

**Best, et al. v. Grant County**

**Monitor's Report**

**Third Quarter, 2009**

October 23, 2009

Submitted by Francisco Rodriguez, Settlement Monitor

**Monitor's Activities**

During the second quarter, I travelled to Grant County on three separate occasions:

- July 13, 2009
- August 17-18 , 2009
- September 14-15, 2009

While in Ephrata, I observed court proceedings, reviewed court files, and met with public defenders. Between site visits, I maintain regular contact with the Supervising Attorney and have periodic contact with individual defenders, investigators, and counsel for both parties.

In addition to my usual activities, I also met with two investigator candidates during the third quarter, one in Seattle and one in Ephrata.

**Access to Information**

The Settlement Agreement provides that the Monitor is entitled to broad access to information concerning the Grant County public defense system. I did not encounter any difficulty in obtaining information from Grant County during the third quarter. Gail Sundean, Office Manager for the Grant County Department of Public Defense, is my main point of contact when requesting data and documents relating to the public defense program, and she continues to be very cooperative and helpful.

**Compliance Issues**

While the parties continue to discuss case credits, case counts, and a few other issues, no formal disputes arose during the third quarter. Based upon preliminary discussions, it appears that the parties will be able to resolve the current issues informally.

## Attorney Staffing

Grant County added two new defenders during the third quarter. Robert Kentner began work as a contract defender on July 7, taking over Karen Lindholdt's remaining cases. Mr. Kentner is an experienced criminal defense attorney from Indiana where he was Chief Deputy Public Defender for Tippecanoe County from 2006-2008. In addition to adding Mr. Kentner as a contract defender, Grant County hired Susan Oglebay to fill the in-house position left vacant with the departure of Frank Grigaliunas in mid-June. Ms. Oglebay is also an experienced criminal attorney, having maintained a private criminal practice for many years in Virginia where she also worked as a part-time prosecutor early in her career. She started work on September 14. Because there was a three month gap between Mr. Grigaliunas' departure and Ms. Oglebay's start date, she did not inherit his caseload. Both Mr. Kentner and Ms. Oglebay promise to bring much needed experience to the Grant County public defense system, though they will undoubtedly face some period of adjustment as they familiarize themselves with Washington's laws and procedures.

These two new hires allow Grant County to approach full staffing. The one remaining gap is John Doherty's limited availability due to the wind-down of his private practice. Mr. Doherty was hired for an in-house position in May. Although hired as a full-time defender, Mr. Doherty was not immediately available on a full-time basis because he had an active private practice in Pierce County. At Grant County's request, I approved a transition plan under which Mr. Doherty would have a limited caseload, essentially working as a part-time attorney, until he could extract himself from his private cases. Grant County initially anticipated the wind down would take two months. Unfortunately, the process has taken longer than expected, and the earliest Mr. Doherty will be available full-time is November 1.

Grant County recently made offers to its defenders for 2010.<sup>1</sup> With felony filings substantially lower in 2009 than in prior years, Grant County plans to reduce staffing. I understand that Grant County will seek to retain Brett Billingsley, Julie St. Marie, and Robert Kentner as contract defenders next year but does not intend to offer Janelle Peterson a contract for 2010. Ms. Peterson is the longest tenured defender in Grant County and has been a valuable contributor to the program. Grant County's decision not to renew her contract is not surprising in light of a confrontation in June involving Ms. Peterson and a Grant County prosecutor that caused Ms. Peterson to retain counsel and seek early release from her contract. I had anticipated that Grant County would terminate her contract early after her attorney advised that she was no longer able to zealously represent her clients, but Grant County instead chose to simply let the current contract expire at year's end. I am concerned about the impact of this decision on Ms. Peterson's clients but have not observed any lack of zealousness in her representation.

With Ms. Peterson leaving Grant County at the end of the year, Supervising Attorney Ray Gonzales should establish a transition plan well in advance of her departure. If possible,

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<sup>1</sup> While Grant County sent out offer letters on October 16, formal contract proposals have not yet been distributed.

Mr. Gonzales should avoid assigning her new cases for the remainder of the year unless he expects those cases can be resolved quickly. To avoid losing Ms. Peterson's caseload capacity, Mr. Gonzales should consider assigning Ms. Peterson to cover the probation violation calendar as those cases are often resolved at the initial hearing. For cases that will need to be transferred, Mr. Gonzales should assign new counsel prior to Ms. Peterson's departure so that the new attorneys will have an opportunity to consult with her about the cases. Mr. Gonzales should also make clear his expectations about transferred cases in terms of transfer memos and case preparations prior to transfer (e.g., investigation, briefing, etc.).

Staff turnover continues to be worrisome in Grant County. With the impending departure of Ms. Peterson, Julie St. Marie is the only defender that has been with Grant County for as long as two years. Five of the eight remaining defenders expected back in 2010 joined Grant County after March 1<sup>st</sup> of this year. While these new defenders may prove to be quite capable, the constant churning of attorneys in and out of the system is extremely disruptive. To be successful in the long run, Grant County must find a way to retain quality defenders. Perhaps the creation of an in-house defender office will prove helpful in this regard. For the contract defenders, however, Grant County must demonstrate its commitment to these individuals if it expects a commitment in return. Grant County's failure to offer new contracts until so late in the year is disappointing. This practice leaves the contract defenders with no sense of job security, and more than one has talked of exploring other employment options. In future years, I hope that Grant County will recognize the importance of initiating contract negotiations earlier in the year to avoid the risk of unexpected departures and to foster a more positive working environment for its contract defenders.

### **Caseloads**

The Settlement Agreement caps annual caseloads at 150 case equivalents for each attorney. With three quarters of the year complete, none of the Grant County defenders appears at risk of exceeding the annual caseload limit. Indeed, most defenders have received less than half of their yearly caseloads at this point. Julie St. Marie had the highest caseload at the end of the third quarter with approximately 77 case equivalents.

