justice shall be administered without favor, denial, or delay.” Regarding the latter obligation, North Carolina is failing to meet both model criminal case processing time standards as well as its own more lenient time standards. Case delays undermine public trust and confidence in the judicial system and judicial system actors. When unproductive court dates cause case delays, costs are inflated for both the court system and the indigent defense system by dedicating — sometimes repeatedly — personnel such as judges, courtroom staff, prosecutors, and defense lawyers to hearing and trial dates that do not move the case toward resolution. Unproductive court dates also are costly for witnesses, victims, and defendants and their families, when they

miss work and incur travel expenses to attend proceedings. Case delay also is costly for local governments, which must pay the costs for excessive pretrial detentions, pay to transport detainees to court for unproductive hearings, and pay officers for time spent traveling to and attending such hearings. Delay also exacerbates evidence processing backlogs for state and local crime labs and drives up costs for those entities. The report at Appendix B provides a detailed road map for implementing the recommended case management reform effort, including, among other things, adopting or modifying time standards and performance measures, establishing and evaluating pilot projects, and developing caseflow management templates. The report, which also recommends that certain key participants be involved in the project and a project timeline, was unanimously adopted by the Committee.

- **PRETRIAL JUSTICE**

As described in the report included as Appendix C, the Committee unanimously recommends that North Carolina carry out a pilot project to implement and assess legal- and evidence-based pretrial justice practices. In the pretrial period — the time between arrest and when a defendant is brought to trial — most defendants are entitled to conditions of pretrial release. These can include, for example, a written promise to appear in court or a secured bond. The purpose of pretrial conditions is to ensure that the defendant appears in court and commits no harm while on release. Through pretrial conditions, judicial officials seek to “manage” these two pretrial risks. Evidence shows that North Carolina must improve its approach to managing pretrial risk. For example, because the state lacks a preventative detention procedure, the only option for detaining highly dangerous defendants

is to set a very high secured bond. However, if a highly dangerous defendant has financial resources — as for example a drug trafficker may — the defendant can “buy” his or her way out of pretrial confinement by satisfying even a very high secured bond. At the other extreme, North Carolina routinely incarcerates pretrial very low risk defendants simply because they are too poor to pay even relatively low secured bonds. In some instances these indigent defendants spend more time in jail during the pretrial phase than they could ever receive if found guilty at trial. These and other problems — and the significant costs that they create for individuals, local and state governments, and society — can be mitigated by a pretrial system that better assesses and manages pretrial risk. Fortunately, harnessing the power of data and analytics, reputable organizations have developed empirically derived pretrial risk assessment tools to help judicial officials better measure a defendant’s pretrial risk. One such tool already has been successfully implemented in one of North Carolina’s largest counties. The recommended pilot project would, among other things, implement and assess more broadly in North Carolina an empirically derived pretrial risk assessment tool and develop an evidence-based decision matrix to help judicial officials best match pretrial conditions to empirically assessed pretrial risk. Such tools hold the potential for a safer and more just North Carolina.

## ● INDIGENT DEFENSE

As discussed in more detail in Appendix D, the Committee offers a comprehensive set of recommendations to improve the State’s indigent defense system. Defendants who face incarceration in criminal court have a constitutional right

to counsel to represent them. If a person lacks the resources to pay for a lawyer, counsel must be provided at state expense. Indigent defense thus refers to the state’s system for providing legal assistance to those unable to pay for counsel themselves. North Carolina’s system is administered by the Office of Indigent Defense Services (IDS). When the State fails to provide effective assistance to indigent defendants, those persons can experience unfair and unjust outcomes. But the costs of failing to provide effective representation are felt by others as well, including victims and communities. Failing to provide effective assistance also creates costs for the criminal justice system as a whole, when problems with indigent defense representation cause trial delays and unnecessary appeals and retrials. While stakeholders agree that IDS has improved the State’s delivery of indigent defense services, they also agree that in some respects the system is in crisis. The attached report makes detailed recommendations to help IDS achieve this central goal: ensuring fair proceedings by providing effective representation in a cost-effective manner. The report recommends, among other things, establishing single district and regional public defender offices statewide; providing oversight, supervision, and support to all counsel providing indigent defense services; implementing uniform indigency standards; implementing uniform training, qualification, and performance standards and workload formulas for all counsel providing indigent services; providing reasonable compensation for all counsel providing indigent defense services; and reducing the cost of indigent defense services to make resources available for needed reforms. Implementation of these recommendations promises to improve fairness and access, reduce case delays, and increase public trust and confidence.

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# APPENDIX A

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**JUVENILE REINVESTMENT**  
Criminal Investigation and Adjudication Committee  
December 2016

# JUVENILE REINVESTMENT

## NCCALJ COMMITTEE ON CRIMINAL INVESTIGATION & ADJUDICATION REPORT

DECEMBER 2016

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### Executive Summary

North Carolina stands alone in its treatment of 16- and 17-year-olds (“youthful offenders”) like adults for purposes of the criminal justice system. In 1919, North Carolina determined that juvenile court jurisdiction would extend only to those under 16 years old.<sup>1</sup> A substantial body of evidence suggests that both youthful offenders and society benefit when persons under 18 years old are treated in the juvenile justice system rather than the criminal justice system. In response to this evidence, other states have raised the juvenile age. Notwithstanding recommendations from two legislatively-mandated studies of the issue, positive experiences in other states that have raised the

<sup>1</sup> In 1919, the Juvenile Court Statute was passed, providing statewide juvenile courts with jurisdiction over children under the age of 16. BETTY GENE ALLEY & JOHN THOMAS WILSON, NORTH CAROLINA JUVENILE JUSTICE SYSTEM: A HISTORY, 1868-1993, at 4 (NC AOC 1994) [hereinafter NC JUVENILE JUSTICE: A HISTORY]. The intent of this legislation “was to provide a special children’s court based upon a philosophy of treatment and protection that would be removed from the punitive approach of criminal courts.” *Id.* at 5.

age, and two cost-benefit studies showing that raising the age would benefit the state economically, North Carolina has yet to take action on this issue.

After careful review, the Committee<sup>2</sup> recommends that North Carolina raise the age of juvenile court jurisdiction to include youthful offenders aged 16 and 17 years old for all crimes except Class A through E felonies and traffic offenses.<sup>3</sup> This recommendation is contingent on:

- (1) Maintaining the existing procedure in G.S. 7B-2200 to transfer juveniles to adult criminal court,<sup>4</sup> except that Class A through E felony charges against 16- and 17-year olds will be automatically transferred to superior court after a finding of probable cause or by indictment.<sup>5</sup>
- (2) Amending G.S. 7B-3000(b) to provide that the juvenile court counselor must, upon request, disclose to a sworn North Carolina law enforcement officer information about a juvenile's record and prior law enforcement consultations with a juvenile court counselor about the juvenile, for the limited purpose of assisting the officer in

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<sup>2</sup> See *infra* pp. 24-25 for a list of Committee members and other participants.

<sup>3</sup> Traffic offenses are excluded because of the resources involved with transferring the large volume of such crimes to juvenile court. This recommendation parallels those made by others who have examined the issue. See NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, REPORT ON STUDY OF YOUTHFUL OFFENDERS PURSUANT TO SESSION LAW 2006-248, Sections 34.1 and 34.2 (2007) [hereinafter 2007 SENTENCING COMMISSION REPORT] (excluding traffic offenses from its recommendation to raise the age); YOUTH ACCOUNTABILITY PLANNING TASK FORCE, FINAL REPORT TO THE GENERAL ASSEMBLY OF NORTH CAROLINA (Jan., 2011) [hereinafter YOUTH ACCOUNTABILITY TASK FORCE REPORT] (same). Consistent with prior recommendations, the Committee suggests that transferring youthful offenders who commit traffic offenses be examined at a later date. See 2007 SENTENCING COMMISSION REPORT, at 8 (so suggesting).

While prior working groups have recommended staggered implementation for 16- and 17-year olds, the Committee recommends implementing the change for both ages at once.

<sup>4</sup> Under the existing provision, the court *may* transfer jurisdiction over a juvenile who is at least 13 years of age and is alleged to have committed a felony to superior court, where the juvenile will be tried as an adult. G.S. 7B-2200. A motion to transfer may be made by the prosecutor, the juvenile's attorney, or the court. *Id.* If the juvenile is alleged to have committed a Class A felony at age 13 or older, jurisdiction *must* be transferred to superior court if probable cause is found in juvenile court. *Id.*

<sup>5</sup> Early in the development of this proposal, the N.C. Conference of District Attorneys' representative on the Committee indicated that requiring Class A-E felonies to be automatically transferred to superior court would be critical to the support of these recommendations by that organization.

Automatic transfer to superior court means that the district court judge has no discretion to retain Class A-E felony charges against 16- and 17-year olds in juvenile court. Providing for transfer by indictment meets the prosecutors' interest in being able to avoid requiring fragile victims to testify at a probable cause hearing within days of a violent crime. The Conference of District Attorneys subsequently revised its position to make support of the proposal contingent on the district attorney being given sole discretion (without judicial review) to prosecute juveniles aged 13-17 and charged with Class A-E felonies in adult criminal court. As discussed *infra* at pp. 22-24, the Committee demurred on this approach.

The Committee contemplated a statutory exclusion for Class A-E felonies but adopted this approach primarily for two reasons. First, it simplifies detention decisions for law enforcement officers. Under this approach when a juvenile is arrested for *any* crime, there will be no uncertainty with respect to custody: custody always will be with the Division of Juvenile Justice. To help implement this change, the Division of Juvenile Justice has committed to provide transportation to all juveniles from local jails to juvenile facilities (currently law enforcement is responsible for this transportation). Second, this procedure protects juveniles who are prosecuted in adult court but are found not guilty or their charges are reduced or dismissed, perhaps because of an error in charging. See *State v. Collins*, \_\_ N.C. App. \_\_, 783 S.E.2d 9 (2016) (with respect to three charges, the juvenile improperly was charged as an adult because of a mistake with respect to his age).

- exercising his or her discretion about how to handle an incident being investigated by the officer which could result in the filing of a complaint.<sup>6</sup>
- (3) Requiring the Division of Juvenile Justice to (a) track all consultations with law enforcement officers about a juvenile<sup>7</sup> and (b) provide more information to complainants and victims about dismissed, closed, and diverted complaints.<sup>8</sup>
  - (4) Amending G.S. 7B-1704 to provide that the victim has a right to seek review by the prosecutor of a juvenile court counselor's decision not to approve the filing of a petition.<sup>9</sup>
  - (5) Improving computer systems to give the prosecutor and the juvenile's attorney electronic access to an individual's juvenile delinquency record statewide.<sup>10</sup>
  - (6) Full funding to implement the recommended changes.<sup>11</sup>

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<sup>6</sup> This recommendation is designed to ensure that law enforcement officers have sufficient information to exercise discretion when responding to incidents involving juveniles (e.g., whether to release a juvenile or pursue a complaint). Although G.S. 7B-3000(b) already allows the prosecutor to share information obtained from a juvenile's record with law enforcement officers, given the time sensitive nature of officers' field decisions, it is not practical to designate the prosecutor as the officer's source for this information. Because juvenile court counselors are available 24/7, on weekends and on holidays, have access to this information, and are the officer's first point of contact in the juvenile system, they are the best source of time sensitive information for officers.

Consistent with the existing statutory provision that the prosecutor may not allow an officer to photocopy any part of the record, the Committee recommends that the counselor share this information orally only. To preserve confidentiality, if this information is included in a report or record created by the officer, such report or record must be designated and treated as confidential, in the same way that all law enforcement records pertaining to juveniles currently are so designated and treated.

<sup>7</sup> This recommendation is necessary to implement recommendation (2) above.

<sup>8</sup> In response to Committee discussions the Division of Juvenile Justice already has revised the Complainant/Victim Letter used for this purpose and presented the revision to the Committee for feedback.

<sup>9</sup> G.S. 7B-1704 currently provides this right only to the complainant. To implement this recommendation, conforming changes would need to be made to G.S. 7B-1705 (prosecutor's review of counselor's determination).

<sup>10</sup> G.S. 7B-3000(b) already provides that the prosecutor and the juvenile's attorney may examine the juvenile's record and obtain copies of written parts of the juvenile record without a court order. Section 12 of the Rules of Recordkeeping defines that record as the case file (the file folder containing all paper documents) and the electronic data. Currently the electronic data is maintained in the JWisE computer system, an electronic index of the juvenile record. Without access to this computer system, prosecutors encounter logistical hurdles to accessing the juvenile record to inform decisions regarding charging, plea negotiations, etc. Allowing prosecutors access to the relevant computer system removes these impediments. The prosecutor's access to computer system information should be limited to juvenile delinquency information and may not include other protected information contained in that system, such as that pertaining to abuse neglect and dependency or termination of parental rights. Additionally, the JWisE system currently allows only for county-by-county searches; it does not allow for a statewide search. Given the mobility of North Carolina's citizens, there is a need for statewide searches. To allow for meaningful access to a juvenile's delinquency record, the computer system must be improved to allow for statewide searching.

To ensure parity of access, if the prosecutor is given access to the juvenile record in the relevant computer system, the same access must be given to the juvenile's attorney. As with prosecutors, G.S. 7B-3000 already allows the attorney to have access to the record without a court order; but as with the prosecutor, lack of access to the computer system makes this logistically impossible.

Existing law prohibiting photocopying any part of the juvenile record, G.S. 7B-3000(c), would be maintained and apply to computer system records.

<sup>11</sup> Two separate studies have examined the costs of raise the age legislation. *See infra* pp. 11-12 (discussing studies).

*This last contingency bears special emphasis: The stakeholders are unanimous in the view that full funding must be provided to implement these recommendations and that an unfunded or partially unfunded mandate to raise the age will be detrimental to the court system and community safety.*

To ameliorate implementation costs to the juvenile justice system associated with raise the age legislation, the Committee recommends that North Carolina expand state-wide existing programs to reduce school-based referrals to the juvenile justice system.<sup>12</sup>

Finally the Committee recommends requiring regular juvenile justice training for sworn law enforcement officers and forming a limited term standing committee of juvenile justice stakeholders to review implementation of these recommendations and make additional recommendations if needed.<sup>13</sup>

### **A Brief Comparison of Juvenile & Criminal Proceedings**

When there is probable cause that a North Carolina youthful offender has committed a crime, that person is charged like any adult. If not released before trial, the youthful offender is detained in the local jail and at risk of being victimized by sexual violence.<sup>14</sup> The youthful offender is tried in adult criminal court and if found guilty, is convicted of a crime. Although a minor's parent or guardian must be informed when the child is charged or taken into custody,<sup>15</sup> the criminal case proceeds without any additional requirement of notice to the parent or parental involvement. If convicted and sentenced to prison, the youthful offender serves the sentence in an adult prison facility.<sup>16</sup> In prison, youthful offenders are significantly more likely than other inmates to be victimized by physical violence.<sup>17</sup> The criminal proceeding and all records, including the record of arrest and conviction, are available to the public, even if the youthful offender is found not guilty. All collateral consequences that apply to adult defendants apply to youthful offenders. These consequences

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<sup>12</sup> See *infra* pp. 18-19 (discussing such programs).

<sup>13</sup> The Standing Committee should include, among others: a district court judge; a superior court judge; a prosecutor who handles juvenile matters; a victims' advocate; and representatives from the law enforcement community, the Division of Juvenile Justice, and the Office of the Juvenile Defender.

<sup>14</sup> A report for the John Locke Foundation supporting raising the juvenile age notes: "one national survey of jails found that in one year, minors were the victims of inmate-on-inmate sexual violence 21 percent of the time, even though they only made up less than one percent of jail inmates." MARK LEVIN & JEANETTE MOLL, JOHN LOCKE FOUNDATION, IMPROVING JUVENILE JUSTICE: FINDING MORE EFFECTIVE OPTIONS FOR NORTH CAROLINA'S YOUNG OFFENDERS 5 (2013) [hereinafter JOHN LOCKE FOUNDATION REPORT], <http://www.johnlocke.org/acrobat/spotlights/YoungOffendersRevised.pdf>.

<sup>15</sup> G.S. 15A-505(a).

<sup>16</sup> Male youthful offenders are incarcerated at the Foothills Correctional Institution, an 858-capacity facility for males aged 18-25 years old. See N.C. Dep't Pub. Safety, *Foothills Correctional Institution*, N.C. DPS, <https://www.ncdps.gov/Adult-Corrections/Prisons/Prison-Facilities/Foothills-Correctional-Institution> (last modified Mar. 19, 2013). Female youthful offenders serve their sentences at the N.C. Correctional Institution for Women, a facility housing the largest inmate population in the state and female inmates of all ages and all custody and control statuses, including death row, maximum, close, medium, minimum and safekeepers. See N.C. Dep't Pub. Safety, *NC Correctional Institution for Women*, N.C. DPS, <https://www.ncdps.gov/Adult-Corrections/Prisons/Prison-Facilities/NC-Correctional-Institution-for-Women> (last modified Aug. 6, 2015).

<sup>17</sup> With respect to physical violence, a report for the John Locke Foundation supporting raising the juvenile age notes: "Research has found minors are 50 percent more likely to be physically attacked by a fellow inmate with a weapon of some sort, and twice as likely to be assaulted by staff." JOHN LOCKE FOUNDATION REPORT, *supra* note 13, at 5.

include, among other things, ineligibility for employment, professional licensure, public education, college financial aid, and public housing.<sup>18</sup>

**Fig. 1.** Current age of legal jurisdiction.



By contrast, when a person under 16 years old is believed to have committed acts that would constitute a crime if committed by an adult, a complaint is filed in the juvenile justice system alleging the juvenile to be delinquent.<sup>19</sup> A juvenile court counselor conducts a preliminary review of the complaint to determine, in part, whether it states facts that constitute a delinquent offense;<sup>20</sup> essentially this determination looks at whether the elements of a crime have been alleged. If the juvenile court has no jurisdiction over the matter or if the complaint is frivolous, the juvenile court counselor must refuse to file the complaint as a petition.<sup>21</sup> Once the juvenile court counselor determines that the complaint is legally sufficient, he or she decides whether it should be filed as a petition, diverted, or resolved without further action.<sup>22</sup> This evaluation can involve interviews with the complainant and victim and the juvenile and his or her parents.<sup>23</sup> “Non-divertable” offenses, however, are not subject to this inquiry; the juvenile court counselor must approve as a petition a complaint alleging a non-divertable offense once legal sufficiency is established.<sup>24</sup> Non-divertable offenses include murder, rape, sexual offense, and other serious offenses designated by the statute.<sup>25</sup> For all other offenses, the case may be diverted with the stipulation that the juvenile and his or her family comply with requirements agreed upon in a diversion plan or contract, such as participation in mediation, counseling, or teen court.<sup>26</sup> The diversion plan or contract can be in effect for up to six months, during which time the court counselor conducts periodic reviews to ensure compliance by the juvenile and the juvenile’s parent, guardian, or custodian.<sup>27</sup> If diversion is unsuccessful, the complaint may be filed as a petition.<sup>28</sup> If successful, the juvenile court counselor may close the case at an appropriate time.<sup>29</sup> The Division of Adult Correction and Juvenile Justice reports that for calendar years 2008-2011, 21% of complaints were diverted and 18% were closed at intake.<sup>30</sup> 76% of those diverted did not acquire new juvenile complaints within two years.<sup>31</sup> If the counselor approves a complaint as a petition, the case is calendared for juvenile court. If the counselor declines to so approve a complaint, the complainant can request that the prosecutor

<sup>18</sup> For a complete catalogue of collateral consequences, see the UNC School of Government’s Collateral Consequences Assessment Tool, a searchable database of the North Carolina collateral consequences of a criminal conviction, available online at <http://ccat.sog.unc.edu/>.

<sup>19</sup> For the procedures for intake, diversion, and juvenile petitions, see G.S. Ch. 7B, Arts. 17 & 18.

<sup>20</sup> G.S. 7B-1701.

<sup>21</sup> *Id.*

<sup>22</sup> G.S. 7B-1702.

<sup>23</sup> *Id.*

<sup>24</sup> G.S. 7B-1701.

<sup>25</sup> *Id.*

<sup>26</sup> G.S. 7B-1706.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> N.C. DEP’T PUB. SAFETY, DIVISION OF JUVENILE JUSTICE, JUVENILE DIVERSION IN NORTH CAROLINA 7 (2013).

<sup>31</sup> *Id.* at 2.

review that decision.<sup>32</sup> In certain circumstances, such as where the juvenile presents a danger to the community, a district court judge may order that the juvenile be taken into secure custody.<sup>33</sup>

For cases that go to court, the child's parent, guardian, or custodian is made a party to the proceeding and is required to attend court hearings.<sup>34</sup> If the child is adjudicated delinquent, a dispositional hearing is held after which the judge enters a disposition that provides "appropriate consequences, treatment, training, and rehabilitation to assist the juvenile toward becoming a nonoffending, responsible, and productive member of the community."<sup>35</sup> Interventions that can be imposed on delinquent youth array on a continuum. Lower level sanctions include things like restitution, community service, and supervised day programs.<sup>36</sup> Intermediate sanctions include things like placement in a residential treatment facility and house arrest.<sup>37</sup> In certain circumstances, the judge's dispositional order may require the child to be committed into State custody, in which case the child will be held in a youth development center (YDC), housing only those adjudicated as juveniles.<sup>38</sup> Upon commitment to and placement in a YDC, the juvenile undergoes a "screening and assessment of developmental, educational, medical, neurocognitive, mental health, psychosocial and relationship strengths and needs."<sup>39</sup> This and other information is used to develop an individualized service plan "outlining commitment services, including plans for education, mental health services, medical services and treatment programming as indicated."<sup>40</sup> A service planning team meets at least monthly to monitor the juvenile's progress.<sup>41</sup> In contrast to the adult prison setting and because YDCs deal exclusively with juvenile populations, all of their programming is age- and developmentally-appropriate for juveniles. Because of the focus on rehabilitation, and in contrast to a judge's authority in the criminal system, the juvenile dispositional order can require action by the child's parent, guardian, or custodian, such as attending parental responsibility classes,<sup>42</sup> or participation in the child's psychological treatment.<sup>43</sup> Because the juvenile record is confidential and not part of the public record,<sup>44</sup> barriers to employment, education, college financial aid, and other collateral consequences associated with a criminal conviction do not attach to the same extent.

### **North Carolina Stands Alone Nationwide in its Treatment of Youthful Offenders**

Forty-three states plus the District of Columbia set the age of criminal responsibility at age 18.<sup>45</sup> In these jurisdictions, 16- and 17-year olds are tried in the juvenile justice system, not the adult

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<sup>32</sup> G.S. 7B-1704.

<sup>33</sup> G.S. 7B-1903.

<sup>34</sup> G.S. 7B-2700.

<sup>35</sup> G.S. 7B-2500.

<sup>36</sup> Juvenile Justice Disposition Chart and Dispositional Alternatives (Dec. 2015) (a copy of this document was provided by the Division of Adult Correction and Juvenile Justice, Subcommittee on Juvenile Age Meeting Feb. 18, 2016).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*; see also G.S. 7B-2506(24).

<sup>39</sup> N.C. Dep't Pub. Safety, *Youth Development Centers*, N.C. DPS, <https://www.ncdps.gov/Juvenile-Justice/Juvenile-Facility-Operations/Youth-Development-Centers> (last visited Mar. 21, 2016).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> G.S. 7B-2701.

<sup>43</sup> G.S. 7B-2702.

<sup>44</sup> G.S. 7B-3000. In certain circumstances, however, information in juvenile court records later may be revealed to the prosecutor, probation officer, magistrate, law enforcement, and the court. *Id.*

<sup>45</sup> Juvenile Justice Geography, Policy, Practice & Statistics, *Jurisdictional Boundaries*, JJGPS, <http://www.jjgps.org/jurisdictional-boundaries> (last visited Aug. 8, 2016) [hereinafter *Jurisdictional*

system. The most recent states to join this majority approach are Louisiana and South Carolina; both of those states raised the juvenile age to 18 in 2016.<sup>46</sup> Raise the age legislation received unanimous support in South Carolina's legislature.<sup>47</sup> Five states set the age of criminal responsibility at age 17.<sup>48</sup> This leaves North Carolina and one other state—New York—as the only jurisdictions that prosecute both 16- and 17-year olds in adult criminal court.<sup>49</sup> New York's procedure, however, is much more flexible than North Carolina's in that it has a reverse waiver provision allowing a youthful offender to petition the court to be tried as a juvenile.<sup>50</sup> While other states have moved<sup>51</sup>—and continue to move<sup>52</sup>—to increase juvenile age, North Carolina has not followed suit.

### **Most North Carolina Youthful Offenders Commit Misdemeanors & Non-Violent Felonies**

Consistent with data from other states, stable data shows that only a small number of North Carolina's 16- and 17-year-olds are convicted of violent felonies.<sup>53</sup> Of the 5,689 16- and 17-year olds convicted in 2014,<sup>54</sup> only 187—3.3% of the total—were convicted of violent felonies (Class A-E).<sup>55</sup> The vast majority of these youthful offenders—80.4%—were convicted of misdemeanors.<sup>56</sup> The remaining 16.3% were convicted of non-violent felonies.<sup>57</sup>

The fact that such a small percentage of youthful offenders commit violent felonies caused Newt Gingrich to argue, in support of raising the age in New York, that “[i]t is commonsense to design the system around what is appropriate for the majority, while providing exceptions for the most serious cases.”<sup>58</sup> Likewise, a report on raising the age prepared by the John Locke Foundation notes, “[w]hile there are a small number of very serious juvenile offenders who should be tried as adults

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*Boundaries*]. Please note that as of August 2016, this source had not been updated to reflect successful raise the age legislation in Louisiana and South Carolina.

<sup>46</sup> The South Carolina law is available here, along with a history of legislative action: [http://www.scstatehouse.gov/sess121\\_2015-2016/bills/916.htm](http://www.scstatehouse.gov/sess121_2015-2016/bills/916.htm). The Louisiana law is here: <https://www.legis.la.gov/legis/ViewDocument.aspx?d=1012088>.

<sup>47</sup> The unanimous votes in the South Carolina House and Senate are reported here: [http://www.scstatehouse.gov/sess121\\_2015-2016/bills/916.htm](http://www.scstatehouse.gov/sess121_2015-2016/bills/916.htm).

<sup>48</sup> *Id.* (these states include: Georgia, Michigan, Missouri, Texas and Wisconsin). Raise the age proposals are under consideration in at least one of these states. See Newt Gingrich & Pat Nolan, *Missouri, Raise the Age*, ST. LOUIS POST-DISPATCH, Apr. 27, 2016, [http://www.stltoday.com/news/opinion/missouri-raise-the-age/article\\_ade5dad7-12aa-54b4-b180-97d3977edfc1.html](http://www.stltoday.com/news/opinion/missouri-raise-the-age/article_ade5dad7-12aa-54b4-b180-97d3977edfc1.html) (noting that Missouri legislature is working on raise the age bill).

<sup>49</sup> *Jurisdictional Boundaries*, *supra* note 45.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* (providing a color coded map showing the upper age of juvenile jurisdiction in U.S. states from 1997 to 2014).

<sup>52</sup> See *supra* note 48.

<sup>53</sup> Convictions by Offense Type and Class for Offenders Age 16 and 17 FY 2004/05 – FY 2013/14 (chart indicating that convictions for Class A-E felonies never exceeded 4% of total convictions for this age group over ten-year period; a copy of this document was provided to the Committee Reporter by Michelle Hall, Executive Director of the North Carolina Sentencing and Policy Advisory Commission, Mar. 24, 2016).

<sup>54</sup> MICHELLE HALL, NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, COMPARATIVE STATISTICAL PROFILE OF YOUNG OFFENDERS IN NORTH CAROLINA 6 [hereinafter COMPARATIVE STATISTICAL PROFILE] (Presented to the NCCALJ Criminal Investigation and Adjudication Committee, Dec. 11, 2015).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Newt Gingrich, *Treating Kids As Kids to Help Curb Crime*, N.Y. POST, Mar. 20, 2015, <http://nypost.com/2015/03/20/treating-kids-as-kids-to-help-curb-crime/> [hereinafter Gingrich].

due to the nature of their crimes, in the aggregate, the limited available evidence . . . suggests that placing all 16 year-olds in the adult criminal justice system is not the most effective strategy for deterring crime or successfully rehabilitating and protecting these youngsters.”<sup>59</sup> Consistent with these arguments, the Committee recommends a policy that is appropriate for the majority of youthful offenders, with two safeguards for ensuring community safety with respect to the minority of youthful offenders who commit violent crimes: (1) requiring that youthful offenders charged with Class A through E felonies be tried in adult criminal court and (2) maintaining the existing procedure that allows other cases to be transferred to adult court when appropriate.<sup>60</sup>

### **Raising the Age Will Make North Carolina Safer**

As noted in the John Locke Foundation report supporting raising the juvenile age in North Carolina, “[r]esearch consistently shows that rehabilitation of juveniles is more effectively obtained in juvenile justice systems and juvenile facilities, as measured by recidivism rates.”<sup>61</sup> Recidivism refers to an individual’s relapse into criminal behavior, after having experienced intervention for a previous crime,<sup>62</sup> such as a conviction and prison sentence. Lower rates of recidivism means less crime and safer communities. Both North Carolina and national data suggest that prosecuting youthful offenders as adults results in higher rates of recidivism than when youthful offenders are treated in the juvenile system. Thus, raising the age is likely to result in lower recidivism, less crime, and increased safety.

North Carolina data shows a significant 7.5% decrease in recidivism when teens are adjudicated in the juvenile versus the adult system.<sup>63</sup> Experts suggest that youthful offenders have a higher recidivism rate when prosecuted in the adult criminal system because, unlike the juvenile system, the criminal system lacks the ability to implement the most targeted, juvenile-specific, effective interventions for rehabilitation within a framework of parental and community involvement to include mental health, education, and social services participation in the continuum of care.<sup>64</sup> North Carolina data also shows that when youthful offenders are prosecuted in the adult system, they recidivate at a rate that is 12.6% higher than the overall population.<sup>65</sup> Also, individuals with deeper involvement in the criminal justice system generally recidivate at higher rates than those with less involvement (for example, a sentence of probation versus one of imprisonment).<sup>66</sup> Contrary to the conventional rule, in North Carolina youthful offenders who receive probation recidivate at a higher

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<sup>59</sup> JOHN LOCKE FOUNDATION REPORT, *supra* note 14, at 2.

<sup>60</sup> *See supra* pp. 2-4 (specifying these recommendations); *see generally* JOHN LOCKE FOUNDATION REPORT, *supra* note 14, at 2 (arguing: “As long as there are mechanisms in place which permit juvenile offenders whose crimes are individually deemed serious enough to be tried as adults, considerations of public safety and the wellbeing of state wards suggest North Carolina should seriously look at joining nearly all other states in making the juvenile justice system the default destination for 16 year-olds.”).

<sup>61</sup> JOHN LOCKE FOUNDATION REPORT, *supra* note 14, at 3.

<sup>62</sup> National Institute of Justice, *Recidivism*, NIJ, <http://www.nij.gov/topics/corrections/recidivism/pages/welcome.aspx> (last modified June 17, 2014).

<sup>63</sup> COMPARATIVE STATISTICAL PROFILE, *supra* note 54, at Tables 9 and 11 (showing a two-year recidivism rate for 16-17 year old probationers to be 49.3% and a two-year recidivism rate for 15-year-olds to be 41.8%).

<sup>64</sup> Comments of William Lassiter, Committee Meeting Dec. 11, 2015.

<sup>65</sup> COMPARATIVE STATISTICAL PROFILE, *supra* note 54, at Table 9 (while the overall probation entry population recidivates at a rate of 36.7%, 16- and 17-year-olds recidivate at the much higher rate of 49.3%).

<sup>66</sup> NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, CORRECTIONAL PROGRAM EVALUATION: OFFENDERS PLACED ON PROBATION OR RELEASED FROM PRISON IN FISCAL YEAR 2010/11, at iii, Figure 2 (2014) (showing that two-year recidivism rate as measured by rearrests was 36.8% for probationers while the rate for persons released from prison was 48.6%).

rate than defendants who are released after a prison sentence.<sup>67</sup> These last two data points indicate that North Carolina's treatment of youthful offenders is inconsistent with reducing crime and promoting community safety. Overall, North Carolina data is consistent with data nationwide: recidivism rates are higher when juveniles are prosecuted in adult criminal court.<sup>68</sup>

Additionally, evidence shows that youth receive more supervision in the juvenile system than the adult system. Because they typically present in the adult system with low-level offenses, charges against youthful offenders often are dismissed.<sup>69</sup> Even when youthful offenders are convicted, because they typically have little or no prior criminal record,<sup>70</sup> sentences are often light.<sup>71</sup> As Newt Gingrich observed when supporting raise the age legislation in New York, "because most minors are charged with low-level offenses, the adult system often imposes no punishment whatsoever, teaching a dangerous lesson: You won't be held accountable for breaking the law."<sup>72</sup>

Some assert that prosecuting youthful offenders in criminal court has an important deterrent effect. However, as noted in a John Locke Foundation report supporting raising the age in North Carolina, studies show that prosecuting juveniles in adult court does not in fact deter crime.<sup>73</sup> That report continues:

The studies all show that, perhaps due to minors' lack of maturity or less-than-developed frontal cortex, which controls reasoning, legislative efforts to inflict

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<sup>67</sup> COMPARATIVE STATISTICAL PROFILE, *supra* note 54, at Table 9 (showing that while recidivism for overall prison releases is 48.6%, recidivism rates for youthful offenders sentenced to probation is 49.3%).

<sup>68</sup> As noted by Newt Gingrich when arguing in favor of raise the age legislation in New York:

Research shows that prosecuting youths as adults increases the chances that they will commit more serious crimes. A Columbia University study compared minors arrested in New Jersey (where the age of adulthood is 18) with those in New York. New York teens were more likely to be rearrested than those processed in New Jersey's juvenile court for identical crimes. For violent crimes, rearrests were 39 percent greater. Studies in other states have yielded similar results, leading experts at the Centers for Disease Control to recommend keeping kids out of adult court to combat community violence.

Gingrich, *supra* note 58; *see also* JOHN LOCKE FOUNDATION REPORT, *supra* note 14, at 3-4 (citing several studies that have compared recidivism rates for juvenile offenders tried in juvenile courts with those for juveniles tried in criminal courts); OLA LISOWSKI & MARC LEVIN, MACIVER INSTITUTE & TEXAS PUBLIC POLICY FOUNDATION, 17-YEAR-OLDS IN ADULT COURT: IS THERE A BETTER ALTERNATIVE FOR WISCONSIN'S YOUTH AND TAXPAYERS? 3, 7-9 (2016) [hereinafter LISOWSKI & LEVIN] (noting that "[i]n Wisconsin, 17-year-olds are three times more likely to return to prison if they originally go through the adult system rather than the juvenile system"; discussing studies in other states, including New York and New Jersey, Florida, and Minnesota).

<sup>69</sup> PowerPoint accompanying Comments of Judge Morey, Committee Meeting Dec. 11, 2015 (noting that in Durham, of the 632 misdemeanors charges taken out on 16- and 17-year-olds in 2012, 495 were dismissed), <http://nccalj.org/wp-content/uploads/2015/12/October-2015-Sentencing-Commissions-Research-and-Policy-Study-Group.pdf>.

<sup>70</sup> COMPARATIVE STATISTICAL PROFILE, *supra* note 54, at Table 5 (showing that less than 2% of youthful offenders present with a prior record at level III or above).

<sup>71</sup> *Id.* at Table 7 (showing that almost 75% of youthful offenders receive non-active (community) punishment).

<sup>72</sup> Gingrich, *supra* note 58.

<sup>73</sup> JOHN LOCKE FOUNDATION REPORT, *supra* note 14, at 3 (so noting and discussing data from New York, Idaho, and Georgia calling into question the notion that prosecuting juveniles in adult court has a deterrent effect).

criminal court jurisdiction and punishments upon minors have not deterred crime. Even more than adult offenders, the very problem with juvenile offenders is that too often they do not think carefully before committing their misdeeds, and they rarely, if ever, review the statutory framework to determine the consequences.<sup>74</sup>

Other researchers agree that adult criminal sanctions do not deter youth crime.<sup>75</sup>

Some have suggested that raising the age will give gang members additional youth to recruit for illegal activities. However, the Division of Juvenile Justice reports that only 7-8% of all youth in the juvenile justice system are “gang involved.” This figure includes youth who are recruited by gang members to help drug or other criminal activity. While this percentage is not insignificant, it shows that only a small proportion of all juveniles who enter the system are connected with gang crimes. Also, the number of juveniles who are alleged to have committed acts that constitute a gang crime offense is very, very small; from 2009-2016, only 20 juveniles in the entire system were alleged to have perpetrated such acts.<sup>76</sup> Finally, there is reason to believe that youth with gang connections are likely to do better in the juvenile system than the adult system. Juveniles in the YDCs are exposed to gang awareness educational and intervention programs, as well as substance abuse programming. Youth processed in the adult system and incarcerated in adult prison have no access to that crucial programming.

It should be noted that the Committee’s recommendation has built-in protections to deal with violent juveniles: (1) requiring that youthful offenders charged with Class A through E felonies be tried in adult criminal court<sup>77</sup> and (2) maintaining the existing procedure that allows other cases to be transferred to adult court when appropriate.<sup>78</sup> Notably, North Carolina’s existing transfer provision has been used for 13, 14, and 15-year-olds for many years, with no empirical evidence suggesting that violent or gang-involved youth are falling through the cracks.<sup>79</sup>

Finally, studies show when states have implemented raise the age legislation, public safety has improved.<sup>80</sup>

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<sup>74</sup> *Id.*

<sup>75</sup> LISOWSKI & LEVIN, *supra* note 68, at 5 (noting that in 1994, after Georgia passed a law restricting access to juvenile court for certain youth, a study showed no significant change in juvenile arrest rates in the years following the statute’s enactment; noting that after New York passed a similar law in 1978, a study found that arrest rates for most offenses remained constant or increased in the time period of the study).

<sup>76</sup> Email from William Lassiter, Deputy Commissioner for Juvenile Justice to Committee Reporter (Sept. 20, 2016) (on file with Committee Reporter) (the offenses examined included all crimes in Article 13A of G.S. Chapter 14 (North Carolina Street Gang Suppression Act) and G.S. 14-34.9 (discharging a firearm from within an enclosure as part of a pattern of street gang activity)).

<sup>77</sup> According to the recommendations above, Class A-E felony charges against 16- and 17-year olds will be automatically transferred to superior court after a finding of probable cause or by indictment. *See supra* p. 2 (so specifying)

<sup>78</sup> *See supra* p. 2 (so specifying).

<sup>79</sup> The John Locke Foundation report concluded: “North Carolina [has] a robust system of transfer for felony juvenile offenders, which ensures that the most serious of juvenile offenders can be tried in adult courts even if the age of juvenile court jurisdiction is raised.” JOHN LOCKE FOUNDATION REPORT, *supra* note 14, at 1.

<sup>80</sup> *See, e.g.*, RICHARD MENDEL, JUSTICE POLICY INSTITUTE, JUVENILE JUSTICE REFORM IN CONNECTICUT: HOW COLLABORATION AND COMMITMENT HAVE IMPROVED PUBLIC SAFETY AND OUTCOMES FOR YOUTH 29 (2013) [hereinafter CONNECTICUT REPORT] (“Available data leave no doubt that public safety has improved as a result of Connecticut’s juvenile justice reforms.”); *see also infra* pp. 14-15 (discussing other states’ experiences with raise the age legislation).

## Raising the Age Will Yield Economic Benefit to North Carolina & Its Citizens

Two separate studies authorized by the North Carolina General Assembly indicate that raising the juvenile age will produce significant economic benefits for North Carolina and its citizens:

- (1) In 2009, the Governor’s Crime Commission Juvenile Age Study submitted to the General Assembly included a cost-benefit analysis of raising the age of juvenile court jurisdiction to 18. The analysis, done by ESTIS Group, LLC, found that the age change would result in a net benefit to the state of \$7.1 million.<sup>81</sup>
- (2) In 2011, the Youth Accountability Planning Task Force submitted its final report to the General Assembly. The Task Force’s report included a cost-benefit analysis, done by the Vera Institute of Justice, of prosecuting 16 and 17-year-old misdemeanants and low-level felons in juvenile court. That report estimated net benefits of \$52.3 million.<sup>82</sup>

Much of the estimated cost savings would result from reduced recidivism, which “eliminates future costs associated with youth ‘graduating’ to the adult criminal system, and increased lifetime earnings for youth who will not have the burden of a criminal record.”<sup>83</sup> Cost savings from reduced recidivism has been cited in the national discourse on raising the juvenile age. As noted by Newt Gingrich when arguing in favor of raise the age legislation in New York:

Recidivism is expensive. There are direct losses to victims, the public costs of law enforcement and incarceration and the lost economic contribution of someone not engaged in law-abiding work. When Connecticut raised the age for adult prosecution to 18, crime rates quickly dropped and officials were able to close an adult prison. Researchers calculated the lifetime gain of helping a youth graduate high school and avoid becoming a career criminal or drug user at \$2.5 million to \$3.4 million *for just one person*. An adult record permanently limits youth prospects; it becomes harder to gain acceptance to a good school, get a job or serve in the military. Juvenile records are sealed and provide more opportunity. It’s only fair to give a young person who has paid his debt to society a fresh start. It is in our best interest that youth go on to contribute to the economy, rather than becoming a drain through serial incarceration or dependence on public assistance.<sup>84</sup>

And as noted in a John Locke Foundation report supporting raising the juvenile age, “North Carolina is not merely relying on the projections, but can look to the proven experience of other states.”<sup>85</sup> That report continues: “Some 48 other states from Massachusetts to Mississippi have successfully raised the age and implemented this policy change effectively and without significant complications. Many states, including Connecticut and Illinois, have found that the transition can be accomplished largely by reallocating funds and resources among the adult and juvenile systems.”<sup>86</sup>

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<sup>81</sup> GOVERNOR’S CRIME COMMISSION JUVENILE AGE STUDY, A STUDY OF THE IMPACT OF EXPANDING THE JURISDICTION OF THE DEPARTMENT OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION 4-6 (2009) [hereinafter 2009 GOVERNOR’S CRIME COMMISSION REPORT].

<sup>82</sup> YOUTH ACCOUNTABILITY TASK FORCE REPORT, *supra* note 3.

<sup>83</sup> LaToya Powell, *U.S. Senators Support “Raise the Age”*, N.C. CRIM. LAW BLOG (July 14, 2014), <http://nccriminallaw.sog.unc.edu/u-s-senators-support-raise-the-age/>.

<sup>84</sup> Gingrich, *supra* note 58.

<sup>85</sup> JOHN LOCKE FOUNDATION REPORT, *supra* note 14, at 7.

<sup>86</sup> *Id.* (providing detail on the experience in Connecticut and Illinois).

The Committee recognizes that its recommendations will require a significant outlay of taxpayer funds, with benefits achieved long-term. However, there are good reasons to believe that costs will be lower than estimated in the analyses noted above. First, the 2011 Vera Institute cost-benefit analysis estimated costs with FY 2007/08 juvenile arrest data. However, as shown in Figure 2 below, juvenile arrest rates have decreased dramatically from 2008.<sup>87</sup>

**Fig. 2.** Falling arrest rates for juveniles under age 18.

	Violent Crime	Property Crime
2008	2,597	13,307
2014	1,537	7,919

Source: North Carolina State Bureau of Investigation, *Crime in North Carolina – 2014*, 7 (Nov. 2015).

These declining arrest numbers for all persons under 18 years old suggest that system costs may be lower than those estimated based on FY 2007/08 data.<sup>88</sup>

Additionally, no prior cost analysis on the juvenile age issue has accounted for cost reductions associated with statewide implementation of pilot programs that reduce admissions into the juvenile system, as recommended by the Committee.<sup>89</sup> For these reasons North Carolina may experience actual costs that are less than those that have been predicted. This in fact would be consistent with the experiences of other states that have raised the juvenile age.<sup>90</sup>

Finally, prior examination of fiscal impact may not have sufficiently taken into account current standards linked to the federal Prison Rape Elimination Act (PREA) that “are likely to raise costs in the adult justice system as county jails and state prisons spend more in areas such as staffing, programming, and facilities.”<sup>91</sup> Thus, “[e]ven the apparent short-term cost advantages of the adult justice system will diminish.”<sup>92</sup> With respect to staffing costs, male 16- and 17-year-old criminal defendants are housed at Foothills Correctional Center; females at North Carolina Correctional Institution for Women.<sup>93</sup> The Division of Juvenile Justice reports that Foothills currently houses 65 juveniles; the Institution for Women houses three. In order to comply with the sight and sound segregation requirements of PREA, every time juveniles are moved within those adult facilities, the facilities must be in lock down, with obvious staffing costs.

<sup>87</sup> North Carolina State Bureau of Investigation, *Crime in North Carolina - 2014*, 7 (Nov. 2015) [hereinafter *NC SBI Crime Report*], [http://crimereporting.ncsbi.gov/public/2014/ASR/2014 Annual Summary.pdf](http://crimereporting.ncsbi.gov/public/2014/ASR/2014%20Annual%20Summary.pdf).

<sup>88</sup> A 2013 fiscal note prepared in connection with HB 725 used data from FY 2012/13. Juvenile arrest rates likewise have declined since 2012: In 2012, 1,556 juveniles under 18 were arrested for violent crimes; that number dropped to 1,537 in 2014. *NC SBI Crime Report*, *supra* note 87. In 2012, 9,539 juveniles under 18 were arrested for property crimes; that number dropped to 7,919 in 2014. *Id.*

<sup>89</sup> *See infra* pp. 18-19.

<sup>90</sup> *See infra* pp. 14-15 (noting that in Connecticut although juvenile caseloads were expected to grow by 40% they grew only 22% and that Connecticut spent nearly \$12 million less in 2010 and 2011 than had been budgeted).

<sup>91</sup> Press Release, John Locke Foundation, Long-Term Cost Savings Likely from Raising N.C. Juvenile Justice Age (July 17, 2013) [hereinafter John Locke Press Release] (quoting Marc Levin, co-author of JOHN LOCKE FOUNDATION REPORT), [http://www.johnlocke.org/press\\_releases/show/713](http://www.johnlocke.org/press_releases/show/713).

<sup>92</sup> *Id.*

<sup>93</sup> *See supra* note 16.

### **Division of Juvenile Justice Already Has Produced Cost Savings to Pay for Raise the Age**

Although raising the age will yield long-term economic benefit to North Carolina and its citizens, it will require a significant outlay of taxpayer funds. In its 2011 report, the Youth Accountability Planning Task Force estimated that the annual taxpayer cost of the then-considered proposal to be \$49.2 million.<sup>94</sup> Although there is reason to believe that actual costs may be lower than estimated in that analysis,<sup>95</sup> even if cost reductions are not realized, the Division of Juvenile Justice already has produced cost savings of over \$44 million that can be used to pay for raise the age.

Between fiscal year 2008-2009 and fiscal year 2015-2016, the Division of Juvenile Justice's budget was reduced from \$168,523,752 to \$123,782,978.<sup>96</sup> This cost savings of \$44,740,774 can be attributed to several Division changes:

- 1) *Reduction in Juvenile Pretrial Detentions through the Use of a Detention Assessment Tool.* The Division's implementation of a detention assessment tool has reduced the number of juveniles housed in detention, instead placing low risk juveniles in less expensive diversion programming and secure custody alternatives that assess juveniles' needs and provide targeted referrals and resources.<sup>97</sup> Specifically, detention center admissions fell from 6,246 in 2010 to 3,229 in 2015. By way of a benchmark, the annual cost per child for diversion programming is \$857; the annual cost per child of a detention center bed is \$57,593.<sup>98</sup>
- 2) *Reduction in Commitments to Youth Development Centers.* As a result of the juvenile reform act and better utilization of less expensive community-based options for lower risk juveniles, the Division has significantly reduced the number of juveniles committed to youth development centers.<sup>99</sup> Because it costs \$125,000/year to confine a juvenile in a youth development center, this reduction in commitments has yielded significant savings to the state.<sup>100</sup>
- 3) *Facility Closures:* Due to the reduction in pretrial detentions and commitments to youth development centers noted above, the Division has been able to close a number of detention center and youth development center facilities,<sup>101</sup> repurposing portions of these facilities to

<sup>94</sup> See YOUTH ACCOUNTABILITY TASK FORCE REPORT, *supra* note 3.

<sup>95</sup> See *supra* p. 12 (noting that costs may be lower than estimated because of falling arrest rates for juveniles and potential cost reductions associated with statewide implementation of school justice partnerships designed to reduce referrals to the juvenile justice system, as recommended in this report).

<sup>96</sup> Juvenile Justice Cost Avoidance Since 2008 (Division of Juvenile Justice, Aug. 15, 2016) (on file with Committee Reporter).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* Because North Carolina's counties pay half of the cost of a juvenile's stay in a detention center, the decline in juvenile pretrial detentions yielded savings for the counties as well as the state. *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> The affected facilities include:

- Perquimans detention center; closed November 15, 2012; approximately \$1 million savings
- Buncombe detention center; closed July 1, 2013; approximately \$1 million savings
- Richmond detention center; closed July 1, 2013; approximately \$1.5 million savings
- Samarkand youth development center; closed July 1, 2011; approximately \$3.1 million savings
- Swannanoa Valley youth development center; closed March 1, 2011; approximately \$4.5 million savings
- Lenoir youth development center, closed October 1, 2013 (scheduled to reopen in 2017 after closing less secure Dobbs youth development center); approximately \$3 million savings

*Id.*

provide assessment services and crisis intervention. These closures reduced annual operational costs by \$14.1 million.<sup>102</sup>

- 4) *Decreased Delinquency Rate.* Consistent with national trends, North Carolina has experienced a reduction in its juvenile delinquency rate.<sup>103</sup> Specifically, the rate of delinquent complaints per 1,000 youth age 6-15 went from 27.55 in 2010 to 20.78 in 2015. This reduced delinquency rate has reduced cost to the Division.<sup>104</sup>

The Committee recommends reinvesting the \$44 million in cost savings *already achieved* by the Division of Juvenile Justice to support raise the age.

### **Raising the Age Has Been Successfully Implemented in Other States**

Other states have enacted raise the age legislation, over vigorous objections that doing so would negatively affect public safety, create staggering caseloads and overcrowded detention facilities, and result in unmanageable fiscal costs.<sup>105</sup> As it turns out, none of the predicted negative consequences have come to pass. For example, in 2009 Illinois moved 17-year-olds charged with misdemeanors from the adult to the juvenile system.<sup>106</sup> Among other things, Illinois reported:

- The juvenile system did not “crash.”
- Public safety did not suffer.
- County juvenile detention centers and state juvenile incarceration facilities were not overrun. In fact, three facilities were closed and the state reported excess capacity statewide.<sup>107</sup>

The Illinois experience was so positive that in July 2013, that state expanded its raise the age legislation to include all 17-year-olds in the juvenile justice system, including those charged with felonies.<sup>108</sup>

Connecticut’s experience was similarly positive. In 2007, Connecticut enacted legislation to raise the age of juvenile jurisdiction from 16 to 18, effective 2010 for 16-year-olds and 2012 for 17-year olds.<sup>109</sup> After the change, juvenile caseloads grew at a lower-than-expected rate and the state spent nearly \$12 million less than budgeted in the two years following the change.<sup>110</sup> A report on Connecticut’s experience gives this bottom line for that state’s experience: “Cost savings and

<sup>102</sup> See *supra* note 101 (itemizing savings).

<sup>103</sup> Juvenile Justice Cost Avoidance Since 2008 (Division of Juvenile Justice, Aug. 15, 2016) (on file with Committee Reporter).

<sup>104</sup> *Id.*

<sup>105</sup> ILLINOIS JUVENILE JUSTICE COMMISSION, RAISING THE AGE OF JUVENILE COURT JURISDICTION: THE FUTURE OF 17-YEAR-OLDS IN ILLINOIS’ JUSTICE SYSTEM 6 (2013) [hereinafter ILLINOIS REPORT] (noting these objections), <http://ijjc.illinois.gov/sites/ijjc.illinois.gov/files/assets/IJJC - Raising the Age Report.pdf>.

<sup>106</sup> *Id.* (noting that initial legislation was passed over opponents’ assertions that the law would lead to “unmanageable fiscal costs”). For more background on the raising the age in Illinois, see Illinois Juvenile Justice Commission, *Raising the Age of Juvenile Court Jurisdiction: The Future of 17-Year-Olds in Illinois’ Justice System*, IJJC, <http://ijjc.illinois.gov/rta> (last visited Mar. 23, 2016).

<sup>107</sup> ILLINOIS REPORT, *supra* note 105, at 6; see also John Locke Press Release, *supra* note 91 (noting that “[a]fter Illinois raised the juvenile jurisdiction age in 2010, both juvenile crime and overall crime dropped so much that the state was able to close three juvenile lockups because they were no longer needed”).

<sup>108</sup> Illinois Public Act 098-0061.

<sup>109</sup> See CONNECTICUT REPORT, *supra* note 80, at 15-16.

<sup>110</sup> *Id.* at 27 (reporting that juvenile caseloads grew at a rate of 22% versus 40% as projected).

improved public safety.”<sup>111</sup> As has been noted, 48 other states have increased the juvenile age “without significant complications.”<sup>112</sup>

While raise the age efforts have proved to be successful, lower the age campaigns have proved unworkable. In 2007, Rhode Island lowered its juvenile age, pulling 17-year-olds out of the juvenile system and requiring that they be prosecuted as adults.<sup>113</sup> Proponents asserted that the change would save the state \$3.6 million because 17-year-olds would be housed in adult prisons rather than training schools. But the experiment was a failure. As it turned out, youths sentenced to adult prison had to be, for safety reasons, housed in super max custody facilities at the cost of more than \$100,000 per year.<sup>114</sup> Just months later Rhode Island abandoned course and rescinded the law.<sup>115</sup>

### **Raising the Age Strengthens Families**

Suppose that 16-year-old high school junior Bobby is charged with assault, after a fight at school over a girl. Because North Carolina treats Bobby as an adult, his case can proceed to completion with no parental involvement or input. This led Newt Gingrich to assert, when arguing for raise the age legislation in New York:

[L]aws that undermine the family harm society. When a 16- or 17-year-old is arrested [he or she] . . . can be interviewed alone and can even agree to plea bargains without parental consent. What parent would not want the chance to intervene, to set better boundaries or simply be a parent? The current law denies them that right.<sup>116</sup>

While the criminal justice system cuts parents out of the process, the juvenile system requires their participation<sup>117</sup> and thus serves to strengthen parents’ influence on their teens.

### **Raising the Age is Supported by Science**

Although North Carolina treats its youthful offenders as adults, widely accepted science reveals that adolescent brains are not fully developed.<sup>118</sup> Among other things, research teaches that:

- Interactions between neurobiological systems in the adolescent brain cause teens to engage in greater risk-taking behavior.<sup>119</sup>
- Increases in reward- and sensation-seeking behavior precede the maturation of brain systems that govern self-regulation and impulse control.<sup>120</sup>

<sup>111</sup> *Id.* at 3. More information on Connecticut’s experience is available at Raise the Age CT (a project of the Connecticut Juvenile Justice Alliance). See Connecticut Juvenile Justice Alliance, *Raise the Age CT*, <http://raisetheagect.org/index.html> (last visited Mar 23, 2016).

<sup>112</sup> John Locke Press Release, *supra* note 91.

<sup>113</sup> 2009 GOVERNOR’S CRIME COMMISSION REPORT, *supra* note 81, at 13.

<sup>114</sup> *Id.*; see also Katie Zezima, *Law on Young Offenders Causes Rhode Island Furor*, N.Y. TIMES, Oct. 30, 2007, <http://www.nytimes.com/2007/10/30/us/30juvenile.html? r=0>.

<sup>115</sup> 2009 GOVERNOR’S CRIME COMMISSION REPORT, *supra* note 81, at 13.

<sup>116</sup> Gingrich, *supra* note 58.

<sup>117</sup> See *supra* p. 6 (noting that parents must participate in proceedings in juvenile court).

<sup>118</sup> Comments of Dr. Cindy Cottle, Committee Meeting December 11, 2015; Comments of Deputy Commissioner Lassiter, Committee Meeting Dec. 11, 2015; Laurence Steinberg, *Adolescent Development and Juvenile Justice*, 5 ANNU. REV. CLIN. PSYCHOL. 459, 465 (2009) (research shows continued brain maturation through the end of adolescence).

<sup>119</sup> Steinberg, *supra* note 118, at 466; Comments of Dr. Cindy Cottle, Committee Meeting Dec. 11, 2015.

<sup>120</sup> Steinberg, *supra* note 118, at 466.

- Despite the fact that many adolescents may appear as intelligent as adults, their ability to regulate their behavior is more limited.<sup>121</sup>
- Teens are more responsive to peer influence than adults.<sup>122</sup>
- Relative to adults, adolescents have a lesser capacity to weigh long-term consequences;<sup>123</sup> as they mature into adults, they become more future oriented, with increases in their consideration of future consequences, concern about the future, and ability to plan ahead.<sup>124</sup>
- As compared to adults, adolescents are more sensitive to rewards, especially immediate rewards.<sup>125</sup>
- Adolescents are less able than adults to control impulsive behaviors and choices.<sup>126</sup>
- Adolescents are less responsive to the threat of criminal sanctions.<sup>127</sup>

This research and related data has significant implications for justice system policy. First, it suggests that adolescents are less culpable than adults.<sup>128</sup> If the relative immaturity of a 16-year-old's brain prevents him from controlling his impulses, he is less culpable than an adult who possesses that capability but acts nevertheless.<sup>129</sup> Second, the vast majority of adolescents who commit antisocial acts desist from such activity as they mature into adulthood.<sup>130</sup> Rather than creating a lifetime disability for youthful offenders (e.g., public record of arrest and conviction; ineligibility for employment and college financial aid, etc.), sanctions for delinquent youth should take into account the fact that most juvenile offenders “mature out of crime,”<sup>131</sup> growing up to be law-abiding citizens. Third, response systems that “attend to the lessons of developmental psychology” are more effective in reducing recidivism among adolescents than the punitive criminal justice model.<sup>132</sup> Research shows that active interventions focused on strengthening family support systems and improving abilities in the areas of self-control, academic performance, and job skills are more effective than strictly punitive measures in reducing crime.<sup>133</sup> While these type of interventions can be and are implemented in the juvenile system, they are virtually unavailable in the adult criminal justice system. Finally, because adolescents are particularly susceptible to peer influence, outcomes are likely to be better when individuals in a formative stage of development are placed in an environment with an authoritative parent or guardian and prosocial peers rather than with adult criminals.<sup>134</sup>

### **Raising the Age is Consistent with Supreme Court Decisions Recognizing Juveniles' Lesser Culpability & Greater Capacity for Rehabilitation**

Raising the juvenile age is consistent with recent decisions by the United States Supreme Court recognizing that juveniles' unique characteristics require that they be treated differently than

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<sup>121</sup> *Id.* at 467.

<sup>122</sup> *Id.* at 468; Comments of Dr. Cindy Cottle, Committee Meeting Dec. 11, 2015; Comments of Deputy Commissioner Lassiter, Committee Meeting Dec. 11, 2015.

<sup>123</sup> Comments of Dr. Cindy Cottle, Committee Meeting Dec. 11, 2015.

<sup>124</sup> Steinberg, *supra* note 118, at 469; Comments of Deputy Commissioner Lassiter, Committee Meeting Dec. 11, 2015.

<sup>125</sup> Steinberg, *supra* note 118, at 469; Comments of Dr. Cindy Cottle, Committee Meeting Dec. 11, 2015.

<sup>126</sup> Steinberg, *supra* note 118, at 470.

<sup>127</sup> *Id.* at 480; Comments of Dr. Cindy Cottle, Committee Meeting Dec. 11, 2015.

<sup>128</sup> Steinberg, *supra* note 118, at 471.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 478.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 478-79.

<sup>133</sup> *Id.* at 479.

<sup>134</sup> *Id.* at 480.

adults. First, in *Roper v. Simmons*,<sup>135</sup> the Court held that the Eighth Amendment bars imposing capital punishment on juveniles. Next, in *Graham v. Florida*,<sup>136</sup> it held that same amendment prohibits a sentence of life without the possibility of parole for juveniles who commit non-homicide offenses. Then, in *Miller v. Alabama*,<sup>137</sup> the Court held that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment. Citing the type of science and social science research discussed in this report,<sup>138</sup> the Court recognized that juvenile offenders are less culpable than adults, have a greater capacity than adults for rehabilitation, and are less responsive than adults to the threat of criminal sanctions.<sup>139</sup> The Court found persuasive research “showing that only a relatively small proportion of adolescents who engage in illegal activity develop entrenched patterns of problem behavior,”<sup>140</sup> stating:

[Y]outh is more than a chronological fact. It is a time of immaturity, irresponsibility, impetuosity[,] and recklessness. It is a moment and condition of life when a person may be most susceptible to influence and to psychological damage. And its signature qualities are all transient.<sup>141</sup>

And just this year, in *Montgomery v. Louisiana*,<sup>142</sup> the Court took the extraordinary step of holding that the *Miller* rule applied retroactively to cases that became final before it was decided. The *Montgomery* Court recognized that the “vast majority of juvenile offenders” are not permanently incorrigible, and that only the “rarest” of juveniles can be so categorized.<sup>143</sup> The Court again noted that most juvenile crime “reflect[s] the transient immaturity of youth.”<sup>144</sup>

The Court’s reasoning in these cases supports raising the age of juvenile court jurisdiction.

### **Raising the Age Removes a Competitive Disadvantage NC Places on its Youth**

Suppose two candidates apply for a job. Both have the same credentials. Both got into fights at school when they were 16 years old, triggering involvement with the judicial system. But because one of the candidates, Sam, lives in Tennessee, his juvenile delinquency adjudication is confidential and cannot be discovered by his potential employer. The other candidate, Tom, is from North Carolina. Because of that, his interaction with the justice system resulted in a criminal conviction for affray. Tom’s entire criminal record is discovered by his potential employer. Who is more likely to get the job?

As this scenario illustrates, saddling North Carolina’s youth with arrest and conviction records puts them at a competitive disadvantage as compared to youth from other states.<sup>145</sup> Although some have suggested that expunction can be used to remove teens’ criminal records, there are significant barriers to expunction, such as legal fees. One district court judge reported to the Committee that

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<sup>135</sup> 543 U.S. 551 (2005).

<sup>136</sup> 560 U.S. 48 (2010).

<sup>137</sup> 567 U.S. \_\_\_, 132 S. Ct. 2455 (2012).

<sup>138</sup> *See supra* pp. 15-16.

<sup>139</sup> *Miller*, 567 U.S. at \_\_\_, 132 S. Ct. at 2464-65.

<sup>140</sup> *Id.* at \_\_\_, 132 S. Ct. at 2464 (internal quotation omitted).

<sup>141</sup> *Id.* at \_\_\_, 132 S. Ct. at 2467 (internal quotation and citation omitted).

<sup>142</sup> 577 U.S. \_\_\_, 136 S. Ct. 718 (2016).

<sup>143</sup> *Id.* at \_\_\_, 136 S. Ct. at 734.

<sup>144</sup> *Id.*

<sup>145</sup> Comments of Judge Brown, Committee Meeting Dec. 11, 2015; Comments of Police Chief Palombo, Committee Meeting Dec. 11, 2015.

expunctions for youthful offenders represent only a “tiny fraction” of the total convictions.<sup>146</sup> Additionally, even if expunction is available to remove the official criminal record, it does nothing to delete information about a youthful offender’s arrest or conviction as reported on the internet by news outlets, private companies, and social media.

### **Reducing School-Based Referrals Can Mitigate the Costs of Raising the Age**

In North Carolina, school-based complaints account for almost half of the referrals to the juvenile justice system.<sup>147</sup> This phenomenon is asserted to be part of the “school to prison pipeline,” through which children are referred to the court system for classroom misbehavior that a generation ago would have been handled in the schools. Concerns have been raised nationally and in North Carolina that excessive punishment of public school students for routine misbehavior is counterproductive and out of sync with what science and social science teach about the most effective corrective action.<sup>148</sup> Some have suggested that such referrals unnecessarily burden the juvenile justice system with frivolous complaints.<sup>149</sup>

Responding to these concerns, individuals and groups throughout the nation have developed models to stem the flow of school-based referrals to the court system, instead addressing school misconduct immediately and effectively when and where it happens. In 2004, Juvenile Court Judge Steven Teske of Georgia developed one such model, in which school officials, local law enforcement, and others signed on to a cooperative agreement. The agreement provides, among other things, that “misdemeanor delinquent acts,” like disrupting school and disorderly conduct do not result in the filing of a court complaint unless the student commits a third or subsequent similar offense during the school year, and the principal conducts a review of the student’s behavior plan. Youth first receive warnings and after a second offense, they are referred to mediation or school conflict training programs. Elementary students cannot be referred to law enforcement for “misdemeanor delinquent acts” at all. Teske’s program reports an 83% reduction in school referrals to the justice system.<sup>150</sup> It also reports another significant outcome: a 24% increase in graduation rates.<sup>151</sup> Two other states that have adopted similar programs—commonly referred to as school-justice partnerships—have experienced similar results.<sup>152</sup> In fact, Connecticut has enacted a state law requiring all school systems that use law enforcement officers on campus to create school-justice partnerships.<sup>153</sup>

North Carolina already has one such program in place. Modeled on Teske’s program, Chief District Court Judge J.H. Corpening II, has implemented a school-justice partnership program in

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<sup>146</sup> Comments of Judge Brown, Committee Meeting Dec. 11, 2015.

<sup>147</sup> Presentation by Deputy Commissioner William Lassiter, Committee Meeting Dec. 11, 2015, <http://nccalj.org/wp-content/uploads/2015/12/JJ-Trends-SPAC-2015.pdf>.

<sup>148</sup> See, e.g., TERI DEAL ET AL., NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, SCHOOL PATHWAYS TO THE JUVENILE JUSTICE SYSTEM PROJECT: A PRACTICE GUIDE 1 (2014), [http://www.ncjfcj.org/sites/default/files/NCJFCJ\\_SchoolPathwaysGuide\\_Final2.pdf](http://www.ncjfcj.org/sites/default/files/NCJFCJ_SchoolPathwaysGuide_Final2.pdf).

<sup>149</sup> *Id.*

<sup>150</sup> Steven Teske, *States Should Mandate School-Justice Partnership to End Violence Against Our Children*, JUVENILE JUSTICE INFORMATION EXCHANGE (Dec. 8, 2015), <http://jjie.org/states-should-mandate-school-justice-partnership-to-end-violence-against-our-children/163156/>.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* (early results from Texas showed a 27% drop in referrals; two sites in Connecticut experienced reductions of 59% and 87% respectively).

<sup>153</sup> *Id.* (reporting that “Connecticut passed Public Law 15-168 to require all school systems using law enforcement on campus to create a school-justice partnership that limits the role of police in disciplinary matters and requires a graduated response system in lieu of arrests”).

Wilmington, North Carolina. Like Teske’s program, the Wilmington program requires that official responses to school-based disciplinary issues conform to what science and social science teaches is effective for juveniles.<sup>154</sup> The program was crafted with participation from local law enforcement, prosecutors, court counselors, the chief public defender, school officials, and community members. The group developed an approach that deals with school discipline in a consistent and positive way through a graduated discipline model.<sup>155</sup> The goal is for the schools to take a greater role in addressing misbehavior when and where it happens, rather than referring minor matters to the court system, with its delayed response. Officials in North Carolina’s Juvenile Justice system view the program as a “huge step forward” with respect to reducing school-based referrals.<sup>156</sup> Because Wilmington’s program is so new, data on its effectiveness is not available. However, based on data from other jurisdictions, statewide implementation of school-justice partnerships based on the Georgia model promises to reduce referrals to the juvenile system and thus mitigate costs associated with raising the juvenile age.

### **North Carolina Department of Juvenile Justice Stands Ready to Implement Raise the Age Legislation**

Increasing the juvenile age will increase the number of juveniles in the juvenile justice system. Notwithstanding this, the North Carolina Division of Adult Correction and Juvenile Justice supports this recommendation and stands ready to implement raise the age legislation.<sup>157</sup> Speaking to the Committee, Commissioner Guice indicated that he was very supportive of raising the age and emphasized that North Carolina already has done the studies and developed the data on the issue. Additionally, he noted that other states have led the way and their experience with raise the age legislation suggests that “there is no reason why we can’t address this in North Carolina.” In fact, he urged the Committee, not to “back away from doing what is right” on this issue.

### **Every North Carolina Study Has Made the Same Recommendation: Raise the Age**

In recent history, the General Assembly has commissioned two studies of raise the age legislation. Both came to the same conclusion: North Carolina should join the majority of states in the nation and raise the juvenile age. First, in 2007, pursuant to legislation passed by the General Assembly, the North Carolina Sentencing and Policy Advisory Commission submitted its Report on Study of Youthful Offenders recommending, in part, that North Carolina increase the age of juvenile jurisdiction to 18.<sup>158</sup> Second, in 2011, pursuant to legislation passed by the General Assembly, the Youth Accountability Task Force submitted its final report to the General Assembly recommending, among other things, moving youthful offenders to the juvenile justice system.<sup>159</sup> Additionally, in December 2012, the Legislative Research Commission submitted its report to the 2013 General Assembly, supporting a raise the age proposal.<sup>160</sup>

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<sup>154</sup> Comments of Judge Corpening, Committee Meeting Dec. 11, 2015 (describing Wilmington’s program).

<sup>155</sup> *Id.*

<sup>156</sup> Comments of Deputy Commissioner William Lassiter, Committee Meeting Dec. 11, 2015.

<sup>157</sup> Comments of Commissioner W. David Guice, Division of Adult Correction and Juvenile Justice, Committee Meeting Dec. 11, 2015; Comments of Deputy Commissioner William Lassiter, Committee Meeting Dec. 11, 2015.

<sup>158</sup> 2007 SENTENCING COMMISSION REPORT, *supra* note 3.

<sup>159</sup> YOUTH ACCOUNTABILITY TASK FORCE REPORT, *supra* note 3.

<sup>160</sup> LEGISLATIVE RESEARCH COMMISSION, AGE OF JUVENILE OFFENDERS COMMITTEE, REPORT TO THE 2013 GENERAL ASSEMBLY OF NORTH CAROLINA 12 (Dec., 2012) [hereinafter AGE OF JUVENILE OFFENDERS COMMITTEE REPORT] (supporting S 434 after consideration of identified issues), [http://www.ncleg.net/documentsites/committees/lrc/2013 Committee Reports to LRC/Age of Juvenile Offenders LRC Report.pdf](http://www.ncleg.net/documentsites/committees/lrc/2013%20Committee%20Reports%20to%20LRC/Age%20of%20Juvenile%20Offenders%20LRC%20Report.pdf).

### **Law Enforcement, Business, Bi-Partisan & Public Support for Raise the Age**

The Committee's proposal, as contained in this report, has received historic law enforcement support. In August 2016, the North Carolina Division of the Police Benevolent Association, the state's largest law enforcement association, issued a press release supporting the Committee's raise the age proposal.<sup>161</sup> In November 2016, Sheriff Graham Atkinson, President of the North Carolina Sheriffs' Association, formally notified the Committee that the Sheriffs' Association supports the Committee's proposal. Sheriff Atkinson's letter, attached as Exhibit A, notes that the Committee's proposal is "tremendously different from previous proposals to raise the juvenile age," in part because it tackles problems in the juvenile justice system identified by sheriffs and other law enforcement professionals. Sheriff Atkinson praised the Committee for its "willingness to thoroughly research the issue, engage all interested parties in frank and open factually based discussions, genuinely receive input from the sheriffs of North Carolina and . . . address the practical real world concerns identified by the sheriffs." In December 2016, the Committee's lengthy, collaborative process yielded still further law enforcement support, with an endorsement of its proposal by the North Carolina Association of Chiefs of Police.

In fact, the Committee's proposal has received historic support from a broad range of groups, including the North Carolina Chamber Legal Institute. In a letter attached as Exhibit B giving "full support" to the Committee's proposal, the Chamber notes:

[The] evidence objectively demonstrates that dealing with young offenders through the juvenile system, as opposed to prosecuting them as adults, is associated with lower rates of recidivism. It is not difficult to foresee how this outcome would, in turn, foster reduced crime rates, improved public safety, and that it would favorably impact workforce issues with resulting tangible economic benefits for North Carolina's economy.

The Committee's proposal has received support from the John Locke Foundation<sup>162</sup> and Conservatives for Criminal Justice Reform.<sup>163</sup> The Locke Foundation's statement, attached as Exhibit C, applauds the Committee's "well-researched and well-reasoned proposal for raising the age of juvenile jurisdiction in North Carolina." The Locke Foundation offers only one "minor quibble," specifically that the Committee's proposal *does not go far enough*; the Locke Foundation supports expansive raise the age reform that include even juveniles charged with violent felonies.

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In fact, efforts to raise North Carolina's juvenile age to 18 date back at least until the 1950s. NC JUVENILE JUSTICE: A HISTORY, *supra* note 1, at 17-18 (in 1955, the Commission on Juvenile Courts and Correctional Institutions recommended that the age limit should be so increased); *id.* at 21-22 (in 1956, the preliminary report of the Governor's Youth Service Commission made the same recommendation); *id.* at 23-24 (a 1956 study by the National Probation and Parole Association noted "the unreasonableness of classifying a sixteen or seventeen year-old youngster as an adult in connection with offenses against society" (quotation omitted)).

<sup>161</sup> Press Release, NC Police Benevolent Association, North Carolina's Largest Law Enforcement Association Supports Raising the Juvenile Age (August 30, 2016), [https://www.sspba.org/gen/articles/North\\_Carolina\\_s\\_Largest\\_Law\\_Enforcement\\_Association\\_supports\\_raising\\_the\\_juvenile\\_age\\_639.jsp](https://www.sspba.org/gen/articles/North_Carolina_s_Largest_Law_Enforcement_Association_supports_raising_the_juvenile_age_639.jsp) (last visited Sept. 19, 2016).

