Supreme Court of Kentucky
No. 2009-SC-000164-TG

Court of Appeals No. 2009-CA-00484-MR

On Appeal from Franklin Circuit Court
Civil Action No 08-CI-1094

ERWIN W. LEWIS, et al. **APPELLANTS**

v. **MOTION TO DISMISS**

TODD HOLLENBACH, IV, et al. **APPELLEES**

The Executive and Legislative Branch Respondents[1] ("Appellees") jointly move this Honorable Court to dismiss this appeal because it has become moot. The Appellants' Petition for Declaratory Judgment sought relief based solely upon the predicted early exhaustion of funds by the Department of Public Advocacy ("DPA") ***during the 2008-2009 fiscal year ("FY 09")***. That question has been rendered moot by the Governor's allocation of additional funds to the DPA. Furthermore, FY 09 will end on June 30, 2009, before briefing of this appeal would be completed, and a new FY 10 budget appropriation of $41,640,500.00[2] will be available to the DPA beginning the following day. Accordingly, Appellants' current action is moot and this appeal should therefore be dismissed.

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[1] The Executive Branch Respondents are Todd Hollenbach, IV, Kentucky State Treasurer, and Jonathan Miller, Kentucky Secretary of Finance and Administration. The Legislative Branch Respondents are David L. Williams, President of the Kentucky State Senate, and Gregory Stumbo, Speaker of the Kentucky House of Representatives.

[2] (Exhibit A, DPA appropriation for FY 09 and FY 10 from biennial budget, attached as Exhibit I to Executive Branch Respondents' Motion for Temporary Injunction, filed 08/11/2008).

A. Appellants' Petition challenges only the FY 09 Budget Appropriation.

The first paragraph of the Appellants' Petition for Declaratory Judgment, which instituted this action, states:

> This is a Petition for Declaratory Judgment relating to a crisis of insufficient funding in Kentucky's public defender system. In the Commonwealth's budget for **fiscal year 2008-09**, which takes effect on July 1, 2008, Kentucky's General Assembly has failed to provide sufficient funding to an already overburdened, underfunded public defender system.

(Exhibit B, Petition for Declaratory Judgment, filed 06/30/2008, p. 3) (emphasis added). The factual predicate underlying the Petition is further explicitly identified as follows: "In 2008, the General Assembly passed a budget which cuts DPA funding by $2.3 million in fiscal year 2009. ***The funding reduction for fiscal year 2009***, at a time of rising costs, will render DPA unable to fill as many as 60 lawyer positions statewide." (*Id.* at 11, ¶ 44) (emphasis added).

The Petition alleges a number of negative effects stemming from the level of funding provided by DPA's appropriation for FY 09.[3] Foremost among these alleged

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[3] Much of the Appellants' Petition addresses the legality of proposed "service reduction plans." The Petition explains:

> In an effort to preserve the ability of public defender lawyers to continue to represent existing clients, and to prevent the loss of all public defender services by the middle of **2009**, the DPA and the Public Defender Corp. have devised service reduction plans to cope with reduced funding and increasing caseloads. Under these service reduction plans, public defenders will decline appointments to represent indigent defendants in certain kinds of cases.

(Exhibit B, Petition for Declaratory Judgment, p. 4, ¶ 4) (emphasis added).

As with the other issues raised in the Petition, the proposed service reduction plans addressed particular problems allegedly created by the FY 09 appropriation, and these claims are also now moot. As explained in a press release from then Public Advocate Ernie Lewis, "Cuts are necessary because of the 2008 General Assembly's failure to fully fund the Department in **FY09**." (Exhibit C, p. 1, Press Release dated May 28, 2008, attached as Exhibit C to Executive Branch Respondents' Memorandum in Support of Motion for Temporary Injunction, filed 8/11/2008). Similarly, an internal DPA memo announcing the service reduction plans explained:

> Unfortunately, for the **Fiscal Year 2009**, the General Assembly reduced the Department's already sparse budget by $2.3 million. Faced

consequences was the predicted depletion of funds available for public defender services before the end of FY 09. The Petition asserted that "[i]f public defenders continue to represent every indigent defendant for whom they are appointed, funding will be completely depleted less than ***eight months into the fiscal year***." (*Id.* at 4, ¶ 3) (emphasis added). As the Appellants recognize in their Supplement to Motion to Transfer (filed 4/20/09), that depletion of funding, and the threatened shut-down of DPA that it portended, have now been avoided.

B. Changed Circumstances have Rendered this Appeal Moot.

This Court has repeatedly held that "[t]he classic occurrence which necessitates a court's abrogation of jurisdiction for mootness is a change in circumstance in the underlying controversy which vitiates the vitality of the action." *Commonwealth v. Hughes,* 873 S.W.2d 828, 830 (Ky. 1994); *see also Ky. High School Athletic Ass'n v. Runyon*, 920 S.W.2d 525, 526 (Ky. 1996) (same). Accordingly, "it is well established that where, pending an appeal, an event occurs which makes a determination of the question unnecessary or which would render the judgment that might be pronounced ineffectual, the appeal should be dismissed." *Louisville Transit Co. v. Dept. of Motor Transp.*, 286 S.W.2d 536, 538 (Ky. 1956). This appeal presents just such a change in circumstance.

The circumstances underlying Appellants' Petition, and therefore the circumstances underlying this case, have changed substantially since the Appellants filed

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> with this cut, we must take drastic steps in order to continue to meet the needs of our existing clients, the courts, and our staff. *It is simply impossible to provide the same level of service for $37.8 million as we have been able to provide for $40.1 million.*

(Exhibit D, "Necessary Service Reductions" Memorandum dated June 3, 2008, attached as Exhibit A to Executive Branch Respondents' Memorandum in Support of Motion for Temporary Injunction, filed 8/11/2008).

Implementation of the service reduction plans was prevented by the Circuit Court's Temporary Injunction entered September 19, 2008. The Appellants have not sought review of that order.

their Notice of Appeal herein on March 17, 2009. On April 16, 2009, the Governor's Office announced that an additional $2 million of available, appropriated funds would be transferred to the DPA's budget. As the press release from the Governor's Office summarized:

> [T]hrough a series of cost-cutting measures and reallocation of existing funds, the Department of Public Advocacy (DPA) has enough money to continue operating through the end of June.

(Appellants' Supplement to Motion to Transfer, Exhibit C).

The underlying premise of the Appellants' Petition for Declaration of Rights was that the budgeted funds for the DPA would be depleted well before June 30, 2009. (*See, e.g.*, Exhibit B at 4 & 5, ¶¶ 3, 9). Now that DPA has received additional funds, which will enable it to continue representing all defendants for whom a public defender is appointed, the major premise underlying this action is gone. Therefore, regardless of whether some new or future set of facts may warrant litigation of similar issues in another case, there is no basis for continuing this appeal.

Furthermore, with little more than two months left in FY 09, the fiscal year will end before briefing of this appeal is even completed. Accordingly, the declarations sought by the Appellants' Petition would now constitute an advisory opinion; therefore, the Petition is moot.

This Court has recognized that even after a case has been transferred to it, the matter may become moot if there is a change in circumstances that makes it impossible to grant relief. *Jones v. Forgy*, 750 S.W.2d 434, 436-37 (Ky. 1988) (holding that the expiration of the terms of the university trustees which were the subject of the suit rendered the case moot). Additionally, mootness, ripeness and other jurisdictional issues

may be raised by any party, and at every stage of the case, or by the Court itself. *Doe v. Golden & Walters, PLLC*, 173 S.W.3d 260, 270 (Ky. App. 2005).

In *Louisville Transit Company v. Department of Motor Transportation*, 286 S.W.2d 536, 538 (Ky. 1956), the Louisville Transit Company filed a declaratory judgment action in Franklin Circuit Court seeking authority to raise its fares because, it alleged, additional funding was necessary for its operations. However, before the case was finally adjudicated, the fare increase that the Transit Company had sought was granted. Therefore, the underlying case and the appeal were dismissed as moot because the appeal "would be wholly ineffectual to afford [the plaintiff] any practical relief." *Id.*

While the Appellants here, just as the plaintiff in *Louisville Transit*, may still urge the Court to proceed to a determination of "some abstract propositions of law," the Court should decline to do so because no practical relief can now be provided within the framework of Appellants' Petition in this action (*i.e.*, in the factual context of FY 09). *Id.*

The present case deals with a challenge to a budget appropriation that has in fact already been practically modified by the provision of additional funding and with a budget year that is near an end. As in *Louisville Transit*, any declaration with respect to this past legislative action is now moot because the continued litigation of this action cannot possibly affect the funding available to public defenders in FY 09. *See also Bischoff v. City of Newport*, 733 S.W.2d 762, 764 (Ky. App. 1987) (holding that court action is reserved for real, immediate, actual controversies, not for "a question which is academic or hypothetical or which calls for nothing more than an advisory opinion. Rather, it is a controversy over present rights, duties, and liabilities.").

Finally, this case is also analogous to *Kentucky High School Athletic Ass'n v. Runyon,* 920 S.W.2d 525 (Ky. 1996). *Runyon* was an appeal from a temporary injunction related to a student's eligibility to participate in interscholastic athletics. *Id.* at 525. By the time the appeal reached this Court, however, the sports season was over. *Id.* at 526. Because the original disagreement between the parties had not been resolved and the student was still of school age, the Court recognized that the underlying legal issue in *Runyon* could have arisen again the next year. *Id.* Nonetheless, the Court found that the many variables that might affect any future eligibility determination meant that "with the beginning of the new season *there may be an entire new set of facts* to be considered[.]" *Id.* (emphasis added). Thus, the Court held that the change in existing circumstances, namely the end of the season, rendered the appeal moot. *Id.*

As in *Runyon*, the circumstances of this case have fundamentally changed since the Franklin Circuit Court entered its final order. As a result, the case that Appellants pleaded in the trial court no longer exists and the factual basis of Appellants' Petition for Declaratory Judgment has become moot.

