No Bond, No Body, and No Return of Service: The Failure to Honor Misdemeanor and Gross Misdemeanor Warrants in the State of Washington

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I. INTRODUCTION

Washington's district and municipal court judges issue arrest warrants after criminal defendants fail to appear in court or violate conditions of release or probation. This Article examines the legal issues surrounding the growing trend in Washington of law enforcement agencies refusing to arrest, detain, and transport defendants wanted on misdemeanor and gross misdemeanor warrants due, in part, to jail overcrowding. Under current law, courts of limited jurisdiction are unable to compel warrant compliance, resulting in a growing threat to public safety and the potential for substantial governmental liability. Consider the following typical example:

Defendant entered a deferred prosecution on several alcohol-related Reckless Endangerment charges in Pend Oreille County.[1] As judge, I issued a statewide arrest warrant after Defendant aborted alcohol treatment and then failed to appear for a probation violation hearing. Defendant was later stopped in Whatcom County near Blaine, Washington, where he blew a .164 on the officer's portable breathalyzer (twice the legal limit of .08 for consumption of alcohol).[2] The officer did not arrest on the Pend Oreille County warrant because of "booking restrictions" at the local jail. Defendant was merely cited for Driving While

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1. State v. Smiley, No. CR2477 (Pend Oreille Dist. Ct. filed July 6, 1999).
2. State v. Smiley, No. C4909 (Blaine Mun. Ct. filed Nov. 25, 2001).

License Suspended (DWLS) and released.[3] Defendant remained at large and generated a second warrant out of Whatcom County after failing to appear on the new DWLS charge.[4]

A significant percentage of defendants released with outstanding warrants commit additional crimes. As a consequence, the State of Washington and its political subdivisions are subject to tort liability for injuries caused by these defendants as a proximate result of law enforcement's failure to arrest on the warrant. The public duty doctrine will not shield law enforcement agencies from tort liability because arrest on an outstanding warrant is mandatory, not discretionary, under Washington law. The government also loses the benefit afforded by judicial immunity because a judicial officer is not given the opportunity to set conditions of release.

In addition, the growing failure to honor outstanding misdemeanor warrants increases the cost to the criminal justice system in the form of additional criminal cases and multiple warrants. There is a growing disrespect for the criminal justice system amongst criminal defendants who are aware that they will not be arrested on misdemeanor warrants or returned to the issuing court.

Unfortunately, limited jurisdiction judges are without legal authority to compel warrant compliance because the traditional contempt remedy for willful failure to obey a court order is not available when the failure to serve a warrant is due to jail overcrowding. In addition, a limited jurisdiction judge does not have jurisdiction over misdemeanors committed in another jurisdiction. This means the local judge cannot order the arrest and return of a defendant wanted on an out-of-county warrant and cannot set terms and conditions of release.

A number of options are available to reduce the hundreds of thousands of outstanding misdemeanor and gross misdemeanor warrants, and ameliorate the harm caused by the failure to honor those warrants.[5] These options include (1) increasing criminal justice funding, (2) decriminalizing selected misdemeanors, (3) establishing priority prisoner release policies, (4) requiring mandatory in-custody detention until court appearance, (5) requiring sureties to return defendants to the issuing jurisdiction, (6) implementing license restoration programs, (7) bootstrapping out-of-county warrant compliance to in-county conditions of release, (8) setting cash-only bail, (9) limiting warrant duration, (10) declining to issue warrants for minor misdemeanors, (11) making use of

3. *Id*. Officer's Report.

4. *Id*. Warrant issued by the Blaine Municipal Court on November 28, 2001; *see* Appendix A, Case No. 33.

5. *See* Appendix B for warrant solution options and recommendations by the Warrant Accountability Committee of the Washington District and Municipal Judges' Association.

warrant-fests, (12) implementing alternatives to incarceration, and (13) publicizing the warrant problem.

This Article will first examine how the warrant system works in Washington and how jail overcrowding and prisoner litigation has hindered the ability of law enforcement to arrest defendants wanted on misdemeanor and gross misdemeanor warrants. Second, the scope of the problem will be documented, followed by an analysis of why limited jurisdiction judges are currently unable to adequately respond to the growing problem. Finally, the harms caused by the failure to execute warrants will be detailed, followed by a survey of options available to correct the problem.

II. JAIL OVERCROWDING PREVENTS THE ARREST OF DEFENDANTS WANTED ON MISDEMEANOR AND GROSS MISDEMEANOR WARRANTS

Washington district and municipal court judges routinely issue statewide[6] misdemeanor and gross misdemeanor arrest warrants that are directed to all peace officers.[7]

A defendant arrested on an outstanding local warrant is booked into the county jail,[8] where the defendant may obtain release pending his or her next court appearance by posting the bail amount stated on the warrant.[9] The defendant can deposit cash or other securities with the court or arrange for a bail bondsman to post the bail amount and act as surety.[10] If the defendant is unable to post bail, he or she will remain in custody until the next court day.

The bonding company charges the defendant a nonrefundable fee of ten to fifteen percent of the bond amount.[11] If the defendant willfully fails to appear, the judge can forfeit the bond, and the bonding company becomes the "absolute debtor of the state for the amount of the bond."[12] The bonding company will, in theory, locate and return the defendant to the court so as to avoid having to pay the bond amount.[13]

At the first hearing after the warrant has been served, the issuing judge may set conditions of release designed to assure future court ap-

6. WASH REV. CODE § 3.66.100(1) (Supp 2002) ("Every district judge having authority to hear a particular case may issue criminal process in and to any place in the state.").

7. WASH. CRIM. R. LTD. JUR. 2.2(d)(1).

8. Defendants wanted on municipal warrants are also booked into county jail. WASH. REV. CODE § 35.20.250.

9. Royce A. Ferguson, *Criminal Practice and Procedure*, *in* 12 WASH. PRAC. § 415 (1997).

10. *Id*.

11. *Id*.

12. *Id.* at § 413.

13. The bonding company has twelve months to return the defendant. WASH. REV. CODE § 10.19.140 (2002).

pearance.[14] Equally important, the judge is authorized to impose terms of release designed to protect the public from substantial danger due to violent criminal activity by the defendant.[15] Because setting terms and conditions of release is a judicial function, the judge is granted absolute immunity from tort liability should the defendant violate the terms of release and cause subsequent harm or injury.[16]

A defendant arrested on an out-of-county warrant has the same opportunity to post bail and be released pending appearance in the court that issued the warrant. However, if the defendant is unable or unwilling to post bond, he or she will remain in custody until transport is arranged and completed back to the jurisdiction where the warrant issued.[17]

The jurisdiction that issued the warrant is responsible for transportation expenses.[18] Any jail within the state may be used for the temporary confinement of a prisoner being returned to the issuing jurisdiction.[19]

Arrest of a wanted defendant by law enforcement is mandatory. The applicable statute states that every warrant "shall command the defendant be arrested and brought forthwith before the court issuing the warrant."[20] Sheriffs and deputies are required to execute all warrants.[21] There is no discretion whatsoever. The officer must serve the warrant and make return of service to the issuing court.[22] This is the way the warrant process is supposed to work in Washington.

Unfortunately, Washington's jails are overcrowded. The statewide average daily jail population was 116.4% over capacity in 2001.[23] The

14. WASH. CRIM. R. LTD. JUR. 3.2.

15. WASH. CRIM. R. LTD. JUR. 3.2(a), (e).

16. Taggart v. State, 118 Wash. 2d 195, 203, 822 P.2d 243, 247 (1992).

17. When the jurisdiction of arrest borders the issuing jurisdiction, law enforcement will sometimes meet at the border to exchange a prisoner, who is then booked directly into the jail of the issuing jurisdiction.

18. WASH. REV. CODE § 70.48.230 (2002).

19. *Id.* Intrastate transport of a prisoner from Seattle to Pend Oreille County on the "chain" can take as long as a week, with the prisoner being housed in local jails along the way. Under the Washington Intrastate Corrections Compact, the state and counties maximize the use of existing resources by contracting together to send and receive prisoners throughout the state. WASH. REV. CODE § 72.76.010 (Supp. 2003).

20. WASH. CRIM. R. LTD. JUR. 2.2(c). WASH. REV. CODE § 2.04.190 (1988) authorizes the Washington Supreme Court to "prescribe, from time to time, the forms of writs and all other process, the mode and manner of . . . serving writs and process of all kinds . . . ." The text of every Pend Oreille County warrant reads as follows: "You are commanded to arrest the defendant and keep the defendant in custody until the defendant is discharged according to law, and make due return of this warrant with your manner of service endorsed thereon."

21. WASH. REV. CODE § 36.28.010(3), (4) (1991).

22. WASH. CRIM. R. LTD. JUR. 2.2(e).

23. Wash. Ass'n of Sheriffs and Police Chiefs, *Counties Rated Capacity, Statewide Average Daily Population*, *at* http://www.waspc.org/jails/statewide.shtml (last visited Apr. 27, 2003).

daily jail population for urban King County for the year 2001 averaged 141.9%.[24] In 2000, nearly half the state's county jails refused to accept misdemeanor defendants because of jail overcrowding.[25]

Washington's correctional facilities must meet federal and state constitutional and statutory requirements relating to the health, safety, and welfare of inmates and staff.[26] Jail overcrowding triggers litigation and court-imposed caps on jail populations or mandated prison standards. In the state of Washington, King,[27] and Pierce[28] Counties operate under court-imposed population caps, and litigation is pending in Jefferson County.[29] The fear of litigation is generally enough to prompt jail commanders to self-impose population caps.[30] Misdemeanor and gross misdemeanor defendants are released before felony defendants; however, jail overcrowding also results in the early release of felony prisoners.[31]

24. *Id*.

25. "Nearly half the state's county jails limited their prisoner counts during a one-month period surveyed by a state law enforcement organization last year. The jails refused to accept prisoners on lesser charges—and in some cases refused to accept new prisoners at all." David Fisher, *County Lockups Are Bursting at the Seams*, SEATTLE POST-INTELLIGENCER, Sept. 28, 2000, at A1, *available at* 2000 WL 5304760.

26. WASH. REV. CODE § 70.48.071 (1987). *See* Susanna Y. Chung, *Prison Overcrowding: Standards in Determining Eighth Amendment Violations*, 68 FORDHAM L. REV. 2351 (May 2000).

27. Hammer v. King County, No. C89-521R (W.D. Wash. Aug. 19, 1991) (Order and Final Judgment entered).

28. Herrera v. Pierce County, No. C95-5025 FDB (W.D. Wash. 1996) The court issued four different orders in 1995 and 1996 addressing population caps, security staffing, floor time, health care staffing, kite systems, grievances, religion, and legal access.

29. Orndorff v. Jefferson County, No. CV02-5096 (W.D. Wash. filed Feb. 25, 2002) (class action alleging unconstitutional and unlawful policies, practices, and conditions of confinement at the Jefferson County, Washington, Jail).

30. *See e.g.*, Rob Tucker, *Thurston Grapples with Crowded Jail*, TACOMA NEWS TRIB., May 17, 2001, at A1, *available at* 2001 WL 3991010; *Snohomish County May Ration Jail Space*, Feb. 21, 2003, *available at* http://seattlepi.nwsource.com/local/109598_snohomish21.shtml.

31. John Gillie, *Felons Set Free If Jail's Full Capacity: Number of Inmates Released Early Concerns County's Judges*, TACOMA NEWS TRIB., Sept. 21, 2000, at A1, *available at* 2000 WL 5337831.

III. LAW ENFORCEMENT AGENCIES UNILATERALLY REFUSE TO ARREST, DETAIN, TRANSPORT, AND ACCEPT THE RETURN OF DEFENDANTS WANTED ON MISDEMEANOR AND GROSS MISDEMEANOR WARRANTS

Despite Washington's mandatory warrant arrest requirement, law enforcement agencies throughout the state daily choose not to arrest, incarcerate, or transport misdemeanor and gross misdemeanor defendants. Thurston County alone has failed to serve nearly 10,000 warrants because of jail overcrowding.[32]

There are over 235,000 active misdemeanor and gross misdemeanor warrants in the State of Washington.[33] Fifty-five thousand Washington defendants are wanted on two or more of the 235,000 active warrants.[34] A significant percentage of these multiple-warrant defendants pick up additional warrants for criminal offenses committed after law enforcement fails to execute the first warrant.[35] For example, in Pend Oreille County, twenty percent of district court defendants wanted on outstanding warrants of $500 or more were subsequently stopped by law enforcement in other jurisdictions without the Pend Oreille District Court warrants being served.[36] Specifically, as of September 2002, there were 166 Pend Oreille County misdemeanor and gross misdemea-

32. Cecilia Nguyen, *Thousands 'Get Out of Jail Free' in Thurston*, TACOMA NEWS TRIB., Feb. 18, 2003, at A01, *available at* 2003 WL 3512331.

33. Statistics as of August 2002, provided by way of a data request to the Office of the Administrator for the Courts DISCUS database search. This figure does not include warrants issued out of the Seattle Municipal Court System, which is one of the largest in the state and is not part of the database. Judge Philip Van de Veer's data request to Office of the Administrator for the Courts, July 31, 2002 (on file with the author) [hereinafter Judicial Request]. State administrators estimate the number of warrants to be higher, at around 370,000. Mike Roarke, *Warrant Fest Rounds 'Em Up in Kitsap County*, SEATTLE POST-INTELLIGENCER, May 18, 2002, at A1, *available at* 2002 WL 5934072.

34. Judicial Request, *supra* note 33. Defendants accrue multiple warrants for different reasons. A defendant may pick up an additional warrant for a criminal offense committed after law enforcement fails to execute an earlier warrant, or a defendant may commit a new criminal offense that triggers a probation violation and warrant from a previous conviction. Sometimes a defendant accrues several criminal charges in a short period of time before the first warrant issues.

35. When a defendant fails to appear or violates probation, the prosecutor (the executive branch) requests a warrant to toll speedy trial and retain jurisdiction over the criminal offense, only to have law enforcement (also the executive branch) later choose not to honor the warrant. This contradictory executive branch conduct adds to the thousands of Washington defendants wanted on multiple warrants.