For 2009, new felony filings continue to be lower than in prior years. Probation assignments and awards of extraordinary credit have been lower as well resulting in a substantial surplus in capacity. A year to year comparison through September is included in the table below:

	<b>Felonies</b>	<b>Probation</b>	<b>Extraordinary</b>	<b>Total Credits<sup>2</sup></b>
<b>2008</b>	616	299	53	916
<b>2009</b>	478	172	3	740

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<sup>2</sup> The total includes credits for contempt cases and others not listed in this table.

Supervising Attorney Ray Gonzales estimates that Grant County currently has a surplus capacity of 142 cases for the year. While I estimate that the actual surplus is substantially lower, I agree that Grant County appears to have adequate caseload capacity for the remainder of 2009.

The figures provided by Grant County underestimate total case credits in two ways. First, some extraordinary credits earned during the last several months have not yet been counted. I understand that these were omitted because Grant County has not received a report of the hours worked on those cases from the assigned attorney, Brett Billingsley.<sup>3</sup> Second, a significant number of probation violation cases have not been counted. I have been discussing this issue with Mr. Gonzales since April as there seems to be uncertainty about when a credit should be awarded for probation cases. He has agreed to provide a clear standard for how to count these cases but has not yet done so. The parties discussed probation case counts at a recent meeting, and I hope this issue will be resolved during the fourth quarter. In the meantime, Grant County should take care in assigning cases to Dean Terrillion who has been handling the majority of the probation violation cases. Should case counts be revised upward, Mr. Terrillion may actually be much closer to his annual caseload limit than current figures suggest.

In addition to annual caseload limits, Grant County has also adopted monthly and quarterly limits to ensure that case assignments are spread relatively evenly throughout the year. During the third quarter, all defenders remained below both the monthly and quarterly limits. This was a marked improvement over last quarter when a flood of case reassignments causes caseload problems in June. With far fewer case reassignments this quarter, most defenders received less than ten case equivalents per month. Cases were also distributed fairly evenly among the defenders.

While the overall case assignment totals are reassuring, I remain concerned about the distribution of class A felonies among the public defenders. The addition of Robert Kentner provided some relief this quarter, but the class A assignments continue to be unbalanced, with John Perry in particular receiving a disproportionate share:

<b>Attorney</b>	<b>2Q</b>	<b>3Q</b>	<b>Total</b>	<b>6mo %</b>
Perry	10	6	16	40%
Billingsley	6	3	9	22.5%
Kentner	N/A	6	6	15%
St. Marie	5	0	5	12.5%
Terrillion	0	2	2	5%
Peterson	1	0	1	2.5%
Doherty	0	1	1	2.5%

<sup>3</sup> Delayed reporting of credits earned has been a chronic problem for Grant County. These credits are supposed to be reported by the 5<sup>th</sup> of the following month. Yet Grant County is still awaiting information regarding credits earned in May. Such delays cause caseloads to appear lower than they actually are and put Grant County at risk of unwittingly exceeding annual caseload limits. Although this risk is minimal for 2009 as Mr. Billingsley is well below his pro-rated annual caseload, Grant County should nonetheless make clear that it is serious about prompt reporting of extraordinary case credits.

During the third quarter, Supervising Attorney Ray Gonzales did assign a few class A cases to Dean Terrillion and John Doherty, but Mr. Perry continued to lead the way with 6 new assignments in addition to the 10 he had received the previous quarter. For the last six months, he has personally received 40% of the class A case assignments. This assignment pattern is not sustainable. In the future, Mr. Gonzales must work toward a more equitable distribution of class A case assignments.

### **Training**

The Settlement Agreement requires Grant County to ensure its defenders receive adequate training. For the first time this year, Grant County organized a local training for its defenders in September. Supervising Attorney Ray Gonzales worked with the Washington State Office of Public Defense to organize a full-day free CLE in Moses Lake on September 18. The CLE included speakers from Seattle and Spokane, and topics included ethics, making a record for appeal, search and seizure issues, and motions practice. All of the in-house defenders attended the training, but unfortunately, none of the contract defenders participated. Nonetheless, the availability of such training is certainly a welcome development.

While half-day and full-day CLEs are an important component of public defender training, they take such time and effort to organize that they tend to occur infrequently. For that reason, public defender offices often rely on shorter but more regular training sessions that occur over lunch, in the morning before court, or in the late afternoon after court. Grant County should not wait another year to organize a day-long CLE. Grant County should strive to provide its defenders with training opportunities each quarter. The County need not recruit speakers from outside the area but could instead evaluate local resources to identify potential candidates including those within its own program. Indeed, Supervising Attorney Ray Gonzales was one of the speakers at the recent CLE in Moses Lake. It is unclear to me why he could not have given the same presentation over lunch with the Grant County defenders months ago.

### **First Appearances**

The Settlement Agreement requires that Grant County provide representation at initial appearances for all indigent defendants. Grant County assigns first appearance duty to its defenders on a rotating weekly basis. Defenders, however, frequently trade weeks or individual days to better suit their personal schedules. In practice, attorneys rarely cover five consecutive days of first appearances. During the last week of July, for example, a different attorney handled first appearances each day.

Based upon my review of court files and intake sheets, Grant County appears to be providing representation to all defendants at first appearance. Although Grant County no longer requires its public defenders to visit defendants in jail prior to their first

appearance, they continue to do on a fairly consistent basis. I found records of 184 such visits during the third quarter:

<b>Attorney</b>	<b># Visits</b>	<b>Days</b>
Terrillion	49	17
Kentner	46	7
Peterson	25	6
Perry	24	7
Billingsley	15	3
Maggard	12	N/A <sup>4</sup>
Doherty	10	5
St. Marie	3	1
<b>Total</b>	<b>184</b>	

Mr. Terrillion and Mr. Kentner were particularly diligent in visiting first appearance clients. They routinely visited all clients scheduled for first appearance on the days to which they were assigned coverage, even when the first appearance dockets were quite heavy. On August 31, for example, Mr. Kentner visited 15 defendants scheduled for first appearance that day. Similarly, on both July 10 and July 13, Mr. Terrillion visited 9 defendants set for first appearance. Other public defenders also managed busy first appearance days well with Ms. Peterson visiting all 12 defendants on September 8, and Mr. Billingsley making 9 visits on August 10.