<sup>162</sup> *Statement Regarding the NCCALJ's "Juvenile Reinvestment" Report*, by Jon Guze, Director of Legal Studies, John Locke Foundation (on file with Commission staff).

<sup>163</sup> Email from Tarrah Callahan, Conservatives for Criminal Justice Reform to Will Robinson, NCCALJ Executive Director (Sept. 7, 2016) (on file with Commission staff).

Public support for raise the age in North Carolina is high. In August 2016, the Commission held public hearings to receive comments on its interim reports, including the Committee's raise the age proposal. 423 people attended those hearings, with 131 offering oral comments.<sup>164</sup> An additional 208 people submitted written comments to the Commission, as did various organizations, such as the NC Conference of Superior Court Judges and the NC Magistrates Association.<sup>165</sup> 96% of the comments submitted on this issue supported the Committee's raise the age proposal.<sup>166</sup>

It is noteworthy that bills to raise the juvenile age have been introduced and supported in North Carolina by lawmakers from both sides of the aisle.<sup>167</sup> Raise the age proposals and related efforts to remove non-violent juveniles from the adult criminal justice system have enjoyed bipartisan support around the nation,<sup>168</sup> as well as support from groups such as the American Legislative Exchange Council (ALEC).<sup>169</sup>

### **A Balanced, Evidence-Based Proposal**

As noted in the letter from the North Carolina Sheriffs' Association supporting the Committee's proposal and attached as Exhibit A, this report includes more than a raise the age recommendation; it includes ten other provisions, most of which are designed to address important, legitimate concerns raised by law enforcement and prosecutors, such as the need to provide more information to officers about juveniles with whom they interact and ensuring that prosecutors have access to information about an individual's juvenile record.<sup>170</sup> Although other proposals have been made to raise the age in North Carolina, no other proposal has been as attentive as this one to the needs, interests, and concerns of those who have historically opposed this reform.<sup>171</sup>

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<sup>164</sup> Emily Portner, Summary of Public Comments on Interim Report 1 (2016) (on file with Commission staff).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 2.

<sup>167</sup> *See, e.g.*, HB 399, 2015 Session of the N.C. General Assembly (primary sponsors: Reps. Avila (R), Farmer-Butterfield (D), Jordan (R), and D. Hall (D)), <http://www.ncga.state.nc.us/gascripts/BillLookup/BillLookup.pl?Session=2015&BillID=h399&submitButton=Go>; HB 725, 2013 Session of the N.C. General Assembly (primary sponsors: Reps. Avila (R), Moffitt (R), Mobley (D), and D. Hall (D)), <http://www.ncga.state.nc.us/gascripts/BillLookup/BillLookup.pl?Session=2013&BillID=h725&submitButton=Go>; AGE OF JUVENILE OFFENDERS COMMITTEE REPORT, *supra* note 160, at 12 (supporting S 434 after consideration of identified issues).

<sup>168</sup> *See, e.g.*, Gingrich, *supra* note 58. In 2014, U.S. Senators Rand Paul (R-KY) and Cory Booker (D-NJ) introduced the REDEEM (Record Expungement Designed to Enhance Employment) Act, encouraging states to increase the age of criminal responsibility to 18.

<sup>169</sup> *Resolution in Support of Presumptively Treating 17 Year-olds in the Juvenile Justice System*, American Legislative Exchange Council (Dec. 2015), <https://www.alec.org/model-policy/resolution-to-treat-17-year-olds-as-juveniles/> (last visited Oct. 25, 2016).

<sup>170</sup> *See supra* pp. 2-4. In his letter transmitting the Sheriffs' Association's support for the Committee's raise the age proposal, Sheriff Atkinson, President of the North Carolina Sheriffs' Association, specifically noted the proposal's attention to law enforcement concerns. *See* Exhibit A.

<sup>171</sup> Committee membership included the Past President of the North Carolina Sheriffs' Association, the President of the N.C. Police Benevolent Association and the then-President of the N.C. Conference of District Attorneys. *See infra* pp. 24-25. Another elected District Attorney served on the Subcommittee on Juvenile Age and the Executive Vice President & General Counsel of the North Carolina Sheriffs' Association was actively involved in all meetings and conversations. *Id.* The Committee Chair, Committee Reporter, and the Deputy Commissioner of Juvenile Justice presented the Committee's proposal and received feedback on it at the Sheriffs' Association conference and numerous meetings and conversations occurred with that group's leadership. Outreach was made to the N.C. Police Chiefs' Association, whose leadership attended meetings, discussed the proposal with the Committee Chair and Reporter, heard from the Committee Reporter and

Although the Committee sought to accommodate all concerns, it declined to adopt a position raised by the Conference of District Attorneys: that the District Attorney be given sole authority to decide whether juveniles aged 13-17 and charged with Class A-E felonies would be prosecuted in adult court, without *any* judicial review. The original rationale for this proposal was that under current procedures, prosecutors are unable to successfully transfer juveniles charged with Class A-E felonies to adult court. Under the existing transfer provision, the district court may transfer jurisdiction over a juvenile who is at least 13 years of age and is alleged to have committed a felony to superior court.<sup>172</sup> A motion to transfer may be made by the prosecutor, the juvenile's attorney, or the court.<sup>173</sup> If the juvenile is alleged to have committed a Class A felony at age 13 or older, jurisdiction *must* be transferred to superior court if probable cause is found in juvenile court.<sup>174</sup> The Committee's proposal recommends maintaining the existing procedure and providing that Class A-E felony charges against 16- and 17-year olds will be automatically transferred to superior court after a finding of probable cause or by indictment.<sup>175</sup> The Committee found that the evidence did not support the prosecutors' request for sole discretion to decide whether 13-17 year olds would be prosecuted in adult court. Specifically, the Division of Juvenile Justice reports that for the 12-year period from 2004-2016:

- Transfer was sought for 487 13-, 14-, and 15-year-olds charged with Class A-E felonies. Of those, 66% were transferred to adult court; 34% were retained in juvenile court. Ninety-one of the juveniles transferred were subject to mandatory transfer for Class A felonies. Removing this number from the data set reveals that 232 discretionary transfer motions were granted, a 58% prosecution success rate.
- Focusing on 14-year olds, transfer was sought for 101 juveniles charged with Class A-E felonies. Of those, 57% were transferred to adult court; 43% were retained in juvenile court. Twenty-four of the juveniles transferred were subject to mandatory transfer for Class A felonies. Removing this number from the data set reveals that 34 discretionary transfer motions were granted, a 44% prosecution success rate.
- Focusing on 15-year-olds, transfer was sought for 341 juveniles charged with Class A-E felonies. Of those, 71% were transferred to adult court; 29% were retained in juvenile court. Sixty-one of the juveniles transferred were subject to the existing mandatory transfer for Class A felonies. Removing this number from the data set reveals that 182 discretionary transfer motions were granted, a 65% prosecution success rate.

Thus, long-term statewide data does not support the suggestion that the prosecution is unable to obtain transfer of 13-, 14-, and 15-year-old juveniles charged with A-E felonies to adult court. After this data was presented, it was suggested that the problem was isolated and judge-specific. The evidence, however, does not support that suggestion. Data from the Division of Juvenile Justice's NC-JOIN database reveals that for the 12-year period from 2004-2016, five judges denied all transfers brought to them. None of those judges, however, had more than 8 juveniles presented (the

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Deputy Commissioner at a conference, and submitted feedback to the Committee. The Committee Reporter presented the proposal to the Executive Board of the N.C. Police Benevolent Association and responded to inquiries and feedback thereafter. Finally, the Committee Reporter prepared a seven-page briefing paper for law enforcement officers addressing common issues or concerns raised about raise the age. These efforts at engagement contributed to the balanced nature of this proposal.

<sup>172</sup> G.S. 7B-2200.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> This recommendation was a concession to a position expressed by the prosecutors early in the process. *See supra* note 5.

number of juveniles presented to these five judges were respectively: 8; 7; 7; 6; 6). At the other end of the spectrum four judges granted all transfers brought to them for a much larger population of juveniles (the number of juveniles presented to these four judges (and transferred to adult court) were respectively: 50, 42, 29, 24). All other judges had mixed results on transfers for the 2004-2016 period. Thus, if this data is read to suggest an issue with some judges always denying transfer motions it also must be read to suggest an even more significant issue with some judges always granting them.<sup>176</sup>

In formal comments to the Committee, the Conference of District Attorneys offered this explanation for its request: “District Attorneys have the most intimate knowledge of the facts of each case and working with law enforcement, are able to determine when there is significant public safety risk and when the more appropriate venue for a particular juvenile would be adult court.”<sup>177</sup> It was added that “[t]his is exemplified in the processes of at least 19 other states.”<sup>178</sup> The Committee disagrees with the first point and concludes that justice is best served when a judge—the only neutral party to the proceeding—determines, according to prescribed statutory factors, whether the protection of the public and the juvenile’s needs warrant transfer to adult court, as is done under the current juvenile code.<sup>179</sup> This determination is consistent with a policy decision that the General Assembly already has made: that public safety is best protected by vesting transfer authority with judges. In enacting the existing juvenile code, the General Assembly decided that the code should be interpreted and construed so as to implement several purposes including “protect[ing] the public.”<sup>180</sup> With this purpose in mind, the General Assembly opted to vest transfer authority with judges not prosecutors. Additionally, affording prosecutors—one side in criminal litigation—sole discretion to decide this significant procedural issue conflicts with core concepts of procedural fairness<sup>181</sup> and is unwarranted in light of the evidence presented above. As to the second point raised by the District Attorneys, the National Conference of State Legislatures reports that a national trend in juvenile law includes reforms of transfer, waiver and direct file statutes, “placing decisions about rehabilitation and appropriate treatment in the hands of the juvenile court.”<sup>182</sup>

Although the Committee was open to discuss a variety of alternative procedures that might meet the prosecutors’ concerns, such as a right to appeal a denial of a transfer request, having a superior court judge determine the transfer motion, or a reverse transfer procedure, exploration of these alternatives ceased when it became clear that further discussion would not be productive.

---

<sup>176</sup> The Committee’s prosecutor member also suggested that the data does not fairly represent the prosecution’s experience with transfer because some prosecutors have “given up” trying to transfer cases after experience a high failure rate. This suggestion, however, is inconsistent with the data presented above regarding prosecutor’s historical success rate on transfer motions.

<sup>177</sup> Comments of the Conference of District Attorneys to Will Robinson, Commission Executive Director (Aug. 29, 2016) (relevant portion of these Comments are attached as Exhibit D).

<sup>178</sup> *Id.*

<sup>179</sup> *See generally* G.S. 7B-2203 (judges determines whether transfer will serve “the protection of the public and the needs of the juvenile” and statute delineates factors that the court must consider, including, among other things, the juvenile’s prior record, prior attempts to rehabilitate the juvenile, and the seriousness of the offense).

<sup>180</sup> G.S. 7B-1500 (purposes).

<sup>181</sup> Significantly, one of the core purposes of the juvenile code is to “assure fairness and equity.” *Id.*

<sup>182</sup> SARAH ALICE BROWN, NATIONAL CONFERENCE OF STATE LEGISLATURES, TRENDS IN JUVENILE JUSTICE STATE LEGISLATION 2011-2015, at 4 (2015) (detailing legislative action in various states), [http://www.ncsl.org/documents/cj/Juvenile\\_Justice\\_Trends\\_1.pdf](http://www.ncsl.org/documents/cj/Juvenile_Justice_Trends_1.pdf).

## **Committee & Subcommittee Members & Other Key Participants**

To facilitate its work, the Committee formed a Juvenile Age Subcommittee to prepare draft recommendations for Committee review. Members of the Subcommittee included:

Augustus A. Adams, Committee member and member, N.C. Crime Victims Compensation Committee  
Asa Buck III, Committee member, Sheriff of Carteret County & Past President, North Carolina Sheriffs' Association  
Michelle Hall, Executive Director, N.C. Sentencing and Policy & Advisory Commission  
Paul A. Holcombe, Committee member and N.C. District Court Judge  
William Lassiter, Deputy Commissioner for Juvenile Justice, Division of Adult Correction and Juvenile Justice, NC Department of Public Safety  
LaToya Powell, Assistant Professor, UNC School of Government  
Diann Seigle, Committee member and Executive Director, Carolina Dispute Settlement Services  
James Woodall, District Attorney  
Eric J. Zogry, Juvenile Defender, N.C. Office of the Juvenile Defender

Committee members included:

Augustus A. Adams, N.C. Crime Victims Compensation Committee  
Asa Buck III, Sheriff of Carteret County & Past President, North Carolina Sheriffs' Association  
Randy Byrd, President, N.C. Police Benevolent Association  
James E. Coleman Jr., Professor, Duke University School of Law  
Kearns Davis, President, N.C. Bar Association  
Paul A. Holcombe, N.C. District Court Judge  
Darrin D. Jordan, lawyer, & Commissioner, N.C. Indigent Defense Commission  
Robert C. Kemp III, Public Defender & Immediate Past President, N.C. Defenders' Association  
Sharon S. McLaurin, Magistrate & Past President, N.C. Magistrates' Association.  
R. Andrew Murray Jr., District Attorney & Immediate Past President, N.C. Conference of District Attorneys  
Diann Seigle, Executive Director, Carolina Dispute Settlement Services  
Anna Mills Wagoner, Senior Resident Superior Court Judge  
William A. Webb, Commission Co-Chair, Committee Chair & Ret. U.S. Magistrate Judge

Other key participants in the Committee's discussions included:

Edmond W. Caldwell, Jr., Executive Vice President and General Counsel, North Carolina Sheriffs' Association  
Peg Dorer, Director, N.C. Conference of District Attorneys

This report was prepared by Committee Reporter, Jessica Smith, W.R. Kenan Distinguished Professor, School of Government, UNC-Chapel Hill.

### Exhibit A: Letter of Support from the North Carolina Sheriffs' Association



**NORTH CAROLINA SHERIFFS' ASSOCIATION**  
LAW ENFORCEMENT OFFICERS AND STATE OFFICIALS  
OF NORTH CAROLINA



President SHERIFF GRAHAM H. ATKINSON Surry County	First Vice President SHERIFF CARSON SMITH Pender County	Second Vice President SHERIFF JAMES E. CLEMMONS, JR. Richmond County	Third Vice President SHERIFF JOHN W. INGRAM V Brunswick County
Secretary - Treasurer SHERIFF DAVID A. MAHONEY Transylvania County	Chairman - Executive Committee SHERIFF HUBERT A. PETERKIN Hoke County	Executive Vice President and General Counsel EDMOND W. CALDWELL, JR.	

EXECUTIVE COMMITTEE  
MEMBERS  
(Past Presidents)

- SHERIFF EARL BUTLER  
Cumberland County
- SHERIFF BRAD RILEY  
Cabarrus County
- SHERIFF STEVE BIZZELL  
Johnston County
- SHERIFF JERRY G. MONETTE  
Craven County
- SHERIFF JAMES L. KNIGHT  
Edgecombe County
- SHERIFF SAM PAGE  
Rockingham County
- SHERIFF TONY E. PERRY  
Camden County
- SHERIFF KEVIN FRYE  
Avery County
- SHERIFF ASA B. BUCK, III  
Gateset County

November 28, 2016

Judge William A. Webb  
 NC Commission on the Administration of Law & Justice  
 Post Office Box 2448  
 Raleigh, NC 27602

RE: Juvenile Reinvestment Report – October, 2016

Dear Judge Webb,

At the early November meeting of the North Carolina Sheriffs' Association, the Association adopted a position in support of the proposal from the NCCALJ Committee on Criminal Investigation and Adjudication to raise the juvenile age in North Carolina from 16 to 18 for all crimes except Class A through E felonies and traffic offenses. The Association's support is contingent on items (1) through (6) contained in the Committee's Juvenile Reinvestment report. As noted in the Committee's report, it bears special emphasis that "full funding must be provided to implement these recommendations and that an unfunded or partially unfunded mandate to raise the age will be detrimental to the court system and community safety."

The sheriffs of North Carolina commend you as Committee Chair and the other members of your committee, and especially the members of the Juvenile Age Subcommittee, for the willingness to thoroughly research the issue, engage all interested parties in frank and open factually based discussions, genuinely receive input from the sheriffs of North Carolina and your willingness to address the practical real world concerns identified by the sheriffs.

Specific accolades are owed to William (Billy) Lassiter, Deputy Commissioner for Juvenile Justice and Jessica Smith, W. R. Kenan, Jr., Distinguished Professor, School of Government, UNC – Chapel Hill, who served as the Committee Reporter. Both of these individuals were exceptionally committed to learning about and helping to address the real world practical concerns with the current juvenile justice system and the impact on that system of raising the juvenile age.

The proposal from your Committee is tremendously different from previous proposals to raise the juvenile age. Previous legislation that has been vigorously opposed by the Association merely deleted the number 16 and

Post Office Box 20049 • Raleigh, N.C. 27619-0049 • Telephone: (919) SHERIFF (743-7433)  
 Fax: (919) 783-5272 • E-mail: ncsa@ncsheriffs.net • www.ncsheriffs.org  
 The North Carolina Sheriffs' Association is a Non-Profit, tax exempt organization recognized by the I.R.S.

Judge William A. Webb  
November 28, 2018  
Page 2 of 2

replaced it with the number 18, did not have a plan for implementation, did not have adequate funding and did not include solutions to the existing problems with the juvenile justice system identified by sheriffs and other law enforcement professionals. The report of your Committee is significantly different in that it does address the current deficiencies in the juvenile justice system that have been identified by the sheriffs and other law enforcement professionals and it makes it clear that the report is contingent on "full funding to implement the recommended changes."

The North Carolina Sheriffs' Association looks forward to working with you, Chief Justice Mark Martin and others to support this legislative proposal, and the contingencies detailed in the report, during the upcoming session of the North Carolina General Assembly.

Respectfully,



Sheriff Graham Atkinson, President  
North Carolina Sheriffs' Association

cc: Chief Justice Mark Martin  
Supreme Court of North Carolina  
  
North Carolina Sheriffs

## Exhibit B: Letter of Support from the NC Chamber Legal Institute



December 14, 2016

Chief Justice Mark Martin  
North Carolina Supreme Court  
2 E Morgan St.  
Raleigh, NC 27601

Dear Chief Justice Martin:

As you know, it is the primary mission of the North Carolina Chamber Legal Institute to examine potential solutions for improving North Carolina's business legal climate and to support those policy solutions in alignment with the overall priorities identified by the statewide business community in *North Carolina Vision 2030*, the North Carolina Chamber Foundation's long-term strategy for securing our state's competitive future. To that end, I am pleased to report that the Chamber Legal Institute fully supports and urges legislative action to enact the reforms recommended in "Juvenile Reinvestment," released recently by the Criminal Investigation and Adjudication Committee, chaired by Judge William Webb, of Your Honor's North Carolina Commission on the Administration of Law and Justice.

The essential recommendation contained in this report, if acted upon by the State of North Carolina, would "raise the age of juvenile court jurisdiction to include youthful offenders aged 16 and 17." This is a worthy goal for a number of reasons which are persuasively set forth in the report. We were fully persuaded by the substantial body of factual evidence presented in your committee's report. Most importantly, this evidence objectively demonstrates that dealing with young offenders through the juvenile system, as opposed to prosecuting them as adults, is associated with lower rates of recidivism. It is not difficult to foresee how this outcome would, in turn, foster reduced crime rates, improved public safety, and that it would favorably impact workforce issues with resulting tangible economic benefits for North Carolina's economy.

The first and second of the four "Pillars of a Secure Future" outlined in *North Carolina Vision 2030* emphasize respectively the need to continually strengthen our state's *education and talent supply* systems, and the necessity to consistently strive for the most *competitive business climate* possible for attracting new economic opportunities to the state. The "Juvenile Reinvestment" report provides compelling evidence that raising the age of juvenile jurisdiction in North Carolina would bolster each of these pillars, both by increasing reform opportunities for juvenile offenders and thus improving their future chances of contributing their talents to a world-class workforce, as well as through the reduced cost and administrative burdens that would result from fewer repeat offenders clogging up the criminal justice system.

As noted in the Committee's report, a broad array of national stakeholders, from legislative policy organizations like the American Legislative Exchange Council (ALEC) to bipartisan coalitions of elected leaders, have supported similar proposals in other states. Here in North Carolina, we commend your Committee for its hard work in developing broad ranging bipartisan support from law enforcement advocacy groups including the North Carolina Division of Police Benevolent Association and the North Carolina Sheriffs' Association, the John Locke

[ncchamber.net](http://ncchamber.net) | p > 919-836-1400  
701 Corporate Center Drive | f > 919-836-1425  
Suite 400  
Raleigh, NC 27607

Foundation, Conservatives for Criminal Justice Reform, as well as the vast majority (96 percent) of those responding to requests for comment in public hearings held by the Committee earlier this year.

The North Carolina Chamber Legal Institute prides itself on advancing forward-thinking solutions to turn challenges into opportunities and to further secure North Carolina's economic competitiveness and business legal climate. We are pleased to give our full support to the "Juvenile Reinvestment" report and are grateful for your leadership and your Committee's hard work.

Sincerely,

A handwritten signature in black ink, appearing to read "Gary J. Salamido". The signature is fluid and cursive, with the first name "Gary" and last name "Salamido" clearly legible.

Gary J. Salamido  
President, NC Chamber Legal Institute

GJS:kmk

cc: Legal Institute Board of Directors

## Exhibit C: Statement of Support from the John Locke Foundation



### Statement Regarding the NCCALJ's "Juvenile Reinvestment" Report By Jon Guze, Director of Legal Studies, John Locke Foundation

The Criminal Investigation and Adjudication Committee of the North Carolina Commission on the Administration of Law and Justice has released a draft report entitled "Juvenile Reinvestment." By preparing and publishing this report, the Committee has taken a major step towards achieving a goal that the John Locke Foundation has advocated for many years—raising the age of juvenile jurisdiction in North Carolina.

The report begins by stating:

*After careful review and with historic support of all stakeholders, the Committee recommends that North Carolina raise the age of juvenile court jurisdiction to include youthful offenders aged 16 and 17.*

In support of this recommendation, the report presents a large body of factual findings. One of the most important of these findings is that recidivism rates are lower when young offenders are dealt with through the juvenile system than when they are prosecuted as adults. As the report explains, this is the primary reason why raising the age is likely to reduce crime, promote public safety, and yield substantial economic benefits.

The report states that the recommendation to raise the age is contingent on adequate funding and on a number of complimentary changes to the juvenile justice system. The Committee is certainly right to insist on adequate funding, and most of the changes to the juvenile justice system that it suggests seem eminently sensible. However, the suggestion that *all* 16- and 17-year olds who are charged with Class A-E felonies should automatically be transferred to adult jurisdiction may be an exception. These are serious crimes that merit severe punishment. However, precisely because of they are so serious, reducing the rate of recidivism by young offenders who commit such crimes is particularly desirable. The existing statutory provision provides for the automatic transfer of juveniles who are charged with Class A felonies while leaving the decision of whether to transfer juveniles charged with other serious crimes to the discretion of the court. Leaving this provision unchanged may be the best way to achieve an appropriate balance between the goals of providing adequate punishment, incapacitation, and deterrence on the one hand, and the goal of reducing recidivism on the other.

Given that fewer than 3% of young offenders are charged with serious felonies, the preceding discussion of how best to deal with such charges is a minor quibble with what is in every other way a remarkable achievement. By bringing all the relevant stake-holders together in support of this well-researched and well-reasoned proposal for raising the age of juvenile jurisdiction in North Carolina, the Criminal Investigation and Adjudication Committee has performed a valuable public service.

John Locke Foundation  
919-828-3876 | [www.johnlocke.org](http://www.johnlocke.org)

200 West Morgan St. Suite 200  
Raleigh, N.C. 27601

## Exhibit D: Comments of the Conference of District Attorneys

C o n f e r e n c e   o f   D i s t r i c t   A t t o r n e y s  
N O R T H   C A R O L I N A

Peg Dorer  
Director

August 29, 2016

P.O. Box 3159  
Cary, NC 27519

Will Robinson  
Executive Director  
North Carolina Commission on the Administration  
Of Law & Justice  
P.O. Box 2448  
Raleigh, NC 27602

919.890.1500  
919.890.1931

Dear Will:

District Attorneys across North Carolina have joined with citizens, other legal professionals and Chief Justice Mark Martin in the Commission’s comprehensive evaluation of our judicial system. As such, both Elected District Attorneys and assistant district attorneys have participated in discussions on numerous committees and subcommittees. Now at this interim juncture, the North Carolina Conference of District Attorneys, consisting of the 44 Elected District Attorneys, would like to offer comment on the Commission’s work.

### CRIMINAL INVESTIGATION AND ADJUDICATION COMMITTEE

**Juvenile Age:** The Conference of District Attorneys supports the Committee’s recommendation to raise the juvenile age for 16 and 17 year olds with two priority conditions:

#### EXECUTIVE COMMITTEE

Scott Thomas  
President

Kimberly Robb  
President Elect

Billy West  
Vice President

Andrew Murray  
Past President

Garry Frank

Mike Miller

Ernie Lee

Lorin Freeman

Pat Nadolski

Jim O’Neill

1. District Attorney have bind over discretion (without transfer hearings) for all juveniles 13-17 who commit A-E felonies. District Attorneys are elected by the citizens and charged with administering justice to hold the guilty accountable, protect the innocent, and ensure public safety. While juvenile courts are structured to protect the juveniles and provide opportunities for second chances and rehabilitation, they do not possess the tools to deal with the small, but violent, sector of juveniles. That is not to say that all violent juveniles should be adjudicated through adult court, but there are times when it is appropriate. District Attorneys have the most intimate knowledge of the facts of each case and working with law enforcement, are able to determine when there is significant public safety risk and when the more appropriate venue for a particular juvenile would be adult court. This is exemplified in the processes of at least 19 other states.
2. Funding is provided for processing the increased numbers of juveniles through juvenile court. Previous fiscal analyses for raising the juvenile age have only addressed the increased needs of the Division of Juvenile Justice; never the needs of the courts. This must be factored into any appropriations that are provided. Current workload formulas, which are antiquated, indicate District Attorneys are already operating at a personnel deficit of 60 assistant district attorneys, statewide. Juvenile court is much more time-consuming than adult court. This need must be met before changes to the current system are made. Raising the age will require more judges, more prosecutors and most likely more clerks to cover the additional juvenile courts required.

Only with both of these conditions met, will the District Attorneys support raising the juvenile age for 16 and 17 year olds.

# APPENDIX B

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## CRIMINAL CASE MANAGEMENT

NCSC — Implementation of a Criminal Caseload Management Plan  
A Report to the Criminal Investigation and Adjudication Committee  
August 17, 2016



# Implementation of a Criminal Caseflow Management Plan

*A Report to the North Carolina  
Commission on the Administration  
of Law and Justice*

**FINAL REPORT**  
**August 17, 2016**

**Nial Raaen, Principal Court Consultant**  
**Lee Suskin, Of Counsel**

**Daniel J. Hall, Vice President**  
**Court Consulting Services**  
**707 Seventeenth Street, Suite 2900**  
**Denver, Colorado 80202-3429**  
**(303) 293-3063**



*This report was prepared at the request of the North Carolina Commission on the Administration of Law and Justice (Commission) with funding support from the State Judicial Institute. The purpose of this report is to support the Commission's deliberations regarding improvements to the adjudication of criminal cases in the state's trial courts. The opinions expressed in this report are those of the authors as employees of the National Center for State Courts and do not necessarily reflect the position of the State Justice Institute, the North Carolina Administrative Office of Courts or the Commission.*

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## Introduction

**The North Carolina Commission on the Administration of Law and Justice** (Commission) was convened by Chief Justice Mark Martin in September 2015 as an independent, multidisciplinary commission that is undertaking a comprehensive evaluation of the North Carolina judicial system and will be making recommendations for strengthening the courts.

Chief Justice Martin intends for the Commission's work to provide a basis for discussion with the General Assembly to help ensure North Carolina's Judicial Branch meets the needs of its citizens and their expectations for a modern court system. The Commission will finalize its findings and recommendations in a series of reports that will be presented to the Chief Justice and made available to the public in early 2017.

The Commission includes a number of committees. This report is made to the Committee on Criminal Investigation and Adjudication Committee. The Committee identified Criminal Case Management and a number of other issues for further exploration.

### **The mission of the North Carolina Judicial Branch is:**

To protect and preserve the rights and liberties of all the people, as guaranteed by the Constitutions and laws of the United States and North Carolina, by providing a fair, independent, and accessible forum for the just, timely, and economical resolution of their legal affairs.<sup>1</sup>

The Superior and District Court divisions are the trial court divisions that hold trials to determine the facts of cases. The Superior Court division houses the Superior Court, which is the court with general trial jurisdiction. Generally, the Superior Court hears felony criminal cases and the District Court hears misdemeanor criminal cases and infractions. The Superior Court holds court in one location in the county, whereas some District Courts hold court in multiple places in the county. Judges for both courts are elected in non-partisan elections.

Each Superior Court district has a Senior Resident Superior Court Judge who manages the administrative duties of the court. Judges are assigned to a judicial district for a six-month period and then rotated to another district for the same time period. Each District Court district has a Chief District Court Judge who manages the administrative duties of the court.

**The National Center for State Courts** (NCSC) is an independent, nonprofit court improvement organization founded at the urging of Chief Justice of the United States Supreme Court Warren E. Burger. He envisioned NCSC as a clearinghouse for research information and comparative data to support improvement in judicial administration in state courts.

The Commission contracted with the NCSC to prepare this report for the Committee.

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<sup>1</sup> Annual Report of the North Carolina Judicial Branch. July 1, 2014 – June 30, 2015.

The NCSC consultant provided general background work for this report to the Committee at its March 11, 2016 meeting<sup>2</sup> on criminal case management and then began a review of data and reports provided by the North Carolina Administrative Office of the Courts (AOC) and made a follow up call with AOC staff. This information helped identify trends or issues that impact criminal case management. This preliminary work was followed by interviews in Raleigh with trial and appellate court judges, district attorneys, defense counsel and public defenders, court administrators, and AOC staff listed in Appendix H.

These interviews provided the NCSC consultant with a better understanding of the perspective of various stakeholders, identified major trends or issues specific to criminal case management, assessed current information collection and reporting capabilities, and determined the feasibility of creating criminal caseflow performance measures. These interviews also afforded an opportunity to discuss the AOC's capacity to support statewide implementation of a criminal caseflow plan and identify additional resources from either the trial courts or the AOC that could support this effort.

This report begins with an overview of caseflow management principles and practices and the current application of those principles in North Carolina. It then presents evidence indicating that North Carolina is ripe for criminal caseflow management reform. It also reviews how key caseflow management tools may improve case management in North Carolina. The report continues with a discussion of the potential benefits of engaging in caseflow management reform, and concludes with a rubric for North Carolina to engage in a statewide criminal caseflow management improvement project.

### **Justice Delayed is Justice Denied**

It is a legal maxim that "justice delayed is justice denied." As Chief Justice Burger noted in an address to the American Bar Association in 1970: "A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people and three things could destroy that confidence and do incalculable damage to society: that people come to believe that *inefficiency and delay will drain even a just judgment of its value*; that people who have long been exploited in the smaller transactions of daily life come to believe that courts cannot vindicate their legal rights from fraud and over-reaching; [and] that people come to believe the law – in the larger sense – cannot fulfill its primary function to protect them and their families in their homes, at their work, and on the public streets"<sup>3</sup> (emphasis added).

This concept – that Justice Delayed is Justice Denied – is embedded in Section 18 of North Carolina's Constitution:

All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

In North Carolina, just as justice may be denied as a result of problems with providing the effective assistance of counsel, justice may be denied by delays in the processing of criminal cases in the trial courts. Indications of potential problems are described below and throughout this report. Generally, delays in the processing of cases may create problems for:

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<sup>2</sup> Minutes and materials from that meeting are posted online (<http://nccalj.org/agendas-materials/criminal-investigation-and-adjudication-agendas-materials/criminal-investigation-and-adjudication-meeting-materials-march-11-2016/>).

<sup>3</sup> Burger, Warren. (1970). "What's Wrong with the Courts: The Chief Justice Speaks Out", *U.S. News & World Report* (vol. 69, No. 8) 68, 71 (address to ABA meeting, Aug. 10, 1970).

- Pre-trial detainees who sit in the county jail while waiting for the prosecution to prove to a judge or jury that they violated the law, and in the meantime cannot earn income or support their family.
- Pre-trial detainees who choose to plead guilty to a charge in order to obtain the short-term gain of getting out of jail but then must face the long term consequences of a conviction, including difficulty finding employment and, in the case of a felony, loss of voting rights.
- Victims of crimes who need resolution of their case in order to receive restitution and/or to put the emotional damage of the crime behind them.
- Witnesses who over time may become unavailable and less likely to provide credible testimony.
- Institutions and individuals who will expend additional time and cost to resolve cases.

## Summary of Findings and Recommendations

### Key Issues

The following is a summary of the key issues that NCSC was asked to address in this report, along with major recommendations resulting from the study:

#### **1. Identify Indicators Suggesting That North Carolina Should Undertake Efforts to Improve the Management of Criminal Cases Through Better Caseflow Management**

As detailed in this report, justice requires that North Carolina must undertake new efforts to improve the management of criminal cases.

As a first step, North Carolina needs to gather accurate information in order to determine the extent of delay in the trial courts. Current reports give a sense of the delay – median time or number not disposed within time standard goals – but they do not provide information on whether some cases are so delayed that they cause injustice to the defendants to victims, nor do the reports give any indication on the causes of that delay. Part of the challenge in obtaining accurate data includes the following:

- Courts now define cases differently, making it impossible to interpret the AOC reports or compare delay in courts within the state or with other states.
- Courts do report median time to disposition, but the median time could be influenced by the number of cases resolved at the first appearance. Reports do not make it easy for the District Attorney (DA) or the Court to determine how many cases are older than two times the time standard or four times the time standard or longer.
- There are no reports on how many cases involve pre-trial detained defendants, on how many detained defendants have had all their charges eventually dismissed, on the sentences imposed on pre-trial detainees and whether those sentences are greater than the time served as detained defendants, or on the number of detainees who plead guilty to charges that they did not commit solely because they and their loved ones could not financially or emotionally afford for them to remain in the county jail.
- There is no systematic collection of information on the number or type of hearings set per case, the number or type of hearings held, the number of hearings continued or the reason for the continuance.
- There is limited information regarding the interval between the time that the defendant, attorneys, witnesses and victims are told the case is scheduled for hearing and the time that the case is actually called for hearing.

For more detail on these issues, see the section on “Information Needed for North Carolina to Know Whether its Trial Courts Are Achieving Timely Resolution of Criminal Cases” on page 40 of this report.

North Carolina must find and allocate the resources to gather this and additional data in order to determine whether its courts are now providing timely justice, and if not, who in its population is being denied justice. Once accurate data is gathered and analyzed, North Carolina can adopt a caseflow management plan that follows the fundamentals of such plans described in this report, which will reduce any injustice now occurring.

## **2. Discuss Potential Benefits to the State for Addressing Criminal Caseflow Management, Including Cost Savings, Improvements in Public Trust and Confidence, and Improved User Perception of Satisfaction with, and Fairness of, Criminal Proceedings**

### **a. Cost Savings**

As described in this report, North Carolina could benefit in many ways by implementing an effective caseflow management program. Jurisdictions that have successfully implemented caseflow management practices have achieved cost savings by, for example:

- Reducing the cost of pretrial detention by reducing the length of time that defendants are jailed while they await resolution of their cases. A recent Committee study of six North Carolina counties found that, depending on the charge, the average length of pretrial detention on the study date ranged from 35 to 193 days and the cost of detention ranged from \$40 to \$60 per day.<sup>4</sup> As stated above, to measure cost savings in North Carolina, the court must know and be able to report the number and age of pending cases with detained defendants. An effective case management system using differentiated case tracking can establish reduced time standards for cases involving detainees and can expedite scheduling of their cases.
- Reducing the cost of pretrial detention by reducing the time that Superior Court defendants are incarcerated while they await their first hearing in Superior Court. Detainees can now wait in jail until the DA calendars an administrative setting or first trial date.
- Reducing the cost and security risks of transporting detainees to court for unproductive hearings.
- Reducing the number of court settings per case, thereby reducing the taxpayer dollars spent on judges, prosecutors, law enforcement officers, public defenders, and court reporters and court personnel who must appear in court for unproductive hearings. As stated above, an effective case management system will result in fewer case settings per case and fewer continuances. Reducing the number of court setting will also reduce the cost to victims, witnesses and families of defendants who travel to court and may need to take time from their work and families.
- Providing more efficient coordination of individuals and tasks associated with complicated cases by utilizing early screening to allocate sufficient time and resources to resolve them.

For more detail on these issues, see the section on “Potential Benefits of Improved Criminal Case Management” on page 43 of this report.

In addition, effective caseflow management practices can save victims, defendants and their families the costs associated with taking off from work and travelling to the courthouse to attend superfluous hearings and the cost to defendants paying legal fees for private counsel. If an effective caseflow management

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<sup>4</sup> North Carolina Pretrial Jail Study. Buncombe, Carteret, Cumberland, Duplin, Johnston, Rowan Counties. 2016 (the study did not attempt to measure the total time of pretrial detention (from charging through trial); it measured only the length of time detainees had spent in custody on the study date).

program is implemented, the probability that every court hearing will be a meaningful event will increase, resulting in a major reduction of times that cases are scheduled for hearing and major savings in costs to taxpayers, victims and defendants.

#### **b. Public Trust and Confidence and Improvements in User Satisfaction**

NCSC conducts national surveys on public trust and confidence in the nation's courts. Surveys confirm that citizens often believe that the legal system takes too long and costs too much overall. In the most recent assessment of satisfaction, focus group participants expressed their belief that there is collusion in the judicial process, particularly by attorneys, to defer or delay court decisions. Participants also expressed concerns that the financial interests of some parties work against the efficient administration of justice.<sup>5</sup>

The 2015 joint Elon University and High Point University poll of citizen confidence in public institutions done for the Commission's Public Trust and Confidence Committee sheds light on the public perception of the North Carolina courts and other institutions.<sup>6</sup> Public confidence in North Carolina is quite high regarding the local police or sheriff, with 81% of those surveyed expressing the opinion that they are "somewhat or very confident" in this local institution. North Carolina state courts followed with nearly 66% of respondents stating they were "somewhat or very confident" in this state institution. Approximately 40% indicated that they believe people "usually" receive a fair outcome when they deal with the court, and a small percentage (3%) answered "always."

Many respondents to the Elon/High Point poll perceive that wealthy individuals and white residents receive better treatment by the state courts than do black, Hispanic, or low income residents. Further, more than half of the respondents believe people without attorneys and those who don't speak English receive somewhat worse or far worse treatment than others in the court system.

While the impact of delay on the public may be difficult to quantify and link directly to public opinion, individuals who appear in court as parties, witnesses, and victims are certainly impacted by delay. The NCSC has noted that one of the most frequent responses to public satisfaction surveys are concerns about starting court on time and complaints about the amount of time it takes to resolve cases.

An effective caseflow management program will result in the timely resolution of criminal cases and will enable the DA and the courts to document that timely resolution. This, over time, will enhance public trust and confidence in the courts.

### **3. Review the Fundamental Principles of Criminal Caseflow Management and Their Application in the North Carolina Trial Courts**

On pages 10 through 30, this report provides a comprehensive overview of caseflow management principles and practices and a review of their current application in North Carolina's trial courts. North Carolina is unique in the practice of prosecutorial control over setting of cases, as opposed to the principle of early and continuous *court* control. As discussed further in the report, North Carolina law does promote a cooperative approach to scheduling, which is in keeping with the principle of communication between the court, opposing parties and other criminal justice agencies.

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<sup>5</sup> Rutledge, Jesse (2016). *The State of State Courts: Reviewing Public Opinion*. The Court Manager. Spring 2016.

<sup>6</sup>Elon University (2015). Elon University Poll. Accessed May 28, 2016 at: <http://www.elon.edu/web/elonpoll/111915.xhtml>.

Comments from interview participants and recent studies suggest that many courts experience problems with scheduling productive and meaningful court events. High rates of continuances are the primary indicator that jurisdictions are having difficulty ensuring that all parties are ready to proceed when they appear in court. Many of the reasons for continuances (such as delays in obtaining drug and alcohol test results, overscheduling of cases, attorney scheduling conflicts and lack of preparation) are not unique to the North Carolina courts, and many jurisdictions have taken steps to address these issues through greater coordination between parties and improved scheduling practices.

#### **4. Identify Key Components of Effective Criminal Caseflow Management That Could Be Employed in North Carolina Such as Differentiated Case Management, Performance Metrics, Evaluation, and Feedback**

As discussed in this report, a set of well-established performance measures relating to caseflow management are in use across the country, and several of these are published by their respective administrative offices. Information on time to disposition, pending case age, and disposition rates was provided by the NC AOC for this report. Problems remain, however, with the accuracy of case information due to differences in how courts count cases and report dispositions. While these limitations should not inhibit progress toward developing a comprehensive caseflow management program, they will need to be addressed. In the short term, efforts to improve consistency at the local level are needed, and more long term efforts are currently underway to move to a next generation of case management software which should provide better information and reporting capabilities.

#### **5. Propose a Step-By-Step Plan to Guide Statewide Planning Toward Improving Criminal Case Management, Including Major Activities, Key Players, and a Timeline**

A number of recommendations are provided below which relate to improving the management of criminal cases. Some of these can be implemented on an individual basis, but the greatest benefit and impact would be gained through a coordinated, state-wide effort led by the Supreme Court and managed by the AOC in order to improve case information and reporting, to promote the adoption of principles through sharing of best practices and establishment of pilot projects, and to provide on-going education and monitoring to sustain the effort. The final section of this report includes an outline and sample timetable for a state-wide caseflow management improvement effort based on experiences in other states.

### **Key Recommendations**

The following recommendations are offered for consideration:

1. The Supreme Court, a revived Judicial Council, Senior Resident Superior Court Judges, Chief District Court Judges and the AOC should exercise leadership in communicating the importance of timely resolution of cases and adoption of caseflow management principles and practices.
2. The Supreme Court should assess the suitability of current time guidelines by directing the AOC ensure that all courts use a single definition of a case and then compare current time to disposition results against the guidelines. The Court should consider modifying the guidelines based on these results, using the Model Time Standards referred to in this report as a guide.

3. The Supreme Court should endorse the use of time guidelines as a tool to help justice system leaders actively manage criminal caseloads.
4. A revived Judicial Council, or a new multi-disciplinary body created by the Supreme Court to address caseflow management, and the AOC should review the data and information needs identified in this report and develop new measures to capture and analyze the effectiveness of scheduling practices in resolving cases within established time standards.
5. The Supreme Court should consider authorizing pilot courts to test and demonstrate the benefits of criminal caseflow management best practices which have the potential for state-wide adoption.
6. The North Carolina Supreme Court should ask the AOC to develop caseflow management plan templates for adoption by courts and district attorneys that emphasize local communication and collaboration between justice system partners. A template may specify elements that should be contained in every plan, while allowing flexibility for each court to develop language that meets local needs.
7. The AOC should continue its efforts to promote data consistency with a particular emphasis on consistent and accurate caseload counts and dispositions to ensure the accuracy of reports and performance measures. This begins with a clear definition of a case and requires the assurance that all persons entering data into the system do so correctly.
8. Along with efforts to improve data accuracy and consistency, the AOC should provide prosecutors and courts with regular caseflow management reports that provide general management information, as well as more detailed information to assist judges and prosecutors who manage individual dockets and cases.
9. The AOC should provide DAs and the courts access to caseflow management reports that contain accurate information on the age and status of pending cases to enable DAs to calendar cases and enable judicial branch leaders and the public to monitor the progress of cases.
10. The AOC should conduct studies designed to further assess the status of criminal case management across the state, which should include such questions as:
  - a. What is the frequency of continuances and their impact on case age?
  - b. What are the primary reasons for continuances?
  - c. What factors account for the wide range of time to disposition across the state?
11. The AOC should develop expertise and information to assist courts in implementing caseflow management practices.
12. Caseflow management topics should be incorporated into training programs for judges, district attorneys, the defense bar, clerks, and court administrative personnel.
13. District attorneys and judges should take steps to ensure that every court hearing is a meaningful event by calendaring and conducting an effective administrative setting in Superior Court within 60 days as required by state statute,<sup>7</sup> and that a similar practice be established for most criminal cases in District Court. An effective administrative setting will

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<sup>7</sup> N.C. Gen. Stat. § 7A-49.4.

- resolve all pretrial issues and then set the case for trial only after discovery is complete, pretrial motions are resolved and final plea negotiations have been completed.
14. The DAs and Judicial Branch leaders should review current calendaring practices, such as “bulk” scheduling, and adopt practices that reduce the number of court settings, the number of continuances and other related delays.
  15. The DAs and Judicial Branch leaders should review the practice of setting cases solely on monthly officer court days in District Court.
  16. The Supreme Court should consider whether District Judges should be authorized to calendar administrative settings for detained Superior Court defendants during the defendants’ first appearance.
  17. The Supreme Court should consider whether magistrates should be authorized and required to make a determination of indigence and assignment of a public defender at the defendant’s first appearance.
  18. The Supreme Court should assign responsibility to the Judicial Council or create a new multi-disciplinary steering committee with the responsibility and authority for providing overall caseflow management strategy and direction to implement the preceding recommendations.

## Caseflow Management Principles and Practices

Caseflow management is the coordination of court processes and resources used to ensure that cases progress in a timely fashion from filing to disposition. Judges and managers in control of case scheduling can enhance justice when they supervise case progress early and continuously, set meaningful events and deadlines throughout the life of a case, and provide credible trial dates. Proven elements of practices in caseflow management include case-disposition time standards, use of differentiated case management, meaningful pretrial events and schedules, limiting continuances, time-sensitive calendaring and docketing practices, effective information systems that monitor age and status of cases, and control of post-disposition case events.

Effective caseflow management makes justice possible both in individual cases and across judicial systems and courts. It helps ensure that every litigant receives procedural due process and equal protection. Caseflow supervision is strictly a management process. The resolution of each case on its legal merits is never compromised by an effective caseflow management system.

## The Impact of Local Legal Culture

The first comprehensive and rigorous national study of delay in state courts was conducted by the NCSC. In 1976, Thomas Church and fellow researchers examined civil and criminal cases disposed in 21 state trial courts of general jurisdiction. They concluded that the speed of disposition of civil and criminal litigation in a court cannot be ascribed in any simple sense to the length of its backlog, any more than court size, caseload, or trial rate can explain it. Rather, both quantitative and qualitative data generated in this research strongly suggest that both speed and backlog are determined in large part by established expectations, practices, and informal rules of behavior of judges and attorneys. For want of a better term, this cluster of related factors was labeled the “*local legal culture.*”

Court systems become adapted to a given pace of civil and criminal litigation. That pace has a court backlog of pending cases associated with it. It also has an accompanying backlog of open files in attorneys' offices. These expectations and practices, together with court and attorney backlog, must be overcome in any successful attempt to increase the pace of litigation. Church and his colleagues observed that trial court delay is not inevitable, but that "changes in case processing speed will necessarily require changes in the attitudes and practices of all members of a legal community." In accelerating the pace of litigation in a court, they noted, "the crucial element . . . is concern on the part of judges [and in North Carolina, the District Attorney as well,] with the problem of court delay and a firm commitment to do something about it." They found that attempts to alter the caseloads of individual judges by adding judges or decreasing filings are not likely to increase either productivity or speed. To reduce pretrial delay, they recommended that courts:

- Establish management systems by which the court, and not the attorneys, controls the progress of cases.
- Use trial-scheduling practices and continuance policies that create an expectation on the part of all concerned that a trial will begin on the first trial date scheduled.
- Emphasize readiness to try (rather than negotiate plea agreements) as a means to induce settlements.
- Increase effectiveness of speedy-trial standards for criminal cases through the introduction of operational consequences for violation of the standards and through reduced ease of waiver by defendants.<sup>8</sup>

Efforts to improve caseload management do not just serve the paramount goal of providing prompt justice. In fact, they are critically important in saving time and work for all participants in the justice system, from litigants to lawyers. Effective caseload management promotes predictability, improves lawyering, and engenders respect for the court and justice system. As an example, when trust is enhanced among lawyers, their jobs get easier. Reliability and consistency means lawyers only have to prepare once. Lawyers' reputations, as well as that of the court, are elevated when events and decisions occur as forecasted.

Improved caseload management means better time management for lawyers, too. One of the laments of both public and private attorneys is the inordinate amount of time they must spend in court, reappearing on the same case on multiple occasions. Effective caseload management can and does reduce unnecessary appearances by lawyers and litigants, saving time and inconvenience for everyone. Clients and the general public are more satisfied when they sense lawyers and the justice system aren't wasting their time.

Lastly, a little known result of more efficient caseload is improved attorney competence. NCSC's research has shown that efficient attorneys are more likely to be viewed as competent and timely, meaning that they did not delay case disposition for lack of preparation or frivolous reasons to gain time<sup>9</sup> by opposing counsel, judges and court staff.<sup>10</sup> As a result, efficiency and preparedness become virtues expected of not only judges, but the practicing bar as well. In turn, the local legal culture changes for the better.

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<sup>8</sup> Steelman, David, John Goerdts and James McMillan (2004). *Caseload Management – The Heart of Court Management in the New Millennium*. National Center for State Courts, Williamsburg, VA.

<sup>9</sup> Griller, Gordon M. and Joseph P. Farina (2002) *Analysis of the Efficiency and Effectiveness of the Magistrate Criminal Calendar: 4th Judicial District of Ada County Idaho*. Court Connections, National Center for State Courts, Williamsburg, VA.

<sup>10</sup> Ostrom, Brian and Roger Hanson, *Efficiency, Timeliness, and Quality: A New Perspective from Nine State Criminal Trial Courts* (1999), p. 106ff. National Center for State Courts, Williamsburg, VA.

## The ABA Standards for Criminal Cases: Speedy Trial; Timely Resolution<sup>11</sup>

These standards relative to speedy trial and timely resolution of criminal cases were published by the American Bar Association with commentary in 2004. They reflect the ABA's support for the principles and objectives of effective criminal case management:

### Standard 12-1.4 Systems Approach

The process for timely case resolution should take into account the perspectives of the defendants, the public, including victims and witnesses, courts, prosecutors and defense counsel and law enforcement agencies.

### Standard 12-3.1 The Public's Interest in Timely Case Resolution

The interest of the public, including victims and witnesses, in timely resolution of criminal cases ... should be recognized through formal adoption of policies and standards that are designed to achieve timely disposition of criminal cases regardless of whether the defendant demands a speedy trial ... increasing public trust and confidence in the justice system.

### Standard 12-3.2 Goals for Timely Case Resolution

- Each jurisdiction should establish goals for timely resolution of cases that address (1) the period from the commencement of the case (by arrest, issuance of citation, or direct filing of indictment or information) to disposition; and (2) the time periods between major case events.
- Goals for timely resolution should be developed collaboratively.
- The jurisdiction's goals for timely resolution should address at least the following time periods:
  - Arrest/citation to first appearance.
  - First appearance to completion of pretrial processes (i.e., completion of all discovery, motions, pretrial conferences, and plea, dismissal, or other disposition in cases that will not go to trial).
  - Completion of pretrial processes to commencement of trial or to non-trial disposition of the case.
  - Verdict or plea of guilty to imposition of sentence.
  - Arrest or issuance of citation to disposition, defined for this purpose as plea of guilty, entry into a diversion program, dismissal, or commencement of trial.
- Goals for timely resolution intended to provide guidance. The establishment of such goals should not create any rights for defendants or others.

### Standard 12-4.3 Jurisdictional Plans for Effective Criminal Caseflow: Essential Elements

Elements of a plan for effective overall criminal caseflow management in a local jurisdiction should include:

- **Incident Reports:** Rapid preparation and transmission, to the prosecutor, of good quality police incident/arrest reports.
- **Test Results:** Rapid turnaround of forensic laboratory test results.
- **Case Screening:** Effective early case screening and realistic charging by prosecutors.
- **Appointment of Counsel:** Early appointment of defense counsel for eligible defendants.
- **Discovery:** Early provision of discovery.
- **Pleas/Sentence Negotiations:** Early discussions between the prosecutor and the defense counsel concerning possible non-trial disposition of the case.

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<sup>11</sup>American Bar Association (2004). *ABA Standards for Criminal Justice: Speedy Trial and Timely Resolution of Criminal Cases*.

[http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_speedytrial\\_toc.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_speedytrial_toc.html)

- **Case Scheduling Conference:** Early case scheduling conference conducted by the assigned judicial officer to:
  - Review the status of discovery and negotiations concerning possible non-trial disposition;
  - Schedule motions; and
  - Make any orders needed.
- **Pre-Trial Caseflow Orders:** Case timetables addressing the time periods allowed for completion of discovery, filing of motions, and other case events that are set at an early stage of the case by the judge in consultation with the prosecutor and defense counsel.
- **Motions:** Early filing and disposition of motions, including motions requiring evidentiary hearings.
- **Monitoring:** Close monitoring of the size and age of pending caseloads, by the court and the prosecutor's office, to ensure that case processing times in individual cases do not exceed the requirements of the speedy trial rule and that case processing time standards are being met for the overall caseload.
- **Continuances:** A policy of granting continuances of trials and other court events only upon a showing of good cause and only for so long as is necessary, taking into account not only the request of the prosecution or defense, but also the public interest in prompt disposition of the cases.
- **Backlog Reduction Plan:** Elimination of existing case backlogs (i.e., cases pending longer than the established case processing time standards), following a backlog reduction plan developed collaboratively by the court, prosecutor's office, defense bar, law enforcement and other criminal justice agencies involved in and affected by criminal case processing.

#### **Standard 12-4.5 Court Responsibility for Management of Calendars and Caseloads**

- **Control Over the Trial Calendar:** Control over the trial calendar, and over all other calendars on which a case may be placed, should be vested in the court. Continuances should be granted only by a judicial officer, on the record. The court should grant a continuance only upon a showing of good cause and only for so long as is necessary. In ruling on requests for continuances, the court should take into account not only the request or consent of the prosecution or defense, but also the public interest in timely resolution of cases. If a ruling on the request for a continuance will have the effect of extending the time within which the defendant must be brought to trial, the judge should state on the record the new speedy trial time limit date and should seek confirmation of this date by the prosecution and the defense.
- **Caseflow Management Reports:** Reports on the age and status of pending cases should be prepared regularly for the chief judge of the court and made available to leaders of other organizational entities involved in criminal case processing.

## **Fundamental Principles of Caseflow Management**

Research and practical experience have identified fundamental principles that characterize successful caseflow management, which are outlined below.

### **Definition of a Case**

In order to process cases to disposition and in order to report and compare the number of cases that need to be disposed and the number that have exceeded time standards with other courts and over time in the same court, the court should have a clear definition of what constitutes a case and all courts in a state

must consistently use that definition when counting cases. A “case” could be defined in a number of ways, such as:

- A single defendant,
- A single complaint/information/indictment (charge) for one defendant, or
- All charges filed against a single defendant for a single first court appearance (arraignment).

For example, when a law enforcement officer stops a driver and charges the driver with careless and negligent driving, driving with a suspended license and disorderly conduct and then the person appears in court for a first appearance on all three charges, a court may decide to count the three charges as one case or as three cases. If the defendant pleads guilty to driving with a suspended license as a plea agreement so that the prosecutor will dismiss the disorderly conduct and careless and negligent driving charges, the court may decide to report one case resolved by plea *or* may decide to report one case resolved by plea and two cases dismissed.

In some states, a “case” is defined as all charges filed against a single defendant for the same initial appearance on court date. A criminal justice system cannot count and manage its cases or compare how it is doing with other states or compare how its counties are doing compared to the other counties until it first defines a “case” and ensures that all counties in the state use the same definition and enter the information into the case management system in accordance with the definition.

### **Application of the Principle in North Carolina**

The Administrative Office of the Courts has defined a "case" as one file number. However, according to the AOC, there is inconsistency across counties regarding how this is handled with respect to multiple charges. In some counties each charge will be a new file number, while in others, there may be multiple charges under the same file number (case).<sup>12</sup>

Without a single definition that is consistently used in every North Carolina court, it is impossible to compare the number of cases filed, the age of pending cases, the number of cases closed within the time standards, or the number of cases disposed by plea or trial within North Carolina or with other states across the country.

The AOC is in the process of changing its definition of a “case” to use the defendant (or incident) as the unit of measure, rather than the ‘case.’ This new AOC definition of a case conforms with the NCSC State Court Guide to Statistical Reporting (Guide), a standardized reporting framework for state court caseload statistics designed to promote informed comparisons among state courts. The Guide directs that courts count the defendant and all charges involved in a single incident as a single case.

Changing this definition will be a major improvement as long as the AOC and Branch leadership take steps to ensure that all courts consistently enter data using this new definition. It will enable North Carolina to compare the degree of trial court timeliness with other states across the country.

### **Early Court Intervention and Continuous Control of Cases**

A fundamental principle of caseflow management is that the court, and not the litigants, controls the progress of a case from filing to disposition. The rationale for court control of calendaring and the pace of

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<sup>12</sup> <http://www1.aoc.state.nc.us/cpms/pages/help/Definitions.jsp>.

the adjudicatory process is based on the principle that in a democratic system of justice, the court is the only neutral party capable of resolving a dispute brought to the government in a fair, unbiased, and independent manner. All other parties have a vested interest in the outcome of a case. The court's only interest is in justice.

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

Early court control involves conducting early case conferences. These conferences may be called status conferences, pre-trial conferences, or as in North Carolina, *administrative settings*. A successful early case conference enables the judicial officer to review the status of discovery, learn of negotiations concerning possible non-trial disposition, schedule motions and make any orders needed to advance the case to disposition.

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

### **Application of the Principle in North Carolina**

**Prosecutor/Court Control of the Docket in North Carolina:** While the principles of caseflow management recommend that the court, and not the attorneys, control the progress of the cases, the North Carolina legislature has decided that the District Attorney is responsible for calendaring criminal cases. Docketing of superior court criminal cases is governed by North Carolina General Statutes § 7A-49.4. Paragraph (a) refers to the establishment of a "criminal case docketing plan developed by the district attorney for each superior court district *in consultation with the superior court judges residing in that district* and after opportunity for comment by members of the bar" (emphasis added). Paragraph (b) (1) places responsibility for setting of deadlines with the court, as well as paragraphs (4) and (5) which designate the court's authority to set and defer rulings on motions, and establish the necessary number of administrative hearings to achieve fair and timely administration of justice.

While the responsibility for setting the trial calendar rests with the DA, the DA no longer has total control of the process, as the prosecutors pointed out in their presentation to the Committee at one of its meetings. Calendaring in North Carolina is a hybrid and consultative process, with docket plans developed by the DA with consultation with the Superior Court and local bar. Concerns remain that about the inequity of having one party in litigation with control over initial scheduling and the potential for using delay as a tactic to influence case outcomes.

Persons charged with a felony who are detained must be brought before a district judge within 96 hours for a first appearance at which the district judge reviews bail and conditions of release and then determines whether to assign counsel. It is possible that a defendant can then sit in jail indefinitely until the DA gets around to calendaring a trial date.

While changes in this statute should be considered as part of any improvements to criminal case management, the current practice of calendaring authority resting with prosecution does not preclude moving forward with an effort to improve criminal caseflow management on a state-wide basis by employing the techniques and best practices noted in this report. Ideally, however, the court should be responsible for case control throughout the life of a criminal case, including initial scheduling.

Under the present arrangement, the DA's Office must have the information it needs to ensure every event is meaningful and is productively moving a case toward resolution. The DA's Office does not now have

the data or information needed to effectively fulfill its responsibilities. In many other jurisdictions across the country where the Clerk's Office, judicial support staff or a Court Administrator is responsible for calendaring and caseflow management, those officials use information in the Court's database to schedule and continually monitor cases to promote fair and timely resolutions. This is the case with the schedule of civil cases. The DAs in North Carolina do not have such access.

The *ABA Standards* recommend that the office responsible for calendaring cases has access to caseflow management reports that contain the age and status of pending cases. For the DA to calendar cases and for the Court to monitor the progress of its cases, the DA and the Court need access to data and reports that provide:

- The number, age, and identity of all active pending cases.
- The number, age, and identity of all inactive pending cases.
  - An inactive case is one that cannot be scheduled for hearing for reasons such as the defendant cannot be found (an order for arrest has been issued) or the defendant is incarcerated on another matter and cannot be transferred to court.
- A list of all cases that are ready for trial, with the date that the case was filed and the date that it became trial ready. The NCSC project team recommends that a case be considered as "trial ready" only after a pre-trial conference has been held and the parties agree (or the DA certifies) that:
  - Discovery is complete. The DA has filed a certificate that all discovery has been provided to defense counsel.
  - All pre-trial motions have been filed. Motions have either been disposed or the parties agree that they can be heard at the beginning of the trial.
  - The DA and defense counsel have completed or are completing everything needed to apply mitigating factors at sentencing (or have been given reasonable time to do so).
  - The ADA and defense counsel have discussed an appropriate sentence to recommend to the Court or have agreed that the sentence can be determined by the judge, pursuant to a plea of guilty by the defendant.
- The court schedule for all cases in the District and Superior Court in a format that enables the DA to identify conflicts, i.e. any other cases calendared for the defense attorney.

## **Differentiated Case Management: A Case Management Tool**

Differentiated Case Management (DCM) is a technique that recognizes that not all cases are created equal when it comes to scheduling and case management, since various types of cases can differ substantially in terms of the time and resources required to achieve fair and timely disposition. Some cases can be disposed of expeditiously, with little or no discovery and few intermediate events. Other cases require extensive court supervision and may include expert witnesses, highly technical issues, or difficult plea negotiations.

One of the main elements of DCM is a process for early case screening which allows for the court to prioritize cases for disposition based on factors such as prosecutorial priorities, age or physical condition of the parties or witnesses, or local public policy issues. Regardless of the criteria chosen for differentiating among cases or the case assignment system in use, two goals and four resulting objectives characterize DCM. The authors of the DCM Implementation Manual suggest the following two goals:<sup>13</sup>

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<sup>13</sup> Solomon, Maureen and Holly Bakke (1993) *Differentiated Case Management Implementation Manual*. Bureau of Justice Assistance, Washington D.C.

1. Timely and just disposition of all cases consistent with each case's preparation and case management needs.
2. Improved use of judicial system resources by tailoring their application to the dispositional requirements of each case.

To achieve these goals, which are consistent with overall caseflow management goals, a DCM program should have the following objectives:

1. Creation of multiple tracks or paths for case disposition, with differing procedural requirements and timeframes geared to the processing requirements of the cases that will be assigned to that track.
2. Provision for court screening of each case shortly after filing so that each will be assigned to the proper track according to defined criteria.
3. Continuous court monitoring of case progress within each track to ensure that it adheres to track deadlines and requirements.
4. Procedures for changing the track assignment in the event the management characteristics of a case change during the pretrial process.

The development of meaningful DCM track criteria requires the identification of factors that determine the extent of party preparation and court oversight required to achieve case resolution. Some courts differentiate on the basis of the seriousness of the case, such as the nature of the charges and whether the defendant could be sentenced to death or life in prison. Other relevant factors may include: likely defenses; the need for time to prepare and present forensic testimony or a psychiatric evaluation; or the number of defendants and the amount of discovery anticipated. Some courts have developed time tracks solely on the basis of case type while others use more complex criteria that employ a combination of these approaches. (see Vermont, Boston, Massachusetts, and Pierce County, Washington, below) Whatever approach is used, it is important that courts continually assess the effectiveness of their DCM program and make adjustments as needed to the process to ensure ongoing success.

The following are examples of how various jurisdictions have implemented time standards and DCM systems:

**The Vermont Supreme Court** adopted Criminal Case Disposition Guidelines in 2010.<sup>14</sup> The guidelines use the principles of DCM to establish two tracks for misdemeanor cases: a standard track with a guideline of 100% disposed within 120 days, and a complex track, with a guideline of 100% disposed within 180 days.

Additionally, the guidelines establish three tracks for felonies:

- A standard track with a guideline of 100% disposed in 180 days
- A complex track with a guideline of 100% disposed in 365 days
- A super-complex track with a guideline of 100% disposed in 455 days

Finally, the Vermont Supreme Court identified complexity factors:

- Misdemeanor complex factors: interpreter, competency evaluation, jury trial, public defender conflict at or after the first calendar call.

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<sup>14</sup> Vermont Supreme Court Administrative Directive 24. Accessed July 24, 2016 at: <https://www.vermontjudiciary.org/LC/Shared%20Documents/Administrative%20Directive%20No.%2024%20-%20Amended%20November2010.pdf>.

- Felony complex factors: interpreter, competency evaluation, jury trial, public defender conflict at or after the first calendar call, pro se defendant, juvenile victim, multiple victims, out of state witnesses, co-defendants, pre-sentence investigation.
- Felony super-complex track: fatality or possible life sentence.

The Vermont Supreme Court also adopted **interim time standards** for the two misdemeanor tracks and the three felony tracks, with guidelines for the number of days between key events, such as arraignment, status conference, motion filing deadline, motion hearing, motion decision, jury draw/trial and sentence.

**The District Court of the Commonwealth of Massachusetts** has established performance goals for case management for the entire criminal caseload. The Boston Municipal Court Department of the Commonwealth of Massachusetts has adopted time standards for its misdemeanor criminal cases, with two tracks, designated in accordance with the misdemeanor's maximum period of incarceration.

**The Pierce County, Washington Superior Court** developed a DCM program to promote the speedy disposition of drug cases and to reduce jail overcrowding. The prosecutor and public defender were responsible for making a DCM plan designation and accompanying schedule for case events, subject to court review and approval. Three tracks were developed, including a fast track of 30 days to disposition, intermediate track that followed statutory speedy-trial requirements of 60 days for in-custody and 90 days for out-of-custody defendants, and a complex track in which the speedy trial rule was waived and cases were assigned to an individual judge for monitoring. Despite a 53% increase in criminal filings over a five-year period, average time to disposition dropped from 210 days to 90 days.

### **Application of the Principle in North Carolina**

North Carolina has not adopted differentiated case management on a system-wide basis.

### **Productive and Meaningful Events**

The scheduling of hearings should balance the need for reasonable preparation time by parties with the necessity for prompt resolution of the case. The court should take an active role in encouraging hearing readiness by parties and lawyers and creating the expectation that court events will occur as scheduled and will be productive. Hearings should be scheduled within relatively short intervals. When hearing preparation is expected to take a particularly long time, the court may wish to schedule intermediate "status" hearings to ensure that the preparation process is proceeding. Good communication between judges and lawyers is important in order to:

- Give attorneys reasonable advance notice of deadlines and procedural requirements.
- Notify lawyers that all requests for continuance must be made in advance of a deadline date and upon showing of good cause.
- Take consistent action in response to non-compliance of parties with deadlines.

Attorneys and litigants should expect that events will occur as scheduled. These participants may not appear or be prepared at a scheduled hearing if the certainty of the hearing being held is in doubt. This means that the court provides advance notice in the event of judicial absence or provides a back-up judge if possible. Further, court scheduling practices should ensure that the calendar is not so over-scheduled as

to create delays or continuances. Creating and enforcing firm continuance policies also improves the likelihood that hearings will be held as scheduled.

### **Application of the Principle in North Carolina**

In North Carolina, the number of continuances and the number of hearings per case indicate that not all scheduled hearings are meaningful events.

Stakeholders reported to the NCSC consultant that continuances regularly occur in North Carolina because of:

- Lack of party preparation;
- Discovery issues;
- Scheduling conflicts;
- Overscheduling of the calendar;
- Need for additional time to determine restitution; and
- Delays in obtaining toxicology and other expert reports.

#### *Law Enforcement Officers' Monthly Court Day*

It is a common practice in North Carolina's District Court for DA's to schedule first appearances and subsequent hearings on the law enforcement officer's monthly court day. These subsequent hearing are often scheduled as trials.

This practice enables law enforcement departments to know officer availability when making their assignments to the community. However, this practice has clear implications on the ability of the DA to schedule cases for timely disposition and creates implications for the defendant having timely access to counsel.

If a defendant is arrested, the defendant initially appears before a Magistrate for a determination of probable cause and for determination of pretrial release. If a defendant charged with a felony is detained, the magistrate assigns a first court date to be held within 96 hours. If a defendant charged with a misdemeanor is detained, the magistrate assigns the officer's next court date as the first court date – this could be one to five weeks later. If the officer has a conflict (i.e. a training program), the case is rescheduled to one month later. The magistrate does not make a determination of whether to assign counsel at that time. The defendant will then be jailed until his/her first appearance before a District Court Judge.<sup>15</sup>

This practice has major implications on the delivery of justice to the defendant and major implications on the cost to taxpayers for the presumed innocent defendant's detention. As discussed below, it also has implications on the time needed to resolve the case.

The NCSC recently conducted a review of scheduling practices in one of North Carolina's District Courts – Wake County.<sup>16</sup> In 2015, the Wake County District Attorney's Office (DA) contracted with NCSC to provide suggestions and recommendations to the DA, the District Court, defense attorneys, and law

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<sup>15</sup> See §15A-511 (Initial appearance) and §15A-601 (First appearance before a district court judge).

<sup>16</sup> District Attorney's Office, Wake County DWI Caseflow Management, March, 2016. Gordon Griller and Lee Suskin.

enforcement agencies on how impaired driving cases (DWIs) can be better calendared and processed in order to obtain a fair and timely disposition.

In Wake County (and presumably in most of North Carolina's District Courts), cases are scheduled for a first appearance and for trial on the law enforcement officers' monthly court dates. The second court setting will be one month after the first appearance and subsequent trial dates will be one month after the previous one. Cases needing six court sessions to resolve will therefore have six trial settings over six months. Each subsequent setting requires attendance and involvement by the law enforcement officer, the ADA, the defense attorney, the defendant, the Judge and court staff. In some cases, the defendant's family and victim also appear. Few cases are resolved within six months despite having six court settings. In Wake County, half of the DWI cases have at least six trial court settings and continuances.

Because the case is set for trial, if the law enforcement officer does not appear at the hearing, defense attorneys will often move to dismiss the case. Otherwise, cases are routinely continued, because the State or the defense or the Court is not ready to proceed.

In Wake County and in some other counties in North Carolina, different judges will preside over trial settings over the life of the case. The judge sitting on a case in month 1 will not necessarily be the judge who sits on the case in month 2. The NCSC project team learned during its visit to Wake County that some defense attorneys, when considering whether to advise their clients to plead guilty to the charge believe that some judges may be more inclined to apply mitigating factors and impose a lighter sentence than others. These attorneys often observe which District Judge is assigned to court that day as they decide whether to advise their client to plead guilty or request a continuance, knowing that there will likely be a different District Judge presiding over the next court appearance.

Most Wake County DWI cases are routinely continued – cases average six and a half case settings and continuances before they are resolved; some are continued twice that many times.

It is important when monitoring continuances for the DA and Court to record who requested the delay, the length of the delay, the reason for the delay, and the age of the case at the time the continuance was granted. Data on postponed and reset cases are critical in determining the location and reasons for bottlenecks in the movement of cases from filing to disposition. More difficult to ascertain is the extent to which there is delay in setting a case for initial hearing since this remains under exclusive control of the DA.

Most egregious are situations in which cases are put on the calendar and offenders and lawyers are required to appear when it is known in advance that the case is not ready for trial. While there was no aggregate data on continuances available at the time of this study, a North Carolina Office of Indigent Defense Services (IDS) report<sup>17</sup> sheds some light on the extent of the problem. Some 75% of those responding to the IDS survey estimated that there were at least three continuances for the average district court case. Clerks estimated that most cases have six or more continuances.

In rural courts with relatively low caseloads the impact of continuances is amplified when the available court dates are limited. It was noted that in some jurisdictions the administrative calendar is scheduled quarterly (or less), so that only a few continuances can add a substantial amount of time to reach final disposition. Although the extent to which the limitations of facilities, and in particular courtroom availability, impacts readiness is not known, the consultants' experience in other states has been that problems with facilities, such as inadequate security for high-profile cases, insufficient jury courtrooms, and other factors contribute to delay. These conditions are often more common in rural jurisdictions.

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<sup>17</sup> Office of Indigent Defense Services (2009). *District Court Scheduling Survey Report*. Durham, NC.

### *Court Wait Time*

Another practice noted during the North Carolina stakeholder interviews, and common in many courts nationwide, is scheduling all cases at a single time, typically 9:00 am. This causes two problems: First, it creates long waiting times for those whose cases are last to be called. Second, litigants quickly realize that they do not need to be prepared as they will correctly assume that with so many cases on the docket it will not matter if their case is postponed.

Existing research on and data from North Carolina suggests that wait time contributes to court system costs. For example, the IDS sought to estimate the cost of paying for private appointed counsel (PAC) waiting-in-court time. The report found public defenders had an average of 4.55 hours of wait time per case. Wait times create problems for victims and family members who take time from their work and family obligations to sit in court for half a day to observe a five to ten-minute hearing.

The DAs and Judicial Branch leaders should review the practice of setting cases on officer court days and of setting an entire morning's cases at 9:00 AM, and should develop alternative practices that enhance timely case resolution and user satisfaction without reducing department ability to provide community safety and without creating "downtime" in the courtroom or reducing the number of matters that can be heard in a day. One alternative practice suggestion would be setting one-third of the morning's cases at 9:00 AM, one-third at 10:00 AM and one-third at 11:00 AM.

Implementing practices that result in courts conducting only meaningful hearings will reduce the number of case settings and provide judges with the time to hear cases in a more orderly scheduled manner.