36. *See* Appendix A. All Pend Oreille defendants are arrested within Pend Oreille County because the sheriff houses prisoners in other counties when the Pend Oreille jail is overcrowded. Housing prisoners in other counties is costly. *See* John Craig, *County Wants Help With Full Jail*, SPOKESMAN REV., July 17, 2002, at B2, *available at* 2002 WL 23059193 (Stevens County pays $250,000 per year to house prisoners in other counties).

nor defendants wanted on active warrants of $500 or more.[37] Thirty-six of those 166 defendants were subsequently cited or charged with at least one offense in another jurisdiction.[38] In every case, the outstanding Pend Oreille warrant was ignored, and the Pend Oreille District Court was never contacted.[39]

The percentage of wanted defendants stopped by law enforcement without service of the outstanding warrant is actually greater than the twenty percent documented as a result of a subsequent change. This is because many wanted defendants are stopped and released without receiving a new criminal charge. For example, an officer makes a routine traffic stop and discovers that the driver or passenger has an outstanding warrant, but releases the defendant due to jail overcrowding or an inability to coordinate transportation. Later, the officer may respond to a call for assistance and, while interviewing witnesses, discover that a witness has an outstanding warrant.[40] According to Presiding Spokane District Court Judge Vance W. Peterson, law enforcement contact with a wanted defendant and the defendant's release without a new charge occurs at least 2400 times per year in Spokane County "wherein those commanded to 'go forth and apprehend' [can] only shake a finger and scold!"[41]

In virtually every instance, law enforcement unilaterally makes the decision not to serve an outstanding warrant. The judge who issued the warrant is not consulted. Consider several examples presented by former Yakima County District Judge Dirk Marler:

> Case #1: Defendant has a five-page individual criminal history that includes at least two DUIs, two DWLR 2 [Driving While Li-

37. Appendix A. Appendix A is compiled from the Pend Oreille County Outstanding Warrants Report dated August 30, 2002, and individual criminal histories are on file with the Seattle University Law Review.

38. *Id.*

39. *Id*. The issuing judge only discovers law enforcement contact if the defendant is cited or charged with a new offense, because the new charge is entered into DISCUS, the judicial criminal history system available to judges.

40. In these situations, there is no judicial record created stemming from a new charge, so the court (and the public) never discovers the law enforcement contact and failure to serve the outstanding warrant. However, a law enforcement record is created. Every state law enforcement request for a driver or warrant check is recorded in the ACCESS database maintained by the Washington State Patrol. Local law enforcement agencies have their own local records entry system that ties into ACCESS. It is this citizen contact database that can be discovered and used to establish liability against a law enforcement agency should a released defendant commit a subsequent crime that causes injury or death after a law enforcement officer fails to execute a mandatory arrest warrant.

41. Email Correspondence with Judge Vance W. Peterson (June 4, 2003, 9:24 P.M. PST) (on file with the Seattle University Law Review). Spokane County comprises only seven percent of the population of the State of Washington. When considered on a statewide level, the number of wanted defendants released without serving the warrant is significant indeed.

> cense Revoked in the Second Degree], numerous other license violations, and two convictions for felony drug crimes. Defendant was on probation in our court for DUI. He failed to appear for [a] hearing regarding his compliance and we ordered a warrant. We received the warrant back on October 29, 2001, indicating it was served in Auburn. Of course we received no bail, no body, and no further information. By researching the criminal history we can tell he posted $200 on the Auburn case and was released. He promptly failed to appear for a hearing there and they already have a new warrant for his arrest. Apparently, no bail was required for him to get out on our DUI case.
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> Case #2: We ordered a warrant for the defendant for failure to comply with probation on his second DUI. Okanogan County also has a warrant on his first DUI. Our warrant [was] . . . served in Walla Walla in November 2000. We still have no bail and no body. In the meantime, the defendant failed to appear in Walla Walla on his third DUI. The Walla Walla warrant was served. The defendant was released from Walla Walla last month. We still have no bail, no defendant, and no idea how he got out on our case.
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> Case #3: Defendant has a seven-page criminal history with 26 previous warrants. He has numerous assaults and license violations. We ordered a warrant when he failed to appear on a Driving [While License] Suspended 3rd [Degree]. The warrant was served in Wapato in July 1999 when he was arrested for a new DWLS 3rd, Reckless Driving, DV Assault 4th, and Interfering with Reporting Domestic Violence. Somebody's jail (I'm not yet sure whether it was our county jail or the municipal jail) took the defendant to the hospital and turned him loose with no further report to the court, no promise to appear, and no bail. Docket notes on the Wapato case show that the chief of police took it upon himself to release the defendant while he was still serving his sentence for the Wapato crimes. Wapato served . . . [its] own new warrant, promptly released the defendant, and then issued another warrant when he failed to appear again. We ended up ordering another warrant on our case. The new warrant was served in Sunnyside. We have no idea where the defendant is. We received no bail and no signed promise to appear.[42]

42. E-mail from Judge Dirk Marler to members of the District and Municipal Court Judges' Association, Philip.VandeVeer@courts.wa.gov [hereinafter DMCJA Listserv] (Dec. 17, 2001, 05:38 P.M. PST) (on file with the Seattle University Law Review). Judge Marler was the 2002–2003 President of the Washington District and Municipal Court Judges' Association.

Many jails refuse to detain out-of-county defendants and refuse to accept the return of in-county defendants. Mason County District Judge Victoria Meadows reports this example:

> Our jail does not take Mason [C]ounty District Court Commitments on Judgments and Sentences, much less on warrants . . . . Other jurisdictions call the Mason County jail to inquire if Mason County will take a defendant and the jail says no—yet not one of my warrants say[s] 'do not take persons from out of county.' Even my 'high priority, $50,000 cash only' warrants get ignored, or [defendants are] book[ed] and release[d] without authorization (4th DUI charge, 2 pending, never been to court).[43]

Jefferson County District Court Judge Mark Huth also reports that the jail releases out-of-county defendants sent directly from his courtroom to the jail, and fails to seek his permission before refusing to accept defendants wanted on in-county Jefferson County warrants.

> [T]he jail decides whether to accept persons arrested for warrants. At times, they will not accept people the court orders into custody based on out-of-county warrants. They are taken into custody in the courtroom, transported to the jail and released. If they are at capacity, they turn them away whether they are arrested here, there, or anywhere. They don't seek permission from the court nor do they inform us if they decline to accept someone held in another jurisdiction on our warrant.[44]

In Eastern Washington, Spokane law enforcement officers routinely release Pend Oreille County defendants wanted by my court rather than detain them to allow pick-up and transport back to Pend Oreille County. One reason is jail overcrowding.[45] Another reason is a lack of coordination between law enforcement agencies. For example, it is common for the Geiger Corrections Center to call the Pend Oreille County 911 dispatch and give Pend Oreille law enforcement from fifteen minutes to a couple of hours to send a transport officer to Geiger before an inmate wanted on a Pend Oreille County warrant will be released. Without additional notice, it is impossible to arrange transport, particularly at night or on the weekends when there is reduced law en-

43. Posting of Judge Victoria Meadows, Victoria.Meadows@courts.wa.gov, to DMCJA Listserv (Sept. 4, 2002) (copy on file with the Seattle University Law Review).

44. Posting of Judge Mark Huth, bench@co.jefferson.wa.us, to DMCJA Listserv (Sept. 5, 2002) (copy on file with the Seattle University Law Review).

45. *See* Thomas Clouse, *Sterk Plans at Home Jail Alternative, But More Jail Space Necessary, Sheriff Insists*, SPOKESMAN REV., Jan. 22, 2003, at A1, *available at* 2003 WL 6399450. As Appendix A documents, many of these Pend Oreille defendants go on to commit subsequent crimes against the citizens of the City of Spokane and Spokane County after they have been released by Spokane law enforcement.

forcement manpower, so the defendant is released in Spokane County.[46] Not once have I been notified that a defendant wanted on a Pend Oreille warrant is being released.[47]

Many municipalities contract with the local county jail to incarcerate municipal misdemeanor defendants.[48] This arrangement provides a further opportunity for failure to honor municipal misdemeanor and gross misdemeanor warrants.[49] Centralia Municipal Court Judge Merle Krouse explains as follows:

> We do not have a jail in Centralia so we contract with the county. The sheriff has actually told me to take my business elsewhere if I don't like what goes on. He feels he has no requirement to take our defendants. We have had numerous occasions when *served* warrants have not been removed from the system only to have the defendant arrested again on the warrant upon release from jail. Or, . . . [a defendant] sits in the jail for a week on a warrant before we are even told the defendant is there.[50]

The Spokane County jail also refuses to accept the return of Spokane municipal defendants arrested in neighboring counties on a Spokane municipal warrant, including those wanted for serious gross misdemeanors. This is because, contrary to the intent of the Spokane municipal judge that issued the warrant, City of Spokane law enforce-

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46. Lincoln County, Washington, District Court Judge Joshua Grant confirms that this is also the situation with Lincoln County defendants.

47. Judge Marler sums up the frustration:

> Even in the face of the State's current funding crisis, we [limited jurisdiction judges] must determine and pursue an appropriate strategy that will allow our branch of government to function at an acceptable level of performance. Part of that must involve giving lawful orders of the court (warrants) meaning throughout the state. This idea of 'nonextraditable' warrants within our own state—or even within a county—makes a mockery of our justice system. The notion that a jail supervisor, chief of police, or sheriff can ignore a court-ordered warrant and walk someone out the door without so much as notifying the originating jurisdiction that they have done so is intolerable.

Posting of DMCJA President Dirk Marler to DMCJA Listserv (Dec. 18, 2001) (copy on file with the Seattle University Law Review).

48. Municipal court commitments "shall be to the county jail." WASH. REV. CODE § 35.20.250 (1990).

49. There is a trend in Washington toward the separation of county and municipal courts into different jurisdictions. Aaron Corvin, *In Brief—King County: 16 Cities Must Develop Court Systems by 2005*, TACOMA NEWS TRIB., Feb. 15, 2003, at B02, *available at* 2003 WL 3512224; Jim Haley, *Cities' Shared Court Questioned*, EVERETT HERALD, Feb. 19, 2003, at B02, *available at* http://www.heraldnet.com/Stories/03/2/19/16456235.cfm. The fragmentation of once-unified court systems will likely exacerbate the warrant problem.

50. Posting of Judge Merle Krouse, Merle.Krouse@courts.wa.gov, to DMCJA Listserv (Sept. 25, 2002) (emphasis in original; copy on file with the Seattle University Law Review). The problem of city-county transport of prisoners is compounded in large jurisdictions like King County, Washington, where numerous municipal law enforcement agencies must coordinate the arrest and transport of prisoners to the county facility.

ment has a policy of entering all Spokane municipal warrants into the system as Spokane County-only. This means that municipal defendants are only arrested on the warrant if picked up within Spokane County. As a result, Spokane defendants picked up in Pend Oreille County are not returned to Spokane, but released in Pend Oreille County.[51]

However justified the reason, the cumulative result of law enforcement's unilateral choice to ignore misdemeanor and gross misdemeanor warrants is that the judicial branch of government is bypassed, as the executive branch usurps the judicial function of determining whom to release and under what conditions. This unilateral course of conduct leads to the harms detailed below.

IV. WASHINGTON LAW DOES NOT GRANT AUTHORITY TO DISTRICT COURT JUDGES TO COMPEL LAW ENFORCEMENT TO COMPLY WITH WASHINGTON'S MANDATORY-ARREST WARRANT LAW

A district court judge has statewide jurisdiction over warrants issued by his or her court. However, the traditional contempt sanction for willful failure to serve the warrant is not available to the judge when law enforcement's noncompliance is caused by jail overcrowding, the intervening order of another court, or statutory requirements.

A district judge does not have jurisdiction over defendants arrested within the jurisdiction who are wanted only on out-of-jurisdiction warrants. This means the local judge cannot compel law enforcement to serve the out-of-jurisdiction warrant and transport the defendant back to the issuing jurisdiction. More importantly, under current law, the judge cannot prevent the release of out-of-jurisdiction defendants into the local community or set terms and conditions of release designed to protect the community.

A. The Traditional Contempt Remedy for Willful Failure to Obey a Court Order Is Not Available Where the Failure to Serve a Warrant Is Due to Jail Overcrowding

A district judge has jurisdiction over misdemeanors and gross misdemeanors that originate within the county.[52] Specifically, "The district court shall have jurisdiction: (1) concurrent with the superior court of all

51. I am unable to compel the return of the defendant to the issuing jurisdiction or set conditions of release to protect my local community because a court of limited jurisdiction does not have jurisdiction over out-of-jurisdiction criminal cases. WASH. REV. CODE § 3.66.060(1) (Supp. 2002).

52. *Id*. "When a court of limited jurisdiction has authority to hear a particular case, the court has statewide criminal process power. However, the statewide criminal process power of a court of limited jurisdiction applies only when the court has jurisdiction to hear the resulting case. Thus, an arrest warrant or summons should not be issued by a district court in one county for an offense which is alleged to have occurred in another county." Ferguson, *supra* note 9, § 3133.

misdemeanors and gross misdemeanors committed in their respective counties and of all violations of city ordinances."[53] A district judge that issues a warrant retains jurisdiction over both the criminal offense and the defendant.[54] The failure to serve a warrant, like the failure to obey any court order, can lead to a finding of contempt.

A district judge may impose sanctions for contempt of court.[55] "Contempt of court" includes the disobedience of any lawful order or process of the district court.[56] The court "may initiate a proceeding to impose a remedial sanction on its own motion or on the motion of a person aggrieved by a contempt of court in the proceeding to which the contempt is related."[57] If the district judge finds the person failed or refused to perform an act within the person's power to perform, the court may find the person in contempt. The court may then impose "an order designed to ensure compliance with a prior order of the court."[58]

However, violation of a court order is not punishable if it was not within the party's power to comply.[59] Therefore, a law enforcement agency would have the opportunity to demonstrate that warrant compliance was impossible due to severe jail overcrowding or an intervening court order setting a jail population cap. The argument can also be made that more dangerous felony defendants must be given detention priority over misdemeanor defendants and, further, that out-of-county misdemeanor defendants can only be held if there is available cell space after local superior, district, and municipal court defendants are accommodated.[60]

The issuing judge would be placed in the difficult position of examining the jail and custody system of the jurisdiction where the warrant was not served in order to determine whether performance was possible and, perhaps, order the service of some or all misdemeanor and gross misdemeanor warrants. It is unlikely the superior court or federal court of that jurisdiction would allow a court of limited jurisdiction to issue contempt orders to law enforcement that could impact every level

53. WASH REV. CODE § 3.66.060(1) (Supp. 2002).

54. *Id.*

55. WASH. REV. CODE § 7.21.020 (1992).

56. WASH. REV. CODE § 7.21.010 (1992).

57. WASH. REV. CODE § 7.21.030(1) (Supp. 2003).

58. WASH. REV. CODE § 7.21.030(2)(c) (Supp. 2003).

59. Olson v. Allen, 14 Wash. 684, 45 P. 644 (1896); Rainier Nat. Bank v. McCracken, 26 Wash. App. 498, 615 P.2d 469 (1980).

