



OFFICE OF THE DISTRICT ATTORNEY
MARIN COUNTY, CALIFORNIA

Prevention * Prosecution * Protection

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July 14, 2023

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June 15, 2023
3501 Civic Center Drive, Room #275
San Rafael, CA 94903

Re: Marin County District Attorney's Response to May 15, 2023, Civil Grand Jury
Findings F1 – F8 and Recommendations R2 – R7

Dear Ms. Shepherd:

Below are the Marin County District Attorney's responses to Findings F1 – F8 and Recommendations R2 – R7 as set forth in the May 15, 2023, report of the 2022–2023 Marin County Civil Grand Jury entitled, *Justice Delayed is Justice Denied – Marin District Attorney's Office in Crisis*.

Finding F1. There is a substantial backlog of criminal cases pending in Marin County.

Response: Per Penal Code section 933.05(a)(2), I partially disagree with this finding.

There is a backlog. However, , the backlog has trended *downward* during the period of time evaluated by the Grand Jury, despite the COVID-19 global pandemic forcing court closures in starting in March of 2020. Per the District Attorney's Office's case management system, which extracts data and statistics from Marin County Superior Court minutes, the number of pending jury trial at various times is a follows:

DATE	TRIALS SET	
	Misdemeanor	Felony
August 18, 2018	267	22
December 27, 2018	280	16
January 3, 2019	271	15
January 6, 2019	District Attorney Lori E. Frugoli took office	
March 16, 2023	285	27
July 6, 2023	226	12

Pat Shepherd, Foreperson
July 14, 2023
Page Two

The Grand Jury's report evaluated jury trial numbers commencing from January 2019. As of July 6, 2023, there were 48 fewer cases set for trial than in January of 2019. Accordingly, the backlog of pending jury trials is no more substantial than before the period the Grand Jury is investigating and in fact has been reduced substantially since the current District Attorney took office in January 2019.

Finding F2. Victims of crimes and people charged with crimes in Marin are waiting an unreasonable length of time for cases to be resolved - in many cases more than a year.

Response: Per Penal Code section 933.05(a)(2), I partially disagree with this finding.

The District Attorney's Office agrees several criminal cases have been pending for more than a year. However, a delay in the resolution of a case is not fairly deemed "unreasonable" merely by the passage of time and, indeed, a one-year duration can be quite expeditious in many instances.

For example, page 8 of the Grand Jury's report referenced a "gang-related homicide case that was in trial for six months." That case involved a May 25, 2016, incident, and charges were filed that same month. The case started with four co-defendants and within a matter of months expanded to eight co-defendants, all associated with the MS-13 criminal street gang. They were accused of killing one Novato High School student with a machete and attempting to kill another student with a gun and a knife. The co-defendant whose trial lasted "in excess of six months" was represented by two defense attorneys who had filed over 100 motions in the case, raising legitimate legal issues that needed to be litigated. Pretrial motions were litigated over the course of several years, and the trial motions themselves lasted four months. Jury selection took nearly six weeks, and the trial itself lasted from August 2022 to March 2023. Following the jury's guilty verdicts, the case was continued for sentencing and other post-judgment proceedings so one of the defendant's attorneys could travel to Pennsylvania this summer to represent Robert Bowers, the man accused of 11 murders in the 2018 Pittsburgh synagogue shooting. Sentencing in the Marin County case is expected to resume in the Fall when the defendant's attorney returns.

This is but one example of the many serious cases pending in the courthouse. At no time did the victims' families complain about the duration of the case and instead repeatedly have expressed their gratitude the District Attorney's Office for its countless hours of effort bringing those defendants to justice.

In terms of the time a case is pending from when charges are filed to resolution, the Grand Jury must appreciate the amount of work a case takes to prepare a case, not only by the People but by the defense. In a felony case, for instance, evidence review alone often involves reading hundreds of pages of reports, reviewing several hours of body-worn camera footage, and lengthy and thorough interviews of potential witnesses. Certain evidence often takes substantial time to obtain, such as blood test results for the presence of drugs and/or alcohol and DNA evidence. Background checks must be conducted on all officers and other witnesses. These delays are unavoidable and are meant to ensure the integrity of the criminal justice system for the accused, the victims, and the community as a whole.

