

Multnomah County, Oregon Case Study

**Using a Centralized Docket and Rapid
Evaluation Process to Reduce Jail Time for
Criminal Defendants Who Are Deemed
Incompetent to Aid and Assist in their Defense**

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JUSTICE SYSTEM PARTNERS



► Summary

In 2016, Multnomah County began changing its court practices for pretrial defendants who appear to be unable to aid and assist in their own defense. With the cooperation of key partners, the county consolidated all such cases under a weekly “aid & assist” (A&A) docket, with a single judge. Now, defendants whose competency to aid and assist in their defense is in question appear on that docket until (1) their criminal case can proceed because their competency has been restored (through community-based restoration or inpatient restoration at the state psychiatric hospital), or (2) their case is resolved in some other way, such as through dismissal of charges and referral to community-based services or civil commitment. Concurrently with the development of the A&A docket, Multnomah County also implemented a process for rapidly evaluating the competency of detained defendants, so that they do not languish in jail awaiting a psychological evaluation to determine their fitness to stand trial.

These changes dramatically reduced custody time for defendants whose competency was in question, which reduced stress on both the jail and those defendants. Less custody minimized the risk of defendants further decompensating in jail. In addition, creating the special docket and the rapid evaluation process improved stakeholder understanding of the day-to-day reality of mental illness, the statutes that define the competency process, and the cooperation needed to provide adequate services to defendants whose competency is at issue.

▷ *“You can’t punish people into sanity.” —Chief Criminal Judge Edward Jones, Multnomah County*

Background

The Oregon Judicial Department is a centralized court system with circuit courts in 36 counties. The Multnomah County Circuit Court encompasses urban Portland, the city of Gresham, and several smaller cities and suburban neighborhoods. In 2016, the court had 4,314 felony and 9,613 misdemeanor case filings¹. In May 2018, the county’s jail had an average daily population of 1,099, with an average length of stay of 12.46 days.² The Bureau of Justice Statistics estimates that in 2017, approximately 26 percent of jail inmates nationally met the threshold for serious psychological distress,³ a mental health indicator. Multnomah County estimates that the population of people with mental illness in its jail is consistent with these data.

Oregon’s statutory process for determining issues of fitness to proceed is outlined in Oregon Revised Statute 161.365⁴. Pretrial defendants in Multnomah County who appear unable to aid and assist in their defense undergo a psychological evaluation to determine their competency. Such defendants are identified by their defense attorney as possibly needing an evaluation.

Once the evaluation is completed, the court makes a determination regarding fitness to proceed. Oregon Revised Statute 161.370 describes the effect of a finding of unfitness, the proceedings if

¹ <https://www.courts.oregon.gov/about/Documents/CaseFiledTrendData.pdf>

² Multnomah County Sheriff’s Office Monthly Jail Report, May 2018.

³ <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=5946>

⁴ Oregon Revised Statute 161.365 defines the process for initial court-ordered evaluations.

fitness is gained or regained, and how pretrial objections are handled.⁵ If the evaluation confirms that the defendant is unable to aid and assist in their own defense,⁶ their competency must be restored before the case can proceed.

Competency Restoration Options

In Multnomah County, options for evaluation and restoration of competency include (1) inpatient evaluation and competency restoration at Oregon State Hospital, a psychiatric hospital located 50 miles away, in Salem, (2) evaluation in the local jail followed by competency restoration at Oregon State Hospital, or (3) evaluation in the local jail or community when safe and appropriate, followed by outpatient competency restoration and supervision in the community under the auspices of the county's forensic diversion program. Individuals sent to Oregon State Hospital cannot be kept there beyond the time equivalent to the maximum sentence for the most serious of their charges (or three years if the sentence would be more than three years). Individuals who are not restored to competency during that time period, or whose case is dismissed, may be released back to the community without any services.