60. However, it is arguable that a felony defendant wanted on a theft of property charge presents a greater danger than a multiple DUI probation violator who will still be driving if the gross misdemeanor warrant is not honored. "One of those skewed priorities is the widely held perception among keepers of the jails that every felony is inherently more important than every misdemeanor or gross misdemeanor." Posting of Judge Dirk Marler to DMCJA Listserv (Dec. 18, 2001) (copy on file with the Seattle University Law Review).

of the judiciary.[61] For this reason, a contempt proceeding will not succeed except in a situation of obvious disregard of a court's arrest warrant where overcrowding or jail conditions are not a factor.

There are no Washington cases dealing with judicial-executive branch disagreements over the release of prisoners. However, *Gates v. Municipal Court of Orange County* centered on a dispute between the presiding judge of California's Orange County Municipal Court and former Sheriff Bill Gates over the release of misdemeanor prisoners.[62]

In the 1970s, a federal court judge ruled that overcrowding at the Orange County Jail violated the cruel and unusual punishment clause of the United States Constitution and ordered changes.[63] In 1985, the federal judge found Sheriff Gates to be in contempt to the tune of $50,000 for failing to adequately address the problem.[64]

In response, the Orange County Sheriff's Department promptly instituted a cite-and-release program for pretrial misdemeanor arrestees. In developing the program, Gates was unaware that the California Penal Code prohibited citation in lieu of arrest for persons arrested for misdemeanors involving violence.[65] The presiding judge of the Central Orange County Municipal Court brought Sheriff Gates' violation of California's pretrial release law to his attention.[66]

Within two months, Sheriff Gates revised his Department's cite-and-release policy in a way that complied with both the federal court mandate and the California Penal Code. In other words, the presiding judge successfully compelled law enforcement through informal means to change its release procedures in spite of jail overcrowding and a conflicting federal ruling.

The presiding Orange County district judge was still not satisfied, and initiated contempt proceedings against Sheriff Gates for citing and releasing eighteen people during the two-month period after Gates learned he was violating the California Penal Code, but before the revised policy was fully implemented. The presiding judge found Sheriff Gates to be in contempt, fined him $17,000, and sentenced him to thirty days in jail.[67]

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61. This would be particularly true where there is current federal litigation or a consent decree relating to jail population caps.

62. Gates v. Mun. Court for Dist. of Orange County, 9 Cal. App. 4th 45, 11 Cal. Rptr. 2d 439 (1992).

63. Stewart v. Gates, 450 F. Supp. 583, 590 (C.D. Cal. 1978).

64. *Gates*, 9 Cal. App. at 49.

65. *Id*.

66. *Id*. at 49–50.

67. *Id.* at 51. *Cf.* Kent County Prosecuting Attorney v. Kent County Circuit Judges, 110 Mich. App. 404, 313 N.W.2d 135 (1981) (holding that a court is without jurisdiction to *sua sponte*

The California Court of Appeals reversed the finding of contempt, ruling that there was no willful violation. The Court of Appeals further chided the presiding judge for not working with other courts and law enforcement to address the problem:

> The County of Orange is responsible for incarcerating individuals involved in the judicial systems of five municipal courts and the superior court. For one municipal court to insist on priority jailing for its prisoners must, of necessity, act as a limitation on the other four municipal courts' ability to function. We hope the Presiding Judge of the Orange County Superior Court will take a leadership role in consulting with all of the county municipal courts and sheriff in dealing with a problem which will only become more complicated in coming years. In an era of shrinking funds for public facilities, additional jail capacity to meet the needs of Orange County may be realized only in the distant future.[68]

Gates stands for the proposition that a contempt proceeding brought by a judge of limited jurisdiction over prisoner release due to jail overcrowding will not succeed.[69]

B. The Local District Judge Does Not Have Jurisdiction Over Misdemeanor and Gross Misdemeanor Cases That Originate in Another Jurisdiction

Because a district judge only has jurisdiction over criminal cases that originate within the county, the local judge cannot take control over cases that originate elsewhere and, therefore, cannot set terms and conditions of release for out-of-county defendants.[70]

Without jurisdiction, the local judge does not have contempt authority over a local law enforcement agency that refuses to arrest and return an out-of-county defendant to the issuing jurisdiction. This is because a court order on contempt is void where the court lacks jurisdic-

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order periodic release of prisoners where there is no adverse proceeding or case in controversy in order to determine that jail was in imminent danger of overcrowding).

68. *Gates*, 9 Cal. App. at 59.

69. *See also* Bd. of Supervisors v. Superior Court of San Diego County, 33 Cal. App. 4th 1724, 39 Cal. Rptr. 2d 906 (1995) (holding that county supervisors and the sheriff did not violate court-imposed consent decree capping jail population by reducing sheriff's budget in response to county budgetary limitations).

70. WASH. REV. CODE § 3.66.060(1) (Supp. 2002). "When a court of limited jurisdiction has authority to hear a particular case, the court has statewide criminal process power. However, the statewide criminal process power of a court of limited jurisdiction applies only when the court has jurisdiction to hear the resulting case. Thus, an arrest warrant or summons should not be issued by a district court in one county for an offense which is alleged to have occurred in another county." Ferguson, *supra* note 9, § 3133.

tion over the parties or the subject matter.[71] The local district judge can only watch as the executive branch releases out-of-county defendants into the community without community safety protections afforded by judicial review.

A good example of the uncontrolled release of dangerous out-of-county defendants is Mr. Davis, who presents a criminal history that includes twenty-one felony and misdemeanor convictions for offenses including Burglary, Criminal Trespass, Assault, Resisting Arrest, Theft, Pedestrian Interference, and Disorderly Conduct. Mr. Davis served a probation violation sentence in the Pend Oreille County jail, and at the time of release had two outstanding Spokane Municipal Court warrants for Driving Under the Influence and Hit and Run Unattended. Unfortunately, Mr. Davis was released in Pend Oreille County because the City of Spokane placed a limit on its warrants to in-county only.[72]

In my experience, law enforcement ignores out-of-jurisdiction warrants as the path of least resistance to dealing with jail overcrowding, poor transport coordination, and budget constraints. The local judge cannot compel compliance, and the judge who has jurisdiction is unaware that this is occurring. It is also my opinion that more serious gross misdemeanors are also more readily ignored when the offense is out-of-county.

In 2000, the Washington Legislature attempted to partially address the problem by allowing district courts "to take recognizance, approve bail, and arraign defendants held within its jurisdiction on warrants issued by other courts of limited jurisdiction when those courts are participating in a [pilot] program established under RCW [section] 2.56.160."[73]

> The administrator for the courts shall establish a pilot program for the efficient state-wide processing of warrants issued by courts of limited jurisdiction. The pilot program shall contain procedures and criteria for courts of limited jurisdiction to enter into agreements with other courts of limited jurisdiction throughout the state to process each other's warrants when the defendant is within the processing court's jurisdiction. The administrator for the courts shall establish a formula for allocating between the court processing the warrant and the court that issued the warrant any

71. State v. Turner, 98 Wash. 2d 731, 658 P.2d 658 (1983).

72. City of Spokane v. Davis, Nos. M65325 & M65735 (Spokane Mun. Ct. filed Feb. 22, 2003); Pend Oreille County v. Davis, No. CR1765 (Pend Oreille Dist. Ct. filed June 18, 1998). The City of Spokane has even refused to accept the return of its defendants when Pend Oreille law enforcement offers to transport the defendant. The result is that the breakdown of the criminal justice system in a large, urban jurisdiction harms smaller, rural jurisdictions.

73. WASH REV. CODE § 3.66.060(6) (Supp. 2003).

moneys collected and costs associated with the processing of warrants.[74]

To date, no pilot program has been established. In reality, a voluntary warrant-processing arrangement between courts will not solve a problem that stems from jail overcrowding and lack of coordination between law enforcement agencies. In addition, it is difficult to coordinate warrant processing with other courts when the courts are not notified as law enforcement refuses to arrest on a warrant or unilaterally releases a defendant.

V. THE RESULTS OF FAILING TO SERVE MANDATORY-ARREST MISDEMEANOR AND GROSS MISDEMEANOR WARRANTS

Failing to serve misdemeanor and gross misdemeanor warrants increases criminal justice costs, threatens public safety, creates the potential for substantial government liability, and fosters disrespect for the criminal justice system among criminal defendants.

A. Increased Cost to the Criminal Justice System

The release of defendants with outstanding misdemeanor and gross misdemeanor warrants substantially increases the number of criminal cases statewide and multiplies the number of outstanding warrants. For example, thirty-six Pend Oreille County defendants who were stopped by law enforcement were charged with thirty-eight additional criminal offenses after law enforcement failed to arrest on the Pend Oreille County warrant.[75] These subsequent offenses include six felonies, nineteen gross misdemeanors, and thirteen misdemeanors.[76] One hundred percent of the felonies and eighty-nine percent of the gross misdemeanors were committed in the city or county of Spokane after Spokane law enforcement failed to honor the Pend Oreille County warrants.[77] These thirty-six Pend Oreille defendants, originally wanted on forty-five Pend Oreille County warrants, continued on to accumulate twenty-six additional warrants in other jurisdictions *after* law enforcement had failed to honor the Pend Oreille warrants. That is a fifty-eight percent increase in the number of outstanding warrants for those defendants.

With over fifty-five thousand Washington defendants wanted on two or more warrants, the inference is clear: failing to arrest on the first

74. WASH. REV. CODE § 2.56.160 (Supp. 2003).

75. Appendix A. Subsequent criminal charges are designated in boldface for each defendant. Seventeen of the thirty-six defendants, or forty-seven percent, went on to commit additional offenses.

76. *Id.*

77. *Id.*

warrant provides the unfettered opportunity for additional criminal conduct leading to additional warrants.[78]

For each criminal offense committed after law enforcement fails to arrest on an outstanding warrant, there is the cost of arrest, booking, incarceration, prosecution, public defense, court costs, and probation.[79] There is also the undocumented cost to victims.

Consider the added criminal justice costs just one defendant can create while outstanding warrants are ignored.[80] In 1998, a Pend Oreille warrant was issued after a defendant failed to appear for a pretrial hearing on a DUI charge. Over the next three years, this defendant was charged with Possession of Marijuana, Possession of Drug Paraphernalia, DWLS 2, and DUI in Spokane District and Municipal Courts.[81] Each new criminal offense occurred while the Pend Oreille warrant was outstanding. On each occasion the defendant was adjudicated without being transported back to Pend Oreille County and remained free to commit additional crimes in Spokane. The result, in my estimate, is thousands of dollars in additional Spokane County criminal justice costs.[82]

There is, of course, no way to guarantee that future criminal conduct will be prevented as the result of the enforcement of all outstanding warrants. However, when a defendant is arrested on the first warrant, it is much more likely that subsequent crimes will be deterred or avoided because of the arrest, transport, incarceration, and subsequent conditions of release or probation imposed as a result of the criminal offense. It is also safe to say that when warrants are not enforced, a clear message is

78. Statistics as of August 2002, provided by way of a data request to the Office of the Administrator for the Courts DISCUS database search.

79. The Office of the Administrator for the Courts does not keep figures relating to cost per criminal case. Local courts generally do not keep such figures. However, I estimate that approximately seventy percent of the resources of the Pend Oreille District Court are employed handling criminal matters (as opposed to civil matters, infractions, and small claims). Applying this figure to the 2002 court budget, the cost to the court is $428.50 per misdemeanor case (on file with the Seattle University Law Review).

80. State v. Dixon, No. CR1635 (Pend Oreille Dist. Ct. filed May 9, 1998).

81. City of Spokane v. Dixon, No. M14472 (Spokane Mun. Ct. filed Jan. 14, 1999); Spokane County v. Dixon, No. CR39681 (Spokane Dist. Ct. filed May 18, 2000); City of Spokane v. Dixon, No. M46291 (Spokane Mun. Ct. filed Nov. 12, 2001).

82. By way of comparison, Utah's Third District Court Judge Michael Hutchings reports that

> it costs $2,157 to arrest, book in jail, release from jail, process paperwork in the police department, District Attorney's office and the courts for one drug defendant who is released CDR [consent decree release] and fails to appear in court. Thus, when the defendant is CDR'd and fails to appear in court, the time and money of everyone involved really is wasted.

Judge Michael L. Hutchings, *Another Vietnam: Salt Lake's War on Crime*, 9-NOV UTAH B. J. 32, 34 (Nov. 1996).

sent that criminal conduct will be ignored and probation violations such as aborting treatment or failing to make restitution will not be enforced.

B. Increased Threat to Public Safety

As already shown, a significant percentage of criminal defendants go on to commit additional crimes when out-of-county warrants are not enforced.[83] Many of these criminal misdemeanants do not present a great hazard to public safety. Their offenses may include fishing without a license or driving with a suspended license due to nonpayment of fines.[84]

On the other hand, defendants charged with certain gross misdemeanors present a significant threat to society. Two common examples are the multiple DUI defendant who has violated probation or been charged with another DUI, and the domestic assault defendant who has violated a no contact order.[85] The failure to take these more serious gross misdemeanor defendants into custody, whether on a pending charge or for violation of probation, provides the opportunity for serious injury or death in a subsequent alcohol-related driving accident, escalated domestic assault, or some other crime of violence.