While the general practice of Grant County's defenders is clearly to visit these clients in jail prior to first appearance, I did find 7 days on which first appearances were scheduled but no visits occurred, including 1 day on which at least 11 first appearances were scheduled. On each of these days except one, my review of the client intake sheets suggests that though there was no jail visit, the assigned defender did meet with the defendants in advance of the hearing.

### **Jail Visits**

Grant County public defenders are required to contact all new clients prior to arraignment. If contact prior to arraignment is not "practicable" for some reason, defenders must nonetheless contact the client within seven days from the date of assignment. For in-custody clients, an in person jail visit is required.

To assess the timeliness of jail visits during the third quarter, I reviewed 85 in-custody felony cases assigned during the quarter, cross-referencing the case assignments with jail visitation logs and inmate lists from the Grant County Jail. Overall, I found that the Grant County defenders visited their clients on or before the day of arraignment

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<sup>4</sup> Kacie Maggard covers first appearances for contempt cases, but she is not assigned to general coverage duties.

approximately 58% of the time and within seven days approximately 81% of the time. These figures are down only slightly from last quarter. The table below reflects the timeliness of jail visits since the first quarter of 2008:

	<b>1Q 2008</b>	<b>2Q 2008</b>	<b>3Q 2008</b>	<b>4Q 2008</b>	<b>1Q 2009</b>	<b>2Q 2009</b>	<b>3Q 2009</b>
<b>Visit before arraignment</b>	25%	34%	38%	70%	41%	59%	58%
<b>Visit within 7 days</b>	39%	46%	65%	90%	76%	83%	81%

Most defenders were quite conscientious about visiting clients within seven days, but a few were not:

<b>ATTORNEY</b>	<b>TIMELY VISITS</b>	<b>TOTAL</b>	<b>% TIMELY</b>
Perry	17	17	100%
St. Marie	9	9	100%
Oglebay	3	3	100%
Kentner	14	15	93%
Peterson	8	9	89%
Terrillion	14	16	88%
Doherty	1	3	33%
Billingsley	2	10	20%
Felice <sup>5</sup>	0	2	0%
<b>Total</b>	<b>68</b>	<b>84</b>	<b>81%</b>

The poor visitation rates for Mr. Doherty, Mr. Felice, and especially Mr. Billingsley brought down the overall rate of timely visits substantially. Setting aside the performance of those three attorneys, the remaining defenders visited 94% of their in custody clients within 7 days.

Mr. Billingsley's jail visits were of particular concern. Four of his in-custody clients did not receive a visit at all. As of October 10, he had clients who had been in jail for 85 days, 52 days, and 43 days without receiving a visit. Two of those clients are being held on class A felonies. In addition to the four who received no visit at all, two other in-custody clients waited more than a month before receiving a visit from Mr. Billingsley, with one waiting 70 days (class A) and the other 56 days. Two more clients had to wait more than two weeks. This is not a new problem for Mr. Billingsley as both former

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<sup>5</sup> Mike Felice was assigned two conflict cases.

Supervising Attorney Alan White and current Supervising Attorney Ray Gonzales have met with Mr. Billingsley to counsel him about the importance of timely jail visits.

While most defenders did visit clients within seven days of assignment, they were not as diligent about visiting clients prior to arraignment. The individual rates varied widely, but only newly hired Susan Oglebay managed to visit all of her jailed clients prior to arraignment:

<b>ATTORNEY</b>	<b>VISITS B4 ARR</b>	<b>TOTAL VISITS</b>	<b>% B4 ARR</b>
Oglebay	3	3	100%
Kentner	11	13	85%
Terrillion	11	15	73%
Perry	12	17	71%
Peterson	5	9	56%
St. Marie	3	9	33%
Billingsley	1	10	10%
Doherty	0	2	0%
Felice	0	2	0%
Total	46	80	58%

Even subtracting the four defenders with the lowest percentage of visits before arraignment only improves the overall rate to 74%.

Supervising Attorney Ray Gonzales has set a higher standard for in-house defenders, requiring them to visit in-custody clients within three days of assignment. I continue to support his efforts to expedite client contact, though I question differentiating between in-house defenders and contract defenders. During the third quarter, the in-house defenders met the three day standard 67% of the time, an improvement over last quarter's 52%. While both these figures are less than ideal, setting the bar higher appears to have had a positive impact as the rate of visits within three days by contract defenders, who are not subject to the higher standard, was only 24%, more than 40% lower than the in-house defenders.

Despite the requirement that jail visits take place prior to arraignment if at all possible, many of Grant County's defenders seem to pay more attention to the outside limit of seven days. A jail visit prior to arraignment is viewed more as an aspirational standard than a requirement. Yet arraignment may be the client's last, best opportunity to secure release pending trial. In some cases, the defendant may choose to plead guilty at arraignment. Meaningful consultation with the client is essential if the attorney is to be prepared to address either of these issues. Given the importance of meeting with clients prior to arraignment and the propensity of current defenders to default to the seven day

deadline, Grant County should consider revising its client contact policy to simply require contact prior to arraignment.<sup>6</sup>

Overall, Grant County public defenders have been better about making timely jail visits during the first three quarters of 2009 than they were during the same period last year. The creation of an in-house defender has likely helped in this regard as a majority of the defenders are now in Ephrata at least 5 days a week, making jail visits more convenient. Personnel changes have probably also played a significant role. Going forward, Grant County should continue to emphasize the importance of timely jail visits. In addition to revising its client contact policy, Grant County should consider weekly monitoring of visits for in-custody clients. At a minimum, defenders who have a history of problems in this area should be subject to closer scrutiny by Supervising Attorney Ray Gonzales. It should go without saying that all jailed clients deserve at least one visit from the attorney assigned to represent them. While the lawyer may feel he or she is able to get by without one, the case is about the client not the lawyer.

