

MCPSCC

JULY 12, 2022

MEETING ATTACHMENTS

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ATTACHMENT 1

MEETING MINUTES MCPSCC APRIL 12, 2022

MARION COUNTY PUBLIC SAFETY COORDINATING COUNCIL

MINUTES

**April 12, 2022, 4:00 PM
Courthouse Square
Salem, OR**

MCPSCC: John Bauer, Joe Budge, Mark Caillier, Kevin Cameron, Rob Carney, Paige Clarkson, Jayne Downing, Don Frederickson, Judge Courtland Geyer, Tamra Goettsch, Troy Gregg, Roland Herrera, Chris Hoy, Linda Hukari, Alison Kelley, Christine McCollum, Ed McKenney, Pete McCallum, Todd McCann, Ed McKenney, Tim Murphy, Tracy Prall, Mike Runyon, Cari Sessums, Shaney Starr, Colm Willis, Shannon Wilson, Jeff Wood, and Hitesh Parekh (recorder).

GUESTS: Bruce Anderson, Chad Ball, Anne-Marie Bandfield, Ed Diehl, Dan Farrington, Christine Herrman, Scott McLean, and Representative Raquel Moore-Green.

1. ADMINISTRATIVE (INFORMATION/ACTION)

Meeting called to order at 4:05 P.M. by Commissioner Kevin Cameron. Introductions were made.

Announcements & Events

- The Marion County Reentry Council will be holding its 12th annual breakfast meeting on April 28 at the Keizer Civic Center. All are welcome to attend.
- Shaney Starr, Executive Director of CASA, announced a benefit event titled Light of HOPE- at the Salem Convention Center on May 14. All are welcome to attend.
- Jayne Downing, Executive Director, Center for Hope and Safety said groundbreaking for the new Hope Plaza will take place on Thursday 21st. All are welcome to attend.
- Bridgeway Recovery Services is opening a 18,000 SF facility on Bridgeway Plaza in Salem on May 19. Outpatient campus moved downtown and will make mental health treatment, chemical dependency, and problem gambling treatment more available to all.

Proposed Casino in Salem Letter

- Commissioner Cameron asked the council to ratify a letter sent to the Bureau of Indian Affairs requesting an Environmental Impact Statement for a proposed casino to be built in Salem.
 - Letter was approved by the Executive Committee of the MCPSCC at their March 22 meeting.
- **MOTION:** Don Frederickson made a motion to ratify letter. Rob Carney seconded motion. Motion passes. Judges Geyer and Prall abstained.

Memberships

MOTION: Jayne Downing made a motion to ratify the appointment of Commissioner Colm Willis and Christina McCollum, Behavioral Health Strategist, PacificSource to the council. Don Frederickson seconded the motion. Motion passes. (Commissioner Willis and Ms. McCollum were appointed by the Board of Commissioners to the council on April 6, 2022.)

Commissioner Cameron announced that the following member terms will expire at the end of July 2022: Alison Kelley, Jayne Downing, Levi-Herrera Lopez, and Representative Rick Lewis.

- Representative Chris Hoy said one bill that did not pass was HB 4036 which requested annual payments from the state for state property within the Salem City boundaries on which no taxes are assessed. State owns \$2.1 B worth of real market property in Salem that translates to \$5.1 M in GF dollars annually that it does not pay taxes on.
- Field Supervisor Mike Runyon, Oregon Youth Authority (OYA) said some language was added to HB 4004 which was a technical fix allowing the OYA to provide supportive payments to community program providers. In the past the OYA could only pay community providers on a fee for service basis for filled beds. However, since capacity is unpredictable, this makes managing a community program challenging.
- Behavioral Health Update- Aid and Assist- focused on length of stay in a county jail, was 5 days for in custody and 15 days for out of custody. Now 5 days for both, great if being charged, but hard on us if we cannot find individual. State also wants to expand crisis services in the community, for youth and families and partner with law enforcement service providers. Will be coming back in future to talk about this.
- Jane Downing, Executive Director, Center for Hope and Safety said several bills had victim related pieces to them. A lot of minor adjustments to make prior bills better.
- Shaney Starr, Executive Director, CASA, said a large portion of the *Victim of Crime Act* federal funds were repurposed and made unavailable locally. Will need to keep watching this in the future.

Summary of Discussion

Many marijuana bills passed in the session. There are a number of illegal grows in southern Oregon and Clackamas County which are related to human trafficking and water theft.

Q: Why have we been able to dodge here what Clackamas County has been going through in terms of grows?

A: Clackamas County is a large county with more national forestland. Lack of law enforcement presence in the wilderness areas. Remote, not many individuals monitoring these areas.

3. CRIMINAL JUSTICE ADVISORY COUNCIL (CJAC)

Commissioner Cameron said the council was now the Criminal Justice Advisory Council being chaired by Marion County Circuit Judge Tracy Prall. Summary of presentation by Judge Prall:

- Marion County's Criminal Justice Advisory Council was active during the COVID-19 period and moved criminal cases through the court.
- There is a statewide shortage of public defenders making this a challenging time for the courts.
 - The state Office of Public Defense Services (OPDS) is in regular contact with the court over this issue.
 - Currently 15 "out of custody" defendants are without counsel in Marion County- although county doing much better than other larger counties such as Multnomah- which has more than 300 defendants without lawyers.
 - Since most defendants are right up against their 60-day period, judges will have to make tough decisions about their release or dismissal. These are serious cases and put the court in a difficult position.
 - Chief Justice of the Oregon Supreme Court is working on a solution.
 - Legislature gave \$12.8 m to OPDS in emergency assistance.
 - Executive Director of Public Defender of Marion County Inc. Shannon Wilson came up with a great idea about designating some of her attorneys to just do BM 11 "in-custody" cases.

6. EMERGING ISSUES/OTHER BUSINESS

His Place

Marion County just brought a house outside the Woodburn city limits to house six dads who will engage in substance abuse recovery. Services are anticipated to start September 2022. PacificSource provided \$500,000 to assist with this.

Ambulance Service Agreements

Woodburn Fire Chief Budge said every five years the county reviews ambulance service agreements. This time there is a long list of service improvement suggestions, but providers are having difficulties getting some of these changes into the ambulance services plan. Commissioner Cameron suggested that better communication needed to occur between the service providers and the Marion County Health and Human Services Department.

Future public safety council items

- Cybersecurity and public safety
- Shortage of public defenders
- Victim services- follow up on sex trafficking survivors.

Commissioner Cameron thanked all the current legislators and those running for office for attending the council meeting.

ADJOURNED

ATTACHMENT 2


STOP DATA PRESENTATION

Oregon Department of
Public Safety Standards &
Training

**2021 S.T.O.P. REPORT
ANNUAL LPSCC
PRESENTATION**

Steve Webster, S.T.O.P. Coordinator
Center for Policing Excellence


Report produced by
Criminal Justice Commission



1

**Role of
DPSST**

**2017 HB2355
SECTION 4**




- (1) "shall receive and review reports."
- (2) "May provide advice or technical assistance to any LE agency mentioned within the report."
- (3) "shall present summary of advice or technical assistance to [LPSCC]."

2

<h1>Mentioned</h1> <p>—</p> <p>ONE</p> <p>ANALYSIS RESULTED IN DISPERATE OUTCOMES</p>	<h1>Referred</h1> <p>—</p> <p>MORE THAN ONE</p> <p>ANALYSIS RESULTED IN DISPERATE OUTCOMES</p>
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5



Clackamas County


Milwaukie Police Department
Facilitated a deeper analysis of data to account for data from a dedicated position

Clackamas County Sheriff's Office
No assistance from DPSST requested

6

Lane County

Eugene Police Department
No assistance from DP5ST requested



9



Washington County

Washington County Sheriff's Office
Joint meeting with WCSO and CJC, resulting in CJC conducting a deeper analysis factoring characteristics unique to WCSO

Hillsboro Police Department
Facilitated contact with CJC for a community meeting presentation

Beaverton Police Department
No assistance from DP5ST requested

10



Oregon State Police Mandatory Charge STOP Analysis

Oregon Criminal Justice Commission

15 April 2022

The results in the 2020-2021 STOP report¹ identified the Oregon State Police (OSP) for disparities for two of the three statistical tests. For one of the analyses, the predicted disposition analysis, which analyzes the dispositional outcomes of stops across race and ethnic group, discussions with OSP identified possible causes of these statistical disparities. OSP, and other police agencies, have internal policies mandating that certain types of violations result in a citation, search, and/or arrest, respectively. In such cases officers have no discretion in how they respond to the violation or crime. If a race or ethnic group is, for whatever reason, more likely to violate one of these rules then this lack of discretion *may* lead to data patterns that suggest discretion. Here we control for these OSP's mandatory action policies that limit officer discretion to examine to what extent, if any, these policies may explain disparities.

OSP provided the CJC with an amended full two-year data set (July 1, 2019 – June 30, 2021) which contained a flag denoting when a stop was identified as a mandatory charge stop, where the officer had little discretion in deciding the disposition of the stop. The mandatory charge nature of each stop was determined by OSP. While these resubmitted data were almost always identical to the originally submitted data there were slight differences that caused minor changes in some of the results, but these differences were relatively rare at the row level and do not impact the substantive results presented here.

The STOP research team included this data in the baseline predicted disposition analysis by adding the mandatory charge variable to both the set of treatment weighting variables and to the outcome regression analysis as a control variable². The results for the original analysis and this new analysis are presented in Table 1 below.

The inclusion of the additional mandatory charge information had varied impacts on the overall results. Where stops of Native American individuals were identified for disparities across all four outcome groupings (citations, searches, arrests, or any outcome (all 3 outcomes combined)) all of these analyses showed insignificant results when including the mandatory charge variable. The statistically significant Latinx search result also became insignificant when including the mandatory charge variable. Conversely, the analyses for the citation outcome and any outcome remained statistically significant for each set of individuals identified as Asian, Black, Latinx, and Middle Eastern, respectively. Within these results, however, the magnitudes of the differences between the actual citation/any rate and the predicted citation/any rate changed in varied directions. The magnitude of the difference for the Asian and Middle Eastern groups *increased* with the inclusion of the mandatory charge variable, whereas the magnitude difference for the Black and Middle Eastern groups *decreased*.

¹ https://www.oregon.gov/cjc/CJC%20Document%20Library/STOP_REPORT_2021_FINAL.pdf

² For more details, see Appendix of the report linked in footnote 1.

Table 1 – Original STOP analysis and new analysis using mandatory charge information

Outcome	Race/ Ethnicity	Baseline Analysis			New Analysis (w/Mand. Charge)		
		Actual	Predicted	Conf. Interval	Actual	Predicted	Conf. Interval
Citation	Asian	40.2%	37.0%*	(35.0%, 38.5%)	40.3%	34.9%*	(32.9%, 36.3%)
Citation	Black	43.9%	38.1%*	(36.3%, 39.4%)	44.1%	42.4%*	(40.6%, 43.6%)
Citation	Latinx	45.5%	37.7%*	(36.6%, 38.3%)	45.8%	42.7%*	(41.8%, 43.3%)
Citation	Mid. Eastern	39.2%	35.9%*	(33.3%, 38.1%)	39.4%	33.1%*	(30.5%, 35.2%)
Citation	Native Amer.	42.4%	37.3%*	(33.4%, 40.7%)	42.7%	46.3%	(43.0%, 49.1%)
Search	Asian	1.1%	1.6%	(1.2%, 1.9%)	1.1%	1.3%	(0.9%, 1.6%)
Search	Black	2.1%	1.9%	(1.4%, 2.3%)	2.1%	2.3%	(1.8%, 2.7%)
Search	Latinx	2.4%	1.9%*	(1.6%, 2.1%)	2.4%	2.4%	(2.1%, 2.6%)
Search	Mid. Eastern	0.9%	1.6%	(1.0%, 2.0%)	0.9%	1.2%	(0.7%, 1.7%)
Search	Native Amer.	5.0%	2.7%*	(1.1%, 4.2%)	5.0%	3.7%	(2.1%, 5.1%)
Arrest	Asian	0.8%	1.5%	(1.2%, 1.8%)	0.8%	1.2%	(0.9%, 1.5%)
Arrest	Black	1.7%	1.9%	(1.4%, 2.3%)	1.7%	2.4%	(1.9%, 2.8%)
Arrest	Latinx	1.9%	1.8%	(1.6%, 2.1%)	1.9%	2.4%	(2.2%, 2.7%)
Arrest	Mid. Eastern	0.7%	1.4%	(1.0%, 1.8%)	0.7%	1.0%	(0.6%, 1.4%)
Arrest	Native Amer.	4.4%	2.7%*	(1.2%, 4.1%)	4.4%	3.8%	(2.4%, 5.2%)
Any Outcome	Asian	40.9%	38.2%*	(36.2%, 39.7%)	40.9%	35.7%*	(33.8%, 37.2%)
Any Outcome	Black	45.3%	39.6%*	(37.7%, 40.9%)	45.3%	43.6%*	(41.9%, 44.8%)
Any Outcome	Latinx	47.2%	39.1%*	(38.1%, 39.8%)	47.2%	44.0%*	(43.0%, 44.5%)
Any Outcome	Mid. Eastern	39.9%	37.2%*	(34.5%, 39.3%)	39.9%	34.0%*	(31.4%, 36.1%)
Any Outcome	Native Amer.	45.6%	39.4%*	(35.4%, 42.6%)	45.6%	48.6%	(45.4%, 51.3%)

* Indicates a statistically lower predicted outcome rate.