To the extent the Grand Jury is concerned about defendants remaining in custody while their cases are pending, it is critical to consider many more factors than simply duration when evaluating reasonableness: How serious are the crimes? What is the defendant's criminal record? Does the defendant have a history of noncompliance with orders to appear? Has the defendant reoffended when released on bail? Initially, it is the arresting agency that decides whether to book a suspect into custody or to release them on a promise to appear in court. Then, the Court is charged with determining whether a defendant should remain in custody, taking into consideration the risk the defendant's release would pose to the community as well as the defendant's likelihood of returning to court if released. In making its determination, the Court considers not only these factors but also the recommendations of the Probation Department, which prepares a detailed Pretrial Report addressing these issues, as well as the observations of the District Attorney and the defendant's counsel. In short, the District Attorney's Office does not have unilateral authority to determine whether a defendant remains in custody.

As of July 7, 2023, 244 individuals are in custody at the Marin County jail. Twenty-two of the current inmates have been booked for charges of murder or attempted murder. Twenty inmates are facing robbery or attempted robbery charges. Six were booked for gang-related crimes. Ninety-eight of the inmates collectively have a total

of 422 prior warrants for their arrest. One inmate has been booked for a total of twenty-two warrants.

Case complexity, danger to the community, the defendants' rights, and the victims' rights cannot be overlooked when considering the "reasonableness" of delays between filing and disposition. It does not appear the Grand Jury considered the interplay of these various relevant considerations when making its Finding No. 2.

Finding F3. The District Attorney's Office is primarily responsible for the delays in resolving criminal cases in Marin.

Response: Per Penal Code section 933.05(a)(2), I disagree wholly with this finding.

Short of dismissing charges, the District Attorney's Office cannot unilaterally resolve a criminal case and certainly cannot force a defendant to plead guilty. Rather, the decision to plead guilty rests solely with the defendant, and even then a defendant can only do so if the decision is "knowing, voluntary, and intelligent." Several current defendants, however, are legally incapable of making a knowing, voluntary, and intelligent decision to plead guilty.

Hundreds of defendants suffer from mental illness, developmental disability, or both, such that judges routinely "declare a doubt" as to their competency to stand trial. In such circumstances, criminal proceedings are suspended, and the defendants are placed in mental health treatment until they are restored to competency, which can take months or even years. While criminal proceedings are suspended, no action can be taken in those cases, including accepting guilty pleas or conducting jury trials. The District Attorney's Office has no control over when a defendant will be declared incompetent to stand trial or for how long the defendant will be treated. In other words, the District Attorney's Office should not be faulted for the often very lengthy delays that occur in mental health cases.

Even where a defendant is legally competent to enter a guilty plea, many cases are pending because a defendant simply rejects the People's offer. A routine response from defense attorneys when asked why an offer was rejected is: "I advised my client to take the deal, but they want to go to trial. I don't have any client control in this case." The District Attorney's Office is wholly understanding of this all-too-common scenario that results in delays at no one's fault other than the defendant.

Another huge volume of unresolved cases is due to defendants who have failed to appear for court and, thus, have outstanding bench warrants for their arrest. According to the Marin County Sheriff's Office, from January 2019 to July 2023, approximately 14,000 bench warrants were issued by the Court. That these cases remain unresolved while defendants have absconded—sometimes for years at a time—should not be attributed to the District Attorney's Office as a source of delay. Furthermore, with the March 2021 issuance of the California Supreme Court's decision in *In re Humphrey*, 11 Cal.5th 135, a far greater number of defendants have been released on their own recognizance, resulting in a concordantly increased number of missed court appearances over the last two years. Again, the District Attorney's Office has no control over defendants who disregard the judges' orders to appear in court.