### **Client Complaints**

The Grant County Department of Public Defense maintains a dedicated phone line for complaints. The line is toll-free, and instructions regarding how to make a complaint are posted in several locations at the jail in both English and Spanish. For out-of-custody defendants, the assigned public defender is expected to provide each client with a flyer at arraignment that directs him or her to contact the Supervising Attorney with complaints. In practice, this does not always occur as attorneys frequently forget to set the forms out at the start of the morning's calendar.

Complaint calls appear to be lower overall in 2009. Calls regarding attorney-client communication issues are noticeably down. There seem to be slightly more substantive complaints regarding the quality of representation, but I attribute that to more accurate and complete record-keeping by the new office rather than any real increase in client dissatisfaction with the defenders. In terms of content, the complaints are fairly typical of public defense clients. The challenge for Mr. Gonzales is to discern whether callers are merely blaming their public defenders for the situation in which they find themselves or if instead, there is merit to their concerns. I was very pleased to see that on several occasions during the third quarter Mr. Gonzales visited clients in the jail to follow-up on complaints.

In reviewing the calls from this quarter, I noticed two recurring themes. First, Julie St. Marie's clients have difficulty reaching her by phone. Interestingly, despite these issues, when asked if they'd like to make a complaint, every single client declined to do so. Second, several of John Perry's clients are frustrated because he has apparently promised to visit, file a motion, or provide an update but has not yet done so because he says he's been too busy. Mr. Gonzales correctly observes that Mr. Perry has a bad habit of making

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<sup>6</sup> If arraignment has already occurred prior to assignment, the policy should specify a time period for contact.

well-intentioned promises that later come back to haunt him, and the two are working on that issue. I am also concerned that the high concentration of serious cases may be taking a toll on Mr. Perry but have not discussed that possibility with him.

**Investigator Staffing**

Grant County currently has five approved public defense investigators: Ellyn Berg, Marv Scott, Jim Patterson, Mario Torres, and Karl Calhoun. Unfortunately, Kathleen Kennedy resigned in mid-September for personal reasons. She had consistently received very positive reviews from the Grant County public defenders, and her departure is a significant loss. Due to her resignation, approximately ten cases had to be reassigned to new investigators.

Karl Calhoun was approved during the third quarter and began receiving cases October 1. He is an experienced investigator with 20+ years in law enforcement followed by several years of defense investigation in Pierce County. Grant County had requested approval of a second new investigator, but after some concerns arose during the approval process, Supervising Attorney Ray Gonzales asked me to put the request on hold.

I continue to receive troublesome reports regarding the work of Mario Torres. While some defenders felt he was more responsive during the third quarter, others reported a lack of follow-through, failure to follow directions, and lack of thoroughness. Both of Grant County’s juvenile court defenders now refuse to work with Mr. Torres. Also of concern is Mr. Torres’ billing. He is now almost 5 months behind in billing Grant County for his services, and the bills he has submitted are problematic. Examples of billing entries include:

	<b>DESCRIPTION</b>	<b>TIME</b>
<b>Example #1</b>	Case review, 3 background checks, msg to attorney	9.7 hours
<b>Example #2</b>	2 additional background checks on both victims, new information on person possible involved, attempted to contact co-defendant, msg to attorney	6.0 hours

While it is important that investigator billing be redacted to protect client confidentiality, the bills must nevertheless contain sufficient detail to justify the amount billed. Supervising Attorney Ray Gonzales should insist that bills be submitted in a timely fashion and that those bills contain adequate documentation of the work performed. I understand that Grant County has already paid the invoices submitted to date but that Gail Sundean recently asked that future bills from Mr. Torres contain more detail to allow for verification of the work performed.

With the departure of Ms. Kennedy and the juvenile attorneys no longer willing to work with Mr. Torres, Supervising Attorney Ray Gonzales increased assignments of adult

felony cases to Jim Patterson and, to a lesser extent, Mario Torres.<sup>7</sup> Mr. Patterson's workload is worrisome as his assignments more than doubled during the third quarter. He was assigned 1 case in the first quarter, 12 cases in the second quarter, and 31 cases in the third quarter. The continued use of Mario Torres on adult felony cases is also troubling. While the loss of Ms. Kennedy may have necessitated the continued use of Mr. Torres during the third quarter, I do not understand the decision to use him on adult felony cases rather than juvenile matters. In any event, Grant County should continue to explore its options for expanding its pool of investigators.

**Investigation Rates**

The overall rate of investigation for the second quarter was 31%, up slightly from the past quarters. The investigation rate has been fairly consistent in 2009 ranging from approximately 28% to 31%. Investigation rates have been higher in prior years at 36% in 2008 and 35% in 2007. The rates for individual attorneys during the third quarter ranged from 4% to 55%:

<b>ATTORNEY</b>	<b>3Q INVESTIGATION RATE</b>
Kentner	55%
St. Marie	53%
Perry	45%
Peterson	43%
Oglebay	17%
Doherty	16%
Terrillion	14%
Billingsley	4%

While many defenders appear to be making appropriate use of investigators, others are not.

Mr. Billingsley's rate of investigation is strikingly low. Over the last two quarters, he has received 46 felony case assignments, including 9 class A felonies, and requested investigation in only 3 cases. His failure to use the investigation resources available to him is simply unacceptable. Mr. Doherty and Mr. Terrillion also had surprisingly low rates of investigation this quarter. Over the last two quarters, Mr. Doherty has received 32 felony case assignments and requested investigation in only 4 cases. Mr. Terrillion's investigation rate was somewhat higher last quarter, but I had expected it to go up rather than down this quarter. Both he and Mr. Doherty need to improve in this area.