C. The Present Case does not satisfy the Requirements for Review under the Exception for Cases that are "Capable of Repetition but Evading Review."

The mootness doctrine is subject to a narrow exception for cases that are "capable of repetition but evading review." This Court has held that "[t]he determination whether the exception to the mootness doctrine is available in a given case turns on the application of a two-part test: (1) is the 'challenged action too short in duration to be fully litigated prior to its cessation or expiration and (2) [is there] a reasonable expectation that the same complaining party would be subject to the same action again.'" *Hughes*, 873

S.W.2d 828, 830-31 (quoting *In re Commerce Oil Co.*, 847 F.2d 291, 293 (6th Cir. 1988)). Neither of these factors supports application of the exception here.

First, as already discussed, the "challenged action" here is an ***annual*** appropriation, which is in fact usually done on a biennial basis. The timeframe for the action at issue is therefore significantly longer than either the sitting of a grand jury impaneled for one month at issue in *Hughes*, 873 S.W.2d at 831, or the athletic season in *Runyon*, 920 S.W.2d at 526. The facts of those cases suggested that the window available for review of any future cases raising the same issues would have been substantially less than a fiscal year. However, in both those cases this Court found that the time during which a future claim might be asserted was too long to qualify the issue as "evading review" so as to warrant an exception to the mootness doctrine.

Furthermore, this case is a far cry from the situation in *Lexington Herald-Leader Co., Inc. v. Meigs*, 660 S.W.2d 658 (1983), which addressed the mootness of a claim regarding the right to media access to voir dire proceedings in a capital case. There the Court held that even though the particular trial in which the issue arose had already concluded, thereby precluding actual relief in the particular case on appeal, the claim was not moot because it fell within the exception for cases presenting issues that are "capable of repetition, yet evading review." *Id.* at 661. The basis for holding the exception applicable in *Meigs* was "[b]ecause criminal trials are typically of 'short duration'" and voir dire would, therefore, never take long enough for a party to effectively challenge the exclusion of the media in any particular case on appeal. *Id.*

Unlike in *Meigs*, the issues raised by the Appellants do not arise for only a very brief span of time.[4] Rather, as already noted, Appellants' Petition deals with an annual appropriation; furthermore the Petition here was filed more than eight months before the predicted depletion of funds for FY 09.[5] Thus, there is no basis for finding that—if Appellants believe that similar factual circumstances in the future warrant an action materially similar to the Appellants' Petition here—this matter would "evade review" in future cases.[6]

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[4] Significantly, the only underlying constitutional right at issue in this litigation, namely an indigent criminal defendant's right to effective assistance of counsel, can never evade review in as much as a criminal defendant may seek relief from the judge in his or her criminal case, including through a post-conviction motion under RCr 11.42, at any time he or she believes that there has been a violation of his or her right to effective assistance of counsel. While, Appellants may prefer proscriptive relief though a purported "class action" on behalf all indigent criminal defendants, the ordinary and proper venue for the evaluation of claims related to the constitutional right to effective assistant of counsel must be in and through the particular criminal case where the alleged violation occurred.

As this Court has recognized, "in determining whether counsel was ineffective . . . . [the reviewing court] must look to ***the particular facts of the case*** and determine whether the acts or omissions were 'outside the wide range of professionally competent assistance' to the extent that the errors caused the 'adversarial testing process' not to work." *Harper v. Commonwealth*, 978 S.W.2d 311, 315 (Ky. 1998) (emphasis added). Thus, the fact-intensive inquiry required to evaluate a constitutional claim of ineffective assistance of counsel is simply not possible in a class-action or in a prospective declaratory judgment action.

[5] The parties now before this Court could have advanced this litigation through the trial court more quickly had they so chosen. In fact, the pace of litigation in this case was shaped in large part by the decisions of the parties to pursue an appropriate political resolution to the funding issues raised by Appellants—while months passed with little substantive action in the case. (*See, e.g.,* Appellants' Supplement to Motion to Transfer at 2 n.3, explaining the Appellants' decision not to seek review of the Temporary Injunction).

Another substantial factor affecting the pace of this case was the mutual effort of the Executive Branch Respondents and the DPA to conduct an audit of a representative portion of DPA's reported caseloads to better understand discrepancies between DPA's caseload numbers and those available from the Administrative Office of the Courts ("AOC"). That agreed process has taken several months and was nearing completion when the case was dismissed by the Franklin Circuit Court. (*See* Appellants' Supplement to Motion to Transfer at p.7, n.10).

[6] Appellees do not suggest that these Appellants would ever be entitled to the specific kind of relief sought in the Petition here. To the contrary, Appellees believe that the Franklin Circuit Court correctly held that the Appellants' claims are in fact not ripe so long as the DPA has immediate access to funds to fulfill its statutory duties and that the named Petitioners lack standing to assert the claims made in the Petition in any event.

However, these issues need not be reached by this Court to dismiss this appeal. Instead, for purposes of the analysis called for in this Motion, Appellees simply note that there is no reason to conclude that there would not be sufficient time to litigate these issues in a future case if Appellants determine that, in their judgment, future factual developments warrant such litigation.

This case is also unlike the situation presented in *Fletcher v. Commonwealth*, 163 S.W.3d 852 (Ky. 2005), which addressed the constitutionality of an executive spending plan in the absence of a budget. First, *Fletcher* presented a purely legal question of constitutional law, which did not turn upon any a material analysis of disputed facts; in contrast, in this case, the substantive issues raised by Appellants' Petition turn on unresolved details of case counts, average caseloads, and particular funding appropriations.[7] Second, the Court in *Fletcher* emphasized that consideration under the exception to the mootness rule was warranted in that case because the exact issue presented had already arisen multiple times and in fact had evaded review repeatedly.

The Court in *Fletcher* observed that:

> On *three occasions* within a ten-year period, the General Assembly convolved itself into a partisan deadlock and adjourned *sine die* without enacting an executive department budget bill . . . . [and] [o]n each occasion, lawsuits were filed to test the constitutionality of those actions. *On each occasion,* the General Assembly enacted an executive department budget bill and ratified the governor's actions *before the issue could be finally resolved by the Court of Justice.*

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[7] The shallowness of the record before the Court argues against accepting the Appellants' invitation to use the Court's extraordinary power to reach substantive legal issues that are not only factually moot but which are also not properly before this Court because they were never addressed below by the trial court. (*See* Appellants' Supplement to Motion to Transfer at p.7, n.11). Even if this Court permits the Appellants to supplement their Motion to Transfer, there is no reason for the Court to accept any evidence not already in the record beyond the additional material Appellants have submitted to inform the Court that DPA now has enough funds to operate through FY 09.

As the record stands, there is no proof supporting DPA's case counts and caseload averages, or any of the new allegations of "fact" that Appellants make in pages 6-7 of their Supplement to Motion to Transfer. While this Court, by virtue of CR 75.08, has the ability to certify a "supplemental record" from the court below in cases of error or an accidental omission, these mere allegations of fact are not part of any existing record and cannot be added to the record on appeal wholesale.

The purpose of CR 75.08 is to allow supplementation of material that has been offered as evidence in the trial court and was inadvertently omitted from the record. *Triplett v. Commonwealth*, 439 S.W.2d 944, 945 (Ky. 1969). Additionally, CR 75.08 does not permit the correction of mistakes on a litigant's part in failing to get a case properly presented to the trial court. *First National Bank of Louisville v. First National Bank of Prestonsburg*, 567 S.W.2d 316, 318 (Ky. App. 1978). Finally, where there is no jurisdiction on the face of the pleadings, as is the case here, courts will not remand for additional development of the record below—and supplemental information cannot cure the jurisdictional defects of a case. *Coyle v. Capital Engineering Services*, 314 S.W.2d 541, 543 (Ky. 1958).

Id. at 859. (emphasis added). It was this history of ***repeated*** failed attempts to seek adjudication of the precise constitutional question raised in the case that led the Court in *Fletcher* to find that case capable of repetition, yet evading review. *Id.* The Appellants here can point to no similar procedural history warranting an exception from the mootness doctrine.

As to the second element, this Court has held that the standard for finding that a moot case satisfies the "capable of repetition" requirement of the exception is that that the same case has a "probability," as opposed to a mere chance, of recurrence. *Forgy*, 750 S.W.2d at 437. However, it is all but certain that the DPA will never again receive the same appropriation that was allocated to it in FY 09. Indeed, Appellants themselves have recognized that material repetition of the factual predicate underlying their Petition for Declaratory Judgment in this case is far from certain. In Appellants' Motion for Leave to Supplement Motion to Transfer, they acknowledge that, "***if*** additional funds are not appropriated by the General Assembly or allocated by the Governor for fiscal year 2009-10, the factual circumstances which precipitated this litigation will remain unchanged."[8] (Appellants' Motion for Leave to Supplement Motion to Transfer, pp. 1-2) (emphasis added). Even assuming for sake of argument that all the other "ifs" in this case—regarding the practical effects of the original FY 09 funding level on caseloads and the

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[8] Similarly, in Appellants' Supplement to Motion to Transfer, they state:

> While this "short term fix" will avoid a complete shutdown of DPA between now and July 1, 2009 — the hiring freeze and the postponement of paying several significant bills simply transfers a substantial deficit from fiscal year 2008-09 to fiscal year 2009-10, ***unless the Governor calls a special session of the legislature and the General Assembly thereupon enacts an additional appropriation for DPA.***

(Appellants' Supplement to Motion to Transfer, pp. 5-6) (emphasis added).

provision of competent representation—are as the Appellants have alleged, this "if" regarding funding is significant.