Community-based Evaluation and Restoration as an Alternative to a Hospital Stay

Multnomah County's forensic diversion program identifies pretrial defendants in jail who might be good candidates for community-based restoration – i.e., their competency is in question but they could possibly be safely and appropriately evaluated and treated in the community as they await trial. Defendants come to the attention of program staff via corrections health staff, jail staff, and defense attorneys. The program's Qualified Mental Health Providers (QMHPs) conduct an assessment to determine whether defendants are willing to take medication, if necessary, and to comply with other requirements during outpatient, community-based competency evaluation and restoration. If so, the program coordinates in-community competency restoration, provides competency restoration services, and connects participating defendants with community-based services: behavioral health treatment, food and clothing, medical treatment, and, when available, permanent or supportive transitional housing, such as that offered by the Stabilization Treatment Preparation (STP) transitional housing program (for men). This short-term residential program provides case management, skills training, and other support to defendants who have behavioral health issues while they stabilize, engage in competency restoration, and fulfill their legal obligations. A third program opening in November 2018, the Diane Wade House, will serve as an additional option for female African-American defendants who have mental illness.

For some defendants, community-based competency restoration is a better option than restoration at Oregon State Hospital because the defendant can maintain his or her existing housing arrangements, family and social relationships, employment or financial benefits, school activities, and other supports that will contribute to long-term success. All of those supports are at risk if a defendant spends an extended period at Oregon State Hospital for competency restoration.

⁵ ORS 161.370 defines the process for subsequent court-ordered evaluations and how defendants are restored.

⁶ ORS 161.360 defines incompetency.

Lengthy Jail Stays and Inconsistent Handling of Cases

Prior to 2016, defendants for whom competency was in question sometimes spent weeks or months in custody, waiting for a psychological evaluation, while defendants who were similarly charged with low-level misdemeanors but clearly competent were out of jail in days.

At that time, court-ordered competency evaluations requested by public defenders often were conducted at Oregon State Hospital, under the so-called “365” process (after the controlling statute, ORS 161.365). Because of space limitations and the high cost of state hospital beds, Multnomah County (the largest user in the state) was under pressure to reduce the number of defendants it was sending to the state hospital.

One challenge the county faced in shifting away from the use of state hospital beds was finding psychologists who were willing to conduct prompt competency evaluations in the jail. Local evaluators were reluctant to prioritize in-jail evaluations on their schedules for multiple reasons, including low reimbursement rates and difficulty gaining agreement between the prosecution and the defense regarding the accuracy or quality of the local evaluations. For some defendants, the result was extra time (sometimes months) spent in custody, waiting for an evaluation to determine their competency. The additional time in jail was unfair, expensive, not therapeutic, and – for mentally ill defendants who had to be searched and restrained for transport to Oregon State Hospital for evaluation – traumatic.

Another significant drawback to the pre-2016 system was its fragmentation. In one sample of 50 misdemeanor defendants sent to Oregon State Hospital, 19 different judges had ordered commitments. As with the prosecutors and defense attorneys, no judge saw more than a few of these cases each year. The fragmentation resulted in inconsistencies and potential disparities in how competency-related cases were handled.

- ▷ *“We had no centralized processing for who got sent to the state hospital. While the standards for this process are theoretically statutory, the actual practice was problematic and inconsistent because there were so many judges and lawyers involved.”*
— Judge Edward Jones, chief criminal judge

Centralized Aid and Assist Docket

In September 2016, in an effort to improve consistency in how competency cases were handled, Judge Edward Jones, then the chief criminal court judge, established a centralized aid and assist (A&A) docket. All competency-related cases are now put on this weekly docket. Defendants whose competency is in question appear in the same courtroom, before the same judge, until either they are able to aid and assist in their defense or their case is dismissed. Prosecution and defense functions have been similarly centralized, with a designated prosecutor and defense attorney overseeing all competency-related cases, in one courtroom.

Centralization has strengthened professional relationships and allowed the judge, attorneys, and staff to increase their skills and expertise so that they can communicate more meaningfully about why a defendant is unable to aid and assist, and what the best option is for that person. Centralization also has resulted in a more efficient and humane system, with considerably more consistency in how competency cases are handled and why particular individuals are sent to Oregon State Hospital.

- ▷ *“Having a centralized docket lets us better evaluate people, so we get better and more accurate outcomes.” — Bryan Francesconi, public defender*
- ▷ *“Centralizing improves the quality of the [process] and the learning experience involved in getting people up to speed. The consistency changed the level of proficiency of those in the courtroom—people’s understanding of the statutory process and familiarity with diagnoses.” — Judge Edward Jones*

Potential defendants for the A&A docket commonly are identified during their first 24 hours in jail – by Corrections Health or jail staff or when they meet with a defense attorney. If the defense attorney has concerns about a defendant’s competency, he or she can contact criminal calendaring to have the defendant scheduled on the docket. Before adding a defendant to the A&A docket, defense attorneys are expected to contact the county’s forensic diversion program to ensure that its staff is familiar with the defendant and can speak to the court about the person’s mental health status.