C. Government Tort Liability

The stage is set for substantial government liability when law enforcement agencies fail to serve Washington warrants, however justified the reason. This is because law enforcement loses the protection afforded under the public duty doctrine, and the government becomes subject to substantial tort liability for subsequent injuries caused by criminal defendants as a proximate result of the failure to arrest, detain, and transport on an outstanding warrant. In addition, by failing to return the defendant to the court, the government loses the opportunity for a judge to set conditions of release that not only protect the public, but also screen the government from tort liability because judges are afforded judicial immunity for decisions performed within their judicial capacity.

83. *See* Appendix A, Nos. 4, 8, 20, 24, 25, 32, 33, and 36 for examples of where failure to honor a Pend Oreille County warrant places the other community at risk and provides the potential for significant government liability. Thirty-six Pend Oreille County defendants were charged with thirty-eight additional criminal offenses, including six felonies and nineteen gross misdemeanors.

84. WASH. REV. CODE § 77.15.380 (Supp. 2003) (fishing without a license); WASH REV. CODE § 46.20.342(1)(c) (Supp. 2003) (third degree driving while license suspended).

85. In Spokane County alone, there are over 2,500 arrest warrants for drunk drivers who have failed to show up for court or failed to comply with conditions of sentence. *Officers Target DUI Scofflaws*, SPOKESMAN REV., Mar. 13, 2001, at B2, *available at* 2001 WL 7048102.

1. Public Duty Doctrine

Generally, a public officer is answerable to private persons injured as a result of the "negligent performance of the officer's imperative or ministerial duties."[86] However, Washington has adopted the public duty doctrine "for application in tort cases against state entities."[87] Under this doctrine, if the duty breached by a governmental entity is merely the breach of an obligation owed to the public in general, then a cause of action will not lie for any individual injured as a result of the breach of that duty.[88] "Stated another way, a governmental duty to all is a duty to no one."[89]

Although the issue has yet to be addressed in Washington, government entities will likely not be shielded from tort liability by the public duty doctrine after law enforcement fails to arrest and serve a misdemeanor or gross misdemeanor warrant.[90] This is because ignoring a mandatory arrest warrant triggers the "failure to enforce" exception to the public duty doctrine.

A duty is imposed under the failure to enforce exception when the following elements are met:

> (1) government agents responsible for enforcing statutory requirements possess actual knowledge of a statutory violation; (2) they fail to take corrective action; (3) a statutory duty to take corrective action exists; and (4) the plaintiff is within the class the statute intended to protect. The burden of establishing each of the elements is on the plaintiff.[91]

In *Bailey v. Town of Forks*,[92] a police officer with the Town of Forks contacted a visibly intoxicated man relating to an altercation at a nearby lounge. The officer then allowed the man to get behind the wheel of his truck and drive away. Shortly after, the driver collided with a motorcycle, killing the motorcyclist and seriously injuring the

86. Dever v. Fowler, 63 Wash. App. 35, 45, 816 P.2d 1237, 1242 (1991).

87. David K. DeWolf & Keller W. Allen, *Tort Law and Practice*, *in* 16 WASH. PRAC. § 14.7 (2d ed. 2002).

88. *Id*.

89. *Id.*

90. *See* City of San Antonio v. Duncan, 936 S.W.2d 63 (Texas 1996) (holding that an issue of fact existed whether officers had ministerial rather than discretionary duty to arrest motorist on a warrant where the motorist subsequently exited the vehicle then was struck and killed); *cf.* Wongittilin v. Alaska, 36 P.3d 678 (Alaska 2001) (holding that Alaska Criminal Rule 4, which states that a "warrant shall be executed," merely defines authority of officer to arrest but does not impose a duty to act, and ALASKA STAT. § 18.65.080 was permissive in that a state trooper "may" execute a warrant).

91. DeWolf & Allen, *supra* note 87, § 14.11.

92. Bailey v. Town of Forks, 108 Wash. 2d 262, 737 P.2d 1257 (1987) (citing WASH REV. CODE § 70.96A.120(2)).

motorcyclist's passenger, Patti Bailey. At the time, Washington statutes provided a criminal sanction for driving under the influence of alcohol and required that a policeman take into custody a publicly intoxicated individual.[93]

The Washington Supreme Court held that the facts as alleged by Ms. Bailey satisfied all three requirements of the failure to enforce exception. First, the officer was a governmental agent with a duty to enforce the two Washington statutes relating to driving while intoxicated and taking a publicly intoxicated individual into custody. Second, the officer failed to take corrective action by allowing Mr. Medley to take the wheel of the pickup truck and drive away, although his intoxicated state was apparent to the officer. Finally, Mr. Bailey, as a user of the highway, came within the class of persons the statutes were designed to protect "from accidents caused by intoxicated drivers."[94]

The "failure to enforce" exception to the public duty doctrine should likewise apply when an officer fails to arrest a defendant on an outstanding misdemeanor or gross misdemeanor warrant, and that defendant then causes an injury related to the underlying offense for which the warrant was issued.

First, every law enforcement officer is a governmental agent with a statutory duty to arrest and serve outstanding warrants. Every officer also possesses actual knowledge of a criminal violation because the warrant itself alerts the officer that the defendant is charged with a violation of Washington law.[95] Just as in *Bailey*, an officer who confronts a defendant with an outstanding Washington warrant has actual knowledge of a criminal offense and a corresponding mandatory duty to take the defendant into custody.

Second, by failing to arrest and serve the warrant for the arrest of a criminal defendant, the officer has failed to take corrective action. The mandatory arrest requirement for Washington warrants should qualify as a statutory duty to take corrective action because there is no discretion allowed by statute or court rule.[96]

Finally, the *Bailey* court noted that Ms. Bailey, as a passenger on a motorcycle, came within the class of persons that the statute was intended to protect.[97] A driver struck by a DUI defendant or the subse-

93. *Id*. at 269, 737 P.2d at 1260.

94. *Id.*

95. Knowledge of a violation without a corresponding duty is not sufficient. Forest v. State, 62 Wash. App. 363, 814 P.2d 1181 (Div. II 1991) (holding that a corrections officer had knowledge that convicted felon violated conditions of parole, but the officer did not have a mandatory duty to take specific action).

96. WASH. REV. CODE § 3.66.100(1) (1998); WASH REV. CODE § 36.28.010 (3), (4) (1965).

97. *Bailey*, 108 Wash. 2d at 269, 737 P.2d at 1260.

quent victim of a defendant with a domestic assault or protection order violation warrant should be considered within the class of persons that Washington's mandatory misdemeanor warrant arrest requirement is designed to protect.[98]

Assuming all elements of the failure to enforce exception are met, a tort plaintiff must still prove proximate cause. For example, a government defendant might successfully argue that failing to arrest on a warrant on a DWLS 3 charge due to nonpayment of fines cannot be considered a proximate cause of a later injury caused by driving under the influence. Or, the date of injury may be too remote from the date when the officer failed to arrest on the warrant.

In addition, the government may argue that a law enforcement officer's failure to arrest was not unreasonable:

> Liability will not attach unless the governmental agent failed to take care 'commensurate with the risk involved.' Forks has only the limited duty of care to act reasonably within the framework of the laws governing the municipality and the economic resources available to it. In determining whether a municipality's act or failure to act was unreasonable, the trier of fact can take into account the municipality's available resources and its resource allocation policy . . . . For example, the trier of fact could consider the following circumstances: the impracticability of detaining Medley in light of other considerations at the time of the incident; the financial resources available to the town to detain all drivers thought to be under the influence of alcohol; and the number of police personnel available at the time to respond to other calls for assistance.[99]

Governmental entities may argue a lack of resources to arrest all defendants wanted on outstanding warrants due to budget constraints, jail overcrowding, or intervening court order setting jail conditions.[100] However, the only way that governmental entities can avoid the potential for liability is by serving the warrant and returning the defendant to the issuing court.

98. This is particularly true where the purpose for arresting a wanted defendant is to return the defendant to the issuing court where the district judge is empowered to set conditions of release to protect the public based on a showing of substantial danger. WASH. CRIM. R. LTD. JUR. 3.2(d), (e), and (k).

99. *Bailey*, 108 Wash. 2d at 270–71, 737 P.2d at 1261 (citations omitted).

100. My condolences go to the government defense attorney who must convince twelve Washington jurors that jail overcrowding or the need to allocate criminal justice funds elsewhere somehow vitiates law enforcement's duty to honor a mandatory warrant where the failure to arrest contributed to the injury or death of a fellow motorist.

2. Loss of Judicial Immunity

By returning a defendant to the court that issued the warrant, the judge has opportunity to set terms and conditions of release.[101] In doing so, the government is coincidentally accorded additional protection from tort liability caused by the subsequent conduct of a criminal defendant because a judge's decision on terms and conditions of release is accorded judicial immunity. This is because judges are immune from civil damage suits for acts performed within their judicial capacity.[102]

In other words, if a defendant causes injury to a third party after the judge has set bond and conditions of release, the government is immune from tort liability stemming from that judge's retrospectively poor decision. On the other hand, a government entity loses the benefit of judicial immunity from the subsequent harmful conduct of a defendant when law enforcement refuses to serve a warrant, thus bypassing the very judicial review that provides the basis for the immunity.

It is an all or nothing proposition. Either law enforcement honors the warrant and gains for the government the protections accorded by the public duty doctrine and judicial immunity, or the government ignores the warrant, loses those protections, and faces the prospect of substantial government liability for the subsequent tortious conduct of an improperly released defendant.

D. Disrespect for the Criminal Justice System

I note a growing disrespect for the criminal justice system among defendants with outstanding warrants who have been released by law enforcement. I find it illuminating to talk with these defendants appearing in my court. The defendant is usually well versed as to which jurisdictions do not arrest or will not transport on misdemeanor warrants. These defendants describe for the court how many times their warrants have been ignored, and under what circumstances.[103] Put simply, de-

101. WASH. CRIM. R. LTD. JUR. 3.2.

102. Taggart v. State, 118 Wash. 2d 195, 203, 822 P.2d 243, 247 (1992).

103. Utah District Judge Michael L. Hutchings notes the responses of Salt Lake City felony defendants who are merely cited and released:

> The criminals know all about the failings of our system. The drug dealers, prostitutes, forgers, and thieves know all about [Consent Decree Release] and ask when they will be CDR'd. Some now are demanding a meal before they are released. Some openly deride the system to the officers, jail officials, probation officers, and judges. The criminals know that sanctions are not being imposed for certain categories of crime and some certainly let us all know about it—they laugh in our faces.

Hutchings, *supra* note 82, at 37.

fendants are aware that the criminal justice system is breaking down at the misdemeanor level and conduct themselves accordingly.[104]

VI. SEVERAL OPTIONS ARE AVAILABLE TO AMELIORATE THE HARM CAUSED BY THE FAILURE TO HONOR MISDEMEANOR WARRANTS

The warrant problem defies easy solution, and any permanent solution will require the joint effort of the legislative, executive, and judicial branches of government. The judiciary can take steps independently and in conjunction with the other branches of government to reduce the number of warrants and ameliorate the harm caused by the failure to honor misdemeanor warrants. A number of available options are discussed below.[105]

A. Legislature: Increase Funding

The failure to honor judicial warrants in Washington ultimately stems from jail overcrowding and a lack of criminal justice funding. The problem must ultimately be solved through additional funding by the Legislature working in tandem with the executive and judicial branches of government. Unfortunately, increased funding is unlikely in the near future due to a lack of public support[106] and the current billion-dollar budget shortfall.[107] Therefore, other options must be considered.

B. Decriminalize Selected Misdemeanors

The Washington State Legislature should decriminalize selected misdemeanors to civil infractions as recommended by law enforcement and the judiciary.

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104. Prisoners in the Pierce County Jail call it "winning the lottery," when released because the daily headcount reveals that the number of inmates exceeds the jail cap. Associated Press, *Too Many Prisoners, So Pierce Sets Them Free*, SEATTLE TIMES, Sept. 22, 2000, at B4, *available at* 2000 WL 5555634. "I get real tired of hearing defendants tell me they aren't taking care of warrants because they are 'non-extraditable.' Word gets around fast in the criminal community." Posting of Centralia Judge Merle Krouse to DMCJA Listserv (Sept. 25, 2002) (copy on file with the Seattle University Law Review).

105. *See* Appendix B for a list and explanation of twenty-two options and recommendations of the Warrant Accountability Committee.

106. For example, an $80 million bond measure to build a new jail and court complex in Thurston County has gained little public support. Nguyen, *supra* note 32.

107. Angela Galloway, *State Budget Menu Has No Sacred Cows*, SEATTLE POST-INTELLIGENCER, Sept. 27, 2002, at B1, *available at* 2002 WL 5942626. In fact, Governor Locke is seeking the early release of felony inmates over the next two years to help fill an overall budget shortfall of $2.4 billion. Angela Galloway, *Prisoner Proposal Sets Off Alarm; Locke Would Free Some Inmates Early As Part of a Plan to Cut Costs*, SEATTLE POST-INTELLIGENCER, Feb. 18, 2002, at B1, *available at* 2003 WL 6290115.

The practical result of Washington's growing backlog of unserved warrants and law enforcement's inability to serve them is the *de facto* decriminalization of misdemeanor offenses through non-enforcement. Many defendants collect one criminal charge after another, as successive law enforcement agencies ignore outstanding warrants while bringing new misdemeanor and gross misdemeanor charges which, in turn, go to warrant status. The criminal justice system is not able to accommodate the growing number of warrants.

In Washington's courts of limited jurisdiction, the decriminalization process already takes the form of routine bond forfeitures (fines) for offenses like Driving With License Suspended Third Degree, Possession of Drug Paraphernalia and Marijuana, Fishing Without a License, and other wildlife violations. The standard offer of the Pend Oreille County prosecutor for the criminal offense of DWLS 3 is, upon presentation of a valid license, a reduction of the criminal offense to the infraction of No Valid License with a $250 fine.