DPA's appropriation for the next fiscal year, FY 10, is nearly $4 million greater than the initial appropriation for FY 09. The enacted budget for FY 09 provided $37,826,300,[9] while the budget appropriation for FY 10 is $41,640,500. (Exhibit A). The effect of this increase of funding on the Appellants' claims is simply unknown, and has never been addressed in this case.[10] Furthermore, the coming fiscal year will include a regular session of the General Assembly during which a new biennial budget will be adopted.

Finally, in both of the most recent budget years the Governor and the General Assembly have acted to supplement DPA's budget before the end of the fiscal year, providing it with substantial funding beyond the original budgeted appropriations.[11] Accordingly, Appellants will have an opportunity to present to the Governor and the General Assembly their assessment of DPA's funding requirements well before the appropriation for the next fiscal year could be exhausted.

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[9] The net result of the recent $2 million dollar allocation from the Governor and the 4% budget cut implemented in December 2008 is that DPA's "revised budget" for FY 09 was $38,556,700. (*See* Appellants' Motion to Transfer, Exhibit D, p. 3 ¶ 6, discussing the 4% reduction). Thus, the current FY 10 Budget is more than $3 million greater than the *revised* budget for FY 09.

[10] Appellees note, however, that the month before filing the Petition instituting this case, the Public Advocate sounded a note of cautious optimism that the crisis that he perceived in FY 09 would not be repeated in FY 10. "The outlook for FY10 is guarded. The enacted budget for FY 10 increases somewhat in FY10 from $37.8 million to $41.6 million . . . whether the service reduction plan continues into FY10 remains to be seen." (Exhibit C, p. 7 Press Release dated May 28, 2008, attached as Exhibit C to Executive Branch Respondents' Memorandum in Support of Motion for Temporary Injunction, filed 8/11/2008).

[11] *See* Exhibit A (reflecting $1.8 million supplemental appropriation for FY 08) and Appellants' Supplement to Motion to Transfer, Exhibit C (reflecting the provision of additional $2 million for FY 09).

CONCLUSION

Because the claims asserted by the Appellants' Petition for Declaration of Rights have been mooted by changed circumstance, the Court should dismiss the pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this Motion to Transfer was served this 28th day of April 2009 via U.S. Mail postage prepaid upon Hon. Thomas D. Wingate, Judge, Franklin Circuit Court, Franklin County Courthouse, 214 St. Clair Street, P.O. Box 678, Frankfort, KY 40602-0678; Sheryl G. Snyder, Jack B. Harrison, Kendrick Wells, IV, Frost Brown Todd LLC, 400 W. Market Street, 32nd Floor, Louisville, KY 40202; Jon L. Fleischaker, Jeremy Rogers, Dinsmore & Shohl LLP, 500 West Jefferson Street, Suite 1400, Louisville, KY 40202; and Charles E. English, E. Kenly Ames, English, Lucas, Priest & Owsley LLP, P.O. Box 770, 1101 College Street, Bowling Green, KY 42102 (*Counsel for Appellants*); and Jack Conway, Tad Thomas, Office of the Attorney General, 700 Capitol Avenue, Suite 116, Frankfort, KY 40601.

Counsel for Executive Branch Respondents

111219.131364/3635573.6

Road Fund	13,881,500	13,881,500
TOTAL	21,414,100	21,397,300

(1) **Vehicle Enforcement Officers' Training Incentive:** Included in the above Restricted Funds appropriation is sufficient funding to provide a $3,100 annual training incentive stipend for vehicle enforcement officers.

7. PUBLIC ADVOCACY

	2007-08	2008-09	2009-10
General Fund	1,801,000	31,741,100	35,679,400
Restricted Funds	35,200	4,301,900	4,300,000
Federal Funds	-0-	1,783,300	1,661,100
TOTAL	1,836,200	37,826,300	41,640,500

(1) **Compensatory Leave Conversion to Sick Leave:** If the Department of Public Advocacy determines that internal budgetary pressures warrant further austerity measures, the Public Advocate may institute a policy to suspend payment of 50 hour blocks of compensatory time for those attorneys who have accumulated 240 hours of compensatory time and instead convert those hours to sick leave.

(2) **Lexington Public Defender's Office:** Included in the above General Fund appropriation is $1,570,000 in fiscal year 2007-2008 and $1,570,000 in each fiscal year of the 2008-2010 biennium for the operation of the Lexington Public Defender's Office.

TOTAL - JUSTICE AND PUBLIC SAFETY CABINET

	2007-08	2008-09	2009-10
General Fund (Tobacco)	-0-	1,923,400	1,923,400
General Fund	28,694,700	621,904,700	649,377,800
Restricted Funds	4,469,700	117,409,000	120,538,000
Federal Funds	813,200	43,145,500	42,995,100
Road Fund	-0-	73,881,500	73,881,500
TOTAL	33,977,600	858,264,100	888,715,800

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION II
CIVIL ACTION NO. 08-CI-1094

ERWIN W. LEWIS, individually and in his official capacity as Kentucky's Public Advocate and on behalf of attorneys employed by the Department of Public Advocacy — **PLAINTIFF**

and

THE DEPARTMENT OF PUBLIC ADVOCACY — **PLAINTIFF**

and

DANIEL T. GOYETTE, individually and in his capacity as Chief Public Defender and Executive Director of Louisville and Jefferson County Public Defender Corporation and on behalf of attorneys employed by the Louisville and Jefferson County Public Defender Corporation — **PLAINTIFF**

and

LOUISVILLE AND JEFFERSON COUNTY PUBLIC DEFENDER CORPORATION — **PLAINTIFF**

and

FRANK MASCAGNI, III, individually and on behalf of others similarly situated — **PLAINTIFF**

and

JOHN DOE individually and on behalf of others similarly situated — **PLAINTIFF**

v.

TODD HOLLENBACH, IV, KENTUCKY STATE TREASURER — **DEFENDANT**

Serve: Jack Conway
Office of the Attorney General
700 Capitol Avenue, Suite 118
Frankfort, Kentucky 40601

Serve: Todd Hollenbach
Office of State Treasurer
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Frankfort, Kentucky 40601

and

JONATHAN MILLER,
KENTUCKY SECRETARY OF FINANCE
AND ADMINISTRATION **DEFENDANT**

Serve: Jack Conway
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Frankfort, Kentucky 40601

Serve: Jonathan Miller
Office of the Secretary
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and

DAVID L. WILLIAMS,
PRESIDENT OF KENTUCKY STATE SENATE **DEFENDANT**

Serve: David L. Williams
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Capitol Room 324
Frankfort KY 40601

and

JODY RICHARDS,
SPEAKER OF KENTUCKY STATE
HOUSE OF REPRESENTATIVES

DEFENDANT

Serve: Jody Richards
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PETITION FOR DECLARATORY JUDGMENT

Plaintiffs, Erwin W. Lewis, the Department of Public Advocacy, Daniel T. Goyette, Louisville and Jefferson County Public Defender Corporation, Frank Mascagni, III, and John Doe ("Plaintiffs"), by counsel, for their Petition for Declaratory Judgment ("Petition"), hereby state as follows.

INTRODUCTION

1. This is a Petition for Declaratory Judgment relating to a crisis of insufficient funding in Kentucky's public defender system. In the Commonwealth's budget for fiscal year 2008-09, which takes effect on July 1, 2008, Kentucky's General Assembly has failed to provide sufficient funding to an already overburdened, underfunded public defender system.

2. The failure of the General Assembly to provide minimal levels of sufficient funding has caused, and will cause, the inability to hire and retain sufficient numbers of public defender lawyers. As a result, caseload levels for public defender lawyers have reached the point where the heads of Kentucky's public defender offices have the ethical obligation to take immediate action to address this situation in order to keep Kentucky's public defender lawyers in compliance with their duty under the Kentucky Rules of Professional Conduct to provide diligent and competent representation and in order to

safeguard indigent criminal defendants' right to have competent defense counsel appointed to represent them.

3. If public defender lawyers continue to represent every indigent defendant for whom they are appointed, funding will be completely depleted less than eight months into the fiscal year. The heads of the Department of Public Advocacy ('DPA") and Louisville and Jefferson County Public Defender Corporation ("Public Defender Corp.") seek to fulfill their ethical obligation to administer a responsible plan designed to serve their existing clients, to avoid as much disruption as possible to the administration of justice, and to ensure that every effort is made to protect the constitutional rights of indigent criminal defendants.

4. In an effort to preserve the ability of public defender lawyers to continue to represent existing clients, and to prevent the loss of all public defender services by the middle of 2009, the DPA and the Public Defender Corp. have devised service reduction plans to cope with reduced funding and increasing caseloads. Under these service reduction plans, public defenders will decline appointments to represent indigent defendants in certain kinds of cases.

5. Accordingly, the heads of DPA and the Public Defender Corp. seek a declaration from this Court that public defender lawyers in the Commonwealth may, consistent with their ethical, constitutional and statutory obligations, legally decline to accept certain appointments to represent indigent criminal defendants.

6. Further, the Plaintiffs herein seek a declaration from this Court that, if prosecution is to go forward as to the indigent criminal defendants whose cases the public defender lawyers decline to accept, such indigent criminal defendants must be appointed

private defense counsel who must be paid with funds from the Commonwealth's Treasury. Without appointed, state-compensated defense counsel, the prosecution of such indigent criminal defendants cannot go forward, and the charges against such defendants must be dismissed.

7. Courts have the authority to appoint private counsel when public defenders are not available. However, such appointed counsel must receive compensation. A system using court-appointed lawyers to represent indigent defendants is unconstitutional under both the Kentucky and United States Constitutions if the court-appointed lawyers are compelled by court order to represent the defendants but are not compensated. Bradshaw v. Ball, 487 S.W.2d 294 (Ky.App. 1972).

8. While court-appointed conflict counsel is typically paid from DPA funds, DPA's inadequate funding renders DPA no longer able to pay such counsel. Part of DPA's service reduction plan involves the cessation of all payments from DPA funds to court-appointed counsel in "conflict cases." For the same reason, it is necessary for the Public Defender Corp. to implement a similar plan and course of action with respect to conflict cases.