STOP Updated Results & Additional OSP Analysis

April 8, 2022

CRIMINAL JUSTICE COMMISSION · STATE OF OREGON

Updated Results



- Error in code => Search outcome group for the predicted disposition analysis was smaller than it should have been
- Reran search outcome analysis
- Citation, arrest, and any outcome analyses unchanged

Outcome	Race	Original w/error		Corrected	
		Actual	Predicted	Actual	Predicted
Search	Asian	0.4%	0.9%	1.1%	1.6%
	Black	0.8%	1.0%	2.1%	1.9%
	Latinx	1.0%	1.0%	2.4%	1.9%*
	Mideast	0.3%	0.8%	0.9%	1.6%
	Native	2.8%	1.7%	5.0%	2.7%*

CRIMINAL JUSTICE COMMISSION · STATE OF OREGON

Mandatory Action Additional Analysis



Race	Outcome	Baseline		w/Mandatory Action	
		Actual	Predicted	Actual	Predicted
Latinx	Citation	45.5%	37.7%*	45.8%	42.7%*
Latinx	Search	2.4%	1.9%*	2.4%	2.4%
Latinx	Arrest	1.9%	1.8%	1.9%	2.4%
Latinx	Any	47.2%	39.1%*	47.2%	44.0%*

CRIMINAL JUSTICE COMMISSION · STATE OF OREGON

Mandatory Action Additional Analysis



Race	Outcome	Baseline		w/Mandatory Action	
		Actual	Predicted	Actual	Predicted
Mideast	Citation	39.2%	35.9%*	39.4%	33.1%*
Mideast	Search	0.9%	1.6%	0.9%	1.2%
Mideast	Arrest	0.7%	1.4%	0.7%	1.0%
Mideast	Any	39.9%	37.2%*	39.9%	34.0%*

CRIMINAL JUSTICE COMMISSION · STATE OF OREGON



Oregon State Police

STOP Data Elements

ReportBeam and Niche RMS
Definitions and Instructions

Last Updated:
5-24-2022

STOP Program Background

In 2017, [House Bill 2355](#) was enacted (codified as ORS 131.935) which requires all Oregon law enforcement agencies to collect and report specific data related to *officer-initiated traffic* and *officer-initiated pedestrian stops* to the *Statistical Transparency of Policing (STOP)* program.

To ensure the Department is in compliance with ORS 131.935 and submitting the best possible data, OSP leadership expects all applicable data fields to be completed each time a trooper makes an officer-initiated contact and/or issues a warning or citation. Troopers are responsible to ensure records are complete, accurate, and use program standards for the various data elements prior to submission.

All STOP data are to be recorded using appropriate fields in ReportBeam or the *STOP Information* form in Niche (for arrests without a citation – see Page 7). Below is a description of the fields in ReportBeam pertaining to STOP data and how to complete them, listed in order they appear.

Defendant Demographic Information

The *Race*, *Sex*, and *DOB* fields are required.

Race: Select the individual's race based on *your perception*. Below are the choice options:

- Asian
- Black
- Hispanic
- Middle Eastern
- Native American
- Pacific Islander
- White
- Unknown (this option should not be used during a STOP contact)

SEX: Select the individual's sex based on *your perception*. Below are the choice options:

- Female
- Male
- Non-Binary
- Unknown (this option should not be used during a STOP contact)

Date of Birth (DOB): Enter the individual's date of birth (MM/DD/YYYY). This is a free-text field.

Below is a table with examples of when to use the different options in the Nature of Stop field.

Nature of Stop Scenarios:

Scenario	Nature of Stop Option
Driver stopped for speeding.	Officer-Initiated Traffic Stop - Vehicle Code Violation
Driver stopped for failing to maintain lane.	Officer-Initiated Traffic Stop - Vehicle Code Violation
Driver stopped for observed altercation in vehicle.	Officer-Initiated Traffic Stop - Other
Driver stopped that was subject of a BOLO after Trooper spotted vehicle that matched description.	Officer-Initiated Traffic Stop - Other
Person observed drinking alcohol in a park where alcohol is not permitted.	Officer-Initiated Pedestrian Stop
Person observed shooting a rifle in a safety zone.	Officer-Initiated Pedestrian Stop
Trooper learns person does not have a hunting license while conducting hunter/angler checks.	Other - Call for Service, Regulatory, or Admin Check
Trooper responds to a reported crash and observes the driver is Driving While Suspended.	Other - Call for Service, Regulatory, or Admin Check

Physical Custody Arrest

Select a *Physical Custody Arrest* value. Below are the choice options and their definitions:

- **Yes:** Select this option only if you took a person into physical custody and lodged them in jail (if you did, there should be a related Arrest Report completed in Niche).
- **No:** Select this option if the outcome of the stop resulted in a warning, citation, and/or the release of the defendant in lieu of physical custody arrest.

Citation #:	
Traffic Type: TRAFFIC/STANDARD	
Date: 04/24/2018	Time: 04:20 PM
Location:	
15	MP 271
Nature of Stop:	
Physical Custody Arrest:	
Latitude:	Longitude:

Search Result(s)

If a search is conducted, select the *Srch Result(s)*. Below are the choice options:

FW Category	
FW Priority	
Search	
Srch Result	
<u>Juvenile Information</u>	

The main categories for the search results are:

- Nothing
- Drugs
- Alcohol (Alc)
- Weapons(s) (Weap)
- Other Evidence (Evd)
- Stolen Property (StolProp)
- Other Not Evidence (NotEvd)

Additional options exist to account for all required STOP data elements, including all 64 possible combinations of the list above.

*When a search is conducted but nothing is found, select "Nothing" in the Search Results field.

ATTACHMENT 3

DEFENSE ATTORNEY AVAILABILITY

MARTHA L. WALTERS
Chief Justice



1163 STATE STREET
SALEM, OREGON 97301-2563
Telephone: (503) 986-5668
FAX: (503) 986-5730
Martha.L.Walters@ojd.state.or.us

July 1, 2022

Via eMail

Per Ramfjord, Chair
Thomas Christ
Mark Hardin
Alton Harvey
Lisa Ludwig
Paul Solomon
Chris Thomas
Steven Wax

Re: Request for a Plan to Fulfill Statutory and Constitutional Obligations

Chair Ramfjord and Members of the Public Defense Services Commission:

I am writing this letter to ask that that the Commission direct the OPDS Executive Director to prepare a plan for presentation to the Commission at its July 21, 2022, meeting. The plan I am seeking is one that proposes immediate steps that will enable PDSC to fulfill its obligation to provide lawyers for those who have a constitutional right to representation.

Background

One of the requirements of the Oregon and United States Constitutions is that individuals who are accused of crimes are entitled to have a lawyer represent them, and, when they cannot afford to pay for a lawyer, to have one provided at public expense.

When such an individual appears in court without a lawyer, the court is required to determine whether the defendant wishes to be represented by a lawyer, and, if so, ***shall appoint*** a lawyer to represent the defendant. ORS 135.045(b).

PDSC is established to provide a system of public defense consistent with the Oregon and United States Constitutions, in other words, to provide lawyers representing those defendants who otherwise cannot afford to pay. ORS 151.216.

To address the need to retain and hire public defense attorneys, we took the following steps:

- Asked legislative leaders for \$12.8 million to hire 36 more lawyers in the counties with the greatest need. The legislature provided those funds.
- Asked the Oregon State Bar to consider changing the requirements for admission to practice in Oregon to make it easier to hire lawyers from out of state. The Bar has developed a proposal that is expected to be submitted to the Oregon Supreme Court for its July 2022 public meeting.
- Talked with the Dean of the University of Oregon School of Law about action the school could take to encourage law students to pursue careers in public defense. We also are supporting a request from the Willamette University College of Law to establish a public defense clinic.

To address the need to reduce public defense attorney caseloads, we took the following steps:

- We asked courts to increase efforts to encourage and assist in case resolution.
- We provided retired judges to conduct settlement conferences.
- We met regularly with judges, court administrators, prosecutors, and defense providers in Marion and Multnomah Counties to identify available lawyers and brainstorm ways to make court procedures more efficient, create settlement dockets, get more cases to trial sooner, and suggest and take other steps to improve efficiency and help public defense attorneys resolve cases and reduce their caseloads.
- Judges and court administrators in other counties also met regularly with defense providers and undertook similar intensive efforts.

To address the need to work with the private bar, we took the following steps:

- We put out a call for volunteers to take cases or become qualified to do so.
- Courts asked qualified private practitioners to take cases.

Those efforts have allowed us to make some progress on all fronts, but they have not been sufficient. ***Hundreds who are constitutionally entitled to counsel are being denied that right, and no end is in sight.***

At a meeting in Marion County on June 27, 2022, a PDSC member, the Executive Director and other representatives of OPDS, judges, administrators, and contract providers agreed that, in that county, at the present time, the only available course of action to provide representation for eligible persons who are in custody is as follows:

- investigators, and case managers; pay retention bonuses; and make arrangements with lawyers willing to take additional cases.
- Providing hiring and retention bonuses for lawyers in select counties.
 - Hiring supervisors, investigators, and case managers to free up staff-lawyer time.
 - Insisting on case resolution and filling every available slot for judicial case resolution.
 - Requiring mandatory settlement conferences with client participation.
 - Providing assistance and taking steps to ensure that cases are ready for trial, avoiding the need to request that they be set over.
 - Providing mentoring, supervision, and training for newer or newly qualified lawyers so that more cases can be tried or otherwise resolved.
 - Paying rates sufficient to persuade qualified lawyers to accept new cases.
 - Expediting the process for qualifying private lawyers who wish to provide public defense services.
 - Recruiting and supervising volunteers who are not yet qualified to independently represent clients and asking them to support public defense attorneys in case investigation and preparation, and in representing clients as permitted under appropriate supervision.
 - Ensuring that each public defense attorney is taking clients that the attorney is ethically permitted to take.
 - Clarifying the circumstances under which a public defense attorney may withdraw from a case when not ethically required to do so.
 - Ensuring that the bill review and payment process, and other necessary processes, are efficient and that each provider is encouraged through excellent customer service to engage in and continue work with OPDS.

I do not necessarily endorse any of those suggestions. I make them only to provide a compilation of some of the ideas that have been consistently raised in discussions that Chair Ramfjord and I have been having with the Executive Director and others in an effort to help PDSC, OPDS, and the courts meet their constitutional and statutory obligations. As noted at the outset, I have joined with others to do what I could conceive of, within the limits of my authority as Chief Justice and as an ex-officio, nonvoting member of the Commission. I will continue to do what I can, but more is needed. Collaboration is necessary, and a plan is necessary.