Judge Michael Hutchings illustrates how *de facto* decriminalization has spread to the felony level in Salt Lake City, Utah: "The lack of enforcement of drug, theft and prostitution has decriminalized what the Legislature has chosen to criminalize. It is undeniable that drug possession and distribution, theft, and prostitution are now becoming *de facto* legalized in Salt Lake."[108]

Reducing the number of warrants for criminal offenses by reducing the number of minor misdemeanors would allow law enforcement to concentrate on more serious criminal offenses that impact public safety. For example, in Wisconsin, one recommendation would make all driving suspensions a civil rather than criminal offense in order to decriminalize certain conduct, but would make third-time driving after suspension a criminal offense to punish habitual conduct.[109]

C. Local and Statewide Priority Release Policies

Another option is to develop a uniform statewide release procedure with a standardized method for determining which inmates should be released first when overcrowding becomes severe.[110] Several states

108. Hutchings, *supra* note 82, at 36. In North Carolina, misdemeanants served only six percent of their sentences as a result of a prison cap. Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina*, 1980–2000, 29 CRIME & JUST. 39, 51 (2002).

109. Christopher A. Mutschler, *Reconsidering the Ramifications of Revocation*, WIS. LAWYER, Sept. 1997, at 8.

110. There are already procedures in place when county jail populations exceed capacity because of increases in sentenced felon populations. WASH. REV. CODE § 9.94A.875 (Supp. 2003) (governor can convene the sentencing guidelines commission to consider revisions to standard sen-

have implemented uniform procedures for addressing local jail overcrowding that places the ultimate decision back in the hands of the judiciary.[111] In Michigan,

> [t]he jail overcrowding act directs a county sheriff to declare a jail overcrowding state of emergency when the general prisoner population of a county jail exceeds one hundred percent of the rated design capacity of the jail. Upon a declaration of emergency, the sheriff is directed to notify designated county executive and judicial officers of the emergency and is exhorted to reduce the prison population by existing legal means such as pretrial diversion, reduction in the bonds of prisoners, and the use of day parole. If these steps do not reduce the jail population sufficiently to eliminate jail overcrowding, the sheriff is directed to supply the chief circuit judge of the county with the name of each prisoner, along with the details of the prisoner's sentence and the offense for which he was convicted. The chief judge is directed to classify the prisoners into two categories, those whose release would present a high risk to the public safety, and those whose release would not present such a risk. The sheriff is then directed to reduce the sentences of the low-risk prisoners by an equal percentage, set by the chief circuit judge, until the overcrowding is alleviated.[112]

A statewide release policy that encompasses misdemeanor criminal offenses should help to limit the ill-advised release of potentially dangerous misdemeanor defendants. It would also end unilateral law enforcement release of criminal defendants without notice to the court.

Where there is no statewide policy and jail overcrowding is a chronic problem at the local level, the various agencies within a local jurisdiction can establish a priority release policy to achieve the same result. This is similar to local law and justice councils that were created, in part, to develop jail management plans, including recommendations to "minimize overcrowding" and "effectively manage the jail and the offender population."[113]

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tence ranges or convene the clemency and pardons board to consider whether the governor's commutation or pardon power should be exercised to meet the emergency).

111. LA. REV. STAT. § 15:764 (1992) (notification to parish judges followed by release only of persons charged with nonviolent offenses); MICH. COMP. LAWS § 801.55–56 (1998); NEV. REV. STAT. § 211.240 (2002) (sheriff applies to the presiding judge for authority to release prisoners).

112. Kent County Prosecutor v. Kent County Sheriff, 428 Mich. 314, 317–318, 409 N.W.2d 202, 203–04 (1987). The existence of statewide overcrowding emergency procedures does not necessarily solve the problem. *See* Muskegon County Bd. of Comm'rs v. Muskegon Circuit Judge, 188 Mich. App. 270, 469 N.W.2d 441 (1991) (holding that the judge, sued by county commissioners, did not have authority to administratively order transfer of prisoners).

113. WASH. REV. CODE § 72.09.300 (3)(a), (f) (Supp. 2003). The Pend Oreille Law and Justice Council stopped meeting after the state discontinued accompanying criminal justice funding.

Priority release policies will not reduce the number of outstanding warrants, but the policies can reduce the harm caused when those warrants are ignored. Collaborating with local law enforcement on a joint release policy means that the local district court regains notice and some control over whether serious gross misdemeanor defendants are released back into the community. In addition, the judge can ensure that dangerous out-of-county defendants, over whom the local judge has no jurisdiction, are not released into the local community. And as an extra bonus, local governments may be screened from subsequent tort liability.[114]

D. Mandatory In-Custody Hold Until First Court Appearances

Mandatory court appearances for designated offenses are designed to avoid continuing harm by allowing a judge to set appropriate conditions of release as soon as possible. Washington law currently requires mandatory next-day court appearance for individuals charged with DUI or domestic assault.[115] In addition, local courts also may adopt rules that require that a defendant be held in custody until appearance before a judge.[116]

The mandatory first-appearance requirement should be enlarged to include in-custody detention until a first court appearance for all defendants wanted on domestic violence, DUI, and other serious gross misdemeanor charges. It is vitally important that in-custody detention also include post-conviction warrants for violation of terms of probation and deferred prosecution. In my opinion, an individual who has aborted treatment or failed to comply with conditions of probation on a second or third DUI or Assault DV presents as great a risk of subsequent harm to the community as do many felony defendants. It is also important that in-custody detention also mandate the return of defendants picked up on out-of-county warrants for appearance in the court that issued the warrant.[117] The fact that a potentially dangerous defendant is wanted in another county does not make the defendant less dangerous.

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114. Unfortunately, this sort of cooperation is more difficult in urban jurisdictions with multiple law enforcement agencies and judicial districts. In Pend Oreille County, by contrast, the process is as simple as a telephone call from the jail commander to the district judge, or vice versa, to discuss options whenever the jail is overcrowded.

115. WASH. REV. CODE § 46.61.50571 (2001) (Alcohol Violators Mandatory Appearances); WASH. REV. CODE § 10.99.045(1) (2002) (Domestic Violence).

116. WASH CRIM R. LTD. JUR. 3.2 (O)(2).

117. Statutorily mandated transport back to the issuing jurisdiction is necessary because otherwise, law enforcement will ignore out-of-county warrants for serious offenses. Consider the first example presented in this Article of the defendant with warrants for three alcohol-related Reckless Endangerment charges who failed to comply with probation yet was allowed to remain free after driving and blowing twice the legal limit for consumption of alcohol.

E. Modify Surety Forfeiture Law

In order to avoid forfeiture on a bond, the surety on a bail bond should be required to surrender a defendant back to the jurisdiction where the criminal charge was filed, and not to the out-of-jurisdiction jail where the defendant arranged bond.

When a defendant willfully fails to appear, the court may enter judgment against the bonding company for the entire amount of the bond.[118] Currently, the surety on a bond about to be forfeited may avoid forfeiture by surrendering the defendant to the jail where the defendant posted bond, even if that jail is not in the jurisdiction of the court that issued the warrant.[119] Unfortunately, many of these jails release out-of-county defendants returned to custody on out-of-county warrants without executing the warrant or holding the defendant for transport to the issuing jurisdiction. The surety, who has benefited from the bail bond fee, now avoids forfeiture notwithstanding a defendant's release and non-appearance before the issuing court.

For example, a defendant fails to appear in Pend Oreille District Court resulting in a warrant. The defendant is arrested in Spokane County on the Pend Oreille warrant and taken to the Spokane jail where the defendant arranges with a surety to post bond on the Pend Oreille charge (the defendant may also bond out on a new Spokane charge). The defendant again fails to appear on the Pend Oreille County charge; I order the bond amount to be forfeited, and the clerk sends the bondsman a notice of forfeiture. In response, the bondsman locates the defendant and returns him to the Spokane jail where the defendant is promptly released without honoring the Pend Oreille warrant. Unfortunately, the bondsman has done all that is currently required under RCW section 10.19.160 to avoid forfeiture, yet he has collected his fee while the defendant remains free with the warrant still outstanding.

This loophole in surety law, combined with a recent ban on cash-only bail, makes the District Court warrant process ineffective in light of the fact that law enforcement routinely ignores out-of-county warrants.

F. Implement License Restoration Programs

A significant portion of the district and municipal caseload is made up of criminal driving while suspended offenses.[120] A license restora-

118. WASH. REV. CODE § 10.19.090 (2002).

119. WASH. REV. CODE § 10.19.160 (2002); Johnson v. County of Kittitas, 103 Wash. App. 212, 11 P.3d 862 (2000).

120. David Fisher, *County Lockups Are Bursting at Seams*, SEATTLE POST- INTELLIGENCER, Sept. 28, 2000, at A1, *available at* 2000 WL 5304760 (Ed Vukich, policy research manager for the

tion program can effectively reduce the number of outstanding cases and warrants for these drivers. Consider the problem:

> The suspended license law can turn into a morass for people who get their licenses suspended for a DUI or for failure to pay fines, then rack up more fines, often from multiple jurisdictions, for continuing to drive before their fines are fully paid . . . . A random survey of 19 people, serving time in the Yakima County Jail for driving with a suspended license, shed some light on how they got to that point: the average faced $8,000 in fines, ranging from $4,000 to $24,000.[121]

A license restoration programs coordinates fines from all participating courts into one low monthly payment. The main benefit of the program is that an individual has his or her license reinstated without having to first pay the full amount owed to all jurisdictions. The license remains reinstated so long as the monthly payment is made. The court benefits by receiving regular payment of court costs with fewer subsequent criminal driving offenses since the defendant is not driving with a suspended license.[122] If all limited jurisdiction courts in Washington were to establish a license restoration programs, I conservatively estimate that outstanding warrants could be reduced by ten percent.

G. Bootstrap Out-of-County Warrant Compliance

Recall that the local district judge does not have jurisdiction over a defendant wanted on an out-of-county warrant. However, a new in-county misdemeanor charge presents an opportunity for the local judge to exercise indirect control over a defendant wanted on an out-of-county warrant, even when local law enforcement refuses to serve and transport on the out-of-county warrant.[123] This is because, in setting terms and conditions of release on the new charge, the judge can require a defen-

state Sentencing Guidelines Commission, estimates 19.2% of local jail inmates—about 2000 prisoners a day—were incarcerated for traffic offenses in 1999).

121. *Id.* at 33. The amounts owed are not so outrageous when one considers that a $490 no-insurance fine can balloon to over $700 with collection fees and interest. Several infractions can result in fines beyond the reach of lower income working individuals to pay. In some cases, driving suspended is a crime of poverty.

122. In Pend Oreille County, non-DUI traffic offenses dropped from 372 cases in 1999 to 101 cases in 2002, in part due to the License Restoration Program started in 1999. PEND OREILLE DISTRICT COURT, 2002 ANNUAL REPORT, *available at* http//www.co.pend-oreille.wa.us/courts.html (last visited May 17, 2003).

123. Because the defendant is charged on a new in-county offense, he or she must appear before the local judge on the in-county charge, assuming the defendant was not released due to jail overcrowding.

dant to appear and take care of warrants out of other jurisdictions.[124] If the defendant has failed to clear up the other warrants by the next hearing, the judge may reasonably conclude that the defendant is not likely to obey conditions or appear at a subsequent hearing on the in-county misdemeanor charge. In those situations, bail can be imposed on the new charge. Of course, this approach only works in jurisdictions where law enforcement is still honoring in-county warrants and the imposition of bond on in-county defendants.

One area of concern is that there are no court decisions specifically authorizing limited jurisdiction judges to use terms of release on in-jurisdiction charges to compel a defendant to take care of warrants on out-of-jurisdiction charges. This lack of specific bootstrap authorization can be solved by amending RCW section 3.66.060(1) to allow judges to take temporary cognizance over out-of-jurisdiction cases for the limited purpose of compelling the clearing up of outstanding warrants and complying with conditions of release.

H. Cash-Only Bail

The criminal rules for courts of limited jurisdiction should be amended to allow a cash-only bail requirement. Amendment is needed because Division III of the Washington Court of Appeals recently held that the criminal rules for courts of limited jurisdiction, as presently worded, do not authorize cash-only bail without a corresponding option to arrange for a surety bond.[125]

I find that imposing cash-only bail increases the percentage of defendants who appear for court and, at the same time, reduces the number of outstanding warrants. One reason for this is that a defendant who posts cash has a greater incentive to appear for court because the entire amount is refunded to the defendant at the end of the case. In addition, many times a family member or friend posts the cash bond on behalf of a defendant. These individuals tend to make sure the defendant appears in court.[126]

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124. WASH. CRIM. R. LTD. JUR. 3.2 allows the judge to set conditions of release after a determination that a defendant is not likely to appear at a future court hearing. The fact that the defendant had not appeared in other courts, thus generating warrants, is a pretty good indication that the defendant is not likely to appear on the current charge, thus warranting bail and conditions of release.

125. Yakima v. Mollett, 115 Wash. App. 604, 63 P.3d 177 (2003) (interpreting "deposit of cash" pursuant to section 3.2(a)(5) as an option that may not be considered separately from allowing the posting of a surety bond). The *Mollett* decision does not prohibit a judge from setting a higher surety bond amount with a lower cash bond amount so that defendants would be more inclined to post the lower cash bond.

126. I regularly see the relative, spouse, or friend who posted the cash bond accompany a defendant to court as much to insure that the defendant appears as to provide support. Many times,

In contrast, a defendant is less likely to appear after posting a surety bond because the fee given to the bondsman is not refunded even if the defendant appears. There is even less inclination to appear when the defendant who posted bond through a bail bond company lives in a jurisdiction that does not serve outstanding warrants because the defendant knows he or she will likely not be arrested and transported. A cash-only bail requirement is also needed to counteract the reduced effectiveness of surety bonds caused by the growing failure to honor misdemeanor warrants.

