

**Felony Case Management
in the
Pierce County Superior Court

Progress Report**

Submitted to:

Pierce County Performance Audit Committee

and

Pierce County Superior Court

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by

Alan Carlson



1888 Sherman Street, Suite 410
Denver, Colorado 80203-1159
Phone: (303) 831-7564; Fax: (303) 831-4564
www.jmijustice.org

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Although this report has been reviewed by a number of people, the contents of the report and the findings and recommendations are JMI's alone. Those who reviewed the draft report are in no way responsible for any errors of omission or commission in the final version of the report. The points of view expressed in this document are those of JMI and do not necessarily represent the official position or policy of Pierce County, any of its agencies, or the Pierce County Superior Court.

I. PROBLEM STATEMENT

The Justice Management Institute (JMI) first began examining felony case processing in Pierce County in 2000. In 2001, a number of changes in structures, policies, and practices were recommended to establish greater accountability for the resolution of felony cases in a more timely, efficient, and effective manner.¹ After receiving the report, the Pierce County Council and the Superior Court contracted with JMI for assistance in implementing the recommendations. The objective was to improve felony case processing, both as to pace and by making more effective use of those public resources allocated to resolving felony cases.² The changes produced measurable results. Fewer felony cases were pending by the end of 2001, and there were fewer old cases in the pending caseload. There was also a reduction in the number and length of continuances of cases set for trial.

However, the positive impact proved transitory. Beginning in late 2002, the resolution of felony cases slowed according to at least two measures:

1. The number of pending felony cases rose significantly, notwithstanding that the rate of new filings was relatively unchanged. The total number of pending felony cases peaked at the end of September 2007, at 2,434, compared to the low of 1,120 at the end of July 2002.
2. The number and proportion of older cases in the pending caseload also grew. The number of pending cases over 9 months old peaked at 336 cases at the end of September 2007, compared to 53 at the end of July 2002. The proportion of old cases is now almost 14% of the pending caseload, compared to 4% at the end of 2002.

In 2007, in response to the growing backlog of felony cases, JMI was asked to conduct a follow-up study of felony case management. A report addressing the growth in the pending felony caseload and recommending further changes in case management practices was presented in October 2007.³

In March of 2008, after consulting with prosecution and defense counsel, the Superior Court made several changes in the way it schedules and hears felony cases. As

¹ JMI 2001 Report. Carlson, Alan, George Gish, Barry Mahoney, Julie Hodges, and Ginger Kyle, MANAGEMENT STUDY OF FELONY CASE PROCESSING IN PIERCE COUNTY, WASHINGTON, FINAL REPORT, The Justice Management Institute, February 15, 2001. The final report, with some appendices published separately, is available at: <http://www.co.pierce.wa.us/xml/abtus/plans/perf-audit/JMI%20Final%20Report%2015FEB01.pdf>.

² JMI 2002 Report. Carlson, Alan, and Aimee Baehler, THE SUPERIOR COURT AND FELONY CASE PROCESSING IN PIERCE COUNTY, WASHINGTON, FINAL REPORT, The Justice Management Institute, March 14, 2002. The final report is available at: <http://www.co.pierce.wa.us/xml/abtus/plans/perf-audit/reports/SCFollow-Up.pdf>.

³ JMI 2007 Follow-up Study. Carlson, Alan, FOLLOW-UP STUDY OF FELONY CASE MANAGEMENT IN PIERCE COUNTY SUPERIOR COURT, FINAL REPORT AND RECOMMENDATIONS, October 2007. The final report is available at: <http://www.piercecountywa.org/performance-audit>.

these changes were being discussed, the Performance Audit Committee and Superior Court required JMI, pursuant to a contract amendment, to prepare a progress report on the impact of the changes made and the status of felony case management.

This progress report has three primary objectives:

1. Assess the current status of felony case processing in Pierce County in light of the observations and recommendations made in the JMI 2007 Follow-up Study;
2. Evaluate the impact on the pending caseload of changes implemented by the Superior Court in March 2008; and
3. Make further recommendations about management and other statistical information that should be collected and analyzed to monitor felony case processing.

A site visit was conducted at the end of July 2008 to conduct interviews, observe proceedings, and gather relevant information. A more complete description of the methodology used to gather information and prepare the report is found in Appendix A.

The progress report first summarizes the changes made in 2008. The status of the pending caseload and scheduling of proceedings is then examined to determine the impact of the changes made. Finally, there are observations about changes in attitudes and practices associated with the changes and recommendations suggesting further actions.

II. CHANGES IMPLEMENTED IN 2008

A. Revised Criminal Case Management Protocols

In the early Spring of 2008, the Pierce Superior Court adopted a revised set of criminal case management protocols, effective March 31, 2008.⁴ The adoption of the protocols was the culmination of extensive negotiations between a committee of Superior Court judges and representatives of the prosecutor's office and defense counsel. The Court drafted the initial proposal and distributed it to prosecution and defense counsel for comment. Numerous meetings were then held to discuss amendments to the proposal. The discussions were reportedly contentious, and the judges revised the draft protocols a number of times in response to concerns expressed by counsel.

The revised protocols are intended to improve the timing and efficiency of the criminal justice system. They also address a number of the recommendations in the JMI 2007 Follow-Up Study. The key changes in the revised protocols include the following:

- A goal of one Omnibus Hearing in each case, set 40 days after arraignment;
- Setting of Omnibus Hearings in a manner that better accommodates the schedules of the prosecutor trial team units;
- The Omnibus Hearing will be 'on the record';
- Explicit expectations as to what attorneys will have done prior to the Omnibus Hearing, including:
 - The prosecutor has provided all available discovery and made an offer prior to the Omnibus Hearing; and
 - Defense counsel has reviewed the discovery provided, met with their client, and discussed the offer;
- Only one Pretrial Conference is to be scheduled in most cases;
- Earlier screening for referral to drug court;
- Provisions for more expedited plea dates;
- Revised practices to make the plea process more efficient and reduce postponements of plea dates;
- Repeal of all existing trial date continuance policies, with all continuances to be heard 'on the record' in the Criminal Division Presiding Judge court (CDPJ);
- Guidelines for the continuance of trial dates based on severity of case;
- A process for trailing cases ready for trial;

⁴ Pierce County Superior Court, JMI Committee, Criminal Case Management Protocols, adopted 3/3/08, rev. 3/12/08, effective 3/31/08, and found at: <http://www.co.pierce.wa.us/xml/abtus/ourorg/supct/Criminal%20Protocols%202008.pdf>.

- Use of pro tem judges to backfill for judges sitting in Criminal Division (CD) courts to hear their civil cases;
- Use of two-part forms, except for the plea form; and
- An unspecified review of old cases every three months.