Currently approximately 18 people appear on the two-hour A&A docket every week. Typically, about half of them are sent to Oregon State Hospital or released to the community for competency restoration; the rest are returning to court after having returned from the state hospital or participated in community-based competency restoration.

Standing Staffing Meeting

The weekly A&A docket is held on Tuesday afternoons and is preceded by a standing Monday morning staffing meeting, during which the judge, prosecuting and defense attorneys, forensic psychologists, and forensic diversion program staff review the docket. Jail mental health staff and outside social service workers also sometimes attend. Together, meeting attendees discuss new cases, competency evaluation results, and plans for defendants who are unfit. For unfit defendants, the psychologists and forensic diversion staff advise whether the defendant’s competency can be restored on an outpatient basis in the community. If not, defendants charged with felonies typically are sent to Oregon State Hospital for competency restoration. Defendants charged with misdemeanors also are sometimes sent to the state hospital; however, the prosecuting attorney may choose to dismiss the charges if they are low level, if mental illness is the primary criminogenic factor, and if the defendant has a plan for community-based treatment and services that will reduce the likelihood of future offenses. Charges may also be dismissed in combination with the civil commitment process.⁷

Meeting attendees share information and make decisions from a systems perspective, with input from everyone. The fact that forensic diversion, mental health, and social service staff participate in problem solving and case planning at the staffing meeting reassures prosecutors that, if charges are dismissed, defendants will get the community-based treatment and services that have been proposed as an alternative to prosecution.

- ▷ *“With everyone in the same room, you have accountability and uniformity of treatment of people who are similarly situated.” — Brendan Stabeno, deputy district attorney*

⁷ ORS 426.005 and 426.701.

Rapid Evaluation Process

Another decision made at the weekly staffing meeting is which defendants will undergo psychological evaluation to determine whether they are able to aid and assist in their defense. If the defense is uncertain whether a defendant is able, they will submit a motion for a competency evaluation.

In the past, the difficulty of getting timely, accurate determinations of whether a defendant was able to aid and assist in his or her defense contributed to long periods in custody for defendants whose competency was in question. Multnomah County addressed this issue in April 2017 by implementing a rapid competency evaluation process. Today, defendants on the A&A docket no longer have to wait in jail for a month or longer for their competency to be determined.

To establish the rapid evaluation process, the county identified two highly experienced forensic psychologists who had previously worked with the court and at Oregon State Hospital and were trusted by both the prosecution and the defense. The psychologists agreed to reserve a total of two slots each week for competency evaluations referred from the A&A docket, and to complete their written reports to the court within two weeks. As compensation, county funds are used to reserve slots; this supplements the limited amount that the state of Oregon pays for competency evaluations. If a reserved slot goes unfilled (which seldom happens), the psychologists receive a reduced fee. The two forensic psychologists complete at least two evaluations each week, and have completed up to seven when their schedules allow and the need exists.

Obtaining relevant health and custody records was another barrier to prompt evaluations. The court worked in cooperation with the county's legal counsel to clear procedural obstacles to the timely release of relevant information to the psychologists, such as a defendant's criminal history, jail medical records, mental health or substance abuse treatment history, and any earlier participation in forensic diversion or social service programs. The necessary orders were created and the critical staff trained. The production of the needed records in a matter of days became routine. Those records give the psychologists a more complete picture of the defendant and his or her mental health status.

- ▷ *"Having the records is key to being able to do an accurate evaluation." — Alexander Millkey, forensic psychologist*
- ▷ *"On more than 50 percent of the cases, the report is presented on the docket the following week." — Judge Edward Jones*

The rapid evaluation process has largely replaced the previously common "365" evaluations, in which defendants were transported to Oregon State Hospital for competency evaluation. As a result of the new process, pretrial defendants whose competency is in question now spend significantly less time in jail waiting for a competency evaluation than they did before: On average, the time from referral to completed report dropped from 30 days to 5.6 days. More analysis is needed, but the shorter time defendants are spending in jail could lead to potentially significant savings in custodial, legal, and court costs.