I. Warrant Triage: Unilateral Court Action

Limited jurisdiction judges have several options available to unilaterally reduce the number of outstanding warrants in light of the Legislature's failure to adequately fund criminal justice and the executive's failure to execute mandatory arrest warrants. Every presiding district judge can develop a policy to significantly reduce the number of outstanding warrants in order to avoid the harm caused when warrants are ignored for serious gross misdemeanors.[127]

One option is to limit the duration of warrants for minor misdemeanors to less than the standard three-year duration.[128] Setting the duration of a warrant at six months for lesser misdemeanors places the onus back on the executive branch to prioritize and on the prosecutor to work with law enforcement to serve outstanding warrants and retain jurisdiction.[129]

Another option is to only reissue warrants for serious gross misdemeanors. Warrants for minor misdemeanors, such as driving while

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the person who posted the bond will report the location of a defendant who has failed to appear so as to avoid forfeiting the cash bond. *Cf.* John A. Chamberlain, *Bounty Hunters: Can the Criminal Justice System Live Without Them?*, 1998 U. ILL. L. REV. 1175, 1196–97 (1998). Bureau of Justice figures indicate that eighty-five percent of defendants who post surety bond make all scheduled court appearances, as opposed to seventy-eight percent of defendants released on full-deposit bonds. *Id.*

127. Limited jurisdiction judges would perform "warrant triage" on a statewide backlog of warrants in order to maintain the integrity and independence of limited jurisdiction courts that is threatened when the executive branch ignores judicial warrants and the legislative branch fails to fund adequate jail facilities. Warrant triage should also allow law enforcement to focus on warrants for more serious crimes that, if ignored, present the greatest threat to the community.

128. The current default setting is three years for warrants entered in the statewide Judicial Information System maintained by the Washington Office of the Administrator for the Courts. No law or rule mandates any particular warrant duration.

129. The prosecutor is not prejudiced by reduced warrant duration because the prosecutor has the option of either dismissing the charge without prejudice to be refiled at a later date or requesting that the warrant be reissued. Shortening the duration of a warrant is different from "purging" warrants. *See* Roarke, *supra* note 33 (Kitsap County Sheriff's Chief Larry Bertholf scoffs at the idea of purging after Seattle Municipal Court purges 20,000 misdemeanor warrants).

license suspended, might be designated in-county only.[130] Also, cases involving a failure to pay or monetary violations can instead be referred to a collection agency rather than allowed to go to warrant.[131]

Reducing the total number of warrants in the system will, unfortunately, allow some defendants to avoid accountability on less serious charges, but it will enhance the ability of law enforcement to hold defendants accountable for criminal conduct that threatens public safety.

J. Decline to Issue Warrants for Minor Misdemeanors

A more drastic solution is for the limited jurisdiction judge to refuse to issue new warrants except for more serious misdemeanor cases. This would only occur in jurisdictions where the warrant problem is so severe that in-county gross misdemeanor warrants are routinely disregarded, thus placing the community at risk and threatening the integrity of the judiciary.

The authority to limit the issuance of warrants already exists. The presiding judge of each judicial jurisdiction is granted the authority to manage the court's business and develop policies to improve the court's effectiveness.[132] The presiding judge can regain control over an out-of-control warrant problem by limiting the issuance of new warrants because the decision whether to issue a warrant is discretionary.[133]

The executive branch is not unduly prejudiced by the court's refusal to issue a requested warrant because the prosecutor still has the opportunity to request a warrant by verified application.[134] In the alternative, the prosecutor can dismiss the case without prejudice and refile when the defendant is located. If the prosecutor chooses not to dismiss, law enforcement still has the opportunity to locate and return the defendant within the speedy trial period.

Controlling the number of warrants issued will force the executive branch (law enforcement and the prosecutor) to coordinate how to most effectively prosecute criminal matters with the inadequate resources given to them by the legislative branch. This will also help to reduce the growing harm to the judiciary and public caused by the flood of war-

130. For example, it may not be cost-effective to issue a statewide misdemeanor warrant for a Pend Oreille defendant who resides in King County, particularly since westside jurisdictions ignore the warrant anyway. Designating warrants as in-county only should never be used for serious gross misdemeanor cases, since the prompt arrest of these defendants benefits all jurisdictions.

131. I find a collection agency to be more effective than a law enforcement agency that is too overburdened to serve a valid arrest warrant. The collection agency used by the Pend Oreille District Court adds its fee to the original court fine, so the entire amount returns to the court.

132. WASH. GEN. R. 29(e).

133. WASH. CRIM. R. LTD. JUR. 3.2(j)(1).

134. WASH. CRIM. R. LTD. JUR. 3.2(k)(1). The court still retains the option of issuing a summons rather than a warrant.

rants, and the inability of the executive branch to arrest, incarcerate, and transport criminal defendants wanted on more serious offenses.

K. Warrant Fests

"Warrant Fest" is a coordinated court and law enforcement operation designed to reduce the number of outstanding warrants. Typically, the community is notified through the media that a certain day will be set aside for defendants to come into court to take care of outstanding warrants and perhaps resolve their criminal charges. Defendants with outstanding warrants are sometimes contacted by telephone ahead of time and encouraged to take advantage of the offer. For those who choose not to take advantage, a law enforcement sweep follows.[135] Those not at home when law enforcement comes to call find a notice on their door. Both Spokane and Kitsap Counties have used this carrot-stick approach to reduce the number of outstanding warrants.[136] Of the 6,000 defendants with outstanding warrants in Spokane, approximately ten percent had them resolved in an eight-day period.[137]

L. Alternatives to Incarceration

There are alternatives to pretrial incarceration. For example, multiple DUI defendants can be required to install a "vi-cap"[138] device in the home or report for breath-alcohol testing several times per day. In Pend Oreille County, the program has resulted in a high compliance rate[139] while, at the same time, saving the town of Newport and Pend Oreille County $39,000 and $34,470, respectively, in the cost of incarceration for the year 2001.[140] Another pretrial alternative is electronic home monitoring.[141]

Mandatory compliance hearings can also reduce the need for incarceration. For example, an individual is convicted of DUI and is re-

135. John Craig, *Police Begin Extracting Price for Ignoring Warrants*, SPOKESMAN REV., Oct. 17, 2002, at B8, *available at* 2002 WL 23064837.

136. Roarke, *supra* note 33.

137. *230 Cases heard in 'Warrant Fest II*,' SPOKESMAN REV., Oct. 20, 2002, at B3, *available at* 2002 WL 23065124.

138. "Vi-cap" stands for video capture, and it attaches to the telephone. Several times a day or night, the defendant is called and required to blow into a tube while his or her photo is taken to monitor abstinence from alcohol. The cost to Pend Oreille defendants is $6 per day.

139. PEND OREILLE DISTRICT COURT, 2001 ANNUAL REPORT, *available at* http//www.co.pend-oreille.wa.us/courts.html (last visited May 17, 2003). The compliance rate was over ninety percent in 2001. A defendant testing positive for alcohol is immediately taken into custody.

140. *Id*. at 2.

141. *Alternatives to Jail Deserve Serious Look*, SPOKESMAN REV., Jan. 24, 2003, at B6, *available at* 2003 WL 6399529.

quired to undergo alcohol treatment. The individual aborts treatment (or never gets started), leading to an eventual Show Cause Probation Violation.[142] One way to reduce post-conviction recidivism is to bypass the standard notice-show cause probation violation process (which can take months and allows for more violations) by setting mandatory compliance review hearings as part of the original sentence and probation. At a fixed time after conviction, usually two to three months, the probationer must return to court and show that he or she is complying with all treatment or other requirements. Holding probationers promptly accountable reduces subsequent offenses and improves the chance for successful treatment.[143]

Unfortunately, these pretrial and post-conviction alternatives are time-intensive and involve a good deal of daily coordination between court, probation, and corrections. Overworked courts in urban jurisdictions may not have the time and manpower to implement these options.

Other alternatives to incarceration include work release, noncustodial work crew, and community service.

M. Publicize the Warrant Problem

In my experience, the citizens of Washington are generally unaware that dangerous gross misdemeanor defendants are released daily into the community without notice or the opportunity to impose judicial protections. When a defendant with an outstanding warrant commits a subsequent crime that causes loss, damage, or injury, the injured party never discovers and is not told that law enforcement may have recently chosen not to arrest the perpetrator on the outstanding warrant, which could have prevented the subsequent harm.

Informing the citizens of Washington of the dangers caused by ignoring warrants on serious misdemeanors will, hopefully, lead to serious public pressure for the three branches of government to implement solutions. Print and other media sources can be advised of the problem so as to generate interest in publishing examples of the failure to honor warrants putting the public at risk. Organizations like MADD and the Washington Coalition Against Domestic Violence can be alerted to pro-

142. The probationer is summoned into court by the prosecutor or probation director to "show cause" why any suspended sentence should not be imposed for failing to comply with treatment or other requirements.

143. In 2001, the Pend Oreille District Court held 146 mandatory compliance hearings. Ninety-six defendants were found to have complied with treatment; thirty-five had made some progress but needed a second hearing to further monitor compliance; nine were found to be noncompliant and immediately taken into custody (terms set and probation violation hearing set); six failed to appear and a warrant issued. PEND OREILLE DISTRICT COURT, 2001 ANNUAL REPORT, *available at* http//www.co.pend-oreille.wa.us/courts.html (last visited May 17, 2003).

vide oversight and inquiry. Government risk insurers and managers interested in avoiding government liability can be put on notice of the very real potential for government liability to compel revisions and corrections in law enforcement practice and policy.

VII. CONCLUSION

It is difficult to predict the future ramifications of the failure to honor misdemeanor and gross misdemeanor warrants. However, current trends indicate that unless promptly addressed, the problem will grow to include the release of felony defendants.[144] Injured citizens will seek, and likely obtain, civil judgments against government entities for injuries suffered as a proximate result of law enforcement's failure to arrest and serve outstanding warrants leading to otherwise avoidable criminal conduct. In addition, failing to hold literally thousands of Washington defendants accountable for misdemeanor crimes is resulting in the *de facto* decriminalization of nonviolent misdemeanors such as driving with a suspended license, possession of marijuana, and possession of drug paraphernalia, to name a few.

There are many options available to address the problem of the failure to honor misdemeanor and gross misdemeanor warrants. Action needs to be taken now to address the serious problems in Washington's current warrant system, and all branches of the government must work together to implement changes.

144. Felony defendants are already being released due to jail overcrowding, thus presenting an even greater threat to the safety of Washington citizens. Gillie, *supra* note 31.

APPENDIX A

Pend Oreille Defendants with Warrants

The source of this appendix is the Pend Oreille District Court *Outstanding Warrants Report*, dated August 30, 2002, showing 166 misdemeanor and gross misdemeanor defendants wanted on active Pend Oreille warrants, with thirty-six of those defendants wanted on warrants of $500 or more. Defendants wanted on warrants of $500 or more, including mandatory appearance warrants, were selected for further analysis.

This appendix summarizes the post-warrant criminal and infraction histories as of August 30, 2002, of the thirty-six criminal defendants with active misdemeanor and gross misdemeanor warrants of $500 or more. The criminal history for each defendant subsequent to issuance of the Pend Oreille County warrant was then accessed using the Judicial Information System managed by the State of Washington Office of the Administrator for the Courts. The results are below.

Law Enforcement Contact

Of the 166 Pend Oreille County defendants, thirty-six defendants (21.68%) were cited, arrested and/or convicted of offenses in other jurisdictions after the Pend Oreille County warrant was issued. In every case, the Pend Oreille warrants were not served at the time the defendants were cited by law enforcement for a new offense. The defendants remained at large on the Pend Oreille warrants.

Subsequent Offenses

Of the thirty-six defendants charged with an offense without the Pend Oreille warrant being served, seventeen defendants (forty-seven percent) were subsequently charged with thirty-eight additional criminal offenses *after* law enforcement failed to arrest on the Pend Oreille warrants. This does not include the offense charged at the time the warrant was not served. These second, third, and fourth offenses include six felonies, nineteen gross misdemeanors, and thirteen misdemeanors. One hundred percent of the felonies and eighty-nine percent of the gross misdemeanors were committed in the city or county of Spokane after Spokane law enforcement failed to honor the Pend Oreille warrant.

Multiple Warrants

The thirty-six defendants are wanted on a total of forty-five Pend Oreille County warrants. These defendants have, to date, generated twenty-nine additional warrants from other jurisdictions, a sixty-four percent increase in outstanding warrants, while the Pend Oreille warrants remain in effect. Sixteen of the twenty-nine subsequent warrants stem from second or third contact/arrests that may have been avoided had law enforcement honored the outstanding Pend Oreille warrant during earlier contacts.

For each defendant, the initial Pend Oreille charges are underlined; the first subsequent law enforcement contact is italicized (when the Pend Oreille warrant should have been served). All subsequent criminal charges are presented thereafter.

1. C6209: Minor in Possession, warrant issued 03/2/01. *Spokane Municipal: Reckless Driving, 03/4/01 (warrant*); Switched Plates, 3/25/01; DWLS 3, 7/6/01 (warrant) and Expired License, 7/6/01. Cheney District: Safety Belt and No Insurance, 05/5/01.

2. CR2743: DWLS 3, warrant issued 10/20/00. *Spokane Municipal: DWLS 3 08/30/01 (warrant).* Spokane District: Felony Possession Firearms, 05/25/02.

3. C6246: DWLS 3, warrant issued 03/17/00. *East Klickitat District: Fugitive (waived extradition to Oregon on felony manufacture of a controlled substance charge*).

4. CR2225: Minor in Possession, warrant issued 6/16/00. *Spokane Municipal: Assault DV, 10/18/00*. Violation No Contact Order, 03/07/01; Violation No Contact Order, 03/31/01; Violation No Contact Order & Obstruction of Law Enforcement, 05/26/01; Open Consumption of Liquor, 10/05/01; DUI, 05/06/02 (warrant). Spokane District: Felony Violation of a No Contact Order, 05/26/01.

5. CR2884: Minor in Possession, warrant issued 03/23/01. *Spokane District: Felony Controlled Substance, 04/22/01*; Theft 3, 11/24/01 (warrant); Possession Drug Paraphernalia, 06/24/02 (warrant).

6. CR2531: Minor in Possession, warrant issued 12/23/99. *Spokane Municipal: Speeding, 03/25/01*; DWLS 3, 04/24/00; Speeding, 08/27/01. Spokane District: No Insurance, 07/25/02.

7. C6378: DWLS 3, warrant issued 02/04/00. *Spokane Municipal: No Valid License, 02/14/01.*

8. CR3078: Minor in Possession, warrant issued 01/18/02. *Spokane Municipal: DWLS 3, 02/06/0;* DWLS 2 & Possession Drug Paraphernalia, 05/11/02 (warrant). Spokane District: Felony Attempt to Elude, 05/24/02; Minor in Possession, 07/28/02 (warrant).

