

# **NH JUDICIAL COUNCIL REPORT ON FELONIES FIRST**

## **Executive Summary**

Senate Bill 124 (Session Year 2015) tasked the Judicial Council with submitting regular reports on the implementation of Felonies First. The following guidance was provided in the legislation:

The judicial council shall survey the municipalities, and counties affected by the felonies first project in order to obtain cost and effectiveness opinions. The judicial council shall evaluate the number of probable cause hearings requested, waived, denied, and held and the final disposition of each probable cause hearing held. The judicial council shall also evaluate the number of discovery depositions requested, denied and approved.

Cheshire and Strafford Counties started Felonies First on January 1, 2016 and Belknap County followed on July 1, 2016.

Under Felonies First, felony complaints are now brought by the County Attorney's Office instead of local law enforcement. Felonies and any directly related misdemeanors and violations originate and resolve in superior court. A defendant's automatic right to a probable cause hearing has been eliminated, and the local circuit courts no longer have any role in these cases. Probable cause hearings can be requested when a complaint has been filed in superior court but the defendant has not yet been indicted by a grand jury. During that window, the defendant is authorized to assert that a material element of the charge is without factual basis or that the charge is legally insufficient to constitute a felony offense. The court can grant or deny the request for a probable cause hearing. If a hearing is scheduled, it must be held within 10 days of filing of the motion if the defendant is incarcerated and within 20 days of the filing of the motion if the defendant is not incarcerated.

The goal of Felonies First is to eliminate unnecessary delay and thus create better outcomes for victims and defendants. Quicker case resolution brings finality to victims early in the process and ensures prompt payment of restitution. As a long-term goal, Felonies First also is expected to result in lower recidivism rates because defendants will be held accountable closer in time to the criminal conduct. The significant reduction in scheduled probable cause hearings is expected to save municipalities' overtime costs that had been accrued when an officer was required to appear for a scheduled hearing. Additional savings were anticipated through the elimination of felonies and related cases from the circuit court docket.

The private defense bar has raised specific concerns about the impact of Felonies First. The main concern is the elimination of a defendant's automatic right to a probable cause hearing when charged with a felony, and its impact on due process rights. Prior to Felonies First, defendants charged with a felony would automatically be scheduled for a probable cause hearing in the circuit court. Under Felonies First, the burden has shifted to the defendant to "challenge probable cause" by asserting that a material element of the charge

is without factual basis or that the charge is legally insufficient to constitute a felony offense.<sup>1</sup> There is also a concern that this new procedure will result in more felony convictions/fewer misdemeanor resolutions due to the more formal nature of Superior Court. While it is too soon to definitively address all the concerns raised by the defense bar, preliminary data from the NH Public Defender office indicates that initial misdemeanor resolution rates in Strafford and Cheshire counties have remained relatively consistent (please see Appendix).

Felonies First does create additional work for County Attorney offices, but prosecutors recognize the efficiencies of the new process. Requiring the County Attorney to file charges directly creates an additional efficiency by culling out questionable charges. All three county attorneys reported reviewing draft complaints that ultimately did not result in the filing of any charges. A preliminary review of vacated bail orders from Belknap, Cheshire and Strafford Superior Courts revealed that in approximately 35 felony arrests, the County Attorney's office did not file felony charges.<sup>2</sup>

It also appears that the increased workload can be substantially offset by the use of a formal Early Case Resolution (ECR) system, which is described in greater detail below. Strafford County has employed a robust ECR system for 10 years and it is the only Felonies First county that did not need to hire new prosecutors.<sup>3</sup>

Despite the short time period since its implementation, Felonies First has already created significant efficiencies, especially in the court and law enforcement arenas. Duplicative procedures have been eliminated and existing processes have become more streamlined. The reduction in probable cause hearings has immediately decreased overtime costs for local law enforcement and increased time available in the community.

For Felonies First to reach its full potential, all stakeholders must be willing to utilize alternative approaches to reach just dispositions in future criminal cases.

## **Introduction**

When felonies originated in the Circuit Courts, they were scheduled separately for an arraignment and a probable cause hearing. Under Felonies First, all felonies and related lesser charges are brought directly in Superior Court by the County Attorney. In the initial review, a prosecutor may determine that a complaint is inadequate and decline to bring the charge. In such cases the bail is vacated, incarcerated defendants are released and the courts do not open files and schedule hearings on cases that would have been dismissed. Early discovery and quicker indictment periods are intended to shorten the time period for resolving these cases.