An additional benefit of the rapid evaluation process is that, because both prosecuting and defense attorneys have confidence in the participating forensic psychologists' work, the results of competency reports are seldom challenged in court.

- ▷ *“Rapid evaluation findings are contested only 4 to 5 percent of the time before a defendant goes to Oregon State Hospital. — Bryan Francesconi, public defender*

Implementation and Operational Considerations

A great deal of effort and problem solving went into establishing the centralized A&A docket and rapid evaluation process, both in implementation and to fine-tune them once they were in place.

Laying the Groundwork

Well before the docket was established, Judge Julie Frantz – the chief criminal judge at the time – recognized the problems caused by delays in completing competency evaluations. She repeatedly raised the issue of delayed evaluations with stakeholders, explored obstacles to speedy evaluations, and identified potential opportunities to improve the process; those efforts laid the groundwork for the rapid evaluation process that was later implemented by the subsequent chief criminal judge, Judge Edward Jones.

During his tenure, Judge Jones took an interest in issues related to defendants with mental illness. He compiled information on who had been sent to Oregon State Hospital for competency restoration in recent years and shared it with criminal justice partners. This was the start of a long discussion of the county's competency-related processes, their costs and outcomes, and possible alternatives. Who could be restored in the community instead of at Oregon State Hospital? Who could have their case dismissed, with a good outcome? Thoroughly reviewing past cases revealed patterns that supported the eventual establishment of the A&A docket and identification of a wider range of alternatives – including case dismissal – for low-level misdemeanors related to mental illness.

Using Stakeholders to Define the Rapid Evaluation Process

Once the A&A docket was established, with Judge Jones presiding, it took many additional conversations with the health department, forensic diversion program staff, prosecutors, and the defense attorneys to develop and vet the new rapid evaluation process. A key move was to identify qualified local forensic psychologists that both sides could agree on. In the end, the prosecuting and defense attorneys selected two forensic psychologists whose work they both respected.

- ▷ *“The rapid evaluation process is grounded on having doctors that people trust, especially the defense attorneys. The program would die quickly with bad doctors.” — Bryan Francesconi, public defender*

Over time, as the forensic psychologists discussed what they do and how, the group of stakeholders hammered out procedural issues such as how the psychologists would be compensated, how they would access defendants in jail, and the structure and content of their evaluation reports to the court.

Streamlining Records Sharing

Particularly challenging was figuring out how the forensic psychologists could access a defendant's full range of relevant records for the competency evaluation, including medical records protected under the Health Insurance Portability and Accountability Act (HIPAA). Eventually, in cooperation with county legal counsel, a court order form was drafted that addressed those issues and allowed for timely provision of a defendant's medical and other records, including those related to medical care in the community and any previous attempts at competency restoration (stays at Oregon State Hospital, how successful medication has been, etc.). The court now issues such orders every week for the release of records for defendants scheduled for rapid competency evaluation.

Addressing Unexpected Challenges

Another issue was the logistics of moving defendants, both from jail to the courtroom and back, and to Oregon State Hospital or other destinations. Reducing the need for transports was always a concern. Having the A&A docket in a courtroom connected directly to the jail reduced transports, but concentrating the competency-related cases in one afternoon made it difficult for already heavily scheduled jail staff to organize the two-person escorts needed to transport multiple defendants individually from a jail cell to the courtroom and back. Also, it took additional, sometimes unplanned hours – with overtime pay – to transport defendants to Oregon State Hospital or other destinations at the end of the docket each week. To address this issue, the sheriff's office created two deputy/sergeant new positions that focus on individuals with behavioral health needs, such as escorting defendants on the A&A docket as needed for transport and release after court. The unanticipated challenges of moving around multiple defendants who have the potential for significant behavioral issues highlight the importance of proactive communication when changing long-standing practices – and the success that is possible when the court and the jail work closely together to solve problems.

A Collaborative Focus on Best Outcomes

Multnomah County has a long history of collaborating to solve justice system problems. The justice system and its behavioral health partners meet regularly to develop policy and practice changes and engage in general problem solving. The county's longstanding Local Public Safety Coordinating Council and its various subcommittees convene regularly around justice system policy and practice discussions. Additionally, justice system leaders convene every Friday morning at 7 a.m. to problem solve around their justice reinvestment program. Because of these many collaborative activities, system partners know each other well and have come together with a strong commitment to deal fairly and humanely with people in the criminal justice system who have a mental illness.