It is not apparent from the Grand Jury's May 15, 2023, report whether any of its members attended any Superior Court proceedings to witness for themselves these aspects of the criminal justice system that result in delays beyond the control of the Court or the District Attorney's Office.

The Grand Jury's report acknowledges that the COVID-19 global pandemic was a factor in creating a backlog of cases in 2020 and 2021 but then assumes business was back to normal starting in 2022. This assumption is unfounded in several respects. First, there were several "false starts" to reopening the courthouse in 2022. The presiding judge of the Superior Court issued multiple orders—all well founded in light of the pandemic—continuing the reopening date 30 days at a time. With each false start, the attorneys for both sides, the judges and court staff, and testifying witnesses had to spend significant time and effort preparing and then re-preparing cases for hearings and trials. Second, many hearings and trials were continued because either an attorney or a witness contracted COVID or needed to care for someone who contracted COVID. Third, even when the courthouse reopened for jury trials, far fewer jurors qualified (or even showed up) for jury duty, requiring several more jury panels to be summoned for a single trial. And, with social distancing, courtrooms could accommodate far fewer jurors at one time, resulting in protracted *voir dire* hearings.

Additionally, several cases have been continued due to courtroom unavailability, despite the District Attorney's Office announcing "ready for trial" when the cases are called. It does not appear that the Grand Jury inquired into court staffing levels and potential other reasons for the longstanding and continuing shortage of available courtrooms, not only in criminal matters but in civil cases as well.

Overall, it does not appear the Grand Jury factored into its analysis the compounding effect of these additional consequences of the COVID-19 global pandemic that delayed the resolution of cases well into 2022 and still today.

In light of pandemic-induced delays, the District Attorney's Office made several temporary policy changes to an effort to reduce the jail population and the number of criminal filings in general. For instance, the District Attorney's Office suspended the filing of charges for various "quality of life" violations such as public intoxication, trespassing, illegal camping, possession of a drugs and drug paraphernalia, and probation violations for those offenses. Additionally, numerous pending cases with those charges were dismissed, all in an effort to reduce the growing backlog. Additionally, the District Attorney's Office significantly lowered our standard offers in DUI cases to encourage disposition of those cases. In January 2023, the District Attorney's Office announced the termination of the "DUI COVID" offers as of May 31, 2023, which precipitated the settlement of 223 DUI cases, a 600% increase over the 36 cases settled in the prior quarter. The District Attorney's Office has made these and several other policy changes in an effort to reduce the backlog that the Grand Jury was either unaware of or did not take into consideration.

In April 2022, another large volume of cases were intentionally delayed with the full cooperation of the defendants, their attorneys, and the Courts. At that time, new legislation was enacted that rendered a greater class of misdemeanor offenses eligible for diversion. The legislation was ambiguous as to whether DUIs qualified for diversion, so the defense, the Courts, and the District Attorney's Office agreed to continue numerous DUI cases while the legal community patiently waited for clarification from the California appellate courts. That calculated delay of a substantial number of cases is not properly attributed solely to the District Attorney's Office, which appears the Grand Jury has done in its May 15, 2023, report.

Ultimately, the California appellate courts clarified that DUI offenses do not qualify for diversion under the new legislation. In response to the then-substantial backlog of DUI cases that had been put on hold, a team of deputy district attorneys worked tirelessly for months to ensure thorough case review and to formulate offers to settle those cases. Then, in May 2022, the DA's Office, defense bar, and the Courts worked collaboratively over a three-day "settlement conference" to resolve as many of those DUI cases as possible, successfully settling approximately 150 such cases.

Moreover, the current backlog of cases is not unique to Marin County. In February 2023, Bay Area elected District Attorneys met to roundtable their mutual concern of court backlog and staffing shortages. We learned that most offices had experienced the "Great Resignation" whereby highly qualified deputy district attorneys left their offices for a variety of reasons, but without one-to-one replacement, leaving huge voids in staffing. Similarly, other counties have experienced substantial backlogs commensurate with how long their courthouses were closed. One office had not conducted a time-waived jury trial in two years.