### *Multiple Unproductive Case Settings*

The practice of multiple case settings (aka "churning") is costly in many ways. There is a financial cost for defendants, their families and their victims who take a day off from work or who must pay for travel to the courthouse. Defendants must pay private counsel. Taxpayers pay for the time that judges, DAs, public defenders attend multiple hearings. There is a cost for transporting detainees, and there are major safety issues related to transporting detainees.

There are also justice implications. Multiple hearings could mean that defendants who must pay private counsel and/or defendants who are detained and not able to earn income, and who cannot support their family financially or emotionally while incarcerated, may decide that it is less costly to plead guilty to an offense that they did not commit, and to suffer the collateral consequences, than it is to require the DAs to take the time to prove their case before a Judge or jury.

In addition, because the first court appearance for most cases in District Court is on the date of the law enforcement officer's monthly court date, a defendant detained after appearing before a Magistrate could sit in the county jail for up to 30 days before their first appearance in court and their first contact with defense counsel.

Despite these challenges, a number of effective practices were identified during the interviews as having been put into place by some of North Carolina's DA's and in some of North Carolina districts to help better manage cases. Examples of these practices include:

- Early discovery and plea offers;
- Informal scheduling orders that are enforced;
- Plea discussions prior to scheduled court dates;

- Staggered setting of cases to avoid docket overcrowding;
- Continuance monitoring by the prosecutor;
- Schedule coordination and posting of office hours by the DA;
- Electronic sharing of discovery materials;
- Setting aside prosecutor and defense counsel consultation time before court begins; and
- Effective use of administrative dockets to resolve cases.

## **Efficient Motions Practice**

If parties file pretrial motions, early court action on these motions will promote earlier case resolution. The court should decide all substantive pretrial motions before the date of trial. Some suggestions for managing the motions process include:

- Scheduling contested and uncontested motions separately to increase judicial time for hearing and deciding motions that could substantially impact the outcome of the case.
- Requiring attorneys to attach a stipulated order or certification that identifies uncontested motions.
- Setting time limits for responses to motions, and setting these deadlines just prior to the hearing date.

### **Application of the Principle in North Carolina**

While problems with delay related to motions were not specifically identified by the small sample of individuals interviewed in the preparation of this report, they may or may not be a significant factor in overall delay. Efficient motions practice is a fundamental principle of effective criminal case management and thus should be examined as part of any criminal caseflow management reform effort.

## **Trial Preparation and Management**

Effective use of the time between filing of charges and the first scheduled trial date is critical to successful trial management. During this time, the judge makes various decisions regarding the evidence to be introduced and an estimate of the time required to hear the case. Some states set pretrial conferences or status conferences to bring parties together for the purpose of determining issues in dispute, determining whether discovery is complete, seeking consensus on evidence and witness presentation, completing discovery, and setting a next court date. Proven trial management techniques include:

- Resolving pretrial motions before the first trial date is scheduled;
- Conducting a trial management conference shortly before a trial starts;
- Reducing unnecessary or repetitive evidence; and
- Fully utilizing the time available in a day to conduct the trial.

### **Application of the Principle in North Carolina**

North Carolina has taken steps to enhance trial preparation and management. State statute (N.C. Gen. Stat. § 7A-49.4) requires that an administrative setting must be calendared in the Superior Court for each felony within 60 days at which:

- (1) The court shall determine the status of the defendant's representation by counsel.

- (2) After hearing from the parties, the court shall set deadlines for the delivery of discovery, arraignment (if necessary), and filing of motions.
- (3) If the district attorney has made a determination regarding a plea arrangement, the district attorney shall inform the defendant as to whether a plea arrangement will be offered and the terms of any proposed plea arrangement, and the court may conduct a plea conference if supported by the interest of justice.
- (4) The court may hear pending pretrial motions, set such motions for hearing on a certain date, or defer ruling on motions until the trial of the case.

The court may schedule more than one administrative setting if requested by the parties or if it is found to be necessary to promote the fair administration of justice in a timely manner. At the conclusion of the last administrative setting, the DA may schedule a trial date unless the court determines that the interests of justice require the setting of a different date.

Conducting effective administrative settings can reduce the number of cases set on a particular date for trial, create trial date certainty, reduce the number of cases dismissed on the trial date, reduce the number of persons who plead guilty on the trial date, and reduce the many instances where attorneys show up for trial unprepared to proceed with the trial.

**Unfortunately, all indications are that the trial courts are not effectively using administrative settings.** The initial impression that the NCSC gained from discussions with various stakeholders and examples of calendars suggests that the scheduling of cases for trial is particularly problematic in North Carolina. This is an indication that administrative settings are not successful at achieving what they were set up to accomplish.

Experience shows that successful caseflow management involves leadership, commitment, communication, and the creation of a learning environment. These factors may ultimately determine whether a state is successful in its effort to provide fair and timely disposition of its cases.

## Leadership

Visible support from both local judicial leadership and the Supreme Court is essential for success. Those in leadership positions should be able to articulate a vision of how case management will improve the system, explain the anticipated benefits, and show an ongoing commitment to the effort. Leaders should be advocates for the program and should work to build consensus and support from both within the court and from those individuals and organizations that do business with the court. Courts should seek to gain support from members of the bar and the justice community. Being a part of the leadership team also includes setting and enforcing expectations once the initial consultation has occurred.

### Application of the Principle in North Carolina

Chief Justice Mark Martin has shown leadership through his creation of the Commission, which studies and provides recommendations to ensure that the Judicial Branch meets the needs of its citizens and their expectations for a functional court system.

On paper, North Carolina has established leadership responsibilities for the administration of the trial courts, for the management of cases, and for record keeping in the courts. In practice, those who could

exercise leadership in monitoring and enhancing caseflow management, as well as in scheduling cases to timely disposition, are not doing so.

The Supreme Court has taken some steps toward ensuring that the Judicial Branch meets the needs of its' citizens by adopting general rules of practice pursuant to its statutory authority to do so; which include the oversight of the following roles.<sup>18</sup>

The Senior Resident Superior Court Judge in each administrative Superior Court District (the most senior judge in years of service) is responsible for various administrative duties, including appointing magistrates and some other court officials, and managing the scheduling of civil, *but not criminal*, cases for trial.

The Chief District Court Judge in each District Court is appointed by the Chief Justice of the Supreme Court, rather than being determined by years of service. Among other duties, the Chief District Court Judge is responsible for creating the schedule of District Court sessions for the district, assigning District Court Judges to preside over those sessions and supervising the magistrates for each county in the district.

The AOC is responsible for developing the uniform rules, forms and methods for keeping the records of the courts, particularly those records maintained by the clerks of Superior Court.

The State Judicial Council was created by the General Assembly in 1999 to promote overall improvement in the Judicial Branch. Its duties include recommending guidelines for the assignment and management of cases and monitoring the effectiveness of the Judicial Branch in serving the public.

In 2003, the State Judicial Council exercised leadership in this area by endorsing the development of trial court case processing measures. Otherwise, based on interviews and in its research, the NCSC did not learn of any steps taken by the Judicial Council or any Chief Judges to communicate the importance of implementing caseflow management plans to enable the trial courts to resolve cases within given time standards.

While the AOC has provided direction on record keeping and, in particular, how to count and report cases, workload, and the age of cases, the AOC has not taken steps to ensure that all courts are following record keeping standards.

While the Supreme Court has adopted general rules of practice, the Supreme Court has not adopted rules that establish effective case management for state trial courts.

## Communication

Good communication is essential for any effort to implement change in the organization. Chances of success are improved through frequent and sustained communication between judges and court staff, as well as consultation among judges, prosecutors, and defense counsel. Communication ensures that all participants have a solid understanding of what the change is, why it is needed, and what their respective roles are with regard to court filings, providing discovery, filing motions, negotiating fair disposition and preparing for trial.

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<sup>18</sup>N.C. Gen. Stat § 7A-34. **Rules of practice and procedure in trial courts.**

The Supreme Court is hereby authorized to prescribe rules of practice and procedure for the superior and district courts supplementary to, and not inconsistent with, acts of the General Assembly.

Several stakeholders interviewed during this project described the benefits of communication between local justice system partners through regular meetings and consultations that helped to identify and resolve problems at the local level. These individuals cited examples of how efforts to work collectively at the local level have improved criminal case management. In most cases this is realized through regular meetings that include representatives of the bench, prosecution, defense, law enforcement, and clerk's office. One challenge in North Carolina is the absence of public defender offices in many of the rural areas, which can make it difficult to achieve this level of local collaboration.

### **Application of the Principle in North Carolina**

The NCSC has identified two examples of good communication among participants in North Carolina's local criminal justice systems:

In Mecklenburg County, a monthly debrief to review performance goals is scheduled with the prosecutor, defense attorneys, and law enforcement. The court administrator's office plays a substantial role in coordinating criminal cases following indictment. More informal approaches, such as the bar lunch meetings conducted concurrent with each administrative session in District 30B (Hayward and Jackson Counties) also are employed.

In Wake County, the District Attorney and Chief Judge of the District Court started a workgroup made up of prosecutors, judges and defense attorneys to develop and monitor a plan to implement recommendations provided by the NCSC on DWI caseflow management. The plan's goal is a system that "sets DWIs only for meaningful initial settings, administrative settings and trial date."

## **Learning Environment**

The successful implementation of caseflow management, whether in the local court setting or statewide, depends on judges, court staff, and outside participants understanding why and how the caseflow management program works and the benefits that can be achieved from the program.

### **Application of the Principle in North Carolina**

Although the principles have been in practice for decades, a sustained effort to educate and update new judges, staff, and litigators is needed. NCSC did not learn of any programs on caseflow management being conducted as a regular part of training for justice system officials, court clerks, prosecutors and defense counsel. The development of caseflow management curricula should be considered.

## **Case Management Measures**

As previously identified (see ABA Standard for Criminal Case Timely Resolution 12-3.2), "Each jurisdiction should establish goals for timely resolution of cases that address (1) the period from the commencement of the case to disposition and (2) the time periods between major events." These events could include arrest/citation to first appearance, first appearance to completion of the pretrial process, completion of pretrial process to trial or to non-trial disposition (plea/sentence or dismissal).

## NCSC *CourTools*<sup>19</sup> Caseflow Management Measures

The NCSC, concerned with trial court delay, has developed a set of ten balanced and realistic performance measures that are practical to implement and use. Understanding the steps involved in performance measurement can make the task easier and more likely to succeed. *CourTools* supports efforts made to improve court performance by helping clarify performance goals, developing a measurement plan, and documenting success.

Effective measurement is key to managing court resources efficiently, letting the public know what your court has achieved, and helping identify the benefits of improved court performance. The NCSC developed *CourTools* by integrating the major performance areas defined by the Trial Court Performance Standards with relevant concepts from other successful public and private sector performance measurement systems. This balanced set of court performance measures provides the judiciary with the tools to demonstrate effective stewardship of public resources. Being responsive and accountable is critical to maintaining the independence courts need to deliver fair and equal justice to the public.

Each of the ten *CourTools* measures follows a similar sequence, with steps supporting one another. These steps include a clear definition and statement of purpose, a measurement plan with instruments and data collection methods, and strategies for reporting results. Published in a visual format, *CourTools* uses illustrations, examples, and jargon-free language to make the measures clear and easy to understand.

*CourTools* measures these four aspects of trial court delay:

- **Clearance Rates:** The number of outgoing cases as a percentage of the number of incoming cases.
  - Clearance rates measure whether the court is keeping up with its incoming caseload. If cases are not disposed in a timely manner, a backlog of cases awaiting disposition will grow. This measure is a single number that can be compared within the court for any and all case types, on a monthly or yearly basis, or between one court and another. Knowledge of clearance rates by case type can help a court pinpoint emerging problems and determine where improvements can be made.
- **Time to Disposition:** The percentage of cases disposed or otherwise resolved within established time frames.
  - This measure, used in conjunction with Clearance Rates and Age of Pending Caseload (below), is a fundamental management tool that assesses the length of time it takes a court to process cases. It compares a court's performance with local, state, or national guidelines for timely case processing.
- **Age of Pending Caseload:** The age of the active cases pending before the court, measured as the number of days from filing until the time of measurement.
  - Having a complete and accurate inventory of active pending cases and tracking their progress is important because this pool of cases potentially requires court action. Examining the age of pending cases makes clear, for example, the cases drawing near or about to surpass the court's case processing time standards. This information helps focus attention on what is required to resolve cases within reasonable timeframes.
- **Trial Date Certainty:** The number of times cases disposed by trial are scheduled for trial.
  - A court's ability to hold trials on the first date they are scheduled to be heard (trial date certainty) is closely associated with timely case disposition. This measure provides a tool to evaluate the effectiveness of calendaring and continuance practices. For this measure,

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<sup>19</sup> <http://www.courtools.org/Trial-Court-Performance-Measures.aspx>. The complete *CourTools* measurement system is available from the NCSC website at [www.courtools.org](http://www.courtools.org).

“trials” includes jury trials, bench trials (also known as non-jury or court trials), and adjudicatory hearings in juvenile cases.

### Application of the Principle in North Carolina

**Adoption of *CourTools*:** Durham County, North Carolina’s 14<sup>th</sup> Judicial District, has adopted *CourTools* as a model for its performance accountability system.

**Time Standards in North Carolina:** Both the National Center for State Courts (Model Time Standards) and the North Carolina Supreme Court have established time standards for the trial courts. The following chart compares the average statewide time to disposition for FY 2014<sup>20</sup> with the current North Carolina standards and the Model Time Standards:

Case Type	Days to Disposition	Current North Carolina Standard	Model Time Standards <sup>21</sup>
<b>DISTRICT COURT</b>			
<i>Felony</i>	104	<ul style="list-style-type: none"> <li>• 100% within 90 days</li> </ul>	N/A
<i>Misdemeanor</i>	145	<i>Criminal Non-Motor Vehicle</i> <ul style="list-style-type: none"> <li>• 75% within 60 days</li> <li>• 90% within 90 days</li> <li>• 98% within 120 days</li> <li>• 100% within 365 days</li> </ul> <i>Criminal Motor Vehicle</i> <ul style="list-style-type: none"> <li>• 75% within 60 days</li> <li>• 90% within 120 days</li> <li>• 100% within 180 days</li> </ul>	<i>Misdemeanor</i> <ul style="list-style-type: none"> <li>• 75% within 60 days</li> <li>• 90% within 90 days</li> <li>• 98% within 180 days</li> </ul> <i>Traffic and Ordinance</i> <ul style="list-style-type: none"> <li>• 75% within 30 days</li> <li>• 90% within 60 days</li> <li>• 98% within 90 days</li> </ul>
<i>Infraction</i>	67	<ul style="list-style-type: none"> <li>• 75% within 60 days</li> <li>• 90% within 120 days</li> <li>• 100% within 180 days</li> </ul>	N/A
<b>SUPERIOR COURT</b>			
<i>Felony</i>	244	<ul style="list-style-type: none"> <li>• 50% within 120 days</li> <li>• 75% within 180 days</li> <li>• 90% within 365 days</li> <li>• 100% within 545 days</li> </ul>	<ul style="list-style-type: none"> <li>• 75% within 90 days</li> <li>• 90% within 180 days</li> <li>• 98% within 365 days</li> </ul>
<i>Misdemeanor</i>	188	<ul style="list-style-type: none"> <li>• 50% within 120 days</li> <li>• 75% within 180 days</li> <li>• 90% within 365 days</li> <li>• 100% within 545 days</li> </ul>	<ul style="list-style-type: none"> <li>• 75% within 60 days</li> <li>• 90% within 90 days</li> <li>• 98% within 180 days</li> </ul>

Table 1: Time to Disposition FY2014 Comparison

The 98 percent threshold in the new model time standards is an acknowledgment that even under the best of circumstances some cases will remain unresolved. As this chart illustrates, the model standards, particularly for general jurisdiction courts, are more stringent than the standards previously adopted by North Carolina. North Carolina has not adopted interim time standards.

<sup>20</sup> North Carolina Judicial Branch Statistics, Fiscal Year 2014-15. North Carolina Administrative Office of the Courts.

<sup>21</sup> Model Time Standards for State Trial Courts. National Center for State Courts, 2011.

## North Carolina's Court Performance Management System (CPMS)<sup>22</sup>

In 2001, as recommended by the State Judicial Council, Chief Justice I. Beverly Lake, Jr., adopted a trial court performance standards system developed by the NCSC. This system is designed to help trial courts identify and set guidelines for their operations, measure their performance, and make improvements to better meet the needs and expectations of the public.

In 2003 the State Judicial Council endorsed the development of five specific trial court case processing measures. Since then the AOC has developed, tested and implemented a web-based system that provides court officials with up-to-date data for three of those measures:

- Case clearance (cases disposed as a percentage of cases filed).
- On-time processing (percentage of cases disposed within time guidelines, based on those adopted by the Supreme Court in 1996).
- Aging case index/backlog (percentage of cases older than times listed in the guidelines).

The CPMS gathers current data (within one month) from the AOC's civil and criminal automated systems and organizes this data allowing for a search and query of the information, for various case types, in any county or district. The CPMS includes both the three percentage-based measures above, plus extensive statistical data, such as the disposition rate for Superior Court criminal or civil cases in a certain county in the past 12 months, or the backlog of all District Courts within the state.

The CPMS "help" pages provide more detailed information about future plans to enhance the CPMS with expanded case types and additional performance measures and statistics, which will eventually eliminate the need for the printing and distribution of paper management reports. The anticipated next two performance measures (subject to enhancements to automated systems) are the number of times a case is put on a court calendar before being disposed, and a measure that will be designed to assess collection of restitution. The CPMS is also an important factor in the planning and development of court technology and information systems.

According to the North Carolina AOC report, four of the eighteen Superior Courts disposed of more than 80% of their cases within the time standard, and seven disposed of less than two-thirds of their cases within the time standard. Few District Courts disposed of less than 50% of their misdemeanors within the time standards.

Many of the stakeholders interviewed for this report were unaware of North Carolina's current overall time standards, and there was considerable divergence in opinion regarding their utility. Concerns included how the results might be interpreted by those outside the courts, as well as their overall usefulness in managing individual caseloads.

### Post-Judgment Issues with Criminal Cases

Most of the emphasis in caseflow management has been on achieving reasonable times to disposition. Increasingly, courts are also looking at how the post-judgment phase can be better managed. Post-judgment issues with criminal cases include enforcement of sentence terms and orders of probation, as well as the appeals and post-conviction process. Few, if any, states have established post-judgment time standards in criminal cases.

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<sup>22</sup> <http://www1.aoc.state.nc.us/cpms/login.do>.

## Application of the Principle in North Carolina

It was noted during interviews with North Carolina stakeholders that problems with court transcription resources are contributing to delay in the post-judgment period. This issue has arisen in other states where problems with the availability of qualified personnel to prepare transcripts or restrictions on third party transcription have created delay.

## The Current Caseload in North Carolina's Trial Courts

As stated before, it is impossible to describe the current landscape in North Carolina because the courts are not using a single, consistent definition of a case. This makes it impossible to accurately provide the number of case filings, the number of cases resolved within time standards, the number of cases resolved by trial, by plea, or by dismissal; or to compare the North Carolina courts with each other or with courts in other states. It is crucial that the North Carolina Judiciary make sure that all courts in the state use a single definition of a case when entering information into the case management system or generating reports or workload or backlog. This is a crucial first step to examining and then improving caseload management in the trial courts.

The following information on caseload filing and disposition is provided to the Committee in this report because it is the best information available. NCSC cautions the Commission to not make any decisions based on this information other than a decision to take steps to ensure the future commissions will be able to review accurate and consistent data.

This report uses a number of measures to define the current landscape: case filings, case dispositions, clearance rates, time to disposition, age of pending cases, and trial date certainty.

### North Carolina Trial Court Caseloads: 2014 – 2015<sup>23</sup>

#### Case Filings:

##### Superior Court

120,835 criminal-non-traffic cases filed

8,131 criminal traffic cases filed

##### District Court

518,879 criminal-non-traffic cases filed

895,718 criminal traffic cases filed

596,127 infractions filed

#### Case Dispositions:

##### Superior Court: Criminal – non-traffic cases

2,644 were disposed by trial

77,188 were disposed by plea

1,419 were dismissed with leave to re-file

49,259 were dismissed without leave

986 were dismissed after deferred prosecution

14,794 – Other

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<sup>23</sup> Annual Report of the North Carolina Judicial Branch, 2014-2015.  
[http://www.nccourts.org/Citizens/Publications/Documents/2014-15\\_North\\_Carolina\\_Judicial\\_Branch\\_Annual\\_Report.pdf](http://www.nccourts.org/Citizens/Publications/Documents/2014-15_North_Carolina_Judicial_Branch_Annual_Report.pdf)

District Court – non-traffic cases

18,192 were disposed by trial  
162,821 were disposed by plea  
13,199 were dismissed with leave to re-file  
264,360 were dismissed without leave  
16,034 were dismissed after deferred prosecution  
115,471 – Other

The number of dismissals is extraordinarily large compared to other states. NCSC assumes, but has not attempted to verify, that the reason for this variance is that a defendant may, in some districts, be charged with four offenses which are counted as four separate cases. A defendant then pleads guilty to one offense with an agreement that the other three offenses will be dismissed, and that court then reports one case disposed by plea and three dismissed. It is common in other states to count dispositions as the AOC defines a case: one disposition by plea.

This creates a problem because it is in the interest of promoting justice for the public to know how many defendants that are arrested and are detained pre-trial are subsequently cleared of all charges by the prosecutor or by the court, or who are “cleared” of some charges as long as they plead guilty to one charge.

Similarly, it is important to know how many cases go to trial and to compare that number with other courts in North Carolina and across the country. NCSC research has found a general downward trend in the percentage of cases which actually go to trial, with no more than one to five percent of criminal misdemeanor cases going to trial nationally.<sup>24</sup> This is the case in North Carolina as well, where only a small number of cases were actually disposed of by trial last year.

### Clearance Rates

One of the indicators of court caseflow performance is represented by the following NCSC *CourTools* measure:

***CourTool 2: Clearance Rates*** – The number of outgoing cases as a percentage of the number of incoming cases.

The case clearance measure relates to the court’s success at resolving as many cases as are filed. For example, if during the time period being measured, 100 cases were filed and 98 were disposed, the case clearance measure is 98% (98/100). This is an important tool for courts that are resolving cases timely and do not have backlogs, as this could signal that the court may be starting to accumulate a backlog.

The North Carolina clearance rate in FY2014 was greater than 100% for all case types. This in no way should be interpreted to mean that North Carolina is providing timely justice.

- Because not all courts in North Carolina define a case as a defendant, a clearance rate of greater than 100 % does not necessarily mean that the court is resolving all cases for as many defendants as are being charged.
- Because cases in North Carolina’s courts may currently be delayed, resolving as many or even more cases as those filed does not mean that they are being resolved timely. A 100% clearance rate can be used by a court and the criminal justice community to justify the status quo.

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<sup>24</sup> See [www.courtstatistics.org](http://www.courtstatistics.org) Court Statistics Project, National Center for State Courts.

## Time to Disposition and Age of Pending Cases

Time to disposition is a *CourTool* measure that provides information on a court's ability to provide timely resolution of disputes:

***CourTool 3: Time to Disposition*** – The percentage of cases disposed or otherwise resolved within established time frames.

If North Carolina consistently counted cases in accordance with the AOC's definition, the *CourTool* would enable comparison with other courts in the state and with state or national guidelines for timely case processing.

Many states have adopted recommended time guidelines similar to those established by the American Bar Association in 1992,<sup>25</sup> more recently updated as the Model Time Standards. The 98% threshold in the model time standards is an acknowledgment that even under the best of circumstances, some cases will remain unresolved. As the comparative table of time guidelines illustrates, the model standards, particularly for general jurisdiction courts, are more stringent than the standards previously adopted by North Carolina.

Another performance measure relating to case age is the age of active pending cases:

***CourTool 4: Age of Active Pending Caseload*** – The age of pending active cases on which court action can be taken.

Pending cases are those that have been filed but not disposed. An accurate inventory of pending cases as well as information about their age and status helps the court manage pending matters by identifying overall trends and identifying specific cases which may be exceeding time guidelines so that action can be taken to resolve them. Typically, courts will produce reports that calculate the time, in days, from filing to the date of the report. Overall results can be reviewed, along with a detailed report listing open cases chronologically, beginning with the oldest pending case. Most states also report individual cases that are over time guidelines for judges to review and take action on those cases, if necessary.

Detailed information provided by the AOC regarding the age of both disposed and pending cases by prosecutorial district is provided in tables found in Appendix D. These tables detail the average age of cases which are pending and disposed over a two-year period by prosecutorial district. The following table summarizes the range of case age for both disposed and pending cases for the prior two years:

Fiscal Year	Range of Age of Disposed Cases	Range of Age of Pending Cases
2013	145 - 419	129 - 455
2014	126 - 496	149 - 374

Table 2: Range of Superior Felony Case Age (in days) by Prosecuting District - Last Two Years

The summary table illustrates the wide range of results between the North Carolina judicial districts. While it is helpful to know that in 2014 some cases took as long as 496 days to resolve, or that some cases were pending for as long as 374 days; this information alone is not helpful. Because the courts define and report cases differently, the summary table does not provide information on how many persons are awaiting disposition in each prosecutorial district. Additionally, North Carolina has set goals for

<sup>25</sup> American Bar Association, *Standards Relating to Trial Courts*, 1992 Edition.

disposition within 120, 180, 365 and 540 days. It would be more helpful to understand the nature of the backlog and to compare courts within the state for courts to accurately and consistently report the number of pending cases within each of those time intervals.

The reasons for district differences in the time to disposition may be the result of a variety of factors, including prosecutorial philosophy, availability of judicial resources, scheduling practices, continuance policies, etc. There does not appear to be any clear relationship between the workload of the court and age of pending or disposed cases based on the data available for fiscal years 2013 and 2014.

### **Trial Date Certainty**

The fifth *CourTool* performance measure relating to caseflow management looks at the efficiency of trial scheduling practices:

***CourTool 5: Trial Date Certainty*** – The number of cases resolved by trial or scheduled for trial.

A court's ability to hold trials on the date they are scheduled is another indicator of caseflow management effectiveness. The measure is calculated by identifying all cases disposed by trial during a given time period, and determining how many times the trial event has been set for each case. By identifying specific cases in which trials were continued the court can further investigate the reasons for delay and take steps to remedy them.

In the NCSC's experience working with numerous jurisdictions, there can be a variety of internal and external factors that cause trial certainty problems. Internal court factors include lack of judicial resources (often due to trial overscheduling), a shortage of jurors, and unavailability of special resources such as interpreters or court reporters. External factors are similar to those that cause delay in general, including lack of preparation by parties, witness availability, delays with exchange of discovery, etc. The unpredictability of trial scheduling causes many courts to schedule a large number of trials on a given day and time, knowing that most will resolve beforehand but with the expectation that a small number will proceed and therefore not leave judges with empty calendars.

One important way to promote trial date certainty is to be realistic in setting trial calendars. This can be accomplished by using data on outcomes of recent trial settings or status conferences to anticipate the percentage of cases set for trial that may be resolved and that must be continued (even under a firm policy limiting continuances), while still trying and disposing enough cases to meet both case clearance goals and time standards.<sup>26</sup> As noted previously, the overwhelming number of cases never go to trial, so efforts dedicated to trial readiness should also include techniques to improve the probability of a timely non-trial resolution.

With the practice of scheduling all hearings after the first appearance as trials (as NCSC learned occurs in Wake County District Court) it is no surprise that trial date certainty does not exist in North Carolina. Courts should set cases for trial only after it has been found in an administrative setting or at a status conference that discovery is complete, that all motions that need to be resolved pre-trial have been filed and decided, and that all witnesses are available.

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<sup>26</sup> Steelman, David (2008) Caseflow Management. *Future Trends in State Courts*. National Center for State Courts.

## Information Needed for North Carolina to Know Whether its Trial Courts Are Achieving Timely Resolution of Criminal Cases

Quality information is critical for knowing whether courts are achieving timely resolution of cases, whether any injustice is resulting from delay and whether changes need to be made to enhance the effectiveness of the court's caseflow management program.

As stated above, as a first step to having quality information, North Carolina must ensure that all courts use a single definition of a case when entering data into the case management system and when counting filings, pending cases and dispositions.

North Carolina needs to gather accurate information in order to determine the extent of delay in the trial courts. Current reports give a sense of the delay – median time and number of cases not disposed within time standard goals – but they do not provide information on whether some cases are so delayed that they cause injustice to the defendants or victims, nor do the reports give any indication on the causes of that delay.

- Courts *do* report median time to disposition, but the median time could be influenced by the number of cases resolved at the first appearance. Reports do not make it easy for the DA or the Court to determine how many cases are older than two or four times the time standard or longer.
- There are no reports on how many of the courts' cases involve pre-trial detained defendants, and in particular how many defendants are detained in the county jail for longer than the time standard.
- There are no reports on how many detained defendants have had all their charges dismissed, nor how long they were detained while awaiting the dropped charges.
- There are no reports on the sentence imposed on pre-trial detainees who are eventually convicted and whether that sentence is greater than the time served as a detainee.
- There are no reports on the number of detainees who plead guilty to charges that they did not commit solely because they could not financially or emotionally afford to remain in the county jail.
- There are no reports on the number or type of hearings set per case, the number or type of hearings held, the number of hearings continued, nor the reason for the continuance.
- There are no reports on the wait time between the time that the defendant, attorneys, witnesses and victims are told the case is scheduled for hearing and the time that the case is actually called for hearing.

### *Inventory of Pending Cases*

Judges, prosecutors and court clerks need to know the inventory of pending cases. To schedule cases and to be able to report on the court's inventory, DAs and courts must be able to identify and report:

- The status and age of each individual case. Does the case need a status conference/administrative setting, a motion hearing, or a trial date?
- Court caseload and performance information such as clearance rates, the number of pending cases, the age of disposed cases, the number of cases older than the time disposition goal, the number of cases twice and three times as old as the time disposition goal, the number of hearings set per case, and the number of continuances in the case.

While automation is not a pre-requisite to caseflow management, the existence of an electronic case management system that includes the ability to track cases, events, and dispositions provides the most efficient way to monitor performance. Useful information for case management includes the following:

For each case:

- Its current status.
  - Is the case active, or has an order for arrest been issued?
- The detention status of the defendant.
- The last scheduled event and date.
- The next event and date.
- The number of times that the case has been scheduled for a hearing.
- The number of hearings actually held.
- The number of times a case has been continued, and the reasons behind the continuances.
- The age of the case at disposition.

For all cases at the court:

- The number and type of cases filed in a time period.
- The number, type and age of cases disposed of in a time period.
- The number, type and age of cases pending each next meaningful event.
- The number of cases continued prior to a scheduled trial date and on a scheduled trial date and the reasons for those continuances.

Both aggregate and case-specific information should be available for judges and court managers to assess overall program performance and to manage individual cases effectively. Judging from the information provided by the AOC for this report, some of this information appears to be available, though a great deal of this information is unavailable.

## Interest by Stakeholders in Improving Caseflow Management

The issue of **prosecutorial control** over setting of calendars was prominent during the interviews. District attorneys believe the current system can work and note that the law provides safeguards and priority to older cases. With judges rotating through districts, they note that the district attorneys are the most consistent element of caseflow management. They also observed that good case management depends on the expectations of judges, regardless of who sets the calendar or preparation by all parties involved. The perceptions of defense counsel are quite different. They question whether the system is really a “level playing field” since the district attorney can potentially keep cases off the docket to put pressure on the defense. It was apparent from the conversations that the philosophy and approach of the district attorney may be a determining factor in successful caseflow management. Several participants noted that regular meetings and communication have helped facilitate better calendar control and coordination. In a limited number of courts, most prominently Mecklenburg County, the court administrator’s office plays a key role in managing the calendar. Calendar management by court support staff, such as court administrators, clerk’s office or judicial assistants, is more typical in other states.

In terms of **reasons for delays** noted during the interviews, practitioners (district attorneys and defense counsel) noted many of the same reasons. External factors such as difficulty in obtaining timely lab reports and incomplete investigative information top the list. Lack of preparation by opposing counsel was also cited. These factors, along with overscheduling of cases and schedule conflicts for attorneys are contributing to high rates of continuances. At least one district attorney who participated in the interviews has developed an internal system for tracking continuances and the reasons for delay. Another noted that his assistants regularly report the outcome of case events for better management. From the perspective of magistrates, missed court dates by defendants is another factor. They attribute this to defendant’s having

to call in for a court date, as well as problems that attorneys have in contacting their clients early in the court process.

Whatever the reason, there was general agreement among all the interviewees directly involved in case processing that **delay is a significant problem**. It was noted that more rural counties where judicial rotations are less frequent may experience greater delay, although some courts have allowed criminal matters to be set on a civil session day if needed, and in some courts district court judges have been authorized to take superior court pleas. Magistrates cited delays in blood kit processing for DUI offenders and the limited number of misdemeanor probation violation hearing dates in some courts (which results in defendants sitting in jail while waiting for a hearing) as significant issues. Magistrates suggested that the expanded use of video conferencing capabilities could reduce delay in certain situations.

There were mixed responses to the utility of **time guidelines and performance measures** among those interviewed. There is a perception among some that time guidelines may focus too much on processing cases efficiently at the expense of quality. Defense attorneys were more in favor of implementing time guidelines than their counterparts in prosecution. Some courts are regularly looking at case data to manage calendars and continuances, though they are likely the exception. There appears to be very little awareness of the existence of the North Carolina time guidelines, although individual courts have adopted time standards as part of a caseflow management plan. Court administrators were particularly critical of the lack of reporting tools for management.

Problems with **data quality** and lack of **case tracking tools** were noted by judges and administrative personnel. Court Services staff acknowledged that there are often inconsistencies in the recording of dispositions and entering counts, and that a standard for bills of indictment is needed to obtain more accurate figures. In terms of case management reports, Court Services staff noted that the number of continuances granted can be recorded and that filters are available in the current system for district attorneys to track case age. Clerks also noted that they are able to track continuances if necessary.

Overall, those interviewed acknowledged that delay is a significant problem. There is agreement that there are a number of systemic issues that need to be addressed, and that better local communication and collaboration is an effective strategy to improve criminal case management, along with better tools and more accurate data. There remains disagreement over the issue of prosecutorial control of calendars, and the utility of performance measures, specifically time guidelines.

## Potential Benefits of Improved Criminal Case Management

### Cost Savings

In the post-recession era, legislative bodies are particularly keen to reduce the cost of providing government services. Several recent analyses reviewed by the NCSC in the preparation of this report provided insight on areas where savings might be realized by other agencies through more efficient management of criminal dockets.

Effective caseflow management practices can reduce costs in several areas. Jurisdictions that have successfully implemented caseflow management practices have achieved cost savings by, for example:

- Reducing the cost of pretrial detention by reducing the length of time that defendants are jailed while they await resolution of their cases. As previously stated, to measure cost savings in North Carolina, the court must know and be able to report the number and age of pending cases with

detained defendants. An effective case management system using differentiated case tracking can establish reduced time standards for cases involving detainees and can expedite scheduling of their cases.

- Reducing the cost and safety risks of transporting detainees to court for unproductive hearings.
- Reducing taxpayer dollars spent on judges, prosecutors, public defenders, and court reporters and court personnel at unproductive events. As previously stated, an effective case management system will result in fewer case settings per case and fewer continuances.
- Reducing the number of failure to appear bench warrants and related cost to law enforcement due to shorter time between court events and greater event predictability.
- Reducing clerical time and costs spent making docket entries and sending notices to parties by reducing the number of scheduled hearings and eliminating unnecessary continuances.
- Saving witness costs, including those related to police overtime through reduced waiting times and continuances.
- More efficient coordination of individuals and tasks associated with complicated cases by completing early screening to allocate sufficient time and resources to resolve them.

In addition, effective caseflow management practices can save victims, defendants and their families the costs associated with taking off from work and traveling to the courthouse to attend a hearing, as well as the cost of defendants paying legal fees for private counsel.

While the research is dated, in the early 1980's the National Institute of Justice funded a study of the cost of continuances to prosecution and defense agencies and witnesses in felony and misdemeanor cases. The study included courts in North Carolina, Virginia, and Pennsylvania. Researchers found that continuances added 12 to 24 percent more work to each prosecution or public defense agency. In fiscal year 1983/84, this increase translated into additional labor costs ranging from \$78,000 to \$1.1 million at the time. Although the dollar amounts are likely to be quite different today, the finding that continuances are quite costly would not be different.<sup>27</sup>

## Public Trust and Confidence

The NCSC's Vice President for External Affairs, Jesse Rutledge, summarized some of the recent findings regarding public satisfaction with the courts nationally. He noted that previous surveys confirmed that citizens often believe that the legal system takes too long and costs too much overall. In the most recent assessment of satisfaction, focus group participants expressed their belief that there is collusion in the judicial process, particularly by attorneys, to defer or delay court decisions. Participants also expressed concerns that the financial interests of some parties work against the efficient administration of justice.<sup>28</sup>

The 2015 joint Elon University and High Point University poll of citizen confidence in public institutions, completed for the Commission's Public Trust and Confidence Committee, sheds light on the public perception of the North Carolina courts and other institutions.<sup>29</sup> Public confidence in North Carolina is quite high regarding the local police or sheriff, with 81% of those surveyed expressing the opinion that they are "somewhat or very confident" in this local institution. North Carolina State Courts followed with nearly 66% of respondents stating they were "somewhat or very confident" in this state institution.

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<sup>27</sup> Jacoby, Joan (1986). *Some Costs of Continuances, A Multi-Jurisdictional Study*. US Department of Justice.

<sup>28</sup> Rutledge, Jesse (2016). *The State of State Courts: Reviewing Public Opinion*. The Court Manager. Spring.

<sup>29</sup>Elon University (2015). Elon University Poll. Accessed May 28, 2016 at: <http://www.elon.edu/web/elonpoll/111915.xhtml>.

Approximately 40% indicated that they believe people “usually” receive a fair outcome when they deal with the court, and a small percentage (3%) answered “always.”

Many respondents to the Elon/High Point poll perceive that wealthy individuals and white residents receive better treatment by the state courts than do black or Hispanic residents, low-income defendants, or those without a lawyer. Further, more than half of the respondents believe people without attorneys, low-income people, and those who don’t speak English receive somewhat or far worse treatment than others in the court system.

While the impact of delay on the public may be difficult to quantify and link directly to public opinion, individuals who appear in court as parties, witnesses, and victims are certainly impacted by delay. The NCSC has noted that one of the most frequent responses to public satisfaction surveys are concerns about starting court on time and complaints about the amount of time it takes to resolve cases. Many studies have concluded that these perceptions are important to the overall level of trust and confidence that the public places in courts as institutions.

An effective caseflow management program will result in timely resolution of criminal cases and will enable the DA and the courts to document that timely resolution. This, over time, will enhance public trust and confidence in the courts.

## **A Rubric for North Carolina to Engage in Statewide Caseflow Management Improvement**

### **Accomplishing Effective Implementation – A Cultural Shift**

For a number of reasons identified below, even when judges, DA’s and defense counsel agree that the status quo is not working and that change is needed to effectuate more fair and timely resolution of court cases, accomplishing change in the courts is often difficult.

NCSC research related to legal culture suggests that the organizational character of courts inhibits judges from reaching consensus on obtaining a more active role in the management of criminal cases. Lack of agreement on the judicial role in managing cases underlies the long-standing research problem of what explains substantial differences in criminal case processing times among courts. Explanations that seem obvious, such as workloads and resources, have not been found to consistently impact resolution.<sup>30</sup> Rather, it appears that the broader concept of court culture is a driving force.

Finally, achieving even minimal coordination among judges, prosecutors, law enforcement, and criminal defense attorneys is for some court leaders a substantial departure from the traditional way of doing business. This may be in part rooted in the adversarial nature of the system, in which the court remains neutral while prosecutors are committed to the protection of society and defense attorneys to the protection of their client’s constitutional rights. However, this view fails to recognize the mutual interest in the fair and timely resolution of criminal cases shared by all participants in the process. Collaboration between all concerned institutions and leaders is critical to successful case management.

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<sup>30</sup> (Church et al., 1978; Goerd et al., 1989, 1991).

## Key Steps

Numerous states have engaged in statewide efforts of improving caseflow management systems. The approaches have varied to some extent and have depended on the degree of court unification and the role of the administrative office in each state. Some states have already been through several iterations of caseflow planning, revising and updating plans concurrent with revisions to time guidelines. It is important to note that the improvement of caseflow management is an ongoing process in which continuous feedback is necessary to assess the effectiveness of new approaches and to account for inevitable changes in statutes and operational practices. Courts must compile, analyze and continually monitor case information, such as the data identified elsewhere in this report, before making necessary modifications to improve results. Notwithstanding the various approaches taken across the country, there are several key steps outlined below that are typically followed by states engaging in caseflow management improvement efforts.

### Adopt or Modify Time Standards/Performance Measures

Whether to begin a statewide effort with the adoption of time and performance standards or delay adopting such standards until more is known about the existing state of caseflow management is a chicken and egg question. Many states have employed published performance measures as a first step and proceeded to develop information and programs to help courts meet the standards. Others have delayed creating or updating time standards pending the collection of background data to assess the current state of caseflow management.

The threshold question is whether information systems can provide sufficiently accurate and reliable information to enable courts and the AOC to determine with reasonable confidence the age and status of criminal cases. Since North Carolina already has published time standards, one approach might be to assess how courts currently stack up against the existing standards before deciding what direction to take with regards to a revised set of standards.

As stated earlier, the court must have confidence that data is reliable before it engages in a process to adopt, implement and monitor compliance with time standards. The Judicial Branch must first make sure that all districts consistently use a definition of a case established by the AOC. This will require leadership and oversight by the Chief Justice, a revived Judicial Council, the Senior Resident Superior Court Judges, and the Chief District Court Judges.

In terms of general performance measures, the NCSC's *CourTools* are a good starting point for developing quality performance measures. The measurement process and recommended instruments in *CourTools* are based on a self-administered format with instructions and suggested report forms. The AOC's Court Performance Management System has already implemented a web-based system that provides information on the following three of *CourTools*' ten performance measures:

- Case clearance rate.
- On-time processing (percent disposed within 1996 time guidelines).
- Aging case index (cases pending over time guidelines).

As noted in the next section, data is gathered in the AOC's criminal automated system and can be searched by case type, county, or district. Additional statistical data, such as the disposition rate for superior court criminal cases by county in the past 12 months, and district court backlogs are also available.

The measures found in the NCSC's *CourTools* suite are by no means exclusive. The Judicial Council (or other body) and the AOC could also adopt other measures that have been developed as part of the original Trial Court Performance Standards or develop in-house measures and standards to meet local needs. These could include measuring some of the cost-related factors mentioned in this report such as juror utilization and jail and prisoner transport costs. Appendix F provides an extensive listing of criminal caseflow benchmarks and indicators.

The AOC and a revived Judicial Council (or a new multi-disciplinary body) should review the data and information needs identified in this report and develop new measures to capture and analyze the effectiveness of scheduling practices in resolving cases within established time standards.

### **Collect Information on Current Practices and Conditions**

It may be that some North Carolina districts are substantially better than others when it comes to timely resolution. Interviews with stakeholders (i.e. those in Mecklenburg and Wake County) in connection with this report revealed that judges, prosecutors, and defense attorneys are already involved in innovative and successful approaches to managing criminal cases that may be appropriate for wider application. Identifying and sharing best practices, including the circumstances under which they appear to be most effective, is an essential step in implementing a plan. For example, as part of its caseflow management improvement effort, the North Dakota Court Administrator's Office surveyed judges and district administrators regarding successful practices that are already in place and shared this information on a special project web site.

In addition to looking at best practices within the state, lessons also can be learned from other jurisdictions. From 2011 through 2014, the NCSC conducted over 20 training and technical assistance projects across the country funded by the Bureau of Justice Assistance (BJA). One project specifically targeted felony caseflow management, and the NCSC worked with courts to identify and resolve felony caseflow issues. The results of successful caseflow management practices and strategies documented during the project are summarized in Appendix E.

The Supreme Court and the AOC should consider requesting technical assistance from the NCSC or another court organization to help North Carolina develop and implement a caseflow management plan. State Justice Institute funds may be available to help reduce the cost to North Carolina's budget.

### **Identify Additional Information Needs**

As discussed above, accurate and timely information is essential to both the management of individual cases and overall policy. The AOC's current information systems supporting record keeping, calendaring and financial management appear to have been developed incrementally and are falling short of user expectations and needs. The AOC is currently engaged in a "gap analysis" to assess current and future automation capabilities. Future opportunities to capture and utilize performance-related information should be included in this analysis.

Realizing that an overhaul of judicial branch information systems is a long-term project, for the time being efforts should focus on getting the best data possible from the current systems. This includes improving the consistency of data entry across jurisdictions by establishing clear definitions for "cases" and disposition types (i.e. dismissed by DA, dismissed by court, guilty or not guilty by bench or jury trial,

plea to the original charge or to an amended charge). This will enable courts to count case settings, hearing types, continuances and reasons for the continuances, and to capture and report on the age and detainee status of pending cases.

Plans are already underway to improve performance measure reporting. As noted on the AOC web site, the current version is scaled-down to introduce the system to court officials, and with their input, improvements will be implemented. Some of the enhancements under consideration include:<sup>31</sup>

- Counting criminal cases with the defendant (or incident) as the unit of measure, rather than each charge (there can be many related charges against the same defendants in different cases, and now these related cases are counted as several cases, instead of just one).
- Aging criminal cases in superior court from the time of original arrest or service of process rather than the time of transfer to superior court.
- Including workload measures for cases in post-disposition status, especially criminal “motions for appropriate relief” and probation violation proceedings, as post-conviction activity comprises a considerable workload for court officials.
- Expanding the display of statistical data (numbers of cases) and eventually eliminating the printing and distribution of paper “management” reports (data on manners of disposition is the principal type of statistical data not yet in the CPMS, but that data is currently in printed reports).
- Removing cases from pending status in appropriate circumstances, such as when a deferred prosecution is being given a chance to work. This will not allow these cases, which can become “old” for good reason, to inappropriately skew or increase overall aging data.
- Adding measures that have already been approved by the judicial branch, but for which automated systems must be enhanced; including the number of times a case is calendared before being tried, as well as the total amount of restitution recovered for victims compared to the amount ordered.
- Breaking down the existing case categories into more specific case types.

These improvements, along with capturing additional data identified in this report, will resolve many of the current issues with data reliability that impact performance measurement and expand into the area of post-judgment performance management.

### **Establish and Evaluate Pilot Projects**

Pilot projects allow courts to test new policies and procedures before engaging in a major change effort. They allow policy makers to try various options, identify costs and benefits, and determine obstacles to implementation. Pilots can serve as a testing ground to evaluate efficiency and effectiveness, and can be applied on a broader basis if proven to be successful. An essential element of implementing change is obtaining support and consensus about both the need for improvement and the solutions that will be effective.

Pilot projects help in the early stages of reform by providing visible examples of how new methods of work can be effective and beneficial. In some cases, courts may need to be granted temporary authorization to implement procedures that are not currently specified by law. For example, in the mid-1990s the Michigan Supreme Court authorized the cross assignment of judges to temporarily create pilot projects to test the impact of court unification. The results of this effort eventually lead to legislation that allowed local consolidation plans.

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<sup>31</sup> Source: <http://www1.aoc.state.nc.us/cpms/pages/help/FuturePlans.jsp> Accessed June 11, 2016.

The IDS report<sup>32</sup> on scheduling noted that there was considerable interest among survey respondents in pilot testing a new district court scheduling system. Given the close relationship of this study to caseflow management in general, there is likely similar interest in establishing pilot projects for caseflow management. In addition, the AOC has relied in the past on the pilot approach to roll out changes to technology and is therefore in a good position to manage this process.

Many of the individuals interviewed for this report emphasized that “one size doesn’t fit” all jurisdictions and accordingly, any effort to implement a statewide program should take this into account. This is where careful thought as to the selection of pilot projects and assessment of existing best practices is needed.

## **Review/Modify Existing Court Rules, Statutes, and Procedures**

Improving case management often requires a re-assessment of existing court rules and statutes. Typically, recommendations for changes will follow an assessment of pilot projects or other means of identifying where existing language either impedes case management or where additional language would provide better clarity or authority. In addition, some changes may be called for in existing work flows and procedures. Often, efforts to improve case management will identify procedural bottlenecks or problems with forms that can be easily remedied. As the AOC considers the development or purchase of next generation case management software, opportunities may exist to improve the efficiency of case processing through functionality that allows better monitoring and management of case events.

## **Develop Caseflow Management Planning Templates and Resources**

One tool that has been successful in many courts is a local caseflow management plan. A good example of a comprehensive plan is Mecklenburg County’s plan, which was developed by a careful analysis of caseflow management data and implemented through a series of stakeholder reviews.<sup>33</sup> Caseflow management plans are most effective when they are developed with input from the individuals and agencies impacted by the plan, such as prosecutors, the defense bar, law enforcement, and corrections officials.

While the court should take the lead in developing the plan, it should be done in a collaborative environment. Plans should also be periodically reviewed, particularly when significant changes in court rules or statutes that impact case processing occur or there are changes in organizational leadership. A benefit of this process, which should be an ongoing effort, is that in many jurisdictions this will be the first time that all criminal justice system actors have come together to focus on improving the judicial process.

Plans are often adopted as local administrative orders. To achieve greater consistency across the state, the North Carolina Supreme Court should ask the AOC to create plan templates for courts to follow. A template may specify elements that should be contained in every plan, while allowing flexibility for each court to develop language that meets local needs. The following are examples of elements found in criminal caseflow plans across the country:

- Case assignment and scheduling.

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<sup>32</sup> Office of Indigent Defense Services (2009). District Court Scheduling Survey Report. Durham, NC.

<sup>33</sup> <http://www.nccourts.org/Courts/CRS/Policies/LocalRules/Documents/1168.pdf>.

- Continuance policies.
- Status or scheduling conferences.
- Motions practices.
- Discovery.
- Diversion.
- Probation violations.
- Time standards.
- Meetings and consultations.

A number of plans from other states are available from the NCSC.

## **Finalize Reporting and Information Requirements**

Any changes or enhancements to reports and other information should be tested before being finalized. In many cases, an unintended consequence of paying greater attention to case reports is the discovery of problems with data quality. The problems most frequently encountered in electronic case management systems are due to clerical errors, such as incorrect date or event entry and failure to close out cases. These kinds of problems typically cause inaccurate case age and disposition counts. Audits and other checks should be performed by the clerk or court to identify errors that impact the reliability of reports.

Decisions regarding who should receive reports, and how often, will need to be made. Caseflow management reports generally fall into one of two broad categories, aggregate and other reports. Aggregate reports provide information on overall trends and conditions, such as clearance rate, time to disposition, and pending inventories statewide and by district. Other reports are designed for the management of individual cases, such as listings of pending cases and cases over time guidelines. Again, the future case management system should be designed with caseflow management information and reporting needs in mind.

Additionally, thought should be given to how performance reports will be monitored and whether any follow up will be conducted to assist jurisdictions where potential problems are indicated. This could be the function of the Senior Resident Judges, the Chief Judges, the AOC and the District Attorney's Office.

## **Provide Training and Technical Assistance**

To ensure consistent adoption of new policies and approaches, education and technical assistance can improve the sustainability of a statewide effort. The AOC Court Services division currently provides assistance to courts around the state, primarily trouble-shooting and training on current applications. With additional qualified staff resources, this office could perform several functions as part of a statewide roll out, including monitoring pilot projects, offering technical assistance, providing resources, and collection and follow-up of performance reports.

There are a number of resources and tools available to help individual courts assess current caseflow management effectiveness, which are available from the Bureau of Justice Assistance and NCSC:

- *Conducting a Felony Caseflow Management Review – A Guide*  
[https://www.bja.gov/Publications/AU\\_FelonyCaseflow.pdf](https://www.bja.gov/Publications/AU_FelonyCaseflow.pdf)
- *How to Conduct a Caseflow Management Review*  
<http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/5>

- *Caseflow Management Maturity Matrix and Questionnaire*  
<http://ncsc.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/2127>
- *Improving Caseflow Management: A Brief Guide*  
<http://cdm16501.contentdm.oclc.org/cdm/ref/collection/ctadmin/id/1022>

In addition, the NCSC has over twenty presentations and technical assistance reports created as a result of a three-year BJA funded project to improve felony caseflow management. Appendix G includes two examples of training program agendas from the project. One of those programs in Cuyahoga County, Ohio, included a broad range of local criminal justice professionals, such as prosecutors, defense counsel, judges and court clerks. The second program in Williamsburg, Virginia, focused on judges and court administrative staff and was designed to help participants develop a caseflow management action plan for their jurisdictions.

Feedback and technical assistance efforts in other states are often tied to regular caseflow management reports provided to the courts and monitored by the administrative office of courts. Trial court services divisions and/or regional administrative offices in many states provide direct technical assistance to courts in this area. The North Carolina AOC would need to assess whether this is a function that could be within the scope of Court Services' responsibilities. Additionally, as the primary training provider for the judiciary, the University of North Carolina School of Government may be engaged to incorporate caseflow management topics in training agendas for the judiciary.

## **Sustained Support through Leadership and Collaboration**

It has been argued that successful reforms are 90% leadership and 10% management. Research and practical experience with caseflow management efforts, both at the state and local levels, is most successful when there is clear and sustained support from leadership. This includes a high-level endorsement by the Supreme Court as well as leadership and collaboration between prosecutors, local judges, and the defense bar.

## **Key Participants**

Direction from judiciary leadership and participation by stakeholder representatives is essential throughout a project of this nature. North Carolina's unique combination of prosecutorial, judicial, and public defense services under one roof should facilitate overall coordination. The following major tasks are associated with a state-wide implementation along with key participants, based on NCSC's experience in other jurisdictions:

## **Project Oversight**

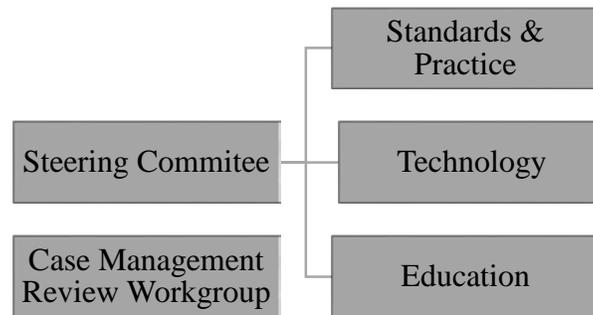
The Supreme Court should assign responsibility to the Judicial Council (or create a new steering committee or similar body) charged with the responsibility of overall project strategy and direction. The committee should be composed of high-level representatives from judicial branch agencies or organizations and the criminal justice community. For example:

- Supreme Court Justice or designee
- Director of the Administrative Office of the Courts or designee
- Trial Court Administrator

- Superior Court Judge
- District Court Judge
- Clerk of Court
- Prosecutor
- Public Defender
- Criminal defense bar
- Law enforcement officials

The committee may establish various working groups to address specific issues such as rule and statutory revisions, technology, communication and education. Participants in working groups will depend on the subject matter, and typically will include individuals with specific expertise or experience. Working groups will be involved in developing specific recommendations and action steps for approval by the steering committee.

As an example, the following is the organizational structure of an effort currently underway in the state of North Dakota to revise the current time guidelines and implement best practices in caseflow management. In this case, the project steering committee has appointed a primary workgroup to manage three topical sub-groups which are responsible for most of the work. The workgroup is responsible for managing project communications and has set up a website for this purpose. North Dakota's effort does not include pilot projects, although courts throughout the state have been asked for their input regarding best practices.



## Project Management

An individual or office should be designated to act as project manager for the effort and should report directly to the steering committee. This position will work closely with the working groups, monitor pilot sites, manage the project budget, and provide general administrative support throughout the project. Typically, a staff person or unit from the administrative office of courts, such as a court services division, is designated for this purpose.

## Evaluation

If a pilot project approach is taken, it is particularly important to have resources available for ongoing monitoring and evaluation. This is a function that could be managed by AOC staff along with the assistance of the University of North Carolina School of Government or similar external organization with research and evaluation experience. AOC technical staff will also need to be closely engaged with the evaluation of the pilot project.

## Education and Training

The sustainability of this effort will be greatly enhanced by establishing a communication strategy throughout the project to educate the criminal justice community about the goals and intended outcomes. This also includes the development of caseflow management training resources for inclusion in programs for judges, clerks, prosecutors and defense counsel.

## Suggested Timeline

The following is a *hypothetical* timeline for implementation of a statewide plan utilizing a pilot project approach to identify best practices over a two-year period:

ACTIVITY	Year 1				Year 2			
Adopt or modify time standards/performance measures								
Collect information on current practices and conditions								
Identify additional information needs								
Establish and evaluate pilot projects								
Review/modify existing court rules, statutes, and procedures								
Develop caseflow management planning templates and resources								
Finalize reporting and information requirements								
Provide training and technical assistance (ongoing)								
Revise time standards (as needed)								

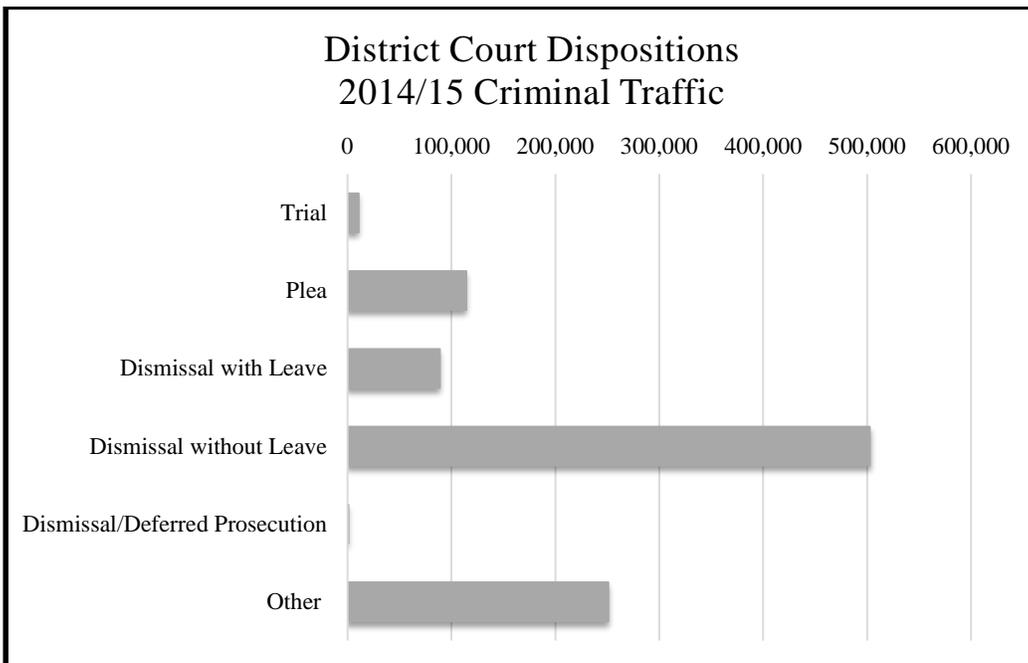
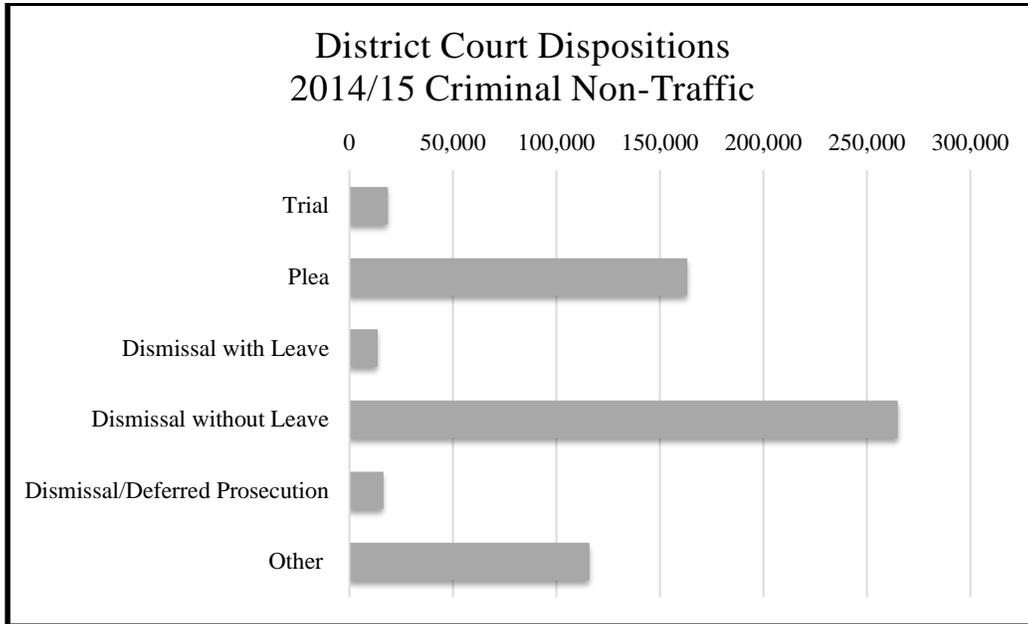
This timeline assumes the creation of pilot projects early in the effort and that changes to rules, statutes and procedures will be identified as a result of the lessons learned in the pilots. As the pilots wind down and receive a final evaluation after a year in operation, specific resource and informational needs can be finalized. This schedule includes an ongoing communication effort during the course of the project, along with the development of education and training materials that will become a standard part of the training curricula.

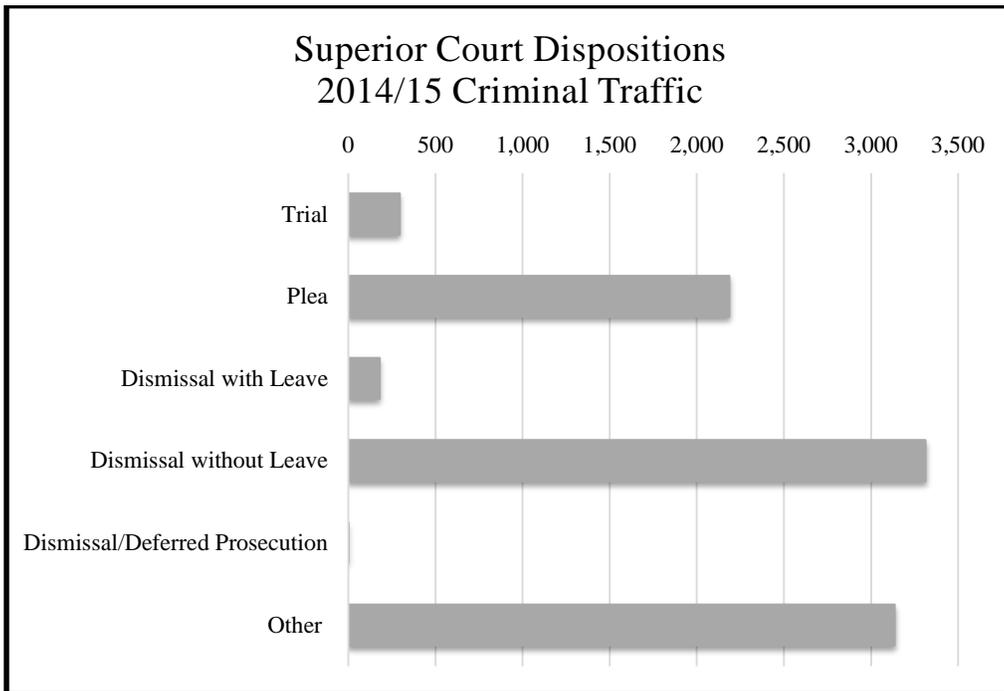
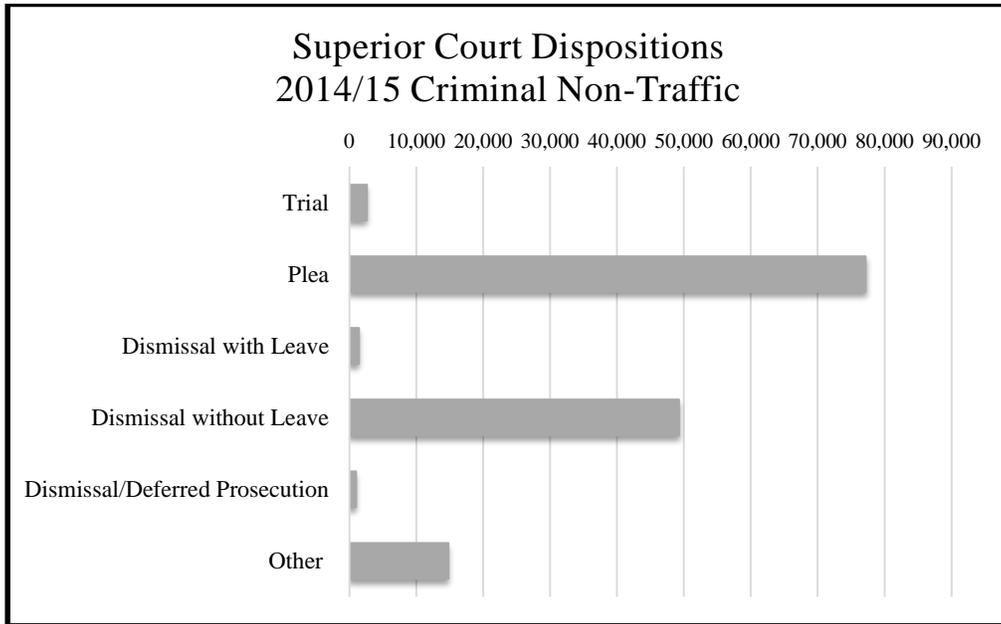
The actual timeline for deployment of a major caseflow management initiative will depend on a number of factors, including whether pilot projects are established before major changes are implemented, the time required to secure enabling legislation or changes to court rules, and the availability of additional staff resources to support the effort.