The revised protocols represent a concerted effort to manage the calendar in a manner that is fair to the attorneys, yet moves cases to more prompt resolution.

B. Changes in the Pending Caseload

A primary goal of the revised protocols was to reduce the number of pending cases. The pending felony caseload has been reduced from a peak of 2,434 at the end of September 2007, to a level of 1,905 at the end of September 2008, a drop of 529 cases, or almost 22%. Chart 1 on the next page displays the rise and fall of the pending caseload from January 2001, to September 2008 (top line). As can be seen, the number of cases pending has been reduced to the levels experienced in late 2006, but has not yet reached the stated goal of 1,500 cases.

The reduction in the pending caseload started in late 2007, as soon as discussions began about changing calendaring practices. The reduction continued until the summer of 2008, where it has roughly plateaued. Looking at past years, although there is a tendency for the pending case level to plateau in the summer, this has not always been the case. The critical question in the Fall of 2008 is whether the decline in pending cases will continue, stabilize, or reverse, and whether the change can be linked to the new protocols and new attitudes.

One possible explanation of a reduction in pending caseloads is that the number of resolutions has exceeded filings. Unfortunately, it is not possible to determine from the information derived from LINX if relative difference in filings and resolutions accounts for the reduction in the pending caseload.

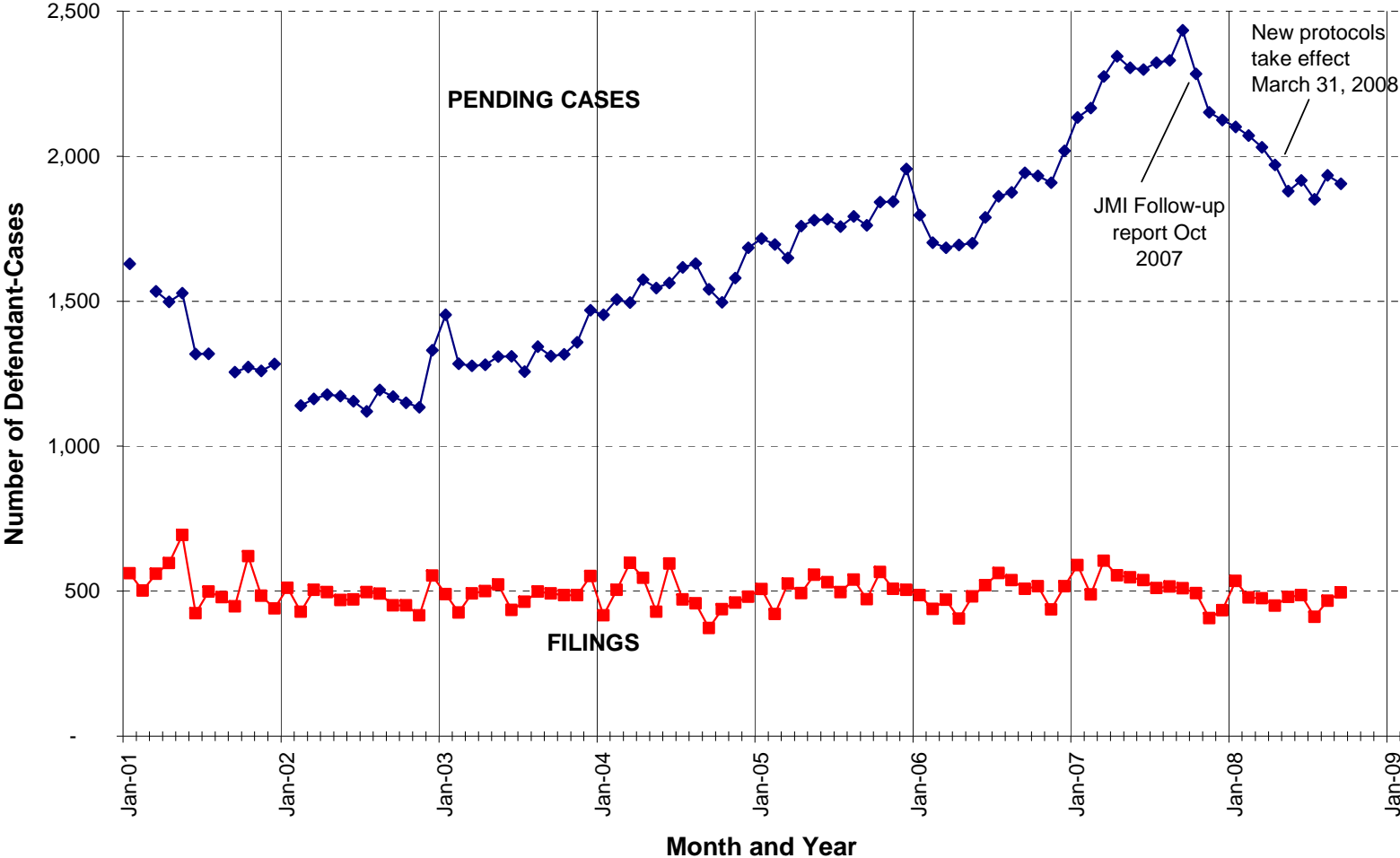
According to LINX, the rate of resolutions in 2008 has continued at about the same rate as in 2007, but the rate of filings is lower. From October 2007 through September 2008, 6,540 resolutions were reported, but only 5,613 new felony filings were reported. This suggests the pending caseload should have decreased by the difference of 927 cases, but the pending caseload only dropped 529 cases during this time period.⁵

Examining prior years, resolutions have exceeded filings during several years when the pending caseload grew. It is not clear why the number of filings, resolutions, and pending cases do not balance, but the inconsistency makes it impossible to determine to what extent the reduction in pending caseload is attributable to resolutions exceeding filings, as opposed to changes in calendaring practices.

⁵ This calculation does not take into account any net increase or decrease in cases where the defendant fails to appear, or returns to the court's jurisdiction, which also directly affects the total pending caseload. The Court reports that its examination of data about such cases does not explain the difference noted in the text.

Chart 1 - Felony Filings and Pending Cases

Data from January 2001 to September 2008 (end of month)



Data Source: Superior Court monthly reports from LINX.
Pending cases exclude bench warrant, Western State evaluation, Drug Court, criminal RALJ appeals, and fugitive ("TU 8") cases.
Filings exclude fugitive cases ("TU 8").