Defenders Kenter, St. Marie, Peterson and Perry all appear to be making good use of investigation on their cases. Ms. Overbay did not start until September 14, so although

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<sup>7</sup> Mr. Gonzales could not compensate by increasing assignments to Ms. Berg as she works exclusively with the in-house defenders. Mr. Scott accepts a limited number of cases and was assigned only three cases during the third quarter, two of which were juvenile matters.

her investigation rate appears low, the fact that she has already requested investigation on one of her six felony cases is a good sign.

During the fourth quarter, Grant County should take steps to ensure that all of its attorneys are utilizing investigators when appropriate. Supervising Attorney Ray Gonzales should meet individually with the defenders with low rates of investigation to discuss the importance of investigation in case preparation, emphasizing the value of investigation not just for trial but for plea negotiations as well. Mr. Gonzales should also consider setting up a training session on this topic.

### **Experts**

The Settlement Agreement anticipates that the use of experts will be essential to effective representation in some cases and requires that expert requests be made *ex parte* and sealed in the court file.

For the third quarter, I found six cases in which Grant County public defenders requested experts. Robert Kentner, John Perry, and Janelle Peterson each made two requests for experts. All of the requests appear to have been made *ex parte*. Both of Ms. Peterson's requests were sealed, while Mr. Kentner and Mr. Perry each had one of their two requests sealed. Procedural issues continue to be an obstacle to proper sealing and thus protection of client confidences. In one case, a motion to seal was filed, but the documents were not sealed, and there was no record of a ruling on the motion to seal. In another case, the expert motion and declaration were sealed, but the motion to seal itself contained confidential information regarding the expert, and that motion was not sealed.

Procedures relating to sealing have been a persistent problem in Grant County. In past reports, I have urged the Supervising Attorney (past and present) to address this issue with little success. I hope that during the fourth quarter, Mr. Gonzales will devote some time and attention to this issue.

### **Motions Practice**

Each quarter, I evaluate motions practice by identifying cases in which motions have been filed and reviewing the relevant court files. I also inquire of the defenders whether they are aware of any additional motions I may have missed.

During the third quarter, I found 13 cases in which Grant County defenders had filed substantive legal motions.<sup>8</sup> Dean Terrillion filed motions in 5 of his cases this quarter, while John Perry filed motions in 4 cases. Robert Kentner (2), Janelle Peterson (1), and Kacie Maggard (1) also filed substantive motions this quarter.

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<sup>8</sup> For purposes of this analysis, I define substantive motions as any written motion to suppress pursuant to CrR 3.5 or CrR 3.6, any written Knapstad motion, and any written brief that contained substantive legal analysis tailored to a particular case.

At least two defenders achieved favorable results for their clients during the third quarter as a result of their motions practice. Mr. Terrillion won the exclusion of evidence in one case and suppression of his client's statements in another. Also in the third quarter, though it is quite rare for written motions to be filed in contempt cases, I learned that Ms. Maggard had not only filed a substantive brief in a contempt matter but won dismissal of the action. Her briefing was extensive and well-reasoned on what appears to have been a complex issue relating to whether the petitioner could pursue Social Security death benefits through a contempt action in the absence of an existing child support obligation .

Three defenders did not file any substantive motions during the third quarter: John Doherty, Brett Billingsley, and Julie St. Marie. I have no concerns about Ms. St. Marie's motions practice as she routinely files suppression briefs and other motions. Mr. Billingsley, however, has filed substantive briefs in only two cases this year and did not file any substantive motions at all in 2008. While natural variation in case assignments may result in Mr. Billingsley being assigned fewer cases with good legal issues than his colleagues, it is very unlikely for this pattern to persist over such a long period of time. As described in my last report, Mr. Billingsley is quite capable of briefing and litigating legal issues, but for some reason, he does so only rarely. Mr. Billingsley should be encouraged to brief legal issues more frequently in the future. Finally, Mr. Doherty has not yet filed any motions since joining Grant County's Department of Public Defense in May. He has been on a reduced caseload, however, and did not inherit an existing caseload when he arrived. As his caseload builds over time, I would expect to see him filing more motions.

In addition to the more substantive legal motions discussed above, I found that Grant County defenders had filed discovery motions and supplemental discovery requests in 31 cases during the third quarter. Mr. Kentner and Ms. Peterson were responsible for the almost all of this discovery litigation with Mr. Kentner filing motions for supplemental discovery in 22 cases and Ms. Peterson filing supplemental discovery requests in 8 cases.<sup>9</sup> These defenders should be commended for carefully reviewing discovery early in their cases and promptly notifying the State that additional discovery is needed. This practice facilitates investigation, plea negotiations, and trial preparation, and as a result, expedites case resolutions. Prompt requests for missing or additional discovery should be a matter of routine. All of Grant County's defenders should follow the lead of Mr. Kentner and Ms. Peterson in this regard. Moreover, if necessary, the defenders should note a motion to compel rather than wait until the omnibus hearing to address outstanding discovery issues. Given the recent emphasis on expeditious case processing in Grant County, defenders who do not actively pursue needed discovery in a timely fashion risk being forced to go forward without it.

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<sup>9</sup> Mr. Perry also filed a motion for additional discovery in one of his cases.

## **Trials**

Julie St. Marie continued to dominate the trial calendar during the third quarter, taking three different cases to verdict. She tried a controlled substances homicide case, a child rape/communication with a minor for immoral purposes (CMIP) case, and a robbery/witness tampering case this quarter. She won a complete acquittal in the robbery/witness tampering case as well as a not guilty verdict on the CMIP charge. Ms. St. Marie has already tried 8 cases this year. She has personally tried more cases in 2009 than all of Grant County's defenders combined in 2007 and has more than double the number of jury trials for the year of any Grant County defender in many years. I continue to be very impressed with her trial work.

Brett Billingsley also had multiple jury trials during the third quarter. He tried two cases, a perjury case and a high-profile Assault 1 case in which the alleged victim was a police officer. The assault trial lasted two weeks and ended with a guilty verdict on the lesser charge of Assault 2. Trial is certainly one of Mr. Billingsley's strengths. He has already tried four cases this year, and until very recently was the only remaining defender other than Ms. St. Marie who had had a jury trial in 2009.