In many respects, establishment of the A&A docket and rapid evaluation system is a natural next step – one that has required patient listening, open conversation about best outcomes, and a willingness by each partner to honestly consider their role. In Multnomah County, the district attorney has long been interested in considering the mental health issues that may have contributed to criminal behavior. Establishing the A&A docket invited the district attorney's office to explore alternatives to prosecution when a defendant's low-level criminal behavior is driven by mental illness. Defense attorneys typically have focused on getting their client out of the criminal justice system without the encumbrance of a hospital stay or other treatment

requirements. In contrast, although the A&A docket may require defendants to address their mental health issues, doing so creates opportunities for them to avoid potential rearrest.

Stakeholders were able to explore these questions honestly and jointly develop new practices because they agreed on their goal: to deal fairly with defendants who have a mental illness by (1) reducing the time they spend in jail waiting for a competency evaluation, (2) getting them into community restoration if possible, and, (3) when not, getting them to Oregon State Hospital as soon as possible for competency restoration.

Keys to Success

The planning and practice changes that Multnomah County has undertaken have resulted in a more streamlined approach to managing competency cases, saving jail bed days, and creating a more fair and humane justice system. The following key points summarize the components of this work to date:

- ▶ **Consolidated aid & assist docket with one designated judge—**
Increases expertise, consistency, and efficiency
- ▶ **Designated staff from partner agencies, including prosecution and defense—**
Allows for skill building over time; increases professional rapport
- ▶ **Collaboration and problem solving among key leaders—**
Builds trust, cooperation, and the likelihood of lasting solutions
- ▶ **Inter- and intra-agency communication on an ongoing basis—**
Ensures stakeholder understanding of why and how the process works
- ▶ **Participation of trusted forensic psychologists to conduct evaluations—**
Brings key partners to the table; decreases the number of contested evaluations
- ▶ **Financial support from the county, so that forensic psychologists can reserve slots for competency evaluations—**
Guarantees the availability of qualified forensic psychologists
- ▶ **Court orders directing release of records to participating forensic psychologists—**
Speeds up the evaluation process
- ▶ **Standing staffing meeting shortly before the A&A docket, with all partners present—**
Places the focus on joint problem solving
- ▶ **District attorney's willingness to dismiss charges when appropriate—**
Allows for more effective options than justice system involvement, such as mental health treatment to address the underlying causes of problematic behavior
- ▶ **Availability of transitional housing and other services—**
Provides an alternative to jail for pretrial defendants needing structure and support

Ongoing Challenges

Centralizing the A&A docket and implementing a rapid evaluation process have standardized practices for competency-related cases, improved consistency in how those cases are handled, shortened the time that pretrial defendants with mental health issues spend in jail, and connected defendants with needed treatment and support services. Yet challenges remain.

Significant additional resources are needed, including more transitional and permanent housing for defendants whose primary issue is homelessness and those who could be successful if they had support; more community-based mental health treatment resources, so that defendants' underlying issues can be addressed; and more resources for forensic diversion, so that defendants who do not need to be in jail can quickly be identified and supervised in the community.

Other challenges include timely identification of those defendants who are unable to aid and assist in their defense but who blend into the general jail population because they are quiet and retiring. Defendants like this may sit in jail for several weeks before they are identified as appropriate for the aid and assist docket. Also, if their charges are dismissed once they reach the docket, dismissal can occur quickly because of the time the defendant already has spent in jail; this can result in the defendant being released to the community suddenly, without any support to keep him or her from returning to jail.

At the other end of the spectrum are defendants with serious charges who act out aggressively. Such defendants usually are not suitable for community-based competency restoration or dismissal of charges and often present a challenge for the jail because of their behavior.