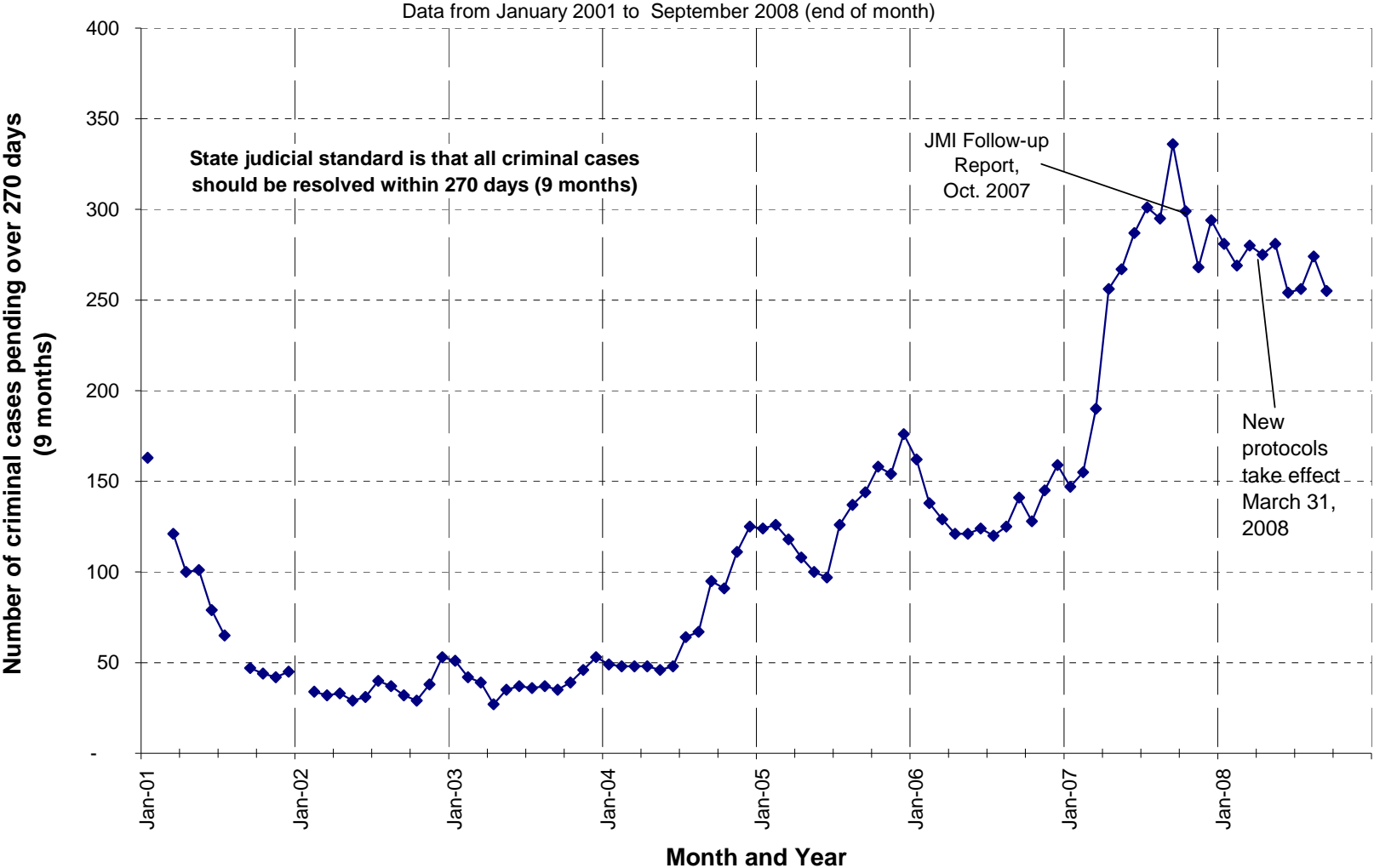
The number of old cases, defined as more than 270 days old, has also dropped since late 2007, but the proportion of old cases relative to the total pending caseload has not. Chart 2 (next page) displays the number of old cases each month since 2001. The number peaked at 336 in September 2007, and dropped to 255 at the end of September 2008. The drop, while not quite as extensive as the drop in the overall pending caseload, does track the overall reduction in the pending caseload.

However, the proportion of cases over 9 months old still remains relatively high. Table 1 below indicates the number and proportion of old cases pending at the end of each year since 2002. The proportion was at a low of 3.6% at the end of 2003, and was almost four times higher at the end of 2007. At the end of September 2008, the ratio is about the same, suggesting that enough attention is being paid to old cases to prevent any further build-up, but not enough to cause the proportion of old cases to decline proportionally.

Table 1 – Proportion of Old Cases in Pending Caseload

Year End	Number of Old Cases Pending	Proportion of Old Cases in Pending Caseload
2002	53	4.0%
2003	53	3.6%
2004	125	7.3%
2005	176	9.0%
2006	159	7.9%
2007	294	13.8%
September 2008	255	13.4%

CHART 2 - Felony Cases Pending Over 9 Months



Data Source: Superior Court monthly reports from LINX.
Pending cases exclude bench warrant, Western State evaluation, Drug Court, criminal RALJ appeals, and fugitive ("TU 8") cases.

C. Changes in Scheduled Proceedings

Another goal of the revised protocols was to reduce both the number of scheduled proceedings and the number whose outcome reflected little or no judicial activity. The JMI 2007 Follow-up Study pointed out the significant growth in the number of proceedings and in the portion of proceedings where there was no significant judicial activity. A review of scheduled proceedings in the first three quarters of calendar 2008 shows some progress towards this goal (see Table 2 on the next page). Since the revised protocols only became effective on March 31st of this year, it may be too soon for improvements to have fully manifested themselves.

Growth in the number of proceedings without significant judicial activity was a major finding in the JMI 2007 Follow-up Study. The total number of scheduled proceedings has dropped, but not extensively (see second row of Table 2). Based on the first three quarters of 2008, there will be 88,664 proceedings scheduled in 2008, about a 4% drop from the number in 2007, but almost 20% higher than the number in 2002. The growth in number of proceedings is not attributable to more cases, as the number of filings is relatively unchanged (see first row in Table 2). While some progress has been made to reduce the number of scheduled events, the approaches implemented have not resulted in significant progress.

The proportion of scheduled proceedings where little or no judicial activity occurs is also down, but, again, only slightly. At the current rate, there will be 39,524 proceedings in 2008 that are cancelled, not held, or continued (see third row of Table 2). This will be fewer than in 2007, and about the same number as in 2006. The projected number represents almost 49% of the scheduled hearings (see fourth row of Table 2), compared to 36% in 2002. Thus, in 2008 it is as likely as not that a scheduled proceeding will not involve any judicial activity.

The revised protocols contemplate a reduction in the number of Omnibus Hearings (OH) per case, and extended the date of first scheduled OH. The number of scheduled Omnibus Hearings has dropped in 2008, but not significantly. An average of 1,155 OH's⁶ was scheduled each month in 2007. The average for the first three quarters of 2008 is 1,002, with lows of 800 in April and May, but over 1,200 in September. While there is some reduction, it remains to be seen whether it will be sustained and have the intended effects.