The trial work of both Ms. St. Marie and Mr. Billingsley this year has been refreshing. Moreover, I understand that several other defenders have tried cases in October. While clients, prosecutors, and the court often have more control over whether cases proceed to trial than public defenders, a robust trial practice is nonetheless usually a good indicator of a strong public defense program.

## **Overall Quality of Representation**

The turnover rate in Grant County makes it very difficult to evaluate the overall quality of representation as it takes time to develop a fair picture of the work being done by individual defenders. Grant County has lost a number of strong defenders over the last year, but in time, their replacements may prove to be as capable or better.

In reporting on the quality of representation, I frequently refer to objective criteria such as timely jail visits, investigation rates, and motions filed. Some defenders have expressed frustration with this approach, suggesting that it does not offer a complete picture of the representation they provide. While I recognize that a defender might, in some cases, be able to provide a good defense without ever visiting his or her client in jail, investigating the case, or filing a written motion, these are all basic aspects of criminal defense practice that should be part of the minimum standards required by any public defense program. At the same time, I understand that lawyers have different styles and philosophies and may achieve success in different ways. Aside from jail visits, which should happen in every case, there is a wide range of acceptable practice. For that reason, I generally try to give Grant County's defenders the benefit of the doubt unless they fall below basic standards of practice.

In general, I am guardedly optimistic about the quality of public defense in Grant County. Aside from caseload limits, the key to good public defense is hiring and retaining the right personnel. The public defenders with the longest tenures in Grant County, Ms. Peterson and Ms. St. Marie have certainly proven to be assets to the program, though unfortunately, Ms. Peterson will be leaving in a few months. While more time is needed to observe and evaluate some of Grant County's newer hires, my preliminary impressions have been, for the most part, positive. The challenge for Grant County going forward will be to evaluate its current public defenders to ensure that they are willing and able to meet Grant County's standards for quality representation. Assuming Grant County is pleased with the results of this process, Grant County must then take care to ensure it retains those defenders for the long term.

### **Interpreters**

Grant County's public defenders have a large number of Spanish-speaking clients and thus frequently rely on Spanish interpreters. The defenders have consistently praised interpreters Saul Castillo and Jeremy Chambers not just for the quality of their work but also for their professionalism and availability. For their part, the interpreters report that many of Grant County's defenders make regular use of interpreters outside of court. In particular, they identified Janelle Peterson, Robert Kentner, Dean Terrillion, and John Perry as regularly scheduling interpreter sessions with their clients.

On my most recent visit to Grant County, both the defenders and interpreters expressed concern regarding a change in the system for scheduling Spanish interpreters for client visits, witness interviews, and the like. Apparently, there is a plan under consideration that would require the defenders to schedule interpreter visits through the court rather than by contacting the interpreters directly.

Defenders have concerns as to how this new system will impact interpreter availability for short notice meetings before or after normal business hours and on weekends. Frequently, the attorneys do not know whether an inmate or witness needs an interpreter until the last minute. Similarly, the attorneys sometimes may not be aware of the need for a meeting until receiving an urgent call from a client, client family member, investigator, or even a prosecutor with a last minute plea offer. These situations have not been a significant problem in prior years because Grant County's Spanish interpreters have been very accommodating in making themselves available for such emergency meetings.

For their part, the Spanish interpreters expressed concern not just about these last minute meetings but also the financial viability of continuing to provide interpreter services for Grant County at all, particularly in light of prior cuts to interpreter services this year. Earlier this year, Grant County cut its Spanish interpreter time significantly. Prior practice had been for Grant County to have two Spanish interpreters available for both the Monday and Tuesday docket days. Both interpreters were based in the courtroom and available to translate documents, assist attorneys in conferring with clients, and provide

in-court interpretation if the court's interpreter was unavailable. One interpreter remained in the courtroom at all times, but the other was available to the defenders to go to the jail or the work release facility for client meetings or to provide other assistance to defenders outside the courtroom. For 2009, however, Grant County cut the scheduled interpreter time on docket days in half. Currently, only one Spanish interpreter is available in court on those days. As a result, attorneys no longer have the option of visiting clients or otherwise utilizing an interpreter outside of court during that time unless specific arrangements have been made in advance. Attorneys also previously had a block of interpreter time reserved on Wednesday mornings, but that too has been eliminated. Interpreters do remain available on an on call basis, however.

As a result of these cutbacks, the interpreters have apparently had to pursue other work and are no longer as available as they once were. Both the defenders and the interpreters have expressed fear that this new system will further cut back on interpreter time and make it even more difficult to arrange to communicate with Spanish-speaking clients or witnesses, particularly if the interpreters are forced to pursue other employment opportunities that further reduce their availability.

The details of this new system remain unclear to me, and I do not believe any changes have yet been implemented, so it may be that the concerns detailed above prove unfounded. I plan to monitor this issue closely in the fourth quarter and will apprise the court and the parties of any issues that arise.

### **Conflicts**

Supervising Attorney Ray Gonzales was definitely more attentive to conflict issues during the third quarter, and this was a positive development. On two occasions when conflicts were discovered mid-case, he addressed them promptly and appropriately. In addition, Mr. Gonzales addressed procedural issues relating to investigator conflicts, though I have not yet had a chance to review those changes.

With respect to the basic conflict check procedures, however, I have concerns about some adjustments that were made during the third quarter. Rather than simply checking past case assignments for prior representation of a victim or witness, Grant County now checks those past assignments for any involvement of a victim or witness in any capacity. This practice dramatically expands the scope of the Department's policy, leading to the identification of far more potential conflicts, though virtually none of these potential conflicts are actual conflicts. For example, if a Wal-Mart security guard is a listed witness, Grant County's new conflict check procedure will identify a conflict for every lawyer who had a prior case that occurred at Wal-Mart involving that security guard. For one defendant recently picked up on a warrant, the Department's new conflict check procedure identified Janelle Peterson as having a conflict due to prior representation involving the same witnesses. Upon further review, I discovered that the prior representation was actually of the same defendant on the same case as she had been the assigned attorney when warrant was issued. Because the new procedure flagged a

conflict, however, the case was assigned to new counsel rather than returned to Ms. Peterson.