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<sup>1</sup> Strafford, Cheshire and Belknap Counties Rules of Criminal Procedure, Rule 6 (b)(1).

<sup>2</sup> This research was conducted by Trial Court Center staff.

<sup>3</sup> Approximately 30 - 40% of new felonies in Strafford County are resolved through ECR.

- Detained defendants must be arraigned within 24 hours, excluding weekends and holidays. Complaints must be filed prior to the commencement of an arraignment.
- County Attorney offices are requesting that local police departments submit affidavits and preliminary reports on the morning of the defendant's arraignment.
- Indictments must be returned within 60 days of the complaint being filed or within two grand jury sessions after the complaint has been filed – whichever is sooner.

While it is difficult to draw definitive conclusions at this stage, Felonies First has created multiple efficiencies, most notably in the court system and for local law enforcement. It is not yet possible to determine if this new process is having a negative impact on resolutions for defendants.

### Stakeholder Interviews

Through interviews with numerous stakeholders, the advantages, savings, costs and concerns of Felonies First were discussed specific to each county. Superior Court Administrator Karen A. Gorham participated in most of these interviews.

**Cheshire CountyCheshire County Attorney Christopher McLaughlin:** County Attorney McLaughlin reported that in preparation for the Felonies First deadlines, he set up a file sharing system to assist local police departments with the timely submission of complaints, affidavits and reports [**county cost: \$2,900/year**]. The County Attorney's office administrator visited every police department to provide training for the new system. The new procedure requires that all law enforcement documents be uploaded by 9:00 a.m. on the day of arraignment.

There is increased work for the County Attorney staff. Review of incoming felony complaints can be time consuming. Due to increased felony caseloads and decreased caseloads in the circuit courts, a part-time regional prosecutor has been transferred to a full-time felony prosecutor in this office [**county cost: approximately \$90,000**]. The shorter windows for indictment have caused an increase in motions to extend indictment. This happens most frequently with drug cases because of the turnaround time at the State Police Forensic Laboratory. Approximately 25% of all drug cases now require a motion to extend indictment.

**Attorney Alex Parsons, Managing Attorney, Keene Public Defender Office:** Attorney Parsons reported that probable cause hearings have essentially been eliminated since Felonies First began. He indicated his office has requested approximately 3-4 probable cause hearings, mostly due to late discovery. Felonies First has not significantly decreased the workload for the public defender office because the preparation time for probable cause hearings was minimal, as there was no discovery to review, attorneys must now attend dispositional hearings, and attorneys must still appear in circuit court to handle misdemeanors -- thus, their travel and court time has not been significantly reduced. Attorney Parsons reiterated one of the original concerns of the private defense bar – fewer felonies will resolve as misdemeanors.

Due to the quick turnaround time imposed by the new court rules, almost half of the Felony First cases did not receive a plea offer until the dispositional conference. Historically, most plea offers would improve with the passage of time,<sup>4</sup> because weaknesses may develop in the State's case or a Public Defender investigation may uncover mitigating evidence. With Felonies First, there is no incentive to accept the first offer - - with probable cause hearings, there was a strong incentive to avoid going forward on a felony with an unknown prosecutor; nor is there an incentive for prosecutors to seek a speedy resolution - with probable cause hearings, there was a strong incentive to avoid having the hearing, witness cross-examination, and possible dismissal.

There is also concern about the impact the new, shortened process will have on attorney client relationships. Probable cause hearings were often critical in establishing good relationship with a new client by allowing the defendant a chance to see their attorney "fight" for them and by giving the defendant a "reality check" regarding how the evidence would appear and be received in open court. Now there is no time for a meaningful discussion with the client prior to the first court appearance. Under the previous system, public defenders had between 60-90 days to build a relationship with their client before indictment. Because a plea requires a "leap of faith" on the part of the client, developing this trust is essential and resolving cases by plea may in some cases be delayed or prevented for failure to develop that trust.

**Lt. Russo, Keene Police Department:** Lt. Russo reported that his department has instituted changes to its complaint and affidavit flow as a result of Felonies First. When defendants are being held, officers must send over sufficient information in a report to the County Attorney's office. Complaints are now being drafted in IMC and uploaded to the file share system instead of being typed on specially ordered complaint forms [**town savings: \$1/complaint form**]. There is a further reduction in costs because DVDs with investigative materials are no longer being provided to the County Attorney's office. It is anticipated that there will be a savings in overtime costs because officers are no longer required to appear for probable cause hearings, but it is too soon to quantify these savings.