# Appendices

## Appendix A – Criminal Dispositions by Type

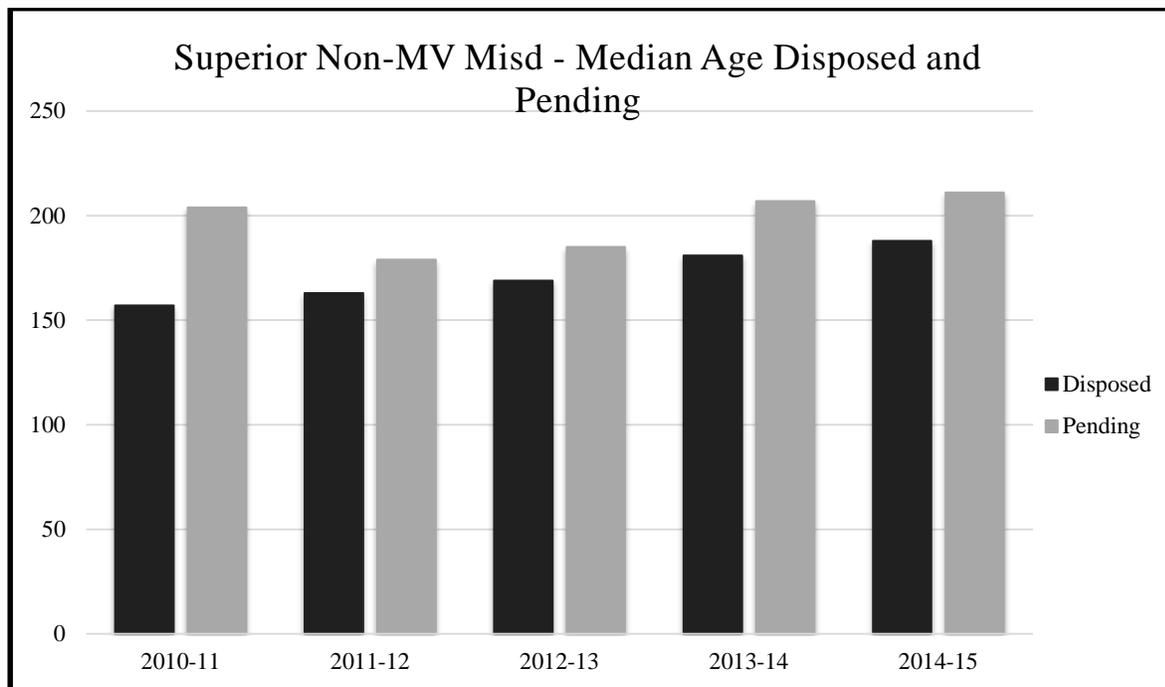
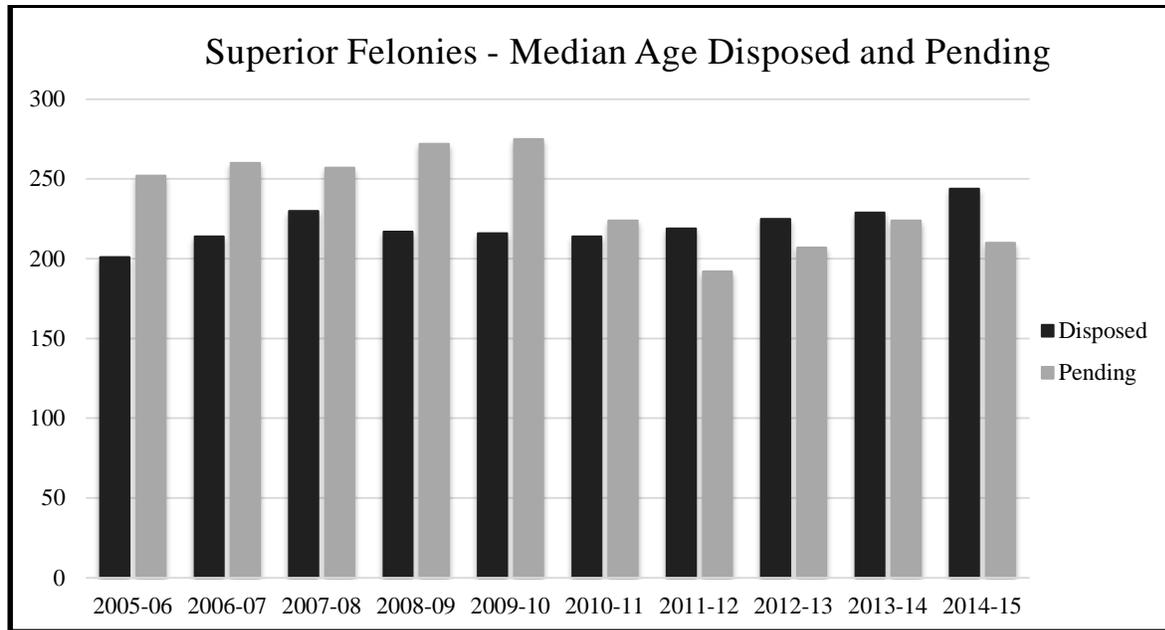
(Source: North Carolina Judicial Branch 2014-15 Statistical and Operational Report)

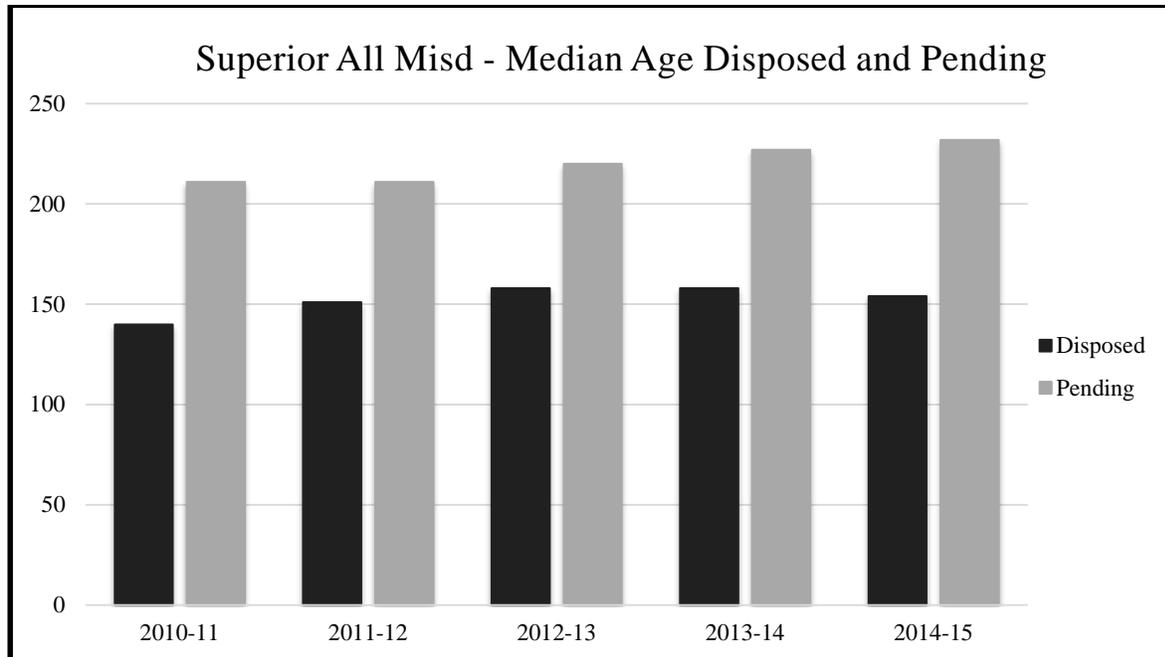
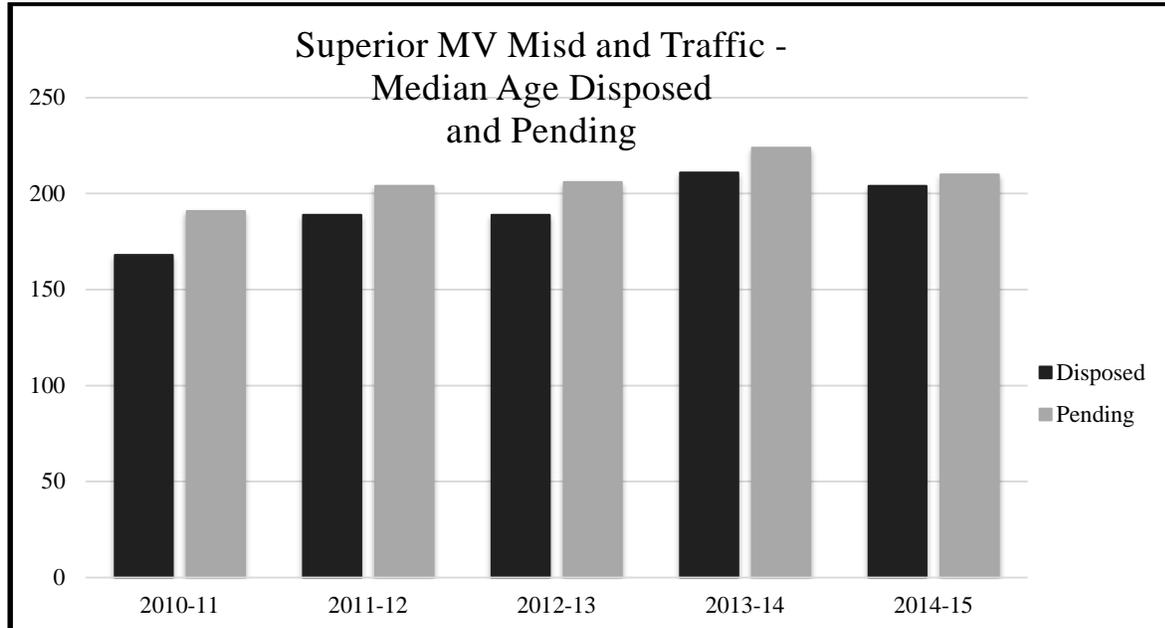




## Appendix B – Disposed and Pending Case Age

Provided by the North Carolina Administrative Office of Courts

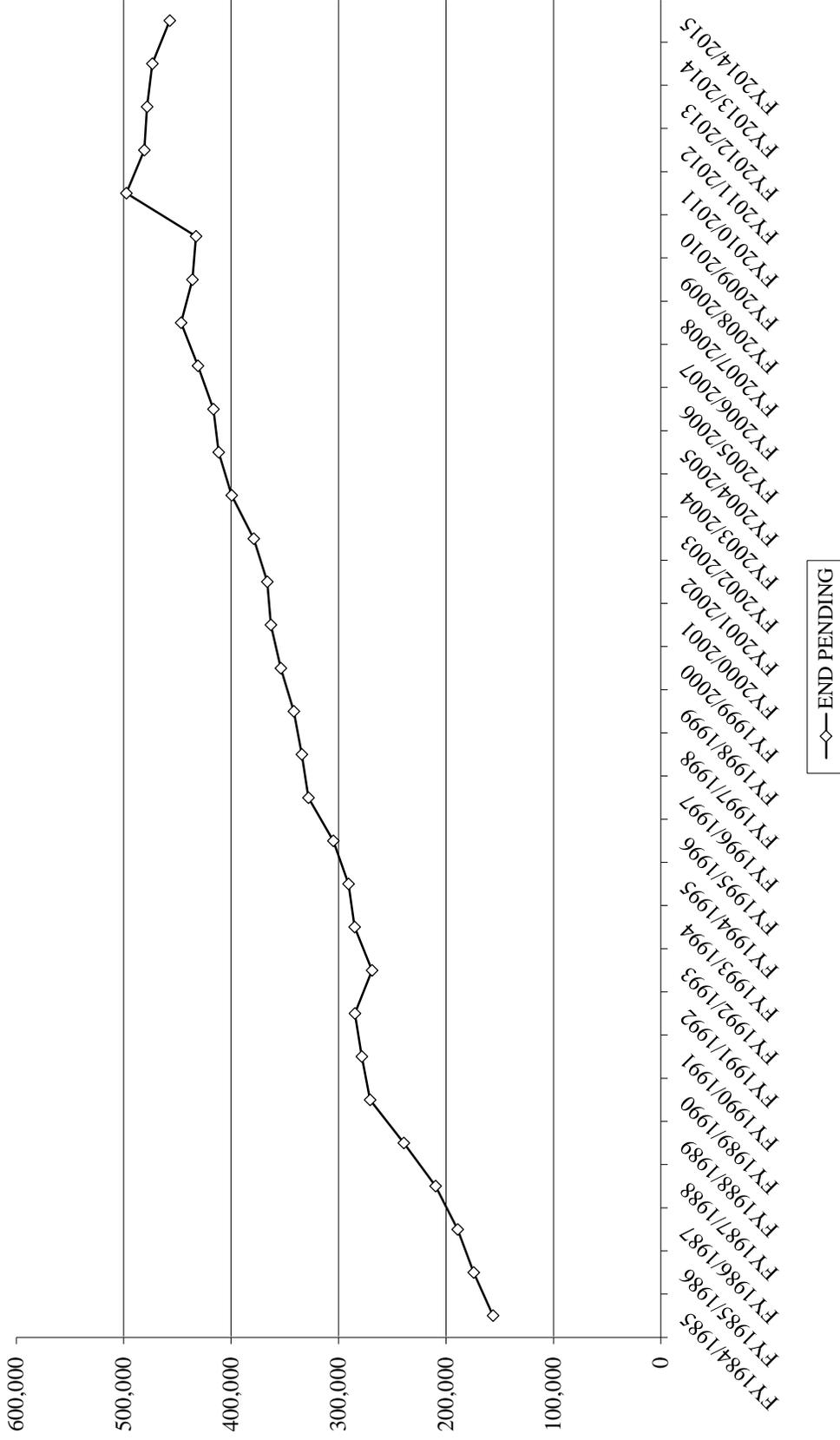




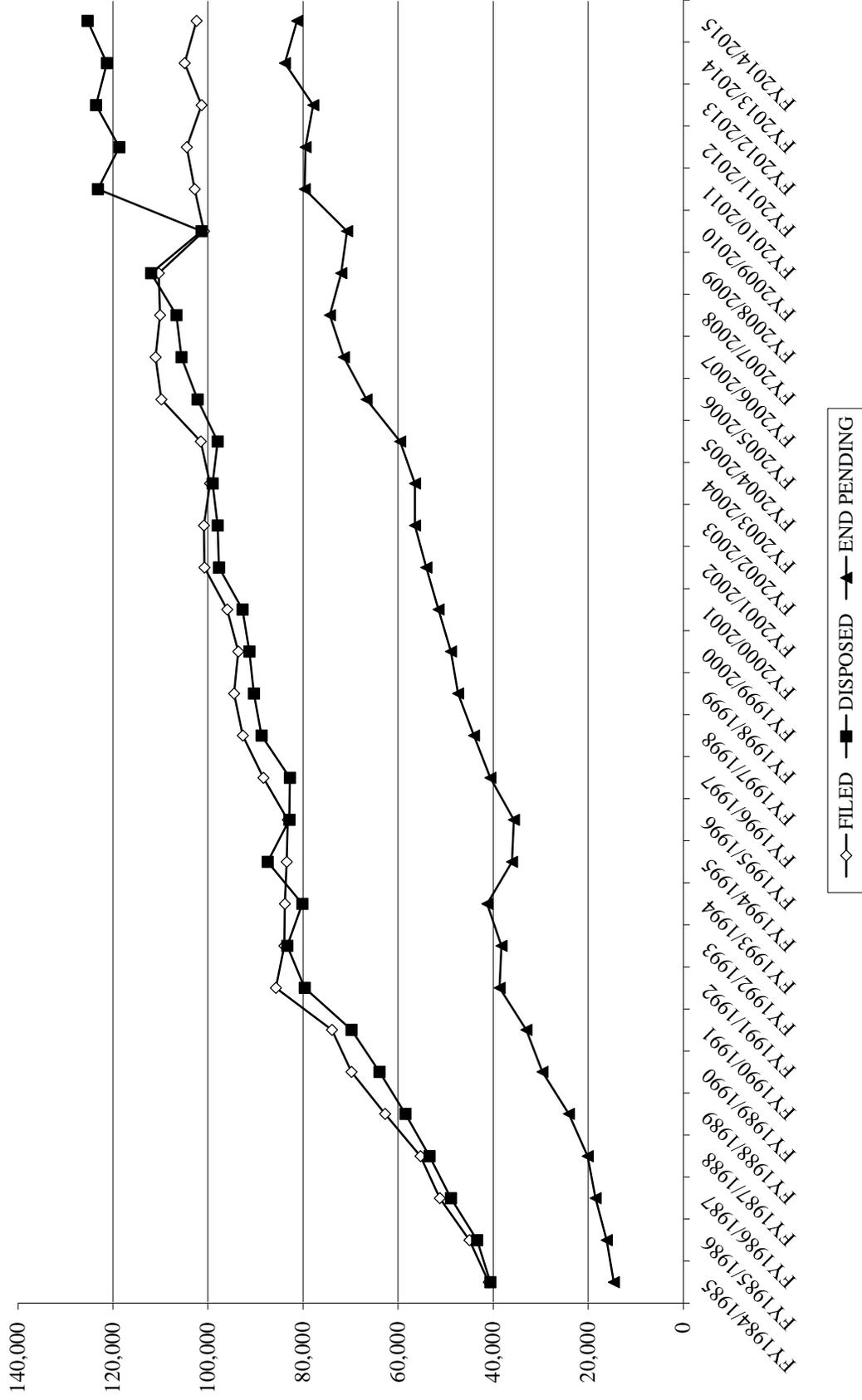
## Appendix C – Criminal Filing Trends 1984-2014

(Source: North Carolina Administrative Office of Courts, derived from Court Statistics section of the Judicial Branch website)

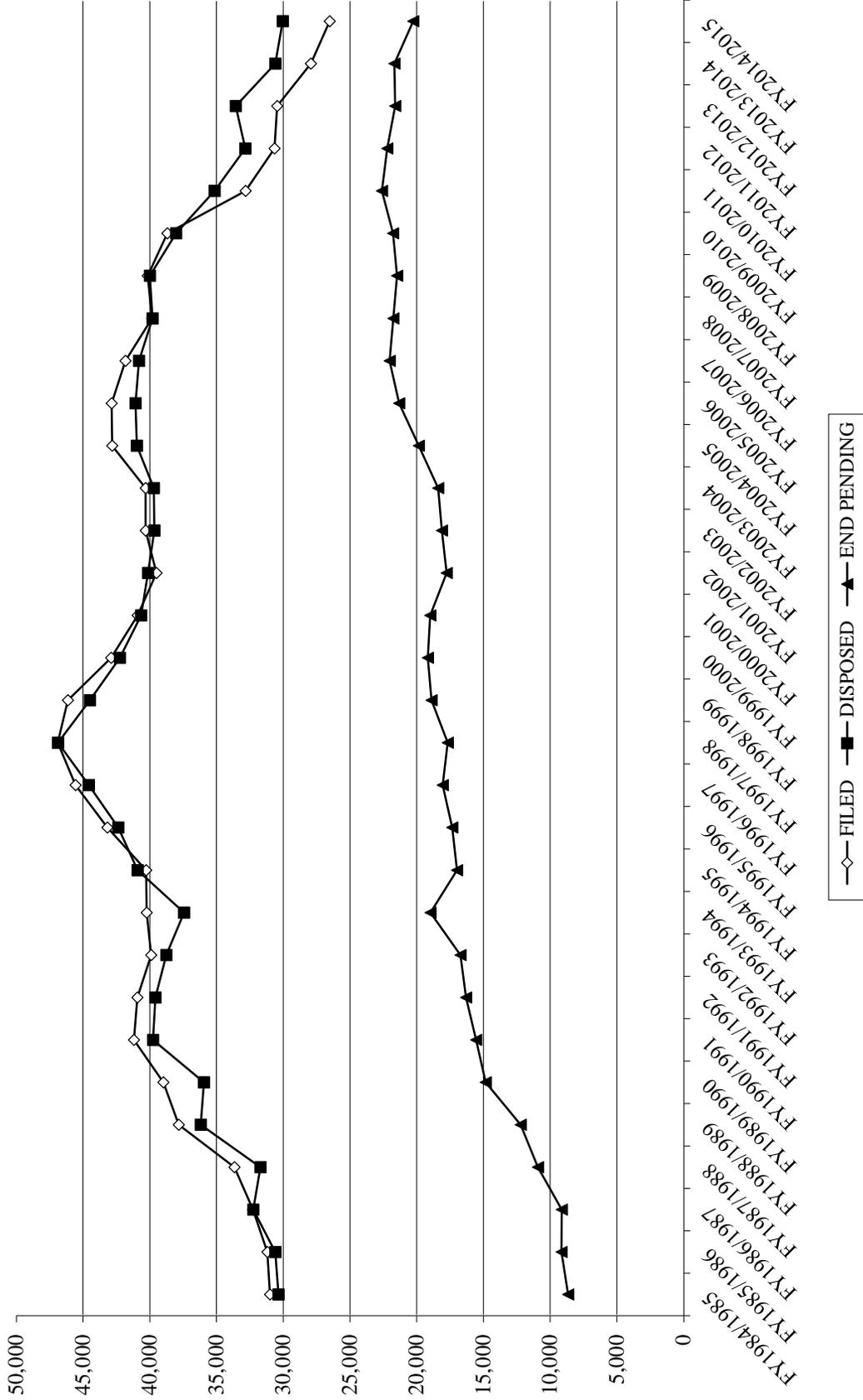
### Statewide End Pending (CVS, CRS, CVD, CR-NMV only)



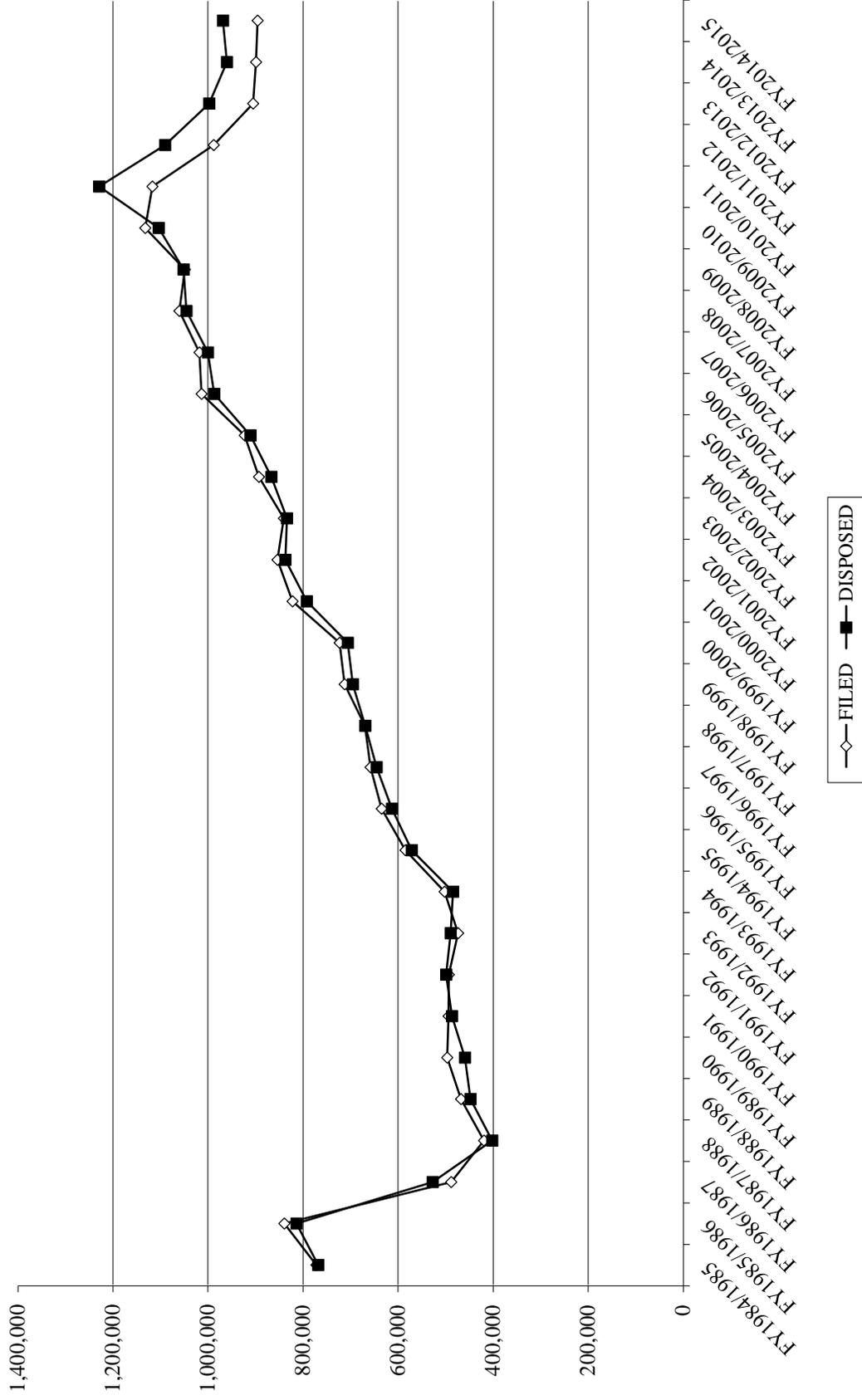
### Statewide Superior Felony Cases



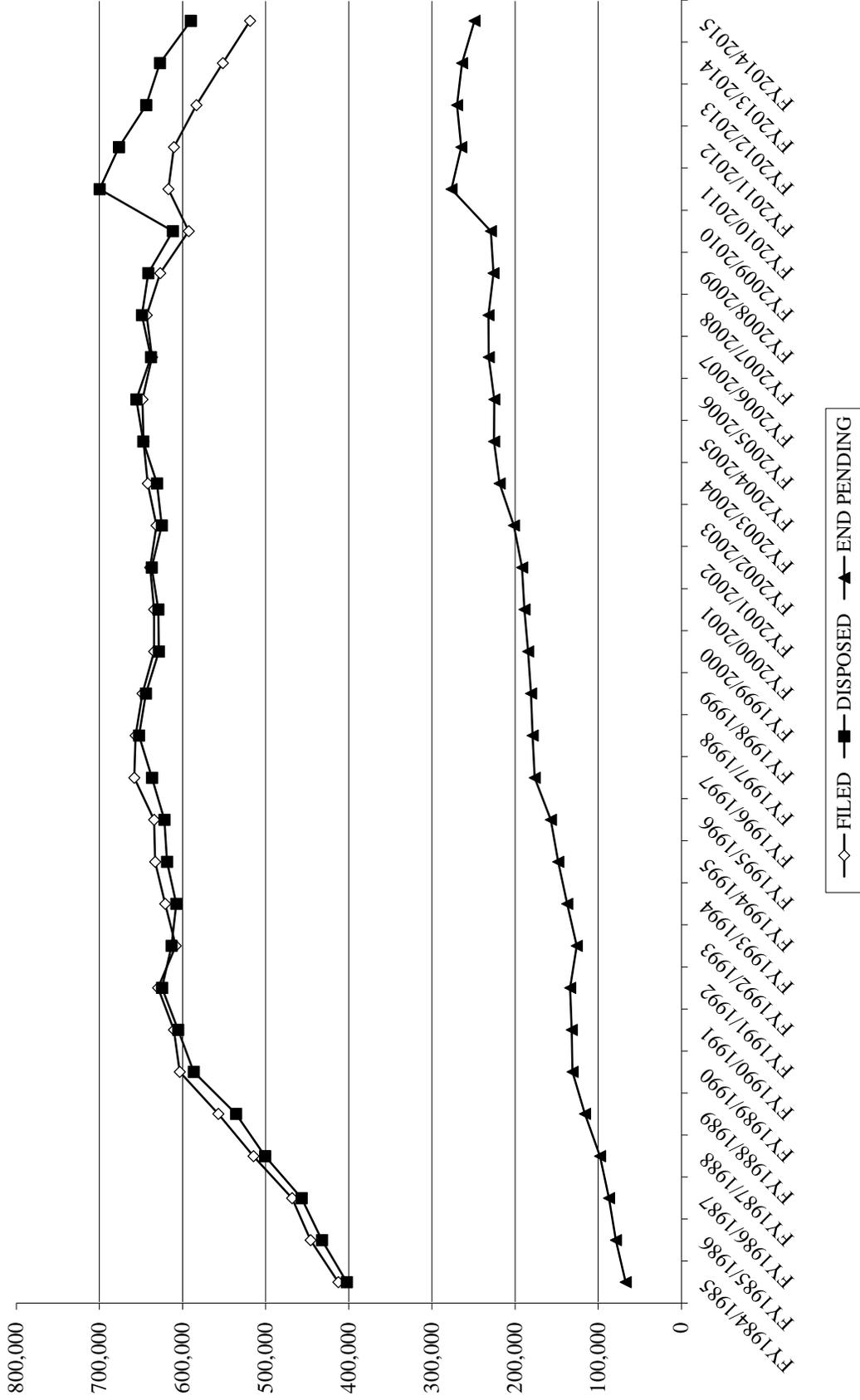
Statewide Superior Misdemeanor Cases



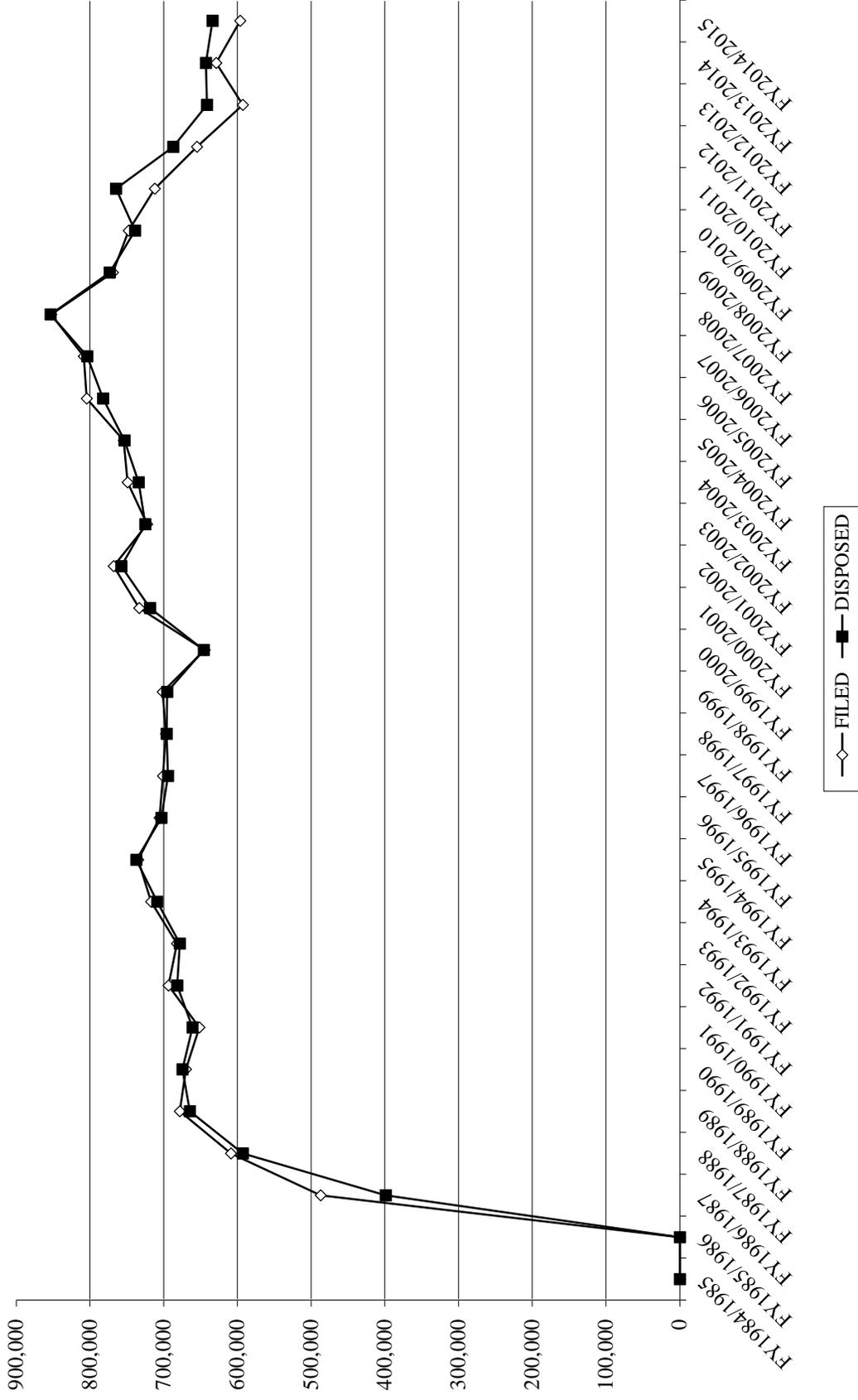
### Statewide District Criminal Motor Vehicle Cases



### Statewide District Criminal Non-Motor Vehicle



### Statewide District Infractions Cases



## Appendix D - Pending & Disposed Case Age Detail, Last Two Years

(Source: North Carolina Administrative Office of Courts)

Criminal Superior Felony Cases by Prosecutorial District

July 1, 2013 - June 30, 2014

Sorted by Pending Median Age - Fewest Days to Most Days Pending

Prosecutorial District	Counties in District	Filed	Disposed	End Pending (as of 6/30/14)	Pending Median Age (days)
<b>Statewide</b>	<b>Statewide</b>	<b>104,942</b>	<b>121,306</b>	<b>83,814</b>	<b>224</b>
15B	Chatham, Orange	971	1,123	553	129
7	Edgecombe, Nash, Wilson	3,761	4,247	2,479	139
4	Duplin, Jones, Onslow, Sampson	3,321	3,954	1,869	140
23	Alleghany, Ashe, Wilkes, Yadkin	1,256	1,686	700	145
03A	Pitt	2,663	3,134	1,765	153
21	Forsyth	1,332	1,493	812	153
14	Durham	2,598	2,998	1,587	158
22B	Davidson, Davie	2,066	2,354	1,452	166
26	Mecklenburg	9,921	11,789	6,908	168
12	Cumberland	4,099	5,126	2,899	174
15A	Alamance	1,789	2,066	1,050	174
17B	Stokes, Surry	1,858	1,850	1,436	194
27A	Gaston	3,170	4,078	1,687	196
09A	Caswell, Person	1,727	1,380	1,594	202
16A	Hoke, Scotland	1,108	1,236	921	202
17A	Rockingham	1,036	1,171	754	202
18	Guilford	9,741	10,017	7,283	202
19D	Moore	1,140	1,362	817	202
11A	Harnett, Lee	1,246	1,297	1,082	209

**Criminal Superior Felony Cases by Prosecutorial District  
 July 1, 2013 - June 30, 2014**

**Continued: Sorted by Pending Median Age - Fewest Days to Most Days Pending**

Prosecutorial District	Counties in District	Filed	Disposed	End Pending (as of 6/30/14)	Pending Median Age (days)
28	Buncombe	2,078	3,094	1,211	210
13	Bladen, Brunswick, Columbus	3,834	3,849	3,207	224
19A	Cabarrus	1,735	1,834	1,458	224
30	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain	1,892	1,917	1,457	224
20B	Union	1,896	2,686	1,397	235
03B	Carteret, Craven, Pamlico	2,702	3,141	2,073	236
20A	Anson, Richmond, Stanly	2,124	3,017	1,617	236
24	Avery, Madison, Mitchell, Watauga, Yancey	1,256	1,529	1,062	238
1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	1,790	2,017	1,962	241
8	Greene, Lenoir, Wayne	1,664	2,110	854	243
5	New Hanover, Pender	2,729	2,625	2,471	244
9	Franklin, Granville, Vance, Warren	2,496	2,595	2,387	244
10	Wake	4,453	5,298	3,120	244
11B	Johnston	869	1,081	544	257
29B	Henderson, Polk, Transylvania	1,174	941	1,064	270
19B	Montgomery, Randolph	1,826	2,003	2,300	273
2	Beaufort, Hyde, Martin, Tyrrell, Washington	1,722	2,149	1,921	279
25	Burke, Caldwell, Catawba	3,110	3,646	3,912	293
27B	Cleveland, Lincoln	3,070	3,778	3,335	293
29A	McDowell, Rutherford	1,171	1,435	1,112	311
22A	Alexander, Iredell	1,745	2,161	2,085	356
06A	Halifax	1,093	1,213	1,115	363
06B	Bertie, Hertford, Northampton	859	974	1,295	371
16B	Robeson	1,558	2,096	1,921	389
19C	Rowan	1,293	1,756	1,286	455

**Criminal Superior Felony Cases by Prosecutorial District  
 July 1, 2013 - June 30, 2014  
 Sorted by Disposed Median Age - Fewest Days to Most Days Pending**

Prosecutorial District	Counties in District	Filed	Disposed	End Pending (as of 6/30/14)	Pending Median Age (days)	Disposed Median Age (days)
Statewide	Statewide	104,942	121,306	83,814	224	229
8	Greene, Lenoir, Wayne	1,664	2,110	854	243	145
15B	Chatham, Orange	971	1,123	553	129	158
4	Duplin, Jones, Onslow, Sampson	3,321	3,954	1,869	140	163
21	Forsyth	1,332	1,493	812	153	165
23	Alleghany, Ashe, Wilkes, Yadkin	1,256	1,686	700	145	169
15A	Alamance	1,789	2,066	1,050	174	173
14	Durham	2,598	2,998	1,587	158	176
27A	Gaston	3,170	4,078	1,687	196	176
17B	Stokes, Surry	1,858	1,850	1,436	194	178
10	Wake	4,453	5,298	3,120	244	182
5	New Hanover, Pender	2,729	2,625	2,471	244	196
17A	Rockingham	1,036	1,171	754	202	197
18	Guilford	9,741	10,017	7,283	202	197

**Criminal Superior Felony Cases by Prosecutorial District  
 July 1, 2013 - June 30, 2014  
 Sorted by Pending Median Age - Fewest Days to Most Days Pending**

Prosecutorial District	Counties in District	Filed	Disposed	Ending Pending (as of 6/30/14)	Pending Median Age (days)	Pending Median Age (days)
11B	Johnston	869	1,081	544	257	198
28	Buncombe	2,078	3,094	1,211	210	203
03A	Pitt	2,663	3,134	1,765	153	205
29B	Henderson, Polk, Transylvania	1,174	941	1,064	270	207
11A	Harnett, Lee	1,246	1,297	1,082	209	209
22B	Davidson, Davie	2,066	2,354	1,452	166	212
26	Mecklenburg	9,921	11,789	6,908	168	213
30	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain	1,892	1,917	1,457	224	213
03B	Carteret, Craven, Pamlico	2,702	3,141	2,073	236	215
7	Edgecombe, Nash, Wilson	3,761	4,247	2,479	139	217
9	Franklin, Granville, Vance, Warren	2,496	2,595	2,387	244	217
06A	Halifax	1,093	1,213	1,115	363	225
16A	Hoke, Scotland	1,108	1,236	921	202	230
24	Avery, Madison, Mitchell, Watauga, Yancey	1,256	1,529	1,062	238	231
29A	McDowell, Rutherford	1,171	1,435	1,112	311	231
12	Cumberland	4,099	5,126	2,899	174	244
27B	Cleveland, Lincoln	3,070	3,778	3,335	293	258
19D	Moore	1,140	1,362	817	202	260
19C	Rowan	1,293	1,756	1,286	455	268
19A	Cabarrus	1,735	1,834	1,458	224	269
13	Bladen, Brunswick, Columbus	3,834	3,849	3,207	224	273

20B	Union	1,896	2,686	1,397	235	279
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**Criminal Superior Felony Cases by Prosecutorial District  
 July 1, 2013 - June 30, 2014**

**Continued: Sorted by Pending Median Age - Fewest Days to Most Days Pending**

Prosecutorial District	Counties in District	Filed	Disposed	End Pending (as of 6/30/14)	Pending Median Age (days)	Pending Median Age (days)
20A	Anson, Richmond, Stanly	2,124	3,017	1,617	236	280
22A	Alexander, Iredell	1,745	2,161	2,085	356	331
25	Burke, Caldwell, Catawba	3,110	3,646	3,912	293	345
09A	Caswell, Person	1,727	1,380	1,594	202	350
2	Beaufort, Hyde, Martin, Tyrrell, Washington	1,722	2,149	1,921	279	352
1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	1,790	2,017	1,962	241	361
19B	Montgomery, Randolph	1,826	2,003	2,300	273	375
06B	Bertie, Hertford, Northampton	859	974	1,295	371	398
16B	Robeson	1,558	2,096	1,921	389	419

Criminal Superior Felony Cases by Prosecutorial District  
 July 1, 2014 - June 30, 2015

Sorted by Pending Median Age - Fewest Days to Most Days Pending

Prosecutorial District	Counties in District	Filed	Disposed	End Pending (as of 6/30/15)	Pending Median Age (days)	Disposed Median Age (days)
Statewide	Statewide	102,443	125,357	81,274	210	244
04	Duplin, Jones, Onslow, Sampson	3,935	4,506	2,159	76	149
23	Alleghany, Ashe, Wilkes, Yadkin	1,486	1,846	634	113	131
28	Buncombe	2,496	2,569	1,752	119	197
03A	Pitt	2,773	3,749	1,541	126	175
12	Cumberland	4,008	5,039	2,729	139	217
07	Edgecombe, Nash, Wilson	3,914	5,078	2,216	140	197
17A	Rockingham	1,213	1,356	870	140	233
08	Greene, Lenoir, Wayne	1,876	2,097	1,121	144	171
27A	Gaston	3,128	3,840	1,721	148	169
05	New Hanover, Pender	2,962	3,459	2,317	154	218
10	Wake	4,362	5,415	2,737	154	195
11B	Johnston	911	1,136	442	160	169
03B	Carteret, Craven, Pamlico	2,912	4,007	1,687	161	229
26	Mecklenburg	9,968	10,616	7,318	169	211
20A	Stanly	743	954	611	175	320
15B	Chatham, Orange	917	1,204	510	181	197
14	Durham	2,419	2,877	1,671	183	202
20B	Union	1,859	2,423	1,350	201	265
09A	Caswell, Person	2,051	2,207	1,736	203	279
21	Forsyth	1,488	1,629	870	210	126
22B	Davidson, Davie	1,683	2,432	1,311	210	279
29A	McDowell, Rutherford	1,200	1,504	1,111	216	317

25	Burke, Caldwell, Catawba	3,440	4,432	3,651	223	366
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**Criminal Superior Felony Cases by Prosecutorial District**

July 1, 2014 - June 30, 2015

Continued: Sorted by Pending Median Age - Fewest Days to Most Days Pending

Prosecutorial District	Counties in District	Filed	Disposed	End Pending (as of 6/30/15)	Pending Median Age (days)	Disposed Median Age (days)
29B	Henderson, Polk, Transylvania	1,115	1,283	1,075	229	337
11A	Harnett, Lee	1,356	1,443	1,214	230	280
16C	Anson, Richmond	1,238	1,622	851	232	269
09	Franklin, Granville, Vance, Warren	2,830	3,495	2,184	235	250
18	Guilford	7,676	9,740	6,236	236	245
13	Bladen, Brunswick, Columbus	3,212	3,816	3,268	238	286
15A	Alamance	1,527	2,123	877	245	178
16A	Hoke, Scotland	835	1,352	672	245	245
27B	Cleveland, Lincoln	3,306	3,401	3,848	271	321
22A	Alexander, Iredell	1,958	2,438	2,054	272	426
01	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	2,034	2,369	2,078	273	336
19A	Cabarrus	1,478	2,167	1,164	273	269
02	Beaufort, Hyde, Martin, Tyrrell, Washington	1,583	2,165	1,746	286	402
19B	Montgomery, Randolph	1,705	2,041	2,343	291	434
19D	Moore	1,108	1,160	907	294	254
17B	Stokes, Surry	1,397	1,688	1,337	299	211
30	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain	1,312	1,877	1,209	315	262
24	Avery, Madison, Mitchell, Watauga, Yancey	882	1,261	898	341	299
19C	Rowan	1,290	1,433	1,305	356	266
16B	Robeson	1,372	1,890	1,934	419	496
06	Halifax, Bertie, Hertford, Northampton	1,485	2,218	2,009	433	374

Criminal Superior Felony Cases by Prosecutorial District

July 1, 2014 - June 30, 2015

Sorted by Disposed Median Age - Fewest Days to Most Days Disposed

Prosecutorial District	Counties in District	Filed	Disposed	End Pending (as of 6/30/15)	Pending Median Age (days)	Disposed Median Age (days)
Statewide	Statewide	102,443	125,357	81,274	210	244
21	Forsyth	1,488	1,629	870	210	126
23	Alleghany, Ashe, Wilkes, Yadkin	1,486	1,846	634	113	131
4	Duplin, Jones, Onslow, Sampson	3,935	4,506	2,159	76	149
11B	Johnston	911	1,136	442	160	169
27A	Gaston	3,128	3,840	1,721	148	169
8	Greene, Lenoir, Wayne	1,876	2,097	1,121	144	171
03A	Pitt	2,773	3,749	1,541	126	175
15A	Alamance	1,527	2,123	877	245	178
10	Wake	4,362	5,415	2,737	154	195
7	Edgecombe, Nash, Wilson	3,914	5,078	2,216	140	197
15B	Chatham, Orange	917	1,204	510	181	197
28	Buncombe	2,496	2,569	1,752	119	197
14	Durham	2,419	2,877	1,671	183	202
17B	Stokes, Surry	1,397	1,688	1,337	299	211
26	Mecklenburg	9,968	10,616	7,318	169	211
12	Cumberland	4,008	5,039	2,729	139	217
5	New Hanover, Pender	2,962	3,459	2,317	154	218
03B	Carteret, Craven, Pamlico	2,912	4,007	1,687	161	229
17A	Rockingham	1,213	1,356	870	140	233
16A	Hoke, Scotland	835	1,352	672	245	245

Criminal Superior Felony Cases by Prosecutorial District  
 July 1, 2014 - June 30, 2015

Continued: Sorted by Disposed Median Age - Fewest Days to Most Days Disposed

Prosecutorial District	Counties in District	Filed	Disposed	End Pending (as of 6/30/15)	Pending Median Age (days)	Disposed Median Age (days)
18	Guilford	7,676	9,740	6,236	236	245
9	Franklin, Granville, Vance, Warren	2,830	3,495	2,184	235	250
19D	Moore	1,108	1,160	907	294	254
30	Cherokee, Clay, Graham, Haywood, Jackson, Macon, Swain	1,312	1,877	1,209	315	262
20B	Union	1,859	2,423	1,350	201	265
19C	Rowan	1,290	1,433	1,305	356	266
16C	Anson, Richmond	1,238	1,622	851	232	269
19A	Cabarrus	1,478	2,167	1,164	273	269
09A	Caswell, Person	2,051	2,207	1,736	203	279
22B	Davidson, Davie	1,683	2,432	1,311	210	279
11A	Harnett, Lee	1,356	1,443	1,214	230	280
13	Bladen, Brunswick, Columbus	3,212	3,816	3,268	238	286
24	Avery, Madison, Mitchell, Watauga, Yancey	882	1,261	898	341	299
29A	McDowell, Rutherford	1,200	1,504	1,111	216	317
20A	Stanly	743	954	611	175	320
27B	Cleveland, Lincoln	3,306	3,401	3,848	271	321
1	Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans	2,034	2,369	2,078	273	336
29B	Henderson, Polk, Transylvania	1,115	1,283	1,075	229	337
25	Burke, Caldwell, Catawba	3,440	4,432	3,651	223	366
6	Halifax, Bertie, Hertford, Northampton	1,485	2,218	2,009	433	374
2	Beaufort, Hyde, Martin, Tyrrell, Washington	1,583	2,165	1,746	286	402
22A	Alexander, Iredell	1,958	2,438	2,054	272	426
19B	Montgomery, Randolph	1,705	2,041	2,343	291	434

16B	Robeson	1,372	1,890	1,934	419	496
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## Appendix E – Caseflow Improvement Strategies<sup>34</sup>

Principle	Strategies
<i>Early Intervention and Triage</i>	Prompt arrest reports and evidence to prosecutor
	Improve defense counsel access to in-custody defendants
	Improve disclosure and discovery exchange
	Structured early judicial intervention
	Improve operation of initial arraignment docket
	Reform approach to preliminary hearings
	Develop specialized calendars to process selected cases expeditiously
	Expand early intervention to all felonies
	Expand differentiated case management (DCM) program
	Use risk/needs assessment instruments to aid pretrial release decisions
<i>Meaningful Events</i>	Create culture of having prepared lawyers at every court event
	Improve communication among all parties
	Address delays in crime lab evidence processing
	Improve criminal settlement conference process
	Greater control of failures to appear
	Improve management of plea negotiations
	Improve management of continuances
	Adopt written continuance policy
Strict court enforcement of timetables and expectations, with sanctions if appropriate	
<i>Trial-Date Certainty</i>	Resolve more cases before trial list
	Improve attorney estimates of trial date readiness
	Establish firm trial dates
	Make operational improvements in trial setting and assignment
<i>Post-Judgment Court Events</i>	Greater efficiency in handling probation violations
<i>Exercise of Court Leadership of Entire Criminal Justice Community</i>	Adopt and publish formal case management plan
	Improve court coordination with system partners
<i>Internal Court Relations and Practices Among Judges</i>	Build greater consistency among judges’ adjudication and courtroom practices
	Consider consistency and best practices in calendaring judicial work weeks
	Report caseflow timelines and measures by division to promote competition among judges in meeting goals
	Consider establishing local guidelines for voir dire to allow for improved consistency and compliance with rules

<sup>34</sup> Steelman, David (2014). *Rethinking Felony Caseflow Management*. National Center for State Courts.

<b>Principle</b>	<b>Strategies</b>
	Standardize use of court forms by judiciary
<i>Education and Training</i>	Include training sessions on caseflow management during judicial conference or at least once annually
<i>Court Organization</i>	Consider holding problem solving (drug court and DUI court) on civil days or certain criminal days
	Consider extension of chief judge term beyond two years so that priorities of court can be addressed
	Create pretrial services unit for felony cases
	Consider options to promote more early resolution of felony charges in limited-jurisdiction courts
	Explore possibility of hybrid-team assignment system
	Establish probation violation and bench warrant calendars
	Consider direct felony filing in general jurisdiction court
	Consider scheduling cases at staggered times, including at least a morning and afternoon docket, to reduce waiting times
<i>Human Resources</i>	Have circuit court judges make better use of their judicial assistants
	Encourage more active participation of calendaring hearings by judicial staff
	Improve indigent representation
	Improve court Interpreter system
<i>Information Resources</i>	Obtain a monthly report from the Sheriff about the pretrial detainee population
	Develop means to exclude warrant time from case aging
	Develop accurate, timely, and useful caseflow management data
	Develop plan for review of case age and reduction of backlogs
	Gather and analyze data on cases washing out before initial pretrial conference
	Consolidate proceedings to reduce redundancy
	Review algorithm for case assignment (allotment) to assure balance among all divisions
	Gather and regularly review failure-to-appear (FTA) and open warrant information
	Streamline management of multi-defendant cases
Reduce conflicts among courtrooms on availability of attorneys	
<i>Technology</i>	Consider options for electronic exchange of disclosure materials
	Improve delivery of information and reporting to Bond Court
	Expand use of audio-video appearances

## Appendix F – Indicators and Benchmarks<sup>35</sup>

Indicator	Definition	Benchmark
<b><i>Effectiveness</i></b>		
<i>CourTools</i> Measure 5, Trial Date Certainty	The likelihood that a case will be tried on or near the first scheduled trial date, as measured by the number of times cases listed for trial must be scheduled and rescheduled for trial before they go to trial or are disposed by other means.	Average number of trial dates per trial list case: <ul style="list-style-type: none"> <li>• Acceptable: an average of 2.0 or fewer settings per case</li> <li>• Preferred: an average of 1.5 or fewer settings per case</li> </ul>
Compliance with Court Orders, including <i>CourTools</i> Measure 7, Collection of Monetary Penalties	Payments collected and distributed within established timelines, expressed as a percentage of total monetary penalties ordered in specific cases.	Benchmarks set by court for following goals: <sup>36</sup> <ul style="list-style-type: none"> <li>• To hold defendants accountable for their actions</li> <li>• To improve the enforcement of court judgments</li> <li>• To reduce judicial and clerical efforts required to collect court-ordered financial obligations</li> <li>• To ensure prompt disbursement of court collections to receiving agencies and individuals</li> <li>• To achieve timely case processing</li> </ul>
<b><i>Procedural Satisfaction</i></b>		
<i>CourTools</i> Measure 1, Access and Fairness	Ratings of court users on the court's accessibility and its treatment of customers in terms of fairness, equality, and respect.	<ul style="list-style-type: none"> <li>• A survey on access and fairness is conducted at least once each year.</li> <li>• The survey results are discussed in a meeting of all judges each year, and any result less favorable than the prior year is a topic for appropriate remedial action.</li> </ul>
<b><i>Efficiency</i></b>		
<i>CourTools</i> Measure 2, Clearance Rate	The number of outgoing cases as a percentage of the number of incoming cases.	100% clearance rate each year
<i>CourTools</i> Measure 3, Time to Disposition <ul style="list-style-type: none"> <li>• Date of filing of complaint with court to date of sentencing</li> </ul>	The percentage of cases disposed or otherwise resolved within established time frames.	Model Time Standards for State Trial Courts (NCSC, 2011): <ul style="list-style-type: none"> <li>• 75% within 90 days, 90% within 180 days, 98% within 365 days</li> </ul>
<i>CourTools</i> Measure 4, Age of Pending Caseload <ul style="list-style-type: none"> <li>• Age of all active pending cases</li> <li>• Percent of active pending cases that are “backlogged”</li> </ul>	The age of the active cases pending before the court, measured as the number of days from filing until the time of measurement. Cases that are “backlogged” are those that have been pending longer than the time standard for felony cases.	Model Time Standards for State Trial Courts (NCSC, 2011): <ul style="list-style-type: none"> <li>• No more than 25% beyond 90 days, 10% beyond 180 days, 2% beyond 365 days</li> </ul>

<sup>35</sup> Steelman, David (2014). *Rethinking Felony Caseflow Management*. National Center for State Courts.

<sup>36</sup> See Michigan State Court Administrative Office, *Trial Court Collections Standards & Guidelines* (July 2007).

<p>Elapsed time between major case processing events:</p> <ul style="list-style-type: none"> <li>• Date of arrest to date of first appearance</li> <li>• Date of filing of criminal complaint to date of arraignment on indictment or information</li> <li>• Date of filing of complaint to date of disposition by plea or trial</li> </ul>	<p>The percentage of cases meeting time standards for the elapsed time between key intermediate case events. (This indicator complements <i>CourTools</i> Measures 3 and 4.)</p>	<p>Model Time Standards for State Trial Courts (NCSC, 2011):</p> <ul style="list-style-type: none"> <li>• In 100 % of cases, the time elapsed from arrest to initial court appearance should be within that set by state law appearance.</li> <li>• In 98% of cases, the arraignment on the indictment or information should be held within 60 days [filing to arraignment].</li> <li>• In 98% of cases, trials should be initiated or a plea accepted within 330 days [complaint to plea or trial].</li> </ul>
<b>Productivity</b>		
<p><i>CourTools</i> Measure 10, Cost per Case</p>	<p>The average cost of processing a single case, by case type.</p>	<ul style="list-style-type: none"> <li>• Statewide average</li> <li>• Average for courts of like size in state</li> </ul>
<p>Judicial and staff case weights by major case type</p>	<p>The average amount of time that judges and staff spend to handle each case of a particular type, from case initiation/filing through all post-judgment activity.</p>	<ul style="list-style-type: none"> <li>• Statewide average</li> <li>• Average for courts of like size in state</li> </ul>
<p>Meaningful court events</p>	<p>The expectation is created and maintained that case events will be held as scheduled and will contribute substantially to progress toward resolution. Courts that choose to monitor continuances routinely make a record of (a) the type of event continued; (b) which party made the request; and (c) the reason the request was granted.</p>	<ul style="list-style-type: none"> <li>• The official purpose of any event (e.g., motion hearing, pretrial conference) is achieved more often than not, or else substantial progress is made toward case resolution, as through a plea agreement.</li> <li>• After arraignment on an indictment or information, more cases are settled by plea or other nontrial means before they are listed for trial than after being listed for trial.</li> <li>• The average number of settings for each kind of court event before trial is less than 1.5 per case.</li> <li>• The most common reasons for the grant of continuances are regularly identified by the court and discussed by court, prosecution and defense leaders to reduce the frequency of their occurrence.</li> </ul>

## Appendix G – Sample Training Program Agenda

(From NCSC/BJA Training and Technical Assistance Project)

### Improving Felony Case Progress in Cuyahoga County, Ohio

June 13, 2013

#### SEMINAR AGENDA

<b>Time</b>	<b>Topic</b>	<b>Faculty</b>
8:00-8:30 AM	Arrival and Check-In	Host Staff
8:30- 9:15 AM	Welcome, Introductions <ul style="list-style-type: none"><li>• Welcome by Neutral Court or Local Government Official</li><li>• Seminar Purpose and Objectives</li><li>• Initial Discussion of Participant Expectations</li></ul>	TBD NCSC Faculty All + Faculty
9:15 -10:30 AM	Basic Principles and Truths of Felony Case Management <ul style="list-style-type: none"><li>• Essential Elements of Caseflow Management</li><li>• Brief Group Discussion of Current Cuyahoga County Status</li><li>• Dynamics of Changing Local Legal Culture</li></ul>	Steelman All + Faculty
10:30 –10:45 AM	<i>Break</i>	
10:45 –12:00 PM	Early Case Disposition and Beyond in Cuyahoga County <ul style="list-style-type: none"><li>• Early Case Disposition in New Hampshire and New Jersey</li><li>• Strengths and Weaknesses of Early Disposition in Cuyahoga County</li></ul>	Reis, Costello
12:00 – 1:30 PM	What’s in It for Me? For Other Stakeholders? <ul style="list-style-type: none"><li>• Instructions for Small Group Discussions</li><li>• Working Lunch and Small Group Discussions</li></ul>	Steelman All
1:30 – 2:30 PM	Reports of Small Groups	All + Faculty
2:30 – 2:45 PM	<i>Break</i>	
2:45 – 3:30 PM	Getting to “Yes”: Collaboration among Stakeholders <ul style="list-style-type: none"><li>• Instructions for Small Group Discussions</li><li>• Small Group Discussions: What can stakeholders in my position do (a) for ourselves, and (b) for other stakeholders to improve felony caseflow management in Cuyahoga County?</li></ul>	Steelman All
3:30 – 4:15 PM	Reports of Small Groups	All + Faculty
4:15 – 4:30 PM	Summing Up: Group Discussion of Possible Next Steps	All + Faculty
4:30 PM	Concluding Remarks and Adjournment	Seminar Host

**Improving Felony Caseflow**  
February 7-8, 2013  
National Center for State Courts Headquarters  
Williamsburg, Virginia

**WORKSHOP AGENDA**

**DAY 1 – Thursday, February 7, 2013**

<b>Time</b>	<b>Topic</b>	<b>Facilitators</b>
8:00-8:30 AM	Arrival and Check-In: Conference Room	Judicial Education Staff
8:30- 9:15 AM	Welcome, Introductions <ul style="list-style-type: none"><li>• Mary McQueen, NCSC President</li><li>• Workshop Purpose and Objectives</li><li>• Participant Introductions and Expectations</li></ul>	Griller; Steelman Faculty
9:15 – 10:00 AM	Unnecessary Delay: The Enemy of Justice	Griller
10:00 –10:45 AM	Participant Survey Results: Plenary Discussion <sup>37</sup>	Steelman; Webster
10:45 -11:00 AM	<i>Break</i>	
11:00 –12:15 PM	Basic Principles and Truths of Felony Case Management <ul style="list-style-type: none"><li>• Time to Disposition Data: 1990's vs. Today</li><li>• Costs of Delay and Substantive Savings</li><li>• Eight Steps of Major Change</li></ul>	Griller Steelman Griller
12:15 - 12:30 PM	Instructions for Problem Scenario Discussions	Griller
12:30 – 2:30 PM	Working Lunch and Small Group Discussions: Problem Scenarios	All
2:30 – 2:45 PM	<i>Break</i>	
2:45 – 3:45 PM	Socratic Panel: Can Caseflow Management Promote Better Lawyering? <ul style="list-style-type: none"><li>• Efficiency and Quality: Are They Mutually Exclusive</li><li>• Judge Shopping – What's a Lawyer to Do?</li><li>• Continuances – What are Workable Policies and Practices</li><li>• How Do You Build Trust Between Adversaries?</li><li>• Prepared Lawyers Settle Cases – How Do Courts Help Prompt Preparation?</li></ul>	TBD
3:45 – 4:15 PM	Plenary Discussion: Techniques in Developing an Action Plan	Steelman; Webster
4:15 – 4:30 PM	Debrief; Get Ready for Tomorrow's Program; Adjournment	Faculty

<sup>37</sup> Prior to attending the workshop, each participant was requested to complete a questionnaire answering 100 questions about felony case processing in their jurisdiction. During this session, we will discuss both overall and specific results.

**DAY 2 – Friday, February 8, 2013**

<b>Time</b>	<b>Topic</b>	<b>Facilitators</b>
8:00 – 8:30 AM	Arrival – Conference Room	Judicial Education Staff
8:30 – 8:45 AM	Briefing on Action Plan Assignment	Steelman; Griller
8:45 – 10:15 AM	Develop Action Plans by Jurisdiction (facilitated by faculty)	All + Faculty
10:15 – 10:30 AM	Break	
10:30 – 12 Noon	Presentation and Discussion of Action Plans	All + Faculty
12 Noon	Adjournment & Evaluation	

## Appendix H - Meeting Participants

(in chronological order of interviews)

### District Attorneys

- **Seth Edwards**, District 2.
- **Scott Thomas**, District 3B.
- **William (Billy) West**, District 12.

### Magistrates

- **Hillary Brannon**, magistrate in Guilford County.
- **Keith Hempstead**, magistrate in Durham County.
- **Sherry Crowder**, chief magistrate in Union county.

### Public Defender

- **Bert Kemp**, Pitt County Public Defender.

### Appellate Judges

- **Justice Sam (Jimmy) Ervin**, Supreme Court.
- **Chief Judge Linda McGee**, Chief Judge, Court of Appeals.
- **Judge Donna Stroud**, Court of Appeals.

### Court Services

- **Cynthia Easterling**, Director of Court Services, AOC.
- **Christi Stark**, Court Services.

### AOC Leadership

- **Judge Marion Warren**, AOC Director.

### Trial Court Administrators

- **Todd Nuccio**, Trial Court Administrator, Mecklenburg County.
- **Kathy Shuart**, Trial Court Administrator, Durham County.

### District Court Judges

- **Judge Lisa Menefee**, Chief District Court Judge, Forsyth County (21<sup>st</sup> District).
- **Judge Jacquelyn (Jackie) Lee**, Chief District Court Judge, Harnett, Johnston, and Lee Counties (District 11).

### Clerks of Superior Court

- **Jan Kennedy**, Clerk of Superior Court in New Hanover County.
- **Todd Tilley**, Clerk of Superior Court in Perquimans County.

### Defense Attorneys

- **Kearns Davis** (NCCALJ member), Brooks, Pierce, McLendon, Humphrey & Leonard LLP.
- **Darrin Jordan** (NCCALJ member), Whitley & Jordan.

### AOC Research and Planning

- **Brad Fowler**, head of AOC Research and Planning.
- **Danielle Seale**, senior research associate.

Superior Court Judges

- **Judge Anna Mills Wagoner** (NCCALJ member), Senior Resident Superior Court Judge, District 19C (Rowan County).
- **Judge Allen Cobb**, Senior Resident Superior Court Judge, 5<sup>th</sup> District (New Hanover and Pender Counties).

# APPENDIX C

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## PRETRIAL JUSTICE

Criminal Investigation and Adjudication Committee

October 2016

# PRETRIAL JUSTICE REFORM FOR NORTH CAROLINA

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## NCCALJ COMMITTEE ON CRIMINAL INVESTIGATION & ADJUDICATION REPORT

OCTOBER 2016

The Committee unanimously recommends that the Chief Justice appoint a Pretrial Justice Study Team (Study Team) to carry out a Pilot Project to implement and assess legal- and evidence-based pretrial justice practices. As used here, the term legal- and evidence-based pretrial justice practices refers to practices that comport with the law and that are driven by research. Such practices have been endorsed by many justice system stakeholder groups, including the Conference of Chief Justices; the Conference of State Court Administrators; the International Association of Chiefs of Police; the National Sheriffs' Association; the Association of Prosecuting Attorneys; the National Legal Aid and Defenders Association; the National Association of Criminal Defense Lawyers; the National Association of Counties; and the American Bar Association. Their use has been shown to produce excellent results. With one exception, legal and evidence-based pretrial justice practices are not in place in North Carolina. Although one North Carolina jurisdiction—Mecklenburg County—has implemented some of these practices, all such practices are not in place in that jurisdiction and to date rigorous evaluation of their implementation has not been done. The Committee recommends implementing and evaluating the full range of legal- and evidence-based pretrial justice practices identified below in North Carolina through a Pilot Project in five to seven counties.

### Background

After identifying pretrial justice reform as a top priority for its work, in February 2016, the Committee received an overview of how pretrial release currently works in North Carolina; heard from John Clark, senior manager, Technical Assistance, Pretrial Justice Institute (PJI) and a team of PJI experts about current research and developments in pretrial risk assessment and risk management; received a briefing on Mecklenburg County's experience with pretrial justice reform; and heard a briefing on the Commonwealth of Virginia's experience with the same. In the Spring of 2016, the Committee issued a Request for Expert Assistance on Pretrial Release Reform. Subsequently the Commission, through the National Center for State Courts, contracted with PJI to provide the requested assistance. Additionally, the Committee received and considered an 88-page response from the North Carolina Bail Agents Association, and heard from that Association's President and members at its October 2016 meeting.

### Pilot Project

The recommended Pilot Project should include, at a minimum, the following legal- and evidence-based pretrial justice practices. All of these practices are discussed in more detail in the PJI report, from which much of this content is directly drawn.<sup>i</sup>

- The use of an empirically-derived pretrial risk assessment tool by the magistrate and all subsequent decisionmakers. Implementing an empirically-derived pretrial risk assessment tool is the keystone to a 21<sup>st</sup> century, legal and evidence-based pretrial release system. First, research demonstrates that such tools are highly effective in sorting defendants into categories showing their probabilities of success on pretrial release in terms of public safety

and court appearance. Second, such tools can track any disparate impacts that might result through their use on racial and ethnic groups; if disparities arise, they can be easily identified, which is the first step in addressing them. Third, using an empirically-derived pretrial risk assessment tool allows a jurisdiction to make valid comparisons between different types of release or specific conditions of release. Fourth, knowing the risk levels of defendants who are in jail helps a jurisdiction assess whether it is using its expensive jail resources for those who need to be there because of their risks. Fifth, knowing the risk levels of defendants coming through the system can help officials plan for, and justify to taxpayers, the resources needed to address the risks. Recognizing these benefits, at least seven states – Colorado, Delaware, Hawaii, Kentucky, New Jersey, Virginia, and West Virginia – have passed laws requiring the use of statewide empirically-derived pretrial risk assessment tools. The Committee recommends use of the Arnold Foundation’s PSA-Court tool, in part because it already has been successfully implemented in Mecklenburg County, North Carolina.

- The development of a decision matrix to help magistrates and judges make pretrial release decisions. Once the risk assessment is completed on a defendant, the next step is to determine how to use that information to make a release/detention decision. Research is providing guidance on how to do that, matching identified risk levels with appropriate risk management strategies. For example, defendants who are found to be low risk have very high rates of success on pretrial release. Research has shown that these already high rates cannot be improved by imposing restrictive conditions of release on low risk defendants. Also, it must be recognized that although the charge may provide little information on a defendant’s risk to public safety or to fail to appear in court, the impact of new criminal activity or failing to appear on the more serious charge is perceived to be much greater. Therefore, many jurisdictions using empirically-derived pretrial risk assessment tools have developed matrices that combine the risk level with charge types, for example, non-violent misdemeanor, violent misdemeanor, non-violent felony, and violent felony. The resulting intersection of the risk level and charge type produces a suggested release/detention decision. The decision itself remains within the discretion of the judge or magistrate after considering the risk assessment, the matrix, and any other relevant factors.
- The implementation of risk management strategies aimed at matching risk levels with the most appropriate level of support or supervision. Put another way: any conditions set on a defendant’s pretrial release should be related to the risk identified for that individual defendant.
- A constitutionally valid preventative detention procedure to ensure that wealthy defendants who present an unacceptable risk cannot secure release simply by paying a money bond.
- Encouraging use of criminal process that does not require arrest for low-risk defendants.
- Early involvement by the prosecutor and defense counsel in the setting of conditions of pretrial release.
- Procedures for timely review, in every case, by a judge or a magistrate’s pretrial release determination for in-custody defendants.
- Evaluation of a variety of conditions of pretrial release (including but not limited to: secured bonds, unsecured bonds, pretrial services, electronic monitoring, and court date reminder systems) for defendants based on their assessed risk.
- Training for all Pilot Project participants.
- Robust, uniform empirical evaluation of all components of the Pilot Project that takes into consideration the three goals of the pretrial release decision-making process: to provide

reasonable assurance of the safety of the community; to provide reasonable assurance of appearance in court; and to maximize pretrial release.

- Recommendations by the Study Team regarding whether or not any of the components of the Pilot Project should be implemented more broadly or statewide.

The Committee recommends that the Study Team be chaired by a North Carolina judicial official and be supported by technical assistance from a well-regarded and nationally known entity in the field of pretrial justice reform as well as full-time administrative staff. In its first phase, the Study Team should identify, for the Director of the North Carolina Administrative Office of the Courts, any changes to statutes or court rules that are required to carry out the Pilot Study.

## **Committee Members**

Committee members included:

Augustus A. Adams, N.C. Crime Victims Compensation Committee  
Asa Buck III, Sheriff Carteret County & Chairman N.C. Sheriffs' Association  
Randy Byrd, President, N.C. Police Benevolent Association  
James E. Coleman Jr., Professor, Duke University School of Law  
Kearns Davis, President, N.C. Bar Association  
Paul A. Holcombe, N.C. District Court Judge  
Darrin D. Jordan, lawyer, & Commissioner, N.C. Indigent Defense Commission  
Robert C. Kemp III, Public Defender & Immediate Past President, N.C. Defenders' Association  
Sharon S. McLaurin, Magistrate & Past-President, N.C. Magistrates' Association.  
R. Andrew Murray Jr., District Attorney & Immediate Past President, N.C. Conference of District Attorneys  
Diann Seigle, Executive Director, Carolina Dispute Settlement Services  
Anna Mills Wagoner, Senior Resident Superior Court Judge  
William A. Webb, Commission Co-Chair, Committee Chair & Ret. U.S. Magistrate Judge

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<sup>i</sup> See attached. UPGRADING NORTH CAROLINA'S BAIL SYSTEM: A BALANCED APPROACH TO PRETRIAL JUSTICE USING LEGAL AND EVIDENCE-BASED PRACTICES, Pretrial Justice Institute, 2016. The PJI report is also available online at <http://nccalj.org/wp-content/uploads/2016/10/Upgrading-NCs-Bail-System-PJI-2016-003.pdf>.

# **UPGRADING NORTH CAROLINA'S BAIL SYSTEM: A BALANCED APPROACH TO PRETRIAL JUSTICE USING LEGAL AND EVIDENCE-BASED PRACTICES**



**John Clark, Pretrial Justice Institute  
Timothy R. Schnacke, Center for Legal and  
Evidence-Based Practices  
Sue Ferrere, Pretrial Justice Institute**

**August 15, 2016**

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Gaithersburg, MD

Updated August 2016

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## PREFACE

The North Carolina Commission on the Administration of Law and Justice contracted, through the National Center for State Courts with the Pretrial Justice Institute (PJI) to produce a report containing evidence-based recommendations to improve North Carolina’s pretrial justice system.

The Pretrial Justice Institute is a market-driven organization that advances safe, fair and effective pretrial justice that honors and protects all people. We do this by monitoring the state of policy and practice across the states, convening communities of practice to reach common goals, communicating about the law and research to diverse groups of people, demonstrating that moving from resource- to risk-based decision-making is possible, and operating with business discipline.

Below are several terms that appear in this report, and definitions for how those terms are used.

**Bail:** Based on legal and historical research as well as accepted notions underlying pretrial social science research, “bail” is defined as a process of conditional pretrial release.<sup>1</sup> Technically, bail is not money. States should not be faulted for blurring the concepts of money (a condition of release) and bail (release) because for roughly 1,500 years, paying money (or giving up property before that) was the only condition used in England and America to provide reasonable assurance of court appearance. Nevertheless, recognizing that bail is not money helps states move forward in their efforts to improve pretrial justice without unnecessary confusion.

North Carolina defines bail as money, (G.S. 15A-531(4); G.S. 58-71-1(2)), but this definition does not appear to pose the major problems we see in other states, such as constitutional “right to bail” provisions. When trying to articulate the right that North Carolina defendants enjoy, however, at least some local pretrial release policies contain quotes from U.S. Supreme court opinions equating the “right to bail” with the “right to release” before trial and the “right to freedom before conviction.” Making sense of these and other statements made about bail throughout its history requires an understanding that bail means release.

At its core, pretrial justice is simply an attempt to release and detain the right defendants, using legal and evidence-based practices to create rational, fair, and transparent pretrial processes. Except when necessary to make some point, this report will mostly avoid using the word “bail” in favor of the term “release.” When the term bail is used, however, such as describing “money-based bail practices” or making various references to the bail literature, the reader should recognize that the authors define “bail” as a process of conditional pretrial release.

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<sup>1</sup> Timothy R. Schnacke, *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform*, National Institute of Corrections, (2014), [hereinafter *Fundamentals*].

**Empirically-derived risk assessment:** A core element of evidence-based pretrial justice practices is the use of an objective risk assessment tool that has been constructed and tested on the basis of research demonstrating the tool’s success in sorting defendants into categories showing their probabilities of appearance in court and of completing the pretrial period without any arrests for new criminal activity. This paper uses the term “empirically-derived risk assessment” to describe such tools.

**Legal and evidence-based practices:** Legal and evidence-based practices are “interventions and practices that are consistent with the pretrial legal foundation, applicable laws, and methods research has proven to be effective in decreasing failures to appear in court and danger to the community during the pretrial stage. The term is intended to reinforce the uniqueness of the field of pretrial services and ensure that criminal justice professionals remain mindful that program practices are often driven by law and when driven by research, they must be consistent with the pretrial legal foundation and the underlying legal principles.”<sup>2</sup>

**Secured bond:** As used in this report, a secured bond is one that requires a financial condition be met before a defendant can be released from custody. That condition can be met by payment of the bond amount by the defendant or others (e.g., family or friends) or by guarantee of payment by a licensed commercial bail bonding company.

**Unsecured bond:** An unsecured bond is one in which the defendant pays no money to the court in order to be released, but is liable for the full amount of the bond upon his or her failure to appear in court.

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<sup>2</sup> Marie VanNostrand, Legal and Evidence-Based Practices: Applications of Legal Principles, Laws and Research to the Field of Pretrial Services, Nat’l Inst. of Corr. (2007), at 12.

## EXECUTIVE SUMMARY

This report focuses on helping North Carolina officials work toward a balanced approach to achieving the three goals of the pretrial release decision-making process: to provide reasonable assurance of the safety of the community; to provide reasonable assurance of appearance in court; and to maximize pretrial release. It does so by focusing on legal and evidence-based practices—ones that fully comport with the law and that are driven by research. The use of such practices has been fully endorsed by all the key justice system stakeholder groups, including: the Conference of Chief Justices; the Conference of State Court Administrators; the International Association of Chiefs of Police; the National Sheriffs' Association; the Association of Prosecuting Attorneys; the National Legal Aid and Defenders Association; the National Association of Criminal Defense Lawyers; the National Association of Counties; and the American Bar Association. And the use of such practices has been shown to produce excellent results.

Except for very promising work being done in Mecklenburg County, legal and evidence-based pretrial justice practices are not in place in North Carolina. Magistrates and judges in the state place significant emphasis on an antiquated tool—bond guidelines—which several federal courts around the country have recently called unconstitutional. Courts also rely heavily on a release option—the secured bond—that was established in the 19<sup>th</sup> Century to address a problem that was unique to that time; the ability of a criminal defendant to flee into the vast wilderness of America's growing frontier and simply disappear, never to face prosecution. And only 40 of the state's 100 counties are served by pretrial services programs that can provide supervision of defendants released by the court with conditions of pretrial release. Many of these programs have very limited supervision capacity.

The model for legal and evidence-based pretrial release practices in North Carolina includes the use of an empirically-derived pretrial risk assessment tool, the development of a decision matrix that would help magistrates and judges make pretrial release decisions, the implementation of risk management strategies aimed at matching risk levels with the most appropriate level of support or supervision, the expanded use of citation releases by law enforcement, the very early involvement of the prosecutor and defense, and the initiation of automatic bond reviews for in-custody misdemeanor defendants.

Implementing such a model of legal and evidence-based practices in North Carolina would be greatly facilitated by changes in the state's laws. Current North Carolina law does not expressly provide for a right to actual pretrial release—it is crafted only in terms of setting or not setting conditions—nor does it articulate a procedure for preventive detention of high risk defendants. A right merely to have conditions set, coupled with the statutory provisions discussing those conditions as well as no decent process for risk-based detention, naturally moves North Carolina magistrates and judges toward using secured money conditions to address risk for both court appearance and public safety, and toward attempting to use unattainable money conditions to detain defendants posing extremely high pretrial risk. In addition, although the statute speaks of pretrial risk, it makes determinations of who is entitled to having release

conditions set based primarily on charge as a proxy for risk, and subtly points judicial officials toward using the money condition to address risk. The better practice would be to set forth a right to release for all except extremely high-risk defendants (or defendants who are not as risky but who also face extremely serious charges, or both), provide for a lawful and transparent detention provision based on risk to allow pretrial detention with no conditions, and then create mechanisms so that persons released pretrial are released immediately.

Based on this review of pretrial justice in North Carolina, the following actions are recommended.

#### Short-Term Recommendations:

- Judicial officials should immediately begin issuing unsecured bonds for pretrial release instead of secured bonds.
- State officials should appoint a Legal and Evidence-Based Practices Implementation Team to oversee the implementation of the recommendations of this report.
- The Implementation Team should develop a vision statement for a state-wide, data-driven pretrial justice system in North Carolina.
- The Implementation Team should develop an Implementation Plan based upon the vision statement, with a focus on initially implementing the plan in 5 to 7 pilot counties.
- The Implementation Team should incorporate the following elements in its plan:
  - The use of an empirically-derived pretrial risk assessment tool by every magistrate in every criminal case at the initial appearance
  - The use of a release/detention matrix that factors risk level and charge type
  - The development of differentiated risk management procedures that match the identified risk to the appropriate supervision level
  - The expanded use of citations by law enforcement
  - Early involvement of prosecutor and defense counsel
  - The institution of automatic bond review procedures for misdemeanor defendants
  - Uniform data reporting standards.
- The Implementation Team should draft language for bills or proposed court rules that incorporate the changes in law needed to implement the plan in the pilot counties.
  - The Implementation Team should develop a preventive detention framework for defendants who present unacceptably high risk
  - The Implementation Team should develop a release framework for defendants who are not detained
  - The Implementation Team should draft other legislation and/or court rules needed to implement the recommendations in this report

#### Mid-Term Recommendations:

- The Implementation Team should fully implement the plan in the pilot counties.

- The Implementation Team should ensure that all staff with a role in implementing the plan are fully informed of its purpose and rationale and trained for successful implementation.
- The Implementation Team should establish a data dashboard to monitor outcomes and regularly review the data and make appropriate adjustments to the plan.

#### Long-Term Recommendations:

- The Implementation Team should begin implementing the plan in the remaining counties of the state.
- The Implementation Team should develop a plan for sustaining changes that have been made and holding accountable those who make the changes.
- North Carolina officials should consider what role, if any, secured bonds should continue to play in the state's pretrial system, and draft appropriate proposals for statutory or court rule amendments.

As the Commission recognizes, implementing these recommendations will not be easy, but the benefits that will flow from doing so will be worth the effort. A well-functioning legal and evidence-based pretrial release process benefits justice system officials who can better see, and thus have greater control over, the process and the extent to which it is achieving the three goals of the pretrial release decision. It also benefits defendants going through the system, reducing instances of racial disparities, giving all defendants a sense of procedural justice, and upholding their Constitutional rights. It benefits victims, giving them perceptions of safety and predictability, and improving their chances of experiencing reparations for harm done to them. Finally, it benefits taxpayers, who have a better understanding of how their taxes are being spent and what outcomes they are getting.

## I. ACHIEVING A BALANCED APPROACH TO PRETRIAL RELEASE THROUGH LEGAL AND EVIDENCE-BASED PRACTICES

There are three goals of the pretrial release decision: (1) to provide reasonable assurance of the safety of the public; (2) to provide reasonable assurance of the appearance of defendants in court; and (3) to provide due process for those accused of a crime, with “[t]he law favor[ing] the release of defendants pending adjudication of charges.”<sup>3</sup> When jurisdictions focus on one or two of these goals at the expense of a balanced approach considering all three, the inevitable result is a dysfunctional system where many defendants who could be safely released remain in jail and many others who pose unacceptably high risks are released.

It is becoming increasingly clear that an option developed in the 19<sup>th</sup> Century – the secured bond – is inherently incapable of achieving the balanced approach that effective 21<sup>st</sup> Century public policy demands. When first introduced, the assumption that a secured bond provided a financial incentive for a defendant to appear in court gave justice system officials some hope in addressing at least one of the three goals of pretrial release. And since the capability to empirically test this assumption did not exist, this assumption became an article of faith, and it remains so today in many jurisdictions. In accepting this assumption, courts developed tools, such as those currently used in many North Carolina local pretrial release policies, that assume that the maximum sentence that defendants face defines their level of risk, and that a dollar amount that falls within a suggested range is the best way to address those risks.