If Grant County used this procedure solely as an initial screening mechanism and then looked more closely at each potential conflict, the system would be labor intensive but workable. Unfortunately, Grant County seldom reviews the conflicts further. In most cases, the preliminary results are the final results, and all the false positives are presumed to be conflicts. This is problematic for a two reasons. First, this system will unnecessarily increase the use of conflict counsel. When false positives make it appear that an all-defender conflict exists, Grant County will end up hiring outside counsel even though its defenders do not have a real conflict. Second, repeat offenders will be less likely to be represented by the same public defender when a new charge is filed. Consistency of representation is beneficial in that both attorney and client already have a relationship, a familiarity with each other that gives the defense a head start. Consistency also benefits the County as it reduces the number of attorneys who will be conflicted out of future representation. If defendants are assigned to a different public defender each time they come through the system, the number of conflicts, and thus the expense of conflict counsel, will increase substantially over time.

I will continue discuss conflict check policy with Mr. Gonzales during the fourth quarter and hope that Grant County will have an approved policy in place by the end of the quarter. Meanwhile, Grant County has purchased case management software and expects to begin implementation in the near future. Gail Sundean, who has worked with this particular software in the past, advises that it will make conflict checks easier. It remains unclear whether the Department of Public Defense will be able to import case assignment data from its existing database into the new software system. If not, Grant County will either have to enter the data manually or maintain a dual system for the foreseeable future.

### **Supervising Attorney**

The Settlement Agreement requires that the Monitor “oversee and assess the Supervising Attorney’s performance.” In August, I contacted counsel for Grant County to discuss Mr. Gonzales’ performance as Supervising Attorney and to advise the County more fully regarding my reservations about his work to date. I offered to meet with the Grant County Commissioners to further discuss the issue if they wished. Unfortunately, another of Grant County’s attorneys, who had not been involved in prior discussions of this matter, apparently took umbrage at my assessment and wrote emphatically of his ongoing support for Mr. Gonzales. As I have tried to stress from the outset, my role with respect to Grant County’s Supervising Attorney is purely advisory. The Settlement Agreement compels me to provide a candid assessment of his performance, but Grant County is free to disregard that assessment.

Though Grant County is apparently satisfied with Mr. Gonzales’ performance at this time, I continue to have concerns. Mr. Gonzales has a great deal of experience as a

public defender and a reputation as a skilled trial lawyer, but the traits that allow one to excel as a front line defender do not necessarily make one a good supervisor. While the third quarter was not as chaotic as the second, I nonetheless continued to find significant problems with supervision.

In reviewing case assignments for July, for example, I found a case in which Mr. Gonzales delayed assigning counsel to an in-custody defendant for a month. Upon further review, I discovered that the problems with the case went far deeper than the delay in assigning a lawyer. H. V. was charged with Assault 2, but at his first appearance on June 8, the court found no probable cause to detain the defendant. There was some discussion of an I.C.E. hold, however, and the court noted that the defendant would remain in custody until that hold was cleared. This was treated by the jail as a no bail hold on the criminal matter.

Though the court appointed counsel on June 8 at first appearance, Supervising Attorney Ray Gonzales did not assign counsel as directed. He apparently believed counsel was unnecessary because he anticipated that the defendant would quickly be taken into the custody of immigration officials. In fact, the no bail hold in the criminal case prevented that from happening.

On June 15, H. V. was brought before the court for arraignment. When the matter was called late that afternoon, Brett Billingsley volunteered to stand in for arraignment as counsel had not yet been assigned. Mr. Billingsley, apparently unaware of circumstances of the case, did not make a motion for release or object to the continued detention of H.V. without probable cause. The matter was set for omnibus hearing on July 7. Although H. V. continued to be held in custody on the criminal matter and had an omnibus hearing scheduled, Mr. Gonzales still did not assign counsel.

On July 7, in-house defender John Doherty had finished in court for the day and was preparing to leave when he noticed that an inmate remained in the jury box but no other defenders were present. To his credit, though he had not been assigned the case, Mr. Doherty looked into the matter and stood in to represent the client at that hearing. Mr. Doherty correctly objected to the continued detention of the defendant in the absence of probable cause. A second judge reviewed the case at that time, and he too found no probable cause to detain. The defendant had been held on the case for 31 days at that point. Nonetheless, the court agreed to give the State additional time to argue probable cause and continued the matter to July 14.

Supervising Attorney Ray Gonzales finally assigned the case to John Doherty after the omnibus hearing on July 7, approximately a month after he had been ordered to do so by the court. During that month's delay, no one visited the client in jail. No one worked on his case. No one did anything to seek his release from custody.

On July 14, a colleague covered for Mr. Doherty<sup>10</sup> at the omnibus hearing and agreed to continue the matter to July 21. H. V. had been in custody for 38 days at that point without any finding of probable cause to detain; yet the matter was simply continued with the apparent consent of defense counsel.

On July 21, Mr. Doherty appeared for the second time and again objected to the continued detention of H. V. without probable cause. The court declined to address the matter and directed the defense to either argue the issue in front of the original judge or appeal to a higher court. An omnibus order was entered, and the matter was scheduled for a CrR 3.5 hearing.

