

County of Santa Clara


Office of the District Attorney

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Clerk of the Court
Superior Court of CA County of Santa Clara
BY  DEPUTY
Janice Jones

August 4, 2017

Santa Clara County Civil Grand Jury
191 North First Street
San José, CA 95113

Dear Civil Grand Jurors:

Pursuant to Penal Code section 933(c), here is the comment of the District Attorney's Office in response to the Civil Grand Jury Report released on June 15, 2017, entitled *Justice Delayed: Why Does It Take So Long To Resolve Felonies In Santa Clara County?*

Finding 1: There is a culture in the criminal justice administration system that tolerates delays in disposition of felony cases. This is costly to Santa Clara County in both financial and human terms.

Response: Agree.

The Office of the District Attorney has been advocating for faster trials of criminal cases with the courts and the criminal defense bar for years, and we welcome the scrutiny by the Civil Grand Jury in the hopes that it provides a catalyst for needed changes.

Santa Clara County Superior Courts take too long to achieve either a resolution that both sides agree is fair, or to conduct a trial. That slow process is painful for victims of crime who must wait and wait for the crime against them to be adjudicated. It is frustrating for witnesses who are told repeatedly that they might be needed to come to court over months and sometimes years. It causes defendants to have the anxiety and uncertainty about what will happen as their cases drag on and on. It costs the County and the Courts money in the form of paying for the staff time for multiple court appearances, lengthy supervision of defendants by the Department of Pre-Trial Services, and costly jail resources from sometimes lengthy pre-trial detention stays.

While the Judicial Council of California Report relied on by the Civil Grand Jury finds that Santa Clara County resolved only 47% of felonies in the 2013-14 fiscal year compared to the statewide average of 88%, internal District Attorney's Office data from 2014 shows a higher percentage of felony cases, 73%, resolved within a year. Even using the internal District Attorney's Office data,

Santa Clara County would still be among the slowest in the state for felony cases, just not as dramatically slow as reported by the Judicial Council. The DA's Office's looks forward to working with the Superior Court to try to reconcile the numbers, and to ensure that the DA's Office internal data is accurate and that our County is accurately reporting its data to the Judicial Council.

Recommendation 1a:

The Santa Clara County District Attorney should:

- **Identify practices that contribute to delays in the resolution of criminal cases.**

Response: This recommendation has been and will continue to be implemented.

The District Attorney's Office has engaged in the study of this issue both internally and with the help of outside entities for several years. The key practices that contribute to the delays are as follows:

1. The criminal defendant and his or her attorney control the clock in a criminal case. In Santa Clara County, that control has not been balanced with the urgent need to adjudicate criminal cases in a more timely way.

Here are the ways the defense controls the clock in a felony case:

- The Defense decides when to enter a plea. At the first appearance, the defendant is arraigned and asked to enter a plea (the event that starts the criminal clock running). Unlike in other counties¹, the defense in Santa Clara County rarely enters a plea of not guilty at the arraignment or close in time to it, and requests to delay the entry of plea to further assess the case. In Stanislaus County (Modesto), the court enters a "not guilty" plea on behalf of the defendant at felony arraignment to start the clock if a plea is not entered at the time of arraignment. In 2014, the median time from the arraignment to the entry of plea of any kind (most often a plea of not guilty) in a felony case was 87 days.
- The Defense decides how fast a case will proceed by deciding whether and when to exercise a speedy preliminary hearing demand. The defense has the right to a speedy preliminary hearing (a hearing for a judge to determine whether the charges filed are supported by probable cause) within 10 days or within 60 days of entry of a plea. In Santa Clara County, this speedy preliminary hearing right is waived in almost all cases by the defense to get more time to evaluate and prepare the case. Sometimes after months of requested continuances, the defense then "pulls their time waiver," resulting in the judge setting a preliminary hearing with live witness testimony within 10 court days of that moment.

¹ In San Mateo County, Alameda County and Sacramento County, the issue simply does not arise because in most instances the defense bar in these Counties enters a plea at or within days of the defendant's first felony appearance in court.