Additionally, most District Attorneys reported a drastic decline in case settlements, which is attributable to the understandable, and frankly reasonable, defense tactic of seeking better offers from the judges during this unique time. Currently, the Marin DA's Office misdemeanor team has 20–30 jury trials set each week. Knowing judges likewise are feeling the crush of the case backlog, defense attorneys are rejecting offers from the District Attorney's Office with the hope they can get better dispositions from judges on the day of trial. This tactic causes further delays in case resolution and wastes hours and hours of time deputy district attorneys spend preparing those cases for trial.

Finding F4. The District Attorney's Office lacks the internal organizational structure and operations to facilitate the efficient processing and resolution of criminal cases.

Response: Per Penal Code section 933.05(a)(2), I partially disagree with this finding.

It is difficult to respond to this broad two-pronged criticism of organizational structure and operations without clarifying what aspects of those issues were identified or investigated by the Grand Jury. This finding appears to be based upon Finding Nos. 2 and 3, with which I disagree as discussed above.

Assuming "structure and operations" refers to additional staffing who could assume duties such as processing discovery, law-and-motion work, murder cases, parole hearings, discovery compliance, and updating protocols, I agree with this finding.

However, there is no indication the Grand Jury visited the District Attorney's Office, reviewed the internal structure of the office, met with its office finance manager, its legal support manager, its IT manager, or its Investigations Unit when making this finding. Had these employees been interviewed, or the processes observed first-hand, the Grand Jury likely would have revised or retracted Finding No. 4.

Other observations in the report appear to be based upon a similar lack of information. (*See response to Finding No. 5, below.*) A demonstration of the District Attorney's case management system and discovery program by those who use the programs would have provided a better picture of the office function, as would observing court proceedings. It does not appear the Grand Jury undertook either of these opportunities.

Finding F5. Deputy district attorneys are unable to consistently carry out their legal duties due to overwhelming caseloads.

Response: Per Penal Code section 933.05(a)(2), I partially disagree with this finding.

Large caseloads did, and continue, to clearly be a concern in the office and do affect the efficiency of attorneys. However, as noted, that is but one factor in the overall consideration of the backlog issue and prosecutor's "legal duties." County employees serve as Disaster Service Workers (DSW) and did so in 2020 during the fires, power outages and throughout the Pandemic. In total, District Attorney staff served 11,000 hours as DSW workers during the Pandemic, in addition to their work duties.

It is believed the Grand Jury finding is based in part on dated information, as significant improvements have been made in the months before the release of the report. During 2022 and continuing into 2023, we implemented procedures to streamline some of our processes. Initial charging and police reports are disclosed and available to the Public Defender's Office digitally when a case is filed and before the person's first court appearance. These documents are also available to an

appointed attorney once we know they are representing an individual. We do not automatically know if a defendant is represented by a private attorney. During 2022, we placed a link on our website for private attorneys to advise us they represent a defendant and request discovery digitally. During the summer of 2022, we worked with attorneys to further streamline the delivery of digital discovery. This process was implemented in January of 2023, and we have received favorable feedback from the defense bar on this improvement.

We agree the Expediter position is crucial to the misdemeanor caseload team and never underestimated the value of this position, nor did we intend to proceed without an expeditor. We moved that position to the misdemeanor trial team due to staffing shortages and the trial backlog. However, in the summer of 2022, we were able to place an experienced prosecutor part-time in that position. Since then, we have been able to assign an employee full-time to that position and recently placed an annuitant in a second Expediter position, which has assisted the misdemeanor team functions.

The fact remains that our attorneys and all staff have been and continue to be overworked and remain committed to the safety of our community despite less than optimum past circumstances. They sacrifice family time, vacations, and evening hours to ensure their legal duties are met to the best of their abilities despite the heavy caseloads.

They remain committed to finding ways to improve our services, as evidenced by the reduction of misdemeanor jury trials and recent settlement of over 300 DUI cases.