On August 3, counsel visited H. V. in jail for the first time. H. V. had been held in custody without probable cause for 58 days at that point. On August 4, 2009, the day his trial was scheduled to begin, H. V. pled guilty to Assault 3 and was sentenced to one month in jail with credit for time served. He had already served twice his recommended sentence at that point. Although the defendant was known to have immigration issues, the plea was not executed with those concerns in mind. By incorrectly listing the *mens rea* as intent rather than negligence and adopting the probable cause statement rather than having the defendant write his own, H. V.'s public defender may have created an entirely new basis for deportation, a problem that could easily have been avoided.<sup>11</sup>

H. V.'s case was completely mishandled from the start. An indigent defendant being held without probable cause on a no bail hold should have been treated with the utmost urgency by the Grant County Department of Public Defense. Supervising Attorney Ray Gonzales should have immediately appointed counsel as directed by the court. Moreover, he should have closely monitored the progress of the case to ensure that assigned counsel was treating the matter with the appropriate seriousness and sense of urgency as well as to provide guidance as to how to proceed in this very unusual circumstance.

Had counsel been assigned, he or she could have sought the defendant's release at arraignment, if not sooner. Indeed, the original judge's intentions in this matter are not at all clear, and it is entirely possible that he never meant for the defendant to be held on the criminal matter. That same judge was on the bench a week later for H. V.'s arraignment, and had the question been brought before him then, the situation might have been resolved that day. If not, the issue should have been briefed and promptly brought before the court again in order to either persuade the court to reconsider or to make a record for appeal. If all efforts in the trial court failed, the assigned attorney, with the assistance of Mr. Gonzales, should have filed an emergency writ with the Court of Appeals seeking the

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<sup>10</sup> Mr. Doherty was apparently in Pierce County addressing another matter as part of the wind down of his private practice.

<sup>11</sup> Assault 3 is one of the few felonies that does not automatically result in deportation. In evaluating whether an offense warrants deportation, federal courts look to the "record of conviction." In this case, the record of conviction is problematic in two ways: (1) the listed elements are inaccurate; and (2) the probable cause statement likely reflects conduct that constitutes a deportable offense under federal law.

immediate release of the defendant. Indeed, this type of situation is precisely why the writ process exists.

Unfortunately, none of these steps ever occurred. No one ever brought the matter back before the original judge. No one filed a formal motion for release with authority for the court to review. No one filed or even considered filing a writ with the Court of Appeals. No one visited this Spanish-speaking client in jail until the day before his trial date. No one investigated the underlying facts of a case in which two judges found no probable cause. Instead, Mr. Gonzales first delayed appointing counsel for a month, and after finally rectifying that mistake, he then failed to ensure that the case was properly handled for another month after that. The case just bumped along on the court's docket until H. V.'s trial date arrived. Mr. Gonzales acknowledges that the Department's handling of H. V.'s case was "not our finest hour" but even now does not seem to comprehend his own failings in this matter. For some reason, though he espouses an aggressive approach to casework, Mr. Gonzales takes a very passive approach to supervision.

As Supervising Attorney, Mr. Gonzales is charged with overseeing all of Grant County's public defenders. Among other tasks, he is expected to provide a measure of quality control. Yet, I find this aspect of supervision to be lacking in Grant County. As Mr. Gonzales himself frequently notes, he presumes competence. While this philosophy is appealingly optimistic, it is in many ways antithetical to management. If one could truly presume competence, there would be little need for a supervisor. The position would be largely ministerial in nature, and Grant County could simply hire an administrator for the program. An effective manager presumes neither competence nor incompetence; he oversees his employees in such a way as to know whether employees are competent or not. Over time, Mr. Gonzales will learn the strengths and weaknesses of the various defenders, and some will prove to require less supervision than others, but to embrace a sort of blind trust from the outset is an abdication of managerial responsibility. A presumption of competence may be warranted if it has been earned, but during his tenure with Grant County, Mr. Gonzales has presumed competence without any basis for doing so. To avoid this problem in the future, Mr. Gonzales needs to be more proactive in monitoring his staff. Rather than presume Grant County's defenders are visiting their clients in jail, requesting investigation, and filing motions, for example, he should know whether they are or not. Taking this approach will allow Mr. Gonzales to address issues early on, before problems become chronic or a crisis develops.

I have had extensive discussions with Mr. Gonzales in recent months regarding my hope that he will hold Grant County's defenders to the same high standard he would expect of himself in representing Grant County's indigent defendants. I have also emphasized to him that he should take the lead in defining practice standards for the defenders. In our discussions, Mr. Gonzales and I frequently agree about legal issues and strategies, but there seems to be a disconnect when it comes to Mr. Gonzales imparting his views to the defenders. For example, Mr. Gonzales and I agree that whenever possible, the attorneys should avoid checking the box on the standard guilty plea form indicating that the

defendant adopts the probable cause statement as his own.<sup>12</sup> Yet I recently pointed out to Mr. Gonzales that most of the Grant County defenders were doing so as a matter of routine. To his credit, after our discussion, Mr. Gonzales addressed this issue with the defenders and explained his views regarding best practices in completing plea forms. Mr. Gonzales must do more of this. His knowledge and experience is only helpful to the defenders if he actively engages them on issues and cases. In the future, Mr. Gonzales needs to be attentive when opportunities to teach arise whether those opportunities relate to the practice of an individual defender or the group as a whole. I was pleased to learn from his September report that Mr. Gonzales is scheduling performance evaluations for the in-house defenders.<sup>13</sup> Perhaps the structure of the evaluation process will provide Mr. Gonzales just the opportunity he needs to mentor his staff and work to raise the overall level of practice in Grant County.

### **Conclusion**

Grant County public defense remains in a state of transition. The in-house office is just over six months old, and a majority of the defenders are new to the program this year. Supervising Attorney Ray Gonzales and these new defenders will define the direction of Grant County public defense over the coming months. I look forward to observing the growth process of this new program. Hopefully, Mr. Gonzales will set high standards and the defenders will exceed them.

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<sup>12</sup> Adopting the probable cause statement can cause a host of problems in future proceedings in immigration court, federal court, and/or court of other states.

<sup>13</sup> Mr. Gonzales should also evaluate the contract defenders as he is responsible for supervising them as well.