- The Defense asks for and receives continuances of court dates to request additional items of discovery from the prosecution. Most felony cases are discussed in an Early Resolution Calendar (ERC), staffed by a prosecutor, defense attorneys, and a judge. These court dates are often not set within the first thirty days after a case has been filed, and sometimes take multiple court dates to achieve a resolution – if one can be agreed upon. Often those delays and multiple court appearances are justified by defense requests for the prosecution to provide more things to the defense to review for them to properly evaluate the case – not just the police report, but the underlying recordings of interviews, photos of the scene, body-worn camera video, confirmatory drug testing by the crime laboratory. *This is the area where the DA’s Office can most directly make changes to speed the process, and we have been dramatically reforming what we provide to the defense, when we provide it, and how we provide it (see section on developing more efficient practices below).*
- A case does not proceed to preliminary hearing until the Defense is ready. If the case does not resolve, the case will not be set for a preliminary hearing until the defense is ready to proceed to that hearing. If the defense wants two or three months to prepare, after the case has had multiple appearances at a resolution calendar, the defense will be given that time by the courts. As stated above, at any time, the defense can “pull time” and demand a preliminary hearing within 10 court days.
- A case does not proceed to trial until the Defense is ready. After a preliminary hearing, the case is set for trial, and the defense has a right to a speedy trial within 60 days of the second arraignment of the case after the preliminary hearing. That speedy trial right is again waived in almost every case, and if the defense states that they are not ready, the defense will be given multiple and lengthy continuances to prepare. Then, at any time, the defense can “pull time” and demand a trial within 60 days.

Announcing “ready for trial” is very different for the prosecution and the defense. A DA’s Office study of the first six months of 2017, showed that defense attorneys announced that they were ready to proceed to trial on the date the trial was set 31% of the time, whereas the prosecution announced ready for trial 70% of the time. In the first six months of 2017, the median time a case remained on the Master Trial Calendar either waiting for both sides to be ready or waiting for an available judge was 196 days. Moreover, because of some cases that have languished on the trial calendar for literally years, the average time is pushed to 327 days. At the very least, this shows that moving to a point where the defense announced ready for trial at a higher rate, would reduce the number of days a case waits to begin a trial from the current median of more than six months. The District Attorney’s Office has moved to reassign cases so that they can proceed to trial as soon as the defense is ready, even if the assigned attorney is unavailable because of other trials, but this kind of change does little to address this larger issue.

Some may point out that the prosecution also has a right to a speedy trial, and that for sexual assault and child molestation cases, the Penal Code states that trials shall be commenced within 30 days after arraignment following a preliminary hearing or grand jury indictment. *Cal. Penal Code*

section 1048(b). Yet the effect of that mandate from the legislature has been nullified by the ability of the court to postpone the trial past 30 days if a finding of good cause is stated on the record, like if the defense states that it is not ready to proceed. So that even when the prosecution asserts the right to a speedy trial in a case with sensitive victims and high priority, the defense still controls the clock. In practice in Santa Clara County, Penal Code section 1048(b) demands by the prosecution are largely meaningless.

It is sometimes said that this slow system is part of the necessary, thorough, and vigorous criminal defense that we have in Santa Clara County, where the public and private defense bar is well-staffed, well-paid and has the resources to investigate the cases brought against their clients. The argument is that the *quality of justice* in our County is better than it would be if cases proceeded more quickly. This argument for slow but better justice is undermined by the fact that most cases do not need to prepare for or proceed to trial. In Santa Clara County, less than two percent of all filed criminal cases proceed to trial. The rest resolve without a trial after agreement by both sides. In most cases, a reading of the evidence quickly shows that the defendant is guilty, and the issues to be resolved are whether the charges filed are fair, and what a fair sentence should be.

The fact that the criminal defendant and his or her attorney control the clock in a criminal case is simply a fact. The challenge for the system as a whole is to do everything that can be done to ensure the defense is ready to proceed at the earliest possible date. The court and prosecution should inquire, if the defense is stating that they are not ready, why that is the case so that those issues can be addressed, and then to use the tools that are in the court's or in the prosecution's hands to move cases toward resolution or toward trial faster.