I am calling upon the voting members of PDSC to direct the Executive Director and the agency to propose a plan with steps that can be taken to address the immediate predicament -- the need to provide lawyers for those who are constitutionally entitled to representation -- and especially those being held in custody. Again, that plan may need to include proposed requests for near-term legislative assistance and funding. If so, it

ABA

EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS



ACKNOWLEDGMENTS

The Standing Committee on Legal Aid and Indigent Defendants is grateful to everyone who assisted in the development of the *ABA Eight Guidelines of Public Defense Related to Excessive Workloads*.

First and foremost, the Standing Committee thanks Professor Norman Lefstein who had the vision to recognize the need to develop the Guidelines and served as Reporter for the project. Professor Lefstein's expertise in the area of indigent defense is well known, as he previously served as Reporter for the Second Edition of ABA Criminal Justice Standards Relating to *The Defense Function and Providing Defense Services*. His prior publications for ABA SCLAID include *Criminal Defense Services for the Poor*, published in 1982, and his co-authorship of *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, published in 2004. Recently, he served as co-Reporter for *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, published in 2009 by the Constitution Project's National Right to Counsel Committee. Earlier in his career, Professor Lefstein served as director of the Public Defender Service for the District of Columbia, as an Assistant U.S. Attorney, and as a staff member in the Office of the Deputy Attorney General of the U.S. Department of Justice.

Special thanks also are owed to members of the Standing Committee and especially to its Indigent Defense Advisory Group whose members reviewed numerous drafts of the Guidelines and provided extensive comments. Also, the Committee is indebted to its talented ABA SCLAID staff, Georgia Vagenas, Assistant Counsel, who assisted all of us and made significant contributions to the Guidelines.

The Standing Committee is grateful as well to the many ABA entities that provided support for the Guidelines by co-sponsoring them in the House of Delegates, including the Criminal Justice Section; Special Committee on Death Penalty Representation; Council on Racial and Ethnic Justice; Standing Committee on Judicial Independence; General Practice, Solo, and Small Firm Division; Section of Litigation; Section of Individual Rights and Responsibilities; Government and Public Sector Lawyers Division; and American Judicature Society. Further, we thank the ABA Standing Committee on Ethics and Professional Responsibility for its review of the Guidelines and comments. The Committee also thanks the many members of the defender community throughout the country whose review of the Guidelines and thoughtful comments improved our final product. The National Legal Aid and Defender Association was instrumental in disseminating the draft Guidelines nationwide and the assistance of its leadership and staff is gratefully acknowledged.

Finally, the Standing Committee expresses its appreciation to John Terzano, President, and Joyce McGee, Executive Director, of The Justice Project, which has administered the grant that facilitated the preparation and publication of the Guidelines.

**Hon. Deborah Hankinson (former)
Chair, Standing Committee on
Legal Aid and Indigent Defendants
2006-2009**

Introduction

The American Bar Association (ABA) has declared the achievement of quality representation as the objective for those who furnish defense services for persons charged in criminal and juvenile delinquency cases who cannot afford a lawyer. This goal is not achievable, however, when the lawyers providing the defense representation have too many cases, which frequently occurs throughout the United States. This was emphasized in the report of the ABA Standing Committee on Legal Aid and Indigent Defendants published in 2004, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, available at www.indigentdefense.org. Additionally, in 2009, two national studies concerned with indigent defense documented the enormous caseloads of many of the lawyers who provide representation of the indigent and the crucial importance of addressing the problem.¹

In 2006, the ABA Standing Committee on Ethics and Professional Responsibility issued its first ever ethics opinion concerning the obligations of lawyers, burdened with excessive caseloads, who provide indigent defense representation.² The opinion made clear that there are “no exceptions” for lawyers who represent indigent clients, i.e., *all* lawyers have a duty to furnish “competent” and “diligent” service, as required by rules of professional conduct.³

Although Formal Opinion 06-441 set forth *some* of the steps that those providing defense services should take when faced with excessive caseloads, neither the ethics opinion nor ABA Standards for Criminal Justice contain the kind of detailed action plan, set forth in these Guidelines, to which those providing public defense should adhere as they seek to comply with their professional responsibilities. Thus, Guideline 1 urges the management of public defense programs to assess whether excessive workloads are preventing their lawyers from fulfilling performance obligations; and Guidelines 2, 3, and 4 relate to the need for continuous supervision and monitoring of workloads, training of lawyers respecting their ethical duty when confronted with excessive workloads, and the need for management to determine if excessive workloads exist. Guidelines 5 through 8 address the range of options that public defense providers and their lawyers should consider when excessive workloads are present. As set forth in Guideline 6, depending upon the circumstances, it may be necessary for those providing public defense to seek redress in the courts, but other choices may be available, as suggested in Guideline 5, before this step is required.

These Guidelines are intended for the use of public defense programs and for lawyers who provide the representation, when they are confronted with too many persons to represent and are thus prevented from discharging their responsibilities under professional conduct rules. In addition, because these Guidelines contain important considerations for those responsible for indigent defense services, they should be valuable to a number of other audiences, including members of boards and commissions that oversee public defense representation, policymakers responsible for funding indigent defense, and judges who are called upon to address the caseload concerns of those who provide public defense services. Since these Guidelines relate directly to the fair, impartial, and effective administration of justice in our courts, they also should be of special interest to bar leaders, as well as to the legal profession and to the public.

¹ See Report of the National Right to Counsel Committee, *JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL* (The Constitution Project 2009)[hereinafter *JUSTICE DENIED*], available at www.tcpjusticedenied.org; *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS* (Nat'l Assoc. Crim. Defense Lawyers 2009) [hereinafter *MINOR CRIMES*], available at www.nacdl.org/misdemeanor.

² ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006)[hereinafter ABA Formal Op. 06-441].

³ ABA MODEL RULES OF PROF'L CONDUCT R. 1.1, R. 1.3 (2008) [hereinafter ABA MODEL RULES].

ABA EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO
EXCESSIVE WORKLOADS

Black Letter

GUIDELINE 5

Public Defense Providers consider taking prompt actions such as the following to avoid workloads that either are or are about to become excessive:

- **Providing additional resources to assist the affected lawyers;**
- **Curtailing new case assignments to the affected lawyers;**
- **Reassigning cases to different lawyers within the defense program, with court approval, if necessary;**
- **Arranging for some cases to be assigned to private lawyers in return for reasonable compensation for their services;**
- **Urging prosecutors not to initiate criminal prosecutions when civil remedies are adequate to address conduct and public safety does not require prosecution;**
- **Seeking emergency resources to deal with excessive workloads or exemptions from funding reductions;**
- **Negotiating formal and informal arrangements with courts or other appointing authorities respecting case assignments; and**
- **Notifying courts or other appointing authorities that the Provider is unavailable to accept additional appointments.**

GUIDELINE 6

Public Defense Providers or lawyers file motions asking a court to stop the assignment of new cases and to withdraw from current cases, as may be appropriate, when workloads are excessive and other adequate alternatives are unavailable.

GUIDELINE 7

When motions to stop the assignment of new cases and to withdraw from cases are filed, Public Defense Providers and lawyers resist judicial directions regarding the management of Public Defense Programs that improperly interfere with their professional and ethical duties in representing their clients.

GUIDELINE 8

Public Defense Providers or lawyers appeal a court's refusal to stop the assignment of new cases or a court's rejection of a motion to withdraw from cases of current clients.

competently.”⁷ In addition, it has been successfully argued that an excessive number of cases create a concurrent conflict of interest, as a lawyer is forced to choose among the interests of various clients, depriving at least some, if not all clients, of competent and diligent defense services.⁸ The responsibilities of defense lawyers are contained in performance standards⁹ and in professional responsibility rules governing the conduct of lawyers in all cases.¹⁰

When defense lawyers fail to discharge the kinds of fundamental obligations contained in this Guideline, it is frequently because they have excessive workloads. For example, the failure of lawyers to interview clients thoroughly soon after representation begins and in advance of court proceedings, as necessary, is often due to excessive workloads.¹¹ When Public Defense Providers rely upon “horizontal” systems of representation, in which multiple lawyers represent the client at different stages of a case, and lawyers often stand in for one another at court proceedings, it is usually because there are too many cases for which the Provider is responsible.¹² If written motions are not filed, legal research not conducted, and legal memoranda not filed with the court, the lawyers most likely have an excessive workload. Similarly, excessive workloads may be the reason that crime scenes are not visited in cases where it might be useful to do so. Besides the performance obligations listed in Guideline 1, there are other indicia of excessive workloads, such as a lack of time for lawyers to participate in defense training programs, the need for which is addressed in Guideline 3 and the accompanying commentary.

⁷ *Id.* at R. 1.3, cmt. 2.

⁸ “When excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created.” In *Re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 1130, 1135 (Fla. 1990). See also American Council of Chief Defenders, Nat’l Legal Aid and Defender Assoc., Ethics Opinion 03-01, at 4 (2003): “The duty to decline excess cases is based both on the prohibition against accepting cases which cannot be handled ‘competently, promptly to completion’ ... and the conflict-of-interest based requirement that a lawyer is prohibited from representing a client ‘if the representation of that client may be materially limited by the lawyer’s responsibility to another client.’” A portion of the language last quoted is from ABA MODEL RULES, *supra* note 3, R. 1.7 (a)(2).

⁹ The most comprehensive and authoritative standards respecting the obligations of defense lawyers in criminal cases have been developed by the National Legal Aid and Defender Association. See PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (4th Printing)(Nat’l Legal Aid and Defender Assoc. 2006). Important defense obligations also are contained in ABA STANDARDS FOR CRIMINAL JUSTICE, DEFENSE FUNCTION STANDARDS(3rd ed. 1993)[hereinafter ABA DEFENSE FUNCTION].

¹⁰ See, e.g., ABA MODEL RULES, *supra* note 3, R 1.4, dealing with the obligation of lawyers to promptly and reasonably communicate with the client.

¹¹ “As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused.” ABA DEFENSE FUNCTION, *supra* note 9, Std. 4-3.2 (a). See also ABA TEN PRINCIPLES, *supra* note 5, Principle 4: “Defense Counsel is provided sufficient time and confidential space within which to meet with the client.”

¹² “Counsel initially provided should continue to represent the defendant throughout the trial court proceedings....” ABA PROVIDING DEFENSE SERVICES, *supra* note 4, Std. 5-6.2. See also ABA TEN PRINCIPLES, *supra* note 5, Principle 7: “The same attorney continuously represents the client until completion of the case.” These ABA policy statements do not preclude one or more lawyers with special expertise providing assistance to the lawyer originally assigned to provide representation, and such practices do not necessarily reflect excessive defense workloads.

represented by the supervisee, as well as their complexity and likely time commitments, be carefully assessed. In overseeing the work of those providing public defense services, it is important that supervisors have access to data through a management information system, which shows the lawyer's current caseload, the status of cases represented by the lawyer, and other important relevant data.¹⁹

GUIDELINE 3

The Public Defense Provider trains its lawyers in the professional and ethical responsibilities of representing clients, including the duty of lawyers to inform appropriate persons within the Public Defense Provider program when they believe their workload is unreasonable.