- ▷ *“You can’t just pay attention to having them out of jail, unless you think about what they’re going to be doing instead – like a warm handoff for people with mental illness. You need to be able to triage them quickly, identify their care providers, find out their medications, and get them stabilized. This takes leadership.” — Brendan Stabeno, deputy district attorney*
- ▷ *“The resources just aren’t there There aren’t enough spots or slots, or the waitlist is too long. And the county has to wait on the same lists as anyone else. We don’t have any backdoor ways to get someone housed. Those are the toughest challenges. We want to get folks who are not thriving out, but where are we going to put them?” — Trevor Backer, county forensic case manager*

Steps for a Smooth Transition

After the A&A docket had been operating for more than a year, its first big transition took place with the retirement of Chief Criminal Court Judge Edward Jones in January 2018 and the transfer of the designated A&A deputy district attorney to other duties. As part of this transition, Judge Nan Waller – who has a keen interest in justice-involved individuals with mental illness – took on the role as presiding judge for the A&A docket. Other steps to support the transition included written documentation and dissemination of A&A docket-related compacts, policies, and procedures; conversations with the forensic diversion program regarding coordination and communication; and tours of key local mental health-related programs and service locations (such as supportive transitional and permanent housing and the local psychiatric emergency room) so that the new judge, attorneys, and court staff could better

understand the population appearing on the A&A docket and the system of jail alternatives available to them. These steps and others were intended to make for a smooth handover to the next generation of personnel for the A&A docket.

Lessons Learned

Success takes persistence. Competency-related cases fall in the complicated intersection of the criminal justice and behavioral health systems. It takes patience and persistence to change existing practices, especially if not all system partners are willing to come to the table right away. Once there, they need to be flexible, cooperative, and willing to address the problems that come up.

Learning is ongoing. Multnomah County's new court practices have been in place for months and have worked relatively well. Yet there is much to be learned and improved upon, even in the midst of success. The partners continue to fine-tune the practices, to overcome challenges and improve ease and effectiveness.

Changes in practices can bring unexpected benefits. Over time, the county's designated A&A judge, prosecutor, and defense have built skills and expertise as they continue to work on competency-related cases. "Doing it every week has lifted the overall quality of the work done by everybody," says Judge Jones. "That was something I didn't anticipate."

The sooner forensic diversion staff can be involved in a case, the better. Forensic diversion staff play a key role in keeping the court informed about individual defendants, their background, diagnoses, treatment options, and available resources – information that supports better decisions about a defendant. Forensic diversion also saves the system money by getting people out of jail and providing an alternative to going to Oregon State Hospital. Especially given the scarcity of resources, forensic diversion staff need to be involved early on so they can provide information, make plans, and line up appropriate resources.

The judge makes a difference. Competency-related cases can be difficult because they often involve people with multiple challenges. To be successful in an A&A docket, the judge must be genuinely interested in this population. Patience, compassion, and curiosity also are important traits, so that the judge can meet people where they are at.

The stigma of criminal involvement creates obstacles. Many pretrial defendants whose competency is at issue are in jail because mental illness caused or contributed to their criminal behavior. Yet the stigma of involvement in the criminal justice system can make it difficult for those defendants to access already limited mental health treatment, housing, and other services. Service providers may need to be educated about why people with mental illness sometimes end up in jail, and what the actual safety risk is that they pose to the community.

Conclusion

Holding a defendant in jail and restoring his or her competency at Oregon State Hospital are time-consuming, expensive, potentially traumatic, and sometimes ineffective ways of dealing with people with mental illness who have committed a low-level offense. Multnomah County has decided to take a different approach. By centralizing the A&A docket and providing options for pretrial defendants to receive competency restoration services in the community

(when safe and appropriate), the county has improved consistency in how it handles competency cases and has reduced the total number of people going to Oregon State Hospital. Similarly, implementing the rapid evaluation process has cut down on the time defendants spend waiting in jail for a psychological evaluation, and possibly decompensating. Together, the new court practice changes have resulted in fairer, more efficient, and more humane treatment of defendants with mental illness, without jeopardizing public safety.

Multnomah County's new court practices acknowledge the reality that, often, little is to be gained from detaining people with low level charges, especially those with mental illness, and that limited jail and hospital resources could be better spent.

- ▷ *"We're looking for more and more ways to reduce our jail populations, so we have the right people in jail for the right reasons." — Katie Burgard, county corrections counselor*
- ▷ *"Ultimately we dismiss a fair number of cases just because this person is mentally ill and we're not going to accomplish anything by adjudicating, as long as their behavior doesn't keep escalating." — Brendan Stabeno, deputy district attorney*

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