The revised protocols schedule only one Pre-Trial Conference (PTC) in most cases. In 2007, the average number of PTC's scheduled per month was 855. The revised protocols took effect on March 31st, and PTCs are scheduled several weeks into the future. Beginning in May 2008, the number of PTC's dropped significantly, averaging 597 per month through September. The change in the protocols has clearly reduced the number of PTC's scheduled per case.

⁶ Data from ad hoc LINX report of all proceedings with proceeding type OH (Omnibus Hearing) or OHO (Omnibus Hearing - Out of Custody).

Table 2 - Comparisons of Filings, Proceedings, Resolutions, and Pending Cases

Row		2002	2006	2007	Projected for 2008
1	Filings	5,744	5,882	6,196	5,705 ^a
2	Total Number of Proceedings Scheduled	74,116	83,705	92,207	88,664 ^a
3	Number of Proceedings Cancelled, Continued or Not Held ^b	26,785	39,688	45,836	39,524 ^a
4	Percent of Proceedings Cancelled, Continued, or Not Held ^b	36.1%	47.4%	49.7%	48.8% ^a
5	Jury Trial Settings ^c	11,157	17,241	20,210	18,236 ^a
6	Continuance Rate of Jury Trial Settings ^d	37%	56%	58%	59%
7	Number of Criminal Jury Trials Ending in a Conviction or Acquittal ^e	302	295	289	320 ^a
8	Pending at end of period	1,331	2,108	2,125	1,905

Source: LINX reports, except as noted otherwise below.

^a Projected from data for January through September 2008.

^b Proceeding Outcome was CANC (cancelled), CONT (continued), or NH (not heard).

^c Proceeding Type is JT.

^d Proceeding Type is JT and Proceeding Outcome is CONC or CONT.

^e Data from WA AOC Reports produced from SCOMIS data. Sum of columns labeled "Acquitted/Not Guilty" and "Convicted" in table labeled "Criminal Case Resolutions After Trial Commencement". Number for 2008 is projection based on data for January through August.

Finally, the 2007 JMI Follow-up Report also recommended reductions in the continuances of trial dates. Unfortunately, the number of jury trial settings is still quite high, and they are far more likely to be continued than not. The projected number of jury trial settings in 2008 will be fewer than in 2007, but still more than in 2006 (see fifth row of Table 2). The projected number of jury trial settings in 2008 is more than 63% higher than in 2002, despite approximately the same number of filings.

Continuances of jury trial dates are worse than ever. The rate is projected to be 59% in 2008, compared to 37% in 2002 (see sixth row of Table 2). Clearly, trial dates are not yet firm and a case set for trial is still far more likely to be continued than to be sent out for trial.

The number of jury trials resulting in an acquittal or conviction is projected to be higher than in the last several years (see seventh row of Table 2). This reflects a greater effort by the court to start criminal trials, discussed further below.

III. OBSERVATIONS

A. Changes in Attitude and Leadership about Managing Cases

The most noticeable change associated with the revised protocols is a shift in attitude, in particular, the leadership in the court and in the offices of the Prosecuting Attorney and Department of Assigned Counsel, about reducing the size of the pending caseload and managing the caseload. The change in attitude is impacting practices and caseloads.

The revised protocols begin with the Court's reaffirmation of its obligation to "to provide swift and efficient resolution of criminal cases".⁷ The protocols also state a goal of getting the pending felony criminal caseload down to 1,500 cases.⁸ The Court's acknowledgment of responsibility is also reflected in the choice of the CDPJ judge for 2008, Judge Ronald Culpepper, who is making a concerted effort to manage the trial calendar and reduce the pending caseload, while respecting the concerns of the trial attorneys. In addition, the discussions about the choice of who will sit in CDPJ in 2009 reflect an attitude that the next CDPJ must follow the patterns and practices established in 2008 and be consistent in implementing the revised protocols. In particular, Judge Thomas Larkin, the Presiding Judge for 2008, deserves recognition for leading the change effort, along with the other judges on the Court's committee⁹ who worked with the lawyers to develop the new protocols.

A new attitude is also in place in the leadership of both the prosecution and defense agencies. They are aware of the system-wide concerns, understand the impact of large pending caseloads on the ability of their lawyers to effectively represent their clients, and realize the potential benefits of smaller caseloads. They are aware of the emphasis on resolving old cases, even if some disagree with the way it is implemented. There is also an understanding that the trial dates chosen by attorneys should be more realistic, especially in old cases. This change in attitude did not occur without some grumbling and expression of frustration. However, attorneys are beginning to see that their caseloads are lighter and fewer proceedings are calendared. This reduces their scheduling conflicts, waiting time in calendar courts, and their stress. JMI observations of proceedings revealed noticeably fewer attorneys present and less of a sense of "mass calendar" calls where the pervasive activity is the continuance of trial dates.

B. Attorneys Managing Their Caseloads

In addition to the Court taking responsibility for managing the total caseload, it is also necessary for the prosecutor and public defender to improve the management of the lawyers in their office and their caseloads. Assigning a case to a particular lawyer for

⁷ Pierce County Superior Court, JMI Committee, Criminal Case Management Protocols, adopted 3/3/08, rev. 3/12/08, effective 3/31/08, p. 1.

⁸ *Ibid.*, Section XIII, C.

⁹ Judge Bryan Chushcoff, Judge Lisa Worswick, and Judge Ronald Culpepper.

resolution does not absolve the office or the management team from monitoring the activities and performance of the lawyer. Not all lawyers are equally skilled in managing their caseload, prioritizing work, and preparing cases in a timely manner. New lawyers need to be mentored to develop good habits in managing a caseload as well as in preparing and resolving cases. More experienced lawyers may also need help to manage a caseload, either because of trial pressure, fatigue, or weaker caseload management skills. During the past year both offices have improved their oversight in an effort to improve operations and reduce the backlog.

As part of the changes made this year, the Department of Assigned Counsel (DAC) has strengthened its oversight of both lawyers and cases. DAC managers have reviewed caseloads, met with DAC lawyers, and even re-assigned cases ready for trial in a few instances. In reviewing a lawyer's performance, supervisors now consider the number of pending cases an attorney has, as well as the number of cases assigned and the age of pending cases. Although the extent of the impact is hard to quantify, these activities have helped reduce the pending caseload and the stress associated with higher caseloads.

RECOMMENDATION 1: DAC should continue to monitor trial deputy caseloads, particularly when someone is in trial for an extended period, to ensure that all defendants have an opportunity to promptly and fairly resolve their case and that their speedy trial rights are not violated.