9. Orders directing the Finance and Administration Cabinet to pay reasonable fees of appointed attorneys are necessary to ensure payment because DPA's budget is insufficient to cover the defense costs for every indigent defendant who will need an appointed lawyer in fiscal year 2008-09. Therefore, the Plaintiffs seek a declaration that it is legal and proper for appointing courts to enter orders directing payment by the Finance and Administration Cabinet and the Treasury for the fees of lawyers appointed to handle cases in which public defender lawyers are not available.

PARTIES

1. The Plaintiffs

10. Daniel T. Goyette ("Goyette") is a lawyer licensed to practice law in the Commonwealth of Kentucky and is the Chief Public Defender and Executive Director of the Public Defender Corp., a non-profit corporation organized and existing under Kentucky law.

11. Pursuant to KRS 31.060, *et seq.* the Public Defender Corp. contracts with the DPA to provide legal services in Jefferson County, Kentucky to indigent adults and juveniles accused of crimes and status offenses, and to those who are subjected to involuntary hospitalization due to mental illness.

12. As Chief Public Defender and Executive Director of the Public Defender Corp., Goyette has "direct supervisory authority," as that term is used in Kentucky Supreme Court Rule 3.130(5.1), over each of the approximately 60 lawyers employed by the Public Defender Corp.

13. Plaintiff Erwin W. Lewis ("Lewis") is a lawyer licensed to practice in the Commonwealth of Kentucky and is Kentucky's Public Advocate and Commissioner of the DPA, an independent agency of Kentucky state government created by the General Assembly pursuant to KRS 31.010, *et seq.*, and attached for administrative purposes to the Justice and Public Safety Cabinet.

14. As Public Advocate, Lewis has "direct supervisory authority," as that term is used in Kentucky Supreme Court Rule 3.130(5.1), over each of the more than 300 lawyers employed by DPA.

15. Plaintiff Frank Mascagni, III ("Mascagni") is a lawyer licensed to practice in the Commonwealth of Kentucky. Mascagni has represented indigent criminal defendants

as "conflict counsel" appointed by DPA in situations in which DPA or other public defenders with whom DPA contracts have been unable to represent such indigent criminal defendants by operation of Kentucky's Rules of Professional Conduct (SCR 3.130).

16. Mascagni has been paid fees from DPA or from other government funds for his appointed representation of indigent criminal defendants in conflict cases, and Mascagni desires to continue to take such appointments from time to time in the future, but only if Mascagni will be paid a reasonable fee for such representation.

17. John Doe is an indigent criminal defendant in one of Kentucky's state courts. As with most any indigent criminal defendant, John Doe desires, and is entitled to, competent legal representation with respect to the charges that have been brought against him.

2. The Defendants

18. Defendant Todd Hollenbach, IV ("Hollenbach") is the Treasurer of the Commonwealth of Kentucky. As Treasurer, Hollenbach is Kentucky's chief elected fiscal officer and is charged with, among other things, disbursement of Commonwealth funds pursuant to warrants issued by the Finance and Administration Cabinet.

19. Defendant Jonathan Miller ("Miller") is the Secretary of Kentucky's Finance and Administration Cabinet. As Secretary, Miller is charged with, among other things, the provision of executive policy and management for the departments and divisions of the Cabinet, and Miller serves as the chief financial officer and manager of the financial resources of the Commonwealth.

20. Miller has the authority to sign warrants, or to designate an assistant to sign warrants, which constitute full and sufficient authority to the Treasurer for the disbursement of public money.

21. Defendant David L. Williams ("Williams") is the President of the Kentucky State Senate, one of the two houses of Kentucky's General Assembly, the legislative branch of government in the Commonwealth.

22. Defendant Jody Richards ("Richards") is the Speaker of Kentucky's State House of Representatives, one of the two houses of Kentucky's General Assembly, the legislative branch of government in the Commonwealth.

23. The General Assembly exercises the legislative authority of the Commonwealth of Kentucky and has the duty to appropriate sufficient funds to defray the constitutionally mandated expenses of providing competent defense counsel to represent indigent criminal defendants.

JURISDICTION AND VENUE

24. This Court has jurisdiction over the subject matter of this Petition for Declaratory Judgment pursuant to KRS 418.040, et seq. as an actual controversy exists concerning the Plaintiffs' rights and the Defendants' constitutional and statutory obligations.

25. Venue for this action is proper in this Court because this action relates to the rights and duties of DPA, and DPA's primary place of business is Franklin County. Venue is also proper in this Court as the Defendants' business offices are each located in Franklin County.

26. Pursuant to KRS 418.040, *et seq.* and pursuant to the Constitution of Kentucky, this Court may properly exercise *in personam* jurisdiction over each of the

Defendants. Official immunity is not a bar to this Court's exercise of jurisdiction over Defendants Williams and Richards as this action seeks as to them only declaratory relief with respect to state constitutional and statutory rights and duties of the parties and does not seek as to Richards or Williams injunctive relief or damages.

FACTUAL ALLEGATIONS

1. The Right to Competent Defense Counsel and the Right of Appointed Counsel to Be Compensated.

27. The constitutions of the Commonwealth of Kentucky and the United States of America require the Commonwealth to provide competent defense counsel to indigent criminal defendants who are charged in state court. See, e.g., Gideon v. Wainwright, 372 U.S. 335 (1963); Smith v. Com., 412 S.W.2d 256 (Ky. 1967).

28. In addition to providing defense counsel, the Commonwealth is constitutionally required to compensate appointed defense counsel for an indigent criminal defendant. Bradshaw v. Ball, 487 S.W.2d 294 (Ky. 1972).

29. If the Commonwealth fails to provide competent defense counsel to an indigent criminal defendant, then the Commonwealth cannot constitutionally proceed with the prosecution of the indigent criminal defendant. Jones v. Com., 457 S.W.2d 627 (Ky. 1970).

30. An indigent criminal defendant's constitutional right to competent defense counsel is violated where a lawyer appointed to represent the indigent criminal defendant has a caseload that is so burdensome that the lawyer is unable to competently and diligently represent the defendant and cannot provide the defendant with effective assistance of counsel.

2. Kentucky's Public Defender System and DPA

31. In 1972, the General Assembly enacted the Public Defender Act, KRS Chapter 31, which provides a scheme for the provision of, and payment for, defense counsel for indigent criminal defendants in Kentucky.

32. The Public Defender Act created DPA as an independent executive branch agency and charged it with the duty to ensure that services are provided to indigent criminal defendants throughout the Commonwealth.

33. The Public Defender Act also provided DPA with authority to develop and promulgate standards, regulations, rules and procedures for administration of the defense of indigent criminal defendants. KRS 31.030.

34. The Public Defender Act also provided DPA with authority to issue rules, regulations and standards to carry out the Act, the decisions of the U.S. Supreme Court and Kentucky's appellate courts and other applicable statutes and court decisions. KRS 31.030.

35. Among other things, DPA is authorized and required to issue policies designed to conform the conduct of lawyers in its employ and under its control with the Rules of Professional Conduct promulgated by the Kentucky Supreme Court.

36. DPA has no authority to appropriate funds for its operation, and it must rely upon the General Assembly to appropriate sufficient funds for DPA to carry out its constitutional and statutory duties and responsibilities.

3. The Public Defender Corp.

37. DPA has offices covering each county in the Commonwealth of Kentucky. In Jefferson County, the public defender program is operated by the Public Defender Corp.

38. The Public Defender Corp. operates as the office of public advocacy for Jefferson County pursuant to KRS 31.060 and provides legal representation for indigent criminal defendants charged in Jefferson County's state courts.

39. The Louisville-Jefferson County Public Defender Corporation is funded in part from monies appropriated to DPA pursuant to KRS 31.050 and 31.060.

40. Pursuant to agreement between the Commonwealth of Kentucky and Jefferson County dating to 1972, two-thirds of the Public Defender Corp.'s budget is provided by DPA and one-third is provided by Louisville-Jefferson County Metro Government.

4. The Current Funding Crisis

41. In the past few years, the funds appropriated for DPA by the General Assembly have been such that DPA resources have been barely adequate to enable DPA to fulfill its responsibility of providing competent legal representation for indigent criminal defendants.

42. While its funding has remained low, DPA caseloads have continuously risen. The total number of cases handled by DPA has increased from 97,818 in fiscal year 2000 to 148,518 in fiscal year 2007. DPA expects that the number of indigent criminal cases in Kentucky's courts will continue to increase in 2008 and 2009.

43. In 2007 the average number of cases handled by an individual DPA lawyer was 436, with 23% (twenty-three percent) of those cases being felony cases in circuit court.

44. In 2008, the General Assembly passed a budget which cuts DPA funding by $2.3 million in fiscal year 2009. The funding reduction for fiscal year 2009, at a time of rising costs, will render DPA unable to fill as many as 60 lawyer positions statewide.

45. Coupled with the already burdensome caseload for the average DPA lawyer, the inability to fill vacant lawyer positions will cause DPA lawyers' average caseload to increase significantly statewide if DPA lawyers continue to accept appointment as counsel for indigent criminal defendants as they have in the past.

46. The Public Defender Corp. has been chronically underfunded and overworked since its inception as the first full-time public defender office in the state over thirty-six (36) years ago. Indeed, the only previous reduction in public defender services in Kentucky occurred in Jefferson County in 1992 as a result of a mid-year state budget cutback. The Public Defender Corp. later restored services when the state acknowledged that indigent defense representation is a constitutionally mandated expense of government and rescinded the Public Defender Corp.'s budget cut. In fiscal year 2007, the Public Defender Corp. handled a total of 33,066 cases. That caseload total resulted in an individual lawyer caseload that exceeded the average number of cases handled by individual DPA lawyers statewide, not to mention the average recommended by national caseload standards. Based upon current caseload statistics, the total for fiscal year 2008 will top the total handled in 2007, and the average individual lawyer caseload will most certainly increase again in fiscal year 2009 unless action is taken and relief is provided.