**Chief Chickering, Chesterfield Police Department:** Chief Chickering reported that the new deadlines for submitting affidavits and reports has been challenging. The Chesterfield Police Department is relatively small, employing just five full-time officers. Due to the size of the department, if an on-duty officer is writing a report, then no officer is on the road during that time. This department has not seen a significant savings resulting from the elimination of probable cause hearings due to the past practice of having the lieutenant, who works day shifts, take over felony investigations. Consequently, probable cause hearings did not result in significant overtime costs. Chesterfield purchases circuit court prosecutor services through the County Attorney's Regional Prosecutor program. Due to a decrease in the cases being heard in this court, future costs to the town should decrease [**town savings: indeterminable amount based on fewer local**

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<sup>4</sup> This is a common phenomenon throughout the country, and is "a major disincentive for early disposition" of criminal cases. See *Conducting a Felony Caseload Management Review: A Practical Guide*, by Maureen Solomon, Bureau of Justice Assistance Criminal Courts Technical Assistance Project at American University (May 2010).

**prosecutions]**. This department has averaged approximately 3 felony arrests per month and did not have the authority to reduce felonies to misdemeanors. As a result of the opioid crisis, Chesterfield has seen an increase in drug sale charges due to the desperation of addicts.

Chesterfield has been using the File Share system set up by the County Attorney's office, which works well for word documents but not for image content. Due to the small staff, the uploading duties fall on the Chief and can be extremely time-consuming. The Chief believes that Felonies First is a change for the better, but it is too early to quantify the specific impact on his department.

**Chief DeAngelis, Swanzey Police Department:** Chief DeAngelis reported that his department employs 12 full-time officers. He felt the leadership of County Attorney Chris McLaughlin has been significant in transitioning to the Felonies First model. Prior to the ShareFile system, officers would have to manually transport a DVR/DVD disk containing all photographic evidence to the County Attorney's office. This department no longer needs to physically bring complaints to the court as they are also sent via ShareFile and can be changed and sworn to by the prosecuting attorney. This new process saves time and money. The elimination of probable cause hearings has been a significant benefit in allowing officers more time for community policing. The quicker deadlines for reports and affidavits are burdensome, and have necessitated overtime costs to ensure that documentation is completed in a timely manner. However, this cost is offset by some of the savings noted above.

**Superintendent Van Wickler, Cheshire County House of Corrections:** Superintendent Van Wickler reported that Felonies First has already had a positive impact on this facility. With fewer hearings requiring defendants to appear in court, there has been far less handling of inmates. The only downside is that when inmates are transported, they tend to be away for a longer stretch of time and need to be provided with bag lunches. This is a minor issue, especially when compared to the efficiencies resulting from Felonies First.

**Capt. Morey, Cheshire County House of Corrections:** Capt. Morey reported a decrease in pre-trial incarcerations with the Superior Court issuing bail on all felonies. Cheshire County's overall inmate population has decreased due in part to services such as electronic monitoring and random drug screening for defendants in the community. In Capt. Morey's opinion, the changes resulting from Felonies First benefit the defendant more than law enforcement. He was initially concerned that Felonies First would result in additional work for staff at this facility, but that has not occurred. Specific information on pre-trial incarceration rates is not yet available.

### **Strafford County**

**Circuit Clerk Cheryll Andrews, 7th Circuit – District Division – Dover and Rochester:** Ms. Andrews held this same position in the Brentwood Circuit Court, which has not yet transitioned to Felonies First and she was knowledgeable about the numerous steps in handling felonies filed in the circuit courts. She explained the "old" procedure included the following:

- a. Complaint comes in at any time, incarcerated defendants get prioritized.
- b. A circuit court case file is opened.
- c. The arraignment is scheduled. Most incarcerated defendants would be arraigned via video.
- d. A probable cause hearing is scheduled. It was common for these hearings to be continued, requiring additional staff time to reschedule.
- e. A trial on any misdemeanors would be scheduled, but there was a possibility that the misdemeanors would ultimately be transferred to Superior Court with the felony.
- f. The circuit court case is bound over, which included making multiple copies of the packets, completing the bound over paperwork and transferring bail conditions. Case was then physically walked over to Superior Court in Brentwood building.
- g. All criminal bail protective orders were given to the Domestic Violence Registry.