Comment

The requirement of training for lawyers who provide public defense representation is well established ABA policy.²⁰ This Guideline emphasizes a particular subject area in which Public Defense Providers have an obligation to provide training. Lawyers who provide defense services need to be aware of their ethical responsibilities to provide "competent" and "diligent" representation, as required by rules of professional conduct,²¹ as well as performance standards that will enable them to fulfill those duties. In addition, lawyers should be instructed that they have a responsibility to inform appropriate supervisors and/or managers within the Provider program when they believe their workload is preventing or soon will prevent them from complying with professional conduct rules.²² This is especially important because there is an understandable reluctance of public defense lawyers to report to those in charge that they either are not, or may not, be providing services consistent with their ethical duties and performance standards. Despite such reluctance, defense lawyers need to make regular personal assessments of their workload to determine whether it is reasonable, whether they are performing the tasks necessary in order to be competent and diligent on behalf of their clients, and whether they need to communicate concerns about their workload to their supervisor. In discussing the ABA Model Rules and their application to excessive public defense caseloads, the ABA Standing Committee on Ethics and Professional Responsibility has explained that lawyers have a duty to inform their supervisors, the heads of defense programs, and, if applicable, the governing board of the Provider when lawyers believe that they have an excessive number of cases.²³ Conversely, it is important that Providers not take retaliatory action against lawyers who, in good

¹⁹ The National Right to Counsel Committee recommends that systems of indigent defense establish "[u]niform definitions of a case and a continuous uniform case reporting system...for all criminal and juvenile cases. This system should provide continuous data that accurately contains the number of new appointments by case type, the number of new dispositions by case type, and the number of pending cases." JUSTICE DENIED, *supra* note 1, Recommendation 11, at 199. See also LA. REV. STAT. ANN. § 15-148 (B)(1) (Supp. 2009), which requires the state's public defender agency to establish a uniform case reporting system, including data pertaining to workload.

²⁰ See ABA PROVIDING DEFENSE SERVICES, *supra* note 4, Std. 5-1.5; ABA TEN PRINCIPLES, *supra* note 5, Principles 6 and 9.

²¹ See ABA MODEL RULES, *supra* note 3, R 1.1., 1.3.

²² The ABA Model Rules contemplate that issues respecting the discharge of professional duties will be brought to the attention of supervisors: "A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional responsibility." ABA MODEL RULES, *supra* note 3, R. 5.2 (b). See also ABA Formal Op. 06-441, *supra* note 2, at 5-6.

²³ "If the supervisor fails to provide appropriate assistance or relief, the lawyer should continue to advance up the chain of command within the office until relief is obtained or the lawyer has reached and requested assistance or relief from the head of the public defender's office.... Such further action might include: if relief is not obtained from the head of the public defender's office, appealing to the governing board, if any, of the public defender's office...." ABA Formal Op. 06-441, *supra* note 2, at 6.

approved by the ABA: “National caseload standards should in no event be exceeded.”²⁹ This statement refers to numerical annual caseload limits published in a 1973 national report.³⁰ As noted by the ABA Standing Committee on Ethics and Professional Responsibility, while these standards “may be considered, they are not the sole factor in determining whether a workload is excessive. Such a determination depends not only the number of cases, but also on such factors as case complexity, the availability of support services, the lawyer’s experience and ability, and the lawyer’s nonrepresentational duties.”³¹ Thus, while the ABA has not endorsed specific caseload numbers, except to the limited extent discussed above, the routine failure to fulfill performance obligations like those listed in Guideline 1, usually indicates that lawyers have excessive workloads.

GUIDELINE 5

Public Defense Providers consider taking prompt actions such as the following to avoid workloads that either are or are about to become excessive:

- **Providing additional resources to assist the affected lawyers;**
- **Curtailing new case assignments to the affected lawyers;**
- **Reassigning cases to different lawyers within the defense program, with court approval, if necessary;**
- **Arranging for some cases to be assigned to private lawyers in return for reasonable compensation for their services;**
- **Urging prosecutors not to initiate criminal prosecutions when civil remedies are adequate to address conduct and public safety does not require prosecution;**
- **Seeking emergency resources to deal with excessive workloads or exemptions from funding reductions;**
- **Negotiating formal and informal arrangements with courts or other appointing authorities respecting case assignments; and**
- **Notifying courts or other appointing authorities that the Provider is unavailable to accept additional appointments.**

Comment

Some of the most important ways in which a Provider may be able to reduce excessive lawyer workloads are listed in this Guideline. When workloads have been determined to be excessive, the steps suggested will be appropriate to pursue if they can be quickly achieved. However, if

²⁹ ABA TEN PRINCIPLES, *supra* note 5, Commentary to Principle 5, at 2.

³⁰ “In its report on the Courts, the Commission [National Advisory Commission on Criminal Justice Standards and Goals] recommended the following maximum annual caseloads for a public defender office, i.e., on average, the lawyers in the office should not exceed, per year, more than 150 felonies; 400 misdemeanors; 200 juvenile court cases; 200 mental health cases; or 25 appeals.” JUSTICE DENIED, *supra* note 1, at 66. As noted in JUSTICE DENIED, these caseload numbers are 35 years old, the numbers were never “empirically based,” and were intended “for a public defender’s office, not necessarily for each individual attorney in that office.” *Id.* In fact, the Commission warned of the “dangers of proposing any national guidelines.” *Id.* The American Council of Chief Defenders, a unit of the National Legal Aid and Defender Association comprised of the heads of defender programs in the United States, also has urged that the caseload numbers contained in the 1973 Commission report not be exceeded. See *American Council of Chief Defenders Statement on Caseloads and Workloads*, August 24, 2007. Some state and local governments have set limits on the number of cases that defense lawyers can handle on an annual basis. See *infra* note 37.

³¹ ABA Formal Op. 06-441, *supra* note 2, at 4.

In some jurisdictions where courts appoint counsel, it may nevertheless be possible for the Provider simply to notify judges or other officials that lawyers from the defense program are unavailable to accept appointments in all or certain categories of cases for a specified period of time or until further notice. A declaration of “unavailability” has sometimes been used successfully, such as in some counties in California. This approach is seemingly based on the implicit premise that governments, which establish and fund providers of public defense, never intended that the lawyers who furnish the representation would be asked to do so if it meant violating their ethical duties pursuant to professional conduct rules. On the other hand, some Providers may conclude that this approach is either not contemplated by the jurisdiction’s statutes³⁸ or is otherwise deemed inappropriate.

In addition to the options listed in this Guideline for dealing with excessive caseloads, there may be other ways in which Public Defense Providers can seek to achieve caseload reductions. For example, two national studies issued in 2009 recommended that legislatures consider reclassifying certain offenses as civil infractions so that the need to provide lawyers is removed, assuming there are not adverse public safety consequences.³⁹ However, if this course is followed, it is important that the possible adverse collateral consequences resulting from a conviction be carefully considered along with any new legislation since a defense lawyer will not be available to counsel the person.⁴⁰ Another alternative that can serve to reduce public defense caseloads is for cases to be diverted from the criminal justice system during the pretrial stage. Depending on the jurisdiction, implementation will require legislation, a change in court rules, or approval of prosecutors.⁴¹

When a Provider cannot reduce excessive lawyer workloads, a motion filed with the court, aimed at stopping case assignments and/or permitting lawyers to withdraw from cases (see Guideline 6 *infra*), or conceivably the filing of a separate civil action, will be necessary. Regardless of the type of litigation pursued, it is almost certain to be time-consuming, labor intensive, and the results not easily predicted. In addition, speedy resolution of the matter may prove elusive. If a trial court decision is adverse to the Provider, an appeal may be required. If the Provider is successful in the trial court, the state may appeal. Moreover, the trial court may simply fail to render a prompt decision in the matter. Accordingly, every effort should be made to resolve excessive workloads without resort to litigation, which is why the options specified in Guideline 5 are so important.

³⁸ Consider, for example, the law in Colorado pertaining to the Colorado State Public Defender: “The state public defender shall represent as counsel...each indigent person who is under arrest for or charged with committing a felony.” COLO. REV. STAT. § 21-1-103 (2004); “Case overload, lack of resources, and other similar circumstances shall not constitute a conflict of interest.” *Id.* at § 21-2-103. This statute is contrary to rules of professional conduct governing lawyers and with these Guidelines.

³⁹ The National Association of Criminal Defense Lawyers has urged that “[o]ffenses that do not involve a significant risk to public safety...be decriminalized” and cites successful examples where this has occurred. See MINOR CRIMES, *supra* note 1, at 27-8. Similarly, the National Right to Counsel Committee has suggested that “certain non-serious misdemeanors...be reclassified, thereby reducing financial and other pressures on a state’s indigent defense system,” and also notes examples where this has taken place. See JUSTICE DENIED, *supra* note 1, at 198.

⁴⁰ “Under these circumstances, to impose harsh collateral consequences of a conviction, like housing limitations, deportation, and employment limitations would be fundamentally unfair.” MINOR CRIMES, *supra* note 1, at 28.

⁴¹ See JOHN CLARK, PRETRIAL DIVERSION AND THE LAW: A SAMPLING OF FOUR DECADES OF APPELLATE COURT RULINGS I-1-I-2 (Pretrial Justice Institute 2006).

GUIDELINE 7

When motions to stop the assignment of new cases and to withdraw from cases are filed, Public Defense Providers and lawyers resist judicial directions regarding the management of Public Defense Programs that improperly interfere with their professional and ethical duties in representing their clients.

Comment

The concern that underlies this Guideline relates to the risk that judges confronted with motions to halt the assignment of new cases or to permit lawyers to withdraw from cases will delve inappropriately into the internal operations of Public Defense Providers. While it is appropriate for judges to review motions asking that assignments be stopped and withdrawals from cases permitted, courts should not undertake to micro-manage the operations of defense programs.⁴⁹

When Providers file motions requesting that assignments be stopped and that withdrawals be permitted, their prayer for relief should be accorded substantial deference because Providers are in the best position to assess the workloads of their lawyers. As the ABA has noted, “[o]nly the lawyers themselves know how much must be done to represent their clients and how much time the preparation is likely to take.”⁵⁰ In discussing a defense lawyer’s claim of conflict of interest in representing co-defendants, the Supreme Court has noted that “attorneys are officers of the court, and ‘when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.’”⁵¹ In an accompanying footnote, the Court further declared: “When a considered representation regarding a conflict of interest comes from an officer of the court, it should be given the weight commensurate with the grave penalties risked for misrepresentation.”⁵²

2006); and ABA Formal Op. 06-441, *supra* note 2, at 1, 4-6. In 2009, a California appellate court endorsed the approach of the ABA’s ethics opinion: “Under the ABA opinion, a deputy public defender whose excessive workload obstructs his or her ability to provide effective assistance to a particular client should, with supervisory approval, attempt to reduce the caseload, as by transferring cases to another lawyer with a lesser caseload. If the deputy public defender is unable to obtain relief in that manner, the ABA opinion provides that he or she must ‘file a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.’... The conduct prescribed by the ABA Opinion, which is fully consistent with the California Rules of Professional Conduct, may also be statutorily mandated.” In re Edward S., 173 Cal. App. 4th 387, 413, 92 Cal. Rptr. 3d 725, 746 (Cal. App. 1st Dist. 2009). This decision cites with approval an earlier California decision, *Ligda v. Superior Court*, 85 Cal. Rptr. 744, 754 (Cal. Ct. App. 1970) (“[w]hen a public defender reels under a staggering workload, he ... should proceed to place the situation before the judge, who upon a satisfactory showing can relieve him, and order the employment of private counsel at public expense.”).

⁴⁹ “We acknowledge the public defender’s argument that the courts should not involve themselves in the management of public defender offices.” In re Certification of Conflict in Motions to Withdraw, 636 So.2d 18, 21-22 (Fla. 1994).

⁵⁰ ABA PROVIDING DEFENSE SERVICES, *supra* note 4, at 71. See also *State v. Smith*, 681 P.2d 1374, 1381 (Ariz. 1984) (“Attorneys are in a position to know when a contract [for defense services] will result in inadequate representation of counsel.”).

⁵¹ *Holloway v. Arkansas*, 435 U.S. 475, 486 (1978).