9. C6342: Minor in Possession, warrant issued 12/03/99. *Lewis County District: DUI, DWLS 3, and Minor in Possession, 02/16/00 (two warrants)*; *Criminal Trespass 2, Resisting Arrest, and Possession Drug Paraphernalia, 05/02/02*. Chehalis Municipal: Obstruction of Law Enforcement and Possession Drug Paraphernalia, 08/16/00 (warrant).

10. C6595: Driving Under the Influence, warrant issued 07/12/02. *Spokane District: Felony Controlled Substance, 07/24/02.*

11. CR2204: Assault 4, warrant issued 09/24/99. *Cowlitz District: Violation of a No Contact Order, 06/09/01*.

12. C6590: Possession Marijuana & Possession Drug Paraphernalia, warrant issued 10/11/01. *Spokane Municipal: Assault and Possession Drug Paraphernalia, 03/29/02.* Spokane District: Assault 4 and Felony Assault, 05/11/02 (warrant).

13. C6172: Indecent Exposure Under 14, warrant issued 11/15/01. *Spokane Municipal: Theft, 11/18/01 (warrant)*; Criminal Trespass 1 (building), 01/23/02 (warrant); Criminal Trespass 2 (premises), 06/05/02 (warrant); Criminal Trespass 1, 06/29/02 (warrant); Intimidate/Display Weapon, 06/30/02 (warrant). Spokane District: Possession of Stolen Property, 12/05/01. Comment: One would think Spokane law enforcement officers would transport the defendant just to get him out of the area for a while.

14. C6895: Obstruction of Law Enforcement, warrant issued 10/26/01. *Grays Harbor District: DWLS 3 and Refuse to Give Information, 08/16/02.*

15. CR3848: DUI, warrant issued 07/15/02. *Issaquah Division: Fail to Wear Safety Belt.* Comment: There was a significant criminal history. The Pend Oreille warrant was a mandatory appearance warrant.

16. C5689, C5744: DUI and DWLS 3 (two counts), warrant issued 05/11/01. *Spokane Municipal: Assault, 08/05/02.*

17. C6709: DWLS 3, warrant issued 11/07/00. *Spokane Municipal: DWLS 3, 06/10/02 (warrant)*; Assault, 07/15/02

18. CR2584: Obstruction of Law Enforcement, Reckless Endangerment, and Theft 3, warrant issued 11/09/00. *Fife Municipal: DWLS 3 and False Statement to Law Enforcement, 01/12/01 (warrant).*

19. PA01-0003: Theft 3, warrant issued 02/23/01. *Spokane Municipal: Fail to Wear Safety Belt, 09/22/01*.

20. CR2114: DUI and DWLS 3, warrant issued 11/30/01. *Franklin District: DUI and DWLS 2 11/30/01*. Comment: The warrant issued at same time as new charge, but new charges were not resolved until 01/23/02, so there was plenty of notice of the warrant.

21. C317987: DWLS 3, warrant issued 8/16/02. Spokane Municipal: DWLS 3, 08/14/02. Comment: The warrant issued after the new

charge, yet the defendant was in jail in Spokane and sent kites to Pend Oreille requesting a court date. She was released.

22. CR2582: Obstruction of Law Enforcement, warrant issued 03/24/00. *Fife Municipal: DWLS 3, 04/27/01 (warrant).* Puyallup Municipal: DWLS 3, 07/08/01 (warrant).

23. C7042, C7041, CR3079, CR3000: Minor in Possession, Possession Marijuana, DWLS 3, and Assault 4, warrants issued 04/27/01-08/03/01. *Spokane District: DWLS3, 09/12/01 (warrant).* Spokane Municipal: DWLS 3, 03/14/02 (warrant).

24. 7191574: DUI, warrant issued 04/27/01. *Spokane Municipal: Open Container, 07/19/02.*

25. CR1572: DUI, warrant issued 12/07/01. *Hoquiam: Malicious Mischief, 05/17/02*; Assault Domestic Violence, 08/11/01.

26. C6558, C293314: DWLS 3 (two counts), warrants issued 06/01/00. *Spokane District: DWLS 3, 06/25/02*. Spokane Municipal: Assault 4, 06/28/02.

27. C6763: DUI, warrant issued 11/07/00. *Spokane Municipal: Disorderly Conduct, 12/16/01;* Malicious Mischief, 02/15/02 (warrant). Spokane District: Felony Robbery, 02/15/02.

28. PA01-0012: Harassment, warrant issued 03/15/02. *Benton County: Violation No Contact Order (three counts) and Calls to Harass, 02/14/02 (warrant*). Comment: The Benton County warrant was served on the defendant on 08/21/02 with the Pend Oreille warrant ignored. No bond, no body, and no excuse.

29. CR2389: DWLS 1, warrant issued 04/09/01. *Spokane District: Safety Belt 06/08/01*. Spokane Municipal: Assault Domestic Violence, 07/01/02, Lewd Conduct and Public Park Rules, 08/10/02 (warrant).

30. CR1657: DWLS 2, warrant issued 01/28/00. *Spokane District: Felony Controlled Substance, 02/10/00.*

31. C6674, C6698, C6811: DUI (2 counts), DWLS 2 (2 counts), Assault 4, and Malicious Mischief, warrants issued 03/19/01 to 04/13/01. *Spokane District: Felony Violation No Contact Order, 04/16/01*. Spokane Municipal: DWLS 3, 10/26/01 (warrant).

32. C208041: DUI and DWLS 3, warrant issued 11/09/00. *Spokane Municipal: Failure to Stop and Give Information, 05/05/01 (warrant)*; Assault Domestic Violence and Interfere with Reporting of Domestic Violence, 07/07/02.

33. C6901, C6902, CR2477: DWLS 3, Use of Loaded Firearm, DUI (vessel) amended to four counts of Reckless Endangerment, warrants issued 9/17/01 to 10/03/01. *Blaine Municipal: DWLS 3, 11/25/01 (warrant).* Comment: The defendant blew a .16, twice the legal limit

while driving, yet the Blaine officer did not arrest, cited for DWLS, and let the defendant walk.

34. CR2520: DUI, warrant issued 09/22/00. *Spokane Municipal: DWLS 3, 02/27/02 (warrant)*. Spokane District: Safety Belt, 08/31/02.

35. CR1006K: DUI, warrant issued 12/22/00. *Spokane Municipal: Open Alcohol Container, 05/14/02*. Comment: This is a perfect liability situation for Spokane; the officer ignored a *mandatory appearance warrant* and released the defendant after citing for alcohol in the car.

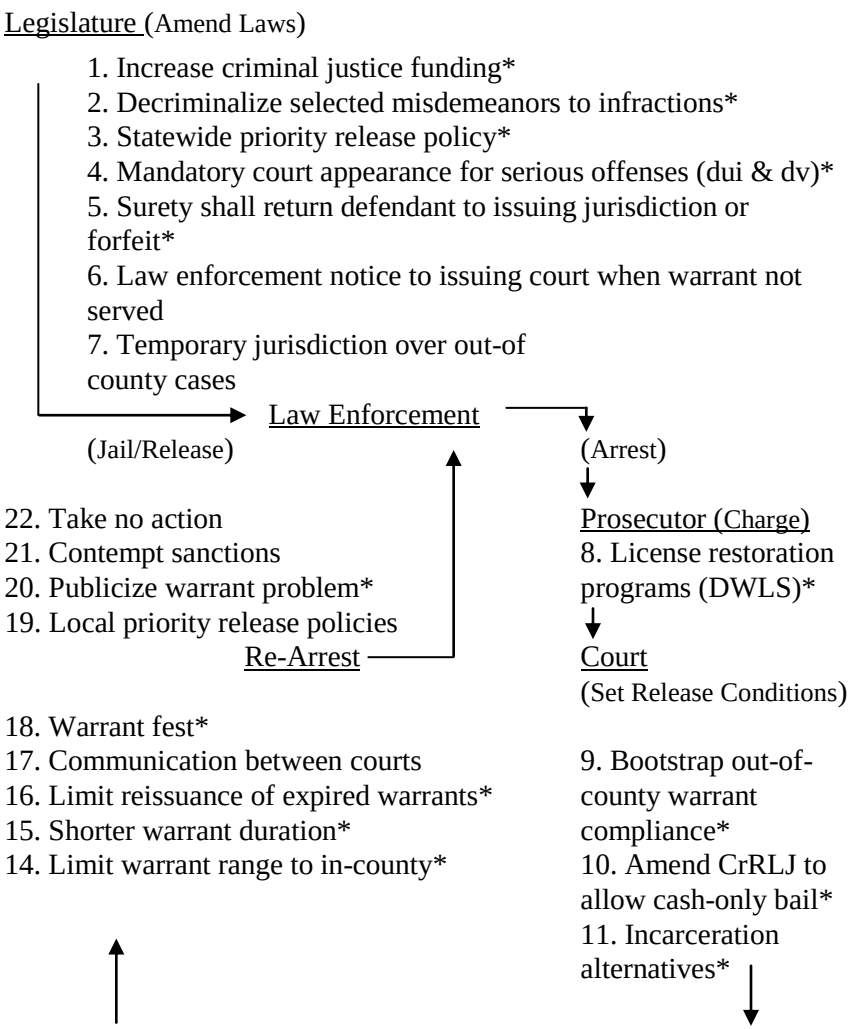
36. CR2470: DWLS 2, warrant issued 09/17/01. *Spokane District: Felony Controlled Substance, 03/14/02*.

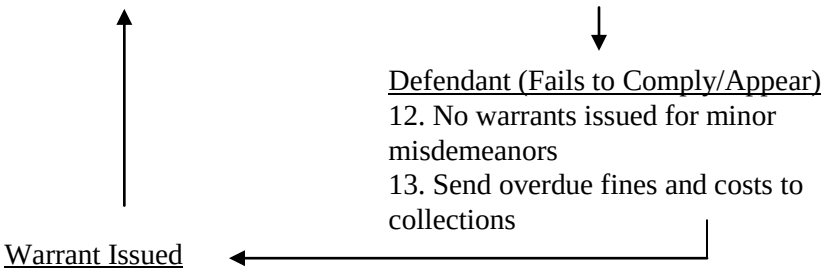
This appendix records subsequent criminal conduct up to August 30, 2002. There may be additional criminal offenses committed by some of the 166 Pend Oreille County defendants after August 30, 2002, while the Pend Oreille County warrant remained unserved. This Appendix does not tally law enforcement contacts with Pend Oreille County defendants where no subsequent criminal charge or infraction was filed.

APPENDIX B

DMCJA Warrant Reduction Options

The Warrants Committee of the District and Municipal Court Judges' Association (DMCJA) considered twenty-two potential options to solve the problem of law enforcement's failure to arrest, serve, and transport defendants wanted on outstanding warrants. Committee recommendations are followed by an asterisk.





1. Legislature: Increase Criminal Justice Funding. The Legislature should increase criminal justice funding. Rationale: Adequate criminal justice funding would solve the warrant problem by alleviating jail overcrowding and facilitating housing and transport on out-of-county warrants.

Recommended.

2. Legislature: Decriminalize Selected Misdemeanors To Infractions. A significant percentage of the hundreds of thousands of outstanding warrants are for lesser criminal misdemeanors that might better be processed as civil infractions. The DMCJA should review the hundreds of current misdemeanors and recommend to the Legislature those offenses that can be decriminalized to allow more effective processing as infractions.

Recommended. The committee supported decriminalization of minor fish and game violations (SB5029). The committee did not discuss which types of misdemeanors might be decriminalized.

3. Legislature: Statewide Priority Release Policy. A statewide release policy would allow the executive, judicial, and legislative branches of government to implement a unified approach to release, transfer, and detention of felony and misdemeanor prisoners where, due to jail overcrowding or court order, law enforcement is unable to detain all inmates. This would minimize the release of dangerous gross misdemeanor inmates (*i.e.*, DUI and Assault DV). Some states have already passed legislation that mandates procedures to be followed before law enforcement can release any prisoners, namely that the local presiding judge has the controlling say on who gets released in situations where overcrowding has reached constitutional magnitude.

Recommended. The committee supported this option if further investigation indicates that a statewide policy is needed.

4. Legislature: Mandatory Court Appearance For Serious Offenses. The mandatory in-custody first appearance requirement for defendants charged with a domestic violence offense should be enlarged to include DV and DUI warrants, *including post-adjudication warrants* for viola-

tion of terms of probation, deferred prosecution, etc. Rationale: The mandatory DV appearance requirement is designed to avoid continuing harm by allowing a judge to set appropriate conditions of release. The same rationale applies to impaired driving and other serious misdemeanors with a potential for harm to the community. It can be argued that an individual who has aborted treatment and failed to comply with DUI or DV probation requirements presents a greater risk of subsequent harm to the community than at first arrest.

Recommended. A mandatory appearance requirement should help to avoid the potential for serious injury and death and may reduce multiple warrants for the same defendant. It is the refusal to serve these types of serious gross misdemeanor warrants by law enforcement that causes the most frustration to limited jurisdiction judges.

5. Legislature: Require Sureties to Return Defendants to Issuing Jurisdiction. RCW section 10.19.160 should be amended to require that, in order to avoid forfeiture on a bond, a surety must surrender a defendant back to the jurisdiction where the criminal charge was filed, and not to the out-of-jurisdiction jail where the defendant arranged bond. Rationale: RCW section 10.19.160 currently allows the surety on a forfeited bond to surrender the defendant to the jail where the defendant posted bond, even if that jail is not in the jurisdiction of the court that issued the warrant.[•] Yet, these out-of-jurisdiction jails routinely release defendants returned to custody on out-of-county warrants without executing the outstanding warrant or holding the defendant for transport to the issuing jurisdiction. The result is that the surety is relieved of the duty of forfeiting the bond amount, notwithstanding the defendant's release, because the bondsman has technically complied with current statute.