To reiterate prior responses, much of the difficulties outlined in this finding would be improved or resolved with additional staffing.

Finding F6. The caseloads must be reduced to manageable levels to stem the departures of attorneys from the office and to facilitate recruiting efforts.

Response: I agree.

Heavy caseloads are only one of many contributing factors which caused the departure of attorneys. Clearly, when the jury trial backlog is reduced, we will not

have the attorneys or support staff to properly address the current workflow and the influx of future complicated and labor-intensive, impending work and obligations. No specific, manageable caseload number was identified by the Grand Jury. Based upon our demonstrated, higher obligations and workload, the District Attorney caseloads should be significantly lower than the Public Defender's caseload and, at minimum equal to that of the Public Defender's attorneys.

Finding F7. The District Attorney's Office needs additional experienced deputy district attorneys to facilitate the processing and resolution of criminal cases.

Response: I agree.

We appreciate and 100 percent agree with this finding. The additional, experienced attorneys should be permanent employees with a promised future in the office as opposed to a temporary position.

Finding F8. The District Attorney's Office does not consistently provide discovery materials (e.g., police report, defendant's criminal history, camera footage) to defense counsel in a timely manner, thereby significantly delaying the resolution of cases.

Response: Per Penal Code section 933.05(a)(2), I partially disagree with this finding.

The District Attorney's Office believes this finding is partially outdated and based upon other findings which we believe have been shown to be inaccurate. Improvements implemented in 2022 and months before the report was released were not referenced in the report. (Refer to response to F#7). We do not agree that the District Attorney has "significantly delayed" the resolution of cases. We have acknowledged incidents where discovery was not timely provided. However, we dispute comments in the report such as "The office does not have a system in place to produce these materials in an organized timely fashion" and "The office does not have a system that identifies what materials need to be produced in each case." (Pg 8).

Discovery in the context of criminal cases is an ongoing and never-ending obligation which continues past conviction. The duty goes beyond providing initial police reports and charging documents, which are available digitally to the Public

Defender's Office before the first arraignment in court, and to the private defense bar when we are advised of their representation of a defendant.

Every case has its own dynamics of what will need to be discovered and the needs often change up to the day of trial. In addition, every case requires independent evaluation, and the discovery obligations may change with new supplemental reports, witness interviews, or information provided by the defense. This often occurs in domestic violence and sexual assault cases. We are required to document and disclose new information that comes to our attention after filing, which triggers another layer of discovery obligations. Even though we are not in possession of contacts with law enforcement, we are presumed to be aware of exculpatory information in the possession of law enforcement and regularly send requests for such information to agencies, creating another layer of discovery if we receive responses to our inquiry. Requests for Department of Justice toxicology reports require a separate request (often taking months to receive), and requests for certified prior conviction documents are submitted separately for each conviction, often to multiple counties or states. Those responses often take weeks or longer.

Attorneys and investigators must review hours (sometimes days) of body-worn camera (BWC) evidence to properly prepare for court proceedings. Bandwidth at the Civic Center often caused the evidence to freeze, and the attorneys had to view the BWCs from their homes. This situation was resolved in July of 2023.

Each item of evidence (BWC, 911 call, photos, prior conviction documents, criminal history information) may require a separate request from our office to the entity with the information. For example, separate requests are made to law enforcement for BWC and dispatch records.

In 2020, we implemented Evidence.com, a digital evidence management solution. This system tracks evidence and provides links for prosecutors and the defense to review and access evidence. It tracks when the discovery link is sent, as well as accessed by the defense attorney. In 2020, 7,741 pieces of evidence were processed through Evidence.com. As of June 30, 1141, pieces of evidence were processed.

In 2022, our Investigations Unit received 387 work order requests for discovery. Each work order ordinarily had several embedded requests such as: BWC, Dispatch records, etc. As of June 30, 2023, we received 192 requests.