Justice system officials across the country have relied on the secured bond option so often and for so long, not because there was evidence that it was effective, but because familiarity has bred acceptance – and because the commercial bail bonds industry that has benefited financially from its continued use has fought against any proposals or actions to implement new, evidence-based practices.<sup>4</sup>

Information showing how ill-suited secured bonds are in achieving the goals of the pretrial release decision can no longer be ignored. Science has provided new, evidence-based tools that show how to achieve the balanced approach, and do so in a way that aligns with the requirements of the law. States around the country, including, now, North Carolina, are looking at the science with the aim of creating a balanced system of pretrial justice that is supported by research and that honors the spirit and the letter of the law.

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<sup>3</sup> *American Bar Association Standards for Criminal Justice (3<sup>rd</sup> Ed.) Pretrial Release* (2007) Std. 10-1.1, at 1.

<sup>4</sup> See, for example: [https://www.themarshallproject.org/2016/06/29/a-professional-bounty-hunter-who-likes-the-bail-system-just-the-way-it-is?utm\\_medium=email&utm\\_campaign=newsletter&utm\\_source=opening-statement&utm\\_term=newsletter-20160630-530#.N7zxLibBb](https://www.themarshallproject.org/2016/06/29/a-professional-bounty-hunter-who-likes-the-bail-system-just-the-way-it-is?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20160630-530#.N7zxLibBb).

## The law requires a balanced approach

The law favors the release of defendants pending trial. As summed up by U.S. Supreme Court Justice Robert Jackson in a 1951 case:

The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense.<sup>5</sup>

But the law also recognizes that some defendants pose unmanageable risks to public safety and non-appearance, and can, if strict procedural steps are followed, be held without bond.<sup>6</sup>

An examination of the history of bail and pretrial release reveals that for centuries, dating back to Medieval England, bail was an “in or out” proposition. Defendants who were bailable under the law were to be released, and those who were non-bailable were to be detained. This system carried over from England to this country during the colonial period and after independence. It was in the mid-1800’s, when defendants found it easy to flee and disappear into parts of the growing country that the idea of secured bonds came about. By 1900, the secured bond system had given rise to the for-profit bail bonding industry. Almost immediately afterwards, and numerous times since, analysts drew attention to the dysfunctions of the pretrial release system that relied on secured bonds.<sup>7</sup> As one researcher noted almost 90 years ago: “In too many instances, the present system neither guarantees security to society nor safeguards the rights of the accused. It is lax with those with whom it should be stringent and stringent with those with whom it could safely be less severe.”<sup>8</sup>

The legal issues raised by the use of secured bonds are now receiving attention by the federal courts. In the past two years, number of cases have been filed in federal courts challenging the use of secured bonds on the grounds that requiring indigent defendants to post financial bonds as a pre-condition to release violates their 14<sup>th</sup> Amendment equal protection rights. The civil rights law firm Equal Justice Under Law (EJUL) has amassed almost a dozen victories in class action challenges to money bail systems in several states, including Alabama, Georgia, Kansas, Louisiana, Missouri, and Mississippi.<sup>9</sup> These suits have forced the courts in those jurisdictions to drastically reform their bail-setting practices.

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<sup>5</sup> *Stack v. Boyle*, 342 U.S. 1, 7 (1951); see also *United States v. Salerno*, 481 U.S. 739, 755 (1987) (“In our society, liberty is the norm and detention prior to trial or without trial is the carefully limited exception.”)

<sup>6</sup> *Salerno*, 481 U.S. at 755.

<sup>7</sup> *Fundamentals*, *supra* note 1, at 35-48.

<sup>8</sup> Arthur L. Beeley, *The Bail System in Chicago*, (1927, reprinted 1966).

<sup>9</sup> For information on these suits, go to the EJUL website at: <http://www.equaljusticeunderlaw.org>.

## The empirical evidence supports a balanced approach

The research has clearly identified several negative consequences of using an unbalanced approach to pretrial release. The first of these consequences is the large number of bailable defendants who remain in jail for either a portion or the entirety of the pretrial period because they cannot meet the condition of their release – posting a secured bond. According to the Bureau of Justice Statistics, approximately 460,000 persons were being held in jails throughout the United States on June 30, 2014 awaiting disposition of their charges, representing 63% of all jail inmates.<sup>10</sup> While not all of these defendants are bailable, most are. 89% of detained felony defendants in a national survey remained in custody throughout the pretrial period on secured bonds that were never posted.<sup>11</sup> As shown in Section II of this report, there are large numbers of persons sitting in North Carolina jails because of inability to meet their release condition – posting a secured bond.

A second consequence of using an unbalanced approach is the impact of short-term incarceration – the few days it may take a person who does have the financial resources to post a secured bond to come up with the money to do so. One study found that, when *controlling for other factors*, defendants who had scored as low risk on the empirically-derived pretrial risk assessment tool and who were held in jail for just 2-3 days after arrest were 39% more likely to be arrested on a new charge while the first case was pending than those who were released on the first day, and 22% more likely to fail to appear. Low risk defendants who were held 4-7 days were 50% more likely to be arrested, and 22% more likely to fail to appear; those held -14 days were 56% more likely to have a new charge and 41% more likely to have a failure to appear. The same patterns held for medium risk defendants who were in jail for short periods.<sup>12</sup> While the study did not explore why short-term incarceration leads to these findings, they may simply reflect the disruption caused to people's lives by being in jail for just a few days.

In short, being held in jail for just a few days while making financial arrangements for a secured bond negatively impacts all three goals of the pretrial release decision: it delays release, it leads to higher rates of new criminal activity, and it leads to higher rates of failure to appear in court.

There are also major consequences for low and moderate risk defendants who remain incarcerated throughout the pretrial period, unable to post secured bonds. The same study also found that, again *controlling for other factors*, low risk defendants who were held in jail throughout the pretrial period due to their inability to post their bonds were 28% more likely to recidivate within 24 months after adjudication than low risk defendants who were released pretrial. Medium risk defendants detained

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<sup>10</sup> Todd D. Minton and Zhen Zeng, *Jail Inmates at Midyear 2014*, Bureau of Justice Statistics (2015).

<sup>11</sup> Brian A. Reaves, *Felony Defendants in Large Urban Counties, 2009 – Statistical Tables*, Bureau of Justice Statistics (2013), at 17.

<sup>12</sup> Christopher Lowenkamp, Marie VanNostrand, and Alex Holsinger, *The Hidden Costs of Pretrial Detention*, Laura and John Arnold Foundation (2013), [hereinafter *Hidden Costs*].

throughout the pretrial period were 30% more likely to recidivate within the following two years.<sup>13</sup>

Such results might be palatable if secured money bonds were found to be more effective in terms of public safety and court appearance. The for-profit bail bonding industry routinely cites studies purporting to show that that is the case, relying on data collected by the Bureau of Justice Statistics (BJS). Despite repeated claims to the contrary by the commercial bail bonding industry, the BJS data survey was not designed to make assessments of the effectiveness of one type of bond over any other type.<sup>14</sup> As a result of these claims by the bail bonding industry, BJS took the highly unusual step of issuing a Data Advisory, warning that its “data are insufficient to explain causal associations between the patterns reported, such as the efficacy of one type of pretrial release over another.”<sup>15</sup>

One study, however, overcomes the methodological flaws of research cited by the bonding industry, by controlling for risk levels and allowing for valid comparisons. That study found that, across all risk levels, there were no statistically significant differences in outcomes (i.e. court appearance and public safety rates) between defendants released without having to post financial bonds and those released after posting such a bond. The study also looked at the jail bed usage of defendants on the two types of bonds. Defendants who did not have to post financial bonds before being released spent far less time in jail than defendants who had to post. This is not surprising, since defendants with secured bonds must find the money to satisfy the bond or make arrangements with a bail bonding company in order to obtain release. Also, 39% of defendants with secured bonds were never able to raise the money and spent the entire pretrial period in jail. In summary, the study found that unsecured bonds, which do not require defendants to post money before being released, offer the same public safety and court appearance benefits as secured bonds, but do so with substantially less use of jail bed space.<sup>16</sup> Unlike any of the studies cited by the for-profit bail bonding industry, this study looked at all three goals of the pretrial release decision – safety, appearance, and release.

It is not surprising that secured money bonds have no impact on public safety rates. Secured bonds allow defendants who have access to money to purchase their pretrial release, regardless of the risk they may pose to public safety. Ironically, under

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<sup>13</sup> Id.

<sup>14</sup> Kristen Bechtel, John Clark, Michael R. Jones, and David Levin, *Dispelling the Myths: What Policy Makers Need to Know About Pretrial Research*, Pretrial Justice Institute (2012).

<sup>15</sup> Bureau of Justice Statistics, *Data Advisory: State Court Processing Statistics Data Limitations* (2010), at 1. The State Court Processing Statistics Project collected data on the processing of felony cases in 40 on the nation’s 75 largest counties. Among the data elements collected were: was the defendant released during the pretrial period; if so, what type of release; and what was the failure to appear rate and rate of new criminal activity by type of release. The project’s methodology was not designed to make sure that the release type groups were similar when looking at failure to appear and new criminal activity rates by release type, which is why the Bureau of Justice Statistics issued the Advisory to make clear that any such comparisons were invalid.

<sup>16</sup> Michael R. Jones, *Unsecured Bonds: The “As Effective” and “Most Efficient” Pretrial Release Option* (2013), [hereinafter *Unsecured Bonds*]. This study was conducted from data on 1,970 defendants from 10 different counties in Colorado in 2011.

this system, magistrates and judges actually may make it easier for defendants deemed to pose unacceptable public safety risks to get out, when, to address those risks, they set high secured bond amounts. While the intent of the judicial officer may be that the defendant will not be able to post the bond, the economic reality is that the higher the bond amount, the higher the profit margin for the bonding company that does business with a high-danger-risk defendant. For example, a commercial bail bonding company might make \$1,500 from a \$10,000 bond, but the company can earn \$15,000 from a \$100,000 bond, giving the company a greater incentive to write a higher bond.<sup>17</sup>

And since the bonding company is only liable for bond forfeiture if the defendant fails to appear in court – not if the defendant is arrested for new criminal activity while on pretrial release – bonding out high-danger-risk, high-bond defendants is a no-risk venture for the company. It is not surprising that research shows that about half of high-danger risk defendants get out of jail pending trial.<sup>18</sup>

### *An unbalanced approach adversely impacts defendants, particularly those of color, and taxpayers*

Research has consistently shown that, all else being equal, defendants who are detained throughout the pretrial period receive much harsher outcomes than those who obtain release.<sup>19</sup> A recent study quantified just how harsh these outcomes are for those found by an empirically-derived risk assessment tool to be low and moderate risk. The study found that low risk defendants who were detained throughout the pretrial period were five times more likely to get a jail sentence and four times more likely to get a prison sentence than their low risk counterparts who were released pretrial. Medium risk defendants who were detained pretrial were four times more likely to get a jail sentence and three times more likely to get a prison sentence. Both low and medium risk defendants who were detained pretrial also received much longer jail and prison sentences than their counterparts who spent the pretrial period in the community.<sup>20</sup>

Disparities unleashed by secured money bonds fall most heavily on racial minorities. Studies have consistently shown that African American defendants have higher secured bond amounts and are detained on secured bonds at higher rates than white defendants, a factor contributing to the disproportionate confinement of persons of color.<sup>21</sup>

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<sup>17</sup> *Rational and Transparent Bail Decision Making: Moving From a Cash-Based to a Risk-Based Process*, Pretrial Justice Institute (2012), at 8-9, [hereinafter *Rational and Transparent*].

<sup>18</sup> Laura and John Arnold Foundation, *Developing a National Model for Pretrial Risk Assessment: Research Summary* (2013).

<sup>19</sup> *Rational and Transparent*, *supra* note 17, at 2.

<sup>20</sup> Christopher Lowenkamp, Marie VanNostrand, and Alex Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Laura and John Arnold Foundation (2013).

<sup>21</sup> Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST Q., 170, 187 (2005); Stephen Demuth, *Racial and Ethnic Differences in Pretrial Release and Decisions and Outcomes: A Comparison of Hispanic, Black and White Felony Arrestees*, 41 CRIMINOLOGY 873, 880-81 (2003).

Requiring defendants to post financial bonds as a pre-condition to being released pretrial has obvious implications for those of low economic means – even when they are able to pay the bondsman’s fees, usually about 15% of the full value of the bond. The money may have come out of family funds for groceries or the next month’s rent. And, of course, those who are unable to make a bond payment may fall into deeper economic despair through the loss of jobs and housing while in pretrial confinement.

North Carolina citizens seem to understand how the state’s justice system impacts those with little money, and those of certain racial and ethnic groups. A 2015 survey of state residents showed that 64% of respondents believe that low-income people are likely to receive unfair treatment from the courts. Forty-seven percent felt that African Americans were treated more harshly, including 67% of African American respondents who felt that way, and 46% of respondents felt that Hispanics received worse treatment.<sup>22</sup>

Detaining persons pretrial also greatly impacts taxpayers, with no return benefit. It has been estimated that budgets for the operation of county jails rose from \$5.7 billion in 1983 to \$22.2 billion in 2011. These figures do not, however, take into consideration the costs that come out of other county budget lines, such as employee pension benefits and contracted health care to jail inmates, leaving the total costs to taxpayers unknown. “Because the costs provided are too often incomplete, policymakers and the public are seldom aware of the full extent of their community’s financial commitment to the operations of the local jail. Given the outsize role that jails play in the country’s criminal justice system – incarcerating millions of people annually – it is striking that the national price tag for jails remains unknown and that taxpayers who foot most of the bill remain unaware of what their dollars are buying.”<sup>23</sup> And given the significant growth in jail spending, it is not surprising that 40% of jails in a national survey state that reducing jail costs is one of their most serious issues.<sup>24</sup>

In short, the current system produces no discernable benefits for anyone, except for one group – the for-profit bail bonding industry. It is not surprising, then, that the industry fights every effort to introduce legal and evidence-based pretrial justice practices.

### *A national movement for legal and evidence-based pretrial justice is underway*

Ignoring the protests of the commercial bail bonding industry, over the past four years, there have been significant and unprecedented calls from key and diverse justice system stakeholders for implementing legal and evidence-based pretrial justice practices aimed at making sure that only those who pose unmanageable risks are detained pretrial.

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<sup>22</sup> *Elon University Poll, State Courts, October 29-November 2, 2015* (2015), at 4.

<sup>23</sup> Christian Henrichson, Joshua Rinaldi, and Ruth Delaney, *The Price of Jails: Measuring the Taxpayer Cost of Local Incarceration*, Vera Inst. Justice, 5 (2015).

<sup>24</sup> Natalie R. Ortiz, *County Jails at a Crossroads: An Examination of the Jail Population and Pretrial Release*, Nat’l Assn. of Counties, (2015), at 8.

For example, in 2012, after a year of study, the Conference of State Court Administrators issued a Policy Paper concluding that “[m]any of those incarcerated pretrial do not present a substantial risk of failure to appear or a threat to public safety, but do lack the financial means to be released. Conversely, some with financial means are released despite a risk of flight or threat to public safety, ...” The Policy Paper went on to say that “[e]vidence-based assessment of the risk a defendant will fail to appear or will endanger others if released can increase successful pretrial release without financial conditions that many defendants are unable to meet. Imposing conditions on a defendant that are appropriate for that individual following a valid pretrial assessment substantially reduces pretrial detention without impairing the judicial process or threatening public safety.”<sup>25</sup>

Endorsing this Policy Paper, the Conference of Chief Justices issued a resolution that “urge(d) that court leaders promote, collaborate, and accomplish the adoption of evidence-based assessment of risk in setting pretrial release conditions and advocate for the presumptive use of non-financial release conditions to the greatest degree consistent with evidence-based assessment of flight risk and threat to public safety and to victims of crime.”<sup>26</sup>

Several other national associations also have issued policy statements or resolutions calling for bail reform. These include: the International Association of Chiefs of Police, the National Sheriffs’ Association, the American Jail Association, the Association of Prosecuting Attorneys, the National Legal Aid and Defenders Association, the National Association of Criminal Defense Lawyers, the American Probation and Parole Association, and the National Association of Counties.<sup>27</sup>

These organizations, along with the National Judicial College, the National Center for State Courts, the American Bar Association, the National Association of Court Management, the National Criminal Justice Association, the Global Board of Church and Society of the United Methodist Church, the National Conference of State Legislatures, the Council of State Governments, the National Organization for Victim Assistance, along with dozens of other groups and individuals, are members of a Pretrial Justice Working Group, convened by the PJI and the Bureau of Justice Assistance of the U.S. Department of Justice to pursue legal and evidence-based enhancements to pretrial justice.<sup>28</sup>

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<sup>25</sup> *Evidence-Based Pretrial Release* Policy Paper available on the National Center for State Court’s website at:

<http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/Evidence%20Based%20Pre-Trial%20Release%20-Final.ashx>.

<sup>26</sup> Resolution available at the National Center for State Court’s website at:

<http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/01302013-pretrial-release-Endorsing-COSCA-Paper-EvidenceBased-Pretrial-Release.ashx>.

<sup>27</sup> Statements available at <http://www.pretrial.org/get-involved/pretrial-national-coalition/>.

<sup>28</sup> Information on Working Group progress available at:

<http://www.pretrial.org/download/infostop/Implementing%20the%20Recommendations%20of%20the%20National%20Symposium%20on%20Pretrial%20Justice-%20The%202013%20Progress%20Report.pdf>.

North Carolina is not alone in exploring bail reform. Legislatures in four states – Colorado, Kentucky, New Jersey and Alaska – recently re-wrote their bail laws to bring them in line with legal and evidence-based pretrial justice practices.<sup>29</sup> Several other states, including Arizona, Indiana, Maine, Maryland, Nevada, New Mexico, Texas, and Utah, have commissions or task forces examining statutory or court rule changes needed to incorporate legal and evidence-based practices.<sup>30</sup>

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<sup>29</sup> Colorado House Bill 13-1236 (2013), Kentucky House Bill 463 (2011), New Jersey Senate Bill 946 (2014), Alaska Senate Bill 91 (2016).

<sup>30</sup> In Arizona, the Chief Justice has appointed a Task Force on Fair Justice for All, tasked with identifying what changes are needed to assure that people are “not jailed pending the disposition of charges merely because they are poor.” See:

<http://www.ncsc.org/~media/Microsites/Files/PJCC/Pretrial%20Justice%20Brief%203%20-%20AZ%20final.ashx>. In Indiana, the Chief Justice appointed a Committee to Study Pretrial Release to advise the court on the use of an empirically-derived pretrial risk assessment tool for the state, and on alternatives to secured bonds. See:

[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=13&ved=oahUKEwio3ban2I7OAhWESyYKHbUMCDQ4ChAWCCgwAg&url=http%3A%2F%2Fwww.ncsc.org%2F~%2Fmedia%2FMicrosites%2FFiles%2FPJCC%2FPretrial%2520Justice%2520Brief%25206%2520-%2520IN%252012-30-2015.ashx&usg=AFQjCNEcAouXXDmNV6xWki\\_k91\\_zJc6KrA&bvm=bv.127984354.d.eWE](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=13&ved=oahUKEwio3ban2I7OAhWESyYKHbUMCDQ4ChAWCCgwAg&url=http%3A%2F%2Fwww.ncsc.org%2F~%2Fmedia%2FMicrosites%2FFiles%2FPJCC%2FPretrial%2520Justice%2520Brief%25206%2520-%2520IN%252012-30-2015.ashx&usg=AFQjCNEcAouXXDmNV6xWki_k91_zJc6KrA&bvm=bv.127984354.d.eWE). In Maine, the governor, chief justice, president of the senate and speaker of the house, have established a Task Force on Pretrial Justice Reform charged with producing recommendations for legislative action that will “reduce the financial and human costs of pretrial incarceration” without compromising public safety or the integrity of the criminal justice system. The directive establishing the task force is available at:

[http://www.courts.maine.gov/maine\\_courts/committees/2015%20PJR.pdf](http://www.courts.maine.gov/maine_courts/committees/2015%20PJR.pdf). In Maryland, the governor appointed a Commission to Reform Maryland’s Pretrial Release System; the Commission issued a report calling for statewide pretrial risk assessment using empirically-derived risk assessments. The Commission report is available at:

[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=oahUKEwiOm7upo47OAhvVG2yYKHdXYAk4QFggpMAI&url=http%3A%2F%2Fgocep.maryland.gov%2Fpretrial%2Fdocuments%2F2014-pretrial-commission-final-report.pdf&usg=AFQjCNHRPiZKczlN7kKA2ItgW\\_sMU19sLw&bvm=bv.127984354.d.eWE](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=3&ved=oahUKEwiOm7upo47OAhvVG2yYKHdXYAk4QFggpMAI&url=http%3A%2F%2Fgocep.maryland.gov%2Fpretrial%2Fdocuments%2F2014-pretrial-commission-final-report.pdf&usg=AFQjCNHRPiZKczlN7kKA2ItgW_sMU19sLw&bvm=bv.127984354.d.eWE). In Nevada, the Supreme Court appointed a Committee to Study Evidence-Based Pretrial Release with the purpose of identifying an empirically-derived pretrial risk assessment tool for that state. Information about that committee is available at: <http://nvcourts.gov/AOC/Templates/documents.aspx?folderID=19312>. In New Mexico, the Supreme Court appointed an Ad Hoc Pretrial Release Committee to make recommendations for rule changes that would incorporate legal and evidence-based pretrial release practices. See:

[https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=oahUKEwiggrXQ107OAhVNySYKHaHBAP4QFggzMAM&url=https%3A%2F%2Fsupremecourt.nmcourts.gov%2Fuploads%2FFileLinks%2F68d7e94c91244c3582e80b8272c30db1%2F2015\\_55.pdf&usg=AFQjCNHYXvihSggAhjTD7AW61\\_kc--eHqg](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=oahUKEwiggrXQ107OAhVNySYKHaHBAP4QFggzMAM&url=https%3A%2F%2Fsupremecourt.nmcourts.gov%2Fuploads%2FFileLinks%2F68d7e94c91244c3582e80b8272c30db1%2F2015_55.pdf&usg=AFQjCNHYXvihSggAhjTD7AW61_kc--eHqg). In Texas, the Chief Justice has appointed a Criminal Justice Committee under the Texas Judicial Council to explore ways of enhancing pretrial justice in that state. See:

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=oahUKEwjWr63loY7OAhXEOiYKHSXjA4MQFggkMAE&url=http%3A%2F%2Fwww.txcourts.gov%2Ftjc%2Fnews%2Fjudicial-council-creates-criminal-justice-committee.aspx&usg=AFQjCNFDRc6uwig2-qgCDRveQj6nSLepoAA>. In Utah, a committee of the Utah Judicial Council, the rule-making body for the judiciary, has recommended court rule changes that would include a clear statement of the presumption of release, free of financial conditions; use of a risk assessment for every defendant booked into a jail in the state; the availability across the state of supervision for moderate- and higher-risk defendants; and uniform, statewide data collection on relevant pretrial process and outcome measures. *Report to the Utah Judicial Council on Pretrial Release and Supervision Practices*, Utah State Courts, November 2015.

## *Legal and evidence-based practices produce excellent results*

Interest is growing in legal and evidence-based practices because they work. The District of Columbia provides one example of what can happen when a jurisdiction implements such practices. In DC, the pretrial services program, using an empirically-derived risk assessment tool, either recommends non-financial release – with or without conditions, depending on the assessed risk level – or that a hearing be held to determine whether the defendant should be held without bond. The program never recommends a monetary bond. The program also supervises conditions of release imposed by the court and sends court date reminder notices to all released defendants. The outcomes are impressive – 80% of defendants are released on non-monetary bonds and 15% are held without bond. The remaining 5% are held on other charges. Of those released, during FY 2012, 89% made all of their court appearances and 88% were not rearrested on new charges while their cases are pending. Only 1% was rearrested for a violent offense. Moreover, 88% of defendants remained on release at the conclusion of their cases without a revocation for non-compliance with release conditions.<sup>31</sup> These results were achieved without the use of secured money bonds.

Kentucky provides another example. In 2011, Kentucky began implementing the latest in legal and evidence-based practices, including reducing reliance on monetary bonds and basing recommendations on the results of an empirically-derived pretrial risk assessment tool. In the first two years after introducing these practices, the non-financial pretrial release rate went from 50% to 66%, with no negative impact on court appearance and public safety rates. In fact, the court appearance rate inched up from 89% to 91% and the public safety rate from 91% to 92%.<sup>32</sup> In 2013, Kentucky's statewide pretrial services program began using an empirically-derived risk assessment tool developed and tested by the Laura and John Arnold Foundation, the Public Safety Assessment–Court (PSA–Court). This tool was constructed after a study of over a million cases from jurisdictions all across the country. It is designed to be universal; that is, it can perform well in every jurisdiction in the country. A study conducted after the first six months of use in Kentucky showed that pretrial release rates rose to 70% of all defendants, and the increased release rate was accompanied by a 15% reduction in new criminal activity of defendants on pretrial release.<sup>33</sup>

In North Carolina, Mecklenburg County has been using the Arnold Foundation's PSA–Court tool since 2014. Mecklenburg County's pretrial services program, which administers this tool, also has developed a release matrix that combines a risk score and charge severity to arrive at a recommendation by the program regarding release.<sup>34</sup> An analysis of how PSA–Court was performing in Mecklenburg County after the first three months showed that it was successfully sorting defendants into risk categories for both

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<sup>31</sup> *Pretrial Services Agency for the District of Columbia: FY 2012 Organizational Assessment*, Dist. of Col. Pretrial Services Agency (2012), at 10.

<sup>32</sup> *Pretrial Reform in Kentucky*, Administrative Office of the Courts, Kentucky Courts of Justice (2013).

<sup>33</sup> *Results from the First Six Months of the Public Safety Assessment – Court in Kentucky*, Laura and John Arnold Foundation (2014).

<sup>34</sup> See *infra* p. 23 (discussing such matrices in general).

new criminal activity and failure to appear. For both of these outcomes, failure rates were lowest for those defendants scored by the tool as low risk, rising in step as the risk levels rose. The data also showed that pretrial release rates were highest for the lowest risk group, and declined in step with the rises in risk, meaning that judicial officials were using the results of the risk assessment tool to help make decisions. These actions resulted in a 93% public safety rate and a 98% court appearance rate in 2015,<sup>35</sup> with no increase in reported crime.

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<sup>35</sup> Data provided by Jessica Ireland, Mecklenburg County Pretrial Services, 7/19/16. See also: <http://charmeck.org/mecklenburg/county/news/Pages/Mecklenburg-County-Recognized-as-Model-for-Pretrial-Reform.aspx>.

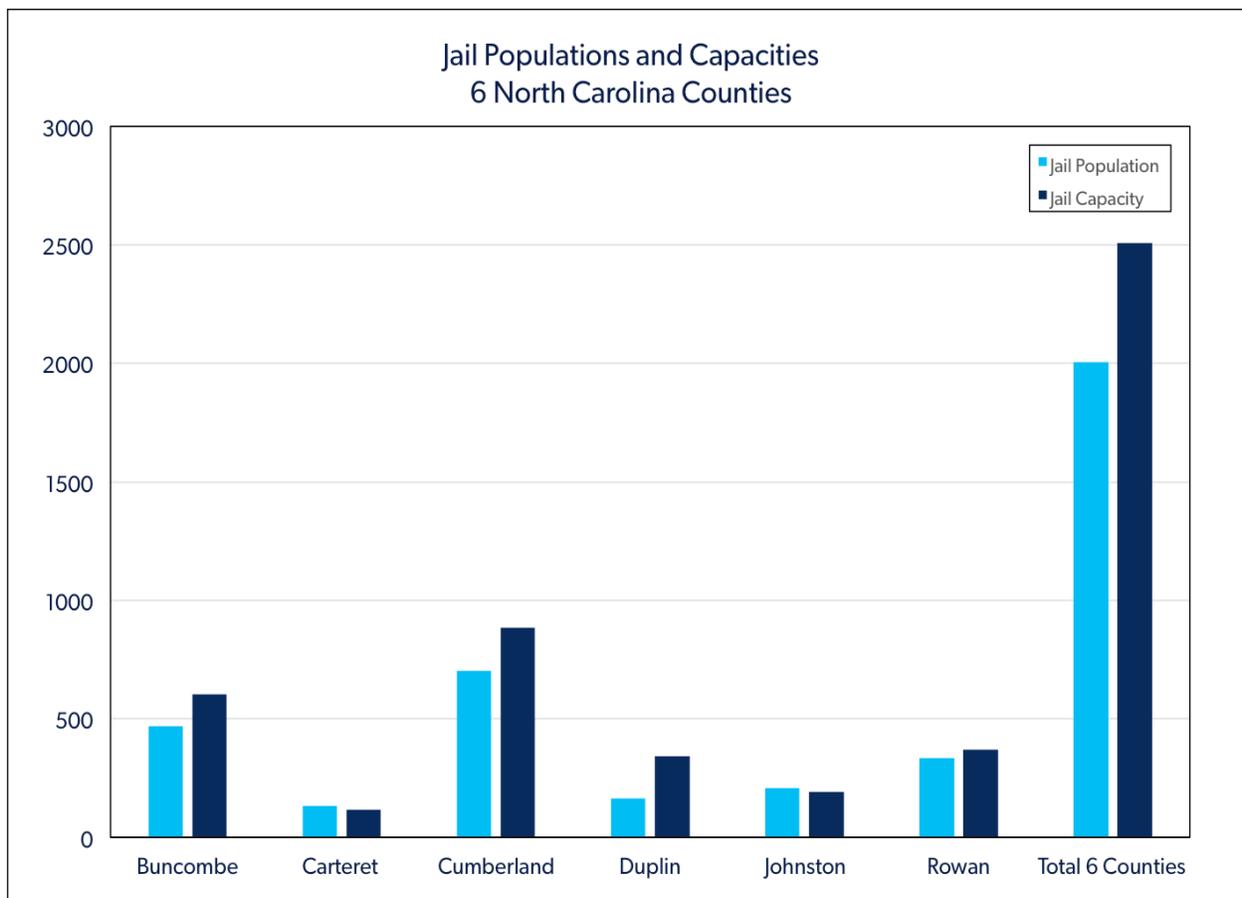
## II. PRETRIAL JUSTICE IN NORTH CAROLINA: CURRENT PRACTICES

This section discusses the state of pretrial release in North Carolina with a review of available data and a discussion of the pretrial release process.

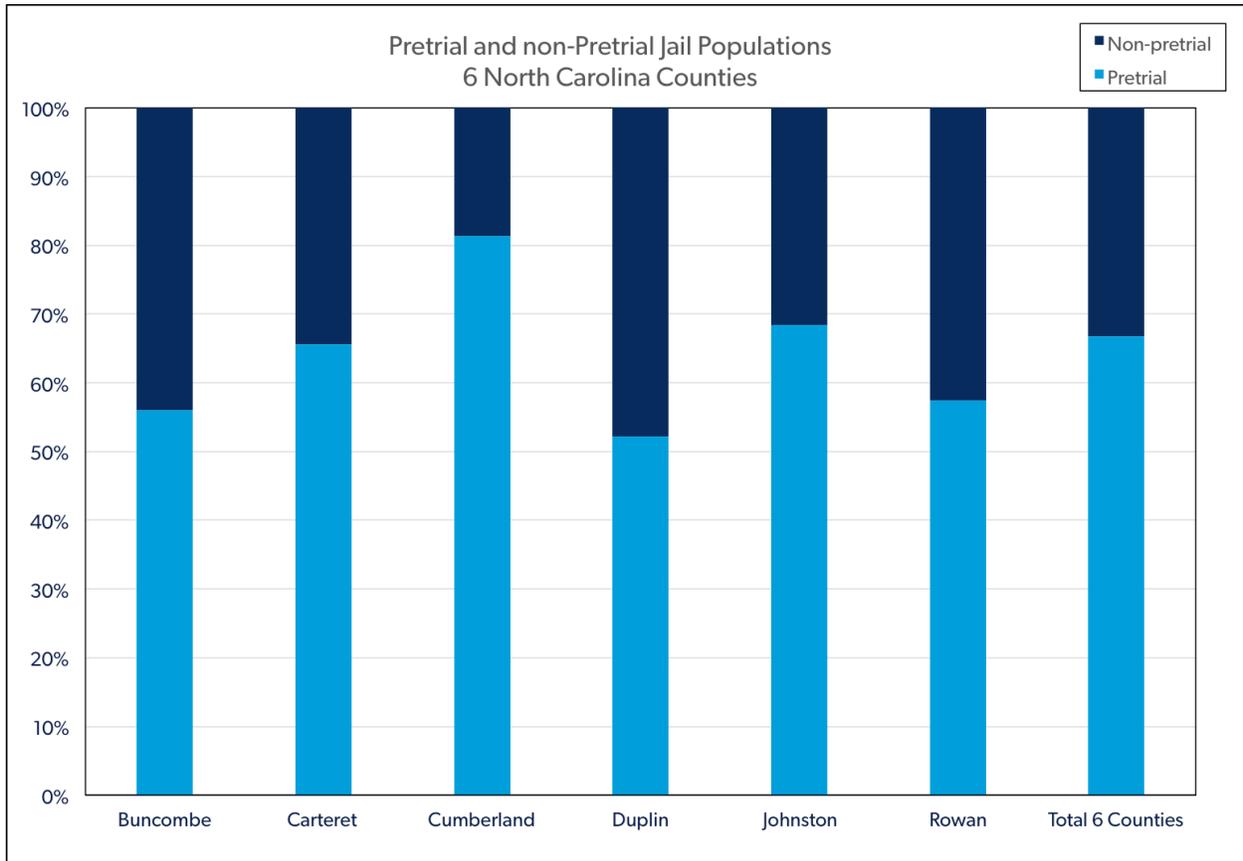
### *Analysis of Jail Data*

Commission staff submitted for analysis jail data for six North Carolina counties. The six counties represent 10.3% of North Carolina’s population and are a diverse demographic and geographic mix. They include Buncombe, Cumberland, Johnston and Rowan Counties, all part of larger metropolitan statistical areas, along with less densely populated and rural Carteret and Duplin Counties. The data comprised a “snapshot” of the jail populations in each of the six counties on a recent date.

Overall, on the date that the snapshots were taken, the jails were at 80% capacity (Column Graph 1), ranging from 48% in Duplin County to over-capacity at 111% in Carteret County.



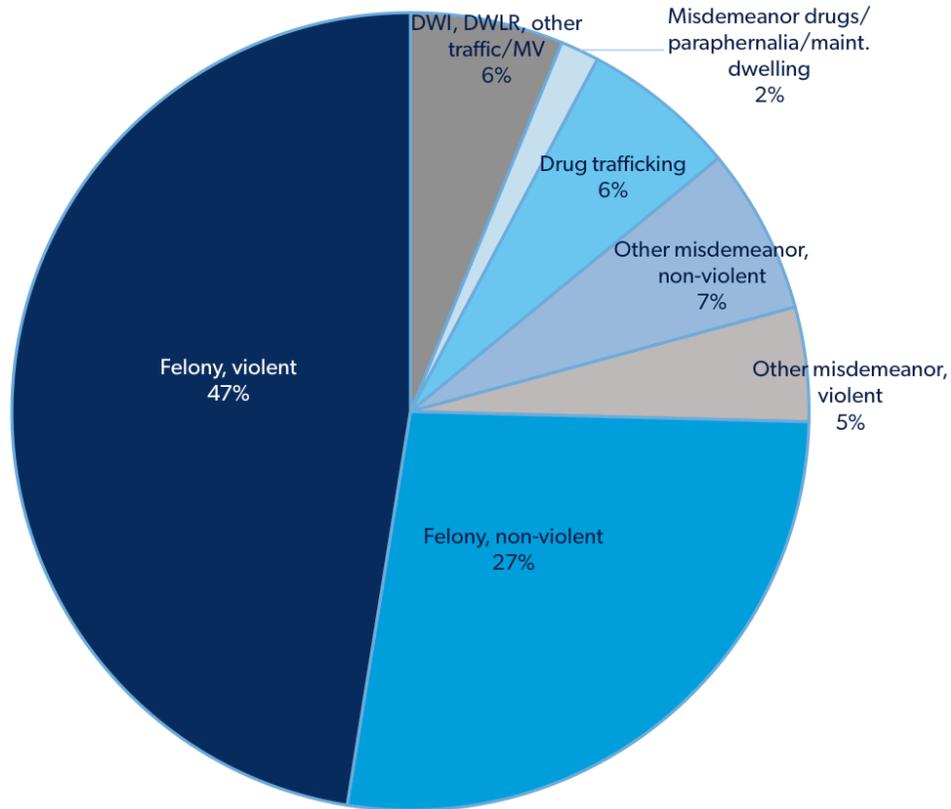
Across the six counties, on the dates of the snapshots, 67% of inmates were pretrial, ranging from a low of 52% in Duplin County to a high of 81% in Cumberland County (column graph below).



Virtually all pretrial detainees (1,268 out of 1,338 or 95%) were detained on cash or secured bond. The remaining 5% (70 detainees) who were being held without bond fell into three offense categories: violent misdemeanors, non-violent felonies, and violent felonies. Most of these (64) belonged to the violent felony category, with many of these being first degree homicide cases.

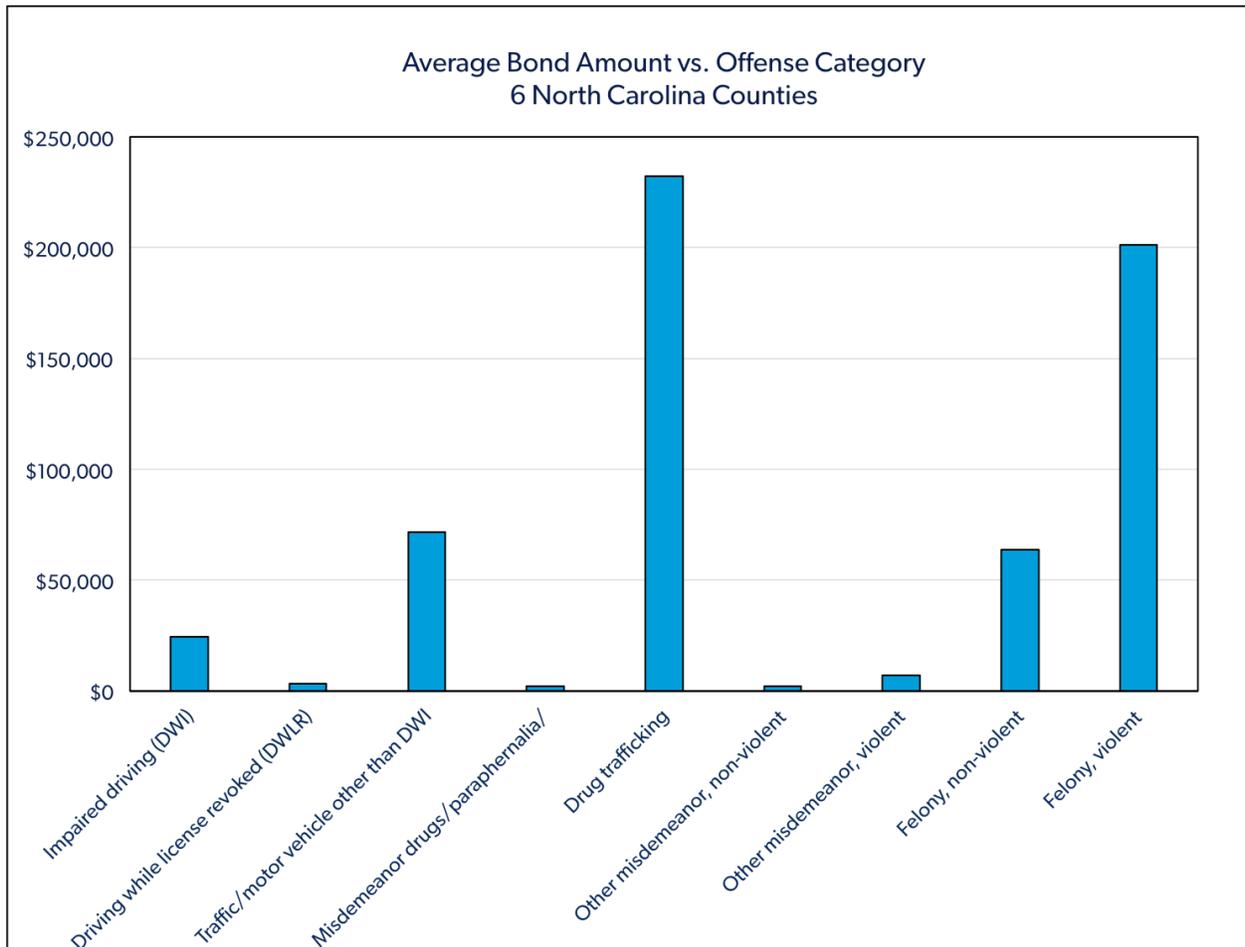
The top charge for a majority (75%) of pretrial detainees was either a violent (47.5%) or non-violent (27.1%) felony (pie chart below). As discussed in Section IV, by just knowing the top charge, and not the risk levels, of detained defendants, it is not possible to assess whether holding these defendants is a good use of jail space.

### Pretrial Detainees by Offense Type 6 North Carolina Counties



Information regarding the average, high and low bond amount for each of 9 offense categories was provided. In general, the more serious the offense, the higher the bond amount (Table below). However, the ranges were large for all offense categories. For example, bond amounts for individuals charged with a non-violent felony ranged from \$100 to \$2,000,000, violent felonies \$1,000 to \$3,000,000, and drug trafficking \$8,000 to \$2,000,000. The highest average bond amounts (graph below) were for drug trafficking (\$232,131) and violent felonies (\$201,261).

Offense Category	Lowest cash or secured bond amount	Highest cash or secured bond amount	Average cash or secured bond amount
Impaired driving (DWI), any type	\$1,000	\$200,000	\$24,610
Driving while license revoked (DWLR), any type	\$500	\$10,000	\$3,286
Traffic/motor vehicle other than DWI or DWLR	\$500	\$800,000	\$71,827
Misdemeanor drugs/paraphernalia/maint. dwelling	\$200	\$20,000	\$2,248
Drug trafficking	\$8,000	\$2,000,000	\$232,131
Other misdemeanor, non-violent	\$200	\$25,000	\$2,288
Other misdemeanor, violent	\$100	\$75,000	\$6,997
Felony, non-violent	\$100	\$2,000,000	\$63,688
Felony, violent	\$1,000	\$3,000,000	\$201,261

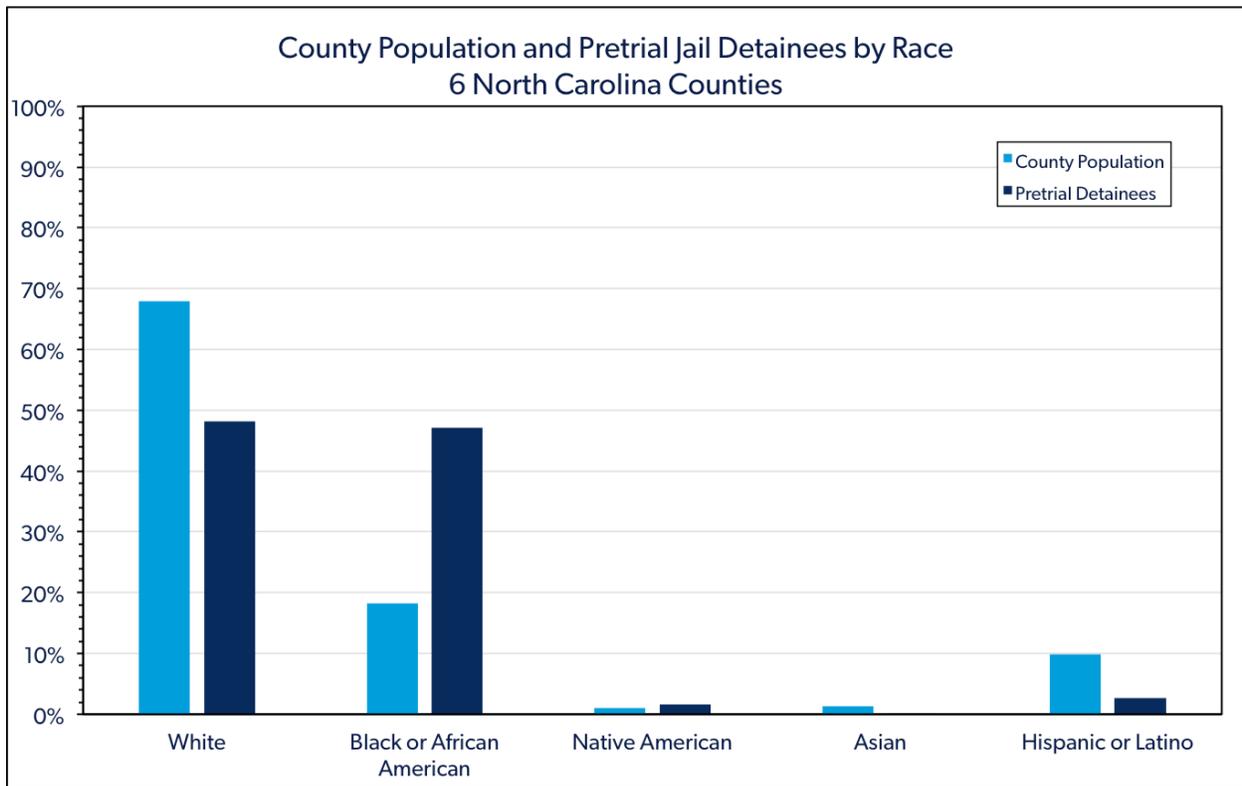


The next chart looks at average days detained. The snapshots that were taken to collect these data show who was in jail on the date of the snapshot for each of the six counties. As such, the data can only show how long defendants were in custody in pretrial status on the date of the snapshot. It cannot show their total length of stay – which would be a more meaningful measure.<sup>36</sup> With that caveat in mind, as the chart below shows, the average number of days detained is directly correlated to the average amount of the bond, that is, individuals stay longer in jail as bond amounts increase. These data must be viewed with the recognition that, as noted earlier, a snapshot of a jail population on a given date can only say how long each person had been in custody as of that date. It cannot provide the total length of stay, which is a much more meaningful figure to know.



African Americans were disproportionately represented in the pretrial population (chart below); although they make up only 18.2% of the population sample, they comprise 47.1% of pretrial detainees. As mentioned above in the discussion of the offense type, it is difficult to know how to put these data into context without knowing the risk level of defendants. This is discussed more in the next section.

<sup>36</sup> To determine total length of stay requires conducting a snapshot of all persons released from jail during a given time period. Time constraints prevented Commission staff from obtaining this information.



### Analysis of Process

Persons arrested in North Carolina are brought “without unnecessary delay” before a magistrate for an initial appearance.<sup>37</sup> At this hearing, with limited exceptions,<sup>38</sup> defendants are entitled to have a pretrial release condition set. In determining those conditions, magistrates must impose the least of the following: written promise to appear; release to the custody of a designated person or organization; unsecured bond; secured bond; and house arrest with electronic monitoring, which must be used with a secured bond.<sup>39</sup>

While the analysis of the jail data suggests that there are large numbers of defendants in North Carolina jails on release conditions that they cannot meet, data are not available for this report to show the extent to which each of the options that are available to the magistrate and judge (i.e., written promise to appear, unsecured bond, secured bond) are used, nor on the ultimate pretrial release rate, rate of new criminal

<sup>37</sup> G.S. 15A-501(2), -511(a)(1).

<sup>38</sup> Exceptions include capital cases, certain drug trafficking cases, certain fugitives, certain firearm offenses, certain gang-related offenses, parole violations, and certain probation violations. See Jessica Smith, *Criminal Proceedings Before North Carolina Magistrates* (UNC 2014) [hereinafter *Criminal Proceedings*], at pp. 27-34. Also, magistrates cannot set a bond in certain domestic violence cases at the initial appearance. *Id.* at p. 35. Those defendants must appear before a judge to have conditions set in 48 hours. *Id.* If a judge does not set conditions in 48 hours, the magistrate has the authority to do so. *Id.*

<sup>39</sup> G.S. 15A-534(a).

activity while on pretrial release, and rate of non-appearance in court. As a result, it is not possible to assess the extent to which the three goals of the pretrial release process – release, public safety, and court appearance – are being met in North Carolina.

It is, however, possible to look at the pretrial release practices that are used in the state, and compare them to legal and evidence-based practices. There are several areas of concern regarding the present process.

First, each judicial district has its own local pretrial release policy, and these policies mirror what is in the statute. However, many of these policies also include bond guidelines, which match the charge classification or the maximum penalty the defendant would face if convicted with a dollar secured bond amount or a range of amounts. Such policies make two assumptions, both of which legal and evidence-based practices show are false: (1) that the charge classification or maximum penalty defines the risks to public safety and court appearance that the defendant poses and (2) that money is the best way to address those risks. The pretrial risk assessment research shows that multiple factors, when considered together, provide the best models for predicting probability of success on pretrial release.<sup>40</sup> And, as noted earlier, research shows that, when controlling for risk levels, defendants who are not required to post a secured bond as a condition of pretrial release have the same public safety and court appearance rates as those who do, but without consuming the expensive jail bed resources used by many of those with secured bonds.<sup>41</sup>

Second, an empirically-derived pretrial risk assessment tool is used currently in only one of the state's 100 counties – Mecklenburg County. As discussed in the next section, the use of an empirically-derived risk assessment is a critical component of legal and evidence-based pretrial justice practices.

Third, only about 40 counties in the state are served by pretrial services entities, which supervise defendants on pretrial release.<sup>42</sup> Even in those counties where pretrial services exist, the statute specifies that the senior resident superior court judge may order that defendants can be released to the supervision of the program if both the defendant and the pretrial services program agree.<sup>43</sup> This approach undermines legal and evidence-based practices. If the empirically-derived pretrial risk assessment tool suggests that a particular defendant should be supervised on pretrial release, the judicial official should have the authority to order such supervision. Neither the defendant nor the pretrial services program should have the ability to, in effect, veto the judicial official's desired action. A potentially dangerous defendant should never be given the option of choosing whether to be supervised in the community or to buy his way out of jail with no supervision.

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<sup>40</sup> See, for example, the Virginia Pretrial Risk Assessment Instrument in Appendix A.

<sup>41</sup> *Unsecured Bonds*, *supra* note 16.

<sup>42</sup> According to a 2007 report, at that time there were 33 pretrial services programs operating within North Carolina, serving 40 of the state's 100 counties. *Pretrial Services Programs in North Carolina: A Process and Impact Assessment*, N.C. Governor's Crime Commission (2007), at 2.

<sup>43</sup> G.S. 15A-535(b).

Fourth, the law requires a formal process for bond review for felony defendants who remain incarcerated on a secured bond, but no such process is required for detained misdemeanor defendants. As a result, many misdemeanor defendants remain in jail for periods exceeding the sentence they could receive if convicted, and many plead guilty just so that they can be released. A new study of misdemeanor defendants from Harris County, Texas shows the serious consequences that can flow when holding misdemeanor defendants on secured bonds.<sup>44</sup> The study, which was conducted by the Rand Corporation and the University of Pennsylvania and which controlled for a wide range of other factors, found that, compared to their released counterparts, detained misdemeanor defendants were 25% more likely to plead guilty, and 43% more likely to be sentenced to jail, with jail sentences more than double of released defendants with a jail sentence. Researchers also found that, again controlling for other factors, detained misdemeanor defendants experienced a 30% increase in felony arrests within 18 months after completion of the case, and a 20% increase in misdemeanors, replicating the findings of research described earlier on the criminogenic effects of pretrial detention.<sup>45</sup> Based on these findings, researchers estimated that if Harris County had released on personal bond just those misdemeanor detainees who were held on bonds of \$500 or less “the county would have released 40,000 additional defendants pretrial, and these individuals would have avoided approximately 5,900 criminal convictions, many of which would have come through erroneous guilty pleas. Incarceration days in the county jail – severely overcrowded as of April 2016 – would have been reduced by at least 400,000. Over the next 18 months post release, these defendants would have committed 1,600 fewer felonies and 2,400 fewer misdemeanors.... Thus, with better pretrial detention policy, Harris County could save millions of dollars per year, increase public safety, and likely reduce wrongful convictions.”<sup>46</sup>

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<sup>44</sup> Paul Heaton, Sandra G. Mayson, Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention* (July 14, 2016). Available at SSRN: <http://ssrn.com/abstract=2809840> or <http://dx.doi.org/10.2139/ssrn.2809840>.

<sup>45</sup> *Hidden Costs*, *supra* note 12.

<sup>46</sup> *Supra* note 44, at 45-46.

### III. LEGAL AND EVIDENCE-BASED PRETRIAL JUSTICE PRACTICES: MODELS FOR NORTH CAROLINA

This section describes the elements of a legal and evidence-based pretrial release system, and discusses how the implementation of these elements in North Carolina can bring the state’s pretrial justice practices into the 21<sup>st</sup> Century.

#### Risk assessment

For a number of reasons, having an empirically-derived pretrial risk assessment tool is the keystone to a 21<sup>st</sup> century, legal and evidence-based pretrial release system. First, research demonstrates that such tools are highly effective in sorting defendants into categories showing their probabilities of success on pretrial release in terms of public safety and court appearance. The table below shows the results of the Colorado Pretrial Assessment Tool (CPAT) in Denver, Colorado.<sup>47</sup> As the table shows, for both safety and appearance, the success rates fall as the risk levels rise. Using the CPAT when making a pretrial release decision, a judicial officer in Denver knows a defendant scoring as a Risk Level 1 has a 96% probability of completing the pretrial period without being charged with new criminal activity while on pretrial release, and a 95% probability of making all court appearances. There is nothing in the risk assessment approach currently used by most North Carolina counties – the bond guidelines – that can produce such quantitative information.

Risk Assessment Outcomes, Denver, Colorado

Risk Level	Safety Rate	Appearance Rate
1	96%	95%
2	93%	86%
3	86%	84%
4	80%	77%

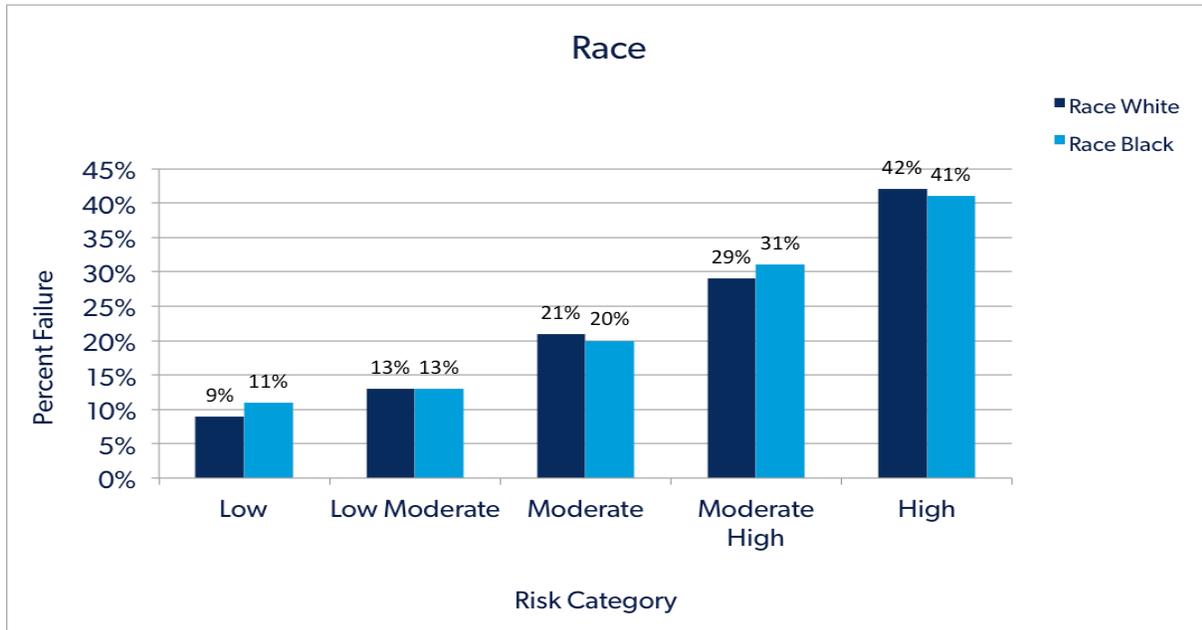
Source: *The Colorado Pretrial Risk Assessment Tool (CPAT)*, Pretrial Justice Institute and JFA Institute (2012)

Second, such tools can track any disparate impacts that might result through their use on racial and ethnic groups. If disparities do arise, they can be easily identified, which is the first step in addressing them. The chart below shows a breakdown by race and risk level of the Arnold Foundation’s PSA-Court risk assessment tool, the same tool being used currently in Mecklenburg County. In developing this tool, researchers ran statistical tests designed to identify disparities. As the chart shows, there has been very little variation in risk levels among African American versus white defendants using the PSA-Court tool.<sup>48</sup> The tool currently used in most North Carolina counties – the bond guidelines – provide no similar opportunity to test for any built-in biases of the tool, or to monitor for disparate outcomes. And, as noted above, data from North Carolina jails show that there are a large number of African Americans, disproportionate to their

<sup>47</sup> *The Colorado Pretrial Risk Assessment Tool (CPAT)*, Pretrial Justice Institute and JFA Institute (2012).

<sup>48</sup> *Results of the First Six Months of the Public Safety Assessment – Court in Kentucky*, Laura and John Arnold Foundation (2014), at 4.

population in the community, who are in jail pretrial.<sup>49</sup> With an empirically-derived pretrial risk assessment tool – one that has been tested for disparities – North Carolina officials would be able to contextualize the race data presented earlier and begin to address any identified issues.



Source: *Results of the First Six Months of the Public Safety Assessment – Court in Kentucky*, Laura and John Arnold Foundation (2014).

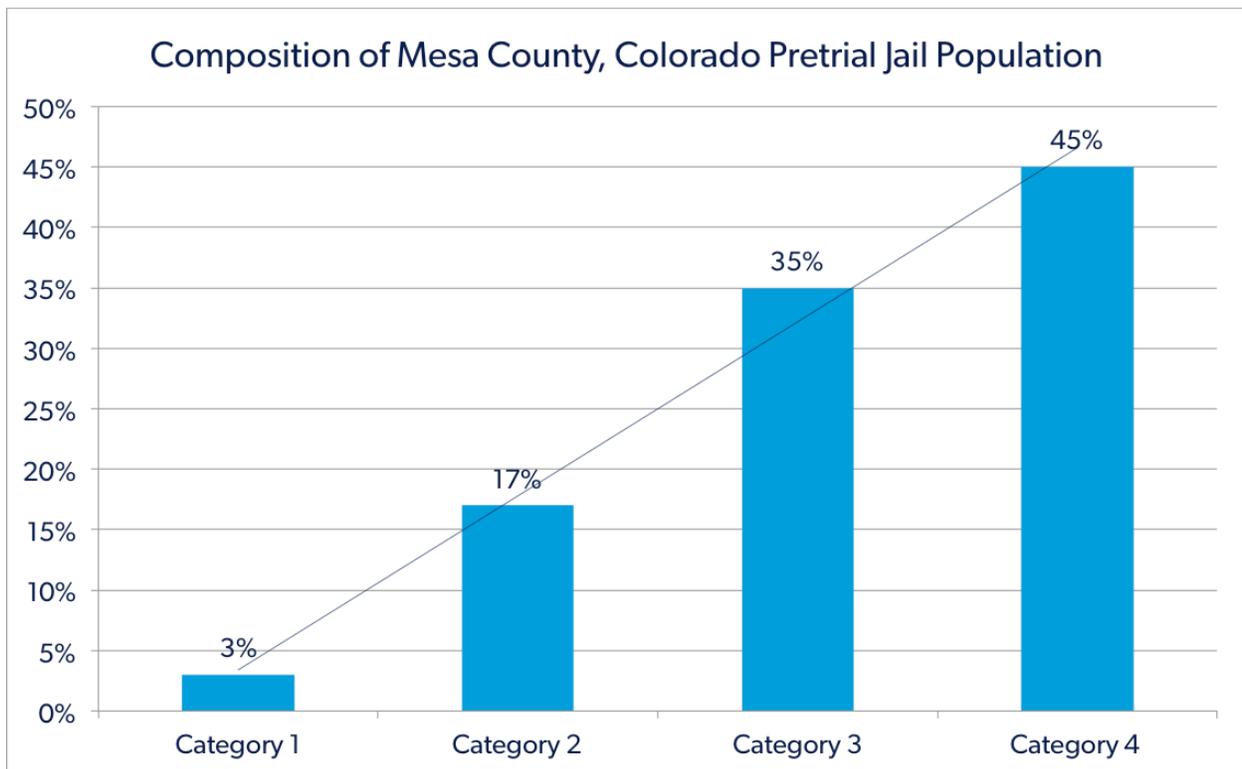
Third, having an empirically-derived pretrial risk assessment tool allows a jurisdiction to make valid comparisons between different types of release, or specific conditions of release. For example, as noted earlier, the for-profit bail bonding industry touts studies showing that defendants released through commercial bonds have higher appearance rates than defendants released through other means. But without knowing the risk levels of defendants it is not possible to know whether defendants in one group are comparable, in terms of risk, to defendants in another group. Such comparisons cannot presently be made in most North Carolina jurisdictions, but they can be made in jurisdictions that have implemented empirically-derived pretrial risk assessment.

Fourth, knowing the risk levels of defendants who are in jail helps a jurisdiction assess whether it is using its expensive jail resources for those who need to be there because of their risks. The data presented in Section II from the six North Carolina counties shows the charges of those who were in jail during the day the snapshot was taken, but since their risk level was unknown, it is very difficult to assess whether this was a good use of jail space.<sup>50</sup> When Mesa County, Colorado officials first implemented the Colorado risk assessment tool, they leaped at the opportunity to look at the risk

<sup>49</sup> *Supra* pp. 15-16.

<sup>50</sup> Once Mecklenburg County began using an empirically-derived pretrial risk assessment tool, it was possible to see how jail space was being used in that jurisdiction. See: <http://nccalj.org/wp-content/uploads/2016/02/Final-Presentation-raleigh-1.pdf>, Slides 11 & 12.

levels of the pretrial defendants they were holding, and they found that there were high percentages of low risk defendants in jail. County officials have been using the risk assessment levels to track progress in addressing that situation. As the chart below shows, officials can now report to their community how they are using the jail for the pretrial population – 80% of the pretrial detainees are scored in the two highest risk categories. Before implementing the risk assessment tool, county officials were in the same position as North Carolina officials – they could only point to data showing that there were large numbers of persons in jail pretrial on low level offenses or low bonds – without any knowledge of their risk levels.



Source: Data provided by Mesa County, Colorado.

Fifth, knowing the risk levels of defendants coming through the system can help officials plan for, and justify to taxpayers, the resources needed to address the risks. Numerous pretrial risk assessment studies have demonstrated that the overwhelming majority of defendants fall into low or medium risk categories, meaning that they should require minimal resources for monitoring in the community. Knowing risk levels can help budget officers better project funding needs.<sup>51</sup>

<sup>51</sup> An analysis of costs in the federal system found that detaining a defendant pretrial costed an average of \$19,000 per defendant, while the costs for supervising a defendant in the community ranged from \$3,100 to \$4,600 per defendant. The analysis took into consideration the costs of supervision, any treatment, and any costs associated with law enforcement returning defendants who had failed to appear for court. Marie VanNostrand and Gina Keebler, *Pretrial Risk Assessment in the Federal Court*, 73 FED. PROB., (2009), at 6.

Recognizing these benefits, at least seven states – Colorado, Delaware, Hawaii, Kentucky, New Jersey, Virginia, and West Virginia – have passed laws requiring the use of statewide empirically-derived pretrial risk assessment tools.<sup>52</sup>

The Arnold Foundation’s PSA-Court tool offers several benefits for use in North Carolina. First, it is presently being used in Mecklenburg County, so there is in-state experience with the tool, giving judges, prosecutors and defenders from around the state the opportunity to speak with their counterparts in Mecklenburg County about their experience working with the tool.

Second, the PSA–Court tool has been validated using data from 1.5 million cases from over 300 local, state and federal jurisdictions all across the country, meaning that it is the most universal pretrial risk assessment tool in existence. Currently 29 jurisdictions, including three states – Arizona, Kentucky and New Jersey – use the tool.<sup>53</sup> This should give North Carolina officials confidence that it will perform well in North Carolina.

Third, the risk assessment can be completed using information typically available at the time of the initial appearance before the magistrate.<sup>54</sup> It does not require an interview with the defendant by a pretrial services program or other entity. This is important given that most North Carolina counties, even those that have pretrial services programs, do not presently have the capacity to interview defendants prior to the initial appearance before the magistrate.

As a result, this report recommends that officials explore implementing Arnold’s PSA-Court tool in jurisdictions throughout North Carolina.<sup>55</sup> Since the tool is not yet publicly available and a timeline for its availability is uncertain, as a backup this report recommends that North Carolina use the Virginia Pretrial Risk Assessment instrument (VPRAI). The VPRAI was first developed in Virginia in 2003 after a study of data from seven diverse jurisdictions throughout the state.<sup>56</sup> It was re-validated in 2009 from nine diverse Virginia jurisdictions.<sup>57</sup> A copy of the Virginia Pretrial Risk Assessment instrument is in Appendix A.

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<sup>52</sup> Colo. Rev. Stat. §16-4-106, 4(c); 11 Del. C. §2104(d), §2105; Haw. Rev. Stat. §353-10; Ky. Rev. Ann. §431.066; 446.010(35); N. J. Stat. Ann. §2A:162-16; §2A-162-17; Va. Code Ann. §19.2-152.3; W. Va. Code Ann. §62-11F-1 et seq.

<sup>53</sup> See:

<https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0ahUKEwig1YDn5I7OAhUFOyYKHaxYB4cQFggIMAE&url=http%3A%2F%2Fwww.arnoldfoundation.org%2Finitiative%2Fcriminal-justice%2Fcrime-prevention%2Fpublic-safety-assessment%2F&usq=AFQjCNE6Iwbltg8uh1AFDgmYPbfcgXjgXA>.

<sup>54</sup> In Mecklenburg County, however, the tool has been implemented only for use by the district court judge.

<sup>55</sup> See Section V, Recommendations. The factors included in this tool are listed in Appendix E.

<sup>56</sup> Marie VanNostrand, *Assessing Risk Among Pretrial Defendants in Virginia: The Virginia Pretrial Risk Assessment Instrument*, Virginia Department of Criminal Justice Services, 2003.

<sup>57</sup> Marie VanNostrand and Kenneth Rose, *Pretrial Risk Assessment in Virginia*, Virginia Department of Criminal Justice Services, 2009.

## Release/Detention Matrix

Once the risk assessment is completed on a defendant, the next step is to determine how to use that information to make a release/detention decision. Research is providing guidance on how to do that, matching identified risk levels with appropriate risk management strategies. For example, defendants who are found to be low risk have very high rates of success on pretrial release. Research has shown that these already high rates cannot be improved by imposing restrictive conditions of release on low risk defendants.<sup>58</sup> The research shows that the only result to expect when imposing restrictive conditions of release on low risk defendants is an increase in technical violations.<sup>59</sup> Instead, the most appropriate response is to release these low risk defendants on personal bonds with no specific conditions, and no supervision other than to receive a reminder notice of their court dates.<sup>60</sup>

Other studies have found that high risk defendants who are released with supervision have higher rates of success on pretrial release than similarly-situated unsupervised defendants. For example, one study found that, when controlling for other factors, high risk defendants who were released with supervision were 33% less likely to fail to appear in court than their unsupervised counterparts.<sup>61</sup>

A reality that any jurisdiction faces is that, even though the charge or type of charge may provide little information on a defendant's risk to public safety or to fail to appear in court, the impact of new criminal activity or failing to appear on the more serious charge is perceived to be much greater. Therefore, many jurisdictions that use empirically-derived pretrial risk assessment tools have developed matrices that combine the risk level with charge types, for example, non-violent misdemeanor, violent misdemeanor, non-violent felony, and violent felony. The resulting intersection of the risk level and charge type produces a suggested release/detention decision. The decision itself remains within the discretion of the judge or magistrate after considering the risk assessment, the matrix, and any other relevant factors.

A copy of the matrix used in Virginia, based on the VPRAI, is in Appendix B. If North Carolina adopts the VPRAI, this matrix, called the Pretrial Praxis, should be used in concert with the VPRAI.

## Risk Management

Any conditions set on a defendant's pretrial release should be related to the risk identified for that individual defendant and should be the least restrictive necessary to reasonably assure the safety of the public and appearance in court.<sup>62</sup> The research on

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<sup>58</sup> *Pretrial Risk Assessment in Federal Court*, *supra* note 46.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Christopher Lowenkamp and Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes*. (New York: Laura and John Arnold Foundation, 2013.)

<sup>62</sup> *American Bar Association Standards for Criminal Justice (3<sup>rd</sup> Ed.) Pretrial Release* (2007) Std. 10-5.2 (a) at 106-107.

risk management is not as advanced as it is on risk assessment. With the current state of research, it is not possible to identify which conditions of release work best for all defendants. But there is some research to guide policy makers.

As noted above, research has shown that putting conditions of non-financial release on low risk defendants actually increases their likelihood of failure on pretrial release. Rather, the most appropriate response is to release these low risk defendants on personal recognizance with no specific conditions.<sup>63</sup>

Several studies have shown that simply reminding defendants of their upcoming court dates can have a dramatic impact on reducing the likelihood of failure to appear. One study found that calling and speaking with defendants to remind them about their court dates cut the failure to appear rate from 21% to 8%.<sup>64</sup> Another study tested the impact of a pilot court date reminder project that using an automated telephone dialing system to contact defendants. The study found that the project led to a 31% drop in the failure to appear rate and an annual cost saving of \$1.55 million.<sup>65</sup>

Two studies that have considered the defendant's risk level, as determined by an empirically-derived risk assessment tool, have found that supervision results in lower rates of failure to appear and new criminal activity when compared to their risk-level counterparts who received no supervision.<sup>66</sup>

The Virginia Pretrial Praxis<sup>67</sup> takes all of this research into consideration, incorporating different options for managing any identified risks. These include release on personal recognizance or unsecured bonds with no conditions of release other than to receive a court date reminder, followed by release on gradually increasing levels of supervision based on identified risks.<sup>68</sup>

## Citations

The American Bar Association's Standards for Criminal Justice (Pretrial Release) state that "[i]t should be the policy of every law enforcement agency to issue citations in lieu of arrest or continued custody to the maximum extent consistent with the effective

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<sup>63</sup> *Pretrial Risk Assessment in Federal Court*, *supra* note 54.

<sup>64</sup> Jefferson County, *Colorado Court Date Notification Program: FTA Pilot Project Summary* (2005).

<sup>65</sup> Matt O'Keefe, *Court Appearance Notification System: 2007 Analysis Highlights* (2007). See also: Michael N. Herian and Brian H. Bernstein, *Reducing Failure to Appear in Nebraska: A Field Study*, THE NEBRASKA LAWYER (2010); and Wendy White, *Court Hearing Call Notification Project*, Coconino County Criminal Justice Coordinating Council (2006).

<sup>66</sup> John S. Goldkamp and Michael D. White, *Restoring Accountability in Pretrial Release: The Philadelphia Pretrial Release Supervision Experiments*, JOURNAL OF EXPERIMENTAL CRIMINOLOGY, 2(2) (2006), at 143-181; Christopher Lowenkamp Marie VanNostrand, *Exploring the Impact of Supervision on Pretrial Outcomes*. Laura and John Arnold Foundation (2013).

<sup>67</sup> See Appendix B.

<sup>68</sup> See Appendix C.

enforcement of the law. This policy should be implemented by statutes of statewide applicability.”<sup>69</sup>

At least one state has changed its laws recently, expanding the use of citation releases. In 2012, Maryland enacted legislation mandating that law enforcement officers issue a citation in lieu of custodial arrest when the officer has grounds to make a warrantless arrest for persons facing misdemeanor or ordinance offenses that carry a maximum penalty of 90 days or less, and for possession of marijuana. The law allows the law enforcement officer to fingerprint and photograph the individual before the citation release. In the year after the law went into effect, there was an 80% increase in the number of citations issued in the state and nearly 20,000 fewer initial appearances in court. “From a cost perspective, the further expansion of criminal citations has the potential to save money by reducing arrests and booking costs.”<sup>70</sup>

### *Prosecutor involvement at the initial hearing*

Ideally, prosecutors should review criminal charges immediately after arrest, prior to the initial bail hearing before a judicial officer, to weed out those cases not likely to advance. Many cases are dropped after review by prosecutors – one study found that 25% of all felony cases are ultimately dropped.<sup>71</sup> Experienced prosecutors, those who have extensive trial experience and who know what is needed to get a conviction, are best equipped to do a review of cases before the initial appearance than less experienced prosecutors. The District of Columbia prosecutor’s office has been doing this for many years. In 2012, of the 27,000 cases brought to the office by law enforcement, 8,000 were declined before the initial appearance before a judicial officer – thus stopping at the front door of the courts about 30% of all new arrests, cases that would have needlessly bogged down the system.<sup>72</sup>

In addition to screening cases early, prosecutors should be present at the initial appearance of the defendant before the magistrate. At the hearing, the prosecutor should make appropriate representations on behalf of the state on the issue of pretrial release. As the National District Attorneys Association standards state, at that hearing “[p]rosecutors should recommend bail decisions that facilitate pretrial release rather than detention.”<sup>73</sup>

In North Carolina, prosecutors are not routinely present at the initial appearance before the magistrate.

### *Defense representation*

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<sup>69</sup> *American Bar Association Standards for Criminal Justice (3<sup>rd</sup> Ed.) Pretrial Release* (2007) Std. 10-2.1, at 63.

<sup>70</sup> *Commission to Reform Maryland’s Pretrial System: Final Report* (2014), at 27-28.