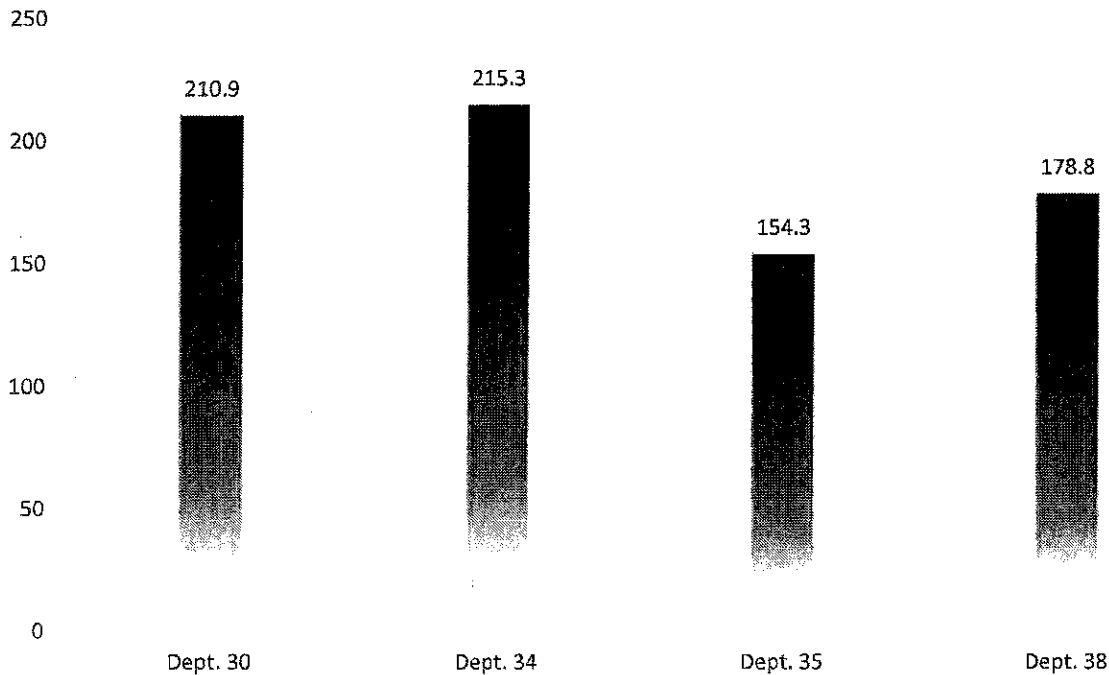
2. Not all courtrooms work as efficiently as they could:

There are also other issues of concern in the delays in our criminal justice system. In January of 2017, the Office of the District Attorney asked Beta Gov (a non-profit that assists government agencies study and address operational and organizational issues) and New York University's Center for Urban Science and Progress (a graduate research program that studies urban issues) to look at the delays in the criminal justice system in Santa Clara County to see if areas could be pinpointed that policy changes might address by examining felony cases filed in the first half of 2014 and tracking what happened to them over the next three years.

Among the findings are:

- Not every courtroom has the same delays. Some courtrooms handling the same kinds of cases with similar litigants, take much longer to process criminal cases. Looking to the courtrooms that do the best job in moving cases fairly and quickly can identify best practices for the judges and staff in the other courtrooms. For example, the chart below shows the length of time a case took to resolve in each of the four case management courtrooms in 2014, and the differences are dramatic, with a two-month difference in the average length of time a felony took to resolve between the fastest and slowest courtrooms.

AVERAGE NUMBER OF DAYS TO DISPOSITION (CASE MANAGEMENT COURTROOMS 2014)



- The length of time from the date of an arraignment to the entry of plea is very long (a median of 87 days in 2014), and a cultural change in the way our courts and parties handle their cases is needed (*and the District Attorney's Office has already implemented new procedures to provide more information on the cases we prosecute to the defense more quickly to do our part to change that culture*).
- The number of court appearances to resolve a felony criminal case is high (the median is 7.5 court appearances), and the length of time between them is a median of 23 days.
- The length of time that some probationers are monitored by the courts is quite varied, and where those times extend past a year or two, the courts are busy with that monitoring instead of handling currently pending cases. Dedicating specific courtrooms for probation monitoring in domestic violence and drug cases, and managing the length of time of that monitoring closely might free up more resources.