The Prosecuting Attorney's Office (PAO) is also concerned with the pending caseloads of its trial deputies and old cases. The office culture has been that deputy prosecutors are delegated responsibility for the cases assigned to them and there was an expectation that each lawyer will act in a professional manner and thus require little supervision. However, senior management is now reviewing caseloads, not assigning new cases, and has even reassigned cases for some trial deputies. Although the extent of the impact is hard to quantify, these activities have helped reduce the pending caseload and the stress associated with higher caseloads.

RECOMMENDATION 2: PAO should continue to monitor trial deputy caseloads and older cases, particularly when someone is in trial for an extended period, to ensure that the resolution of cases, particularly old cases, is not unnecessarily delayed.

During negotiations on the revised protocols, there was an understanding that the judges would provide feedback to the PAO and DAC about lawyers whose management of their caseloads was felt to be weak or whose judgment about case resolutions was unnecessarily contributing to delayed resolution of cases. The judges are beginning to provide this type of feedback to managers in the PAO or DAC on a limited basis. Although the level of feedback and extent of the impact is hard to quantify, these activities should help reduce the pending caseload and the lawyer's stress associated with higher caseloads.

RECOMMENDATION 3: The Court should continue to advise PAO and DAC regarding attorneys whose cases may be lingering, either because the attorney is in trial or is not effectively managing his or her cases or caseload.

C. Attorneys in Trial with Other Trial Ready Cases

Attorneys in trial who have several, often relatively old, cases set for trial continue to present a challenge to the reduction of the pending caseload. It is difficult for an attorney who is in trial, particularly a long or complex trial, to take the time to effectively address the resolution of other cases in his or her caseload. Being in trial effectively suspends work on the attorney's other cases. The unavailability not only prevents other trials from being started, it can also delay non-trial resolution in other cases because the attorney does not have time to review new information about the case and negotiate an appropriate resolution. This contributes to the backlog, because the attorneys on the other side also have caseloads that they are trying to resolve. The problem can exist for attorneys in the PAO, the DAC, and in private practice.

Addressing this problem is not easy. The prosecution as well as the defense can argue that the establishment of rapport, with a victim or the defendant respectively, means they should not be arbitrarily ordered to "hand off" a particular case. However, there are cases where a plea or dismissal is an appropriate resolution, given the state of facts, and the assigned attorney is not critical to the resolution.

When an attorney is in trial, especially for an extended period, the attorney's supervisor should review the cases in the attorney's pending caseload to see if other cases are ready to be resolved, or to respond to offers from opposing counsel. The intent is not to have the supervisor micromanage the lawyer's caseload just because, or while, he or she is in trial, but to avoid a case remaining unresolved and becoming unnecessarily old just because the lawyer cannot devote adequate time to it while in trial. This would more commonly involve cases to be pled or dismissed, and not cases going to trial, although that might also occur in infrequent instances. The process would be aided if the lawyer in trial took the initiative to inform his or her supervisor about cases in his or her caseload that need attention while in trial. This is not a sign of inability to manage one's caseload, rather, it is evidence of the lawyer's concern to give equal care to all clients.

RECOMMENDATION 4: Both the PAO and DAC should continue to monitor the cases trial deputies who are in trial for an extended period to ensure that other cases assigned to the deputies are prepared and resolved in a timely manner.

D. Old Cases

Although the revised protocols themselves did not provide specific practices to address the high number and proportion of old cases, the Court has taken steps to make the resolution of older cases a higher priority. Beginning in the Fall of 2007, the Court began 'publishing' a list of the cases over 9 months old. This was initially done by

placing a copy of the list on the counsel table in the CDPJ court. At first, there were objections that the list was inaccurate or that there were ‘explanations’ of why a particular case was so old. The persistence of the Court in referring to the list and in giving preference to old cases in assignment of cases to trial has helped to change attitudes. The lawyers now know that old cases need to be addressed, and not just allowed to become older. The PAO and DAC both report consulting with each other about old cases coming up for trial regarding both readiness and non-trial resolution.

During 2008, Judge Culpepper, as CDPJ, has also emphasized the age of a case both when assigning cases for trial and when granting continuances. It is now more difficult to obtain a continuance in old cases, and the trial dates must be selected more carefully, because the dates will be considered firmer by the CDPJ.

Notwithstanding these efforts, the number of old cases remains high, and is a significant proportion of the pending caseload. Greater attention needs to be paid to resolving old cases and reducing their proportion of the pending caseload.

RECOMMENDATION 5: The Superior Court, in consultation with PAO and DAC, should develop and implement a specific plan to address old cases. Elements of the plan might include:

- a) Identify the 200 oldest cases in the pending caseload and conduct a status conference in each case to determine the status of the case and what needs to be done to get it ready for trial;**
- b) Identify the 200 defendants who have been in custody for the longest period of time and conduct a case status conference in each case to determine the status of the case and what needs to be done to get it ready for trial; and**
- c) Give these old cases preference when assigning cases to trial; or**
- d) Designate specific trial departments to hear only these old cases.**

E. Scheduled Proceedings

One of the recommendations in the JMI 2007 Follow-up Report and one of the objectives of the protocols adopted in March is to have fewer proceedings in each case and insure that court proceedings involve judicial activity or oversight that contributes to prompt and just resolution of the case. Fewer scheduled hearings also means fewer appearances for attorneys and more time for them to investigate and prepare cases and resolve them, as well as less paperwork and file handling for the clerk of court.

The protocols sought to achieve this by reducing the expected number of hearings in each case and changing the nature of the Omnibus Hearing (OH). The protocols provided for one OH that is set farther out in time from arraignment to allow counsel to engage in investigations, discovery, and discussions about resolution. In addition, the

OH is to be “on the record”, reflecting the judicial oversight and decision making expected. Only one Pretrial Conference is anticipated in most cases. Some cases (TU 5 - drug and vice cases) are allowed two Pretrial Conferences. Again, the objective is fewer, and more meaningful, hearings.

In the past, counsel have often relied on scheduled proceedings to meet with clients and discuss case resolution. Reducing the number of scheduled proceedings, therefore, requires counsel to develop alternatives to court hearings for meeting to discuss and resolve cases and for defense counsel to meet with their clients. Both the PAO and DAC offices resisted the changes, in large part, it appears, because a scheduled proceeding had become the primary mechanism and point in time for the lawyers to talk to each other and for the defense counsel to talk with their client. The revised protocols provide no alternative to court hearings for meetings, leaving that to the discretion of the lawyers.

The court has begun to address the problem of too many proceedings scheduled where there was little or no judicial activity, but the attorneys do not appear to have come up with alternatives for meeting with clients or talking to each other without the need to schedule a hearing. There are alternatives (for example, the phone lines and the video link into the jail to talk to in-custody clients), but there was no indication during interviews that defense counsel are making greater use of these alternatives. The more numerous, and more private, meeting spaces for defense counsel and in-custody clients in the new CD facilities (discussed below) may actually exacerbate the habit of scheduling a proceeding in order to meet with a client.