The process would then essentially be duplicated by Superior Court staff once the case had been transferred. Ms. Andrews described the impact of Felonies First on the circuit courts as “phenomenal.” She said that Felonies First has resulted in substantial circuit court savings.

**Strafford County Attorney, Thomas Velardi:** County Attorney Velardi reported that the Strafford County Attorney’s Office has engaged in vertical prosecution for approximately 14 years. County Attorney prosecutors appeared in circuit on all felonies and domestic violence cases. Felonies First has cut down on mileage costs and attorney travel time. Complying with the new timeframe for indictment has been difficult and Motions to Extend Indictment have been filed on roughly one-third of all new felonies. Further, if a felony charge is severed from an accompanying misdemeanor, the current procedure requires the misdemeanor to remain in Superior Court. County Attorney Velardi expressed concern about the impact this additional workload could have on staff. In the practice here, County Attorney Velardi has found that dispositional conferences held prior to indictment are not helpful. The review of incoming complaints is time-consuming, but the process is necessary to filter out inadequate criminal charges.

Attorney Velardi has prioritized the effective use of Early Case Resolution (ECR). Currently, 30-40% of new cases are placed on the ECR track, although they may not ultimately resolve through this process. Once a case has been selected for the ECR track, an experienced prosecutor reviews all reports, affidavits and complaints and obtains input from the victim. The prosecutor provides defense counsel with all discovery in the State’s possession and makes an offer to resolve the charge. No charges are off-limits, and defendants have pled to prison sentences on ECR matters. The offer is only available until the case has been indicted by a grand jury. Once that happens, and absent special circumstances, future plea offers will be harsher. With the ECR model already in place, this office has been able to handle the increased Felonies First workload without adding additional staff

**Attorney David Betancourt, Managing Attorney, Dover Public Defender office:** Attorney Betancourt reported that it has become harder to build client relationships with the shorter timeframe and wondered if this will lead to an increase in trials. Elimination of probable cause hearings has not had a noticeable

difference in attorney workload or travel time. Attorneys were going to circuit court on other cases, not just felonies. Staff at the Dover office has not been filing probable cause requests because it seems that they have all been denied. Attorneys sign up to cover incarcerated client arraignments Prior to Felonies First, the Public Defender did not represent clients at the arraignment phase. Having representation at this stage is an advantage to the client.

**Deputy Chief Kelley, Durham Police Department:** Deputy Chief Kelley credited County Attorney Velardi's leadership with making Felonies First successful in Strafford County. He said there has always been good communication between the County Attorney's Office and local law enforcement. Deputy Chief Kelley said they have noticed a savings with regard to probable cause hearings. Before Felonies First, there were between 3-5 probable cause hearings per month, most of which required overtime. Due to minimum overtime requirements, the typical probable cause hearing would cost approximately \$120 in overtime [**town savings: \$4,320 - \$7,200 annually**].

**Lt. Brant Dolleman, Dover Police Department.** Lt. Dolleman reported that the Dover police prosecutor has not handled felony arraignments in over 10 years due to vertical prosecution. In 2015 alone, the Dover Police Department made approximately 200 felony arrests. While ECR eliminated some probable cause hearing in the past, Felonies First should result in cost savings, especially in overtime with regard to probable cause hearings. There has also been a decrease in workloads for civilian staff. Lt. Dolleman believes that the department is coming out ahead in a cost-benefit analysis, but pointed out that it is difficult to quantify some of the efficiencies that have occurred. He said that Felonies First has not created more work, but has required a change in procedure and that the transition to Felonies First was significantly easier because ECR was in place. ECR has the added benefit of reducing officer time before the grand jury, because indictments were waived. The department has a history of working closely with the County Attorney's office and Lt. Dolleman feels this is critical for Felonies First. He stressed that, for Felonies First to be manageable in other counties, each local police department should designate a point person as the contact for the County Attorney's office.

**Attorney Kimberly Schoen, Private Defense Counsel.** Attorney Schoen practices in both Strafford and Rockingham Counties. She has represented clients in each since implementation of Felonies First in Strafford County. Under the new deadlines, defense attorneys receive pleas and discovery quickly, allowing for an early determination of which cases will likely proceed to trial. Attorney Schoen reported that due to Strafford's ECR, cases there have historically resolved more quickly than other counties. Since the implementation of Felonies First in Strafford, Attorney Schoen's average case resolution time has been cut in half from 90 days to 45 days. By contrast, her average case resolution time in Rockingham County is 9 months.