3. The case management system's current practices foster delays.

Looking at the four case management courtrooms that conduct the discussions for early resolution of felony cases, there are many reasons why cases get stuck there for months at a time. Sometimes it is because of the difficulty of getting all the defense attorneys and the prosecutor together in multi-defendant cases because of commitments to other criminal cases. Sometimes it is because certain kinds of cases rarely, if ever, resolve at an early resolution conference because of the need in some cases to "test the evidence" through a preliminary hearing (often Gangs or Sexual Assault cases).

Regularly, it is because there is little incentive for the defendant to resolve cases before preliminary hearing. Once an offer of resolution is received in the case management department, many judges re-extend the same or lower offers of resolution as the case proceeds through the system, undermining the defense's main incentive for early resolution².

It should be noted that the Civil Grand Jury report acknowledges that the Civil Grand Jury has no authority to comment on the power of the DA's Office to charge cases or by extension to make offers of resolution (p.8 of Civil Grand Jury Report). The report nonetheless does list the DA's Office's "approach to charging" as one of the possible explanations for delay. Felony charging decisions are made in the District Attorney's Office by senior prosecutors who make their decisions by asking, after a review of the police reports and other evidence: 1) was there a crime; 2) do we know who did it; 3) can we prove the charges beyond a reasonable doubt to a unanimous jury; and 4) is charging the right thing to do? They balance victim's rights, public safety, consistency, and the criminal history of the defendant in every case. In no part of their decision-making is or should there be the concern that perhaps the fair, consistent and appropriate way to charge the case will result in a delay of that case. Instead, it is all of our jobs to try to ensure that properly charged cases move through the system with appropriate speed.

4. Trials are postponed because the lack of an available felony criminal judge.

Another way that the DA's Office has studied this issue is by looking at the incidents where both sides in a case "announced ready" for trial but there was not an available trial department (another way of saying that no judge was available to try the case). On the felony Master Trial Calendar, this is a weekly event for most weeks in the past 18 months for one or more cases. Then when a judge has become available a few weeks later, one of the attorneys may not be available any longer because of engagement in another trial or hearing.

5. Cases take longer to try than they used to because of the increasing complexity of a felony criminal trial

The District Attorney's Office has examined this issue over time by looking at the length of time in court days for the average felony trial in the last twenty years. The results are striking. In 1996, the average felony trial took 6.1 court days. In 2015, the average felony trial took 10.3 court days. We can understand why this has happened. Today a typical felony trial involves the presentation of body camera video, surveillance video, crime laboratory testing and the live testimony of civilian witnesses because our jurors today expect as much to be convinced that the case is proven beyond a reasonable doubt. There is also a difference in the pace for trial set by different judges, that can vary by a few days or over the course of a lengthy trial, a few weeks. In the last generation, the amount of evidence presented in the typical felony case was substantially less. While cases are taking longer to try and are more complex, those facts are also true in every other county in California. The challenge of presenting a longer more complex trial should not place Santa Clara County among the slowest in the state in resolving cases before trial.

² There will be cases where over time new facts are learned that make a case less serious than previously thought or more serious than previously thought that can result in the offer of resolution changing with less or more time, but these instances are the exception rather than the general rule.

- **Educate staff about the financial and human impacts of delays on Santa Clara County.**

Response: This recommendation has been and will continue to be implemented.

In the DA's Office Executive Management Meetings, the Meetings of all Supervisors, and in prosecutor team meetings this topic of pre-trial delay is regularly addressed, as well as the new ways we are attempting to address the DA's Office's part of this problem.

- **Develop more efficient practices while maintaining the integrity of the role of the prosecution.**

Response: This recommendation has been and will continue to be implemented.