5. Applicable Rules of Professional Conduct.

47. Lawyers that DPA and the Louisville-Jefferson County Public Defender Corporation employ, or are otherwise responsible for, are members of the bar of the Commonwealth of Kentucky and must comply with applicable rules of Kentucky's Supreme Court, including the Rules of Professional Conduct, SCR 3.130.

48. SCR 3.130(5.1) provides that "A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." The Rule also makes the supervisory lawyer responsible for the subordinate lawyer's violation of the Rules of Professional Conduct if the supervisory lawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

49. SCR 3.130(1.1) provides that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

50. SCR 3.130(1.16) provides that "a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) The representation will result in violation of the Rules of Professional Conduct or other law... ."

51. Kentucky Supreme Court Rule 3.130(6.2) provides that "A lawyer should not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: (a) Representing the client is likely to result in violation of the Rules of Professional Conduct or other law... ." Comment 2 of the Supreme Court commentary to Rule 6.2 provides that "For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel...," and that "[g]ood cause exists if the lawyer could not handle the matter competently... ."

52. Lawyers employed by DPA and by the Public Defender Corp. are bound by the Rules of Professional Conduct and by the Kentucky and United States Constitutions to seek to avoid appointment as counsel for indigent criminal defendants when the lawyer's

caseload is so large that the lawyer is unable to competently and diligently represent the defendant and, therefore, cannot provide effective assistance of counsel.

53. As lawyers with direct supervisory authority over other lawyers, Goyette and Lewis are bound by the Rules of Professional Conduct and by applicable provisions of the Public Defender Act to take reasonable steps to ensure that the lawyers under their supervision are not saddled with caseloads so burdensome that, in their objectively reasonable opinion, they are unable to competently and diligently represent their indigent criminal defendant clients and cannot provide effective assistance of counsel.

6. Standards for Public Defender Caseload Limits.

54. The National Advisory Commission on Criminal Justice Standards and Goals ("NAC") issued a report in 1973 that contained recommendations to improve public defense services, including recommended caseload limits for public defender lawyers. NAC Standard 13.12 Workload of Public Defenders provides in relevant part:

> The caseload of a public defender office should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court [delinquency] cases per attorney per year: not more than 200; Mental Health act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.
>
> For purposes of this standard, the term case means a single charge or set of charges concerning a defendant (or other client) in one court in one proceeding. An appeal or other action for post judgment review is a separate case.

55. The NAC standards are intended to be applied proportionately such that, for example, a public defender assigned 75 felony cases should not be assigned more than 100 juvenile cases, and should receive no additional assignments under NAC standards.

56. In August 2007, the American Council of Chief Defenders issued a Resolution and Report on Caseloads and Workloads (the "ACCD Resolution and Report"). The ACCD Resolution and Report analyzed the NAC standards set in 1973. The ACCD Resolution reaffirmed the NAC standards set in 1973 and concluded that, in general, caseloads should not exceed the NAC standards and, in many jurisdictions, caseload limits should be lower than the NAC standards in light of current developments and local practices in the provision of public defender services.

57. On May 13, 2006, the American Bar Association's Standing Committee on Ethics and Professional Responsibility issued ABA Formal Opinion 06-441 entitled "Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation." Interpreting and applying rules substantially similar to those contained in Kentucky's Rules of Professional Conduct, ABA Opinion 06-441 concluded that public defenders have an ethical obligation not to accept excessive caseloads when they cannot provide competent representation.

58. Presently, the average caseloads for Kentucky's public defenders at DPA and at the Public Defender Corp. significantly exceed the NAC standards.

59. In light of funding cuts and expected increases in overall indigent criminal defendant cases, Kentucky's public defenders' caseloads will significantly increase to exceed even further the NAC standards if those lawyers continue to accept appointments as they have in the recent past.

60. At current levels of staffing and funding, and with caseloads continuing to increase, Kentucky's public defenders will not be able to provide the diligent and competent legal representation of indigent criminal defendants that is required by the Rules of

Professional Conduct and the state and federal constitutions in fiscal year 2009 if public defenders continue to accept appointments of cases as they have in recent years.

7. DPA's and the Public Defender Corp.'s Service Reduction Plans.

61. In light of the growing caseloads and the shrinking budget, both Lewis and Goyette have developed plans to decrease public defender services. These service reduction plans include cost containment measures such as no longer funding "conflict cases" (i.e. cases in which private "conflict counsel" are appointed to represent indigent criminal defendants in situations where public defenders cannot undertake the representation because the defendants' interests are in conflict).

62. The service reduction plans also envision the possibility of public defenders no longer accepting appointments in parole violation matters, status offender cases, family court, involuntary commitment cases, Class B and some Class A misdemeanor cases.

63. On March 26, 2008, Kentucky's Public Advocacy Commission issued a resolution approving the implementation of DPA's service reduction plan in the event of expected budget cuts for DPA.

64. Now that DPA's already inadequate budget has been cut significantly as of July 1, 2008, Lewis and Goyette intend to implement the service reduction plans, which will cease payment from DPA funds for conflict counsel in approximately 3,000 to 5,000 conflict cases annually, and will also create a greater need for appointed private counsel in the kinds of cases where public defenders will be unable to ethically accept appointments.

65. The DPA, Lewis as Kentucky's Public Advocate and Commissioner of DPA, the Public Defender Corp., and Goyette as Chief Public Defender, have the legal authority and professional responsibility to implement the service reduction plans.

8. The Requirement to Appoint and Compensate Private Counsel or to Dismiss Charges

66. Despite the fact that DPA funds are insufficient to compensate private appointed counsel for indigent criminal defendants and DPA (and, correspondingly, the Public Defender Corp.) thus cannot compensate private appointed counsel, both as a matter of fiscal reality and as a matter of the service reduction plans, such counsel cannot constitutionally be required to represent indigent criminal defendants without compensation.

67. Kentucky's courts have the authority to appoint private counsel to represent indigent criminal defendants in situations, such as under DPA's service reduction plan, or in the classic case of "conflict counsel," such as under the Jefferson County Public Defender Assigned Counsel Panel Plan, or where public defenders are unable to serve. See, e.g., KRS 31.235.

68. The constitutionally mandated responsibility to provide and compensate counsel appointed to represent an indigent criminal defendant rests with the Commonwealth. When DPA funds or other specifically allocated funds are insufficient for the compensation of such appointed counsel, an appointing court may properly order the Finance and Administration Cabinet and the Treasurer to compensate appointed private counsel from the Commonwealth's Treasury.

69. In addition, KRS 31.185 provides a continuing appropriation of funds from which fees may be paid for the provision of appointed private defense counsel. KRS 31.185(3) provides, in relevant part, that,

> Any direct expense ... that is necessarily incurred in representing a needy person under this chapter ... shall be paid from the special account established under subsection (4) of this section and in accordance with the proceedings provided in subsection (5) of this section.

70. In turn, KRS 31.185(4) provides for an automatic, standing annual appropriation of $0.125 per capita per county to a special account to be administered by the Finance and Administration Cabinet.

71. KRS 31.185(5) directs the Finance and Administration Cabinet to pay all orders entered pursuant to subsection (3) from the special account established under subsection (4). Once those funds are depleted, KRS 31.185(5) directs that orders are then to be paid out of the Commonwealth's Treasury "in the same manner in which judgments against the Commonwealth and its agencies are paid."

72. Thus, because DPA lacks the funds to provide counsel (either employed directly by DPA or compensated as "conflict counsel") consistent with relevant constitutional requirements and with the Public Defender Act, a court may appoint private defense counsel for an indigent criminal defendant and order the Finance and Administration Cabinet and Treasurer to compensate the appointed counsel with funds from the Treasury.

73. Under the DPA's and the Public Defender Corp.'s service reduction plans, the Commonwealth's courts should appoint private defense counsel to represent indigent criminal defendants and may order the Finance and Administration Cabinet and Treasurer to compensate the appointed counsel with funds from the Treasury.

74. Under the DPA's and the Public Defender Corp.'s service reduction plans, the Finance and Administration Cabinet and Treasurer are obligated to comply with such court orders for payment of appointed counsel both as a matter of constitutional law and by operation of KRS 31.185.

75. If Kentucky's General Assembly does not appropriate sufficient funds to provide an indigent criminal defendant with competent defense counsel, or the executive branch of Kentucky's government does not provide and compensate competent defense counsel for an indigent criminal defendant, then the Commonwealth cannot prosecute, and must dismiss the charges against, that indigent criminal defendant.

CLASS ACTION

76. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because this lawsuit is a declaratory judgment action concerning questions of law and fact that are common to all members of the various classes and because naming all members of the various classes individually as parties would be impracticable, burdensome upon this Court and upon the parties, and could risk varying or inconsistent adjudications.

1. The Plaintiff Class of Public Defender Corp. Lawyers.

77. Plaintiff Goyette brings this action individually and on behalf of the class of lawyers in the employ of the Public Defender Corp. and under his direct supervisory authority pursuant to Rule 23 of the Kentucky Rules of Civil Procedure ("CR"). The class consists of all lawyers employed by the Public Defender Corp.

78. There is an approximate total of 60 members in the class. Individual joinder of the numerous members of this Plaintiff class is therefore impracticable.

79. As class representative of this Plaintiff class, Goyette's claims against the various Defendants herein will be typical, if not identical, of those of this Plaintiff class.

80. Goyette will fairly and adequately protect the interests of such class.

81. There are questions of law and fact common to this Plaintiff class.

2. The Plaintiff Class of DPA Lawyers.

82. Plaintiff Lewis brings this action individually and on behalf of the class of lawyers in the employ of DPA and under his direct supervisory authority pursuant to CR 23. The class consists of all lawyers employed by DPA who defend clients charged with criminal offenses or mental states that may result in a deprivation of liberty.