Attorney Schoen recommended a medical "opt out" for clients who may still be under the influence of drugs at the initial arraignment phase.

**Belknap County**County Attorney Melissa Gulbrandsen. Prior to the July 1, 2016 roll out of Felonies First, County Attorney Gulbrandsen met with all Belknap County chiefs of police to review the new procedures with law enforcement. She reported that the deadlines for complaints and affidavits have been burdensome, especially on the smaller departments because a supervisory sergeant now needs to be on each shift in order to approve reports. The 10-day deadline for discovery is also burdensome to these smaller departments.

As anticipated, Felonies First has increased the workload in the County Attorney's office and one additional prosecutor has been hired [county cost: \$89,329]. Prosecutors have a short window to review complaints and affidavits submitted by law enforcement. This was not an issue previously as there were approximately six weeks between grand juries, which provided ample time to draft indictments. However, the felony case load is on the rise and for the first time in 5 years a Belknap County grand jury had to return for a second day due to the number of cases. Motions to extend indictment are being filed on cases that require additional investigation or are awaiting drug results from the State Police Forensic Laboratory. In light of this, County Attorney Gulbrandsen has found that the 60-day deadline for indictment is not reasonable.

Despite the new employee, this office is stretched very thin. Independent misdemeanor trials will be an additional burden on staff. Cases that were historically resolved in the Circuit Court as misdemeanors are now being filed in Superior Court, resulting in a further increase in the Superior Court caseload. County Attorney Gulbrandsen has delayed any additional hiring until staff has had more experience with the new procedures. In her opinion, this system is more efficient than the previous set-up and should result in the elimination of grand juries because a judge will have already made a determination on probable cause.

**Attorney Jesse Friedman, Managing Attorney, Laconia Public Defender office:** Attorney Friedman reported this public defender office handles both Belknap and Carroll counties. Both prior to and following the implementation of Felonies First, felony charges had increased in both counties. Attorney Friedman attributes the post-July 1, 2016 increase to Felonies First and the County Attorney's increased staffing. There is significant pressure on defense counsel to resolve cases as quickly as possible. Attorney Friedman likened the situation to attorneys being put into the position of a "used car salesman" when there is insufficient time to develop a relationship with a client. In this climate, clients, who may already be distrustful of assigned counsel, can get the impression that no one is working for them.

The Laconia office had one probable cause hearing. This is partially due to the fact that defense counsel now receives discovery immediately. Unless there is a determination that the case could be dismissed entirely after a probable cause hearing, or that a hearing could affect bail, attorneys are not requesting hearings. Attorney Friedman expressed concerns that there will be fewer misdemeanor resolutions for clients and that Felonies First model may result in the Public Defender to moving away from the vertical representation model. He also reported that attorney time spent on incarcerated arraignments has doubled.



**Lt. Richard Simmons, Attorney Jim Sawyer, Laconia Police Department:** Lt Simmons reported that the Laconia Police Department budgeted \$141,403 for overtime costs in FY2016.<sup>5</sup> This amount covers all overtime costs, but court time is the biggest contributor. In 2015, 235 people were charged with felonies by this department. Officers had to appear at each probable cause hearing. Though dependent on the testifying officer's schedule, most of these court appearances resulted in overtime costs. The average overtime cost (minimum of 3 hours) is \$116.34 [**town savings: \$116/felony arrest**].

In addition, the shorter window for report writing has caused a back-up for this department. Officers dictate their reports and secretarial staff type them up. Prior to Felonies First, this department had a report backlog that had been building for a few years. Adding Felonies First reports to this backlog resulted in an initial spike in pending reports, requiring overtime for the secretarial staff [**town cost: \$1,100/month**].

Attorney Sawyer observed that though the workload has not changed, there is less wasted time because officers are not in court for probable cause hearings. He also expressed the concern that not all felonies are appropriate for the more formal setting of Superior Court. Attorney Sawyer gave an example of a developmentally disabled individual who was well-known to the local prosecutor and Circuit Court judge, but was not known to the parties in Superior Court. This individual ended up staying in jail longer than necessary. Attorney Sawyer reported that a mechanism for removing felonies from the Felonies First process would be helpful. He also advised that the police department would benefit from having more time for discovery with non-incarcerated defendants, which could result in more thorough plea negotiations. Attorney Sawyer said that one of the benefits of Felonies First has been increased communication between the police and the County Attorney's Office.