For example, a defendant fails to appear in Pend Oreille County District Court resulting in a warrant. The defendant is arrested in Spokane County on the Pend Oreille warrant and taken to the Spokane jail, where the defendant arranges with a surety to post bond on the Pend Oreille charge (defendant may also bond out on a new Spokane charge). The defendant again fails to appear on the Pend Oreille County charge and the clerk sends the bondsman a notice of forfeiture. The bondsman picks up the defendant and returns him to the Spokane jail where he is released without honoring the Pend Oreille County warrant. The bondsman has done all that is required under RCW section 10.19.160 to avoid forfeiture, yet the defendant remains free and the warrant not served. This glaring loophole in surety law combined with a recent ban on cash-only bail makes the district court warrant process ineffective when law enforcement ignores out-of-county warrants.

[•] Johnson v County of Kittitas, 103 Wash. App. 212, 11 P.3d 862 (2000).

Recommended.

6. Legislature: Law Enforcement Notice to Issuing Court. The Legislature should require that, at a minimum, law enforcement agencies notify the issuing court every time law enforcement contact is made with a wanted defendant and the warrant is not fully honored. This would include all checks through ACCESS and local law enforcement databases leading to discovery of an outstanding warrant. Rationale: It is impossible to solve a problem if the scope of the problem is not ascertainable. Requiring that law enforcement disclose every contact with a wanted defendant to the court of jurisdiction will allow the full extent of the problem to be ascertained. It will also allow the issuing court the opportunity to decide whether to continue or quash particular warrants (example: a three year old No Valid Operator's License without Identification, or a warrant issued for DWLS 3 for a defendant now living across the state).

Not Recommended. This would probably not make a substantial difference.

7. Legislature: Temporary Jurisdiction Over Out-of-County Cases. The Legislature should amend RCW section 3.66.060 to allow limited jurisdiction judges to take temporary cognizance over out-of-jurisdiction cases to facilitate conditions of release and/or return of the defendant. Rationale: Defendants wanted on out-of-county warrants are released by local law enforcement. Some go on to commit additional crimes. Allowing the local judge to intervene would enhance local public safety and reduce the local criminal caseload, thus improving the administration of justice. It would also allow the local judiciary to take contempt action to compel law enforcement compliance, particularly the honoring of warrants for defendants wanted on the more serious DUI and DV warrants.

Not Recommended. This would create additional jurisdictional problems, and some judges would not take kindly to judges in other jurisdictions handling local cases.

8. Court/Prosecutor: License Restoration Programs. The DMCJA should encourage and assist local jurisdictions to implement license restoration programs that work in tandem with similar programs in other jurisdictions statewide. Rationale: A significant percentage of the district and municipal court caseload is comprised of suspended driving offenses, many for nonpayment of fines. A license restoration program allows a suspended driver to obtain license reinstatement while still paying off fines from one or several jurisdictions, rather than requiring that defendant pay all fines in total before becoming eligible for license reinstatement. Allowing drivers to obtain their licenses sooner will

avoid the all too common second and third driving suspended offense with a corresponding increase in fines owed before reinstatement is allowed. This should reduce criminal caseload as well as the number of outstanding warrants.

Recommended. While local restoration programs are effective, the Legislature should consider statewide standards for license restoration to provide uniformity and consistency. It is also *recommended* that courts track infractions, along with any concurrent criminal offenses, in order to reduce the number of infraction failures to appear, and to assist suspended drivers to regain their licenses.

9. Court: Bootstrap Out-of-County Warrant Compliance to In-County Conditions. A new in-county misdemeanor charge presents an opportunity for the local district judge to exercise indirect control over an out-of-county defendant even when local law enforcement refuses to serve and transport on the out-of-county warrant. In setting terms and conditions of release on the new charge, the judge can, as a condition of release on the new charge, order the defendant to take care of any warrants out of another jurisdiction, because the existence of other warrants is an indicator that the defendant will not appear or comply with terms of release. As a condition of probation, the judge can require that the defendant take care of outstanding warrants in order to improve the chances of successfully completing probation without subsequent violation.

Recommended. While there has been some concern over whether bootstrapping constitutes an overextension of judicial authority, a number of judges are currently using this approach with success.

10. Court: Amend CrRLJ 3.2 to Allow Cash-Only Bail. The Washington State Supreme Court should amend the Criminal Rules for Courts of Limited Jurisdiction (CrRLJ) 3.2 to allow limited jurisdiction judges to impose cash-only bail, or set a lower cash bail with a higher surety bond amount to encourage defendants to post cash bail. Rationale: A lower cash bond can be more effective in compelling defendants to appear for hearings and comply with terms of release because the defendant knows the entire amount posted will be returned either during or at the end of the case. In contrast, the surety does not refund the ten to fifteen percent fee charged, so there is less incentive to appear. This is particularly true when the defendant does not reside within the jurisdiction because the chances are good that law enforcement in other jurisdictions will not arrest, serve, and transport on the warrant. In such cases, the ten to fifteen percent retained by the surety (not the court) becomes the de facto cost to the defendant of avoiding a criminal prosecution, while the court remains burdened with outstanding warrants. A cash-only bond is also

advantageous in situations where a family member or friend helps post the bond amount because these individuals tend to take an active role in making sure the defendant gets to court, if only to make sure that the bond amount is not forfeited. Finally, sureties are not particularly effective in returning defendants to the issuing jurisdiction, and are currently not accountable if the out-of-jurisdiction jail to which a defendant is returned is released without issuing the warrant.

Recommended. Cash-only bail is an effective tool to compel a defendant to appear in court, while the defendant also benefits from return of the entire bond amount.

11. Alternatives to Pretrial and Post-Trial Incarceration. There are alternatives to pretrial incarceration. For example, multiple DUI defendants can be required to install a vi-cap device in the home or report for breath-alcohol testing several times per day. One way to reduce post-conviction recidivism is to bypass the standard notice-show cause probation violation process, which sometimes takes months from notice to adjudication, thus providing the opportunity for additional alcohol-related violations. Instead, the judge sets mandatory compliance review hearings as part of the original sentence and probation. At a fixed time shortly after conviction, the probationer returns to court and shows that he or she is complying with all treatment or other requirements. Holding probationers promptly accountable reduces subsequent offenses and improves the chance for successful treatment. Other alternatives to incarceration include electronic home monitoring, work release, noncustodial work crew, and community service.

Recommended. These programs are time-intensive and difficult to implement in overworked, urban courts.

12. Court: No Warrant Issued for Minor Misdemeanors. The DMCJA should authorize limited jurisdiction judges to exercise judicial discretion by refusing to issue warrants for failure to appear on minor misdemeanors in jurisdictions where law enforcement is currently unable to honor even serious in-county warrants. Rationale: One way to reduce the harm caused by the failure to honor the growing number of outstanding warrants is to refuse to issue new warrants except for more serious misdemeanor cases. GR 29(e) authorizes the presiding judge of each judicial jurisdiction to manage the court's business and develop policies to improve the court's effectiveness. The decision to issue a warrant is discretionary. CrRLJ 3.2(j)(2) indicates that the judge "may" revoke release. In addition, CrRLJ 3.2(k)(1) gives the judge the discretion to choose whether to issue a warrant or summons to appear. The executive branch is not unduly prejudiced by the failure to issue a warrant because the prosecutor can dismiss without prejudice and then re-

file when and if the defendant is located. If the prosecutor chooses not to dismiss, the speedy trial clock is ticking, and law enforcement has the opportunity to locate and return the defendant. Controlling the number of warrants issued will force the executive branch (law enforcement and the prosecutor) to coordinate how to most effectively prosecute criminal matters given their limited resources caused by the legislative branch's failure to adequately fund criminal justice. This will also help to reduce the growing harm to the judiciary and public caused by the flood of warrants and the executive branch's inability to arrest, incarcerate, and transport criminal defendants wanted on more serious offenses.

Not Recommended.

13-16. Court: Warrant Reduction Policy (Triage). Each court should implement a warrant policy that will reduce the number of outstanding warrants. Warrant reduction steps can include (1) issuing warrants for less than the three-year default period, (2) designating certain classes of warrants in-county only, (3) limiting the reissuance of expired warrants to more serious gross misdemeanors, (4) referring cases of failure to pay fines and costs to collections rather than warrant, and (5) issuing *de minimis* amount warrants that toll speedy trial but have no extradition requirement. Rationale: The system cannot handle the current number of warrants. The result is that serious misdemeanor warrants are ignored along with less serious warrants. Reducing the total number of warrants in the system will, unfortunately, allow some defendants to avoid accountability on less serious charges, but it will also enhance the ability to hold defendants accountable for charges that threaten public safety.

Recommended. A primary reason for issuing a warrant is to toll speedy trial. Shorter warrant duration on some misdemeanors will still allow the executive branch to locate and return the defendant or refile the charge at a later date after dismissal without prejudice.

17. Court: Communication Between Courts. When a defendant with outstanding out-of-county warrants appears before a local judge, the local judge should attempt to contact the issuing court regarding resolution of the outstanding warrant. All courtrooms have telephones, many with speakerphones, so it is possible to teleconference. An out-of-jurisdiction judge can be contacted to hold a telephonic first appearance or, at minimum, discuss the warrant. In larger jurisdictions, a commissioner can handle these contacts through a direct line. Rationale: Resolving the warrant in another jurisdiction increases the likelihood that the defendant will take care of the in-jurisdiction matter. If judges do not work together to address the problem, then they really cannot blame law enforcement for taking unilateral action.

Not Recommended. This option is not recommended except on a high priority, case-by-case basis. It is difficult for judges to contact each other, and there may be a judicial ethics problem stemming from ex parte communication between judges about defendants.

18. Court/Law Enforcement: Warrant Fests. Courts should continue to work with law enforcement and/or independently start the practice of setting times for wanted defendants to come into court to have warrants reviewed.

Recommended. This seems to be rather effective, and this is one way that the courts are attempting to solve the problem.

19. Court/Law Enforcement: Local Priority Release Policy. Judges in each jurisdiction should meet with law enforcement and jail officials to work out an agreed approach to processing defendants wanted on both in-county and out-of-county warrants during times of jail overcrowding. Rationale: Lack of funding and jail overcrowding are realities that prevent many law enforcement agencies from arresting, incarcerating, and transporting every defendant. Therefore, every jurisdiction should develop a unified policy that allows the continued detention and transport of the more serious gross misdemeanor defendants.

No Consensus. This has been successful in some jurisdictions, though there is some concern that authorizing law enforcement to choose whom to release based upon agreed guidelines is sanctioning what law enforcement is already doing in contravention of law.

20. Publicize the Warrant Problem. The DMCJA should publicly disclose the growing problem of law enforcement's failure to honor both in-county and out-of-county warrants due to jail overcrowding and budget constraints while, at the same time, offering solutions to the problem. Rationale: The public is unaware that warrants are being ignored, and unaware that this results in additional crime. Public awareness is essential to create public pressure to solve the problem. Local and statewide media sources should be officially alerted by the DMCJA. Private groups like MADD, the Washington Coalition Against Domestic Violence, government insurers, and risk managers have a specific interest in warrants being honored and should also be alerted of the harms caused by the failure to honor warrants. Local courts should be encouraged to keep an ongoing list of instances when law enforcement agencies have ignored an outstanding warrant. This list of defendants and instances would be available in the same way the record of court dockets and proceedings are available to the public.

Recommended. Most citizens are unaware of the problem and resulting harms. Disclosure needs to be ongoing.

21. Court: Contempt Proceedings Against Law Enforcement. The DMCJA should authorize contempt proceedings when law enforcement refuses to honor a limited jurisdiction warrant. It is problematic whether the judge issuing the warrant can hear the contempt case, so a visiting judge may need to be appointed. The appointment can be handled by the DMCJA. Rationale: Contempt is, after all, the traditional remedy for willful refusal to follow a court order. In addition to the problem of overcrowding, it is simply easier for law enforcement to take unilateral action and refuse to arrest rather than go to the trouble and expense of arrest, booking, and transport to a far-off jurisdiction. A contempt remedy is necessary as a last resort to compel the executive branch to comply with the lawful orders of the judicial branch.

Strongly Not Recommended. This would be a public relations disaster, and should only be considered in the most egregious case. Law enforcement officers are just as upset as the judiciary about not being able to hold and house all criminal defendants.

22. Take No Action. The final option is to do nothing. The problem may grow worse until such time as injured plaintiffs obtain civil judgments against government entities for harm suffered as a proximate result of law enforcement's failure to arrest and serve outstanding warrants, leading to otherwise avoidable criminal conduct. This would compel the Legislature to take action. The problem could also grow to include the release of felony defendants, presenting an even greater threat to the safety of Washington citizens.

Not Recommended. This is the default setting if the DMCJA and membership fail to take prompt and effective action.

In addition to the above options, there are several steps that the executive branch of Washington government should take to ameliorate the warrant problem.

1. Law Enforcement Coordination and Transport of Defendants Between Jurisdictions. If jail overcrowding is a leading cause of the failure to honor warrants, then the lack of coordination between law enforcement agencies is a second-leading cause. In many jurisdictions there is a breakdown in the ability to transport and exchange prisoners. This takes the form of a county jail refusing to accept city prisoners, though the county is the responsible agent to house city prisoners. The transfer of prisoners between municipal and county facilities in large jurisdictions is hampered by lack of manpower or fixed schedules for the reception of prisoners. Sometimes, one law enforcement agency fails to notify another jurisdiction that a wanted defendant is about to be released. The various law enforcement agencies must more closely cooperate in the transport and exchange of prisoners, and must notify the

issuing court when a wanted defendant is in custody so the court can take a role in returning the defendant.

2. Continued Department of Licensing Hold. Coordination needs to be established with the Department of Licensing (DOL) to make sure the DOL does not remove failures to appear from a driving record without contacting the issuing court.

3. Reporting of Deceased Defendants Wanted on Warrant. There should be a way for the courts and law enforcement to get confirmation of death at no charge, yet most counties charge for a copy of the death certificate.

The members of the DMCJA Warrants Committee include:

Snohomish County District Court Judge Stephen Dwyer;
Lincoln County District Court Judge Joshua Grant;
DMCJA Court Program Analyst Douglas Haake;
Jefferson County District Court Judge Mark Huth;
Pierce County District Court Judge Judy Jasprica;
Centralia Municipal Court Judge Merle Krouse;
Mason County District Court Judge Victoria Meadows;
Pend Oreille County District Court Judge Philip Van de Veer;
Spokane County District Court Judge Patricia Walker.