83. There is an approximate total of 325 members in the class. Individual joinder of the numerous members of this Plaintiff class is therefore impracticable.

84. As class representative of this Plaintiff class, Lewis's claims against the various Defendants herein will be typical, if not identical, of those of this Plaintiff class.

85. Lewis will fairly and adequately protect the interests of such class.

86. There are questions of law and fact common to this Plaintiff class.

3. The Plaintiff Class of Private Counsel Willing to Accept Paid Appointments to Represent Indigent Criminal Defendants.

87. Plaintiff Mascagni brings this action individually and pursuant to CR 23 on behalf of the class of lawyers admitted to practice in Kentucky's state courts who are willing and able to accept appointments to represent indigent criminal defendants whom DPA and Public Defender Corp. lawyers cannot represent because of their respective service reduction plans, because of those public defenders' ethical responsibilities, and because of the constitutional rights of the indigent criminal defendants to be represented competently and to receive effective assistance of counsel.

88. There is an unknown, but significant, number of members in the class. Individual joinder of the numerous members of this Plaintiff class is therefore impracticable.

89. As class representative of this Plaintiff class, Mascagni's claims against the various Defendants herein will be typical, if not identical, of those of the members of this Plaintiff class.

90. Mascagni will fairly and adequately protect the interests of such class.

91. There are questions of law and fact common to this Plaintiff class.

4. The Plaintiff Class of Indigent Criminal Defendants

92. Plaintiff John Doe brings this action individually and pursuant to CR 23 on behalf of the class of indigent criminal defendants charged in Kentucky's state courts who desire the fulfillment of their constitutional right to be appointed competent defense counsel and provided with effective assistance of counsel.

93. There is an unknown, but significant, number of members in the class. Individual joinder of the numerous members of this Plaintiff class is therefore impracticable.

94. As class representative of this Plaintiff class, John Doe's claims against the various Defendants herein will be typical, if not identical, of those of the members of this Plaintiff class.

95. John Doe will fairly and adequately protect the interests of such class.

96. There are questions of law and fact common to this Plaintiff class.

REQUEST FOR DECLARATORY JUDGMENT

97. There is a current case and controversy involving the parties' legal rights and duties with respect to the propriety of DPA's and the Public Defender Corp.'s service reduction plans in response to the General Assembly's inadequate funding of DPA, the ability of indigent criminal defendants to obtain competent defense counsel when public

defenders cannot ethically or competently accept appointment, and the ability of appointed private defense counsel to be compensated from state funds.

98. Pursuant to KRS 418.040, the Plaintiffs seek a binding declaration of rights with respect to this actual controversy.

WHEREFORE, the Plaintiffs pray that this action be certified as a class action as pleaded herein and that the Court declare the rights of the parties in a declaratory judgment binding upon all Defendants declaring that:

A. The funds appropriated by the General Assembly for DPA's budget in fiscal year 2008-09 are insufficient to provide Kentucky's indigent criminal defendants with the effective assistance of competent defense counsel;

B. The DPA, and Lewis as Public Advocate and Commissioner of DPA, and the Public Defender Corp., and Goyette as Chief Public Defender, have the authority and legal right, as well as the professional responsibility, to implement the service reduction plans;

C. Public defender lawyers are required to, and may ethically and legally, comply with the service reduction plans and, consistent with their ethical, constitutional and statutory obligations, may legally decline to accept appointments to represent indigent criminal defendants when, in their objectively reasonable judgment, their respective caseloads render them unable to competently, diligently and effectively represent those defendants;

D. The service reduction plans are necessary in order to safeguard indigent criminal defendants' constitutional right to be appointed competent defense counsel and to be provided effective assistance of counsel;

E. If prosecution is to go forward as to the indigent criminal defendants whose cases the public defender lawyers decline to accept pursuant to the service reduction plans, such indigent criminal defendants must be appointed private defense counsel; and

F. If private defense counsel is appointed by a circuit or district judge to represent indigent criminal defendants, the Secretary of the Finance and Administration Cabinet and Treasurer may be properly and lawfully ordered by the appointing judge to compensate the appointed counsel with funds from the Treasury, and the Treasurer must comply with the Secretary's warrants regarding same, or in the alternative;

G. The General Assembly has the duty to appropriate sufficient funds to DPA or otherwise to appropriate sufficient funds to provide for the compensation of competent defense counsel for indigent criminal defendants, and if the General Assembly does not appropriate sufficient funds to provide indigent criminal defendants with competent defense counsel by a date fixed by the Court, then in every case in which public defenders cannot ethically accept appointments, the trial courts must dismiss all the charges.

Respectfully submitted,

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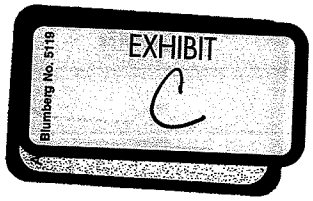
The Department of Public Advocacy Notifies Local Judges of Service Reduction

FRANKFORT, KY (May 28, 2008) - - - The following letter was mailed to local judges on Friday, May 23, by Public Advocate Ernie Lewis. This letter gives notice to local judges of the DPA's plan for reducing services necessary to achieve ethical caseloads beginning July 1, 2008. This is the first time since 1991 that the Department has had to reduce services. Cuts are necessary because of the 2008 Kentucky General Assembly's failure to fully fund the Department in FY09.

"Dear Judge X,

It is with considerable disappointment that I write this letter to you announcing service reductions by the Department of Public Advocacy. This is a follow-up to the letter I wrote to you in March encouraging you to contact your legislator regarding the budget for indigent defense. Unfortunately, after I sent you that letter, the budget situation for DPA only worsened. The General Assembly failed to pass a budget that would fully fund indigent defense in Kentucky. My only choice now as an executive branch administrator is to tailor service delivery to the enacted budget. I will be doing so knowing that the Kentucky and United States Constitutions mandate that we provide virtually all of the



services that I will be cutting. As someone who has devoted almost 31 years of my legal practice to indigent defense, that is my most profound regret as I announce these actions.

DPA is a statewide public defender system committed to implementing the mandates of the U.S. Supreme Court in *Gideon, Argersinger*, and *Shelton*. KRS Chapter 31 established the Department of Public Advocacy as a statewide public defender program. DPA is responsible for representing all indigents accused of a crime or mental state for which their liberty is threatened. Today, all of the counties except for Jefferson County have chosen to have the Commonwealth fund indigent defense in its entirety. DPA does so through the most cost-effective model known—delivering services through 30 full-time offices at approximately $254 per case. The private bar is involved through the provision of conflict services in approximately 3000-4000 cases. Overall, DPA handled over 148,000 cases in FY07. DPA has a model enabling statute, an active and conscientious oversight board, an excellent training program, and a cost-effective delivery system. Unfortunately, DPA has been starved for resources historically; a history that now threatens the full provision of the right to counsel for indigents.

DPA requested a budget that would have allowed its attorneys to handle all appointed caseloads. DPA requested a budget that would have been sufficient to provide competent legal representation over the next biennium. Had the budget passed it would have allowed DPA to comply with caseload standards consistently recommended over the past three decades. The basis for the budget was the reduction of caseloads to no more than 350 new cases per lawyer in our rural offices and no more than 450 cases per lawyer in our four urban offices. In addition, DPA's budget request contemplated a 3% increase in caseloads over the biennium, a conservative request and estimate given the 8% annual increase in caseloads since 2000. DPA based its funding request upon historical caseload data.

The General Assembly slashed DPA's budget. In FY08, DPA's amended budget is $40.1 million. Even at that level, it is estimated that the FY08 budget did not fund 30 of DPA's positions. The Governor and the House agreed to fund DPA at $39 million in FY09, a $1.1 million decrease. The Senate cut DPA's budget to $37.2 million. The General Assembly, after the free conference committee made its decisions, funded DPA at $37.8 million for FY09. This cut $2.3 million from DPA's amended FY08 budget.

DPA can only deliver $37.8 million in legal services. In FY07, lawyers for DPA carried caseloads 40% above the upper limits set by the National Advisory Commission for public defenders. DPA lawyers have handled excessive caseloads for many years. Most DPA lawyers work significant numbers of hours of overtime. DPA cannot deliver unlimited legal services and cannot be expected to deliver the same services for $37.8 million that it was able to deliver for $40.1 million. Rather, DPA can only deliver the legal services for which it is funded. For FY09, the General Assembly has funded indigent defense services in the amount of $37.8 million. Like all other Executive Branch agencies, DPA must reduce its service levels consistent with the enacted budget.

DPA has a responsibility to ensure ethical caseloads for its attorneys. In order to

perform its statutory duties in compliance with state and constitutional requirements, DPA has a professional responsibility not to impose unethical caseload levels on its lawyers. ABA Formal Opinion 06-441 was issued on May 13, 2006 by the American Bar Association Standing Committee on Ethics and Professional Responsibility. It states with clarity that all "lawyers, including public defenders and other lawyers who, under court appointment or government contract, represent indigent persons charged with criminal offenses, must provide competent and diligent representation." It adds that a "lawyer's workload 'must be controlled so that each matter may be handled competently.'" It cites with approval the *ABA Ten Principles of a public defense delivery system* (2002) which require that defense counsel's workload be controlled "to permit the rendering of quality representation." The American Council of Chief Defenders Ethics Opinion 03-01(2003) states that a "chief executive of an agency providing public defense services is ethically prohibited from accepting a number of cases which exceeds the capacity of the agency's attorneys to provide competent, quality representation in every case....When confronted with a prospective overloading of cases **or reductions in funding or staffing** which will cause the agency's attorneys to exceed such capacity, the chief executive of a public defense agency is ethically required to refuse appointment to any and all such excess cases." As the Public Advocate and chief administrator of the statewide public defender system, I and the leadership of DPA have the responsibility to control the workloads of our lawyers.