⁵² *Id.*, at n. 9. Judges should be especially understanding of the representations of Providers given that the “judiciary plays a central in preserving the principles of justice and the rule of law.” ABA CODE OF JUDICIAL CONDUCT, Preamble (2007). Similarly, prosecutors have a duty “to seek justice ... [and] to reform and improve the administration of criminal justice.” ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION STANDARDS, Std.3-1.2 (c), (d) (3rd ed., 1993). However, when a Provider seeks relief in court from an excessive workload, the prosecutor seemingly has a conflict of interest in opposing the Provider’s motion. Not only do the decisions of prosecutors in filing charges against persons directly impact the caseloads of Providers, but the

Provider will likely have to continue to provide representation.⁶⁰ This places the Provider in an extremely awkward situation since on the one hand those in charge of the defense program have made it clear that, in their professional judgment, caseloads are excessive and the lawyers providing direct client services are being forced to violate their ethical responsibilities, yet relief is unavailable. Accordingly, the Provider should continue to explore non-litigation alternatives (*see* Guideline 5) while requiring the Provider's lawyers to make a record in their cases, if appropriate, about the lawyers' inability, due to excessive caseloads, to furnish "competent" and "diligent" representation as required by professional conduct rules. The Public Defense Provider should also continue to seek public support from bar associations, community groups, and the media.⁶¹

⁶⁰However, the Provider or lawyer also will likely want to proceed expeditiously in the appellate court to strike the stay or modify the order pending appeal.

⁶¹"Theoretically, when judges resolve court cases concerning indigent defense reform, it should be irrelevant whether the litigation is covered by print and other news media. Nor should it matter whether prominent persons in the state or community speak publicly in favor of necessary changes in the delivery of indigent defense services. However, the reality is that news reports about problems in indigent defense and strong public support for improvements may make a difference not only when legislatures consider new laws, but also when courts decide difficult cases." JUSTICE DENIED, *supra* note 1, at 146.

FORMAL OPINION NO. 2007-178

Competence and Diligence: Excessive Workloads of Indigent Defense Providers

Facts:

Lawyer *A* is employed by a public defender firm (“the firm”), where Lawyer *A* represents indigent clients accused of criminal offenses. Lawyer *B* is the direct supervisor of Lawyer *A*. Lawyer *C* is the executive director of the firm. A board of directors, which includes some lawyers, oversees the business of the firm. Lawyer *C*’s responsibilities include negotiating and entering into the firm’s contracts with a state agency pursuant to which the firm agrees to represent a certain number of clients annually.

Lawyer *D* is a partner in a small firm that is part of a consortium of firms that contract with the state to accept court appointments to represent indigent defendants. Lawyer *E*, also a member of the consortium, negotiates the contract between the consortium and the state and also administers the contract for the consortium. A board of directors, which includes some lawyers, oversees the business of the consortium.

Lawyer *F* is a sole practitioner who is paid by the state on an hourly basis to accept court appointments to represent indigent defendants.

Lawyers *A*, *D*, and *F* each believe that they have an excessively large caseload of court-appointed clients.

Questions:

1. What are the ethical obligations of Lawyers *A*, *D*, and *F* with respect to representation of their court-appointed clients?
2. What are the ethical obligations of lawyers who supervise other lawyers who may have excessive caseloads?

- 1.3⁴, and
- 1.4⁵,

all lawyers are required to provide each client with competent and diligent representation, keep each client reasonably informed about the status of his or her case, explain each matter to the extent necessary to permit the client to make informed decisions regarding the representation, and abide by the decisions that the client is entitled to make. As ABA Formal Ethics Opinion 06-441 observes, the rules “provide no exception for lawyers who represent indigent persons charged with crimes.” For each client, a lawyer is required to, among other things, “keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; and communicate effectively on behalf of and with clients,” among other responsibilities. ABA Formal Ethics Op No 06-441. A lawyer who is unable to perform these duties may not undertake or continue with representation of a client. Oregon RPC 1.16(a).⁶

A caseload is “excessive” and is prohibited if the lawyer is unable to at least meet the basic obligations outlined above. The ABA opinion notes that various jurisdictions have suggested or adopted numerical

⁴ Oregon RPC 1.3, entitled “Diligence,” provides: “A lawyer shall not neglect a legal matter entrusted to the lawyer.” Cf. ABA Model Rule 1.3, which requires that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.”

⁵ Oregon RPC 1.4, entitled “Communication,” provides: “(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” ABA Model Rule 1.4(a) also requires a lawyer to promptly inform the client of any decision or circumstance requiring the client’s informed consent, consult with the client about the means to achieve the client’s objectives, and consult with the client about any relevant limitation on the lawyer’s conduct if the lawyer knows the client expects assistance not permitted by the rules of professional conduct or other law.

⁶ Oregon RPC 1.16(a) provides in part that “a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client . . . if the representation will result in violation of the Rules of Professional Conduct or other law[.]”

workload. If a supervisor fails to approve appropriate relief, then Lawyer *A* should “continue up the chain of command within the office,” ultimately appealing to the executive director, Lawyer *C*. If satisfactory relief is still not received, Lawyer *A* “must take further action,” suggesting appeals to the firm’s board of directors and the filing, without firm approval, of motions to withdraw. Lawyer *A* might also seek assistance from the state agency that administers the firm’s contract, and the Public Defense Services Commission, which approves the contract.

Lawyer *D* must take similar steps to control her workload, first requesting that Lawyer *E*, the administrator of the consortium, withhold the assignment of new cases, and/or approve the transfer of cases to another lawyer within the consortium, as long as another lawyer will be able to provide ethical representation. If Lawyer *E* does not provide appropriate assistance, then Lawyer *D* might appeal to the governing body for the consortium. Ultimately, Lawyer *D* may also move to withdraw from a sufficient number of cases to achieve a manageable workload.

The actions that Lawyer *F*, the sole practitioner, might take include declining new appointments until that lawyer’s workload is reduced to a level that permits accepting new cases, and/or filing motions to withdraw from a sufficient number of cases to achieve a manageable workload.

Supervisory lawyers, including a firm director or manager, may violate ethical responsibilities when subordinate lawyers have excessive workloads. The ABA opinion describes two ways such violations may occur. First, under ABA Model Rule 5.1(a) firm managers “shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.” Second, in subsection (b), the Model Rule requires that a lawyer with supervisory authority over another lawyer “shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.” The Oregon RPCs have no counterpart to Model Rule 5.1(a) or (b). However, Oregon RPC 5.1(a) and (b), like ABA Model Rule 5.1(c), make a lawyer responsible for the misconduct of another lawyer if “the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved,” or, in the specific case of supervisory lawyers, that lawyer “knows of conduct at a time

supervisory lawyer and incurred potential responsibility under Oregon RPC 5.1.¹¹

As noted, the ABA opinion does not address the ethical responsibilities of lawyers involved in the process of contracting for the provision of public defense services. For the reasons discussed above, Lawyer *C*, who heads a public defender office, and Lawyer *E*, who negotiates the contract for a consortium, may be responsible for the misconduct of other lawyers if they contract for caseloads knowing that they do not have adequate lawyer and other support staff to provide competent representation to each client. Likewise, managers who knowingly “induce” other lawyers to violate the RPCs by knowingly contracting for excessive caseloads may violate Oregon RPC 8.4(a)(1), which makes it “professional misconduct for a lawyer to . . . violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”

Lawyers representing indigent clients must refuse to accept a workload that prevents them from meeting their ethical obligation to each client. Lawyers who work in public defense organizations should seek the assistance of supervisors and managers in achieving manageable workloads. When those supervisors and managers have knowledge of excessive workloads among firm lawyers, they must make reasonable efforts to remedy the problem.

Approved by Board of Governors, September 2007.

¹¹ Oregon RPC 1.0(d), in defining a *law firm*, recognizes that even in the absence of a firm agreement or association, lawyers may organize themselves or work together in such a manner to create “indicia sufficient to establish a de facto [sic] law firm among the lawyers involved.” Furthermore, Comment 2 to ABA Model Rule 1.0 observes that if lawyers “present themselves to the public in a way that suggests that they are a firm *or conduct themselves as a firm*, they should be regarded as a firm for the purposes of the Rules” [emphasis added].



Dear Senator Prozanski and Representative Evans,

We, the members of the Racial Justice Council's Police Accountability and Criminal Justice Reform Committee, write to you as the Three Branch Workgroup begins its work to reform Oregon's public defense system. Our committee wishes to elevate an issue of critical importance: the need to justly fund public defense for Oregon.

Our committee was established in the wake of George Floyd's murder and the racial reckoning that transpired across America in 2020. Part of the Governor's mandate to us includes "[dismantling] the structures of racism that have created grave disparities in virtually all of our social systems and structures." The chronic underinvestment in public defense services in Oregon is a racial justice issue of the highest importance. Racism pervades every stage of the criminal legal system, as is apparent from the disproportionate number of people of color who are stopped, arrested, charged, and incarcerated. Fixing the severe racial disparity that exists within our system is an impossibility if the attorneys tasked with challenging these injustices continue to receive a fraction of the funding necessary to operate. If we are to dismantle the structures of racism within our criminal legal system, then funding public defense is essential.

Public defenders do important, inspiring, and difficult work. Criminal defense is a challenging and specialized field that requires a deep understanding of criminal law, evidence, forensic science, and so much more. Public defenders provide a broad range of indigent legal services, representing clients in criminal cases as well as juvenile delinquency, dependency, and civil commitments. Outside of the legal and intellectual demands of the profession, the psychological and emotional costs are high, as well. Public defenders must attend to their clients' needs, which are often extensive and complex. Those who qualify for public defenders come from positions of extreme vulnerability, as the criminal legal system captures those suffering from poverty, mental illness, severe childhood trauma, addiction, and the list goes on. Building trust, making connections to necessary services, and effectively communicating the life trauma that clients have suffered and sought to overcome, are all integral pillars of public defense work. It is time we acknowledge the critical role public defenders play in serving those most at risk in our community. Nelson Mandela's quote should resonate with us now more than ever: "It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones."

**GOVERNOR'S
RACIAL JUSTICE
COUNCIL**



to recruit and retain a diverse and talented workforce. In many counties, the disparity in pay between public defenders and district attorneys is egregious. This disparity reflects a failure to value work done on behalf of the poor. It also demonstrates a narrow understanding of public safety and ignores the work public defenders and their social workers (of which there are far too few) do to address the root causes of crime, and thereby protect our community.

Bryan Stevenson, a champion of racial and criminal justice issues, writes in his memoir, *Just Mercy*, "I've come to believe that the true measure of our commitment to justice, the character of our society, our commitment to the rule of law, fairness, and equality cannot be measured by how we treat the rich, the powerful, the privileged, and the respected among us. The true measure of our character is how we treat the poor, the disfavored, the accused, the incarcerated, and the condemned." The chronic underinvestment in public defense services has tarnished our character as a society. We hope that the Oregon legislature will take this valuable opportunity to correct this imbalance and to restore our commitment to justice.

Sincerely,

The Racial Justice Council's Police Accountability and Criminal Justice Reform Committee

Members:

Paul Solomon (Co-Chair)
Lamar Wise (Co-Chair)
Senator Lew Frederick
Michael Schmidt
William Barnes
Terrence Hayes
Tristen Edwards
Maria Caballero- Rubio
Babak Zolfaghari
Andy Ngo
Leland Baxter-Neal

Public Defense Services Work Group Members

2022-2024

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ATTACHMENT 4

MEASURE 110- HEALTH JUSTICE RECOVERY ALLIANCE



**health
justice
recovery
alliance**

Measure 110 Backgrounder

Overview

How Measure 110 works

Measure 110 was created in response to the overdose crisis.

What services are funded through Measure 110?

What are Behavioral Health Resource Networks (BHRNs)?

How will BHRNs help my community?

How much money will my county region receive?

To prevent more overdoses, we must scale up harm reduction.

Why decriminalize drug use?

- It's more effective than incarceration.

- Forcing people into treatment usually doesn't work.

- A criminal record can create lifelong barriers.

- A "drug war approach" has created multigenerational harms.

- Law enforcement disproportionately targets people of color.

- Incarceration for drug use causes more harm

- Criminalization makes people afraid to ask for help.

A public health approach costs taxpayers less. Accessible, low-barrier services save lives

Measure 110 opened more doors to services.

Measure 110 is changing the system so that there is no wrong door to access services.

Early numbers show Measure 110 is working.

- More people are accessing services and support

- Fewer people are being saddled with lifelong barriers

Most crime rates have held steady or even gone down since Measure 110 passed.