<sup>71</sup> Reaves, *supra* note 11, at 24

<sup>72</sup> *The United States Attorneys Office for the District of Columbia: 2012 Annual Report* (2013) at 31.

<sup>73</sup> *National Prosecution Standards: 3<sup>rd</sup> Edition*, National District Attorneys Association, 2009, Std 4-1.1.

The U.S. Supreme Court has said that “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of the adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”<sup>74</sup> The Court stopped short of saying that an attorney must be present at the hearing, only that the right to counsel attaches at that time.

The American Council of Chief Defenders, however, calls on all public defender offices to “dedicate sufficient resources to the bail hearing and/or first appearance, where the pretrial release terms are set.” At that hearing, public defenders should “obtain and use crucial risk assessment information for making relevant and persuasive arguments regarding appropriate release conditions for their clients.”<sup>75</sup> Research has shown that indigent defendants who are represented by counsel at the bail hearing are released non-financially at about 2½ times the rate of those who were unrepresented.<sup>76</sup>

Defense attorneys do not presently represent indigent defendants at the initial appearance before the magistrate in North Carolina. In many North Carolina jurisdictions, the defendant first receives counsel at the first appearance in District Court.

### *Bond review of defendants unable to post bond*

As noted in Section II, current North Carolina law requires a first appearance (which includes a review of pretrial conditions) before a district court judge for in-custody defendants charged with a felony. However, no such hearing is required for in-custody defendants charged with misdemeanors. This can, and often does, result in misdemeanor defendants remaining in pretrial confinement for periods longer than they might serve as a sentence if convicted. This “gap” in the law seems to be unique to North Carolina. In other states, a defendant who remains in custody after an initial hearing before a magistrate will appear before a judge the next court business day for a bond review hearing, regardless of the charge level.

### *Data/performance measures*

Collecting data on the impact and outcomes of evidence-based practices is crucial for 21<sup>st</sup> Century pretrial justice. Jurisdictions should be able to report on data on all criminal cases relating the three goals of the bail decision:

- Public safety rate (defendants not arrested for new criminal activity while on pretrial release) for all released defendants, broken down risk level and by release type.

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<sup>74</sup> *Rothgery v. Gillespie*, 554 U.S. 191 (2008), at 20.

<sup>75</sup> American Council of Chief Defenders, *Policy Statement on Fair and Effective Pretrial Justice Practices* (2011), at 14.

<sup>76</sup> Douglas L. Colbert, Ray Paternoster and Shawn Bushway, *Do Attorneys Really Matter? The empirical and Legal Case for the Right of Counsel at Bail*, *CARDOZO LAW REVIEW*, 23 (2002) at 1719-1793.

- Court appearance rate for all released defendants (percentage of defendants who did not fail to appear for all scheduled hearings, resulting in the issuance of a warrant or order for arrest), broken down by risk level and by release type.
- Pretrial release rate, broken down by risk level, release type, and time between arrest and release.

Other important measures include:

- Number of defendants released by citation, broken down by charge and by police department and/or sheriff's office.
- Percent of defendants for whom an actuarial risk assessment was scored prior to the release-or-detain decision by the magistrate, broken down by county or judicial district.
- Percent of cases reviewed by an experienced prosecutor prior to the initial appearance before a magistrate, broken down by county or judicial district.
- Percent of initial appearances before the magistrate in which the prosecution and defense participate, broken down by county or judicial district.
- Percent of cases in which the magistrate's decision matches that suggestion of the pretrial matrix, broken down by county and by magistrate.
- Percent of detained defendants who were detained as a result of a detention hearing, broken down by county or judicial district.
- Percent of detained defendants who were held on a secured bond, broken down by risk level and by county or other appropriate jurisdiction.
- Length of stay in jail for detained defendants who were held on a secured bond, broken down by risk level, bond amount, and county or other appropriate jurisdiction.

## IV. PRETRIAL JUSTICE IN NORTH CAROLINA: THE LEGAL STRUCTURE

### *Prerequisites to Understanding the Legal Analysis*

Understanding any legal analysis designed to guide decision makers toward implementing legal and evidence-based practices requires first knowing three broad concepts. First, every jurisdiction in America already has many essential elements of a pretrial system, even if that system does not function optimally. For example, each jurisdiction does a version of risk assessment. In some jurisdictions, however, risk assessment is done simply by glancing at a defendant's top charge. Other jurisdictions use empirically-derived risk assessment instruments, validated to their populations, which help predict the chances of a defendant's pretrial misbehavior. Likewise, all jurisdictions do some sort of risk management, from merely hoping that a defendant will come back to court and stay out of trouble during the pretrial phase to using dedicated professional pretrial services agencies designed to further the lawful purposes of release and detention. In the same way, every state has a legal structure to effectuate pretrial release and detention that works at some level. Nevertheless, sometimes that structure can actually hinder what we know today are "best-practices" in pretrial release and detention. Understanding this allows us to acknowledge that "bail reform" is not necessarily a daunting task; indeed, it often means merely improving existing systems, even if those improvements are comprehensive.

Second, we are learning that a great deal of education is necessary to fully understand what those improvements should be. Pretrial release and detention is deceptively complex, and yet suffers from decades of neglect in our colleges, universities, and law schools. It is simply not enough to take on a topic like pretrial release and detention with the traditional and existing knowledge of criminal justice stakeholders. Some specialized education must take place. Fortunately, to help jurisdictions obtain the knowledge necessary to advance pretrial justice, there are numerous documents and programs available today through the Pretrial Justice Institute and other leading organizations that can provide education, advice, and assistance. Even though decision-makers in particular jurisdictions may believe that they lack data and information, in this generation of bail reform we have virtually every answer to the significant questions that have nagged America over the past 100 years – answers that can lead to substantial progress toward pretrial justice. Due to time and space limitations given for this report, it will be up to North Carolina criminal justice leaders to read beyond this report to fully learn the additional material that points to those answers.<sup>77</sup>

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<sup>77</sup> North Carolina stakeholders should begin by reading *Fundamentals of Bail*, *supra* note 1, and Timothy R. Schnacke, *Money as a Criminal Justice Stakeholder: The Judge's Decision to Release or Detain a Defendant Pretrial*, Nat'l Inst. Corr. (2014), and references cited therein. By doing so, stakeholders will learn that broad reports (such as this one) concerning the state of pretrial release and detention in any particular state can often only provide the impetus for continued conversations over legal and evidence-based practices based on research, which, in turn, is being published at an increasingly rapid pace.

Third, the knowledge gained from deep bail education often illustrates that certain assumptions underlying a state's existing release and detention laws, policies, and practices are flawed, and that the solutions to perceived issues at bail are counterintuitive in our current culture. For example, for over 100 years, courts in America have assumed that defendants pose higher pretrial risks when facing higher charges, and our laws and practices are set up to effectuate release based on that assumption. However, the pretrial research is demonstrating that certain misdemeanor defendants often pose higher risk than felony defendants and that many felony defendants pose little risk at all. Likewise, jurisdictions often assume that money helps to keep citizens safe, but the research, the history, and the law all tell us that this is not so. Understanding the somewhat counterintuitive nature of certain pretrial justice change efforts helps us to understand and possibly change the current culture surrounding pretrial release and detention.

### *The History of Bail and the Fundamental Legal Principles*

Understanding any legal analysis also requires having at least some familiarity with the history of bail (release) and no bail (detention) – considered to be a “fundamental” or “core” element that jurisdictions must understand to make improvements in pretrial justice. Generally speaking, the history of bail shows that in roughly 1900, America moved from a system of pretrial release using personal sureties administering unsecured bonds to a system relying on commercial sureties administering mostly secured bonds. Justice system professionals and researchers in America very quickly learned that the infusion of profit, indemnification, and security into bail led to continued and, indeed, increased unnecessary detention of bailable defendants,<sup>78</sup> but not before states had already adopted the “charge-and-secured money” legal systems we still see today.

At the time, many courts in America believed that using commercial sureties and secured bonds would help get most defendants out of jail pretrial, but it only made things worse. Today, after two generations of bail reform in America designed to fix the problems with the charge-and-secured money release system, we find ourselves in yet another generation of reform hoping to fix it once again because secured money bonds continue to interfere with rational release and detention.

Moreover, understanding any legal analysis requires knowing how the fundamental legal principles underlying American pretrial release and detention have been molded by history and have, in many ways and until very recently, failed in fixing the problems brought on by the changes in 1900. Knowing the law for bail and no bail means knowing that the law has been largely ignored for decades, allowing states to craft legal schemes that are now being successfully challenged in the courts. Generally speaking, many state bail laws are simply unlawful when measured against the larger American legal principles, such as procedural due process and equal protection, and this

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<sup>78</sup> See, e.g., Roscoe Pound & Felix Frankfurter (Eds.), *Criminal Justice in Cleveland* (Cleveland Found. 1922); Arthur L. Beeley, *The Bail System in Chicago*, at 160 (Univ. of Chicago Press, 1927).

alone is causing many states to make substantial changes to those laws to allow for legal and evidence-based practices in pretrial release and detention.<sup>79</sup>

### Current North Carolina Legal Structure

Unlike many states, North Carolina has a detailed recitation of existing laws, and that recitation has served as a useful tool for the instant report.<sup>80</sup> This analysis seeks to go beyond that recitation to assess whether the legal structure helps or hinders best pretrial practices. Due to time limits, this overview of the North Carolina legal structure must be viewed only as the beginning of a conversation about holding up the state's laws to the broader legal principles, the history of bail, the pretrial research, and the national standards on best practices to assess every element affecting pretrial justice. Pretrial reform often involves making improvements to *all* decisions and practices from the initial police stop to sentencing. Reviewing those decisions and practices, looking at the associated legal and evidence-based literature for each, holding them up to some model and to existing laws while comparing those laws to other sources, and making recommendations for possible changes, while fruitful, would be laborious and lead to an overwhelmingly lengthy document. Accordingly, this report will examine in detail only the most crucial issues facing North Carolina at this time, which mostly deal with the judicial official's decision to release or detain a defendant pretrial.<sup>81</sup>

Nevertheless, the people of North Carolina should see the benefits of looking at other decision points or practices in the process. For example, a crucial element in pretrial justice is diversion, and while the author saw references to a variety of local diversion programs, such as "jail diversion," mental health courts, and public and private diversion for certain first offenders in North Carolina, other state's statutes provide many more opportunities for structured pretrial diversion, and base those programs on their own literatures concerning best practices. Likewise, even though there did not appear to be anything legally hindering defense counsel providing assistance at initial appearances, this does not appear to be the practice in North Carolina even though at the initial appearance defendants are facing significant deprivations of liberty.<sup>82</sup> By briefly reviewing the North Carolina laws, the author also saw potential issues concerning: (1) police issuing citations versus arresting persons and courts issuing summonses versus warrants for arrests (laws can be amended to encourage or even require the use of citations and summonses so that arrest is only

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<sup>79</sup> As only one example, the Ninth Circuit Court of Appeals recently struck down as unconstitutional an Arizona "no bail" provision enacted in its constitution. See *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772 (2014). Until very recently, people have mistakenly inferred the lawfulness of certain bail practices due simply to the lack of opinions expressly declaring them to be unlawful.

<sup>80</sup> See *Criminal Proceedings*, *supra* note 37.

<sup>81</sup> A more detailed legal analysis would also look deeply into North Carolina case law, which was not done for purposes of this report.

<sup>82</sup> Defense counsel at the initial appearance has spun off into its own reform effort, with multiple groups working on the issue simultaneously. Reasons for including defense counsel at initial appearance include empirical evidence in addition to fairness. See *Early Appointment of Counsel: The Law, Implementation, and Benefits* (Sixth Amend. Ctr./PJI 2014); *Do Attorneys Really Matter?*, *supra* note 70.

reserved as a last resort):<sup>83</sup> (2) practices such as requiring fingerprinting and DNA testing that might lead to unnecessary arrests; (3) the potentially inefficient practice surrounding the use of appearance bonds for infractions; (4) certain laws that allow for delays in holding the initial appearance (such as tasks required of officers arresting defendants on implied consent offenses) or that hinder the immediate release of low and medium defendants present at that appearance (the pretrial research, which follows the law, would point to dealing with the vast majority of defendants rapidly, and especially low and medium risk defendants because keeping those defendants unnecessarily detained can actually lead to more crime and failures to appear for court); (5) speedy trial for detained defendants; (6) potential problems with implementing risk assessment into a legal scheme already containing various untested risk factors that judicial officials “must” consider;<sup>84</sup> and (7) collecting data and performance measures (data collection is crucial to understanding the efficacy of any pretrial system, and many states are now enacting requirements for such things into their laws).

Moreover, when considering changes to the release and detention decision, most jurisdictions recognize that empirically-derived risk assessment and evidence-based risk management are crucial elements, if not prerequisites, to those changes. Only by knowing defendants’ risk can courts follow the law and the evidence by immediately releasing the majority of pretrial defendants under varying levels of research-supported supervision to both protect the public and bring people back to court, while providing for extreme public safety risk management through the ability to detain certain defendants in a fair and transparent procedure. The laws must allow for these elements, and if they do not, they must be changed.

The largest issue facing North Carolina, however, deals with the laws surrounding the judicial official’s decision to release or detain a defendant pretrial. North Carolina currently has a legal scheme with elements based firmly in a charge-and-secured money bond system and with somewhat faulty assumptions about both money and charge.

To assess North Carolina’s laws for how it deals with the release and detention decision, this section examines the following: (1) how the North Carolina laws operate broadly as compared to other states, focusing primarily on its statutory release/detention eligibility framework; (2) certain assumptions that seem to buttress

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<sup>83</sup> Current North Carolina law appears to allow an officer to issue a citation for a misdemeanor or infraction, but there is no preference or mandatory language. G.S. § 15A-302. The law concerning summonses apparently allows the issuance of a summons for felonies in addition to misdemeanors and infractions (also with no preference), but because the AOC criminal summons form has been drafted not to charge a felony, persons have apparently been advised not to issue one for felonies. *See id.* §15A-303(a); *Criminal Proceedings, supra* note 37, at 4. Other jurisdictions have shown that requiring the arrest of felony defendants is not always necessary, and the trend across America appears to be the use of mechanisms that gradually ratchet up criminal process and that incorporate every means possible to compel court appearance before resorting to arrest. To the extent that warrants (or OFA’s in North Carolina) use financial conditions of release on their face, that practice should be made part of any discussion to reduce or eliminate secured financial conditions generally. To the extent that North Carolina can discuss the appropriate use of arrests for violations of release conditions, it should do so also. Finally, to the extent that North Carolina can adopt the evidence-based practice of court date notification in all of its courts, it should do so.

<sup>84</sup> *See* G.S. § 15A-534(c).

existing laws and that might make change difficult; (3) provisions setting out the detention process; (4) provisions setting out the release process; and (5) issues gleaned from a reading of various local pretrial release policies.

### *North Carolina Laws: The Right to Release and Authority to Preventively Detain High Risk Defendants Generally*

Current North Carolina law does not expressly provide for a right to actual pretrial release or articulate a procedure for preventive detention of high risk defendants. As discussed below, both omissions create barriers to pretrial reform.

North Carolina eliminated the right to bail provision in its constitution of 1868.<sup>85</sup> North Carolina is thus like eight other states and the federal system, all of which operate without a constitutional right to bail, which means that certain changes to the system of release and detention will not be hindered by constitutional right to bail hurdles.<sup>86</sup> From a legal standpoint, states with no constitutional right to bail can more easily implement both release and detention provisions that follow legal and evidence-based practices than states with such a constitutional right.

This is not to say that North Carolina does not have a right to release pretrial, and, indeed, there are good arguments for why a state could never completely eliminate any right to pretrial release. But in North Carolina, it appears that the right is somewhat confused. Unlike in other states' laws, there is no explicit delineation of precisely who should actually be released or detained. Although Section 15A-533 is entitled, "Right to pretrial release in capital and noncapital cases,"<sup>87</sup> the body of the statute is crafted only in terms of setting or not setting conditions. Various local pretrial release policies quote cases articulating a right to pretrial release,<sup>88</sup> and even interpreting § 15A-533 to provide for a "right to release,"<sup>89</sup> but while the statute's title speaks of a right to release, the statute both generally and specifically points only to a "right to have one's conditions set," which is far from actual release.<sup>90</sup>

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<sup>85</sup> The previous constitution stated: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident, or the presumption great." N.C. Const. art. 39 (1776).

<sup>86</sup> Of course, as in other states, North Carolina has other constitutional provisions that are relevant to bail, and that will form the boundaries over potential reforms. For example, some states have issues with constitutional victim's rights provisions when those provisions require a victim's presence at initial appearance, thus causing delay. The relevant North Carolina provision articulates a "right as prescribed by law [for victims] to present their views and concerns to the Governor or agency considering any action that could result in the release of the accused, prior to such action becoming effective." N.C. Const. art 1, § 37(1)(g). Because this provision speaks of the "accused," it has clear implications for pretrial release; nevertheless, the right appears to hinge on how it is "prescribed by law," and in the time allotted for this analysis, the author was unable to find any statutory provision that might delay or hinder the release or detention decision.

<sup>87</sup> G.S. § 15A-533.

<sup>88</sup> See, e.g., *In the Matter of Promulgating Local Rules Relating to Bail and Pretrial Release for Judicial District 8A*, at 5-6 (quoting *Stack v. Boyle*, 342 U.S. 1 (1951)).

<sup>89</sup> See, e.g., *Policies Relating to Bail and Pre-Trial Release Second Judicial District*, at 2.

<sup>90</sup> G.S. §§ 15A-533(b) (stating that "[a] defendant charged with a noncapital offense must have conditions or pretrial release determined"). The relevant treatise also speaks only of a right to have conditions set,

Moreover, the statute has no discernable process for detention of the sort approved in the U.S. Supreme Court’s opinion in *United States v. Salerno*,<sup>91</sup> which guides states in crafting such provisions. Existing North Carolina law creates rebuttable presumptions that “no conditions or combination of conditions” will provide reasonable assurance of public safety and court appearance for defendants charged with certain offenses with certain preconditions,<sup>92</sup> but those provisions only testify to the notion that other cases, even without the presumptions, are potentially cases in which “no condition or combination of conditions” would suffice; obviously, presumptions toward a certain result in some cases means that there should be a broader set of cases allowing the presumptive subset to exist, yet the statute has no provisions to deal with them. There are simply no statutory provisions setting forth exactly what to do in a typical case where a defendant is deemed extremely high risk and unmanageable outside of secure detention and falls outside of the rebuttable presumption cases.

As discussed below, a right merely to have conditions set, coupled with the statutory provisions discussing those conditions as well as no decent process for risk-based detention, naturally moves North Carolina judicial officials toward using secured money conditions to address risk for both court appearance and public safety, and toward attempting to use unattainable money conditions to detain defendants posing extremely high pretrial risk. By contrast, “model” release and detention schemes would expressly articulate who is releasable, who potentially is not, and provide mechanisms to make sure that the in-or-out decision is made purposefully, transparently, and fairly, and with nothing (such as money) interfering with the decision.<sup>93</sup>

In addition to not being entirely clear on what right North Carolina defendants actually enjoy as well as not providing for a due-process laden detention process, North Carolina law overall illustrates the same issues facing virtually every other state in America: the legal scheme is based on a charge and secured-money model, and this core issue can hinder attempts to improve the system without statutory changes. Specifically, although the statute speaks of pretrial risk (something other state statutes often do not do), it makes determinations of who is entitled to having release conditions set based primarily on charge as a proxy for risk, and subtly points judicial officials toward using

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and provides as exceptions those cases in which defendants don’t enjoy a right to have conditions set. *Criminal Proceedings*, *supra* note 74, at 27.

<sup>91</sup> To pass constitutional muster, a preventive detention provision would have to comply with the requirements discussed in *United States v. Salerno*, 481 U.S. 739 (1987) (finding the Bail Reform Act of 1984 constitutional against facial due process and excessive bail claims).

<sup>92</sup> *See, e.g.*, G.S. § 15A-533(d) (rebuttable presumption for persons accused of drug trafficking). These provisions are also fairly limited, requiring judicial officers in most cases to find facts concerning the offense as well as certain preconditions such as already being on pretrial release at the time of the current offense along with some delineated previous conviction. *See generally Criminal Proceedings*, *supra* note 74, at 27-30.

<sup>93</sup> There are few exemplary statutes that currently do this. However, the D.C. bail statute, D.C. Code Ann. §§ 23-1301-09, 1321-33, which reflects principles articulated in the American Bar Association Standards on Pretrial Release, has been used by many jurisdictions as a model to begin conversations about statutory reform.

the money condition to address risk.<sup>94</sup> The better practice would be to set forth a right to release for all except extremely high risk defendants (or defendants who are not as risky but who also face extremely serious charges, or both), provide for a lawful and transparent detention provision based on risk to allow pretrial detention with no conditions, and then create mechanisms so that persons released pretrial are released immediately. Rebuttable presumptions, though perhaps not made entirely unnecessary by the move toward infusing risk into charge-based systems, can be crafted to use both risk and charge in ways that support the law and the research.

### *North Carolina Law: Underlying Assumptions*

Many jurisdictions have learned that overcoming flawed assumptions concerning pretrial release and detention is necessary before making improvements to the process. In addition to the flawed assumption that the right to bail is merely a right to have one's conditions set, or the equally flawed assumption that higher charge necessarily equals higher risk, there are two additional significant assumptions that should be addressed. These assumptions are not unique to North Carolina; indeed, they are seen across the country and illustrate a much more pressing problem with bail reform in America, which is that many pretrial improvements involve thinking about release and detention in an entirely different way. This means that bail reform involves “adaptive change,” which involves overcoming faulty assumptions driving the way we think about any particular topic.<sup>95</sup>

One assumption found throughout the North Carolina laws appears to be that money at bail affects public safety. It is found either explicitly, as in G.S. §15A-534(d2)(1), which requires judicial officials to impose a secured bond or house arrest (which includes a secured bond) “[i]f the judicial official determines that the defendant poses a danger to the public,” or implicitly, as in G.S. § 15A-534(d3), which allows a judicial official to double the amount of money condition for defendants who commit crimes while on pretrial release, presumably to better protect the public from future crimes. Money does not protect the public, however, unless it is used unlawfully to detain an otherwise releasable defendant.<sup>96</sup>

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<sup>94</sup> For example, although the statute includes an express presumption for non-secured releases, G.S. § 15A-534 (b), later provisions do not mandate and also place significant limitations on pretrial services supervision, which might lead judicial officials to set more secured bonds. Likewise, various provisions throughout the statute equating secured money amounts with public safety might nudge any particular judicial official toward setting a secured bond since a finding of “a danger of injury to any person” is one reason for overcoming the presumption of non-secured release. The fact that the statute requires judicial officials to set conditions for high risk defendants falling outside of the “no conditions” exceptions, also necessarily moves those officials toward using secured money bonds to at least respond to extremely high risk.

<sup>95</sup> Bail reform has only recently begun to understand that the improvements involved require system changes as well as changes in people's beliefs and core understandings of certain concepts. For information on how adaptive change can be addressed at bail, go to <http://transformingcorrections.com/about/>.

<sup>96</sup> Using money to detain defendants pretrial would obviously implicate a state's right to bail or release provision, but the practice can also lead to claims concerning both substantive and procedural due process, equal protection, and excessive bail.

In many states, using money to protect the public is expressly unlawful, but even in a state like North Carolina, it is irrational and thus implicitly unlawful. North Carolina G.S. § 15A-544.3 makes failure to appear for court the only event that can lead to forfeiture of money on a bail bond. Thus, when a defendant commits a new crime while on pretrial release, the money is not forfeited. Accordingly, it is irrational to set money to motivate defendant behavior concerning criminal activity because the money cannot lawfully act as a motivator. Setting a condition of release that cannot lawfully do what one intends it to do is irrational, and thus likely unlawful based on any legal theory that requires courts to use rationality or reason in its actions.<sup>97</sup> Likewise, no research has ever shown money to protect the public. In fact, the research on secured money bail shows that setting secured bonds leading to the detention of low and medium risk defendants actually causes them to become *higher* risk for both new criminal activity and failure to appear for court.<sup>98</sup> Setting a condition of release that leads to the *opposite* of what a court intends is even more irrational than setting one that simply doesn't work.

Finally, no matter how high the amount, any particular extremely dangerous defendant might still be able to pay it, leading to the potential for some horrific yet avoidable crime during the pretrial period. This public safety problem is exacerbated by North Carolina law, which appears to limit a judicial officer's ability to set a "cash only" bond.<sup>99</sup> Because commercial sureties cannot lose money due to new criminal activity, in many states those sureties help extremely high risk defendants obtain easy release by using no-money-down and payment plan options.

Another assumption found in North Carolina law (including the local pretrial release policies) that potentially hinders the adoption of legal and evidence-based practices appears to be an assumption that release to pretrial services agency supervision should be reserved only for low level crimes or low risk defendants.<sup>100</sup> In fact, the use of pretrial services functions are part of a high functioning pretrial system, and such agencies are often best when overseeing defendants posing high risk or charged with more serious crimes.

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<sup>97</sup> For example, even using its lowest level of scrutiny, due process analysis requires the means of government action to be rationally related to some legitimate end. There should be no doubt that all government action must be rational and non-arbitrary.

<sup>98</sup> See, e.g., *Hidden Costs*, *supra* note 12.

<sup>99</sup> See *Criminal Proceedings*, *supra* note 37, at 39.

<sup>100</sup> See G.S. § 15A-535(b) (allowing, but not requiring pretrial services programs, requiring defendant consent before they are used, and allowing them only in lieu of release under condition options (1), (2), or (3) of G.S. §15A-434(a)). Apparently, very few North Carolina judicial districts have pretrial services agency programs, and at least one that does puts a wide variety of further restrictions on using them, including a long list of exclusionary criteria and excluded offenses that most people would describe as "serious." See *Bail Policy for Twenty Sixth Judicial District* at 5, 23-33. Together, these factors suggest an assumption that pretrial services supervision is only inappropriate for certain low level crimes or low risk defendants. This assumption is often tied to the first concerning money and public safety; jurisdictions that believe money is the best way to manage pretrial risk often believe that pretrial services supervision should be reserved only for those cases in which money is unnecessary.

## North Carolina Law: Preventive Detention of High Risk Defendants

As noted above, North Carolina law does not expressly establish a procedure for the preventive detention of high risk defendants. Moreover, the rebuttable presumption provisions allowing for “no conditions” are, in most cases, quite narrow, and there appears to be some confusion as to whether persons other than those statutorily separated out for no conditions can be detained, even if, in their particular cases, no conditions or combination of conditions would suffice to provide reasonable assurance of public safety or court appearance. Combined with the assumption that money protects the public and the various statutory provisions subtly leading judicial officials to use money to respond to risk, the lack of a risk-based detention process likely means that many – if not most – defendants who are perceived to be high risk are being detained purposefully through the unwise and potentially unlawful<sup>101</sup> process of using unattainable secured money bonds. Indeed, an Internet search reveals numerous North Carolina cases of defendants being held bonds in amounts of millions or even tens of millions of dollars, at least suggesting judicial intent to detain. Moreover, one local pretrial release policy reported a “modification” of recommended bond amounts because, “Those who pose the greatest threat [to the community] must not be allowed to roam free while keeping in mind the presumption of innocence.”<sup>102</sup> This statement clearly indicates the use of money to detain.

While it is unclear whether individual judicial districts would, or even could, create a lawful and transparent detention process like the one reviewed by the U.S. Supreme Court in *United States v. Salerno*,<sup>103</sup> such a process could be fairly easily created in the North Carolina statutes. Because detaining someone pretrial involves jailing someone for something the person may or may not do in the future, the Supreme Court has cautioned that pretrial detention provisions must be carefully limited and fair by incorporating numerous procedural due process elements.<sup>104</sup> Detention through the use of money – a practice apparently used widely throughout North Carolina – simply does not measure up to that standard.

The closest North Carolina law comes to providing the required due process fairness elements to its detention procedure is through the fairly limited findings necessary for its rebuttable presumption cases, and the mandate in G.S. § 15A-434 (b) that judicial officials record in writing the reasons for imposing a secured bond, but only to the extent required by local pretrial release policies. Thus, while G.S. § 15A-535(a) requires the creation of such local policies, it merely allows districts to decide whether to include a further requirement that judicial officials make written records.<sup>105</sup> None of the

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<sup>101</sup> As mentioned previously, using the release process to detain defendants by using money potentially violates both substantive and procedural due process, equal protection notions, and the prohibition against excessive bail.

<sup>102</sup> *In the Matter of Promulgating Local Rules Relating to Bail, Judicial District 8A*, at 1.

<sup>103</sup> 481 U.S. 739 (1987).

<sup>104</sup> *See id.* at 747-52.

<sup>105</sup> *See* G.S. § 15A-535(a) (directing that policies “*may* include . . . a requirement that each judicial official who imposes condition (4) or (5) in G.S. 15A-434(a) must record the reasons for doing so in writing.” (emphasis added)).

local pretrial release policies reviewed by this author contain detention provisions remotely similar to the provisions favorably reviewed in *Salerno*, which were described by the Court as a “full blown adversary hearing.”<sup>106</sup> Moreover, at least one local pretrial release policy requires judicial officials to provide reasons only for secured amounts falling above those provided in the schedule of recommended amounts.<sup>107</sup> Others provide check-box forms for the required reasons.<sup>108</sup> Still others appear to have no record requirement at all.

### *North Carolina Law: The Release Process*

Looking at the release processes broadly, North Carolina’s law is like most other states’ bail laws, in that it is charge-based, overly reliant upon financial conditions, does not include provisions for empirical risk assessment, has limits upon pretrial services agency supervision, and tends naturally to point to the use of mostly secured money bonds administered by commercial sureties. The North Carolina statute does not have the feel of a statute cobbled together over the decades; indeed, it appears to have much more direction and cohesive intent than most other state’s bail laws. Nevertheless, it also appears to have grown over time simply to respond to the various crimes separated out for different pretrial treatment.<sup>109</sup> Like most states, there are some good provisions, such as an express presumption for release on recognizance or unsecured bond,<sup>110</sup> but there are also some bad ones, such as those requiring money to address public safety and permitting “bond doubling.”<sup>111</sup>

As previously noted, believing that the legal right that defendants enjoy pretrial is a right merely to have “conditions set” can lead to significant hindrances when secured money remains one of those conditions. Quite broadly, secured money conditions cause the two most significant problems we see in the field of pretrial justice: (1) the unnecessary and often unlawful detention of low and medium risk defendants for failure to pay the security necessary for release; and (2) the unwise release of extremely high risk defendants who have the money necessary to obtain release. People often equate the first problem as one representing a lack of fairness, but North Carolina should realize that detaining low and medium risk persons unnecessarily for even short periods of time also causes increases in new criminal activity and failures to appear for court both short- and long-term. Thus, the more that the North Carolina release process can be improved to quickly assess and release all eligible defendants, but especially low and medium risk defendants, the more public safety will be enhanced.

The statute currently attempts to do this through its presumption of release under either a written promise to appear or an unsecured bond,<sup>112</sup> but because there

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<sup>106</sup> *Salerno*, 481 U.S. at 750.

<sup>107</sup> See, e.g., *Bail Policies for the Judicial District Twenty-Nine-B*, at 3.

<sup>108</sup> See, e.g., *In the Matter of Promulgating Local Rules Relating to Bail and Pretrial Release for Judicial District 30A*, at 17-18.

<sup>109</sup> See, e.g., G.S. 15A-534(d2) (special procedure for probationer charged with a felony).

<sup>110</sup> G.S. § 15A-534(b).

<sup>111</sup> See, e.g., G.S. 15A-534(d1) (requiring bond doubling after failure to appear).

<sup>112</sup> G.S. § 15A-534(b).

exist no provisions concerning the use of empirically-derived risk assessment instruments, North Carolina judicial officials must attempt to assess risk mostly clinically – that is, based on their experience, with untested and unweighted statutory factors and with a series of possibly faulty assumptions about the pretrial process.<sup>113</sup> Accordingly, the presumption of release on a written promise or unsecured bond<sup>114</sup> can be easily and possibly incorrectly overcome with little evidence.

Empirically-derived risk assessment is considered to be a prerequisite to effective reform because knowing pretrial risk is the first step toward placing the right defendants in the right places during the pretrial phase of a criminal case. A second prerequisite is risk management. In many jurisdictions, risk management is done most effectively through the use of pretrial services agencies, which assess defendants for pretrial risk, make recommendations to courts, and then supervise defendants using minimal to intensive supervision techniques. In North Carolina, the statute mentions such programs,<sup>115</sup> but places severe limitations on their use by requiring both the pretrial entity to accept defendants into the program and the defendants to consent to be placed under supervision. The far better practice using both of these prerequisites is for judicial officials to base their release and detention decisions on empirically-derived risk assessment, and then to order released defendants to pretrial supervision, which might range from a simple phone call reminder to more intensive supervision, depending on the risk.

The primary bail-setting provision in North Carolina involves judicial officials setting at least one of five main conditions, from a written promise to appear to house arrest with a secured bond,<sup>116</sup> but, again, the lack of empirical risk assessment and the proper use of pretrial services agency supervision likely pushes judicial officials toward the more restrictive of these conditions to address mostly subjective notions of pretrial risk.

Making sure that the release or detention decision is structured properly and done right in the first instance can virtually eliminate any acute need for review of *unattainable* conditions. Nevertheless, there is often still some need for a failsafe to make sure the decision is effectuated, and it is absolutely crucial in any system that has not yet made improvements reducing the need for later review. In North Carolina, magistrates may modify a pretrial release order at any time prior to the first appearance

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<sup>113</sup> See § *id.*, § 15A-534(c). These types of factors were included in most state statutes in the wake of the United States Supreme Court’s opinion in *Stack v. Boyle*, 342 U.S. 1 (1951), as a way to avoid arbitrary bail setting by incorporating individualizing elements. Nevertheless, without statistically-derived risk assessment, judicial officials are likely to look at a statutory factor such as the “nature and circumstances of the offense charged,” G.S. § 15A-534(c), incorrectly assume that a higher charge would lead to a higher risk of pretrial misbehavior, and thus be moved toward using more restrictive conditions, such as secured bonds.

<sup>114</sup> The presumption also includes release on option number three, release to the custody of a designated person or organization, but if a judicial official chooses this option, defendants are allowed to choose to post a secured bond instead. See G.S. § 15A-534(a).

<sup>115</sup> G.S. § 15A-534(b).

<sup>116</sup> *Id.* §§15A-534(a)(1)-(5).

before a judge,<sup>117</sup> but it appears that there is no formal process for subsequent mandatory review of bonds for misdemeanor defendants who are not released in the first instance.<sup>118</sup> This appears to be a significant gap in the North Carolina statute that must be fixed regardless of any additional improvements.

### *North Carolina Law: The Role of Local Pretrial Release Policies*

North Carolina G.S. § 15A-535(a) requires senior resident superior court judges to create and issue local pretrial release policies to help in “determining whether, and upon what conditions, a defendant may be released before trial.” This statutory language indicates that policies might be drafted to potentially supplement various elements missing from the statute, including important elements as a process to detain extremely high risk defendants. Overall, however, the various local pretrial release policies reviewed for this report illustrate mostly varying re-statements of the current statutory requirements along with the inclusion of money-based bail schedules. The policies vary widely in length, in age, in amounts included in the schedules, and, unfortunately, even in articulation of what should be uniform statements of the purposes of pretrial release and detention. Some local pretrial release policies would be rated as very good when held up to legal and evidence-based practices, but others most certainly would not. One frequent problem observed throughout the policies is an articulation of assumptions or rationales based primarily on experience rather than research or the law, and thus policies seeking only to follow the law and the pretrial research would likely look significantly different than the policies this author reviewed. Indeed, even elements within the various policies incorporated without any rationale (indicating, perhaps, universal acceptance), such as monetary bail bond schedules, would likely be eliminated after a review of the law and the evidence.

While there may be a place in pretrial justice for local determination of various details surrounding release and detention, the mechanism incorporated in North Carolina to do so could be improved. This notion should not be read merely to suggest the need for uniformity among the various bail schedules because the use of a traditional money bail schedule is simply not a legal or evidence-based practice. Instead, it should be read to indicate recognition that some local control could be built into a statewide pretrial justice system, but only after statewide issues are fully understood and addressed. Only after a thorough study of bail and no bail in North Carolina can the state likely assess which elements must be addressed in the statute and which can be left to individual judicial districts.<sup>119</sup>

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<sup>117</sup> *Id.* § 15A-534(e).

<sup>118</sup> *See id.* §15A-601(a) (limiting the first appearance provisions to felony defendants); § 15A-614 (requiring release eligibility review for felony defendants).

<sup>119</sup> As one example, a state might allow local flexibility in determining the “cut-offs” on a particular risk instrument, but only after that state determines broadly who should be released and detained pretrial, decides to use an empirical risk instrument, determines which instrument to use, and then decides that cut-off flexibility within a given range is even desirable.

## Legal Framework Needed to Implement Legal and Evidence-Based Practices in North Carolina

Incorporating legal and evidence-based practices into a state's pretrial release laws typically requires substantial revision to those laws. Knowledge of legal and evidence-based practices often leads to a series of discreet changes, which quickly add up to large-scale revisions. Moreover, simply trying to incorporate a single element of bail reform – such as, for example, risk assessment – can lead to the need to address multiple statutory sections using charge as its primary proxy for risk. Thus, even targeted reforms can require significant statutory changes. Rather than attempting to re-write North Carolina's pretrial statutes, this report recommends broad statutory changes that will need to be fine-tuned by the people of North Carolina. For example, while this report recommends creating a preventive detention provision based on risk, it leaves to North Carolina the determination of who, exactly, should be detained and how best to make that happen.<sup>120</sup>

North Carolina officials likely wish to know both what they can accomplish with little or no changes to the law as well as what changes are absolutely necessary to create a legal and evidence-based system of release and detention. To determine this, we look primarily at the two crucial elements of legal and evidence-based pretrial practices: (1) risk assessment; and (2) risk management surrounding both release and detention, including the elimination of a secured money bond's potential to interfere with either release or detention.

**Risk Assessment:** Without any statutory alteration, local pretrial release policies could incorporate empirically-derived risk assessment into their decision-making framework.<sup>121</sup> This change would serve to better inform judicial officials as to which defendants should be released and which should be detained pretrial. However, it would also likely further highlight deficiencies in the current statutory release and detention scheme based, in large part, on criminal charge and secured-money bail (especially to purposefully detain high risk defendants).

Incorporating empirically-derived assessment could also be done without altering the current statutory risk factors that are neither tested nor weighted for prediction of pretrial risk.<sup>122</sup> However, it can cause confusion to have two sets of factors to assess risk. Moreover, having two sources for risk assessment can lead to an unacceptable number of unnecessary overrides to the empirical instrument, and can also lead to decisions that are actually less accurate than when based on the empirical set alone.

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<sup>120</sup> General recommendations can, however, be quite useful as a starting point. In Colorado, for example, the State Crime Commission released three broad recommendations concerning pretrial release (increase the use of evidence-based practices including empirical risk assessment, increase the use of pretrial services agencies, and reduce the use of money), and those three recommendations led to a comprehensive, line-by-line overhaul of the bail statute.

<sup>121</sup> Indeed, this has apparently already been done to some extent in Judicial District 26, which has adopted the Arnold Foundation's PSA-Court tool.

<sup>122</sup> See G.S. § 15A-534(c).

For these reasons, in addition to empirical risk assessment's importance as a prerequisite to pretrial improvements, North Carolina should consider ways to encourage (if not mandate) and optimize, through its laws, the use of empirically-derived risk assessment instruments statewide.

**Risk Management – Release:** Without statutory amendment, judicial officials could also initially release virtually all (in the aggregate) low and medium risk defendants (as well as some high risk defendants deemed safe enough to manage outside of secure detention) on a written promise to appear or an unsecured bond, which would eliminate the tendency for secured bonds to interfere with the release of defendants deemed suitable for supervision in the community. Like risk assessment, however, there are strong reasons (including various assumptions surrounding the efficacy of money) for North Carolina to enact proactive statutory changes to dramatically reduce, if not eliminate, the use of secured money at bail.

Moreover, a key element of risk management for released defendants is pretrial supervision using differential supervision techniques based on the risk principle for both public safety and court appearance. However, the statute currently places restrictions on that supervision by not mandating such programs and by not making such supervision mandatory when the judicial official believes it necessary.<sup>123</sup> Thus, even if judicial districts created their own pretrial release programs, the various limitations might make it likely that few defendants would participate. Accordingly, while judicial districts might make progress on their own, statutory guidance and/or mandates are likely necessary.

**Risk Management – Detention:** Judicial officials must also have the ability to detain pretrial extremely high risk defendants through a due process-laden procedure complying with the principles articulated in *United States v. Salerno*.<sup>124</sup> Because North Carolina law does not currently allow this (instead, it requires conditions of release to be set for all defendants except for those not entitled to conditions pursuant to statute based primarily on charge), the law must be changed.

Pretrial detention using unattainable money amounts is likely unlawful under multiple legal theories. Accordingly, even if a judicial district incorporates significant procedural due process protections before setting an unattainable money bond, that bond might still be challenged under other theories, such as substantive due process, excessive bail, or equal protection grounds.<sup>125</sup> As noted previously, money at bail can also pose significant public safety problems, and when money is used to detain, its use tends also to bleed into cases with defendants posing lower risk, leading to additional issues of fairness. Moreover, even states having robust preventive detention provisions

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<sup>123</sup> See G.S. § 15A-534(b).

<sup>124</sup> 481 U.S. 739 (1987).

<sup>125</sup> For example, recent federal lawsuits challenging the use of unattainable financial conditions on equal protection grounds have led to settlements practically eliminating the use of secured financial conditions. Any jurisdiction looking into pretrial justice must always consider the possibility that secured money bonds as a condition of release might one day be simply removed as a lawful alternative.

often see those provisions ignored when secured money is left in the process.<sup>126</sup> The only way to leave money in the system and yet make sure that it does nothing to hinder either release or detention of defendants pretrial is to incorporate a mandate that the amount not lead to detention,<sup>127</sup> which, in turn, highlights the importance of creating a proper risk-based detention provision to begin with.

Accordingly, there is much that can be done without legislation, but it would require massively coordinated efforts by all judicial districts (and judicial officials within those districts) and an almost inconceivable change in current judicial and public culture. For example, under current law, judicial districts could incorporate risk instruments into their decision-making frameworks, create pretrial services programs to perform evidence-based risk management functions, systematically release all low and medium risk defendants on written promises to appear or unsecured bonds, convince those defendants to agree to pretrial services agency supervision, and use unattainable secured bonds, albeit likely unlawfully, to detain defendants with unmanageable risk and who fall outside of the categories of cases eligible for “no conditions.” Such a system would resemble a “model” pretrial release and detention system, but having such a system arise organically across North Carolina is highly unlikely to happen. And even if it did, the option of using money to detain might be challenged and curtailed or eliminated, forcing North Carolina to once again revisit its laws concerning release and detention. The better option is for North Carolina to instead consider comprehensive changes to its laws now, prior to potentially being forced.

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<sup>126</sup> For example, numerous officials from Wisconsin have report privately that their preventive detention provision is not used primarily because it is cumbersome compared to using secured money bail. In Colorado, judges routinely avoid using a much less robust provision and rely, instead, on secured money bonds to detain high risk defendants.

<sup>127</sup> The relevant American Bar Association Pretrial Release Standard states: “The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay.” *American Bar Association Standards for Criminal Justice (3<sup>rd</sup> Ed.) Pretrial Release* (2007) Std. 10-5.3 (a) at 110. The federal and the District of Columbia statutes each have provisions prohibiting judges from ordering financial conditions that result in the pretrial detention of the defendant. *See* 18 U.S.C. § 3142 (c)(2); D.C. Stat. § 23-1321(c)(3).

## V. RECOMMENDATIONS

North Carolina should implement the following recommendations for achieving a 21<sup>st</sup> Century legal and evidence-based pretrial release system that will allow for the simultaneous movement toward all three goals of the pretrial release decision – public safety, court appearance, and release for bailable defendants.<sup>128</sup> The recommendations are presented as short-term (to be accomplished in the next 18 months), mid-term (to be accomplished within three years), and long-term (to be accomplished within the next five years.)

### *Short-Term Recommendations*

**Judicial officials should immediately begin issuing unsecured bonds for pretrial release instead of secured bonds.**

Current law allows for a number of pretrial release options, including the issuance of unsecured bonds—those that require payment only upon a defendant’s failure to appear in court. As noted in this report, judicial officials have relied on secured bonds more out of habit than evidence.<sup>129</sup> But as noted earlier, research has demonstrated that unsecured bonds are equally as effective at assuring public safety and appearance as secured bonds.<sup>130</sup> Unsecured bonds offer the additional benefit of resulting in substantially less pretrial detention than secured bonds.<sup>131</sup> Given that research, plus the North Carolina statute requiring that judicial officials select the least restrictive release option,<sup>132</sup> there is no reason why unsecured bonds could not immediately begin replacing secured bonds. The expanded use of unsecured bonds will go a long way to eliminating poverty-based incarceration in the state.

**Appoint a Legal and Evidence-Based Practices Implementation Team to oversee the implementation of the recommendations of this report.**

The purpose of the Implementation Team would be to collaboratively identify and guide a data-driven approach to pretrial justice that works for North Carolina, incorporating the law and the best empirical research to best achieve the three goals of the pretrial release decision. Team members should be well-respected leaders of their stakeholder groups, capable getting buy-in from their colleagues, and fully committed to implementing legal and evidence-based pretrial release practices in the state. The Team should be comprised of representatives of the judiciary, court administration, prosecution, defense, law enforcement, jail administrators, victims, state legislators, and county elected officials.

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<sup>128</sup> See Section I (discussing the importance of a balanced approach to pretrial justice).

<sup>129</sup> *Supra*, p. 1.

<sup>130</sup> *Supra*, note 16.

<sup>131</sup> *Id.*

<sup>132</sup> G.S. 15A-534(b).

The Implementation Team should be authorized to appoint sub-committees, and members to those subcommittees, to help implement these recommendations.

The Implementation Team should develop a vision statement for a state-wide, data-driven pretrial justice system in North Carolina.

Guided by the information and recommendations in this report, the Implementation Team should create a vision statement that describes a legal and evidence-based pretrial justice system for North Carolina that encompasses the three goals of the pretrial release decision. (See Appendix D for examples of vision statements of jurisdictions working to implement legal and evidence-based pretrial justice practices.)

The Implementation Team should develop an Implementation Plan based upon the vision statement with a focus on initially implementing the plan in 5 to 7 pilot counties.

Achieving the vision in a timely manner will require an implementation plan that will serve as a roadmap and timeline for putting vision components into practice. In keeping with recognized implementation science and strategy, it is recommended that the Implementation Team focus on implementing this plan in 5 to 7 of the state's counties (i.e., a mix of urban, suburban and rural). This will allow for "pilot" testing of the tools and policies and procedures, so that wrinkles in implementation can be ironed out before a statewide roll-out of the plan.

The Implementation Team should incorporate the following elements in its plan:

The use of an empirically-derived pretrial risk assessment tool by every magistrate in every criminal case at the initial appearance.

Given the benefits of the Arnold Foundation's PSA-Court tool, as described earlier,<sup>133</sup> this tool should be the first choice for North Carolina. As noted earlier, the tool is not publicly available yet, but the Implementation Team should work with the Arnold Foundation to try to approximate a time when it might be available to the state. If the tool will not be available when the team is otherwise ready to begin implementing this plan in the pilot counties, then the Virginia Pretrial Risk Assessment Instrument (VPRAI) should offer a workable alternative.<sup>134</sup> The VPRAI was empirically tested in multiple jurisdictions in a state that borders North Carolina, which should provide some confidence that it would perform well in North Carolina. Whatever tool is selected should be subjected to a validation study.

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<sup>133</sup> *Supra*, p. 22.

<sup>134</sup> The Committee received information about the VPRAI at its February 12, 2016 Committee meeting from Kenneth Rose, Pretrial Coordinator, VA Department of Criminal Justice Studies. Information presented by Mr. Rose is posted on the NCCALJ's website (<http://nccalj.org/wp-content/uploads/2016/02/Commission-Presentation-1.pdf>).

The use of a release/detention matrix that factors risk level and charge type.

The Implementation Team should seek consensus on a matrix that would provide guidance to magistrates and judges in pretrial release decision-making.<sup>135</sup>

The development of differentiated risk management procedures that match the identified risk to the appropriate supervision level.

As noted in the report, about 60% of North Carolina counties are not served by pretrial services programs.<sup>136</sup> Even in many of those counties that have such programs, supervision capacity is limited. With 100 counties in the state, many that are rural, implementing legal and evidence-based pretrial risk management practices in every part of the state is a challenge that the Implementation Team must address. There are two different approaches that the Team should explore.

The first approach would be establishing a statewide pretrial services program, with the capacity to supervise defendants released by the court with conditions in every part of the state. Kentucky has had statewide pretrial services since the 1970s, and New Jersey is in the process of implementing statewide pretrial services. A statewide pretrial services would offer several benefits: (1) it would assure supervision services are provided uniformly throughout the state; (2) it would assure standardized supervision practices; and (3) it would require a standardized data system for recording supervision activities and outcomes.

The second approach would be for the counties to run but the states to fully or substantially fund pretrial services programs in the state. This approach is used in Virginia, where the Virginia Department of Criminal Justice Services provides funding for 29 pretrial services programs that serve 97 of Virginia's 133 localities.<sup>137</sup> This arrangement is authorized by statute.<sup>138</sup>

Regardless of the approach used, the Implementation Team should remember that supervision services should be reserved only for those defendants who need them, given their risk levels. As noted earlier, supervising low risk defendants has no beneficial impact on increasing their already high rates of success.<sup>139</sup>

One intervention that all defendants, regardless of their risk level, should receive is a court date reminder. The research, cited earlier, has made clear that the simple act of reminding defendants of their upcoming court dates has a significant impact on improving court appearance rates.<sup>140</sup> The technology is available, and is becoming

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<sup>135</sup> See *supra* p. 23 (discussing the use of such matrices).

<sup>136</sup> *Supra*, p. 17.

<sup>137</sup> *Comprehensive Community Corrections Act and Pretrial Services Act Annual Report, July 1, 2013 – June 30, 2014*, Virginia Department of Criminal Justice Services (2014), at 1.

<sup>138</sup> Va. Code Ann. § 19.2-152.2.

<sup>139</sup> *Pretrial Risk Assessment in Federal Court*, *supra* note 54.

<sup>140</sup> *Supra* notes 62 and 63.

increasingly affordable, to establish automated systems that can call or text such reminder notices.

### The expanded use of citations by law enforcement

As discussed above, expanding the use of citations in lieu of arrest in appropriate cases is an important strategy for achieving a balanced approach to pretrial justice, and it already has been successfully implemented in at least one state.<sup>141</sup> North Carolina law already allows law enforcement to issue a citation for any misdemeanor or infraction.<sup>142</sup> The Implementation Team should work with law enforcement agencies throughout the state to identify the opportunities for expanding the use of citations, and to see if the obstacles that exist to doing so can be addressed.

### Early involvement of prosecutor and defense counsel

Given the benefits, described in Section III, of having a prosecutor screen cases before the initial pretrial release decision and for both prosecution and defense to be present at that hearing, the Implementation Team should identify how to make this happen. The State of Delaware, which, like North Carolina, has a 24/7 magistrate system, already is seeking to do this. Officials have set up special procedures for persons charged with certain felony offenses in that state's largest jurisdiction – Wilmington. Instead of having Magistrate Court 24/7 for those defendants, one court session is held at 8am and another at 8pm. This makes it easier for prosecution and defense to be present and making appropriate representations to the magistrate on the issue of pretrial release. Officials will take what they learn from this pilot effort to see if they can overcome the challenges presented by staffing initial appearances with prosecutors and defenders for indigent defendants.

### The institution of automatic bond review procedures for misdemeanor defendants.

As discussed above, some in-custody defendants do not receive timely review of their release conditions.<sup>143</sup> Misdemeanor defendants who are in custody on secured bonds set by the magistrate should have an automatic review of that decision at the next regular session of district court. The Implementation Team should assess whether making this happen will require a statutory change, a change in court rules, a policy directive, or some other action.

### Uniform data reporting standards

Collecting the data elements listed in Section IV and required for an effective pretrial justice system would involve every state law enforcement agency, and jail and the court system. To achieve the purposes of data collection for implementing this plan, it would be ideal if there was a uniform data system among all law enforcement agencies

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<sup>141</sup> *Supra* pp. 24-25.

<sup>142</sup> G.S. 15A-302(a).

<sup>143</sup> *Supra* p. 26.

and a uniform system among all jails. This may or may not be a practical option. Another approach may be to develop data reporting standards that the appropriate entities would follow. For example, every law enforcement agency would report to a central entity every month how many citations were issued, and for what charges. Every jail would report monthly on the percent of the total population that is held on secured bonds, and the length of stay of those persons, by their risk level.<sup>144</sup> The Implementation Team should work with the state's law enforcement agencies and jails to assess the best ways to implement such data reporting standards.

The Implementation Team should draft language for bills or proposed court rules that incorporate the changes in law needed to implement the plan in the pilot counties.

The Implementation Team should develop a preventive detention framework for defendants who present unacceptably high risk.

As noted above, North Carolina does not have a preventive detention statute that allows for the detention of defendants who present unacceptably high risk.<sup>145</sup> As a result, very risky defendants with resources can buy their way out jail, even when very high bonds are set. The Implementation Team should draft proposed legislation and court rules to establish a preventive detention provision similar to the provision reviewed by the U.S. Supreme Court in *United States v. Salerno*<sup>146</sup> (albeit incorporating risk).

The Implementation Team should develop a release framework for defendants who are not detained.

For releasable defendants, the Implementation Team should draft and North Carolina should enact legislation and court rules to give North Carolina judicial officials broad discretion to use legal and evidence-based practices to: (1) effectuate release quickly; (2) successfully manage defendants in the community through conditions and supervision techniques shown by research to be effective at achieving the purposes of pretrial release and; and (3) respond to pretrial failure that does not lead to detention. If money is to be left in such a system, the state should enact a provision mandating that no condition of release lead to the detention of an otherwise releasable defendant. The law should expressly articulate the use of "least restrictive" conditions, and encourage courts to monitor defendants to increase or decrease the use of conditions to respond to changes in risk. Moreover, the law should be changed to provide that no otherwise releasable defendant may be detained for failure to meet a release condition.

The Implementation Team should draft other legislation and/or court rules needed to implement the recommendations in this report.

The Implementation Team should draft and the state should enact provisions mandating the use of the chosen empirically-derived risk assessment instrument, the adoption of a decision-making framework (possibly statewide) designed to guide release

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<sup>144</sup> See *supra* pp. 26-27 (listing other data needs).

<sup>145</sup> See *supra* pp. 36-37 (discussing this).

<sup>146</sup> See *supra* note 89.

and detention decision-making, and the creation of pretrial services programs to use differential supervision methods on all defendants for both public safety and court appearance.<sup>147</sup> It should eliminate the use of traditional money bail bond schedules based on charge. It should enact provisions for the speedy review of pretrial conditions in all cases. It should amend or repeal those provisions in North Carolina law not compatible with these recommendations. And finally, it should actively oppose any future legislation that runs counter to these recommendations.

### *Mid-Term Recommendations*

The Implementation Team should fully implement the plan in the pilot counties.

While some aspects of the plan may be implemented during the short-term period, the Implementation Team should make every effort to implement the full plan in the pilot sites during this period.

The Implementation Team should ensure that all staff with a role in implementing the plan are fully informed of its purpose and rationale and trained for successful implementation.

One of the most important keys to successful implementation of any plan is fidelity by those responsible for carrying out the plan day-to-day. If the plan is not executed as intended, the intended results will not be achieved.

Training should be included as a key part in the implementation plan. At a minimum, information and training sessions should be directed to bail-setting judicial officials, law enforcement officers, assistant district attorneys, assistant public defenders, and pretrial services staff or others who have a role in pretrial supervision.

The Implementation Team should establish a data dashboard to monitor outcomes and regularly review the data and make appropriate adjustments to the plan

The team should assess what changes need to be made to the data infrastructure in place in county jails and the courts to be able to gather the data elements listed in Section III of this report.

### *Long-Term Recommendations*

The Implementation Team should begin implementing the plan in the remaining counties of the state.

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<sup>147</sup> Although it is perhaps ideal, pretrial services functions do not necessarily have to be performed by government entities. For example, in Colorado, two entities – one for-profit and one nonprofit – help jurisdictions with release using methods that are similar, if not identical to, public pretrial agency functions. It bears repeating, however, that legal and evidence based pretrial supervision does not include supervision through a commercial surety using a financially-based contract.

Based on the experiences of the pilot projects, the Team should start implementing the plan throughout the state.

The Implementation Team should develop a plan for sustaining changes that have been made and holding accountable those that make the changes.

Sustaining change can be very difficult, particularly as those who pushed for the changes move on. North Carolina leaders and stakeholders should be mindful of this and develop a plan for sustaining reforms. This involves ensuring that statutes and court rules codify these policies. It also involves robust reporting systems and transparency for the public about the risk profile of North Carolina's arrestee population, how risk assessments are used, and how risk-based supervision strategies are being employed and the results they are producing regarding public safety and appearance in court.

North Carolina officials should consider what role, if any, secured bonds should continue to play in the state's pretrial system, and draft appropriate proposals for statutory or court rule amendments.

As North Carolina's plan for a legal and evidence-based approach to pretrial justice unfolds, it should become increasingly clear that the continued use of secured bonds is incompatible with that approach, and it will be much easier to make the case for completely replacing secured bonds with recognizance or unsecured-bond releases.

## APPENDIX A. VIRGINIA PRETRIAL RISK ASSESSMENT INSTRUMENT

Risk Factor	Criteria	Assigned Points
Charge Type	If most serious charge for the current offense is a felony	1
Pending Charge(s)	If the defendant has one or more charges pending in court at the time of the arrest	1
Criminal History	If the defendant has one or more misdemeanor or felony convictions	1
Failure to Appear	If the defendant has two or more failure to appears	2
Violent Convictions	If the defendant has two or more violent convictions	1
Current Residence	If the defendant has lived at the current residence for less than one year prior to the arrest	1
Employed/Child Caregiver	If the defendant has not been employed continuously for the previous two years and was not the primary caregiver for a child at the time of arrest	1
History of Drug Abuse	If the defendant has a history of drug abuse	1

Risk Level	Risk Score
Low	0,1 points
Below Average	2 points
Average	3 points
Above Average	4 points
High	5 – 9 points

## APPENDIX B. VIRGINIA PRETRIAL PRAXIS

Risk Level/ Charge Category	Traffic: Non- DUI	Non- violent misd.	Theft/ Fraud	Traffic: DUI	Drug	Failure To Appear	Firearm	Violent
<i>Low Risk</i>								
PR or UA Bond	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Pretrial Supervision	No	No	No	No	No	Yes	Yes	Yes
Supervision Level	N/A	N/A	N/A	N/A	N/A	I	II	II
<i>Below Average Risk</i>								
PR or UA Bond	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Pretrial Supervision	No	No	Yes	Yes	Yes	Yes	Yes	Yes
Supervision Level	N/A	N/A	I	I	I	II	II	II
<i>Average Risk</i>								
PR or UA Bond	Yes	Yes	Yes	Yes	Yes	Yes	No	No
Pretrial Supervision	Yes	Yes	Yes	Yes	Yes	Yes	No	No
Supervision Level	I	I	II	II	II	III	N/A	N/A
<i>Above Average Risk</i>								
PR or UA Bond	Yes	Yes	Yes	Yes	Yes	No	No	No
Pretrial Supervision	Yes	Yes	Yes	Yes	Yes	No	No	No
Supervision Level	I	I	II	III	III	N/A	N/A	N/A
<i>High Risk</i>								
PR or UA Bond	Yes	Yes	Yes	No	No	No	No	No
Pretrial Supervision	Yes	Yes	Yes	No	No	No	No	No
Supervision Level	II	II	III	N/A	N/A	N/A	N/A	N/A

PR or UA Bond – Yes = Recommended for Personal Recognizance or Unsecured Appearance Bond, No = Not Recommended

Pretrial Supervision – Yes = Recommended for Pretrial Supervision, No = Not Recommended

Supervision Level – [I, II and III] = Recommended Level of Supervision, N/A = Supervision not recommended (level not applicable)

## APPENDIX C. VIRGINIA DIFFERENTIAL PRETRIAL SUPERVISION

Condition	Level I	Level II	Level III
Court date reminder for every court date	√	√	√
Criminal history check before court date	√	√	√
Face-to-face contact once a month	√		
Face-to-face contact every other week		√	
Face-to-face contact every week			√
Alternative contact once a month (telephone, email, text, as approved locally)	√		
Alternative contact every other week (telephone, email, text, as approved locally)		√	
Special condition compliance verification	√	√	√

## APPENDIX D. EXAMPLES OF VISION STATEMENTS

### *Vision Statement of the Delaware Smart Pretrial Policy Team*

We envision a fair pretrial system that relies on individualized decisions based on risk and the effective use of resources to honor individual rights, protect public safety and promote the administration of justice.

#### Ten things we know to be true...

1. We can work well together.
2. Delaware's small size is an asset.
3. Reliable data driven decisions lead to a more objective and reliable system.
4. Meaningful options for supervision will make a better pretrial system.
5. We want to live in a safe community.
6. We must move forward with a risk-based system.
7. More information for bail decisions is better than less.
8. Lack of community-based mental health and substance abuse services contribute to our pretrial detentioner population.
9. Innovation does not have to come at a cost.
10. Sustainability requires commitment.

#### In our ideal system we would...

Work together,  
Protect an individual's right to liberty,  
Protect the safety of our community,  
Use resources efficiently,  
Make risk informed choices,  
Utilize meaningful evidence based supervision options for our pretrial system, and  
Recognize the impact that pretrial decisions have on individuals, the community, and the judicial process.

### *Vision Statement of the Denver, Colorado Smart Pretrial Policy Team*

Pretrial decisions are equitable, fiscally responsible, and data informed; they recognize the presumption of release and reasonably ensure appearance in court with a commitment to public safety.

#### Guiding Principles

- 1) Release and detain decisions for all defendants should be risk based, individualized, and consider the safety and needs of the community. Release decisions shall be informed by an empirical pretrial risk assessment.
- 2) Pretrial processes shall maintain the presumption of release, equality, justice, and due process.
- 3) Pretrial risk can be lessened for some risk levels with the use of appropriate pretrial supervision conditions.

- 4) Pretrial system decisions should be research based and evaluated based on continuing data outcome evaluation.
- 5) The collaboration of the stakeholders in the pretrial justice process is essential to establish system best practices.

### *Vision Statement of the Yakima County, Washington Smart Pretrial Policy Team*

The vision of Yakima County is to operate a pretrial system that is safe, fair, and effective and which maximizes public safety, court appearance, and appropriate use of release, supervision, and detention.

## APPENDIX E. FACTORS INCLUDED IN THE ARNOLD FOUNDATION PSA COURT RISK ASSESSMENT TOOL

- Whether the current offense is violent
- Whether the person had a pending charge at the time of the current offense
- Whether the person has a prior misdemeanor conviction
- Whether the person has a prior felony conviction
- Whether the person has prior convictions for violent crimes
- The person's age at the time of arrest
- How many times the person failed to appear at a pretrial hearing in the last two years
- Whether the person failed to appear at a pretrial hearing more than two years ago
- Whether the person has previously been sentenced to incarceration.

# APPENDIX D

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## IMPROVING INDIGENT DEFENSE SERVICES

Criminal Investigation and Adjudication Committee

October 2016

# IMPROVING INDIGENT DEFENSE IN NORTH CAROLINA

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## NCCALJ COMMITTEE ON CRIMINAL INVESTIGATION & ADJUDICATION REPORT

OCTOBER 2016

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## Executive Summary

As the United States Supreme Court recently declared: “No one doubts the fundamental character of a criminal defendant’s Sixth Amendment right to the ‘Assistance of Counsel.’”<sup>1</sup> This right is so critical that the high Court has deemed its wrongful deprivation to constitute “structural” error, affecting the very “framework within which the trial proceeds.”<sup>2</sup> For indigent defendants, this fundamental right to effective assistance of counsel must be provided at state expense.<sup>3</sup> When the system fails to provide this right, it denies indigent defendants justice. That denial has very real consequences for defendants, including excessive pretrial detention, increased pressure on innocent persons to plead guilty, wrongful convictions, and excessive sentences.<sup>4</sup>

There are, however, other costs associated with the State’s failure to provide effective assistance, including costs to victims, families, communities, taxpayers and the criminal justice system as a whole.<sup>5</sup> Costs to the criminal justice system include trial delays and an increased number of appeals and post-conviction challenges, all of which must be funded by North Carolina taxpayers, as are costly retrials when those challenges are successful.<sup>6</sup> As has been noted: “Justice works best when all players within the system are competent and have access to adequate resources. When the system includes well-trained public defenders, cases move faster (helping the court manage growing caseloads), and the system tends to generate and implement innovative programs.”<sup>7</sup>

Trial delay is not merely a theoretical danger; it is an actual one. District Attorneys forcefully asserted to the Committee that an erosion of the quality of North Carolina’s indigent defense bar was impairing their ability to deliver justice in the state’s criminal courts.<sup>8</sup>

In comments to the Committee, Justice Rhoda Billings emphasized that wrongful convictions deny justice to victims and put North Carolina’s citizens in danger by allowing the real criminal to remain

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<sup>1</sup> *Luis v. United States*, 578 U.S. \_\_\_, 136 S. Ct. 1083, 1088 (2016). The Sixth Amendment provides, in relevant part: “In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.” U.S. CONST. amend. VI.

<sup>2</sup> *Luis*, 578 U.S. at \_\_\_, 136 S. Ct. at 1089 (quotation omitted).

<sup>3</sup> *Id.*

<sup>4</sup> Comments of the Honorable Rhoda Billings, Committee Meeting Nov. 23, 2015 [hereinafter Billings Comments]; *see also* THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 6 (2009) [hereinafter JUSTICE DENIED] (noting that wrongful convictions have occurred as a result of inadequate representation by defense counsel), <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf>.

<sup>5</sup> JUSTICE POLICY INSTITUTE, SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 2 (2011) [hereinafter SYSTEM OVERLOAD],

[http://www.justicepolicy.org/uploads/justicepolicy/documents/system\\_overload\\_final.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf).

<sup>6</sup> JUSTICE DENIED, *supra* note 4, at 2 (noting the cost of retrials); Comments of District Attorney Lorrin Freeman, Committee Meeting Nov. 23, 2015 (ineffective assistance leads to costly retrials); Comments of Former Attorney General Eric Holder, Brennan Legacy Awards Dinner, Nov. 16, 2009 [hereinafter Holder] (“Even assuming these defendants were guilty of the crimes for which they were originally convicted, the public still must bear the cost of appeals and retrials because the system didn’t get it right the first time.”),

<https://www.brennancenter.org/analysis/attorney-general-eric-holder-indigent-defense-reform>.

<sup>7</sup> Tony Fabelo, *What Policymakers Need to Know to Improve Public Defense Systems*, US BUREAU OF JUSTICE ASSISTANCE EXECUTIVE SESSION ON PUBLIC DEFENSE, Dec., 2001, at 2 [hereinafter *What Policymakers Need to Know*] (a strong public defense system “facilitates a smoother operating justice system”),

<https://www.ncjrs.gov/pdffiles1/bja/190725.pdf>.

<sup>8</sup> Comments of District Attorney Andrew Murray, Committee Meeting Nov. 23, 2015 (underfunding of IDS impairs the prosecutors’ ability to be efficient and effective); Comments of District Attorney Lorrin Freeman, Committee Meeting Nov. 23, 2015 (when lawyers are overloaded, prosecutors cannot move forward with their cases); Comments of District Attorney Michael Waters, Committee Meeting Nov. 23, 2015.

at large, free to perpetrate crime on others.<sup>9</sup> Additionally, families of wrongfully convicted defendants suffer, not just from the loss of a family member who may be incarcerated, but from the dramatic collateral consequences that follow as a result of any criminal conviction, including barriers to obtaining employment, joining the military, or receiving financial aid to pursue higher education.<sup>10</sup> These collateral consequences impair the person's ability to support both himself and his family, often necessitating public assistance and thus additional taxpayer support.

In addition to paying for the cost of an inefficient justice system, taxpayers pick up the tab for ineffective assistance in other ways. When inadequate lawyering results in excessive pretrial detentions and sentences and in incarceration for convictions that are later reversed, the costs of such detentions are paid by North Carolina's citizens.<sup>11</sup>

Finally — and perhaps most importantly — another cost of failing to provide an effective indigent defense system is a loss of public confidence in the court system's ability to administer justice.<sup>12</sup> Inadequate indigent defense services compromise the integrity of the justice system,<sup>13</sup> by calling its fairness into question.<sup>14</sup> Because people in the lowest income groups are most likely to require indigent defense services, failures in the indigent defense system are felt most acutely by these individuals.<sup>15</sup> As Justice Billings noted to the Committee: Americans strongly believe that the amount of money a person has should not affect the amount of justice he or she receives; any perception of fairness vanishes if our citizens believe that a poor person is placed at a significant disadvantage in the justice system.<sup>16</sup> In fact, evidence indicates that a majority of citizens *already* believe that poor people are at such a disadvantage: A recent survey of North Carolinians shows that 64% of respondents believe that low-income people fare worse than others in our state court system.<sup>17</sup>

Sixteen years ago the North Carolina General Assembly created the state's existing indigent defense system. While stakeholders agree that North Carolina has benefited greatly from the creation of the Office of Indigent Defense Services (IDS) and the Commission on Indigent Defense Services (IDS Commission),<sup>18</sup> the potential that IDS and the IDS Commission hold for providing uniform quality,

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<sup>9</sup> Billings Comments, *supra* note 4; *see also* JUSTICE DENIED, *supra* note 4, at 6; Holder, *supra* note 6 (“And for those cases in which the defendants were not guilty, then obviously the price tag is much higher -- both in the ultimate nightmare scenario of sending an innocent person to jail, and in terms of letting the person who actually committed the crime remain free.”).

<sup>10</sup> *See generally* Collateral Consequences Assessment Tool (UNC School of Government), <http://ccat.sog.unc.edu/> (centralized database of collateral consequences).

<sup>11</sup> Billings Comments, *supra* note 4 (so noting with respect to pretrial incarceration of low-risk defendants); *see also* JUSTICE DENIED, *supra* note 4, at 2 (noting that increased jail expenses result from a failure to provide effective assistance); Holder, *supra* note 6 (“An analysis conducted by the State Appellate Defender Office in Michigan found that the state's failure to invest resources at the trial court level has contributed to the costly imprisonment of defendants whose convictions were later reversed.”).

<sup>12</sup> JUSTICE DENIED, *supra* note 4, at 2; Billings Comments, *supra* note 4; SYSTEM OVERLOAD *supra* note 5, at 23.

<sup>13</sup> SYSTEM OVERLOAD, *supra* note 5, at 23; *What Policymakers Need to Know*, *supra* note 7, at 2 (“A strong public defense system promotes the legitimacy of the justice system—legitimacy necessary to maintain public support.”).

<sup>14</sup> *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

<sup>15</sup> *What Policymakers Need to Know*, *supra* note 7, at 2.

<sup>16</sup> Billings Comments, *supra* note 4.

<sup>17</sup> Elon University Poll, conducted at the request of the NC Commission on the Administration of Law & Justice, at 26 (2015) (on file with Commission staff).

<sup>18</sup> DAVID BROWN & MONICA YELVERTON, TRIAL JUDGES' PERCEPTIONS OF NORTH CAROLINA'S OFFICE OF INDIGENT DEFENSE SERVICES: A REPORT ON SURVEY RESULTS (UNC School of Government 2016) [hereinafter TRIAL JUDGES']

cost-effective representation statewide has yet to be fully achieved. North Carolina is not alone in this respect. Just last year, Tim Lynch, Director of the CATO Institute Project on Criminal Justice, noted that “indigent defense in America today is in a state of crisis” and that “[f]or the indigent, the right to counsel too often has been illusory.”<sup>19</sup> Similarly, a recent Heritage Foundation program noted that fulfilling the promise of providing indigent defense services remains a “continuing challenge.”<sup>20</sup> Nor is North Carolina alone in its desire to improve indigent defense. In a statement accompanying a major grant to the National Association of Criminal Defense Lawyers (NACDL), Charles G. Koch, chairman and CEO of Koch Industries, expressed support for “NACDL’s efforts to make the Sixth Amendment’s guarantee of an individual’s right to counsel a reality for all Americans, especially those who are the most disadvantaged in our society.”<sup>21</sup> Support for these efforts crosses traditional ideological lines.<sup>22</sup> As noted in a 2012 report on indigent defense reform by the American Bar Association and the NACDL, conservatives and liberals “share the belief that people should be protected by counsel when liberty is taken away.”<sup>23</sup>

This report aims to help North Carolina strengthen the protections it offers to indigent people when their liberty is at stake. It begins with a brief background. It then defines the critical characteristics of an effective indigent defense system and makes recommendations regarding how to best achieve those characteristics in North Carolina. Key recommendations include:

- Establishing single district and regional public defender offices throughout the state.
- Providing oversight, supervision and support to all counsel providing indigent defense services.
- Implementing uniform indigency standards.

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PERCEPTIONS OF IDS] (based on responses of 135 judges surveyed, judges had a generally positive view of IDS’s performance), [https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/20160060\\_Judges\\_Perceptions\\_Brown.pdf](https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/20160060_Judges_Perceptions_Brown.pdf); Comments of Jeff Cutler, Attorney, Committee Meeting Nov. 23, 2015 (IDS has been very successful in providing good quality legal services); Comments of Chief Public Defender James Williams, Committee Meeting Nov. 23, 2015 (IDS has improved the quality of legal services and has done it relatively cost-effectively); Comments of Desmond McCallum, Attorney, Committee Meeting Nov. 23, 2015 (IDS has been effective in ensuring that poor people can get the same type of lawyer afforded to wealthy individuals); Comments of District Attorney Seth Edwards, Committee Meeting Nov. 23, 2015 (noting success of a new public defender office and IDS’s strength in training staff).