**Superintendent Gray, Belknap County House of Corrections:** Superintendent Gray reported that while it is too early to quantify the savings, Felonies First has resulted in less movement of inmates. Due to the set-up in this facility, in the past video arraignments were conducted in the booking area which required all booking activity to stop ceased when arraignments were occurring. This is no longer necessary as inmates are transported to the Superior Court for all hearings. Superintendent Gray anticipates that pre-indictment incarceration rates will decrease. Even if there is no decrease in total amount of incarcerated time, sentenced individuals have significantly greater access to services. Superintendent Gray also noted that the House of Corrections collects funding from the fees associated with work release and electronic monitoring, so that the costs of incarceration are offset.

### **General Comments**

**David Bennett, Criminal Justice Reform Consultant:** Mr. Bennett explained that the goal of Felonies First is not just to move cases more quickly, but to obtain better outcomes—same justice sooner and better. Initially the new procedures create more work for the county attorney offices; however, the goal is to allow prosecutors to work smarter. Complaints filed directly by the County Attorney's office allow the prosecutor

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<sup>5</sup> This figure does not include overtime costs associated with Bike Week.

to prevent inappropriate cases from even being charged. The implementation of a structured Early Case Resolution program (ECR) will permit prosecutors to resolve lower-level cases through early discovery and realistic plea offers allowing more time and resources to focus on the serious charge cases that will need more work and/or are likely to go to trial.

Mr. Bennett spoke about handling arrests and prosecutions in a manner that will address the underlying behavior that led to the arrest and the importance of lowering recidivism rates. He addressed the importance of the swiftness and certainty of short-sanctions as the best motivator of behavior, not long sentences. To fully realize the benefits of Felonies First, all stakeholders must focus on outcomes, not just resolving cases, and in this way, stop future behavior that would result in an arrest.

**Administrative Judge Hon. Edwin W. Kelly:** Judge Kelly reported that under Felonies First, cases move along more smoothly and the scheduling is more efficient. He noted there is “nothing negative about it” and there have not been any unintended consequences for the circuit court case loads.

**Attorney Alan Cronheim, NH Association of Criminal Defense Lawyers (NHACDL), President.** Attorney Cronheim reported that the NHACDL Board unanimously opposed Felonies First legislation because of its impact on defendants. According to NHACDL’s statistical analysis, approximately 25% of felonies are resolved in circuit court. Attorney Cronheim felt that circuit courts are “community courts” which historically have greater knowledge and/or understanding regarding certain local residents. He reiterated the impact that the loss of automatic probable cause hearings will have on some defendants.

Based on a review of the new procedures and consistent with the initial concerns of NHACDL, Attorney Cronheim opined that the net effect of the new system is to functionally eliminate probable cause hearings. He indicated that during a September, 2016 Superior Court meeting, it was stated that only 1 probable cause hearing had been held since January 1, 2016 in the counties that had implemented the Felonies First program. To Attorney Cronheim’s view, this demonstrates that the new statute too narrowly defines the times that probable cause hearings are allowed. He indicated that defense lawyers are aware of the limited circumstances when hearings are granted and, as a result, these hearings are rarely requested in the Superior Court.

In terms of the functioning of the new system, and perhaps more importantly, Attorney Cronheim indicated that anecdotal information supports NHACDL’s previously stated view that more cases will be resolved as felonies and fewer cases will be resolved as misdemeanors under the new system. In addition, it does not appear that the new system has led to a quicker resolution of these lesser cases. Attorney Cronheim recognizes that there have been transition issues in implementing the new procedures but is concerned that if a fuller statistical analysis supports this information, it means that the new system is not neutral or merely procedural but differently is, as feared, leading to more defendants having felony records and fewer cases having a more measured misdemeanor result.

**Randy Hawkes, Executive Director, Public Defender Program:** Attorney Hawkes acknowledged the prevalent defense counsel concern that the Felonies First timelines can negatively impact their ability to establish the trust and confidence essential to the attorney-client relationship. Attorney Hawkes noted that, with regard to those felonies that resolved as misdemeanors in circuit court, the tight timeline was not an impediment to the development of the attorney/client relationship that allowed defense counsel to confidently enter a plea on behalf of the client. He clarified that this concern is not shared universally by defense lawyers and explained that because every case and client is different some cases lend themselves to a quick resolution. In those cases the speed of the docket is not an issue.