RECOMMENDATION 6: The attorneys need to develop alternative mechanisms for meeting to discuss resolution of cases. Defense counsel should develop new habits and practices for meeting with clients, whether in or out of custody, to discuss a case, including possible resolution.

Counsel also complain that the requirement that the Omnibus Hearing be on the record does not accomplish the intended purpose of monitoring whether attorneys are getting cases ready for trial or resolution in a timely manner. Requiring it to be on the record has proved meaningless, and the CDPJ is reportedly signing OH orders without holding the hearing contemplated by the protocols. Scheduling conflicts of attorneys, particularly those in trial, makes it even more difficult to conduct the Omnibus Hearings on the record.

RECOMMENDATION 7: Reassess the purpose of the Omnibus Hearing and either adopt changes in practices that the lawyers agree will encourage earlier preparation, or discontinue the hearing as ineffective in contributing to prompt resolution of cases and a reduction of the backlog.

F. Availability of Judges

Prior JMI reports noted that the lack of availability of judges to try criminal cases has contributed to the backlog. This problem is exacerbated by the fact that more

attorneys are now announcing 'ready for trial' on a given day than there are judges to try the cases. The challenge for the court is to have sufficient judges available to try cases, and ensure that judges maximize the length and number of trial days. In the past, there has been some disagreement about the appropriate allocation of judicial resources to hear criminal cases. However, there are several indications that a concerted effort is being made during 2008 to increase the number of judges available to hear criminal cases. The effort includes more civil panel judges hearing criminal cases, use of pro tem judges, and checking on the availability of judges to start criminal trials.

In 2008, the CDPJ is making a more concerted effort, compared with the practice in recent years, to look for judges who can start a criminal trial. He is known to 'walk the halls' to find judges who can take criminal trials and to closely monitor the status of cases sent out to begin trial. As unpleasant as it may be to check on fellow judges, it is an important step to ensuring that available judicial resources are used as fully as possible. Unfortunately, the lack of available data (see discussion associated with recommendation number 12 below) makes it impossible to quantify the impact, if any, of monitoring judge availability.

RECOMMENDATION 8: In the future, the CDPJ should continue the practice of checking judge availability to ensure that judicial resources are fully utilized. Judges should promptly notify the CDPJ of availability to take a criminal case for trial.

Several judges have reportedly volunteered to do criminal cases during their civil panel months, including during the summer. There are also reports of judges postponing the start of civil cases a day or two to take or complete a criminal trial. In order to increase the number of civil panel judges hearing criminal trials without disadvantaging civil litigants, the Court is employing pro tem judges to hear civil cases. The Court also employs pro tem judges to back-fill judges during their CD rotations.

Parties in criminal cases are also asked if they will stipulate to a pro tem judge (usually a retired judge) hearing their trial. Although this rarely happened in the past, it is now occurring, although the extent is unknown. This adds to the number of judges available to start criminal trials.

The use of pro tem judges was reportedly extensive during the Spring and Summer of 2008. However, the Court has reportedly exhausted the available funding and stopped employing pro tem judges. As a result, either civil litigants will have to wait for their trials to start, or fewer judges will be available to try criminal cases.

RECOMMENDATION 9: The Superior Court should consider requesting additional funding for pro tem judges from the Pierce County Council. In the request, the Court should provide statistical evidence of the contribution made by pro tem judges over the last year in reducing the pending felony backlog and provide a plan as to how the requested funding will be used to further reduce the backlog.

Another aspect of judge availability has to do with knowledge of how many judges are available to start trials on a particular date. Knowledge of judge availability affects the perceived firmness of trial dates. No lawyer likes to prepare a case for trial, and then discover on the day of trial that no judge is available to try the case. Consequently, both the PAO and defense counsel have an interest in knowing how many judges will not be available to start trial during a given week, whether because of vacations, judicial education, or other absences. The Court is reportedly reluctant to provide information about known judicial absences, arguing that letting attorneys know which judges will be “off” invites judge shopping. However, the Court does not need to say who is off, just be more transparent about how many judges will be unavailable during a particular period, especially in the Summer.

An argument has been made that the uncertainty about whether trial judges will be available encourages non-trial resolutions. The idea is that attorneys will prepare cases because they might be sent out for trial, and the preparation will often lead to a non-trial resolution. However, the likelihood of starting trial on the date scheduled is so low in Pierce County that the opposite effect occurs. Attorneys assume no trial judge will be available, and, consequently, do not prepare for trial or resolve cases set for trial. Letting counsel know how many judges are available allows attorneys to be properly prepared, and avoids wasting their time and disrupting the lives of victims and witnesses who are subpoenaed to testify.

RECOMMENDATION 10: The Court should routinely make available to attorneys information about the number of judges who will be available to try criminal cases each week for the next three months.

Another important aspect of the effective use of trial judges is to set cases for trial to match judge availability. If too many cases are set to begin trial in a given week, not enough judges will be available to start all of the trial-ready cases. If the cases cannot be sent out for trial, they will be continued, at great inconvenience to victims and witnesses and waste of attorney preparation time. If too few cases are set, judges are sitting and waiting for a case to try, a poor use of public resources. The Court must set a number of cases for trial that ensures all judges will be busy, yet not so many that trial-ready cases must be continued.

An argument is often made that oversetting is required by the number of pending cases. However, this is counter-productive. A simple example will demonstrate the fallacy. Assume a court can try five cases a month. If ten cases are set one month, and only five can be reached, the other five are continued until the next month, when they can be tried. Five cases are resolved the first month, five the second, for a total of ten resolutions. There are fifteen trial dates set, with five continuances of trial dates. If, instead, five cases were set the first month and five set the second month, the court would still resolve ten cases in two months. However, only ten trial dates will be set, and there will be no continuances of trial dates. Moreover, the average age at disposition would not change. The oversetting just increases the burden on the lawyers, the clerks, and the court.

RECOMMENDATION 11: The Court should monitor trial settings more closely and adjust them to reflect the number of judges available based on historical patterns of resolutions on the day of trial.

A key element to proper setting levels is knowledge of judge availability. Information about judge availability is also critical to assessing the impact on the pending caseload of changes made in 2008. Unfortunately, the Court has declined to provide clear information about judge allocation or availability. Past JMI reports have recommended gathering and use of data about the allocation and availability of trial judges.

In 2007 the Superior Court was asked by the County Council to begin reporting information about judges,¹⁰ and it has not done so. Consequently, it is impossible to assess whether the Court has actually increased judicial resources for criminal cases, and, if so, what the impact on the pending caseload has been. Without this information, it is also impossible to project the impact, if any, of adding judgeships, or how much additional judicial resources (judges reallocated from civil cases or pro tem judges) might be needed to bring the pending caseload to a lower level.