As discussed above, one of the key factors to address in speeding up the system is to address the needs of the criminal defense bar in a more timely way, because the criminal defendant controls the clock in a criminal case. This is the main area where the District Attorney's Office can and is making dramatic changes.

For decades, the practice for felony criminal cases has been to provide the defendant through his attorney at the time of the first court appearance an "initial discovery packet" that includes the police report, the charging document (the Complaint) and a copy of the defendant's criminal history (rap sheet) so that the defense could evaluate the case and make decisions quickly about how to proceed. The provision of that initial discovery packet is just the start of a discovery process that can take weeks and months. First the defense requests time to review the initial discovery and to decide what additional items to request (like photos), then the defense requests those additional items, the DA's Office then asks the police department for those items, the police provide the additional items to the DA's Office, and the DA's Office to then provide the requested items to the defense. The defense will ask for more time to review these, and possibly ask for additional items.

For years, the Family Violence Team in the DA's Office has had a different view of what "initial discovery" is, providing in each case the 911 recording, the police dispatch log, and the photos of the injuries of the victim right away, because both sides understand that those items are key to both sides evaluating the case. In 2016, the Homicide Team adopted a new vision of initial discovery working to provide all recordings of interviews, all photos of the crime scene, all 911 call recordings, all body worn camera and surveillance videos, and all other items possessed by the police at the time murder charges were filed within a week of the first court appearance (unless the protection of a confidential informant, or the apprehension of an additional defendant delayed that disclosure).

In April of 2017, the District Attorney's Office's General Felonies Team and Violent Felonies Team also began re-thinking what initial discovery should be. That change has had the District Attorney's Office requesting from the outset from police agencies the photos in these cases, the recordings of all interviews including the defendant's interview, the body worn camera video, the 911 call and other items that both sides and the court know will be needed by the defense in order to decide whether to plead guilty or to proceed to contested court hearings.

These changes are more of a cultural change than one of workload, because the staff at the DA's Office has been requesting, obtaining and delivering these items in felony cases for years, but has done so only after a request by the defense. This waiting for a request from the defense, then ordering the items from the police in piecemeal, then providing it to the defense over the course of several months and court appearances has been a structural delay in the system that these changes within the DA's Office are solving. This piecemeal system has lasted as long as it has is because of the fact that some felony cases do resolve with a guilty plea based solely on the police report, and the thinking has been that to acquire and provide more complete information (photos, recordings, etc.) for all cases would create work in some cases that was unnecessary. The benefit, though, of speeding up the process for all cases, while actually providing the defense with a more complete set of information on all cases outweighs that cost. The District Attorney's Office is committed to providing more complete information on all cases, faster, for the benefit of the whole system.

Starting in September of 2016, the Central Misdemeanor Team began a transition to paperless prosecutions of misdemeanor cases in San Jose that was completed in March of 2017. Not only are no paper files being created for these cases, but the exchange of documents and information with the defense is being done electronically via secure file transfer systems. This change in process has resulted in the initial discovery in misdemeanor cases being provided faster than ever before by the team that handles the most cases in the DA's Office.

In April of 2017, the Homicide Team began providing the voluminous and large file discovery (lengthy video recordings of defendant interviews, large amounts of data from the results of search warrants into cell phone data for example) to the defense electronically via secure file transfer systems as well. This change has resulted in the criminal defense attorneys in Homicide cases receiving more documents and information faster than ever before.

Both of these transitions to an electronic practice from the team with the highest volume of cases (Central Misdemeanors) and the team with the cases that have the most complex investigations (Homicide) have hit bumps along the way and have undergone dramatic changes in the way the work has been organized and the documents stored. This set of changes however, will make it possible to provide all discovery to the defense in all cases electronically via secure file transfer in the months to come. Moreover, these changes have also allowed the District Attorney's Office to begin providing discovery to the defense bar for free because we are not charging criminal defendants for the cost of our using paper, toner, and envelopes. We are sending the items electronically.