In complicated cases, there is a perception that is shared by prosecutors and defense lawyers that the expectations set by the timelines are unrealistic. Defense attorneys are receiving plea offers shortly before, or even on the day of dispositional conferences. Often in complex cases the State has not provided complete discovery by the time of the dispositional conference. Thus, lawyers are unable to meet with clients prior to the dispositional hearing to review the offer and engage in a fully-informed, meaningful discussion about the client's options. Nonetheless, defense lawyers feel pressure to respond to the plea offer at the dispositional hearing. Late offers and incomplete discovery gives rise to a perception among defense counsel that there is no pressure on prosecutors or police departments to adhere to the timeline rules.

Felonies First arraignments put pressure on NHPD to provide an attorney on short notice to review a Gerstein affidavit, travel to the house of corrections, interview the defendant, prepare for a bail hearing, and appear at an arraignment; sometimes all within a couple of hours. Because the attorneys are often in other courts, staffing arraignments can be a challenge. Attorney Hawkes agreed with NHPD managing attorneys that the elimination of probable cause hearings will not result in savings for NHPD. It is too early to say conclusively what the impact of felonies first will be on NHPD's operations. Strafford and Cheshire Counties cannot be viewed as bellwethers of what is to come across the state.<sup>6</sup>

While not attributable to the implementation of felonies first, NHPD has seen a steadily increasing number of felony cases. Ten months into the current year, NHPD has opened over four hundred more felony cases than during the same period last year. Attorney Hawkes believes the volume of felonies will present challenges to the NHPD and courts unless ECR programs are endorsed and adopted by stakeholders statewide.

**Tim Pifer, Director, State Police Forensic Laboratory:** Mr. Pifer reported the lab's current drug backlog at over 3,400 cases. This backlog predates Felonies First, but is exacerbated by requests to prioritize drug results. The lab receives approximately 750 submissions per month and completes approximately 550 analyses per month. In the controlled drug section, the lab currently employs 1 supervisor, 6 full-time drug

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<sup>6</sup> For years, the Strafford County Attorney has employed a vertical prosecution model to handle felonies in Circuit Court and has had an early case resolution program in place. Historically, Cheshire County has led the state in the percentage of felony cases resolved with "misdemeanor or less" dispositions in its Circuit Courts. Early indications are that that trend has not been upended by the implementation of felonies first. That may or may not be the case in other counties.

criminalists, 1 part-time drug criminalist and, as part of a recent grant award, 2 temporary full-time drug criminalists. The current facilities cannot accommodate any additional staff in this section. There is no mechanism for tracking Felonies First cases, preventing an accurate measurement of the impact the deadlines is having at the lab. Mr. Pifer anticipates that active ECR programs could result in a meaningful decline in the current demand.

### Conclusion

With the caveat that Felonies First is a new program, there do appear to be several takeaways from the counties that have already implemented it.

**Felonies First has succeeded in consolidating serious criminal cases in the Superior Courts.** By all accounts, the jurisdictions that have implemented Felonies First have enjoyed the active support of all the stakeholders in the criminal justice system; police, prosecutors, defense attorneys and court staff have all cooperated to help make the new system work. It is clear that strong working relationships between the individual County Attorney Offices and the local chiefs of police have been instrumental in helping law enforcement adjust their practices to the new procedures.

**Felonies First has increased the workload in County Attorney Offices and, predictably, decreased the workload at the municipal level.** Particularly in those County Attorney offices that are not already engaged actively in prosecution of cases at the Circuit Court level, the implementation of Felonies First has required the addition of at least one prosecutor at the County Attorney office in order to assist with handling the immediate demands of arraigning and processing felony arrestees in Superior Court on short notice. By contrast, towns and cities are requiring less of their uniformed officers' time spent in Circuit Court anticipating the possibility of testifying in a probable cause hearing, and they are contributing less in the way of resources dedicated to managing the prosecution of felony cases in the Circuit Court. At the same time, especially in small towns, Felonies First has put pressure on departments to turn around police reports and affidavits in very tight time frames, and to adjust to new means of delivering case information to the county prosecutors.

**Early Case Resolution helps improve felony case flow.** The practice of engaging in a formal program of Early Case Resolution (ECR) has allowed the Felonies First project in Strafford County to bring a certain percentage of felony cases to an expeditious and just disposition, and has allowed the criminal justice system to devote more resources to the more complex cases. Key components of a successful ECR program are mutual trust and buy-in from the prosecution and defense representatives and active judicial leadership in the jurisdiction. Some defense counsel have expressed worry that aggressive ECR will undermine the attorney-client relationship, particularly if defendants get the impression that their cases are being fast-tracked to meet the needs of other participants in the justice system.