With respect to improvements in cost-effectiveness in the delivery of indigent defense services, the Commission reports that “overall IDS demand (spending and current-year obligations) since IDS was created has averaged 4.3%, which is significantly below the average annual increase (more than 11%) during the seven years prior to IDS’ creation.” REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 1 (Submitted to the N.C. General Assembly Mar. 1, 2016) [hereinafter IDS REPORT], <http://www.ncids.org/Reports%20&%20Data/Prior%20GA%20Reports/LegislatureReport2016.pdf>. The Commission reports that although indigent defense per disposition expenditures fluctuate from year to year, “overall per disposition costs during fiscal year 2014-15 were only \$9.67 more than per disposition costs the year before IDS was established (fiscal year 2000-01).” *Id.* It further reports that while there have been modest increases in average per case costs for some case types over the past 15 years, the overall increases in demand on the fund are primarily due to an expanding indigent caseload. *Id.*

<sup>19</sup> Tim Lynch, *2015 Can be the Year of Criminal Justice Reform*, CATO INSTITUTE, <http://www.cato.org/publications/commentary/2015-can-be-year-criminal-justice-reform> (last visited May 24, 2016).

<sup>20</sup> The Heritage Foundation, *Gideon at 50: Fundamental Right, Ongoing Challenge* (Mar 12, 2013), <http://www.heritage.org/events/2013/03/gideon> (this Heritage Foundation panel discussion was co-hosted with the National Association of Criminal Defense Lawyers).

<sup>21</sup> Jacob Gershman, *Koch Industries Funds Legal Defense for the Poor*, THE WALL STREET JOURNAL LAW BLOG (Oct. 22, 2014), <http://blogs.wsj.com/law/2014/10/22/koch-industries-funds-legal-defense-for-the-poor/>.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

- Implementing uniform training, qualification, and performance standards and workload formulas for all counsel providing indigent services.
- Providing reasonable compensation for all counsel providing indigent defense services.
- Developing a long-term plan for the delivery of indigent defense services in the state.
- Ensuring that the indigent defense function is directly accountable to the legislature but independent of the conflicts created by judicial control.
- Reducing the cost of indigent defense services to make resources available for needed reforms.

The NCCALJ<sup>24</sup> Criminal Investigation and Adjudication Committee (Committee)<sup>25</sup> recognizes that these recommendations cannot be implemented all at once. It hopes however that they will serve as a long-term blueprint for changes to the state's indigent defense system. In the short term, the Committee hopes that these recommendations will serve as important touchstones for evaluating the merits of new legislative proposals, and that legislation advancing the blueprint, as drawn here, will be adopted and that legislation at odds with it will be averted. It is important to note that many of the Committee's recommendations are interdependent. For example, this report recommends both establishing single district and regional public defender offices statewide and that IDS provide oversight, supervision and support to all counsel providing indigent defense services. The vehicle for implementing the latter recommendation is the offices created by the former.

The Committee's work was limited by both time and resources. As a result, while civil proceedings for which indigent defense services are required are mentioned in this report, its focus is on criminal cases. The Committee suggests that further study be done to make recommendations for improving indigent defense representation in non-criminal cases.

This report begins with background information regarding IDS and the IDS Commission. It then defines the characteristics of an effective indigent defense system. Finally, it makes recommendations to bring North Carolina's indigent defense system in line with those characteristics so that it can best achieve its mission: ensuring fair proceedings by providing effective representation in a cost-effective manner.

## Background

### Creation of IDS & IDS Commission

In August 2000, the North Carolina General Assembly passed the Indigent Defense Services Act,<sup>26</sup> creating the Office of Indigent Defense Services (IDS) and the IDS Commission and charging them with overseeing the provision of legal representation to indigent persons entitled to counsel at state expense. On July 1, 2001, IDS formally assumed its responsibilities under the Act.<sup>27</sup>

The impetus for the Indigent Defense Services Act included findings from a 1998 legislative study commission that indigent defense in North Carolina suffered – with regards to both cost-effectiveness and quality – from a lack of a centralized agency to provide coordinated planning, oversight, and management. Among other things, the study commission found that the indigent

<sup>24</sup> For information about the North Carolina Commission on the Administration of Law & Justice (NCCALJ), visit the Commission's website: <http://nccalj.org/>.

<sup>25</sup> See *infra* pp. 50-51 (listing all Committee members).

<sup>26</sup> S.L. 2000-144. The stated purpose of the Act was to enhance the oversight, quality, independence, and cost-effectiveness of indigent defense services; establish uniform policies and procedures for the delivery of those services; and generate reliable statistical information about services provided and funds expended. *Id.*

<sup>27</sup> IDS REPORT, *supra* note 18, at 1.

defense function should be independent of judicial control; that an independent centralized agency would be more accountable to the legislature and taxpayers; and that the quality of indigent defense services was unequal across the state, and was at times poor.<sup>28</sup>

### **IDS Commission**

The IDS Commission oversees IDS as well as the Offices of the Juvenile Defender, Appellate Defender, and Capital Defender. The Commission's 13 members are appointed by the Chief Justice, Governor, Senate, House, State Bar, Bar Association, Public Defenders Association, Advocates for Justice, Association of Black Lawyers, Association of Women Lawyers, and the Commission itself.<sup>29</sup>

The IDS Commission has substantial authority, including the power to appoint the IDS Executive Director, Appellate Defender, Capital Defender, and Juvenile Defender and to set standards of representation and rates of compensation.<sup>30</sup> In 2011, authority to appoint Chief Public Defenders was transferred from local senior resident superior court judges to the IDS Commission;<sup>31</sup> in 2013, that appointing authority was returned to the local senior resident superior court judges.<sup>32</sup>

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<sup>28</sup> INDIGENT DEFENSE STUDY COMMISSION, REPORT AND RECOMMENDATIONS (Submitted to the N.C. General Assembly May 1, 2000) [hereinafter LEGISLATIVE STUDY COMMISSION REPORT], [http://www.ncids.org/home/ids\\_study\\_commission\\_report.pdf](http://www.ncids.org/home/ids_study_commission_report.pdf).

<sup>29</sup> G.S. 7A-498.4. Commissioners serve a 4-year term, with an optional one-time reappointment. *Id.* Commissioners must have significant experience in the defense of cases subject to the IDS Act, or have a demonstrated commitment to quality representation in indigent cases. G.S. 7A-498.4(d).

<sup>30</sup> G.S. 7A-498.5.

<sup>31</sup> S.L. 2011-145, sec. 15.16(b) (amending G.S. 7A-498.7(b); requires the local bar to nominate two to three candidates, from which the IDS Commission will make its selection).

<sup>32</sup> S.L. 2013-360, sec. 18A.5(a).

The authority to appoint the Public Defender has been vested in different persons and in a combination of persons over time. When the State's first two Public Defender offices were created in 1970, the Governor was given authority to appoint the Public Defender. S.L. 1969-1013. In 1973, a third office was created in District 28 (Buncombe County); while the Governor retained appointment authority with respect to the first two offices, the senior resident superior court judge was given appointment authority for the new office. S.L. 1973-799, sec. 2. From 1975 to 1981, additional offices were created, with the Governor designated as appointing authority. S.L. 1975-956, sec. 14; S.L. 1979-1284, sec. 2; S.L. 1981-1282, sec. 73. Then, in 1985, appointment authority was transferred to the senior resident superior court judge for all offices. S.L. 1985-698, sec. 22.1. In 1987, two new offices were created in Districts 16A (Scotland and Hoke Counties) and 16B (Robeson County). S.L. 1987-1056, sec. 8. The senior resident superior court judge was given appointment authority in District 16A; however, appointment authority for District 16B was vested with "the resident superior court judge of superior court district 16B other than the senior resident superior court judge." *Id.* at sec. 10. This arrangement continued until the Senior Resident Superior Court Judge in District 16B, Joe Freeman Britt, left the bench in 1997, at which time appointment authority in the district was given to the senior resident superior court judge. S.L. 1997-175. Meanwhile, when a new office was created in District 14 (Durham County), appointment authority went to the senior resident superior court judge. S.L. 1989-1066, sec. 127(b). Thus, by the time IDS and the IDS Commission were created, appointment authority for all Chief Public Defenders resided with the senior resident superior court judge. Although the report of the legislative study commission that led to the Indigent Services Act recommended that the IDS Commission be vested with authority to appoint Chief Public Defenders, LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 2, when the IDS Commission was created, appointing authority was left with the senior resident judges. The IDS Commission was first vested with that authority in 2011; specifically, the IDS Commission was authorized to select the Chief Public Defender from a list of two or three attorneys nominated by the local bar. S.L. 2011-145, sec. 15.16(b). Then, effective August 1, 2013, responsibility for appointing Chief Public Defenders was transferred back to the local senior resident superior court judges. S.L. 2013-360, sec. 18A.5(a).

## IDS

As initially created in 2001, IDS was an independent agency within the Judicial Department. However, the 2015 Appropriations Act provides that IDS is a sub-agency of the North Carolina Administrative Office of the Courts (NCAOC).<sup>33</sup> That Act also provides that the IDS budget is part of the NCAOC budget, that the NCAOC shall conduct an annual audit of the IDS budget, and that the NCAOC director has the authority to modify the IDS budget without approval of the IDS Commission.<sup>34</sup>

The IDS office includes the executive director and administrative staff.<sup>35</sup> It is responsible for administration and implementation of policy as directed by the Commission. The executive director has direct oversight of the Office of the Special Counsel, and fiscal authority over the 16 public defender offices.<sup>36</sup> The IDS office also has statutory reporting requirements.<sup>37</sup>

The NCAOC provides general administrative support to IDS,<sup>38</sup> in the form of purchasing and personnel functions and technology and telecommunications support.<sup>39</sup>

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<sup>33</sup> S.L. 2015-241, sec. 18A.17(b).

<sup>34</sup> *Id.*

<sup>35</sup> IDS REPORT, *supra* note 18. IDS' administrative offices accounted for less than 2% of IDS' overall budget in fiscal year 2014-15. *Id.* at 4.

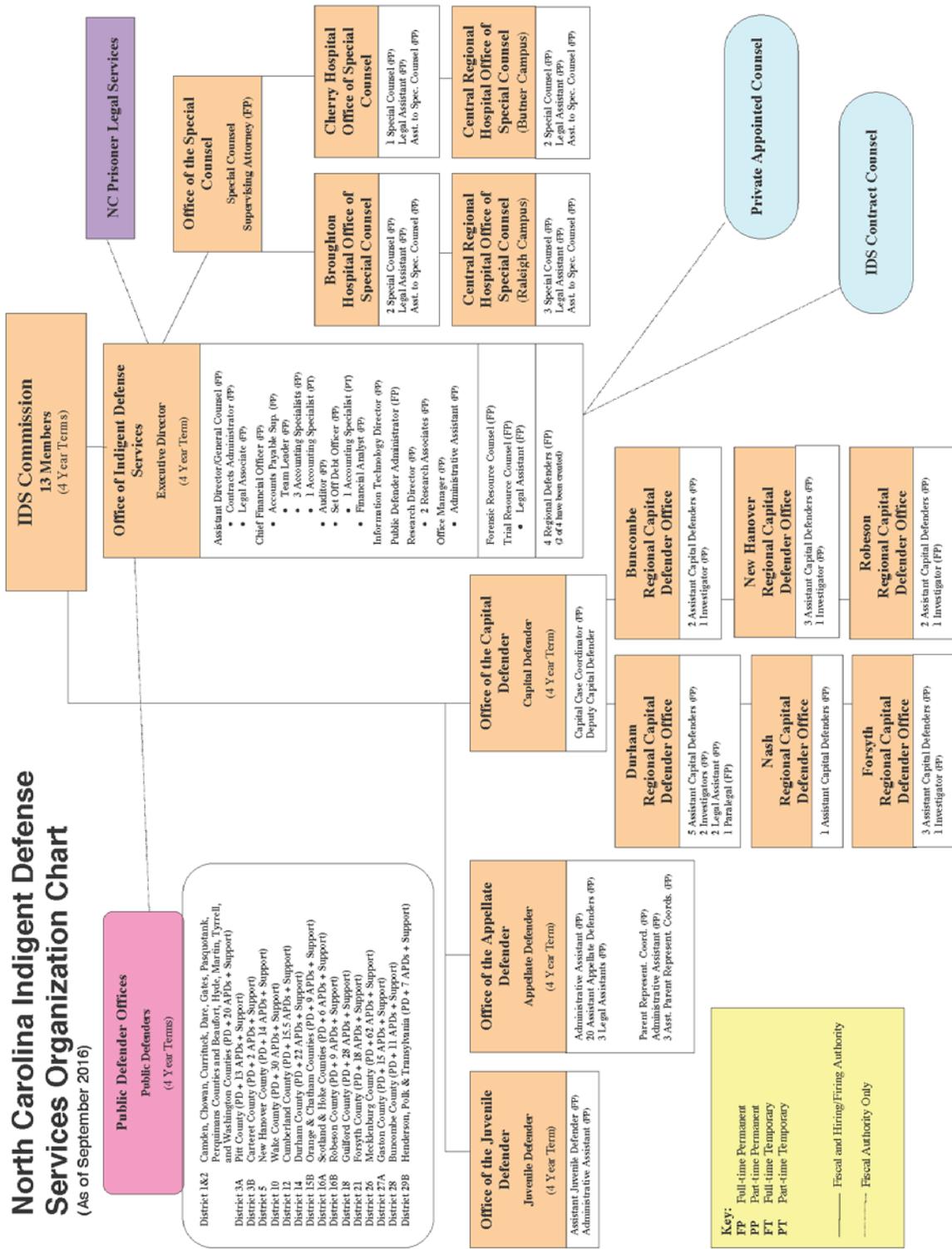
<sup>36</sup> Public defender offices are located in the following areas: District 1& 2: Camden, Chowan, Currituck, Dare, Gates, Pasquotank, Perquimans Counties and Beaufort, Hyde, Martin, Tyrrell, and Washington Counties; District 3A: Pitt County; District 3B: Carteret County; District 5: New Hanover County; District 10: Wake County; District 12: Cumberland County; District 14: Durham County; District 15B: Orange & Chatham Counties; District 16A: Scotland & Hoke Counties; District 16B: Robeson County; District 18: Guilford County; District 21: Forsyth County; District 26: Mecklenburg County; District 27A: Gaston County; District 28: Buncombe County; District 29B: Henderson, Polk & Transylvania. IDS REPORT, *supra* note 18.

<sup>37</sup> IDS must report annually to the Chairs of the Joint Legislative Oversight Committee on Justice and Public Safety and to the Chairs of the House of Representatives Subcommittee on Justice and Public Safety and the Senate Appropriations Committee on Justice and Public Safety on: the volume and cost of cases handled in each district by assigned counsel or public defenders; actions taken to improve the cost-effectiveness and quality of indigent defense services, including the capital case program; plans for changes in rules, standards, or regulations in the upcoming year; and any recommended changes in law or funding procedures that would assist IDS in improving the management of indigent defense services funds, including recommendations concerning the feasibility and desirability of establishing regional public defender offices. G.S. 7A-498.9. Also, IDS must report annually on contracts with local governments for additional assistant public defender positions. G.S. 7A-346.2(a).

<sup>38</sup> G.S. 7A-498.2(c).

<sup>39</sup> IDS REPORT, *supra* note 18, at 11.

Fig. 1. Organizational Chart



Source: Email from Whitney B. Fairbanks, Assistant Director/General Counsel, NC IDS to Committee Reporter (Sept. 31, 2016) (on file with Reporter)

## Case Types & Caseloads

IDS provides counsel in the categories of cases shown in Fig. 2 below.

**Fig. 2. IDS Case Types**

- Capital cases at the trial level
- Non-capital at the trial level, misdemeanors and felonies
- Juvenile delinquency
- Civil commitments
- Competency/Guardianship
- Adult protective services
- Juvenile abortion waivers
- Minors petitioning to marry
- Abuse, neglect, dependency cases
- Termination of parental rights cases
- Civil and criminal contempt
- Treatment courts
- Direct appeals
- Post-conviction proceedings, capital, and non-capital

*Source: Email from Danielle Carman, former Assistant Director/General Counsel, NC IDS to Committee Reporter (Mar. 31, 2016) (on file with Reporter).*

In fiscal year 2014-15, IDS handled 320,489 cases.<sup>40</sup> Based on NCAOC data, IDS handled 53.7% of all non-traffic criminal filings in North Carolina in that year.<sup>41</sup> However, IDS handled a greater percentage of non-traffic superior court criminal dispositions (71%) than non-traffic district court criminal dispositions (49.4%).<sup>42</sup>

IDS has responsibility for a wider range of cases than do North Carolina’s prosecutors. In North Carolina, prosecutors handle only trial level criminal cases and some post-conviction matters. Unlike IDS, the prosecution is not responsible for criminal appeals; advocacy for the State in criminal appeals is handled by the Attorney General’s office. And unlike IDS, the prosecution is not involved in any civil cases.

## Funding & Budget

Indigent defense services primarily are funded through State appropriations from the General Fund and budgeted recoupment revenues.<sup>43</sup> Budget appropriations for the fiscal biennium ending June 30, 2017 are shown in Figure 3 below. Recoupment revenue is shown in Figure 4 below. In addition to state funds, IDS pursues grant funding to support special projects.<sup>44</sup> Also, two counties —

<sup>40</sup> IDS REPORT, *supra* note 18, at Appendix C.

<sup>41</sup> *Id.* at 33.

<sup>42</sup> Email from Danielle Carman, former Assistant Director/General Counsel NC IDS to Committee Reporter (Mar. 31, 2016) (on file with Reporter).

<sup>43</sup> If an indigent defendant is convicted, attorney fees and the \$60 appointment fee are due back to the state, either through probation or collection of a civil judgment. See NC OFFICE OF INDIGENT DEFENSE SERVICES, INDIGENCY SCREENING AND RECOUPMENT (Mar. 2016), [http://www.ncids.org/News%20&%20Updates/Screening\\_Recoupment.pdf](http://www.ncids.org/News%20&%20Updates/Screening_Recoupment.pdf). “Recoupment” refers to the collection of these funds.

<sup>44</sup> IDS REPORT, *supra* note 18, at 28-29 (listing grants received).

Mecklenburg and Durham — provide additional support for indigent defense under an agreement with IDS.<sup>45</sup>

**Fig. 3. IDS Budget Appropriations**

Fiscal Year	Base Budget	Recurring Adjustments <sup>46</sup>	Nonrecurring Adjustments	Total Appropriation
FY 2015-2016	\$112,087,174	\$3,485,302	\$430,421	<b>\$116,002,897</b>
FY 2016-2017	\$112,097,118	\$6,717,688	\$4,256,503	<b>\$123,071,309</b>

Source: S.L. 2015-241; Email from Thomas K. Maher, Executive Director, NC IDS to Committee Reporter, Sept. 30, 2016 (explaining adjustments made in the short session) (on file with Reporter).

**Fig. 4. IDS Recoupment Revenue**

Fiscal Year	Recoupment Revenue (millions)
FY 2012	\$13.2
FY 2013	\$13
FY 2014	12.9
FY 2015	\$10.02

Sources: REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 24 (Submitted to the N.C. General Assembly Mar. 1, 2013); REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 26 (Submitted to the N.C. General Assembly Mar. 10, 2014); REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 28 (Submitted to the N.C. General Assembly Feb. 1, 2015); REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 33 (Submitted to the N.C. General Assembly Mar. 1, 2016).

### Characteristics of an Effective Indigent Defense System

Agreement as to the characteristics of an effective indigent defense system is a necessary prerequisite to any recommendations regarding North Carolina's indigent defense system. Without agreement as to what the system *should provide*, there is no baseline against which to assess its components. The characteristics presented here derive from this overall goal for North Carolina's indigent defense system:

*The goal of North Carolina's indigent defense system is to ensure fair proceedings by providing effective representation in a cost-effective manner.*

<sup>45</sup> *Id.* at 42; Email from Thomas K. Maher, Executive Director, NC IDS to Committee Reporter, Oct. 3, 2016 (on file with Reporter).

<sup>46</sup> A significant portion of the recurring adjustments to the IDS budget were allocated to address a dramatic reduction in recoupment revenue due to changes in the NC tax code. *See* Figure 4 (showing reduction in recoupment revenue); Email from Danielle Carman, former Assistant Director/General Counsel NC IDS to Committee Reporter, June 10, 2016 (on file with Reporter) (explaining the need for recurring adjustments). As IDS has explained:

[T]he 2013 state tax reforms were accompanied by changes in the withholding tables that are resulting in 40% to 50% fewer people receiving state income tax refunds. One-third of IDS' previous recoupment revenues came from intercepted state tax refunds, and revenues have declined significantly as a result of the tax changes.

*Id.*

## Meaningful Access to Counsel

### Types of Cases

The United States and North Carolina Constitutions require the State to provide indigent defense services for felony cases and misdemeanor cases if an active or suspended sentence is imposed and in specified other proceedings.<sup>47</sup> North Carolina’s lawmakers, however, have long recognized that there are good reasons to provide indigent defense services in additional case types above the constitutional floor,<sup>48</sup> such as promoting efficient case management and ensuring fairness and confidence in the court system. In addition to constitutionally required services, an effective indigent defense program provides services in proceedings arising from or connected with a criminal action in which the defendant may be deprived of liberty or otherwise subjected to serious deprivations<sup>49</sup> or resulting in significant collateral consequences.<sup>50</sup>

### Determination of Indigency

The system must promptly and meaningfully screen clients for eligibility<sup>51</sup> and decision makers must have clear and easily implemented written uniform standards for assessing indigency.<sup>52</sup> For example, one guideline might state that a defendant who is incarcerated or receiving food stamps is presumed to be indigent.<sup>53</sup> Use of presumptions streamlines the process and reduces the cost of indigency screening.<sup>54</sup> For those not presumed to be indigent, indigency should be determined based on standards that compare “the individual’s available income and resources to the actual price of retaining a private attorney.”<sup>55</sup> “Non-liquid assets, income needed for living expenses, and

<sup>47</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963) (felony defendants); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (all criminal charges resulting in imprisonment); *Alabama v. Shelton*, 535 U.S. 654 (2002) (suspended sentences); *In Re Gault*, 387 U.S. 1 (1967) (juvenile delinquency proceedings); *Douglas v. California*, 372 U.S. 353 (1963) (first appeal granted as a matter of right).

<sup>48</sup> *See, e.g.*, G.S. 7A-451(a)(3) (defendant has a right to counsel on a post-conviction motion for appropriate relief).

<sup>49</sup> AMERICAN BAR ASSOCIATION, ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Standard 5-5.2 & Commentary (3d ed. 1992) [hereinafter ABA STANDARDS].

<sup>50</sup> *See* John D. King, *Beyond “Life and Liberty”: The Evolving Right to Counsel*, 48 HARV. CIV. RIGHTS-CIV. LIBERTIES L. REV. 1 (2013) (arguing that defendants facing severe collateral consequences require the assistance of counsel).

<sup>51</sup> AMERICAN BAR ASSOCIATION, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 3 (2002) [hereinafter ABA TEN PRINCIPLES] (Principle 3 provides: “Clients are screened for eligibility . . .”); JUSTICE DENIED, *supra* note 4, at 197-98 (noting that it is “highly desirable that screening be undertaken pursuant to uniform written standards used throughout the jurisdiction” and that the statewide Commission “is in a position to adopt uniform eligibility standards for the state”); BRENNAN CENTER FOR JUSTICE, ELIGIBLE FOR JUSTICE: GUIDELINES FOR APPOINTING DEFENSE COUNSEL 6 (2008) [hereinafter ELIGIBLE FOR JUSTICE] (“Screening is a good idea in almost every jurisdiction.”), <https://www.brennancenter.org/sites/default/files/legacy/publications/Eligibility.Report.pdf>.

<sup>52</sup> ELIGIBLE FOR JUSTICE, *supra* note 51, at 2, 5-6 (standards should be uniform and in writing); ABA STANDARDS, *supra* note 49, Commentary to Standard 5-7.1 (“to assure fair eligibility determination and equal treatment for defendants . . ., it is essential that there be detailed written guidelines” for determining indigency). Several states currently have uniform, statewide screening criteria, including Massachusetts, New Hampshire and Oregon. ELIGIBLE FOR JUSTICE, *supra* note 51, at 7.

<sup>53</sup> ELIGIBLE FOR JUSTICE, *supra* note 51, at 21-22. The ability of the defendant to post bond should not be used as a basis for determining indigency because it requires the accused to choose between receiving legal representation and the opportunity to be at liberty pending trial. *Id.* at 5, 17-18; ABA STANDARDS, *supra* note 49, Commentary to Standard 5-7.1.

<sup>54</sup> ELIGIBLE FOR JUSTICE, *supra* note 51, at 21-22 (listing standards that can be used to create such a presumption).

<sup>55</sup> *Id.* at 2.

income and assets of family and friends should not be considered available for purposes of this determination.”<sup>56</sup> The standard should not determine individuals ineligible based on strict income or asset cut-offs.<sup>57</sup>

Although uniform standards are the goal, geographic variations in the cost of living and the price of obtaining a lawyer may require local adjustments.<sup>58</sup>

Uniform eligibility standards provide several benefits. First, they help the state predict future costs of indigent defense services.<sup>59</sup> Second, they help ensure that state funds are used only for persons who are in fact indigent.<sup>60</sup> Third, they “raise the quality of defense services by concentrating communities’ limited resources where they are truly needed.”<sup>61</sup> Fourth, uniform standards promote fairness by ensuring that similarly situated persons are treated similarly.<sup>62</sup> And finally, uniform standards promote due process by guarding against arbitrary eligibility determinations.<sup>63</sup>

Eligibility determinations should not be done by individuals affiliated with the indigent defense services program or any entity that has a conflict of interest in the indigency determination.<sup>64</sup> Consistent with this principle, a number of people can serve as screeners, such as the magistrate, court personnel, or a judge other than the presiding judge.<sup>65</sup>

Eligibility standards should be regularly updated to account for, among other factors, inflation and increases in the cost of living.<sup>66</sup> To ensure appropriate use of taxpayer funds, the system must regularly verify, through auditing or other techniques, that the screening tool ensures that services are being provided only to indigent persons.

### Timely Appointment of Counsel

Timely appointment of counsel is a key component of an effective indigent defense delivery system.<sup>67</sup> Timely appointment is necessary for several reasons, one of which is to advocate on the client’s behalf with respect to pretrial release.<sup>68</sup> Relatedly, early appointment of counsel may

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<sup>56</sup> *Id.* at 2, 5, 14-17.

<sup>57</sup> *Id.* at 12.

<sup>58</sup> *Id.* at 7 (“Although statewide uniformity of screening criteria and procedures is desirable, local variations in the cost of retaining private counsel and in the cost of living may require that particular jurisdictions depart from statewide standards . . .”).

<sup>59</sup> JUSTICE DENIED, *supra* note 4, at 198 (so stating); ELIGIBLE FOR JUSTICE, *supra* note 51, at 7.

<sup>60</sup> ELIGIBLE FOR JUSTICE, *supra* note 51, at 2.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 6.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 2, 5, 8 (“[C]ommunities should protect screening from conflicts of interest. Prosecutors, defense attorneys, and presiding judges all have interests—for example, in controlling their workloads by resolving cases—which conflict with their need to be objective when deciding who should receive free counsel. Decisions about eligibility should be made by those who are not involved with the merits of individuals’ cases.”); JUSTICE DENIED, *supra* note 4, at 198 (asserting that screening should be done by court or other personnel; citing concerns regarding conflict of interest, confidentiality rules, and harm to the attorney-client relationship).

<sup>65</sup> ELIGIBLE FOR JUSTICE, *supra* note 51, at 8 (listing other appropriate screeners).

<sup>66</sup> *Id.* at 7.

<sup>67</sup> ABA TEN PRINCIPLES, *supra* note 51, Principle 3 (“defense counsel is assigned and notified of appointment, as soon as feasible after clients’ arrest, detention, or request for counsel”).

<sup>68</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-6.1 (“Where the accused is incarcerated, defense counsel must begin immediately to marshal facts in support of the defendant’s pretrial release from

reduce the number of instances where defendants plead guilty simply to obtain release from pretrial detention.<sup>69</sup> Early appointment of counsel also is necessary so the defense can obtain and preserve critical evidence that may otherwise dissipate;<sup>70</sup> advocate for charges to be dismissed, reduced, or diverted;<sup>71</sup> and allow the defendant to more effectively aid in his or her defense.<sup>72</sup> Thus, counsel should be provided as soon as possible after arrest, charge, detention, or a request for counsel by the client.<sup>73</sup>

### Access to Counsel

Whether in custody or released, indigent defendants must have meaningful access to counsel. Among other things, counsel must be available to interview the defendant prior to court appearances, discuss plea options, identify relevant evidence and key witnesses, and prepare the defendant for hearings and trial. Access also requires that counsel have an office in or near the jurisdiction<sup>74</sup> or be able to demonstrate that counsel will be available to the court and to the defendant.

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custody.”); JUSTICE DENIED, *supra* note 4, at 8 (lack of a timely appointment causes defendants to remain in custody far longer than they would otherwise); *id.* at 86; Billings Comments, *supra* note 4 (noting the recurring problem of people charged with nonviolent offenses languishing in jail because they do not have an advocate who can argue for pretrial release or for a speedy trial); Holder, *supra* note 6 (“In . . . parts of the country, . . . defendants may sit in jail cells for weeks, even months, waiting for a lawyer.”); *see generally* Nadine Frederique et al., *What is the State of Empirical Research on Indigent Defense Nationwide? A Brief Overview and Suggestions for Future Research*, 78 ALBANY L. REV. 1317, 1322 (2015) [hereinafter *Empirical Research on Indigent Defense*] (discussing studies showing that involvement of counsel has positive impacts on pretrial release determinations). The importance of securing early pretrial release cannot be overstated. For example, one recent study found that, controlling for all other factors, “when held 2-3 days, low-risk defendants were almost 40 percent more likely to commit new crimes before trial than equivalent defendants held no more than 24 hours.” Laura and John Arnold Foundation, *Pretrial Criminal Justice Research* (LJAF Research Summary) Nov. 2013, at 4, [http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief\\_FNL.pdf](http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF-Pretrial-CJ-Research-brief_FNL.pdf).

<sup>69</sup> JUSTICE DENIED, *supra* note 4, at 86.

<sup>70</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-6.1 (“Often there are witnesses who must be interviewed promptly by the defense lest their memories of critical events fade or the witnesses become difficult to locate.”); JUSTICE DENIED, *supra* note 4, at 86 (late appointment of counsel affects the ability to prepare a defense: “Unless counsel represents the accused soon after arrest, witnesses may be lost, memories of witnesses may fade, and physical evidence useful to the defense may disappear.”).

<sup>71</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-6.1 (“Counsel’s early presence in the case can also sometimes serve to convince the prosecutor to dismiss unfounded charges, to charge the accused with less serious offenses, or to divert the case entirely from the criminal courts.”). The Committee notes that early resolution of cases reduces system costs overall.

<sup>72</sup> Billings Comments, *supra* note 4 (noting that if a defendant is not allowed pretrial release, his or her ability to aid in the defense is greatly inhibited).

<sup>73</sup> ABA STANDARDS, *supra* note 49, Standard 5-6.1 (“as soon as feasible”); *see also* JUSTICE DENIED, *supra* note 4, at 13 (expressly recommending that “defense lawyers should be provided as soon as feasible after accused persons are arrested, detained, or request counsel”); Billings Comments, *supra* note 4 (right to counsel must begin with the initiation of criminal process and noting that the report of the National Right to Counsel Committee so recommended). Some standards suggest that counsel typically should be provided within 24 hours of such events. ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 3.

<sup>74</sup> Exceptions to the general rule may be appropriate in some proceedings, such as appellate litigation and capital and other serious cases requiring specialized expertise that may not be available locally.

## Counsel is Qualified

The system must provide qualified counsel uniformly throughout the state.<sup>75</sup> In order to meet this obligation, the system must provide appropriate supervision, oversight and support to counsel, as detailed below.

### Supervision & Oversight

National standards recognize that supervision and oversight of counsel is essential to ensure that the system is providing effective representation.<sup>76</sup> Such supervision and oversight should be done by system-employed supervisors.<sup>77</sup>

#### *Initial Selection of Counsel*

In an effective indigent defense system, counsel’s “ability, training, and experience match the complexity of the case.”<sup>78</sup> To provide this guarantee, the system must have uniform statewide standards specifying the prerequisite skills and experience counsel must possess to handle each type of case for which indigent services are provided.<sup>79</sup> These standards should specify, at a minimum, training requirements (what topics; how much; acceptable providers; how recent, etc.) and required litigation experience (types of cases; how many; how recent, etc.). “A meaningful assessment of attorney qualifications, however, should go beyond objective quantitative measures.”<sup>80</sup> Appointment standards should be regularly reviewed and modified, as needed, based on developments in the law, science, technology and other disciplines relevant to criminal defense practice.

If there is an insufficient number of qualified counsel to handle caseloads in any geographic area or for any particular type of case, the system should devote resources and develop programs for counsel to gain the necessary skills and experience.

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<sup>75</sup> As has been noted:

No system of public defense representation for indigent persons can be successful unless the lawyers who provide the representation are capable of rendering quality representation. Regardless of whether assigned counsel, contract attorneys, or public defenders provide the defense services, states should require that the attorneys be well-qualified to do so.

JUSTICE DENIED, *supra* note 4, at 191.

<sup>76</sup> ABA TEN PRINCIPLES, *supra* note 51, Principle 10 (“[d]efense counsel is supervised and systematically reviewed for quality and efficiency”); *see also* JUSTICE DENIED, *supra* note 4, at 12 (expressly recommending that the statewide board or commission “should ensure that all attorneys who provide defense representation are effectively supervised and remove those defense attorneys who fail to provide quality services”); *id.* at 91 (it is “essential” that counsel “be appropriately . . . supervised”); SYSTEM OVERLOAD, *supra* note 5, at 10; ROBERT C. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS 40-41 (2009) [hereinafter MINOR CRIMES, MASSIVE WASTE] (“Supervision of misdemeanor defenders is sorely lacking and, often, performance reviews are non-existent”; recommending that such lawyers be actively supervised).

<sup>77</sup> JUSTICE DENIED, *supra* note 4, at 192.

<sup>78</sup> ABA TEN PRINCIPLES, *supra* note 51, Principle 6.

<sup>79</sup> JUSTICE DENIED, *supra* note 4, at 191 (recommending that the Commission establish and enforce qualification standards and specifying: “A tiered system of qualifications for appointment to different levels of cases, depending on the training and experience of the lawyers, will help to ensure that the defender has the requisite knowledge and skills to deliver high quality legal services, whether the charge is juvenile delinquency, a simple misdemeanor, or a complex felony.”).

<sup>80</sup> *Id.* (so stating and noting that “States should also implement other more substantive screening tools, including audits of prior performance, in-court observations, inspection of motions and other written work, and peer assessments”).

To ensure that counsel's ability, training, and experience match the complexity of the case assigned, supervision is required with respect to selection of counsel for each case. Supervision also is required to avoid conflicts, both at initial appointment and as the case develops.<sup>81</sup> And it is required to ensure that counsel has appropriate resources to handle the case, such as office space, office support, access to research tools, etc.<sup>82</sup>

### ***Ongoing Evaluation of Counsel***

The fact that counsel is determined at the outset to have the necessary ability, skills, and experience to handle the case is insufficient to ensure that he or she is delivering effective representation.<sup>83</sup> The system should have uniform performance standards for all types of cases.<sup>84</sup> Evaluation against those standards should involve observations of counsel's in-court performance and client and witness interviews; reviewing counsel's legal filings; and soliciting input from judges, prosecutors, clients and peers.<sup>85</sup> Evaluation should involve an opportunity for the supervisor to give counsel feedback and develop a remediation plan for any deficiencies.

### ***Ability to Reward & Sanction***

In order to incentivize excellence, supervisors must be able to reward good performance. Additionally, system-employed supervisors must have authority to remove or disqualify counsel who provide deficient performance, pursuant to established criteria.<sup>86</sup> Because peers may be reluctant to remove or disqualify a colleague, this authority should not reside with volunteer local bar committees. To preserve counsel's independence,<sup>87</sup> authority to remove or disqualify counsel from performing indigent defense services should not lie with the judge, except in cases where removal is required by law or pursuant to the court's inherent authority to discipline counsel.

### ***Monitoring Workload***

To ensure that counsel has sufficient time to spend on each case, system supervisors should monitor and adjust workloads for all counsel providing indigent defense services. Monitoring and adjustment should be made pursuant to uniform, statewide workload formulas, as discussed below.<sup>88</sup>

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<sup>81</sup> For a discussion of the types of conflicts to be avoided, see OFFICE OF INDIGENT DEFENSE SERVICES, REPORT ON PUBLIC DEFENDER CONFLICTS FOR FISCAL YEAR 2014-15 (2015).

<sup>82</sup> See *infra* pp. 17-19 (discussing necessary resources).

<sup>83</sup> JUSTICE DENIED, *supra* note 4, at 192 ("It is not sufficient, however, just to make sure that attorneys who provide defense services are qualified when they begin to provide representation.").

<sup>84</sup> *Id.* at 12 (expressly recommending that board or commission "should establish and enforce qualification and performance standards"); *id.* at 91 ("it is essential that . . . lawyers adhere to performance standards"); see also *Empirical Research on Indigent Defense*, *supra* note 68, at 1323-24 (2004 study concluded that indigent defense standards improved quality).

<sup>85</sup> ABA TEN PRINCIPLES, *supra* note 51, Principle 10 ("Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards."); *id.* Commentary to Principle 10 ("The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency").

<sup>86</sup> ABA STANDARDS, *supra* note 49, Standard 5-2.3 ("[t]he roster of lawyers should periodically be revised to remove those who have not provided quality legal representation"; "Specific criteria for removal should be adopted in conjunction with qualification standards."); JUSTICE DENIED, *supra* note 4, at 12 (expressly recommending that the statewide commission "should ensure that all attorneys who provide defense representation are effectively supervised and remove those defense attorneys who fail to provide quality services"); *id.* at 191-92.

<sup>87</sup> See *infra* p. 21.

<sup>88</sup> See *infra* p. 18.

## Resources

Even the most qualified and dedicated counsel cannot provide effective assistance if counsel lacks necessary resources,<sup>89</sup> as outlined below.

### ***Time***

Having appropriate time to handle a case is essential to providing a quality defense.<sup>90</sup> Counsel cannot provide effective representation when caseloads are excessive and counsel lacks time to perform critical tasks, including interviewing clients and witnesses; conducting legal research; writing and responding to motions; accessing and preparing experts, and preparing to advocate on the client's behalf at hearings, trial and sentencing.<sup>91</sup> The costs of ineffective assistance to defendants, victims, the court system and the citizens of North Carolina are detailed above.<sup>92</sup> Additionally, problems with excessive caseloads can compound: "Eventually, working under such conditions on a daily basis undermines attorney morale and leads to turnover, which in turn, contributes to excessive caseloads for the remaining defenders and increases the likelihood that a new, inexperienced attorney will be assigned to handle at least part of the caseload."<sup>93</sup> Thus, national standards emphasize the need for defense counsel to have manageable case and workloads.<sup>94</sup>

### ***Workload Formulas***

To ensure that counsel has sufficient time to handle indigent cases and is prepared when the case is called for hearing or trial, the system should have workload formulas in place for all indigent defense providers.<sup>95</sup> The workload formulas should be more sophisticated than simple caseload limits,<sup>96</sup> taking into consideration factors such as case complexity, administrative responsibilities<sup>97</sup> and counsel's skill and experience. Workload formulas should balance quality and efficiency.<sup>98</sup>

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<sup>89</sup> Billings Comments, *supra* note 4 (when an attorney is overburdened with cases and does not have adequate resources (e.g., for investigators), even the most competent attorney cannot be effective).

<sup>90</sup> *Id.*; ABA TEN PRINCIPLES, *supra* note 51, Principle 5 ("Defense counsel's workload is controlled to permit the rendering of quality representation."); SYSTEM OVERLOAD, *supra* note 5, at 10, 13.

<sup>91</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-5.3 ("One of the most significant impediments to the furnishing of quality defense services for the poor is the presence of excessive workloads."); JUSTICE DENIED, *supra* note 4, at 65; *see also id.* at 7; Billings Comments, *supra* note 4 (when an attorney is overburdened with cases even the most competent attorney cannot be effective).

<sup>92</sup> *See supra* pp. 3-5.

<sup>93</sup> JUSTICE DENIED, *supra* note 4, at 65; *see also id.* at 69 (citing a survey finding a statistically significant correlation between excessive caseloads and use of less experienced lawyers to handle serious felony cases).

<sup>94</sup> ABA TEN PRINCIPLES, *supra* note 51, Principle 5.

<sup>95</sup> JUSTICE DENIED, *supra* note 4, at 12 (expressly recommending that the board or commission "should establish and enforce workload limits for defense attorneys"); *id.* at 68 ("High caseloads often force attorneys to continue cases."); *id.* at 194 ("The issue of workload is important not only to public defenders but also to assigned counsel and to private attorneys who provide services pursuant to contracts. In the case of private attorneys, this should include oversight of the extent of their practice in order to ensure that they have adequate time to devote to their indigent cases.").

<sup>96</sup> There is, however, some evidence that even caseload caps improve the quality of representation. Geoff Burkhart, *How to Improve Your Public Defense Office*, CRIMINAL JUSTICE, Spring 2016, at 56, 57 (noting that a study by the Center for Court Innovation found that New York City's caseload caps resulted in "highly positive" results).

<sup>97</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-5.3 (simple caseload limits are insufficient); JUSTICE DENIED, *supra* note 4, at 12 (expressly recommending that workload limits should take into account other responsibilities in addition to client representation); *id.* at 192-93.

<sup>98</sup> *See* ABA TEN PRINCIPLES, *supra* note 51, Principle 5 ("Defense counsel's workload is controlled to permit the rendering of quality representation.").

Additionally, procedures must be in place to ensure that defense counsel has adequate time to provide quality representation at the time of appointment and throughout representation.<sup>99</sup>

### ***Access to Investigators, Experts & Other Support***

Counsel must have access to necessary experts, such as mental health and forensic experts<sup>100</sup> and investigators and interpreters.<sup>101</sup> Access must be timely so that counsel can prepare for pretrial hearings, such as bail and competency hearings. Counsel must have access to specialized legal resources, such as forensic resources and immigration counsel. Counsel must have necessary office support, such as a suitable location to work, a private location for client and witness meetings, computer and internet access, telephone services, and access to pattern jury instructions and online legal research tools.<sup>102</sup> While the system should endeavor to provide such access when possible, counsel without such resources should not be allowed to provide indigent defense services.

### ***Compensation***

Reasonable compensation is required to ensure that the State can sustainably provide effective indigent defense services.<sup>103</sup> When compensation falls below reasonable levels, lawyers who can be reasonably compensated elsewhere flee the system. An insufficient number of competent lawyers threatens the system's ability to guarantee effective assistance of counsel, both because of the quality of counsel available and because of higher caseloads for quality counsel still performing indigent work.<sup>104</sup> All of the other costs of failing to provide effective assistance also attach, such as wrongful convictions and case delays.<sup>105</sup>

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<sup>99</sup> JUSTICE DENIED, *supra* note 4, at 65 (noting that NLADA guidelines so require and that withdrawal should be sought when counsel has insufficient time to provide quality representation).

<sup>100</sup> Experts often are necessary to present an effective defense, test physical evidence, or provide an opinion independent of the prosecution's state-supplied expert. JUSTICE DENIED, *supra* note 4, at 93-94. For an indigent defendant's legal right to such assistance, see *Ake v. Oklahoma*, 470 U.S. 68 (1985) (right to mental health expert) and JUSTICE DENIED, *supra* note 4, at 25 & n.36.

<sup>101</sup> ABA STANDARDS, *supra* note 49, Standard 5.14 ("The legal representation plan should provide for investigatory, expert, and other services necessary to quality legal representation."); JUSTICE DENIED, *supra* note 4, at 13, 93-95 ("The outcome of a criminal case can hinge on retaining an appropriate expert or conducting a thorough fact investigation. In the case of non-English speaking clients, qualified interpreters are critical for attorney-client communication."); SYSTEM OVERLOAD, *supra* note 5, at 10, 13; Billings Comments, *supra* note 4.

Investigators are needed to interview witnesses and collect physical evidence. JUSTICE DENIED, *supra* note 4, at 93. The Committee notes that access to investigators may reduce the cost of indigent defense services. ABA STANDARDS, *supra* note 49, Commentary to Standard 5-1.4 ("If the defense attorney must personally conduct factual investigations, the financial cost to the justice system is likely to be greater because the defender's time is generally more valuable than the investigator's.").

<sup>102</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-1.4 (importance of, among other things, secretarial support, computers, telephones, and copying and mailing facilities); *id.*, Commentary to Standard 5-4.3 (it is "essential" that facilities be provided in which clients can be interviewed in privacy and that counsel have necessary office equipment and legal research tools); *see also* JUSTICE DENIED, *supra* note 4, at 8 (lawyers must have access to technology and data).

<sup>103</sup> JUSTICE DENIED, *supra* note 4, at 12 (expressly recommending that fair compensation should be provided); *id.* at 195 (noting that the ABA urges "reasonable" compensation).

<sup>104</sup> IDS REPORT, *supra* note 18, at 15.

<sup>105</sup> *See supra* pp. 3-5 (discussing these costs).

**Training**

Having access to training is essential to providing a quality defense.<sup>106</sup> Training is necessary not just for new lawyers, but for experienced lawyers,<sup>107</sup> so that they can keep abreast of changes in the law, science, technology, and other related disciplines.<sup>108</sup> It is also essential for support staff, such as investigators.<sup>109</sup>

**Feedback on Performance & Remediation Services**

As noted above, evaluation of counsel's performance should involve an opportunity for the evaluator to give counsel feedback and to support counsel by developing a remediation plan to address any deficiencies.<sup>110</sup>

**System Is Actively Managed  
Collect & Use Data in Decision-Making**

Lack of data is an obstacle to improving public defense systems.<sup>111</sup> Good data informs decision making and leads to better results. In an effective public defense system, data is gathered, maintained consistently over time, and plays a key role in decision making. Data needs in indigent defense are wide and varied and include, among other things:

- Measuring the quality of representation provided through various delivery methods
- Measuring the cost and cost effectiveness of various delivery mechanisms
- Assessing implications on performance of changes in procedures or standards
- Measuring cost implications of procedural or system changes
- Measuring workloads
- Measuring the effectiveness of training and other support systems
- Predicting future funding needs

**Long-Term Planning**

The system should have a long-term plan for providing indigent defense services that articulates discrete, measurable objectives. The plan should be evidence-based, in that it accounts for among other things: anticipated demographic changes, including geographic in- and out-migration;

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<sup>106</sup> ABA STANDARDS, *supra* note 49, Standard 5-1.5 (“The legal representation plan should provide for the effective training, professional development and continuing education of all counsel and staff involved in providing defense services.”); *id.* Commentary to Standard 5-1.5 (“Adequate and frequent training programs are a key component in the provision of quality representation by defense attorneys.”); ABA TEN PRINCIPLES, *supra* note 51, Principle 9 (“Defense counsel is provided with and required to attend continuing legal education.”); JUSTICE DENIED, *supra* note 4, at 91 (it is “essential” that counsel “be appropriately trained”); SYSTEM OVERLOAD, *supra* note 5, at 10, 15; MINOR CRIMES, MASSIVE WASTE, *supra* note 76, at 39-40 (“Appropriate training is critical to practice, regardless of level”; recommending that defense counsel be required to attend training on trial skills, substantive and procedural laws and collateral consequences before being allowed to represent misdemeanor defendants).

<sup>107</sup> ABA STANDARDS, *supra* note 49, Standard 5-1.5 (“The legal representation plan should provide for . . . continuing education of all counsel and staff”); *id.* Commentary to Standard 5-1.5 (“programs should be established for both beginning and advanced practitioners”).

<sup>108</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 9 (training should be “comprehensive”).

<sup>109</sup> ABA STANDARDS, *supra* note 49, Standard 5-1.5 (“The legal representation plan should provide for the effective training . . . of all counsel and staff”).

<sup>110</sup> See *supra* p. 16.

<sup>111</sup> *What Policymakers Need to Know*, *supra* note 7, at 1.

predicted changes in crime rates; expectations regarding availability of counsel in geographic areas; and expected technology changes.

This type of long-term planning allows the system and the State to better predict resources needed for indigent defense services. It also allows for an evaluation of the overall system. Additionally, long-term planning permits the system to undertake systemic reform that requires longer lead and implementation time. And finally, when the system's long-term plan is endorsed by lawmakers, it allows the system to focus on accepted long-term objectives, rather than devoting resources to respond to short-term changes in sentiment.

### **Managed for Efficiency**

As noted, the goal of North Carolina's indigent defense system is to ensure fair proceedings by providing effective representation in a cost-effective manner.<sup>112</sup> The system must be gathering and using data to make evidence-based decisions about cost-effective ways of delivering services. This should involve evaluation of existing and alternative systems. The system should stay abreast of developments in other jurisdictions and new ideas that may yield efficiencies. When appropriate, pilot studies should be used to test new systems.

### **Reporting & Accountability**

To ensure transparency and confidence, the system should report regularly to the funding authority, courts, the bar, and the public, providing evidence-based assessments of system performance against discrete, measurable objectives.<sup>113</sup> The system should be audited regularly to ensure appropriate use of funds. The system should be directly accountable to the funding authority.

### **System Affords Appropriate Independence from the Judiciary**

Independence is a key component of an effective indigent defense system.<sup>114</sup> At the micro level independence refers to the ability of counsel to zealously advocate for the client, unimpeded by conflicts of interest, or control by the prosecutor or judge, except with respect to legal rulings and the trial court's inherent authority to discipline lawyers. To preserve independence at the micro level, direct supervisory authority over counsel should lie with system-employed supervisors. Although it is sometimes asserted that judges can provide the necessary supervision, allowing judges to supervise lawyers providing indigent defense services creates "[s]everal serious problems," including putting "constraints on zealous representation which do not exist for prosecutors or lawyers representing non-indigent clients."<sup>115</sup> Additionally, "[i]n general, judges lack

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<sup>112</sup> See *supra* p. 12.

<sup>113</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-1.2 ("[T]hose responsible for the administration of defense services programs . . . should render periodic reports on operations, and these reports should be made available to the funding source, to the courts, to the bar, and to the public. Regular reports help to maintain public confidence in the integrity of the services provided . . .").

<sup>114</sup> JUSTICE DENIED, *supra* note 4, at 7 (lack of independence is an impediment to a successful indigent defense program); *id.* at 80-84.

<sup>115</sup> LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 7; see also ABA STANDARDS, *supra* note 49, Standard 5-1.3 (lawyers providing indigent services "should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice"); JUSTICE DENIED, *supra* note 4, at 7 (when there is a lack of independence from the judiciary, "[l]awyers deemed to be too aggressive may be excluded from appointments, or favoritism may be shown to certain lawyers, who are appointed to a disproportionate share of the cases"); Holder, *supra* note 6 (a statewide survey of Nebraska judges raised concerns about judges who refused to reappoint lawyers who requested too many trials).

the time and information to exercise uniform or coordinated management, or monitor or control the quality of representation.”<sup>116</sup> This sentiment was echoed by stakeholders who spoke to the Committee,<sup>117</sup> and is consistent with national guidelines.<sup>118</sup>

At the macro level, independence refers to the independence of the statewide indigent defense system. Assuring an appropriate level of system independence has long been understood to be a critical component of an effective indigent defense system.<sup>119</sup> Independence allows the system to set priorities statewide based on its overall goal of ensuring fair proceedings by providing effective representation in a cost-effective manner, as opposed to other court system goals that may undermine that objective, such as increasing case clearance rates. Additionally, an independent system serves as an important counterweight to pressures by individual actors in the court system, such as a district attorney who pressures a lawyer to resolve cases in a certain manner or a judge who unreasonably reduces a lawyer’s fees. Thus, the Report of the National Right to Counsel Committee “urge[d] that the state’s commission be an independent agency of state government and that its placement within any branch of government be for administrative purposes only.”<sup>120</sup>

### System Involved in Policy Discussions

As a critical stakeholder in the system with valuable information and experience, the indigent system and indigent defense providers should be involved in policy decisions that affect the delivery of indigent defense services.<sup>121</sup>

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<sup>116</sup> LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 7.

<sup>117</sup> Comments of Superior Court Judge Anna Mills Wagoner, Committee Meeting Nov. 23, 2015 (noting difficulties because of Superior Court Judge rotation).

<sup>118</sup> See ABA TEN PRINCIPLES, *supra* note 51, Principle 1 (“The public defense function, including the selection, funding, and payment of defense counsel, is independent.”); see *id.* Commentary to Principle 1 (“The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.”).

Issues of independence also can arise with respect to selection of Chief Public Defenders. The report of the study commission that led to the creation of IDS noted that “serious problems arise by placing authorities over appointment of public defenders . . . with judges;” it thus recommended that appointment authority be vested with the IDS Commission. LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 7. Additionally, a 2007 performance audit of IDS by the North Carolina State Auditor noted that because chief public defenders were appointed by the senior resident Superior Court judge of the district those lawyers suffered from a lack of independence from the judiciary. OFFICE OF THE STATE AUDITOR OF NORTH CAROLINA, PERFORMANCE AUDIT-OFFICE OF INDIGENT DEFENSE SERVICES 6-7 (2007). That report stated: “Since it is reasonable to assume that each public defender has an interest in being reappointed to the next four-year term and would like to remain in the judge’s favor during the interim, neither the public defender, his or her staff, nor the private counsel they appoint can be considered free from judicial influence.” *Id.* at 7. Likewise, national standards emphasize the need for the indigent defense function to be independent of the judiciary and recommend that “[s]election of the chief defender . . . by judges should be prohibited.” ABA STANDARDS, *supra* note 49, Standard 5-4.1; *id.* Commentary to Standard 5-4.1 (“What is not deemed satisfactory is for the chief defender to be chosen by judges, because that method fails to guarantee that the program will remain free of judicial supervision. Even with the best of motives by both judges and defenders, the appearance of justice is tarnished when the judiciary selects the chief defender . . .” (quotation omitted)). North Carolina’s shifting approach on this issue is detailed in footnote 32 above.

<sup>119</sup> ABA TEN PRINCIPLES, *supra* note 51, Principle 1 (“The public defense function, including the selection, funding, and payment of defense counsel, is independent”); LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 1 (recommending such independence for North Carolina’s system: “defense function must be independent of judicial or other control over policy and budgetary decisions”).

<sup>120</sup> JUSTICE DENIED, *supra* note 4, at 10.

<sup>121</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 8 (“Public defense should participate as an equal partner in improving the justice system.”); SYSTEM OVERLOAD, *supra* note 5, at 33.

## Recommendations

The Committee offers these recommendations for improving North Carolina’s indigent defense system, all of which flow from the characteristics set forth above and are designed to achieve the system’s overall goal: ensuring fair proceedings by providing effective representation in a cost-effective manner.

### Organizational Structure & Management

#### Ensure Accountability to General Assembly & Independence from Judiciary

##### *Retain Existing Commission Structure*

The report of the legislative study commission that led to the Indigent Services Act recommended the establishment of an independent commission to oversee IDS.<sup>122</sup> That recommendation was accepted and the IDS Commission was created. A Commission structure is the majority approach in the country,<sup>123</sup> is recognized as the preferred structure for an indigent defense system,<sup>124</sup> ensures critical independence and accountability,<sup>125</sup> and should be maintained.<sup>126</sup>

Members of the Commission should be appointed by a diverse group of officials and organizations, with no single person or organization authorized to appoint a majority of Commissioners.<sup>127</sup> All members of the Commission should be committed to the delivery of quality indigent defense services, and a majority should have prior experience in providing indigent defense representation.<sup>128</sup> Under current law, a private defense lawyer may serve on the Commission but a full-time Public Defender or employee of the public defender’s officer may not so serve.<sup>129</sup> Because Public Defenders and their employees can add important perspectives and experience, this restriction should be removed.

The Commission should have a responsibility to hire the Executive Director of IDS and remove him or her for cause.<sup>130</sup>

<sup>122</sup> LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 8.

<sup>123</sup> Comments of Professor John Rubin, Committee Meeting, Nov. 23, 2015; JUSTICE DENIED, *supra* note 4, at 10 (noting that of the 27 states that have organized their defense services either entirely or substantially on a statewide basis, 19 have a state commission with supervisory authority over the state’s defense program; in the remaining 23 states, there is either a state commission with partial authority over indigent defense (9 states), a state appellate commission or agency (6 states), or no state commission of any kind (8 states)).

<sup>124</sup> JUSTICE DENIED, *supra* note 4, at 185-86 (“The system most frequently recommended . . . [is] an independent Board or Commission vested with responsibility for indigent defense.”).

<sup>125</sup> See *supra* pp. 21-22 (defining these as characteristics of an effective indigent defense delivery system).

<sup>126</sup> Geoff Burkhardt, *How to Improve Your Public Defense Office*, CRIMINAL JUSTICE, Spring 2016, at 56, 57 (advocating for a strong well-structured commission to “safeguard independence, increase funding, and decrease caseloads, helping to ensure ethical and constitutional defense provision”).

<sup>127</sup> JUSTICE DENIED, *supra* note 4, at 186-87.

<sup>128</sup> *Id.* at 185, 187.

<sup>129</sup> G.S. 7A-498.4(d) (“No active public defenders, active employees of public defenders, or other active employees of the Office of Indigent Defense Services may be appointed to or serve on the Commission, except that notwithstanding this subsection, G.S. 14-234, or any other provision of law, Commission members may include part-time public defenders employed by the Office of Indigent Defense Services and may include persons, or employees of persons or organizations, who provide legal services subject to this Article as contractors or appointed attorneys.”).

<sup>130</sup> JUSTICE DENIED, *supra* note 4, at 189. Currently, the statute provides that the Commission may remove the Director by a vote of two-thirds of all of the Commission members, G.S. 7A-498.6(a), without specifying that cause is required.

## ***Financial Matters***

### **Budget**

The report of the study commission that led to the creation of IDS found that the indigent defense function must be “free of the influences and priorities the NCAOC must set for core court functions, prosecutorial operations, and other programs under the NCAOC” and recommended that the NCAOC should “not have control over policy or budgetary decisions.”<sup>131</sup> National commissions have come out similarly on this issue. The Report of the National Right to Counsel Committee concluded, in part:

If a state’s indigent defense system is financed primarily by the state, it is especially important that its budget remain separate from those of other agencies, including the courts, so that resources directed towards indigent defense are not seen as having a negative impact on other worthwhile spending. For example, if the agency is housed in the judicial branch and is part of the judiciary’s budget, the judiciary may be less likely to advocate for increased indigent defense funding if it means less money will be available for judges, court personnel, and facilities.<sup>132</sup>

IDS was created as an independent agency within the Judicial Department. As noted above, however, in 2015 the General Assembly made IDS a sub-agency of the judicial branch and gave the NCAOC authority to modify the IDS budget without approval of the IDS Commission.<sup>133</sup>

Although current NCAOC leadership has indicated that it does not intend to exercise this new budgetary authority, leadership and policies can change. Thus, to preserve appropriate independence from the judiciary, the Committee believes that the pre-2015 standard is preferable with respect to IDS’s status and budgetary authority.

### **Compensation Methods for Private Assigned Counsel (PAC)**

Consistent with the recommendations below regarding PAC compensation methods,<sup>134</sup> IDS should have flexibility to determine the most appropriate methods of compensating PAC to achieve the overall system goal of ensuring fairness by providing effective indigent defense services in the most cost-effective manner.<sup>135</sup>

### **Resource Flexibility**

The report of the study commission that led to the creation of IDS noted that one deficiency of the then-existing system was that “[c]rucial decisions that could be made flexibly for the most effective ways to provide services are instead fixed in legislation.”<sup>136</sup> To some extent this deficiency still exists. For example, in 2011, the General Assembly mandated that IDS implement a contract payment system for PAC statewide. The Committee recommends that IDS be afforded flexibility in managing its resources, subject to required reporting and accountability directly to the General Assembly.

That same report recommended that IDS have authority to “determine and implement the best approaches to provide representation in each area of the state among public defender offices, private counsel systems, and/or contracts.”<sup>137</sup> The Committee concurs and recommends that IDS

<sup>131</sup> LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 1-2.

<sup>132</sup> JUSTICE DENIED, *supra* note 4, at 160.

<sup>133</sup> *See supra* p. 8.

<sup>134</sup> *See infra* pp. 39-46.

<sup>135</sup> *See supra* p. 12 (setting out this goal); *supra* pp. 21-22 (discussing the need for independence).

<sup>136</sup> LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 1.

<sup>137</sup> *Id.* at 2.

have broad authority to implement the best approaches to providing representation, including the creation of new Public Defender offices. It further notes that historically the General Assembly has given IDS authority to create a certain number of new attorney and support staff positions within existing defender programs,<sup>138</sup> and supports continuation of this flexibility.

### ***Direct Accountability to the General Assembly***

Consistent with the recommendations of the legislative study commission that led to the creation of IDS, the Committee believes that IDS should be directly accountable to the General Assembly.<sup>139</sup>

## **System Is Actively Managed**

### ***Development of Indigency Standards***

The legislative study commission report that led to the creation of IDS noted that “[n]o statewide uniform standards exist for determination of indigency.”<sup>140</sup> Thus, G.S. 7A-498.5(c)(8) was enacted, directing the IDS Commission to develop standards governing the provision of services under the IDS Act, including “[s]tandards for determining indigency.” Notwithstanding this provision, no such standards currently exist. Instead, defendants submit affidavits of indigency<sup>141</sup> and each judge makes his or her own determination as to whether or not individuals qualify as indigent. Although IDS has suggested that “it will be very challenging to develop indigency standards that would be both meaningful and flexible enough to take into account the wide variety of financial situations facing defendants and respondents,”<sup>142</sup> the Committee believes that in spite of this difficulty developing such standards will benefit the system. It thus recommends that the Commission develop easily implemented uniform standards for indigency. To promote efficiency, it further recommends that those standards employ presumptions of indigency to avoid a full screening in every case.<sup>143</sup>

Based on evidence suggesting that indigency verification may not be cost-effective,<sup>144</sup> the Committee declines to recommend such a procedure for all cases. The Committee notes that it is a Class I felony to make a false material statement about one’s indigency<sup>145</sup> and that attorneys have a statutory obligation to inform the court if they believe an assigned client has the resources to hire

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<sup>138</sup> IDS REPORT, *supra* note 18, at 14.

<sup>139</sup> LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 8.

<sup>140</sup> *Id.* at 1. G.S. 7A-450(a) defines an indigent person as one “who is financially unable to secure legal representation and to provide all other necessary expenses of representation.”

<sup>141</sup> The affidavit of indigency is NCAOC-CR-226, available here <http://www.nccourts.org/Forms/Documents/687.pdf>.

<sup>142</sup> IDS REPORT, *supra* note 18, at 7.

<sup>143</sup> *See supra* p. 13 (discussing the value of presumptions of indigency). At a minimum, the guidelines should specify that a juvenile is presumed indigent.

<sup>144</sup> As reported by IDS,

[T]he North Carolina court system employed indigency screening staff in the 1990s and found that they were not cost effective. In addition, a 2007 study of indigency verification in Nebraska found that the process detected inaccurate information in approximately 5% of applications for court appointed counsel. However, only 4% of the 5% that included misstatements (or only 1 in every 500 applications) led to the appointment of counsel in cases in which counsel otherwise would not have been provided. A more significant percentage of the inaccurate applications overstated the applicants’ financial resources. If the same holds true in North Carolina, it is highly unlikely that additional screening or verification of financial information in affidavits of indigency would pay for itself.

IDS REPORT, *supra* note 18, at 7.

<sup>145</sup> G.S. 7A-456.

an attorney.<sup>146</sup> However, to ensure appropriate use of taxpayer funds, IDS should regularly verify, through auditing or other techniques, that the screening tool ensures that indigent defense services are being provided only to persons who are in fact indigent.

### ***Development of Workload Formulas***

As noted above, an effective indigent defense system employs workload formulas to ensure that counsel has sufficient time to spend on indigent cases and that cases are tried on time.<sup>147</sup> Additionally, workload formulas can help assess system capacity and future needs.

Except for caseload limits for private counsel handling potentially capital cases,<sup>148</sup> and some case limitations that apply to attorneys handling contracts,<sup>149</sup> IDS does not have workload formulas for counsel providing indigent defense services.<sup>150</sup> The Committee recommends that IDS develop and use workload formulas for public defenders and PAC. The workload formulas should balance quality and efficiency. Consistent with national standards, IDS should contractually limit PAC's participation in private cases that would exceed the workload formulas given existing indigent assignments.<sup>151</sup> Workload formulas should be regularly updated based on changes in case processing, technology, and other developments.

Although the Committee defers to IDS on the creation of the appropriate workload formulas, within these broad requirements, it notes that a number of systems have set caseload limits to help maintain quality representation.<sup>152</sup> Reference to these standards may facilitate creation of standards for North Carolina. In no event, however, should national caseload standards be exceeded.<sup>153</sup> North Carolina's workload formulas should adjust caseloads by complexity,

<sup>146</sup> G.S. 7A-450(d).

<sup>147</sup> See *supra* p. 18.

<sup>148</sup> Cap on the Number of Potentially Capital Cases Per Private Appointed Counsel, IDS Policy, [http://www.ncids.org/Rules & Procedures/Policies By Case Type/CapCases/Cap\\_OpenCases.pdf](http://www.ncids.org/Rules%20&%20Procedures/Policies%20By%20Case%20Type/CapCases/Cap_OpenCases.pdf).

<sup>149</sup> Lawyers doing full-time contract work are prohibited from engaging in the private practice of law without the advance approval of the IDS Director. See Standard Contract Terms and Conditions § 8 (NC IDS), <http://bit.ly/23utrgP>.

<sup>150</sup> "Workload" as used here is distinguishable from the more narrow term "caseload." See generally ABA STANDARDS, *supra* note 49, Commentary to Standard 5-5.3. Caseload refers to the number of cases assigned to an attorney at a given time. *Id.* Workload by contrast is the total of all work performed by counsel; it includes the number of cases assigned but also includes other administrative or supervisory work, and adjusts caseload for complexity. *Id.*

<sup>151</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 5 ("Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels." (emphasis added)).

<sup>152</sup> SYSTEM OVERLOAD, *supra* note 5, at 11-12 (discussing caseload limits in place in Seattle, Washington DC, among others).

<sup>153</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 5 ("National caseload standards should in no event be exceeded . . ."). Like others, the Committee expresses caution with respect to the national maximum caseload numbers suggested by the National Advisory Commission on Criminal Justice Standards and Goals in 1973. As has been noted, those standards are decades old and were never empirically based. JUSTICE DENIED, *supra* note 4, at 66 (asserting that those standards "should be viewed with considerable caution" because of their age, lack of empirical support, and the fact that since they were developed the practice of criminal and juvenile law has become "far more complicated and time-consuming"; those 1973 standards set caseload limits at: 150 felonies; 400 misdemeanors; 200 juvenile cases; 200 mental health cases; or 25 appeals). For one set of more recent standards, see DOTTIE CARMICHAEL ET AL., GUIDELINES FOR INDIGENT DEFENSE CASELOADS: A REPORT TO THE TEXAS INDIGENT DEFENSE COMMISSION (2015) ("for the delivery of reasonably competent and effective representation attorneys should carry an annual full-time equivalent caseload of no more than" 236 Class B Misdemeanors; 216 Class A Misdemeanors; 175 State Jail Felonies; 144 Third Degree Felonies; 105

incorporate counsel's administrative responsibilities to the system,<sup>154</sup> and account for variations in local practice that may affect efficiency.<sup>155</sup>

### ***Robust Local Supervision***

As noted above, an effective indigent defense system requires rigorous supervision and oversight of its indigent defense service providers.<sup>156</sup> To ensure appropriate independence, counsel should be supervised by local system-employed supervisors.<sup>157</sup> In public defender offices, the structure and personnel exist to provide such supervision and oversight to assistant public defenders and staff. However, such supervision and oversight is not carried out uniformly in all public defender offices. To address that, IDS should develop uniform standards regarding supervision and oversight, consistent with the characteristics of an effective indigent defense delivery system as stated above.<sup>158</sup>

The appropriate structure and personnel do not exist to provide the necessary supervision and oversight of PAC. Currently, these attorneys are supervised, if at all, by volunteer local bar committees, or for those doing contract work, by IDS's regional defenders. Volunteer bar committees are unable to provide the requisite level of supervision. First, they lack the infrastructure and capacity to do so. Second, perhaps because bar committee members may find it difficult to sanction a peer in the local community, such sanctions rarely occur, indicating a lack of rigor in this peer review system. While IDS's regional defenders provide important oversight for contract attorneys,<sup>159</sup> only two such positions exist, responsible for oversight of 218 contract lawyers.<sup>160</sup> This workload precludes the type of rigorous review required for an effective indigent defense system.

In light of this and consistent with national standards,<sup>161</sup> the Committee recommends the use of local PAC supervisors housed within single district, regional or conflict public defender offices<sup>162</sup> and afforded the required time and resources to provide the necessary oversight and supervision pursuant to uniform policies adopted by IDS. Consistent with national standards, the local

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Second Degree Felonies; 77 First Degree Felonies), [http://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/2015/lisclaidsummit04texasstudyfullreport.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2015/lisclaidsummit04texasstudyfullreport.authcheckdam.pdf).

<sup>154</sup> See *supra* p. 18 (discussing factors that should be incorporated into a workload formula).

<sup>155</sup> For example, a lawyer who works in an urban area on only one type of case (e.g., adult felony) in one courthouse where court meets daily can be more efficient than a lawyer in a rural area responsible for a more varied caseload in multiple courthouses that do not hold court daily.

<sup>156</sup> See *supra* pp. 15-17.

<sup>157</sup> See *supra* p. 15.

<sup>158</sup> See *supra* pp. 15-17 (setting out the required oversight and supervision needed for an effective system).

<sup>159</sup> Comments of Michael Waters, Committee Meeting Nov. 23, 2015 (noting the support offered by IDS's current regional defenders).

<sup>160</sup> REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES TO THE CHAIRS OF THE HOUSE APPROPRIATIONS COMMITTEE ON JUSTICE AND PUBLIC SAFETY, THE SENATE APPROPRIATIONS COMMITTEE ON JUSTICE AND PUBLIC SAFETY, AND THE JOINT LEGISLATIVE OVERSIGHT COMMITTEE ON JUSTICE AND PUBLIC SAFETY: REQUESTS FOR PROPOSALS AND CONTRACTS FOR LEGAL SERVICES 2 (2015), [http://www.ncids.org/RFP/RepData/GA\\_Report\\_2015.pdf](http://www.ncids.org/RFP/RepData/GA_Report_2015.pdf) [hereinafter REPORT ON REQUESTS FOR PROPOSALS AND CONTRACTS FOR LEGAL SERVICES].

<sup>161</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 2 ("The appointment process should never be ad hoc, but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction. Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide." (footnote omitted)).

<sup>162</sup> See *infra* pp. 34-35 (recommending the creation of such offices).

supervisors should be lawyers with experience in North Carolina criminal law.<sup>163</sup> The local supervisors would replace the current supervisory role of volunteer local bar committees and would ensure implementation of uniform workload, training, and performance standards as well as provide required support to PAC.<sup>164</sup>

### ***Uniform Training Standards***

As noted above, training is a key component of an effective indigent defense system.<sup>165</sup> Currently, IDS has no uniform training requirements for new defense counsel or continuing education requirements for experienced lawyers. To the extent training requirements exist,<sup>166</sup> they vary by jurisdiction, as set forth in the jurisdiction's appointment plan.<sup>167</sup> Some local plans were waived in when IDS was created and have not been updated since; given the age of these plans it is not possible to believe that their training requirements are currently appropriate, given changes in law, science, and technology. In jurisdictions without a public defender office it is not clear how or if training requirements are enforced by the local bar committee. Public defenders receive more regular training through an IDS/UNC School of Government partnership,<sup>168</sup> but training opportunities still vary, with some offices offering robust in-house training and others offering none.

To ensure that counsel has the necessary ability and skills to handle indigent cases, IDS should develop uniform training requirements for all defense counsel, setting out training prerequisites for particular cases (type of training, hours, how recent), continuing education requirements, and acceptable training providers. The Committee further recommends that these standards be enforced by local supervisors.

If at any time the system lacks qualified lawyers in a particular jurisdiction or for any particular type of case, IDS should develop programs for counsel to gain the necessary skills and experience, such as a second chair program or collaboration with law school clinical programs.

### ***Uniform Qualification Standards***

As noted above, in an effective indigent defense system, counsel's ability, training, and experience match the complexity of the case; to provide this guarantee, the system must have uniform standards specifying the prerequisite skills and experience counsel must possess to handle each type of case for which indigent services are provided.<sup>169</sup> North Carolina has no such uniform

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<sup>163</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 2.

<sup>164</sup> See *infra* pp. 28-30 (uniform standards).

<sup>165</sup> See *supra* p. 19 (so noting); see generally MINOR CRIMES, MASSIVE WASTE, *supra* note 76 at 40-41 ("Supervision of misdemeanor defenders is sorely lacking and, often, performance reviews are non-existent."; recommending that such lawyers be actively supervised).