Decriminalization is not legalization.

Are drug overdoses on the rise because of Measure 110?

and fined \$100.

- 2) Behavioral Health Resource Networks (BHRNs) are being established in each county, guaranteeing that all Oregonians will have access to a full array of low-barrier addiction services — including peer-supported recovery, harm reduction services, and supportive, transitional, and long-term housing. The law builds on critical services offered by existing community-based providers throughout the state, wherever possible. Those seeking help or to have their citation waived may access services through their local BHRN, or by calling the Lines for Life 24/7 hotline.
- 3) Services will be funded through grants and contracts with all cannabis tax revenue above \$45 million each year. (The Oregon Legislature allocated \$302 million from the fund for the 2021-23 biennium.)
- 4) The law established an [Oversight and Accountability Council \(OAC\)](#) composed of people with lived experience, including people who actively use drugs, as well as with addiction and service delivery experts. Working with the Oregon Health Authority, the OAC determines how funds will be distributed.
- 5) The Secretary of State conducts regular financial and performance audits to ensure proper oversight and fiscal management of the program. The program's [first real-time audit](#) identified key areas where the Oregon Health Authority can better support the OAC and minimize future funding delays.

Measure 110 was created in response to the overdose crisis.

Overdose deaths are on the rise all across the country⁴ — not just in Oregon. Even after decriminalization, Oregon's overdose death rate remains lower than the Western states average, where overdose deaths have increased by 40%⁵.

What services are funded through Measure 110?

The law establishes Behavioral Health Resource Networks, which, working together will increase access to vital harm reduction and addiction recovery services, including:

- Behavioral Health Treatment that is evidence-based, trauma-informed, culturally specific, linguistically accessible, and patient-centered;
- Peer support and recovery services designed to help people continue to address their substance use;
- Housing; and
- Harm reduction interventions including overdose prevention, access to naloxone and hydrochloride along with drug education and outreach.

⁴ <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm>

⁵ WA - 30.59%, Oregon - 33.63%, California - 22.23, Alaska - 75.34%

emphasize that being able to focus on the individual person using drugs, their wellbeing, and connecting them with critical support services made all the difference.

Why decriminalize drug use?

It's more effective than incarceration.

The US has been criminalizing drug use for 50+ years and it has proven not only to be cruel, but largely ineffective.⁷ More people are incarcerated than ever before, and more people are addicted than ever before. Oregon ranks second in the nation for substance abuse disorder and 50th in access to services⁸. This is a crisis and we must treat it with urgency by doing what works: make addiction recovery services available to more people in the most low-barrier, equitable way possible. In doing so, more people will get help and we will further destigmatize addiction and recovery. More people will feel safe to come forward and ask for help.

Forcing people into treatment usually doesn't work.

Coercing people into treatment undermines their dignity and autonomy, and the evidence suggests that coerced treatment is ineffective. Data show that the risk of dying immediately after discharge from compulsory care for addiction is very high, especially for younger clients.⁹ Services should be evidence-based, voluntary, and accessible. That's exactly what Measure 110 does, and that's why decriminalization has been so effective in other countries when it comes to reducing stigma, connecting people with critical services, and ultimately preventing more people we love from dying from drug overdoses.

A criminal record can create lifelong barriers.

A criminal record for even a misdemeanor drug charge can sometimes be an automatic barrier to getting a job, accessing housing, qualifying for a credit card or student loan, and can also automatically disqualify people from being eligible for certain professional licenses. Increased drug testing and hyper-criminalization fueled by the drug war combine to often prevent people from vital public services. Eligibility policies that target people who use drugs make it harder for families to meet basic needs, and these bans do nothing to improve circumstances for people struggling to put food on the table.

A "drug war approach" has created multigenerational harms.

We've tried for more than half a century to arrest our way out of this public health crisis, and doing so has created harms that span generations.¹⁰ The disproportionate impact of

⁷ Drug Policy Alliance

⁸ SAMHSA National Survey on Drug Use and Health

⁹ <https://www.sciencedirect.com/science/article/pii/S0376871622002290>

¹⁰ "The United States is home to less than 5% of the world's population, but nearly 25% of its prisoners. ...Over 1.6 million people are arrested, prosecuted, incarcerated, placed under supervision and/or deported each year on a drug law violation." - Drug Policy Alliance data on mass incarceration

A public health approach costs taxpayers less.

A [recent study](#) looking at decriminalization in New Jersey found that \$1 billion in direct costs and health casualties of the drug war can be saved through decriminalization, and that such savings can be utilized to fund a more effective public-health approach for people who use drugs.¹⁷

According to the Office of National Drug Control Policy, drug abuse leads to about \$120 billion in criminal justice costs, health care costs, lost wages and incarceration, and victim costs every year. In Oregon, the total cost of substance abuse was estimated to be almost \$6 billion. A study by the Oregon Office of Alcohol and Drug Abuse Programs found that for every tax dollar spent on addiction recovery services, it saved \$5.60 in taxpayer money.¹⁸

Accessible, low-barrier services save lives

Measure 110 makes care more accessible to more people by removing barriers to and conditions for care. The Oregon Health Authority reported that in only six months, Measure 110 funding enabled over 16,000 *more* people to receive care.

Low-barrier care eliminates many typical obstacles that prevent people from accessing care. Care is considered “low-barrier” when a person is able to access the services they need without having to deal with long wait times, wait lists, prohibitive costs, or other delays. A low-barrier approach is a way to “meet people where they are” and provide an environment where they can be who they are — culturally and emotionally.

Measure 110 opened more doors to services.

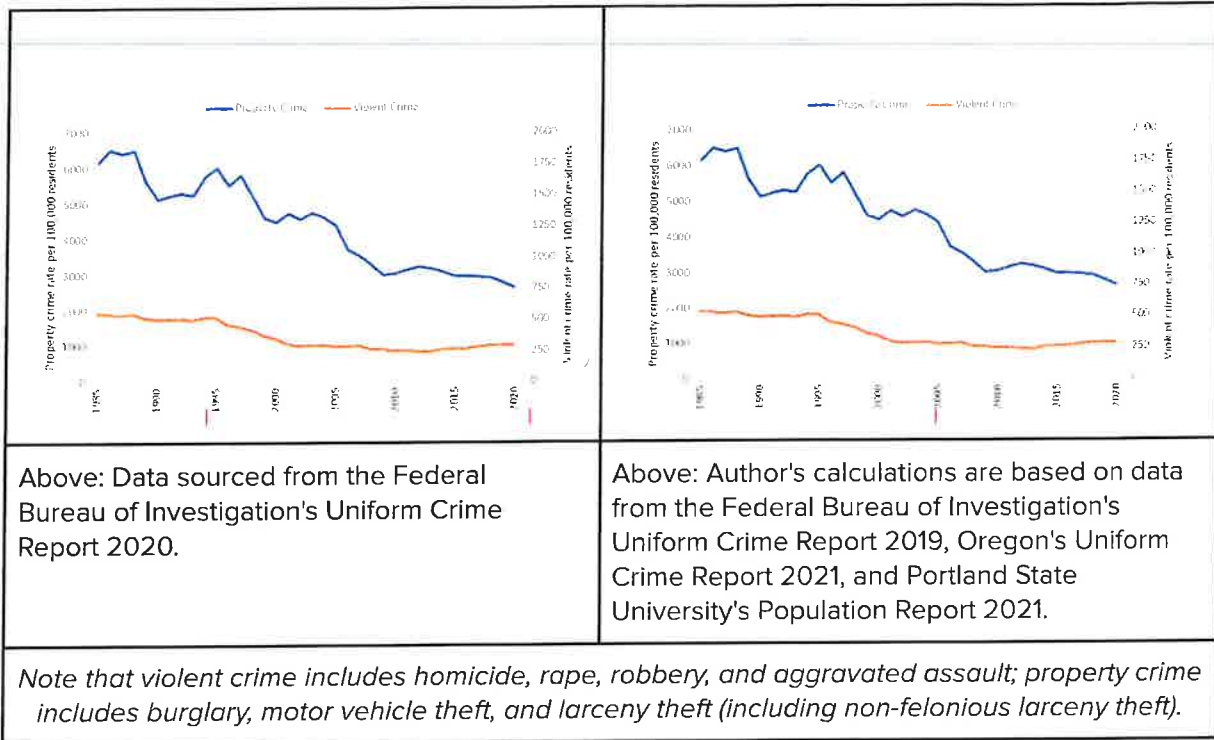
Some have wrongly asserted that prior to Measure 110, people in Oregon struggling with substance use could easily access addiction recovery services through the criminal justice system. They have argued that Measure 110 removed this pathway to services. This is far from accurate. There are few services available for incarcerated people in Oregon struggle. Addiction recovery providers also report that prior to the initial Measure 110 funding being released, it was not uncommon to have to turn people seeking services away, or put them on a waiting list that was weeks long.

Measure 110 is changing the system so that there is no wrong door to access services.

You don't have to get arrested before you are *maybe* offered help. Our loved ones struggling with substance use can now either call the 110 hotline to get connected to services, or seek them out directly through local providers. Measure 110 is changing the addiction recovery service landscape so that regardless of the path, supportive services will be more readily available closer to home.

¹⁷ "Estimating the Savings from Decriminalizing Drug Consumption: The Case of New Jersey", *Rutgers Journal of Law and Public Policy*

¹⁸ *The Statesman Journal*



Decriminalization is *not* legalization.

Measure 110 only *decriminalized* personal possession of small amounts of drugs, reducing criminal possession offenses from misdemeanors to civil infractions. Other conduct involving drugs — like manufacturing, dealing, intent to sell, driving under the influence, etc. — remain illegal.

Are drug overdoses on the rise because of Measure 110?

Measure 110 funds overdose prevention services. Like gun violence, drug overdoses are on the rise all across the country — not just in Oregon where possession of small amounts of drugs have been decriminalized. Oregon ranks 50th in the nation in access to critical addiction recovery services. The influx of funds from Measure 110 will help Oregon meet the tremendous need for these services. That’s why it’s so important to quickly release the funding into the communities that desperately need these services. The influx of Measure 110 is five times the amount that Oregon currently spends on harm reduction and addiction recovery services.

Is Measure 110 making the fentanyl crisis worse?

Fentanyl entered the illicit drug supply years before Measure 110 took effect. The CDC reports²³ that overdose deaths are rising to record levels nationwide. Blaming Measure 110 locally is politically convenient but incredibly inaccurate. Oregon is fortunate that Measure 110 funding is available to help reduce the likelihood of fentanyl-related overdose deaths by investing a total of

²³ <https://www.cdc.gov/nchs/nvss/vsrr/drug-overdose-data.htm>





Ballot Measure 110 Implementation Update

1

What the law does, at a glance:

- Decriminalizes possession of small amounts of drugs. (Does not legalize.)
- Invests \$302 million in funding for critical addiction recovery and harm reduction services for this biennium.
- Expands access to a full array of low-barrier addiction services, including:
 - Low barrier treatment (detox, sobering, outpatient);
 - Peer-supported recovery;
 - Harm reduction and overdose prevention services; and
 - Supportive, transitional, and long-term housing.
- Treats people with substance use through a healthcare approach.

2

Access to Care Grant Early Successes: Housing



Multnomah County

Quest Center was able to open its second recovery home for LGBTQ+ clients taking part in its “Finding and Sustaining Recovery” program, Quest’s integrated behavioral health treatment program that helps people build sober and healthy lifestyles.

The Recovery Home serves some of Quest’s most vulnerable clients working to overcome housing barriers while providing them with a safe, sober space as they transition into recovery.

5

Access to Care Grant Early Successes: Peer Services & Outreach

The Miracles Club



Bringing A Community Together One Person at A Time

Multnomah County

Measure 110 enabled the Miracles Club to add three additional peer mentors to their full-time staff of five. Miracles is a community recovery center that offers addiction peer services to the African American Community, as well as a fellowship hall, events and meeting space for community recovery meetings, and housing.