Based upon budgeted funding, the caseloads of trial attorneys in many DPA offices will reach unethical levels if appropriate action is not taken. As mentioned above, even the amended budget for FY08 failed to fund approximately 30 positions. The enacted budget for FY09 fails to fund 54 positions at a minimum and perhaps as many as 70 positions. **30-40 trial attorney positions will have to remain vacant during FY09 for the budget to balance.** Positions presently vacant will for the most part have to remain unfilled, and newly vacated positions will in all likelihood remain unfilled throughout FY09. I hope to avoid layoffs. In FY07, trial lawyers (at full staffing) carried an average of 436 new cases per lawyer. Under the enacted budget for FY09, trial attorneys' caseloads would soar near or above 500 cases per lawyer, far above the national standards. While a few of our offices will maintain ethical caseload levels with no services cut, most of our offices have vacancies that cannot be filled and action must be taken to control caseloads or ethical limits will be breached.

The Post-Trial Division is Equally Affected by this Cut: In addition to its trial clients, DPA also has a legal duty to represent clients on appeal, in post-conviction proceedings, and in juvenile post-dispositional actions. Unfortunately, our funding for these services has been cut significantly. This would result in significant staff shortages in most years, but this year it is a particular challenge because approximately 10% of the post trial division is scheduled to retire this year. In light of budget language directing the Finance Cabinet to recapture the salary of retiring employees, we cannot say at this time whether the Post-Trial Division will have its budget further reduced as a result of these retirements. Regardless, it is a certainty that the Post-Trial Division will be facing critical staffing shortages throughout the year. These shortages will have the following impacts

on post trial clients in the trial and appellate courts:

Appeals Courts: Appellate courts currently expect, in general, that a brief be filed within 180 days of assignment. Existing resource shortages make it difficult to meet those deadlines. As staff is reduced further, it will no longer be possible for an attorney to practice ethically before the appellate courts and meet those deadlines. In the coming weeks, the Post Trial Division Director will be communicating with the appellate courts to determine whether they would prefer that DPA withdraw from excessive cases altogether, or authorize that those cases be filed later than 180 days from the date of assignment.

Circuit/District Courts: The Post Conviction and Juvenile Post Disposition Branches have statewide responsibilities but are located primarily in Frankfort. Both branches will be more closely scrutinizing cases to determine whether they meet the criterion for representation under KRS 31.110(2)(c), 31.110(4), and 15A.065.(6). In order to facilitate that decision, the branches will be seeking extensions of time to review those records and file appropriate pleadings. Counsel will also be seeking to conduct routine motions, such as scheduling motions, telephonically in order to reduce travel costs.

DPA must live within its budget. DPA has few choices. Unlike universities, DPA cannot raise tuition. Unlike the prison system, DPA cannot delay capital projects. All DPA can do is reduce the size of its staff, since our budget consists entirely of personnel and the operating expenses to support the personnel.

DPA has no money to pay for conflict counsel. As previously mentioned, 145,000 or so cases are handled each year by full-time staff. In another 3000-4000 cases, DPA is obligated by legal and ethical requirements to obtain private counsel to represent persons with whom DPA has a conflict of interest, usually in situations involving codefendants. DPA spends approximately $1.2 million each year to contract with private attorneys to handle conflict cases. This has proven grossly insufficient over the years. Private attorneys are handling conflict cases on a nearly *pro bono* basis for approximately $300-500 per case for mostly felony representation. DPA has no money to pay even this small amount in FY09. DPA has been cut $2.3 million in FY09, and thus **will not fund conflict cases in FY09.**

That does not mean that DPA is not responsible for providing conflict counsel. DPA will continue to identify private attorneys willing to handle conflict cases. DPA will simply not be able to provide compensation for those attorneys willing to take cases.

DPA will be asking the courts to order the Finance Cabinet to pay for conflict counsel as well as other counsel as a necessary governmental expense. The dilemma that now exists is that the Commonwealth of Kentucky is obligated to provide counsel to poor people charged with crimes, but the legislature has failed to fund that obligation. DPA will assert that the solution to this is for courts to enter orders requiring the Commonwealth to pay for private counsel. DPA will provide to you names of counsel

willing to take conflict or other service reduction cases.

Another solution is for courts to decide in advance that a person charged with a crime is not subject to a loss of liberty. The provision of counsel is mandated when a person is charged with a "serious crime" as defined in KRS 31.100 (4). However, there is no constitutional right to state funded counsel where a person charged with a crime is not facing jail time and where there will be no other consequences later if counsel is not provided. Courts and prosecutors can explore the possibility of dismissal and diversion for numerous low level misdemeanor offenses where jail time is not intended or appropriate.

Many offices will reduce services in additional cases. Reducing the funding for conflict cases will not necessarily be the only reduction in services. In order to maintain ethical caseloads while being unable to fill present and future vacancies, DPA will have to reduce caseloads in additional categories of cases in some offices. I have written you previously regarding the possible categories of cases involved in these service reductions. They include family court cases, status offender cases, probation and parole revocation cases, and some Class A and B misdemeanors. In addition, DPA will not be providing services in involuntary commitment cases under KRS 202A. The Trial Division Director is presently evaluating the vacancies in each office in every local jurisdiction and working with the regional managers and directing attorneys to craft an office-specific plan to achieve ethical caseload levels.

Some offices will not be affected by service reductions other than in the area of conflict cases. As mentioned, each office will be treated differently outside of the conflict arena. Some offices with lower caseloads and no vacancies may not have any other services reduced. All offices (outside of Louisville) will be affected by the elimination of funding for conflict cases or attorneys in involuntary commitment cases.

The Trial Division Director, Damon Preston, will be sending letters to each directing attorney ordering specific service reductions for each defender office outside of Louisville Metro. The directing attorney for each office serving your courts will then meet with you and provide you a copy of the letter and give you advance notice of the service reductions in your courts. The Director of the Louisville Metro Public Defender's Office, Dan Goyette, is currently reviewing the budget and evaluating the workload of his office, and, after conferring with his board of directors, will determine the nature and extent of any service reductions that may be necessary. He intends to meet with the Chief Judges of the Jefferson District and Circuit Courts before the commencement of the new fiscal year to discuss his office's unique situation and whatever decisions are made with respect to the provision of services. We will keep you informed at every step of this process and have no intention of taking any action for which you are not given advance notice.

Vacancies have the potential to change the service reduction plans of individual offices. DPA has approximately 4 attorneys leaving the organization each month. If this turnover rate continues during FY09, and if DPA remains unable to fill vacancies due to

the budget cuts, the offices affected by the service reduction plan may change. If a change occurs, you will be notified.

The Public Advocacy Commission supports this service reduction plan. The service reduction plan as outlined above was presented to the Public Advocacy Commission at its February 29th meeting. The Commission is a 12 member oversight board, 7 of whom are appointed by the Governor, 3 by the Deans of the law schools, and 2 by the Court of Justice. The Commission thereafter passed unanimously a resolution supportive of this plan. In essence, the Commission resolved that the "Public Advocate has no choice but to implement some or all of his service reduction plan. Be it further resolved that the Public Advocacy Commission encourages Kentucky policy makers to fund the Department of Public Advocacy sufficiently to ensure that public defenders do not carry excessive caseloads."

AOC and DPA are working together to ensure that only those eligible for a public defender are appointed a public defender. The *Blue Ribbon Group* encouraged the AOC and DPA to work together to ensure that eligibility decisions were made in a uniform, consistent and reliable fashion. Most recently, the Chief Justice initiated an Affidavit of Indigency Committee "to review the affidavit of indigency form utilized by our courts. It has been suggested that the current form requires too little information and results in the appointment of public defenders in circumstances that may not be entirely appropriate." Public defender caseloads have increased by 8% annually since 2000, irrespective of the crime rate. It is hoped that the work of this committee will be that those who are eligible, but only those who are eligible, will be appointed a public defender in the future so that the diminishing resources of DPA can be used wisely and effectively.

The Lexington Public Defender's Office will be severely affected by the service reductions. The service reduction plan will have its most significant impact in Lexington. DPA requested $2.8 million annually for the Lexington Office. This office handles over 10,500 cases annually. DPA requested sufficient funds to hire 22 lawyers, thereby lowering caseloads to approximately 450 for this urban office. For comparison purposes, prosecutors in Lexington are funded at $5.9 million with 37 prosecutors. The Governor and the House lowered the amount requested to $1.8 million. The Senate budget zeroed the Lexington budget out entirely. The budget as enacted fixed the budget at $1.5 million. That budget will allow for only 16-17 lawyers who would carry caseloads of over 600 cases per lawyer, a clearly unethical level. This budget is not in parity with the prosecution function in Lexington. Principle #8 of the *ABA Ten Principles of a public defense delivery system* (2002) is that "[t]here is parity between defense counsel and the prosecution with respect to resources..." That principle was violated by the budget as enacted by the 2008 General Assembly. As a result, DPA will be reducing significantly the number of cases handled by public defenders in the Lexington courts, with as many as 2000-3000 cases to be affected.

I understand that these actions will affect the lives of many. I do not take these actions lightly. In fact, as I end my third (and final) term as Public Advocate, I am

profoundly disappointed by having to take these steps. I am not unmindful of the effect this will have on the lives of the clients for which DPA is responsible. However, I do not believe that I have any choice. Without this action, our attorneys cannot properly represent their clients. I will not assign unethical caseload levels to our attorneys. The Commonwealth must live up to its responsibilities to provide counsel to the people it arrests and charges with criminal offenses for which they can be deprived of life or liberty.

The outlook for FY10 is guarded. The enacted budget for FY10 increases somewhat in FY10 from $37.8 million to $41.6 million. $41.6 million is approximately $1.5 million more than the amended FY08 budget of $40.1, which did not have funding in it for full staffing. This increase depends upon an improving economy, and we will have to see what happens with caseloads. Whether the service reduction plan continues into FY10 remains to be seen.