The rethinking of initial discovery and the speedier way those documents and things can be provided to the defense will sharply curtail the lengthy discovery dance that occurs at the beginning of a criminal case, and help more cases move faster through the court system. *As we proceed, the District Attorney's Office will be looking to the County Information Services Department and the Board of Supervisors for the tools and people needed to improve these systems.*

Another area where the District Attorney's Office can improve is to speed our internal review of cases where we are seeking a life sentence in a "three strikes case³." Currently, if a charging Deputy

³ Under California's three strikes law, if a criminal defendant commits a serious or violent felony, and has been previously convicted of two serious or violent felonies, the District Attorney's Office can charge the person as a Three Strikes defendant who will then, if convicted and if so sentenced by the judge, receive a sentence of 25 years to life in prison.

District Attorney files a three strikes case, the DA's Office's Three Strikes Committee reviews the filing to decide whether seeking a life sentence for this defendant and for this new crime is fair and appropriate. These reviews occur on average three months after a case is filed after a thorough review of all of the facts of the cases in the defendant's criminal history and the current case. However, speeding the process and completing these reviews within 30 days would perhaps resolve or move to trial more cases faster, because both sides would know the committee's decision and make their own decisions accordingly. In order to maintain the detailed review process, and speed up the process, the DA's Office would need to dedicate a full-time paralegal to preparing these reviews (replacing the current process of assigning the preparation of these cases to paralegals on all teams throughout the building to work on in addition to their regular work), and would need the funding to hire that additional staff person.

We can do more as well. More cases should proceed to the Grand Jury (where a grand jury determines whether there is sufficient evidence to proceed to trial without the presence of the defense attorney) instead of a preliminary hearing (where a judge makes that decision after the key witnesses are examined by both sides) in cases where the defense is taking an inordinately long time to be ready for a preliminary hearing.

Prosecutors should state on the record requests for trial and object on the record to defense requests for more time in cases where the cases have languished to insist that the defense commit to the court on the record what is are the specific reasons why a case cannot proceed, when they will be ready and what needs to be done to be ready to proceed. This is especially important in cases where the People have asserted the right to a speedy trial pursuant to Penal Code section 1048(b).

Most importantly, the prosecution needs a new culture of urgency to proceed quickly and fairly with our criminal cases, that will be a part of the training for all employees and all new hires to the District Attorney's Office.

- **Hold staff accountable for adopting those practices.**

Response: This recommendation has been and will continue to be implemented.

New software tools and computer systems now make it possible for prosecutors and their supervisors to see how long cases are taking to proceed through the criminal justice system in aggregate for the whole caseload of an attorney, and a team. These tools will be implemented soon so that the information can be used as a benchmark for improvement.

Other Findings and Recommendations Related to Other Entities and Departments:

The Civil Grand Jury Report has made additional findings that address the other parts of the criminal justice system and County government. The report leads to the asking of some hard questions:

- Can judicial resources be allocated better?
- Can the practices in our criminal courtrooms be improved and expedited?

- Can our traditional process of proceeding in felonies without the entry of a plea at the outset be changed?
- Can the Public Defender's Office be given the resources to rethink how they receive and evaluate initial discovery to take advantage of the speedier process from the District Attorney's Office?
- Can the District Attorney's Office be given the resources to accelerate and broadly implement the changes described in this document?
- Will we all have a new sense of urgency for this vital issue?

The District Attorney's Office looks forward to continuing to implement the here-listed and other changes internally and to working with our colleagues in the defense bar and the bench to improve the fair and expeditious administration of justice.

Sincerely,



Jeffrey F. Rosen
District Attorney
Santa Clara County

JFR/es

- c: Dave Cortese, Board President, Board of Supervisors
Cindy Chavez, Member of the Board of Supervisors
Joe Simitian, Member of the Board of Supervisors
Mike Wasserman, Member of the Board of Supervisors
Ken Yeager, Member of the Board of Supervisors
Dr. Jeff Smith, County Executive
Miguel Márquez, County Chief Operating Officer
The Honorable Patricia M. Lucas
The Honorable Deborah Ryan
Molly O'Neal, Public Defender