**Multnomah and Marion
Counties**

Measure 110 helped Morrison expand Parents Anonymous®, an evidence-based, family strengthening program for parents seeking support for mental health and substance abuse issues.

6

In June, 2021 the Oregon Legislature approved \$302 million for Measure 110 services over the next two years.

That's more than **5 TIMES** what Oregon currently spends on non-Medicaid funding for those services.

Source: Oregon Criminal Justice Commission

9

What's happening now: Funds are getting out to providers

M110 BHRN Grantees 2022

Measure 110 is a first of its kind health-based approach to substance use and overdose prevention.
 Number of entities subject to change as negotiations progress.

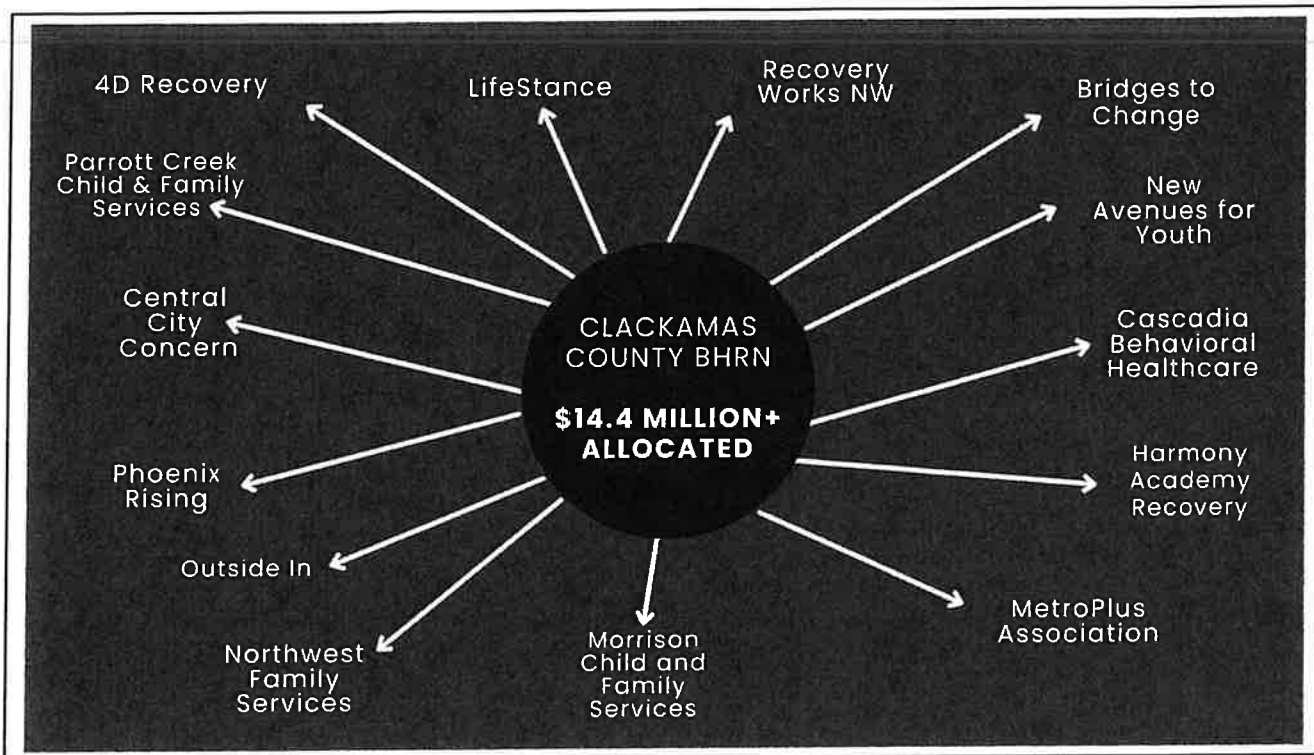
BHRN Approval Progress

Total Entities for Consideration	Total Entities Approved for Negotiation Phase	Complete BHRNs
334	245	10

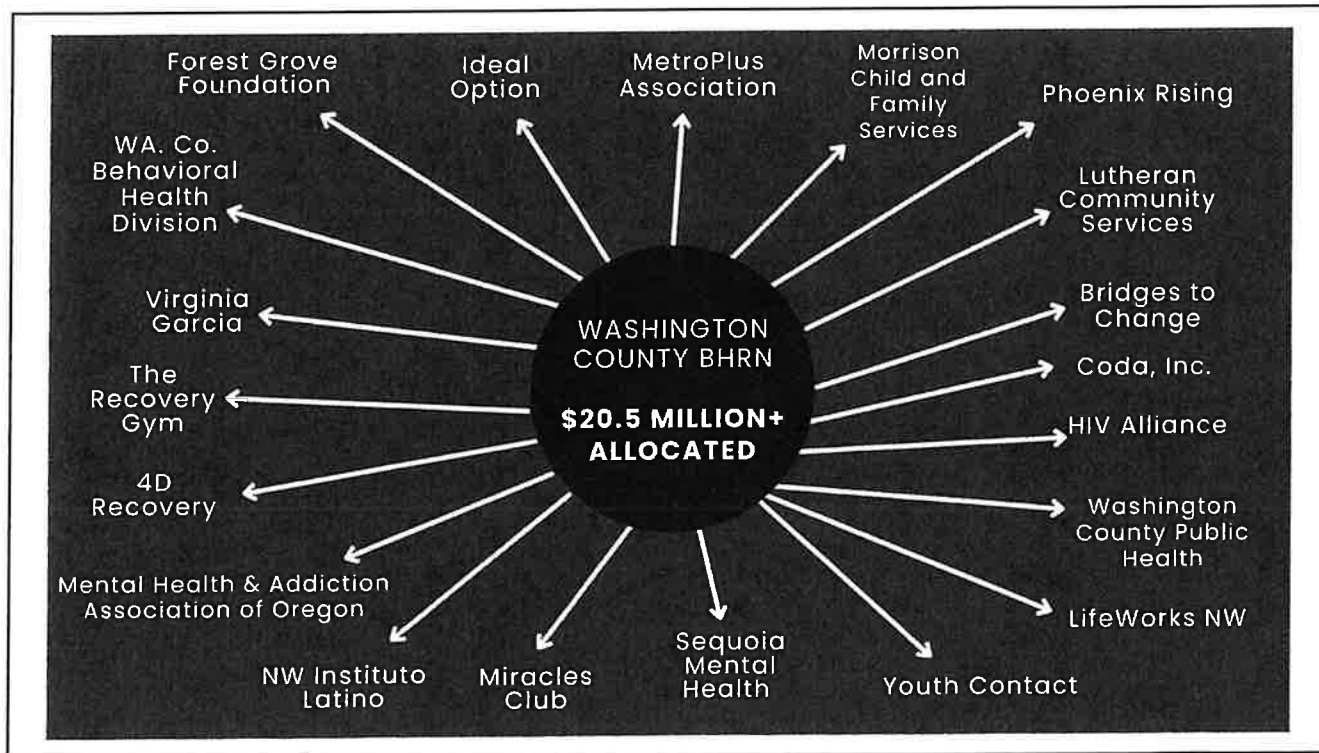
* Entities Approved for Negotiation

County	Approved for Negotiation	Complete BHRN
Baker	1	0
Benton	6	0
Clackamas	18	0
Clatsop	7	0
Columbia	5	0
Cook	5	0
Crook	3	0
Curry	2	0
DeShaunesse	6	0
Douglas	3	0
Elbert	2	0
Grant	2	0
Harney	1	0
Hood River	5	0
Jackson	20	0
Jefferson	1	0
Josephine	8	0
Klamath	6	0
Lake	1	0
Lincoln	18	0
Linn	9	0
Linn	7	0
Mallam	3	0
Marion	6	0
Morrow	1	0
Multnomah	41	0
Polk	2	0
Shannon	2	0
Tillamook	7	0
Umatilla	2	0
Wasco	2	0
Washington	2	0
Wheeler	10	0
Wheeler	20	0
Wheeler	2	0
Yamhill	8	0

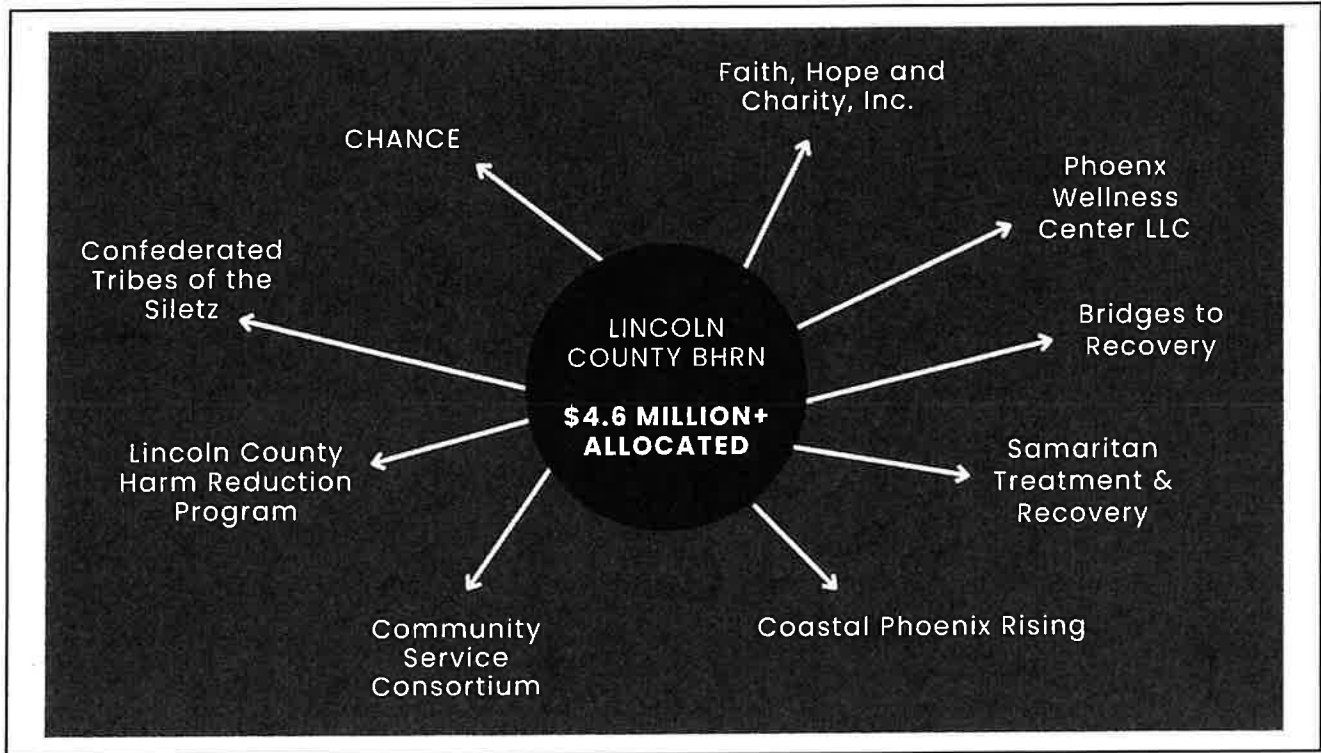
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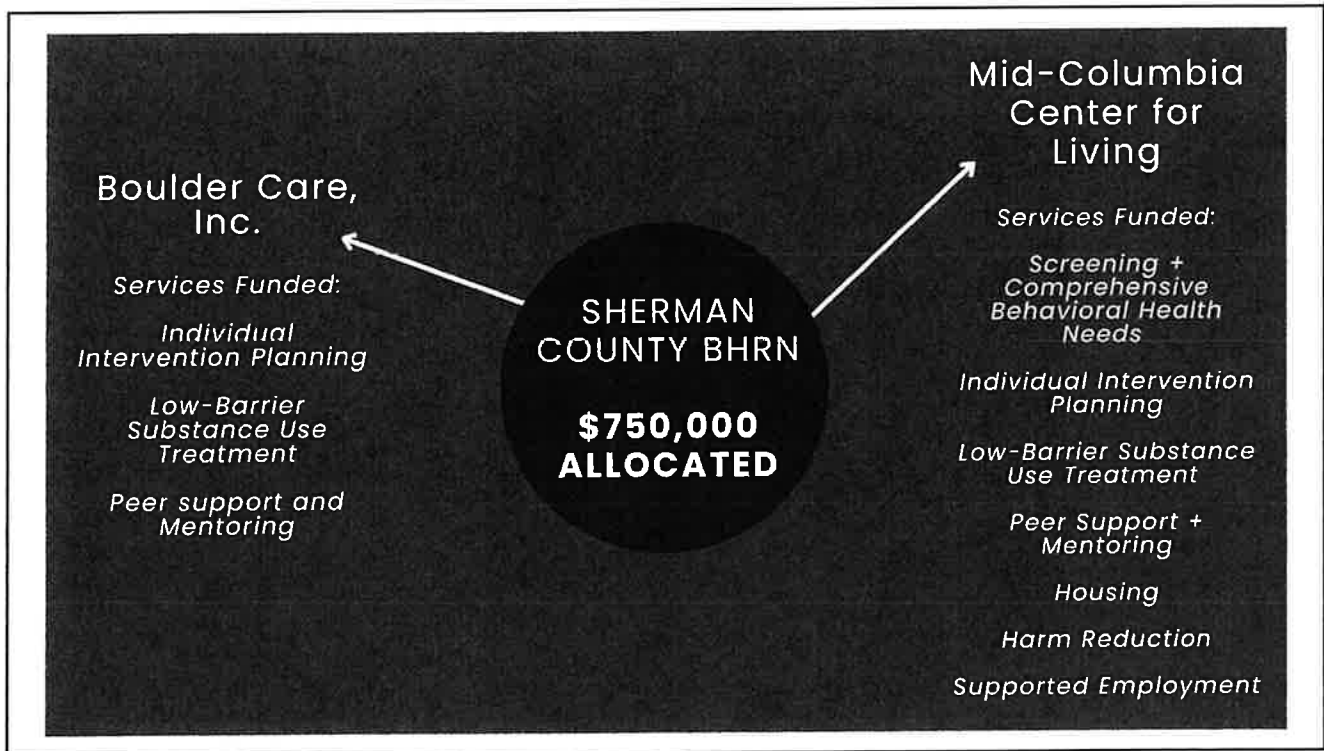
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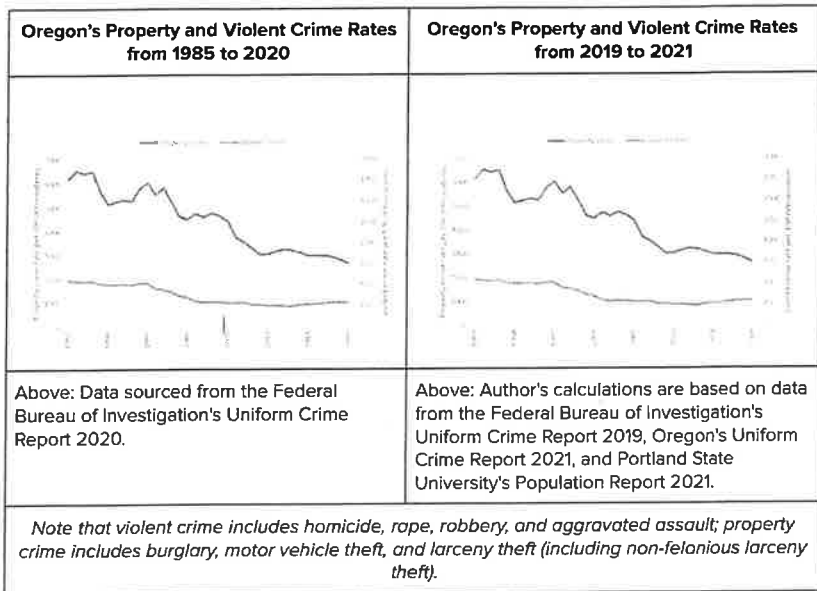