This is an action for which I am ultimately responsible and any sanctions or retribution should be directed at me rather than a directing attorney or individual staff attorney. I fully anticipate that there will be some judges who attempt to put pressure upon our local lawyers to represent people outside of this service reduction plan. I would ask that courts respect the separation of powers and the independence of the Department of Public Advocacy. I am the person who serves as chief administrator and appointing authority of DPA, and I am ultimately responsible for these decisions. Any pressure placed upon DPA's local lawyers to represent people outside of this service reduction plan would be inappropriate. I will make every effort to be responsive and available to the judiciary as this service reduction plan is implemented.

Please contact me with any questions regarding these actions.

Sincerely,
Ernie Lewis
Kentucky Public Advocate

Cc: The Honorable Steven L. Beshear, Governor of the Commonwealth of Kentucky
Hon. Joseph E. Lambert, Chief Justice of the Kentucky Supreme Court
J. Michael Brown, Secretary of the Justice and Public Safety Cabinet
The Honorable Jack Conway, Attorney General
Robert C. Ewald, Chair of the Public Advocacy Commission
Ms. Mary Lassiter, State Budget Director
Damon Preston, Trial Division Director
Tim Arnold, Post-Trial Division Director
Dan Goyette, Executive Director of Louisville Metro Public Defender's Office
All DPA Directing Attorneys"

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COMMONWEALTH OF KENTUCKY

DEPARTMENT OF PUBLIC ADVOCACY

Office of the Director, Trial Services Division

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MEMORANDUM

TO: Glenn Vencill, Acting District Court Supervisor
Todd Henning, Acting Circuit Court Supervisor

FROM: Damon L. Preston, Trial Division Director

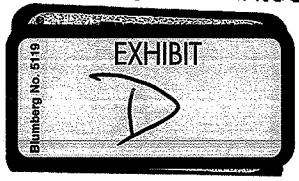
DATE: June 3, 2008

RE: Necessary Service Reductions

As you are aware, the Department Of Public Advocacy has been underfunded for many years, but we have managed to establish and maintain a high level of service to the courts and our clients by focusing on excellent personnel and cutting corners wherever else we can. We entered FY08 underfunded and with a hiring freeze. We pinched pennies every conceivable way we could to keep our staff serving as many clients as possible with hopes of a better year in FY09. Most of our offices have aging desktop computers, a high-mileage state vehicle, a copier that breaks down weekly, and mismatched furniture. Almost every employee hired in the last year came to us at entry level salary. Despite these economical practices, DPA's budget for the current year was not sufficient to maintain our authorized personnel and we have been forced to keep at least 30 vacant positions at all times. Throughout these challenging times, you have provided great leadership and have enabled the Department to continue to meet all its obligations.

Unfortunately, for the Fiscal Year 2009, the General Assembly reduced the Department's already sparse budget by $2.3 million. Faced with this cut, we must take drastic steps in order to continue to meet the needs of our existing clients, the courts, and our staff. It is simply impossible to provide the same level of service for $37.8 million as we have been able to provide for $40.1 million. The Public Advocacy Commission unanimously approved a resolution approving the reduction of services if the Department's budget was cut.

By this memorandum, under the authority and direction of the Public Advocate, Ernie Lewis, I am instructing you to cut the services your office provides in the manner detailed below. Because these are difficult policy decisions necessitated by the statewide budget reduction, the Public Advocate, Ernie Lewis, and I take



full responsibility for these actions. As an employee of the Trial Division of the Department of Public Advocacy, you do not have any discretion in these matters, and you are hereby directed and required to comply.

A. The first step we must take is to recognize that we no longer have the resources to provide conflict counsel in any case. In the past, DPA has set aside $1.2 million to contract with private attorneys. Because this was insufficient, DPA has at times authorized full-time attorneys with full caseloads from another office to travel to your service area and cover a conflict case. Because of the budget cut, increased travel costs, and the requirement that ethical caseloads be maintained, neither of these options will be available in Fiscal Year 2009.

When your office is unable to represent a defendant due to a conflict of interest, the Department will be unable to provide counsel for that defendant. I will be sending you sample motions and orders as the means of communicating our unavailability to the court. While it will then be the court's responsibility to appoint an attorney, I hope that you will provide any logistical assistance you can in that process. You should also inform the court of any attorneys who you believe would be willing to take court appointments in conformance with this DPA policy. It is our intention not to disrupt the court, but to assist the court in getting through this crisis caused by the legislature's failure to fund the system adequately.

To be absolutely clear about DPA policy in conflict cases, let me reiterate that **you are hereby directed, as of July 1, 2008, to decline any new appointment to a case which involves or creates a conflict of interest for your office.**

B. The second step we must take is to recognize the impact the reduced budget has on our office caseloads and, where needed, impose limits on the office's cases so no attorney is forced to carry an unethical caseload. The American Bar Association has made clear that the workload of public defenders must be controlled "so that each matter may be handled competently" (ABA Formal Opinion 06-441). When attorneys are assigned uncontrolled and excessive caseloads, unethical representation may likely result. Both the ABA and the American Council of Chief Defenders place the responsibility of monitoring and controlling caseloads on the leaders of a public defender agency.

The exact moment at which a caseload becomes excessive is obviously imprecise. However, the ABA has recognized that national standards should provide a baseline and that other information should also be considered. "National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement." (ABA, *The Ten Principles of a Public Defense Delivery System*). The most accepted national standards were issued by The National Advisory Commission on Criminal Justice Standards and Goals, and they were recently reaffirmed by the American Council of Chief Defenders. Those standards are:

The caseload of a public defender office should not exceed the following:

felonies per attorney per year: not more than 150;
misdemeanors (excluding traffic) per attorney per year: not more than 400;
juvenile court [delinquency] cases per attorney per year: not more than 200;
Mental Health Act cases per attorney per year: not more than 200; and
appeals per attorney per year: not more than 25.

For purposes of this standard, the term case means a single charge or set of charges concerning a defendant (or other client) in one court in one proceeding.

Keeping these standards in mind in the context of the budget shortfall and recent caseload history, the Leadership Team of the Department Of Public Advocacy has established the following limits: (a) offices in mostly rural areas will be limited to 400 new cases per attorney per year, (b) offices in urban areas will be limited to 500 new cases per attorney per year, and (c) offices in areas that contain both urban and rural counties shall be limited to 450 new cases per attorney per year. Given that these caseloads are mixed (felony, misdemeanor, and juvenile) and that office supervisors are included in calculations without consideration of leadership responsibilities, these numbers are significantly higher than what a straight application of national standards would provide. In setting these caseload limits, DPA is seeking to maximize service to the courts while providing some controls on caseloads to ensure that DPA attorneys can provide ethical representation to all clients.

Your office covers Fayette County and is designated a urban office. Thus, you are directed to limit the office caseload to 500 new cases per attorney per year. Because of vacancies, only 16 attorneys are in your office currently. In FY07, your office was assigned to 10423 cases. For FY08, your office is projected to be assigned to 10707 cases. **At your current staffing, your average caseload is 669 cases per attorney.**

Because of the cut in DPA's budget, personnel is not only restricted, but actually must be cut further. We hope to avoid layoffs, but it is very unlikely that we will be able to fill any vacancies for quite some time. The vacancies in your office have resulted in excessive caseloads for the attorneys you have. The FY09 budget ensures that relief through personnel is unavailable so your office is forced to cut the services it provides. We cannot maintain an ongoing situation where DPA attorneys are expected to handle an uncontrolled, excessive, and unethical number of cases.

Having reviewed your office's responsibilities and caseload, I am **hereby directing that no services be provided in the following areas:**

1) 202(a) Mental Inquest cases
2) Family Court status cases
3) Family Court adult contempt cases
4) Probation Revocations – District and Circuit Court
5) Preliminary Parole Revocation Cases

These service cuts are required to ensure that the attorneys in your office can provide competent representation to all clients. As these cuts are being ordered by the Public Advocate and Trial Division Director, who are ultimately responsible for ensuring ethical caseloads, you have no discretion in this area and must comply with this directive.

You should immediately meet with the judges whose courts will be affected by these cuts. As with the conflict cases discussed above, you should provide any help you can in securing conflict-free counsel. Again, it is not our intention to disrupt the court, but to assist the court in getting through this crisis caused by the insufficient funding of indigent defense.

Office caseloads will be reviewed monthly. If these cuts result in a greater than expected reduction in caseload, some or all of these services will be restored. If your office's average caseload rises due to an increase in assignments or a decrease in attorney personnel, further cuts may be required in the future.

Every DPA attorney must provide ethical representation for all clients. These limits are one method to achieve ethical caseloads. However, I recognize that there may be offices where the limits contained herein are actually too high, due to a high number of complex cases (including death penalty cases), significant non-representation responsibilities, or an unusual number of inexperienced attorneys on staff. If you believe that further service cuts should be implemented by your office, please feel free to contact me.

Conclusion: The leaders of DPA tried hard to convince the General Assembly that we were inadequately funded to provide all the services necessary to fulfill the constitutional right to counsel for all citizens. Rather than provide the funds we needed, the General Assembly actually cut $2.3 million from our already insufficient budget. As a result, we have no choice but to impose cuts in services. This can be done prudently through deliberate, responsible strategic planning, or it can be done by continuing to provide services in the same manner we have in the past until our insufficient funding is depleted, at which time we would have to completely shut down our agency, most probably in the early spring of 2009. The limited cuts that have been directed in this memo are your office's part of our carefully considered plan to continue to serve the Commonwealth at a high level for the entire year, while also ensuring the provision of quality, ethical representation by our attorneys.

If you have any questions, please feel free to contact me.

cc: Scott West, Bluegrass Region Manager