<sup>166</sup> Some appointment plans fail to state any training requirements for handling serious cases. See, e.g., Vance County Appointment Plan (specifying no training requirements to serve on the list to handle Class F through I felonies), [http://www.ncids.org/IndigentApptPlans/Non-PD Appt Plans/Vance County.pdf](http://www.ncids.org/IndigentApptPlans/Non-PD%20Appt%20Plans/Vance%20County.pdf); District 1 Appointment Plan (specifying no training requirements to serve on the list for Class A through E felonies), [http://www.ncids.org/IndigentApptPlans/PD Appointment Plans/1st judicial district.pdf](http://www.ncids.org/IndigentApptPlans/PD%20Appointment%20Plans/1st%20judicial%20district.pdf).

<sup>167</sup> For example, compare the Vance County Appointment Plan cited above in footnote 166 (specifying no training requirements to serve on the list to handle Class F through I felonies) with the District 1 Appointment Plan cited above in the same footnote (specifying that trial experience requirement for the same category of cases may be satisfied by showing that counsel has "attended at least six (6) hours of continuing legal education in the area of criminal jury trials").

<sup>168</sup> For information about the training offerings pursuant to that partnership, see UNC School of Government, *Indigent Defense Education*, SOG.UNC.EDU, <https://www.sog.unc.edu/resources/microsites/indigent-defense-education> (last visited May 27, 2016).

<sup>169</sup> See *supra* pp. 15-16.

standards in place.<sup>170</sup> The Committee recommends that, in addition to establishing and enforcing through local supervisors uniform training requirements as discussed immediately above, IDS develop and enforce in the same manner standards specifying required litigation experience (types of cases; how many; how recent, etc.) for each IDS case type.<sup>171</sup> The Committee further recommends that these standards be regularly reviewed and modified, as needed, based on developments in the law, science, technology and other disciplines relevant to criminal defense practice.

### ***Uniform Performance Standards***

The IDS Commission is required by law to establish “[s]tandards for the performance of public defenders and appointed counsel.”<sup>172</sup> To date, the IDS Commission has developed and published performance guidelines for attorneys representing:

- indigent defendants in non-capital criminal cases at the trial level<sup>173</sup>
- juveniles in delinquency proceedings,<sup>174</sup>
- indigent parent respondents in abuse, neglect, and dependency cases,<sup>175</sup> and
- indigent parents in termination of parental rights cases.<sup>176</sup>

The policy pertaining to non-capital criminal cases was adopted twelve years ago; the others were adopted nine years ago.<sup>177</sup>

IDS reports that because of the close supervision afforded in the offices of the Capital Defender, Appellate Defender and the Center for Death Penalty Litigation and because it screens the qualifications of lawyers who handle capital and appellate cases, it has not devoted resources to developing performance standards for potentially capital, appellate, or post-conviction capital cases.<sup>178</sup> IDS reports that it has not devoted resources to developing best practices in post-conviction non-capital cases because of the small number of such cases that the system handles outside of North Carolina Prisoner Legal Services.

Notwithstanding this, to ensure consistent quality throughout the state, IDS should establish uniform standards for performance of counsel for all cases in which it provides services.<sup>179</sup> These standards are necessary both to support counsel (e.g., in training and as resources for new counsel)

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<sup>170</sup> See, e.g., *supra* pp. 28-29 (discussing the lack of uniform training standards).

<sup>171</sup> See *supra* p. 10 (listing IDS case types).

<sup>172</sup> G.S. 7A-498.5(c)(4).

<sup>173</sup> NORTH CAROLINA COMMISSION ON INDIGENT DEFENSE SERVICES, PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL (Adopted Nov. 12, 2004), <http://www.ncids.org/Rules & Procedures/Performance Guidelines/Trial Level Final Performance Guidelines.pdf>.

<sup>174</sup> NORTH CAROLINA COMMISSION ON INDIGENT DEFENSE SERVICES, PERFORMANCE GUIDELINES FOR APPOINTED COUNSEL IN JUVENILE DELINQUENCY PROCEEDINGS AT THE TRIAL LEVEL (Adopted Dec. 14, 2007), <http://www.ncids.org/Rules & Procedures/Performance Guidelines/Juv Del perf guides 1-08.pdf>.

<sup>175</sup> NORTH CAROLINA COMMISSION ON INDIGENT DEFENSE SERVICES, PERFORMANCE GUIDELINES FOR ATTORNEYS REPRESENTING INDIGENT PARENT RESPONDENTS IN ABUSE, NEGLIGENCE, DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS PROCEEDINGS AT THE TRIAL LEVEL (Adopted Dec. 14, 2007), <http://www.ncids.org/Rules & Procedures/Performance Guidelines/Parent Atty guides 1-08.pdf>.

<sup>176</sup> *Id.*

<sup>177</sup> See *supra* notes 173-76.

<sup>178</sup> IDS has however adopted Best Practice Guidelines in Potentially Capital Cases at the Trial Level in a Time of Severe Budgetary Constraints (Adopted June 27, 2011), <http://www.ncids.org/Rules & Procedures/Performance Guidelines/BestPracticeGuidelines.pdf>.

<sup>179</sup> See *supra* p. 10 (listing case types); see MINOR CRIMES, MASSIVE WASTE, *supra* note 76 at 41-42 (“Jurisdictions should adopt practice standards applicable to all attorneys representing indigent defendants.”).

and so that local supervisors can adequately assess their work. Additionally, IDS should develop a regular schedule for review of its performance standards; at a minimum, standards should be reviewed every seven years.

### ***Data Collected & Maintained; Evidence-Based Decisions***

As recommended throughout this report, IDS should move towards uniform measures and standards. IDS's long-term planning and short-term decisions should be based on objective data as evaluated against these measures and standards.<sup>180</sup>

### ***Long Term Plan for Indigent Defense Services***

North Carolina currently does not have a long-term plan for the delivery of indigent defense services. The Commission heard evidence about expected changes in North Carolina's demographics.<sup>181</sup> North Carolina needs a long-term plan for providing indigent defense services that accounts for these demographic and other changes.<sup>182</sup> Such a plan may forecast shifting resources from areas where population is expected to decrease to those expected to increase. Having such a plan will aid not only IDS and the IDS Commission but also legislators as they plan for needed resources. Additionally, because such a plan will include discrete, measurable objectives,<sup>183</sup> it will allow for evaluation of the system.

## **Access to Counsel Types of Cases**

As noted above, an effective indigent defense program provides services in criminal cases and in proceedings arising from or connected with a criminal action against the defendant and in which the defendant may be deprived of liberty or subjected to serious deprivations or collateral consequences.<sup>184</sup> In light of this, indigent defense services should be expanded to defendants filing petitions for removal from the sex offender registry,<sup>185</sup> based on the severity of the consequences that attach when such a petition is denied.<sup>186</sup>

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<sup>180</sup> The Committee notes that IDS currently has a Systems Evaluation Project underway. Details of that project are provided in the IDS Commission's 2016 Report to the General Assembly. See IDS REPORT, *supra* note 18, at 40-42.

<sup>181</sup> Jon Williams, North Carolina Court Operations: An Overview, Part Two (presentation at Commission meeting Sept. 30, 2015), [http://nccalj.org/wp-content/uploads/2015/09/NCCALJ\\_Court\\_Operations\\_Presentation-Part-Two.pdf](http://nccalj.org/wp-content/uploads/2015/09/NCCALJ_Court_Operations_Presentation-Part-Two.pdf) [hereinafter Williams].

<sup>182</sup> See *supra* p. 20 (sketching out the broad parameters of a long-term plan for indigent defense services).

<sup>183</sup> *Id.*

<sup>184</sup> See *supra* p. 12.

<sup>185</sup> See generally, James M. Markham, *Petitions to Terminate Sex Offender Registration*, in NC SUPERIOR COURT JUDGES' BENCHBOOK (Jessica Smith, Editor), <http://benchbook.sog.unc.edu/criminal/petitions-terminate-sex-offender-registration>.

<sup>186</sup> The Indigent Defense Subcommittee also raised the issue of extending indigent defense services to all misdemeanor prosecutions against 16- and 17-year-olds because of the severe collateral consequences that attach to young persons upon conviction. However, because of the Committee's separate recommendation to raise the juvenile age, see JUVENILE REINVESTMENT, NCCALJ CRIMINAL INVESTIGATION & ADJUDICATION COMMITTEE REPORT, this issue is not addressed here. If the Committee's raise the age recommendation is not implemented, counsel should be provided in all misdemeanor prosecutions against juveniles.

## Time for Appointment

As noted above, timely appointment of counsel is a key component of an effective indigent defense system.<sup>187</sup> Many public defender offices assign staff to regularly review jail populations to ensure that appointments are timely made for in-custody defendants. In areas without a public defender office, no system or infrastructure exists to conduct such a review. As explained below, the Committee recommends that all areas of the state be served by either a single-district or regional public defender office.<sup>188</sup> Creation of such offices will provide the infrastructure for such reviews. IDS should, by policy or rule, require frequent review of jail populations by assigned staff in single-district and regional public defender offices to ensure timely appointment of counsel.<sup>189</sup> Additionally, to ensure that all in-custody indigent defendants receive counsel as soon as possible after detention, the Committee further recommends that the first appearance statute be amended to require a first appearance for all in-custody defendants within 48 hours or the next day that district court is open.<sup>190</sup>

## Waiver of Counsel

Current law allows certain magistrates to accept waivers of counsel.<sup>191</sup> Although the Committee believes that magistrates can make initial indigency determinations using a uniform indigency screening tool,<sup>192</sup> it believes that only a judge should be authorized to take a waiver of constitutional rights<sup>193</sup> and that current law should be amended accordingly.

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<sup>187</sup> See *supra* p. 14.

<sup>188</sup> See *infra* pp. 33-34.

<sup>189</sup> Under G.S. 7A-453, a custodian must inform authorities when that person has custody of someone who is without counsel for more than 48 hours. In public defender districts, notification is made to the public defender office. *Id.*; Rules of the Commission on Indigent Defense Services, Rule 1.3(b). In areas without such an office, notification is made to the clerk of superior court. G.S. 7A-453. In the latter situation, it is not clear whether such notifications are uniformly occurring or what happens after such notification is made.

State law requires a first appearance to be held within 96 hours after a felony defendant is taken into custody. G.S. 15A-601. A counsel determination is made at that proceeding. G.S. 15A-603. A first appearance is not, however, required for in-custody misdemeanor defendants.

Recent research shows that controlling for other factors, even a short pretrial detention can have negative consequences for a defendant. See *supra* note 68.

For all of these reasons, the Committee recommends frequent review of jail rosters as explained in the text above.

<sup>190</sup> Under existing law, a first appearance need only be held for in-custody felony defendants; it must be held within 96 hours after the defendant is taken into custody or at the first regular session of district court, whichever is earlier. G.S. 15A-601. Because the statute does not afford a first appearance for in-custody misdemeanor defendants, these individuals sometimes remain in pretrial detention, without any court hearing, until their first court date, which then must be continued because they do not have counsel. In some instances, a misdemeanor defendant will spend more time in pretrial detention than could be imposed as a sentence if he or she is found guilty. Additionally, as noted above, recent research shows that controlling for other factors, even short pretrial detentions can have negative consequences for a defendant. See *supra* note 68.

<sup>191</sup> G.S. 7A-146(11) (chief district court judge may designate certain magistrates to accept waivers of counsel in all cases except potentially capital cases).

<sup>192</sup> ELIGIBLE FOR JUSTICE, *supra* note 51, at 8 (noting that a magistrate is one of several court personnel who appropriately can serve as an indigency screener); see *supra* pp. 25-26 (recommending uniform indigency standards).

<sup>193</sup> The procedure of taking a constitutionally valid waiver of counsel is exacting, see Jessica Smith, *Counsel Issues*, in NC SUPERIOR COURT JUDGES' BENCHBOOK (Jessica Smith, Editor), <http://benchbook.sog.unc.edu/criminal/counsel-issues>, and failure to take a proper waiver of counsel results in reversal. See JESSICA SMITH, CRIMINAL CASE COMPENDIUM, <https://www.sog.unc.edu/resources/legal->

## Ability to Meet and Communicate with Counsel

As noted above, indigent defendants must have timely access to counsel.<sup>194</sup> This is a particular problem with in-custody defendants. IDS reported to the Committee that some jail rules and policies create barriers to counsel's confidential access to in-custody defendants, including strict visitation hours, guards who will not afford privacy for client meetings, and long wait times for visitation. IDS should document these difficulties and advocate for rule and policy changes to facilitate counsel's access to in-custody defendants.

Because geographic distances can make it difficult for lawyers and clients to meet face to face,<sup>195</sup> the Committee recommends that PAC assignments take into account, whenever possible, this access issue.

### Delivery Systems Preference for Public Defender Offices

For the following reasons, the Committee believes that the best delivery system for indigent defense services in North Carolina is a public defender office:

- A public defender office provides personnel and infrastructure to offer the oversight, supervision, and support of counsel (both within the office and PAC) required for an effective indigent defense delivery system.<sup>196</sup>
- Strong stakeholder support for services delivered by public defender offices.<sup>197</sup>
- Empirical research showing that, on average, public defenders provide better services than PAC.<sup>198</sup>

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[summaries/criminal-case-compendium](#) (listing published North Carolina cases since 2008 that have held waivers to be invalid).

<sup>194</sup> See *supra* p. 14.

<sup>195</sup> See Comments of Superior Court Judge Henry W. Hight, Jr., Committee Meeting Nov. 23, 2015 (noting that when lawyers do not have offices nearby, many indigent defendants, because of transportation issues, have difficulty seeing their lawyers).

<sup>196</sup> See *supra* pp. 15-19 (discussing that oversight, supervision, and support are key characteristics of an effective system).

<sup>197</sup> See, e.g., Comments of District Court Judge Athena F. Brooks, Committee Meeting Nov. 23, 2015 (when a public defender office is monitoring the appointed list, quality is improved); Comments of District Attorney Seth Edwards, Committee Meeting Nov. 23, 2015 (comparing the quality of representation provided by public defenders versus PAC and noting that the public defender office enforces a requirement that counsel meet with the defendant within a specific number of hours whereas PAC sometimes come to court never having met with their clients; noting that the new public defender office in the district has raised the quality of counsel and "has done a great job").

<sup>198</sup> See Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel*, (National Bureau of Economic Research, Working Paper No. 13187, 2007) (compares federal public defenders and appointed counsel and finds that defendants represented by appointed counsel are more likely to be found guilty and to receive longer prison sentences than those represented by a public defender), <http://www.nber.org/papers/w13187.pdf>; JAMES M. ANDERSON & PAUL HEATON, MEASURING THE EFFECT OF DEFENSE COUNSEL ON HOMICIDE CASE OUTCOMES (2012) (compares outcomes in Philadelphia murder cases and finds that assigning cases to the public defender over private counsel reduced the conviction rate by 19%, the probability that the defendant received a life sentence by 62%, and the overall expected sentence length by 24%); TONY FABELO ET AL., COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER, IMPROVING INDIGENT DEFENSE: EVALUATION OF THE HARRIS COUNTY PUBLIC DEFENDER (2013) (finds significant advantages to full-time public defenders, including overwhelming statistical evidence of better outcomes), <http://tidc.texas.gov/media/23579/jchcpdfinalreport.pdf>.

- National standards, which express a preference for public defender offices.<sup>199</sup>
- Efficiencies that can be obtained by using providers who devote all of their efforts to indigent cases.<sup>200</sup>
- The fact that a public defender office is typically in the best position to supply counsel to indigent persons in a timely manner.<sup>201</sup>

Recognizing that resources are not unlimited, the Committee recommends that where caseload is sufficiently high or where quality indigent defense services are unavailable, a single district public defender office, where economically feasible, is the preferred delivery system for indigent defense services. In assessing economic feasibility, reasonable PAC compensation rates should be used. Using the current unsustainably low rates<sup>202</sup> in such an analysis is unlikely to ever make creation of a new single district public defender office appear cost effective or cost neutral.

### ***Regional Public Defender Offices When Single District Office Is Not Feasible***

To ensure a level playing field, a public defender office should exist in every jurisdiction that has a prosecutor's office. Having such parity should be the long-term goal of the system. Until that long-term goal can be achieved and to effectuate the Committee's preference for public defender offices while doing so in a cost-effective manner, the Committee recommends, consistent with national standards,<sup>203</sup> that where an individual district's caseload does not warrant creation of a public defender office or it is not cost effective to do so, a regional public defender office should be created to serve a multi-district or multi-county area. The Committee notes that IDS already has successfully implemented one such regional defender office in Districts 1 and 2.<sup>204</sup> The personnel

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Early data from IDS's outcomes research confirms these national results, showing that for key performance indicators (KPIs), North Carolina public defenders outperform PAC. For example, with respect to KPI I (Non-conviction), public defenders achieved 3-year client favorable outcomes 48.9% of the time in high exposure cases; the comparable figure for PAC was 41.6%; for low exposure cases those percentages were 72.4% and 64.0% respectively. See Margaret Gressens, *Indigent Defense Milestone: A Comparison of Delivery Systems in North Carolina* (May 2016) (PowerPoint presentation on file with Committee Reporter). For KPI V (convicted of highest charge), public defenders had lower client unfavorable outcomes than did PAC, as measured by 3-year averages for both high exposure and low exposure cases, again suggesting better performance. *Id.* Public defenders also had lower client unfavorable results with respect to KPI VI (Alternative to incarceration convictions ended in supervised probation) than PAC with respect to high exposure cases; with respect to low exposure cases the two groups had comparable results. *Id.* For KPI III (Felony cases ending in a conviction that end in misdemeanor conviction) public defenders outperformed PAC in client favorable results. *Id.* Although PAC outperformed public defenders with respect to KPI VIII (failure to appear) (client unfavorable outcome), *id.*, further research is needed to validate these results; for example, research should test whether public defender clients experience higher failure to appear rates as compared to PAC because public defenders are more effective in securing pretrial release for their clients). A similar question must be resolved with respect to KPI VIIa (Percentage of convictions that were time served) where PAC outperformed public defenders. *Id.*

<sup>199</sup> ABA TEN PRINCIPLES, *supra* note 51, Principle 2; ABA STANDARDS, *supra* note 49, Standard 5-1.2; *id.*, Commentary to Standard 5-1.2 ("The primary component in every jurisdiction should be a public defender office, where conditions permit.").

<sup>200</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5.1-2 (noting that by devoting all of their expertise to criminal cases, public defenders develop "unusual expertise in handling various kinds of criminal cases").

<sup>201</sup> *Id.*

<sup>202</sup> See *infra* pp. 39-41 (discussing the need for reasonable compensation of PAC).

<sup>203</sup> ABA STANDARDS, *supra* note 49, Standard 5-1.2(a) ("Multi-jurisdictional organizations may be appropriate in rural areas.").

<sup>204</sup> See *supra* note 36 (listing counties in Districts 1 and 2).

and infrastructure that such an office would provide would allow for the oversight, supervision, and support necessary to an effective indigent defense delivery system.<sup>205</sup>

### ***Conflict Defender Offices Where Caseloads Warrant***

For the same reasons that the Committee favors single district and regional public defender offices as the primary vehicles for delivery of indigent defense services, the Committee recommends the creation of conflict defender offices where sufficient volume exists to sustain such an office. Currently only a small number of districts have sufficient volume to support such an office. However, given expected demographic changes, additional offices may be justified over time.<sup>206</sup>

The Committee notes that G.S. 7A-498.7(f1) provides that, whenever practical, public defender offices should seek to assign conflict cases to another office in the region, rather than to PAC. However, as IDS has explained, “with the possible exception of very serious felony cases and excluding the Gaston County conflict attorney who is housed in the Mecklenburg County office, it is rare for an assignment to a neighboring office to be practical because of the additional time it would take assistant public defenders to travel to a neighboring county and because of the disruption to their regular in-county caseloads.”<sup>207</sup> Establishing conflict defender offices within the jurisdiction would eliminate this logistical problem.

### ***Pilot Use of Part-Time Public Defenders***

State law currently prohibits practicing lawyers to serve as part-time public defenders.<sup>208</sup> Allowing part-time defenders to serve in regular, regional, or conflict public defender offices offers benefits to the system, including:

- Administrative flexibility and cost effectiveness in offices where caseloads warrant additional staff less than a full-time employee.
- Administrative flexibility in terms of being able to split one full-time position into two part-time positions and thus cover a larger geographic territory.

Although the Committee notes that part-time defenders will pose challenges, these challenges can be managed with oversight and supervision, including strict adherence to workload formulas.<sup>209</sup> It further notes that although some national standards advise against the use of part-time defenders, others endorse their use.<sup>210</sup> Thus, the Committee recommends that state law be amended to allow for the use of part-time defenders, when and where IDS determines them to be appropriate. In no instance however should a lawyer be hired as a part-time defender if he or she maintains a significant private practice in areas outside of those assigned by the indigent defense system.<sup>211</sup> IDS

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<sup>205</sup> See *supra* pp. 15-19 (discussing that oversight, supervision, and support are key characteristics of an effective system).

<sup>206</sup> Williams, *supra* note 181.

<sup>207</sup> IDS REPORT, *supra* note 18, at 12.

<sup>208</sup> G.S. 84-2 (public defender prohibited from engaging in the private practice of law; criminalizing the practice).

<sup>209</sup> See *supra* pp. 26-27 (recommending the creation of such formulas).

<sup>210</sup> Compare ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 2 (stating, in principles adopted in 2002, that “private bar participation may include part-time defenders”), with ABA STANDARDS, *supra* note 49, Commentary to & Standard 5-4.2 (explaining, in these 1992 standards, that “[w]here part-time law practice is permitted, defenders are tempted to increase their total income by devoting their energies to private practice at the expense of their nonpaying clients”). See also JUSTICE DENIED, *supra* note 4, at 12 (“Public defenders should be employed full-time whenever practicable”).

<sup>211</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-4.2 (with respect to the use of part-time defenders, explaining that “the expertise required of defense counsel is less likely to be developed if an

should develop rules and/or policies providing clear, and uniform standards for the scope and performance of duties of part-time defenders, limits on private practice, and the avoidance of conflicts of interest.<sup>212</sup>

### Formal Assigned Counsel System for PAC

Even if North Carolina had single district and regional public defender offices covering the entire state, conflict and overload cases will require continued active participation by the private bar.<sup>213</sup> Currently, almost 2,600 PAC handle indigent defense cases.<sup>214</sup> In part because of the large number of PAC doing indigent work, the system is unable to adequately supervise and support these lawyers.<sup>215</sup> This problem is not new. In fact, the lack of “statewide uniform standards . . . for . . . appointment, qualifications . . . or performance of counsel” was cited as a reason supporting the creation of IDS.<sup>216</sup> These deficiencies continue to exist. In districts with a public defender office, IDS and the Commission have “worked with the chief public defenders to develop plans for the appointment of counsel in non-capital criminal and non-criminal cases . . . , which provide for more significant oversight by the public defenders over the quality and efficiency of local indigent representation and contain qualification and performance standards for attorneys on the district indigent lists.”<sup>217</sup> In districts without a public defender office, IDS and the Commission have developed a model indigent appointment plan that includes qualification standards for the various indigent lists, provides for oversight by a local indigent committee, and includes some basic reporting requirements to the IDS Office.<sup>218</sup> Although districts are required to adopt appointment plans, they have some discretion regarding the content of their plans.<sup>219</sup> IDS reports that as it implements contracts pursuant to legislative mandates, local appointment plans are being supplemented or superseded by contractor appointment instructions that IDS issues in consultation with local court system actors.<sup>220</sup>

The Committee finds that the existing method of supervising PAC is deficient in the following respects:

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attorney maintains a private practice involving civil cases”). *See generally supra* p. 10 (listing the civil cases for which indigent defense services are provided). Although the authority cited here focuses on lawyers who maintain a civil practice beyond that served by the indigent defense system, similar concerns arise where the lawyer’s private criminal practice is outside of the area handled in his or her indigent cases.

<sup>212</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-4.2.

<sup>213</sup> JUSTICE DENIED, *supra* note 4, at 53. In fiscal year 2014-15, public defender offices assigned out 13,379 case-specific conflict cases and 7,684 workload conflict cases. OFFICE OF INDIGENT DEFENSE SERVICES, REPORT ON PUBLIC DEFENDER CONFLICTS FOR FISCAL YEAR 2014-15, at 4 (2015).

<sup>214</sup> IDS REPORT, *supra* note 18, at 16.

<sup>215</sup> *See* TRIAL JUDGES’ PERCEPTIONS OF IDS, *supra* note 18 (survey responses showed that judges had concerns about the appointment process for PAC counsel and about the management, and supervision of PAC); *id.* at 16 (noting that some judges suggested that there was a need for more IDS monitoring of PAC); Comments of Chief Public Defender James Williams, Committee Meeting Nov. 23, 2015 (regional public defenders are required to supervise PAC); Comments of District Attorney Seth Edwards, Committee Meeting Nov. 23, 2015 (local committee provided little or no real oversight of PAC).

<sup>216</sup> LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 1.

<sup>217</sup> IDS REPORT, *supra* note 18, at 5.

<sup>218</sup> *Id.*

<sup>219</sup> Memorandum from Malcolm Ray Hunter, Jr., IDS Director to Bar Presidents, Appointed Attorneys, Superior Court Judges, District Court Judges, Clerks of Court, Regarding Model Indigent Appointment Plan for Non-Public Defender Districts (April 2008), [http://www.ncids.org/IndigentApptPlans/Non-PD%20Appt%20Plans/Memo\\_ModelAppointmentPlan.pdf](http://www.ncids.org/IndigentApptPlans/Non-PD%20Appt%20Plans/Memo_ModelAppointmentPlan.pdf).

<sup>220</sup> IDS REPORT, *supra* note 18, at 5.

- Because appointment plans vary by jurisdiction, there is no uniform statewide standard with respect to the ability, training, and experience required for indigent cases.<sup>221</sup>
- Some appointment plans fail to state minimum training requirements<sup>222</sup> or litigation experience or fail to state those requirements with the necessary specificity.<sup>223</sup>
- No uniform requirement is in place for the regular review and updating of appointment plans.<sup>224</sup> According to IDS, some appointment plans have not been updated since the 1980s.
- No infrastructure or systems exist to address a shortage of qualified PAC to handle caseloads in particular areas or for particular types of cases.<sup>225</sup>
- No infrastructure or systems exist to verify that PAC meets the minimum standards required to handle the particular case (e.g., training and experience).<sup>226</sup>
- No infrastructure or systems exist to help PAC identify and report conflicts when a case is initially assigned and as it progresses.<sup>227</sup>
- The plans do not require and no infrastructure or systems exist to ensure that counsel has appropriate resources to handle the case, such as office space, office support, access to research tools, etc.<sup>228</sup>
- The plans do not require and no infrastructure or systems exist for ongoing evaluation of PAC's performance, including observations of PAC's in-court performance and client and witness interviews; reviewing PAC's legal filings; and soliciting input from judges, prosecutors, clients and peers.<sup>229</sup>
- The plans do not require and no infrastructure or systems exist for the evaluator to give PAC feedback and develop a remediation plan for any deficiencies.<sup>230</sup>
- Vesting supervisory authority over PAC with volunteer local bar committees does not provide the required rigor of review.<sup>231</sup>

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<sup>221</sup> See *supra* pp. 15-16 (noting that in an effective indigent defense system, counsel's ability, training, and experience matches the complexity of the case and that to provide this guarantee, the system must have uniform statewide standards identifying the prerequisite skills and experience counsel must possess to handle each type of case for which indigent defense services are provided).

<sup>222</sup> See *e.g.*, District 1 Appointment Plan, *supra* note 166, at 11 (stating no training requirements for counsel to handle Class A through E felony cases).

<sup>223</sup> See *supra* pp. 15-16 (noting that standards should specify, at a minimum, training requirements and required litigation experience); see, *e.g.*, District 1 Appointment Plan, *supra* note 166, at 11 (stating that to handle Class A through E felonies, counsel "must have tried as lead counsel or individually at least three jury trials to verdict" but not specifying what type of trial experience is necessary (case type) or how recent such experience must be).

<sup>224</sup> See *supra* p. 16 (noting that in an effective system, appointment standards should be reviewed on a regular basis and modified, as needed, based on developments in the law, science, technology, and other disciplines relevant to criminal defense practice).

<sup>225</sup> See *supra* p. 16 (noting that when this occurs, the system should devote resources and develop programs for counsel to gain the necessary skills and experience).

<sup>226</sup> See *supra* p. 16 (noting that to ensure that counsel's ability, training, and experience match the complexity of the case assigned, supervision is required with respect to selection of counsel).

<sup>227</sup> See *supra* p. 16 (noting that supervision is required to avoid conflicts, both at initial appointment and as the case develops).

<sup>228</sup> See *supra* pp. 18-19 (noting that in an effective indigent defense system such resources are required).

<sup>229</sup> See *supra* p. 16 (noting that in an effective indigent defense system such an evaluation is provided).

<sup>230</sup> See *supra* p. 16 (noting that in an effective indigent defense system such activities would occur).

<sup>231</sup> See *supra* p. 17 (noting that volunteer attorneys may be reluctant to sanction a colleague and suggesting that sanctioning authority should be vested with local supervisors); LEGISLATIVE STUDY COMMISSION REPORT, *supra* note 28, at 7 ("Some local district bar committees do a poor job managing the local lists of attorneys that can be appointed to provide representation, particularly with regard to monitoring and when necessary sanctioning the performance of local attorneys.").

- The plans do not provide for and no infrastructure or systems exist to develop, monitor and enforce workload requirements.<sup>232</sup>
- With the exception of services provided by IDS’s Forensic Resource Counsel,<sup>233</sup> few if any resources are provided to help PAC access necessary expertise and support, such as investigators and experts or access to individuals with specialized expertise in certain subject areas.<sup>234</sup>
- No infrastructure or systems exist to provide timely, high quality, relevant, skills based training to *all* PAC.<sup>235</sup>

In light of this and consistent with national standards,<sup>236</sup> PAC should be employed through a formal assigned counsel system where a local supervisor housed within the single district, regional or conflict public defender office provides the requisite supervision, oversight and support pursuant to uniform performance and workload standards developed by IDS.

### **Budget & Funding Issues**

Consistent with other states’ experiences,<sup>237</sup> stakeholders across North Carolina acknowledge that the State’s indigent defense system is woefully underfunded.<sup>238</sup> In this section, the Committee makes recommendations regarding budget and funding issues.

#### **Continue State Funding of Indigent Defense**

North Carolina should retain its current state-funded indigent defense program. State funding is the majority approach in the country.<sup>239</sup> Additionally, and as numerous studies have shown, a state funded model avoids the inevitable inequities that develop with locally-funded programs<sup>240</sup> and thus promotes uniformity in the delivery of justice in the state’s criminal courts. Funding should come from the General Fund or other stable revenue source; to ensure that the State honors its constitutional obligation to provide counsel to indigent persons, funding from unpredictable revenue sources should be avoided.<sup>241</sup>

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<sup>232</sup> See *supra* p. 18 (noting the importance of such requirements for an effective indigent defense delivery system).

<sup>233</sup> IDS REPORT, *supra* note 18, at 31 (describing the role of Forensic Resource Counsel).

<sup>234</sup> See *supra* pp. 18-19 (noting the importance of this support function).

<sup>235</sup> See *supra* p. 19 (noting that training is a key feature of an effective indigent defense system).

<sup>236</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 2 (“private bar participation may include . . . a controlled assigned counsel plan”); ABA STANDARDS, *supra* note 49, Standard 5-1.2(b) (participation of the private bar “should be through a coordinated assigned-counsel system”).

<sup>237</sup> See, e.g., Sarah Breitenbach, *Right to an Attorney? Not Always in Some States*, THE PEW CHARITABLE TRUSTS, (April 11, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/04/11/right-to-an-attorney-not-always-in-some-states> (“There is a lack of funding for public defense in every state . . .”); JUSTICE DENIED, *supra* note 4, at 59-60 (citing states experiencing funding emergencies in indigent defense); *id.* at 64 (noting that throughout the country, “compensation of assigned counsel is often far from adequate”).

<sup>238</sup> Comments of District Attorney Andrew Murray, Committee Meeting Nov. 23, 2015; Comments of District Attorney Lorrin Freeman, Committee Meeting Nov. 23, 2015 (IDS is “woefully underfunded”); TRIAL JUDGES’ PERCEPTIONS OF IDS, *supra* note 18, at 16 (survey respondent stated that “court appointed attorneys are woefully underpaid”).

<sup>239</sup> JUSTICE DENIED, *supra* note 4, at 53.

<sup>240</sup> *Id.* at 54-55.

<sup>241</sup> *Id.* at 57 (noting that “[s]pecial funds and other revenue sources are unpredictable and more apt to fall short of indigent defense needs”).

## Funding to Meet Obligations on Annual Basis

As shown in Figure 5 below, IDS repeatedly has been unable to pay its obligations on an annual basis. IDS has accurately predicted its funding needs; end-of-year deficits have resulted from appropriations at levels lower than predicted demand.<sup>242</sup>

**Figure 5. IDS Debt at Fiscal Year End**

Fiscal Year	Year End Debt
2009-10	\$664,752
2010-11	\$9.9 million
2011-12	\$9.9 million
2012-13	\$7.9 million
2013-14	\$3.1 million
2014-15	\$6.1 million

*Source: IDS REPORT, supra note 19, at 30; Email from Danielle Carman to Committee Reporter (Mar. 31, 2016) (on file with Reporter).*

Recurring budget shortfalls result in payment delays and hardship for PAC, most of whom are solo practitioners in small law firms.<sup>243</sup> The Committee concurs with IDS' assertion that regularly allowing it to run short of funds and stop payments to PAC leads to a deterioration in the quality of lawyers willing to do assigned work.<sup>244</sup> Consistent with national standards,<sup>245</sup> the Committee recommends that IDS be funded adequately so that it can consistently meet its obligations on an annual basis.<sup>246</sup>

## Compensation of Providers

### **Compensation Should Be Reasonable**

Counsel providing indigent defense services should receive reasonable compensation.<sup>247</sup> Doing so ensures that the State can sustainably provide effective indigent defense services.<sup>248</sup> Stakeholders agree that compensation for assistant public defenders, like that of assistant district attorneys and other judicial branch employees, is insufficient.<sup>249</sup> With respect to compensation for PAC,

<sup>242</sup> Thomas Maher, *Indigent Defense in North Carolina*, (Nov. 23, 2016) (PowerPoint presentation on file with the Committee Reporter).

<sup>243</sup> IDS REPORT, *supra* note 18, at 18.

<sup>244</sup> *Id.*

<sup>245</sup> ABA STANDARDS, *supra* note 49, Standard 5-2.4 ("Assigned counsel should receive prompt compensation . . .").

<sup>246</sup> JUSTICE DENIED, *supra* note 4, at 183 ("For this Constitutional requirement to be implemented effectively, adequate funding of defense services is indispensable.").

<sup>247</sup> ABA STANDARDS, *supra* note 49, Standard 5-2.4 (compensation should be "reasonable"); ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 8 ("[a]ssigned counsel should be paid a reasonable fee").

<sup>248</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-2.4 (noting a variety of reasons why reasonable compensation is appropriate); JUSTICE DENIED, *supra* note 4, at 63 ("Across the country, because of inadequate compensation, public defense programs find it difficult to attract and retain experienced attorneys."); SYSTEM OVERLOAD, *supra* note 5, at 11 ("Low rates of compensation for public defenders can make it difficult to attract and keep attorneys, resulting in higher turnover and less experienced defenders. Low pay can also decrease the participation of private attorneys as assigned or contracted counsel." (footnotes omitted)).

<sup>249</sup> See, e.g., Comments of District Attorney Lorrin Freeman, Committee Meeting Nov. 23, 20015; Comments of District Attorney Andrew Murray, Committee Meeting Nov. 23, 2015; Comments of District Attorney Mike Waters, Committee Meeting Nov. 23, 2015.

prosecutors, defense counsel, and judicial stakeholders agree that all current compensation systems (hourly, flat fee, and contract) are unsustainable in terms of ensuring that competent lawyers are available to do indigent defense work<sup>250</sup> and as a result, qualified lawyers are declining such work.<sup>251</sup>

In fact, evidence indicates that private lawyers plan to decline or already have declined to do indigent work because of low pay.<sup>252</sup> An insufficient number of competent lawyers threatens the system in several ways:

<sup>250</sup> TRIAL JUDGES’ PERCEPTIONS OF IDS, *supra* note 18, at 18-19 (by a two-to-one margin, judges responded that they had seen impacts on the quality of representation due to reduction in PAC hourly rates, with the vast majority of judges indicating that the quality of representation had suffered).

<sup>251</sup> See, e.g., IDS REPORT, *supra* note 18, at 2; Comments of Superior Court Judge Henry W. Hight, Jr., Committee Meeting Nov. 23, 2015 (noting that lawyers are leaving indigent work because it no longer is financially feasible); Comments of District Attorney Michael Waters, Committee Meeting Nov. 23, 2015 (because of low payment rates, many PAC no longer handle misdemeanor or high level felony cases; this has eroded quality); Comments of District Attorney Lorrin Freeman, Committee Meeting Nov. 23, 2015 (at current rates the contract system is not sustainable; a number of people have dropped out of the contract system because of low pay; expressing grave concerns about the quality of lawyers who will continue to do contract work); TRIAL JUDGES’ PERCEPTIONS OF IDS, *supra* note 18 (noting that in a follow-up question, 59 of 66 survey respondents indicated that the quality of representation had suffered primarily due to fewer experienced attorneys being willing to take indigent cases, as a result of a reduction in PAC hourly rates); *id.* at 16-17 (survey respondent indicated that “fees are such that more experienced attorneys will not accept the cases”; several judges urged IDS to lobby the legislature to approve rate increases).

Original PAC rates, original PAC rates adjusted for inflation and current PAC rates are as follows:

Case Type	Original PAC Rates (set in 2002)	Original PAC Rates Adjusted for Inflation to 2015 *	Current PAC Rates (set in May 2011)	Current PAC Rate as % of CPI Adjusted
Potentially Capital Cases	\$85	\$111.99	\$85 (\$75 after a non-capital declaration)	75.9% (67.0%)
High-Level Felonies (Class A-D)	\$65	\$85.64	\$70	81.7%
All Other Superior Court Cases	\$65	\$85.64	\$60	70.0%
All Other District Court Cases	\$65	\$85.64	\$55	64.2%

\* Based on CPI Inflation Calculator.

IDS REPORT, *supra* note 18, at 17.

The history of changes in PAC rates is as follows:

Case Type	Original IDS Rates (2002)	Aug. 2006 Rates	Feb. 2008 Rates	Jan. 2011 Rates	May 2011 Rates
Potentially Capital Cases	\$85	\$95	\$95	\$95 (\$85 after a non-capital declaration)	\$85 (\$75 after a non-capital declaration)
High-Level Felonies (Class A-D)	\$65	\$65	\$75	\$75	\$70
All Other Superior Court Cases	\$65	\$65	\$75	\$75	\$60
All Other District Court Cases	\$65	\$65	\$75	\$75	\$55

REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES 13 (Submitted to the N.C. General Assembly Feb. 1, 2015), <http://www.ncids.org/Reports%20&%20Data/Prior%20GA%20Reports/LegislatureReport2015.pdf>.

<sup>252</sup> In a January 2015 survey, 41.8% of PAC said that rate cuts were the primary cause of changes in their state court practice since May 2011. IDS REPORT, *supra* note 18, at 17. When asked if they will stop accepting indigent cases in the next two years if the rates remain at current levels, 41.7% said they either definitely will or there is a strong possibility that they will, and 39.5% said they are considering that change. *Id.*; see also Comments of Desmond McCallum, Attorney, Committee Meeting Nov. 23, 2015 (noting that he can no longer afford to handle misdemeanors at current rates and that he has seen a number of lawyers in his jurisdiction leave because of low compensation); Comments of Chief Public Defender James Williams, Committee Meeting

- The State may be unable to fulfill its constitutional obligation to provide defendants with effective assistance of counsel.
- The State may experience higher caseloads as a result of ineffective assistance of counsel claims asserted on appeal and in post-conviction motions.
- The State may experience trial delays as a result of overburdened or unprepared lawyers.
- The State may wrongfully convict defendants, with negative consequences for those persons, their families, victims, taxpayers, and the justice system.<sup>253</sup>

In light of this, the Committee recommends that IDS develop a clear, objective method for determining reasonable compensation of PAC and a long-term plan for obtaining and implementing reasonable compensation statewide.

### ***Compensation Should Ensure Parity with Prosecution Function***

The importance of parity in funding with the prosecution has been articulated in national standards, by the Department of Justice, the United States Supreme Court and other experts.<sup>254</sup> The Committee recommends that compensation for indigent defense providers should be commensurate with that provided to prosecutors.<sup>255</sup>

### ***Compensation Methods Should Not Create Negative Incentives or Disincentives***

#### **Contracts**

Since 2003 IDS has been exploring the use of contracts to pay for indigent defense services provided by PAC.<sup>256</sup> In fiscal year 2014-15, IDS had individually negotiated contracts with 44 different attorneys in a range of counties and covering a variety of case types, including adult criminal; juvenile delinquency; abuse, neglect and dependency; termination of parental rights; civil commitment; guardianship; Industrial Commission contempt; and treatment court proceedings.<sup>257</sup> Additionally, IDS contracts with over 200 attorneys through its separate Request for Proposal contract system.<sup>258</sup> IDS supports the use of contracts, noting that “carefully planned and tailored contracts can result in greater efficiencies and savings while improving the quality of services being delivered.”<sup>259</sup>

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Nov. 23, 2015 (noting that two of the most experienced lawyers in his district ceased handling serious cases because of low contract rates); *supra* note 251.

<sup>253</sup> See *supra* pp. 3-5 (discussing the costs to defendants, victims, taxpayers and the court system when the State is unable to provide effective assistance of counsel for indigent persons).

<sup>254</sup> ABA TEN PRINCIPLES, *supra* note 51, Principle 8; ABA STANDARDS, *supra* note 49, Standard 5-4.1; JUSTICE DENIED, *supra* note 4, at 12; SYSTEM OVERLOAD, *supra* note 5, at 8; *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

<sup>255</sup> Unlike the experience in other states, see JUSTICE DENIED, *supra* note 4, at 63 (noting that “throughout the country, public defender salaries are often significantly below those of prosecutors”), current data suggest that rough parity—at least in terms of assistant public defender and assistant district attorney pay—currently exists. See Summary of average APD and ADA Pay, Provided to Committee Reporter by Susan Brooks, IDS Public Defender Administrator, April 4, 2016 (on file with Committee Reporter).

A full analysis of parity would go beyond a comparison of salary and would examine all resources (e.g., support staff such as investigators and outside funding) supporting the defense and prosecution functions and compared to workload. See *supra* p. 10 (discussing the differences between indigent defense and prosecution case types).

<sup>256</sup> IDS REPORT, *supra* note 18, at 19.

<sup>257</sup> *Id.*

<sup>258</sup> REPORT ON REQUESTS FOR PROPOSALS AND CONTRACTS FOR LEGAL SERVICES, *supra* note 160, at 2.

<sup>259</sup> IDS REPORT, *supra* note 18, at 19. IDS notes that excluding certain contracts that were reported under a different system, all of the individually negotiated contracts combined saved 8% during fiscal year 2014-15 compared to fees paid to PAC under an hourly individual appointment method. *Id.*

In light of this and consistent with national standards,<sup>260</sup> the Committee supports IDS’s strategic use of contracts when<sup>261</sup> and where appropriate.<sup>262</sup> However, to ensure effective representation contracts should:

- Not be awarded primarily on the basis of cost; quality must be a consideration<sup>263</sup>
- Set minimum attorney qualifications, including training requirements<sup>264</sup>
- Separately fund expert, investigative and other litigation support services<sup>265</sup>
- Specify performance standards<sup>266</sup>
- Provide independent oversight and monitoring<sup>267</sup>
- Provide workload caps<sup>268</sup>
- Provide limitations on the practice of law outside of the contract<sup>269</sup>
- Provide an overflow or funding mechanism for excess, unusual or complex cases<sup>270</sup>
- Contain management and tracking requirements<sup>271</sup>

<sup>260</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 2 (“private bar participation may include . . . contracts for services”); ABA STANDARDS, *supra* note 49, Standard 5-1.2(b) (participation of the private bar may include contracts for services); *id.*, Standard 5-3.1 (“Contracts for services of defense counsel may be a component of the legal representation plan.”).

<sup>261</sup> Stakeholders say that contracts work well for some cases but not others. Comments of Jeff Cutler, Committee Meeting Nov. 23, 2015 (contracts work well for misdemeanors and felony pleas in district court but not for serious felony trials where more time is required to handle the case); Comments of District Attorney Lorrin Freeman (contracts work well for misdemeanors felony pleas in district court but not for complex cases requiring more time).

<sup>262</sup> Stakeholders report that contracts work best in areas with high case volume; they emphasized difficulties contracts pose in low volume areas, including exacerbating court date conflicts because a small number of lawyers are handling a bulk of the indigent docket. Comments of Superior Court Judge Henry W. Hight, Jr., Committee Meeting Nov. 23, 2015 (because a small number of lawyers are handling a large portion of the docket, court conflicts result); Comments of Jeff Cutler, Committee Meeting Nov. 23, 2015 (contracts work well in Wake County but not in rural areas); Comments of District Attorney Michael Waters, Committee Meeting Nov. 23, 2015 (court conflicts are common because the contract system has reduced the number of lawyers available to do the work).

<sup>263</sup> ABA STANDARDS, *supra* note 49, Standard 5-3.1; *id.* Commentary to Standard 5-3.1 (“The key with all components of an effective defense services program is not merely cost but also the provision of quality legal representation. While it should be obvious that no contract for defense services should be awarded on the basis of cost alone, the apparent economies in the use of contracts make the admonition necessary . . .”).

<sup>264</sup> UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, CONTRACTING FOR INDIGENT DEFENSE SERVICES 16 (April 2000) [hereinafter CONTRACTING FOR INDIGENT SERVICES], <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf>; *see also* ABA STANDARDS, *supra* note 49, Standard 5-3.3(a) (“Contracts should include provisions which ensure quality of legal representation . . .”).

<sup>265</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 8; ABA STANDARDS, *supra* note 49, Standard 5-3.3(b)(x); CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 16.

<sup>266</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 8; CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 16; *see also* ABA STANDARDS, *supra* note 49, Standard 5-3.3(a) (“Contracts should include provisions which ensure quality legal representation . . .”).

<sup>267</sup> CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 16; ABA STANDARDS, *supra* note 49, Standard 5-3.3(b)(xi).

<sup>268</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 8; ABA STANDARDS, *supra* note 49, Standard 5-3.3(b)(v); CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 16.

<sup>269</sup> CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 16; ABA STANDARDS, *supra* note 49, Standard 5-3.3(b)(viii).

<sup>270</sup> ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 8.

<sup>271</sup> CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 16; ABA STANDARDS, *supra* note 49, Standard 5-3.3(b)(xiv).

- Provide a mechanism for oversight and evaluation<sup>272</sup>
- Specify grounds for terminating the contract<sup>273</sup>
- Provide for the completion of cases if the contract is terminated, breached, or not renewed<sup>274</sup>

IDS should avoid the following characteristics, associated with a deficient contract system:

- Rewarding low rather than realistic bids<sup>275</sup>
- Placing cost containment before quality<sup>276</sup>
- Creating incentives to plead cases out early rather than go to trial,<sup>277</sup> when a plea is not in the client’s best interest
- Resulting in lawyers with fewer qualifications and less training doing a greater percentage of the work<sup>278</sup>
- Offering limited training, supervision, or continuing education to counsel<sup>279</sup>
- Providing unrealistic caseload limits or no limits at all<sup>280</sup>
- Failing to provide resources for investigative or expert services<sup>281</sup>
- Resulting in case dumping that shifts cost burdens back to the institutional defender<sup>282</sup>
- Failing to provide for independent monitoring or evaluation of performance outside of costs per case<sup>283</sup>
- Failing to include a case tracking or case management system and failing to incorporate a strategy for case weighting<sup>284</sup>

Importantly, contracts should never be a separate, “stand-alone” delivery system; contracts always must be administered under a formal assigned counsel system that allows for appropriate oversight, supervision, and support.<sup>285</sup>

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<sup>272</sup> CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 16.

<sup>273</sup> ABA STANDARDS, *supra* note 49, Standard 5-3.3(b)(xv).

<sup>274</sup> CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 16. IDS reports that it considered all of these characteristics in creating its existing contract system. Telephone conversation between Danielle Carman, former Assistant Director/General Counsel, NC IDS, Thomas Maher, Executive Director, NC IDS and Committee Reporter, June 9, 2016. *See generally* REPORT OF THE COMMISSION ON INDIGENT DEFENSE SERVICES TO THE JOINT LEGISLATIVE COMMISSION ON GOVERNMENTAL OPERATIONS: REQUESTS FOR PROPOSALS AND CONTRACTS FOR LEGAL SERVICES (2011) (noting considerations), [http://www.ncids.org/RFP/RepData/GA\\_Report.pdf](http://www.ncids.org/RFP/RepData/GA_Report.pdf).

<sup>275</sup> CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 13; SYSTEM OVERLOAD, *supra* note 5, at 9.

<sup>276</sup> CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 13; ABA TEN PRINCIPLES, *supra* note 51, Commentary to Principle 8 (“[c]ontracts with private attorneys for public defense services should never be let primarily on the basis of cost”).

<sup>277</sup> CONTRACTING FOR INDIGENT SERVICES, *supra* note 264, at 13.

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-1.2 (noting that the ABA does not endorse the use of contracts as a stand-alone system; use of contracts must be part of a larger, coordinated assigned counsel system and “[t]he structure should guarantee adequate independence, oversight and quality control for the use of contracts”). *See generally supra* pp. 35-38 (recommending a formal assigned counsel system).

## Flat Fee

A flat fee system offers payment per case or per session. North Carolina has experience with flat fee compensation. Specifically, when IDS was created, it approved two preexisting flat per case fee systems for district court cases in Cabarrus and Rowan counties.<sup>286</sup> Additionally, in 2016, the General Assembly directed the NCAOC and IDS to implement a flat fee pilot project in one or more counties in at least six judicial districts.<sup>287</sup>

As compared to contracts, flat fee arrangements involve lower administrative costs, allow for greater participation by the private bar, give greater flexibility for private lawyers who may not want to take a large number of indigent cases as part of a contract and provide certainty to the client regarding the potential amount of attorney fees that he or she may be ordered to pay. However, national standards discourage the use of flat fees,<sup>288</sup> explaining: “The possible effect of such rates is to discourage lawyers from doing more than what is minimally necessary to qualify for the flat payment.”<sup>289</sup> This disincentive to providing an effective defense is particularly acute when the flat fee arrangement does not allow for additional payment in exceptional cases.<sup>290</sup> More importantly, a 2011 study by IDS found that “case outcomes, both in terms of determination of guilt and disposition or sentence, for PAC DWI and misdemeanor cases under the hourly rate system were significantly more favorable than outcomes under the flat fee systems in Cabarrus and Rowan [Counties].”<sup>291</sup> A more recent IDS study confirmed those results.<sup>292</sup>

In light of concerns about flat fee arrangements and existing evidence showing that outcomes for North Carolina cases compensated under a flat fee method are less favorable than for those compensated on an hourly basis, the Committee recommends that any decisions about continued use or expansion of flat fee payment systems should be evidence-based, relying on fiscal and outcomes data generated from the new flat fee pilot program.

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<sup>286</sup> NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES, DISTRICT COURT DWI AND MISDEMEANOR FLAT FEES AND CASE OUTCOMES 1 (2011) [hereinafter FLAT FEES & CASE OUTCOMES], [http://www.ncids.org/systems\\_evaluation\\_project/caseoutcome/research/districtcourt.pdf](http://www.ncids.org/systems_evaluation_project/caseoutcome/research/districtcourt.pdf).

<sup>287</sup> S.L. 2016-94, sec. 19A.4.

<sup>288</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-2.4 (“Since a primary objective of the payment system should be to encourage vigorous defense representation, flat payment rates should be discouraged.”).

<sup>289</sup> *Id.* (going on to note that decisions striking down statutory fee maximums “constitute a strong trend away from the payment of flat fees”); *see also* SYSTEM OVERLOAD, *supra* note 5, at 9 (noting that if the purpose of a flat fee arrangement is solely to reduce costs, the arrangement will negatively impact indigent defense services by creating a disincentive to devote the necessary time to the case); MINOR CRIMES, MASSIVE WASTE, *supra* note 76, at 30 (noting that with a flat fee arrangement, the lawyer is motivated to dispose of the case as quickly as possible to maximize profit, creating a conflict of interest between attorney and client; recommending that jurisdictions discontinue the use of flat fee systems); Stephen J. Schulhofer, *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, 12 OHIO STATE J. OF CRIM. LAW 505, 511 (2015) (“If attorney compensation is low, defense counsel may forego useful investigations and may avoid trial even when there are good chances for acquittal.”).

<sup>290</sup> ABA STANDARDS, *supra* note 49, Commentary to Standard 5-2.4 (noting the importance of providing extra payments to counsel when representation is provided in unusually protracted or complicated cases).

<sup>291</sup> FLAT FEES & CASE OUTCOMES, *supra* note 286, at 3-6.

<sup>292</sup> Margaret Gressens, *Indigent Defense Milestone: A Comparison of Delivery Systems in North Carolina* (May 2016) (PowerPoint Presentation on file with Committee Reporter). Just one of the findings of that study was that for high exposure cases, public defender offices achieved a 48.9% 3-year average of client favorable outcomes; for the same group of cases over the same period, flat fee arrangements yielded 21.8% client favorable outcomes. *See supra* note 198 (discussing IDS’s outcomes research and data for key performance indicators).

### Hourly Fees

A benefit to an hourly fee compensation method<sup>293</sup> is that payment is directly tied to case complexity. Thus, this compensation method does not create a disincentive for counsel to spend an appropriate amount of time on the case.

One potential problem with an hourly fee compensation method is that it creates an incentive to “overwork” a case to increase hours and thus compensation.<sup>294</sup> In North Carolina, however, there seems to be no evidence of widespread overbilling under the hourly fee method. In fact, the average hours claimed by PAC for adult criminal cases in fiscal year 2012 was only 4.56 hours.<sup>295</sup> Average hours claimed by PAC ranged from a low of 3.31 hours for district court misdemeanor non-traffic cases to a high of 7.59 hours for superior court Class I felony cases.<sup>296</sup> Nevertheless, to ensure appropriate use of taxpayer funds and confidence in the indigent defense program, IDS should develop a system to flag high fee submissions by PAC in individual cases and a system for appropriate auditing.

Numerous stakeholders expressed concern that current depressed compensation rates are negatively impacting the criminal justice system and are unsustainable long term.<sup>297</sup> As noted above, the Committee recommends that IDS develop a clear, objective method for determining reasonable compensation of PAC and a long term plan to obtain and implement reasonable compensation statewide.

### Voucher & Client Choice Systems

Under a voucher system, the indigent defendant is given a voucher for a specified sum and is instructed to hire his or her own counsel. This payment method is not currently in place in North Carolina. Nor did research reveal any other state or jurisdiction that has employed such a system. Although a pilot program in Comal County Texas (population 116,524) sometimes is cited as an example of a voucher system, the Comal pilot is not a true voucher program. Rather, clients chose lawyers from an approved list of lawyers and in felony cases the judge sets the compensation rate within a specified range; as such, the Comal pilot may be better described as a client choice model.<sup>298</sup> Some suggest that by providing client choice, voucher systems will improve outcomes for defendants and the system.<sup>299</sup> The Committee, however, identified difficulties presented by a voucher system including:

- what to do with a case when the client-selected lawyer later is dismissed or removed;
- how to provide resources to pretrial detainees so that they can make informed choices regarding counsel and can contact counsel to discuss representation;

<sup>293</sup> For current hourly PAC compensation rates, see note 251.

<sup>294</sup> See Schulhofer, *supra* note 289, at 511 (“if compensation is very generous, defense counsel may pursue unproductive investigations or hold out hopes for acquittal at trial when a guilty plea would better serve the client’s interest”).

<sup>295</sup> See NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES, FY12 PRIVATE APPOINTED COUNSEL AVERAGE HOURS STUDY 1 (2013) (breaking down hours claimed by case type), [http://www.ncids.org/Reports & Data/Latest Releases/FY12\\_PACHoursStudy.pdf](http://www.ncids.org/Reports & Data/Latest Releases/FY12_PACHoursStudy.pdf).

<sup>296</sup> *Id.*

<sup>297</sup> See *supra* pp. 39-40.

<sup>298</sup> See Schulhofer, *supra* note 289, at 545-46 (judges must approve assigned counsel vouchers; in felony cases judges have wide discretion to select the compensation rate they consider appropriate within an authorized range; separately describing misdemeanor vouchers).

<sup>299</sup> See *id.* (arguing for client choice); Stephen J. Schulhofer & David D. Friedman, *Reforming Indigent Defense: How Free Market Principles Can Help to Fix a Broken System* (CATO Institute Policy Analysis, Sept. 1, 2010), <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa666.pdf>.

- what to do when the client is unable to find a lawyer who will accept the voucher;<sup>300</sup>
- how to address the negative incentives that are inherent in any flat fee arrangement, such as a voucher system;<sup>301</sup> and
- what to do when voucher recipients flock to a popular lawyer, resulting in case conflicts and delays.

Perhaps most importantly, however, the Committee has identified a lack of supervision and support of PAC to be a key deficiency with the state’s existing indigent program and has recommended system changes to address this deficiency, such as uniform qualification standards for PAC.<sup>302</sup> By placing no limits on who can serve as counsel, a voucher system undercuts core recommendations in this Report.

For these reasons, the Committee recommends against implementing a true voucher system in North Carolina. However, it recognizes that client choice—allowing defendants the option of choosing counsel from an approved list—may promote the lawyer-client relationship. It thus recommends that IDS evaluate the outcome of the Texas pilot program to determine whether to pilot the use of a client choice model in North Carolina.

#### Debt Forgiveness

Programs that allow for forgiveness of law school student loan debt in exchange for working for a specified period of time in a public defender office may be a valuable tool to attract qualified new law school graduates to indigent defense practice.<sup>303</sup> The Committee recommends that IDS and the NCAOC pursue such programs with North Carolina’s law schools and through the North Carolina Legal Education Assistance Foundation,<sup>304</sup> to attract candidates to public defense positions, positions in the prosecutor’s office, and to other public service positions within the judicial branch.

### Strategies to Reduce Indigent Defense Expenses

A number of the Committee’s recommendations will require additional resources. To reduce the taxpayer funds required to implement these recommendations, the Committee recommends the following strategies to reduce indigent defense expenses to create capacity to implement recommended reforms.

#### **Reclassify Minor Crimes**

Unlike prosecutors, who can exercise discretion with respect to which cases and defendants they wish to prosecute, IDS does not have discretion to refuse to provide indigent defense services once charges have been initiated. IDS must provide qualified counsel for every indigent person who has a right to representation. As noted, both the United States and North Carolina Constitutions require the State to provide indigent defense services for misdemeanor cases whenever an active or

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<sup>300</sup> A defendant cannot be required to proceed pro se unless the defendant (1) knowingly, voluntarily and intelligently waives the right to counsel, *Iowa v. Tovar*, 541 U.S. 77, 88 (2004); or (2) forfeits the right to counsel. See Jessica Smith, *Counsel Issues*, in NC SUPERIOR COURT JUDGES’ BENCHBOOK (Jessica Smith, Editor), <http://benchbook.sog.unc.edu/criminal/counsel-issues>. North Carolina applies a presumption against forfeiture, *id.*, and a finding of forfeiture must rest on a factual record of the defendant’s intent to disrupt the criminal justice process. *Id.*

<sup>301</sup> See *supra* pp. 44-45.

<sup>302</sup> See *supra* pp. 27-31 (recommendations regarding oversight and support).

<sup>303</sup> JUSTICE DENIED, *supra* note 4, at 12 (expressly recommending that “[l]aw student loan forgiveness programs should be established for both prosecutors and public defenders”); *id.* at 195-96 (same).

<sup>304</sup> The Foundation website is here: <http://ncleaf.org/>.

suspended sentence is imposed.<sup>305</sup> Thus, one way to reduce indigent defense caseloads—and indigent defense costs—is to repeal minor, non-violent misdemeanors or reclassify them as civil infractions for which defendants are subjected only to fines.<sup>306</sup> If the potential for incarceration is eliminated with reclassification, counsel is not required under the constitution.<sup>307</sup> Reclassification of minor offenses is recommended in the Report of the National Right to Counsel Committee as a tool to reduce pressures on indigent defense systems<sup>308</sup> and has been implemented in some jurisdictions.<sup>309</sup> Although commonly associated with liberals, supporters of reclassification come from across the political spectrum and include former Texas Governor and 2012 Republican presidential candidate Rick Perry, evangelical minister Pat Robertson, and the Cato Institute.<sup>310</sup>

In March 2011, IDS released a study designed to identify misdemeanor offenses that could be reclassified as infractions without negatively impacting public safety and to estimate potential cost savings to the state’s indigent defense system if these offenses were reclassified as infractions.<sup>311</sup> That study found, in part, that the state’s court system has a high volume of minor misdemeanor cases, especially misdemeanor traffic cases.<sup>312</sup> Specifically, in 2009, 55.2% of the 1.498 million cases disposed of by the state’s court system were cases where the highest charge was either a Class 2 or 3 misdemeanor.<sup>313</sup> Focusing on thirty-one specific misdemeanor offenses, the study found that:

- 12 of the offenses resulted in dismissal without leave at least 75% of the time;
- 21 resulted in dismissal without leave at least 50% of the time; and
- for all but 2 offenses, active time was imposed in less than 1% of cases.<sup>314</sup>

After reviewing cost savings associated with reclassifying the identified offenses, the study concludes: “The data shows that the North Carolina court system is handling a high volume of low level misdemeanor cases and suggests that the North Carolina court system could save significant money and relieve over-burdened courts by reclassifying many minor misdemeanor offenses as infractions.”<sup>315</sup> Specifically, it concluded that the state could save approximately \$2.25 million just

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<sup>305</sup> See *supra* p. 12 (discussing the scope of the right to counsel).

<sup>306</sup> THE SPANGENBERG PROJECT, THE CENTER FOR JUSTICE, LAW AND SOCIETY AT GEORGE MASON UNIVERSITY, AN UPDATE ON STATE EFFORTS IN MISDEMEANOR RECLASSIFICATION, PENALTY REDUCTION AND ALTERNATIVE SENTENCING, at i (2010) [hereinafter THE SPANGENBERG PROJECT REPORT] (so noting); see also Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1073 (2015) [hereinafter *Misdemeanor Decriminalization*] (“[a]larmed by the crisis in indigent defense,” commentators have “zeroed in” on the cost saving that decriminalization provides).

<sup>307</sup> JUSTICE DENIED, *supra* note 4, at 198.

<sup>308</sup> *Id.* at 13, 72-73 (discussing how indigent defense providers in several states are burdened with excessive caseloads of minor, petty offenses).

<sup>309</sup> THE SPANGENBERG PROJECT REPORT, *supra* note 306, at 4-6 (noting that as of 2010 both Alaska and Massachusetts had done so; noting other then-pending legislation); *Misdemeanor Decriminalization*, *supra* note 306 at 1070-71 (noting more recent legislation, including marijuana decriminalization).

<sup>310</sup> *Misdemeanor Decriminalization*, *supra* note 306, at 1069.

<sup>311</sup> See NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES, FY11 RECLASSIFICATION IMPACT STUDY 3 (2011), <http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/FY11ReclassificationImpactStudy.pdf> [hereinafter RECLASSIFICATION IMPACT STUDY].

<sup>312</sup> *Id.* at 5.

<sup>313</sup> *Id.* North Carolina’s high percentage of the criminal docket attributed to misdemeanors is in line with other states. *Misdemeanor Decriminalization*, *supra* note 306, at 1057.

<sup>314</sup> RECLASSIFICATION IMPACT STUDY, *supra* note 311, at 6.

<sup>315</sup> *Id.* at 8.

in counsel fees if all thirty-one studied offenses were reclassified as infractions.<sup>316</sup> Of course, overall savings to the court system would be much greater.

In light of this, repeal and/or reclassification are promising tools to reduce indigent defense costs without sacrificing public safety.<sup>317</sup> The Committee thus recommends that the North Carolina Sentencing and Policy Advisory Commission<sup>318</sup> be charged with the responsibility of identifying—on a regular basis—criminal offenses that should be considered for repeal or reclassification as fine-only infractions, because, for example, charges are routinely dismissed or rarely result in an active sentence.<sup>319</sup>

### **Capital Cases**

Spending on potentially capital cases constitutes approximately 12.75% of IDS’s budget.<sup>320</sup> Capital cases<sup>321</sup> are expensive for a number of reasons, including that proceeded capital cases require two

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<sup>316</sup> *Id.*

<sup>317</sup> THE SPANGENBERG PROJECT REPORT, *supra* note 306, at i.

<sup>318</sup> The North Carolina Sentencing and Policy Advisory Commission was created by the General Assembly to make recommendations to the General Assembly for the modification of sentencing laws and policies, and for the addition, deletion, or expansion of sentencing options as necessary to achieve policy goals. *See* The North Carolina Court System, *Sentencing and Policy Advisory Commission*, NCCOURTS.ORG, <http://www.nccourts.org/courts/crs/councils/spac/> (last visited June 2, 2016).

<sup>319</sup> The Sentencing and Policy Advisory Commission already provides a detailed annual analysis of convictions and sentences imposed by class of crime. *See, e.g.*, NORTH CAROLINA SENTENCING AND POLICY ADVISORY COMMISSION, STRUCTURED SENTENCING STATISTICAL REPORT FOR FELONIES AND MISDEMEANORS: FISCAL YEAR 2014/15 (2016), [http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/statisticalrpt\\_fy14-15.pdf](http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/statisticalrpt_fy14-15.pdf).

The Committee notes that in 2013, the General Assembly reclassified certain misdemeanors as infractions. *See* Robert L. Farb, *2013 Legislation Affecting Criminal Law and Procedure* 25-26 (rev. Nov. 2013), <https://www.sog.unc.edu/sites/www.sog.unc.edu/files/reports/2013CriminalLegislation%20Revised%20Nov%202013.pdf> (discussing these changes). Thus, the General Assembly has recent experience with the type of reclassification discussed here. That same 2013 legislation also reclassified certain Class 1 and 2 misdemeanors as Class 3 misdemeanor offenses. *Id.* The Committee notes that when low-level crimes are reclassified as fine-only Class 3 misdemeanors, the crimes remain criminal offenses but because the possibility of incarceration is removed, so too is the right to counsel. Such an approach is sometimes thought of as a “win-win,” in that it relieves the defendant of the threat of incarceration while saving the state millions of dollar in defense and other justice system costs. *Misdemeanor Decriminalization*, *supra* note 306, at 1058-59 (noting that some so characterize such reforms but asserting that collateral and other consequences that attach to fine-only misdemeanors suggest otherwise). However, fine-only misdemeanors are still crimes and as such still trigger a panoply of burdens, including arrest, fines, criminal records and, importantly, all of the collateral consequences that attach to any criminal conviction, *id.*, including barriers to obtaining employment, joining the military, or receiving financial aid to pursue higher education. *See supra* note 10 (North Carolina’s Collateral Consequences Assessment Tool). As noted above, an effective indigent defense program provides services in proceedings arising from or connected with a criminal action resulting in significant collateral consequences. *See supra* p. 12. Because significant collateral consequences attach to *any* criminal conviction, including fine-only misdemeanors, an approach that reclassifies minor misdemeanors as fine-only crimes violates a core characteristic of an effective indigent defense program and thus is not preferred. *Misdemeanor Decriminalization*, *supra* note 306, at 1058-59 (noting the collateral consequences that attach to fine-only misdemeanors and observing: “These burdens, moreover, can be imposed on offenders quickly, informally, and without counsel, so that the standard procedural safeguards against wrongful conviction and overpunishment are lessened, if not eliminated altogether.”); THE SPANGENBERG PROJECT REPORT, *supra* note 306, at 11-12 (discussing the dangers of uncounseled misdemeanor convictions); MINOR CRIMES, MASSIVE WASTE, *supra* note 76.

<sup>320</sup> Email from Danielle M. Carman, Assistant Director/General Counsel NC IDS to Committee Reporter (May 16, 2016) (on file with Reporter) (the figure excludes the local public defender offices’ share of potentially capital cases at the trial level and the Office of the Appellate Defender’s share of capital appeals).

<sup>321</sup> The term “potentially capital cases” includes cases charged as first-degree murder or undesignated degree of murder. NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES, FY15 CAPITAL TRIAL CASE STUDY: POTENTIALLY

lawyers to be appointed to assist with the defense; the hourly rate for potentially capital cases is higher than the rate for non-capital cases; potentially capital cases require more hours to both prepare and litigate; and most potentially capital cases require additional support services, such as private investigators, mitigation specialists, experts and attorney support services (e.g., paralegals).

Figure 6 below shows the results of a recent IDS study that examined the average indigent defense costs associated with different types of homicide cases between 2007 and 2015.

**Fig. 6. Average PAC & Expert Costs for Homicide Prosecutions**

	<b>Proceeded Capital Murder<sup>322</sup></b>	<b>Potentially Capital Murder<sup>323</sup></b>	<b>Proceeded Non-Capital Murder<sup>324</sup></b>	<b>Second-Degree Murder</b>	<b>Voluntary Manslaughter</b>
<b>Average Cost</b>	\$93,231	\$34,666	\$21,022	\$2,338	\$1,023

*Source:* NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES, FY15 CAPITAL TRIAL CASE STUDY: POTENTIALLY CAPITAL CASE COSTS AT THE TRIAL LEVEL (2015)

That same study also found that although most alleged intentional homicides are charged as first-degree or undesignated murder, more than 83% of these cases are eventually disposed as second-degree murder or less.<sup>325</sup> Specifically, of all potentially capital cases disposed between 2007 and 2015:

- 83.6% ended in a conviction of second degree-murder or less.
- 11.7% ended in a voluntary dismissal, no true bill, or no probable cause finding.
- 45.7% ended in a conviction of less than second-degree murder.<sup>326</sup>

For proceeded capital cases:

- 58.1% ended in a conviction of second-degree murder or less.
- 20.1% ended in a conviction of less than second-degree murder.
- 2.2% ended in a death verdict.<sup>327</sup>

That report posits that “North Carolina is spending unnecessary taxpayer dollars by charging cases as first-degree or undesignated murder and prosecuting them as potentially capital cases when most are disposed at a much lower level.”<sup>328</sup> The Committee finds this data compelling and recommends, consistent with a study required by the 2016 Appropriations Act,<sup>329</sup> that IDS work

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CAPITAL CASE COSTS AT THE TRIAL LEVEL 7 (2015), <http://www.aoc.state.nc.us/www/ids/Reports & Data/Latest Releases/FY15CapitalCaseStudy.pdf> [hereinafter CAPITAL CASE COSTS] “Proceeded capital” refers to a subset of potentially capital cases at the trial level in which two appointed attorneys worked on the case simultaneously at any given point in time. *Id.*

<sup>322</sup> See *supra* note 321 (defining this term).

<sup>323</sup> See *id.* (defining this term).

<sup>324</sup> “Proceeded non-capital” refers to a subset of potentially capital cases at the trial level in which no more than one appointed attorney worked on the case at any given point in time. See CAPITAL CASE COSTS, *supra* note 321, at 7.

<sup>325</sup> *Id.* at 2.

<sup>326</sup> *Id.* at 4.

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> S.L. 2016-94, Sec. 19A.3.

with the NC Conference of District Attorneys to identify ways for earlier identification of charges that truly warrant prosecution as capital cases.

### ***Maintain Open File Discovery***

North Carolina was a leader in adopting open file discovery.<sup>330</sup> Open file discovery should be maintained for a number of reasons, one being that it reduces indigent defense costs.<sup>331</sup>

### **Committee & Subcommittee Members**

To facilitate its work, the Committee formed an Indigent Defense Subcommittee to prepare draft recommendations for Committee review. Members of the Indigent Defense Subcommittee included:

Athena Brooks, District Court Judge and President N.C. Conference of District Court Judges  
James Coleman, Jr., Professor, Duke University School of Law and Committee member  
Darrin D. Jordan, Lawyer, IDS Commissioner and Committee member  
Thomas K. Maher, Executive Director, IDS  
LeAnn Melton, Public Defender  
John Rubin, Albert Coates Professor of Public Law and Government, School of Government, UNC Chapel Hill  
Anna Mills Wagoner, Senior Resident Superior Court Judge and Committee member  
Michael Waters, District Attorney

Members of the Committee included:

William A. Webb, U.S. Magistrate Judge (ret.) and Committee Chair  
Augustus A. Adams, N.C. Crime Victims Compensation Committee member  
Asa Buck III, Sheriff and Chairman, N.C. Sheriffs' Association  
Randy Byrd, President N.C. Police Benevolent Association  
James E. Coleman, Jr., Professor, Duke University School of Law  
Kearns Davis, Lawyer and President, N.C. Bar Association  
Paul A. Holcombe III, District Court Judge  
Darrin D. Jordan, Lawyer and IDS Commissioner  
Robert C. Kemp III, Public Defender and Immediate Past-President, N.C. Defenders Association  
Sharon S. McLaurin, Magistrate  
R. Andrew Murray Jr., District Attorney and Immediate Past-President, N.C. District Attorneys Conference  
Diann Seigle, Executive Director, Carolina Dispute Settlement Services  
Anna Mills Wagoner, Senior Resident Superior Court Judge

This report was prepared for the Committee by Committee Reporter Jessica Smith, W.R. Kenan, Jr. Distinguished Professor, School of Government, UNC Chapel Hill.

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<sup>330</sup> Hon. Alex Kozinski, *Preface to Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC., iii, xxvi-xxvii (2015) (advocating for open file discovery and noting that NC adopted its open file discovery rule by statute in 2004).

<sup>331</sup> JUSTICE DENIED, *supra* note 4, at 77 ("Open-file discovery not only promotes the prompt disposition of cases; it can also significantly reduce indigent defense workloads and costs."); *id.* at 207 (same).