ECR was not part of the Felonies First statute. It is not mandated and is completely voluntary. To assist those counties interested in implementing ECR, the Judicial Branch has funded several trainings with David Bennett, the architect of the Strafford County ECR. Every county attorney's office has scheduled an ECR training session. On December 14, 2016, the Judicial Branch hosted a state-wide ECR training for all stakeholders.

**Defense attorneys have earnestly engaged in Felonies First but remain skeptical.** Defense attorneys remain concerned about the elimination of automatic probable cause hearings as well as the new burden on the defendant to challenge probable cause. This concern relates not only to the loss of a guaranteed opportunity to explore the quality of the State's evidence in a confrontational setting, but also to the attorney-client relationship building that occurred during these preliminary proceedings.

Defense counsel raised additional concerns that Felonies First will result in a higher percentage of felony-level convictions, (rather than reduced-level misdemeanor convictions), as a result of removing felony cases from the Circuit Courts. While data on case dispositions is as yet inconclusive on this last point the question deserves continued scrutiny.

In conclusion, a lack of a large volume of data, and the multiplicity of potential variables in the small case counts we currently have, make it impossible to render much in the way of reliable statements about Felonies First's implementation in anything but very broad strokes. Misdemeanor resolution rates have not yet been reviewed for Belknap County, due to the short period since implementation. Future reports will provide a more detailed review of misdemeanor resolutions as well as a review of the time to disposition under Felonies First.

Significant stakeholders, such as the Public Defender Program, have not determined whether they need to alter their operations to accommodate the procedural changes of the new program, or to determine what the costs would be to them and to the system of doing so. However, it appears that the changes implemented through Felonies First have already saved the municipalities and courts both time and money. Cheshire and Belknap Counties, which do not have a formal ECR in place, had costs associated with hiring an additional prosecutor. Felonies First has the potential to improve outcomes for all stakeholders, but it will require a cultural shift in the criminal justice realm.

**Appendix A**

COUNTY	POP.	PUBLIC DEFENDERS	COUNTY ATTORNEYS	DISCOVERY DEPOSITIONS REQUESTED	PROBABLE CAUSE HEARINGS REQUESTED	PROBABLE CAUSE HEARINGS DENIED	PROBABLE CAUSE HEARINGS GRANTED	HEARING OUTCOMES	
Belknap	60,252	9*	5	6	0	0	0	PC FOUND	0
								PC NOT FOUND	0
								WITHDRAWN	0
								GUILTY PLEA	0
								INDICTED	0
								NOL PROSSED	0
Strafford	124,387	6	8	0**	15	5	10	PC FOUND	0
								PC NOT FOUND	1
								WITHDRAWN	2
								GUILTY PLEA	5
								INDICTED	2
								NOL PROSSED	0
Cheshire	76,596	8	7	0**	10	1	9	PC FOUND	1
								PC NOT FOUND	0
								WITHDRAWN	1
								GUILTY PLEA	0
								INDICTED	5
								NOL PROSSED	2

Statistics were provided by the NH Trial Court Center.

\*The Belknap County Public Defender office also covers Carroll County cases.

\*\* County specific practices vary widely with regard to discovery depositions. It may be the custom in some counties to proceed with assented to depositions.

**Appendix B**

COUNTY	TIME FRAME	FELONIES CLOSED	PLED TO FELONY	REDUCED TO MISDEMEANOR		DISMISSED	
Strafford	Jan-Jun 2015	345	126	TOTAL	80	48	
				DISTRICT	65		
				SUPERIOR	15		
	Jan-Jun 2016	432	171		TOTAL	61	79
					DISTRICT	27	
					SUPERIOR	34	
	Mar-Aug 2016	396	149		TOTAL	58	71
					DISTRICT	12	
					SUPERIOR	46	
Cheshire	Jan-Jun 2015	206	60	TOTAL	51	37	
				DISTRICT	39		
				SUPERIOR	12		
	Jan-Jun 2016	203	60		TOTAL	51	43
					DISTRICT	24	
					SUPERIOR	27	
Mar-Aug 2016	182	56		TOTAL	44	43	

These statistics were provided by the NH Public Defender office and reflect only those cases handled by the NH Public Defender office.