In the summer of 2022, we began the process of further streamlining our investigative work requests. A streamlined process for most misdemeanors was implemented in January of 2023, with positive responses from the defense bar.

The District Attorney began seeking budget resources to improve the coordination of discovery delivery in March of 2019 and continue to do so as recently as the last budget request. Available programs to speed the processing of evidence are ever evolving. However, we cannot fast-track the time it takes to review body-worn cameras, which is required in many cases before filing, and by the attorneys before they go to court.

We continue to review and identify improvements to our discovery process, including the possibility of new software. Resources for these expenditures have been requested since March of 2019. Resources have been identified and set aside by the CAO's office for this purpose. We continue to meet with software and program vendors as recently as this week.

RECOMMENDATIONS

Recommendation R2. By December 1, 2023, the District Attorney's Office should hire two or more highly experienced former deputy district attorneys on short term (6 - 12 mos.) contracts whose sole responsibility would be to reduce the backlog of cases through plea negotiations, starting with the longest pending cases.

Response: This recommendation has been implemented.

This implementation has been partially implemented. In July, we hired an experienced, temporary Deputy District Attorney to assist with the backlog. The remainder of this recommendation will be implemented when additional, requested budget becomes available.

Recommendation R3. Once the caseload has been significantly reduced, the District Attorney's Office should hire experienced deputy district attorneys to maintain caseloads at a manageable level.

Response: This recommendation has not been implemented.

The District Attorney's Office fully supports this recommendation and firmly believes the positions should be permanent employees. This would vastly improve recruitment efforts and provide the promise of a future with the District Attorney's Office. The District Attorney's Office has requested resources on an ongoing basis. This recommendation will be implemented when additional, requested budget becomes available.

Recommendation R4. By December 1, 2023, the District Attorney's Office should implement a new process to provide discovery materials (e.g., police report, defendant's criminal history, and camera footage) to defense counsel within a reasonable time of arraignment.

Response: This recommendation has been implemented.

As noted in the response to Finding #8, many of our processes were improved months prior to issuance of the Grand Jury report. We continue to review and identify improvements to our discovery process, including the possibility of new software. Resources for these expenditures have been identified and set aside by the CAO's office.

Recommendation R5. By December 1, 2023, the District Attorney's Office should institute a position, such as an expeditor, that is primarily responsible for facilitating plea negotiations in misdemeanor cases.

Response: This recommendation has been implemented. Last summer, a prosecutor was assigned to the misdemeanor team whose primary focus was expediting SVU (Special Victims Unit) cases.

In April of 2023, we assigned a prosecutor to the Expediter position part-time, and they transitioned to the position full time in June of 2023.

In June of 2023, we hired an experienced, temporary attorney who is also serving as a misdemeanor expeditor.

Pat Shepherd, Foreperson
July 14, 2023
Page Fourteen

Recommendation R6. By October 1, 2023, the District Attorney's Office should hire paralegals to assist attorneys with discovery, witness coordination, and trial preparation.

Response: This recommendation has not been implemented.

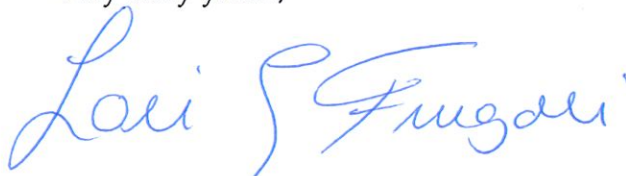
The District Attorney's Office requested resources for paralegals in our most recent budget request. This recommendation will be implemented when additional, requested budget becomes available.

Recommendation R7. By November 1, 2023, the District Attorney's Office should commence providing a quarterly update and statistical report to the Board of Supervisors and the County Administrator's Office on its progress to reduce the backlog of criminal cases.

Response: This recommendation has not been implemented and will be in the future.

We agree with this recommendation and will provide the first quarterly report at the Board of Supervisors' direction.

Very truly yours,



LORI E. FRUGOLI
DISTRICT ATTORNEY

LEF/sd