RECOMMENDATION 12: The Court should begin to gather and use information about the number of judge days allocated to cases and the length of trials, especially criminal trials

G. Effective Use of Open Trial Departments

The judicial resources allocated to hearing criminal cases must be used fully and efficiently. There are several aspects to this matter. The primary goals are to maximize both the number of days a judge is available to conduct trials and the length of each trial day. Anything that diminishes either factor will result in under-utilization of judges and contribute to a case backlog.

There are several indications that trial judges are not yet utilized efficiently. Comments continue to be made that in-custody defendants who are in trial are not transported to the courtrooms until late in the mornings, resulting in lost trial time. Counsel also report that trials seem to be taking longer than in the past and that, in some trial departments, there is no particular sense of urgency to complete trials promptly. Unfortunately, there is little documentation of these matters, as information that could provide answers to such questions is not gathered or reported by the Court.

RECOMMENDATION 13: The Court should develop and implement policies and practices designed to make full and efficient use of trial departments. The following options should be considered for adoption:

¹⁰ Pierce County Ordinance No. 2007-104s, section 18.

- a) **Conduct a “managing trials” workshop for all trial judges to reach consensus on trial practices that increase the efficiency of trial judges and lengthens their trial days;**
- b) **Adopt policies and practices establishing consistent early start times and the expected length of trial days for trial departments;**
- c) **Reach an agreement with the transportation staff in Corrections to give priority to in-custody defendants who are in trial so that they are transported to the courtroom as early in the day a possible; and**
- d) **Obtain pro tem judges to sit in empty courtrooms, whether the courtroom is empty because the judge is sitting in a CD rotation, at a conference, on vacation, or otherwise not available to do trials.**

The effective use of open trial departments may also involve more targeted use of open courtrooms to address the pending caseload. There are a number of cases in the pending caseload that will undoubtedly plead or be dismissed if sent to a courtroom for trial. However, because the case does not involve serious charges, is not particularly old, or does not have much priority to be sent out for trial, it lingers in the pending caseload unresolved. A situation may have developed where defendants charged with less serious crimes, particularly those in custody, now believe that they will not get sent out for trial, so there is no incentive to plead. If such cases are sent out, it might have a ripple effect in the pending caseload, triggering other resolutions. The objective is to create an expectation that such cases will be sent out for trial if they do not resolve. One way to do this would be to set aside a few trial departments, perhaps only for a limited time, to try the lesser cases and clear them out of the backlog.

RECOMMENDATION 14: The Court should consider designating at least two trial departments to hear only short criminal trials, especially in B and C felony cases, for a limited time to reduce the number of pending cases.

H. Paperwork

The handling of documents in felony cases is another practice that could be streamlined to reduce the length of court hearings and make better use of public resources. Prior JMI reports recommended that something be done to eliminate the reliance on multi-part forms to record the results of hearings, and document pleas, judgment, and sentencing. The reports noted the waste of court and attorney time attributable to the separation and collating of multi-part forms during and after hearings. One solution is to migrate from paper forms to the use of electronically generated documents in cases.

In 2008, Pierce County sought and received a federal grant to develop electronic versions of court documents in criminal cases that would be produced and shared in lieu of paper documents. The grant request identifies three objectives:

1. Replace the current manual process for producing court orders using multi-part forms with electronic production and distribution of court orders;
2. Reduce the duplicate data entry required when paper forms are used to communicate court orders; and
3. Reduce errors and inconsistencies caused by these manual processes.

The grant proposed a nine-month time frame to develop and implement electronic court orders.

Eliminating the use of multi-part paper court orders in favor of electronically produced and distributed documents would be a significant accomplishment. The judges of the Superior Court and the attorneys should actively embrace this development. While the adjustment to electronic documents can be disconcerting, initially, the transition period is generally short. Judges, lawyers, and court and clerk staff in jurisdictions across the country that have converted to use of electronic documents would strongly oppose any attempt to go back to paper documents and case files.

RECOMMENDATION 15: The Court should endorse and support the efforts of the Clerk of Court to implement electronic production and sharing of court documents in lieu of paper forms.

I. New Criminal Division (CD) Facilities

The inadequacy of the existing CD facilities is well known, as is noted in prior JMI reports. The layout and security arrangements of the current CD facilities delay court proceedings and impose artificial constraints on calendaring practices. As of late October 2008, construction of the new CD courtrooms on the second floor has been completed, and operations are scheduled to begin on November 10.

The new courtrooms and their layout should improve operations in the CD courts in several ways. More defendants can be brought to court at any one time, improving the efficiency of the trial calendar in CDPJ as well as those in the other CD courts. The size and layout of the new holding areas will also allow more flexibility of calendaring and remove some of the artificial calendaring requirements dictated by the existing facilities. The new facilities should also dramatically improve the opportunity for defense counsel to meet and confer with in-custody clients. Concerns about security and safety for defendants, officers, and the public, as well as limitations on prisoner movement, will also be addressed.

After using the new courtrooms for a period of time, the Superior Court and attorneys will begin to realize both efficiencies and inefficiencies regarding the calendars now heard in the CD courts. It may be that different times for hearing certain types of cases or proceedings may be more efficient in terms of: a) reducing attorney schedule conflicts, b) minimizing prisoner transport, c) reducing the number of in-custody defendants that are moved for a particular calendar, d) minimizing the number of proceedings where the outcome does not contribute to the resolution of the case (for

example, a continuance), and e) starting on time and attorneys being present when the calendar is called. It may also be that fewer judicial resources are needed to hear the calendars now heard in the CD and CDPJ courts.

RECOMMENDATION 16: The Court should closely monitor what occurs in existing calendars after they are moved to the new CD courtrooms. After a period of time using the new facilities, the Court should convene meetings of affected agencies and request ideas and input regarding changes to the calendars. The court should then revise the calendars to make the most effective use of judge and attorney time and expedite the resolution of cases, including the possibility of combining the calendars of the two CD courts and the CDPJ court to allow them to be heard by two judges instead of three.

As noted above, the convenience and privacy of the new attorney-client meeting spaces does present a risk that defense counsel will calendar hearings solely in order to meet with their client, instead of going to the jail or meeting in their office. The culture of using hearings just to meet with clients is, unfortunately, already well established.

