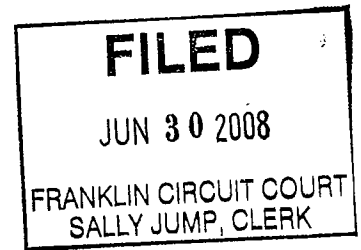


COMMONWEALTH OF KENTUCKY  
FRANKLIN CIRCUIT COURT  
DIVISION II  
CIVIL ACTION NO. 08-CI- 1094



**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  
1050 US Highway 127 South, Suite 100  
Frankfort, Kentucky 40601

and

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

**DEFENDANT**

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

Serve: Jonathan Miller  
Office of the Secretary  
Room 383, Capitol Annex  
Frankfort, KY 40601

and

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

**DEFENDANT**

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

and

**JODY RICHARDS,  
SPEAKER OF KENTUCKY STATE  
HOUSE OF REPRESENTATIVES**

**DEFENDANT**

Serve: Jody Richards  
702 Capitol Ave  
Anne Johnson Room 303A  
Frankfort KY 40601

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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;

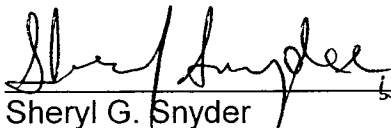
D. The service reduction plans are necessary in order to safeguard indigent criminal defendants' constitutional right to be appointed competent defense counsel and to be provided effective assistance of counsel;

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

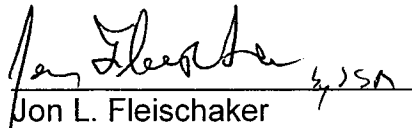
F. If private defense counsel is appointed by a circuit or district judge to represent indigent criminal defendants, the Secretary of the Finance and Administration Cabinet and Treasurer may be properly and lawfully ordered by the appointing judge to compensate the appointed counsel with funds from the 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.

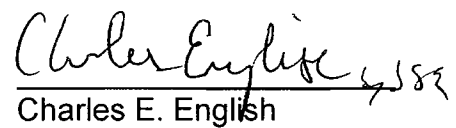
Respectfully submitted,



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