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Most crime rates have held steady or even gone down since Measure 110 passed.

Despite the sensationalism from some elected officials and media outlets about the alleged rise in crime in recent years, data show that, in general, crime rates have held steady since 2018.

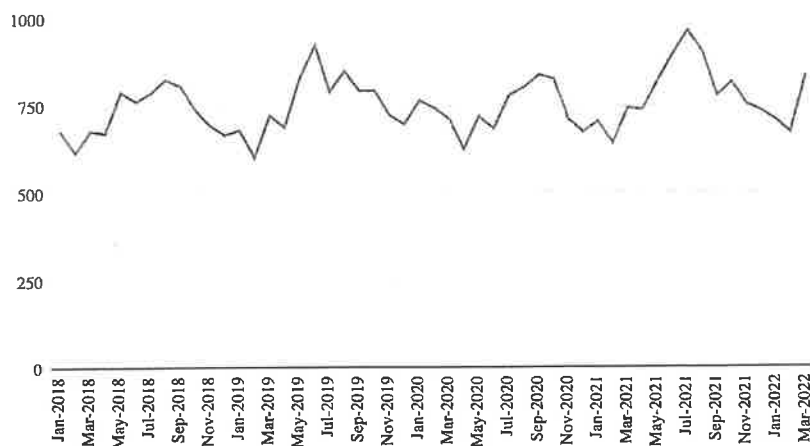
Preliminary data on 2021 crime rates within Oregon's largest cities show that most crime rates either held steady or even declined.



21

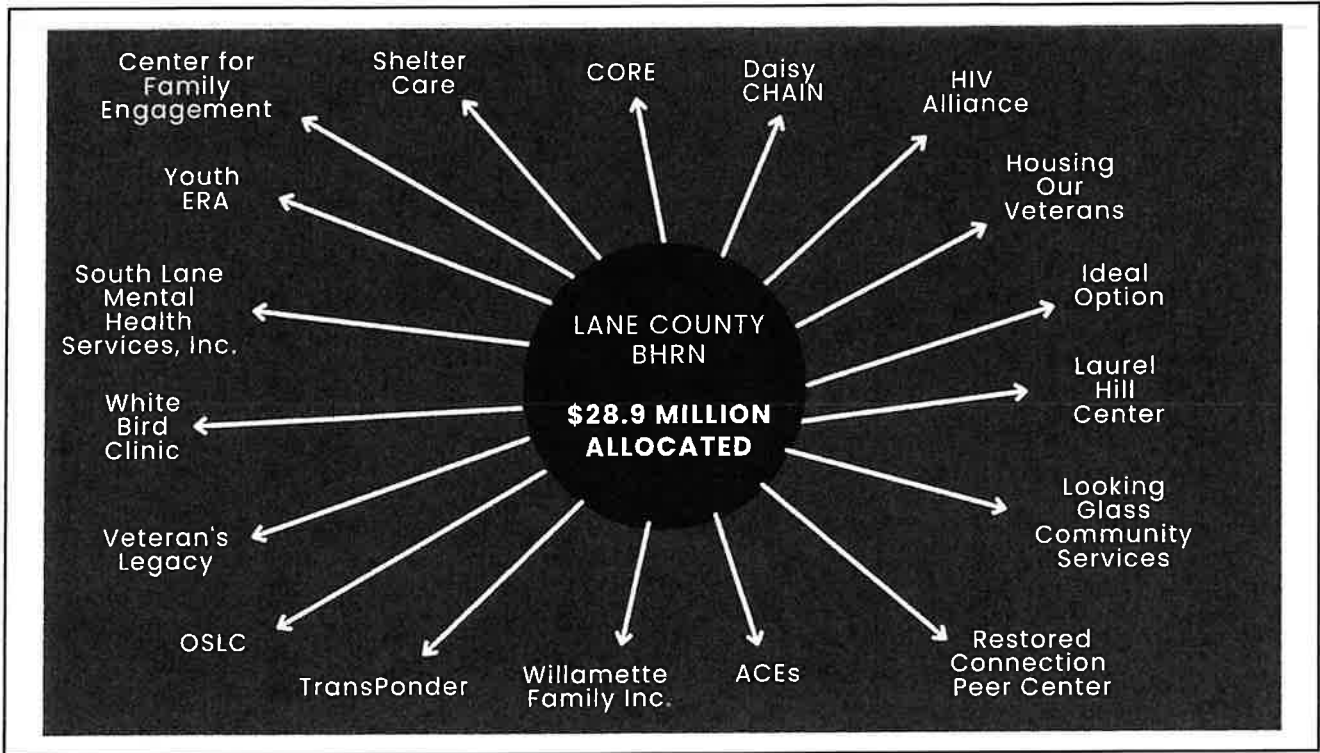
Reported assaults in Portland, by month

In Portland, assault rates in the city have remained relatively constant since 2018 and sex offenses appear to be trending down.

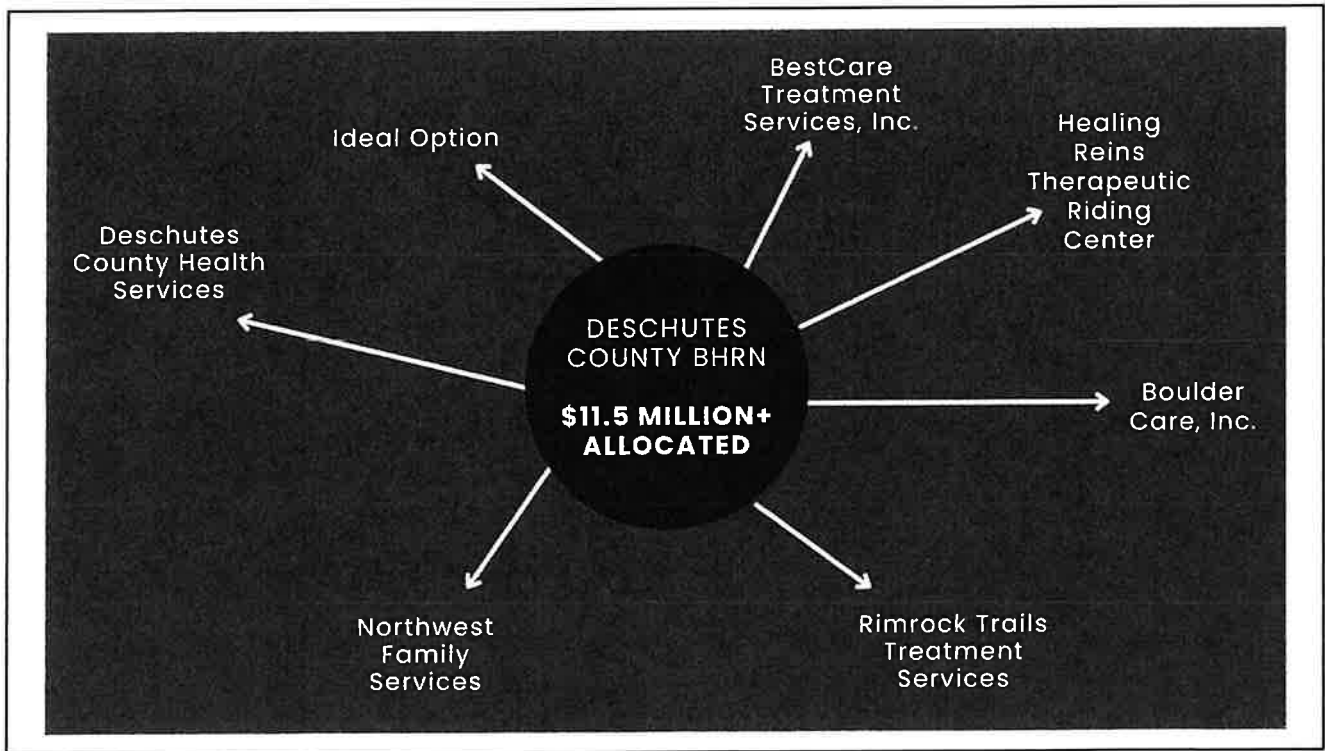


Source: Portland Police Bureau Crime Dashboard / OPB

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