RECOMMENDATION 17: The prosecutors, defense counsel, and Court should consider approaches such as the following to minimize the extent to which the practice of scheduling hearings to meet with clients interferes with the hearing and resolution of cases:

- a) **Encourage greater use of video or telephone conferencing for attorneys consulting with their in-custody clients;**
- b) **Allow attorneys to schedule only a very limited number of proceedings in each case; or**
- c) **Acknowledge this will happen, and establish procedures for attorneys to make appointments (not scheduled court hearings) to meet with their in-custody clients in the new CD facilities at times that do not disrupt court calendars and have the least impact on the Correction's transportation staff. Perhaps the appointments could be limited to a fixed number in each case, or only be allowed where there is some assurance that the point of the meeting is to prepare plea paperwork or for discussions that will likely lead to a resolution of the case.**

Since meetings between defense counsel and their clients must occur in order to resolve cases, the meetings should be encouraged and facilitated. However, this should not be done at the expense of regular court hearings needed to resolve issues in other cases requiring judicial action, and it should not be done if there are less costly alternatives, considering the costs to all entities in the justice system.

IV. CONCLUSIONS

In late 2007, the Pierce County Superior Court and representatives of the prosecution and defense bar began discussions intended to reverse the continued growth in the pending felony caseload. The result of the discussions was a revised set of protocols adopted by the Superior Court that became effective on March 31, 2008. The revised protocols changed the way felony cases were calendared and heard. Fewer hearings were to be scheduled in each case. Trial date continuance policies were revised and a process for trailing cases was instituted.

At the beginning of 2008, during the discussions, a different judge became CDPJ. He worked to better manage cases set for trial, including paying greater attention to old cases. He also attempted to make better use of the available judges. The Superior Court made more judges available to hear criminal cases. Managers in both the Department of Assigned Counsel and Prosecuting Attorney's Office reviewed the status of the calendars of attorneys in their respective offices and took some actions to relieve sources of congestion.

The total pending felony caseload has dropped since the Fall of 2007, although the reduction slowed in the Summer of 2008. The factors that contributed to the decline are hard to identify, much less quantify. Factors that could explain the drop include: a) a slight drop in filings, b) more judges available to hear criminal cases, b) trial deputies being prepared to start trial or resolving cases earlier, c) the practice of trailing cases, and d) better management of cases in the attorney offices. The extent to which any one factor contributed to the backlog is impossible to assess because of the lack of reliable data. In particular, there is no good data about the number of resolutions, the number of jury trials, or the level of judicial resources allocated to criminal cases. In addition to not being able to identify the reason for the backlog reduction, it is difficult to determine whether the lower pending caseload level can be sustained or further reduced.

Another goal of the changes made was a reduction in the total number of proceedings and the number where no significant judicial activity took place. While the total number of proceedings has been reduced, the portion that are cancelled or continued is still very high. Trial dates are particularly problematic, as it is still not more likely than not that a case set for trial will be continued. There are fewer Pretrial Conferences, but the changes regarding Omnibus Hearings appear to be ineffective.

In order to achieve a further reduction in the pending caseload, new and additional actions will have to be taken by the Superior Court and the attorneys involved in criminal cases. The new CD facilities may provide a good opportunity to review and change the calendaring practices for pretrial proceedings. Further efforts will have to be made to make trial dates more meaningful, possibly including more careful setting of trial dates and focusing on old cases and relatively simple cases. Finally, a greater effort must be made to gather reliable data about judge availability, number and length of trials, and number of resolutions. This information is essential if the Superior Court and other criminal justice agencies are to make more informed decisions about what to do and to assess whether it works.

V. RESOURCES

JMI 2007 Follow-up Study: Carlson, Alan, FOLLOW-UP STUDY OF FELONY CASE MANAGEMENT IN PIERCE COUNTY SUPERIOR COURT, FINAL REPORT AND RECOMMENDATIONS, October 2007. The final report is available at: <http://www.piercecountywa.org/performance-audit>.

JMI 2002 Report: Carlson, Alan, and Aimee Baehler, THE SUPERIOR COURT AND FELONY CASE PROCESSING IN PIERCE COUNTY, WASHINGTON, FINAL REPORT, The Justice Management Institute, March 14, 2002. The final report is available at: <http://www.co.pierce.wa.us/xml/abtus/plans/perf-audit/reports/SCFollow-Up.pdf>.

JMI 2001 Report: Carlson, Alan, George Gish, Barry Mahoney, Julie Hodges, and Ginger Kyle, MANAGEMENT STUDY OF FELONY CASE PROCESSING IN PIERCE COUNTY, WASHINGTON, FINAL REPORT, The Justice Management Institute, February 15, 2001. The final report, with some appendices published separately, is available at: <http://www.co.pierce.wa.us/xml/abtus/plans/perf-audit/JMI%20Final%20Report%2015FEB01.pdf>.

The 2001 report appendices and an associated report prepared by the Washington AOC are available at: <http://www.co.pierce.wa.us/pc/abtus/plans/perf-audit/reports.htm>.

Pierce County Superior Court, JMI Committee, CRIMINAL CASE MANAGEMENT PROTOCOLS, adopted 3/3/08, rev. 3/12/08, effective 3/31/08, found at: <http://www.co.pierce.wa.us/xml/abtus/ourorg/supct/Criminal%20Protocols%202008.pdf>

APPENDIX A – METHODOLOGY

The information forming the basis for this progress report was gathered from four sources: 1) discussions with key players, 2) an analysis of available data about case processing, 3) observations of court proceedings, and 4) the review of documents related to felony case processing. JMI staff talked with judges, senior managers in each of the county entities involved in felony case processing, and representatives of the private bar. In particular, discussions were held with:

- Judges, including the Presiding Judge, criminal division presiding judge, and other judges on the “JMI committee”;
- Senior management in the Prosecuting Attorney Office;
- Senior management in the Department of Assigned Counsel;
- Several private criminal defense lawyers;
- Managers and staff in Superior Court administration;
- Performance Audit Committee staff, and
- Managers and staff in the County Clerk’s office.

Most interviews were conducted during a three-day site visit in July 2008. Some sources were interviewed further by telephone in October.

Information gathered from interviews, observations, and reports was augmented with statistical information about caseload, workload, and performance about what has changed since the JMI 2007 Report. The statistical data gathered and analyzed included filings, resolutions, pending caseload, and proceeding scheduling and outcomes. The data reviewed was derived from both regularly produced reports and ad hoc reports generated from LINX specifically for this progress report.

Reports and documents relevant to felony case management and the implementation of recommendations from the JMI 2007 Follow-up Report were also reviewed. These included protocols, other studies or performance audits, news stories, and agency documentation of plans, policies, or practices. In addition, Washington state statutes, appellate court opinions, and state and local court rules were examined. These provided valuable background and context for understanding current operations and possible legal limitations on further actions.

It should be noted that the review process was abbreviated, involving a limited amount of time and resources. Although the report cannot be considered comprehensive, it does provide a snapshot of progress and the challenges and opportunities present.