

The Advocate



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KY Defenders: Protecting Rights and Justice, Providing Fiscal Efficiency



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Public Advocate

A smart and safe way to reduce criminal justice costs to taxpayers is by making the criminal justice system more effective and efficient. To fully accomplish the efficiencies, Kentucky needs a strong public defense system.

Here is a look at what Kentucky defenders face, their needs, and commonsense ideas for safe reforms that are a source of additional funding for defenders, prosecutors and the courts *if they are implemented*.

DPA's 4-Point Plan to protect rights and justice and advance fiscal efficiency

1. Creating more alternative sentencing options for judges across the state for persons who would otherwise serve their time in a jail or prison;
2. Increasing the time local conflict lawyers spend on conflict cases to have cases timely, completely, and fairly resolved;
3. Reducing caseloads of public defenders to insure cases are addressed sooner with quicker and final resolutions; and
4. Realigning the 32 DPA trial offices to 57 to reduce delays and improve the efficiency in the local justice communities.

Current biennium: \$4.4 million deficit

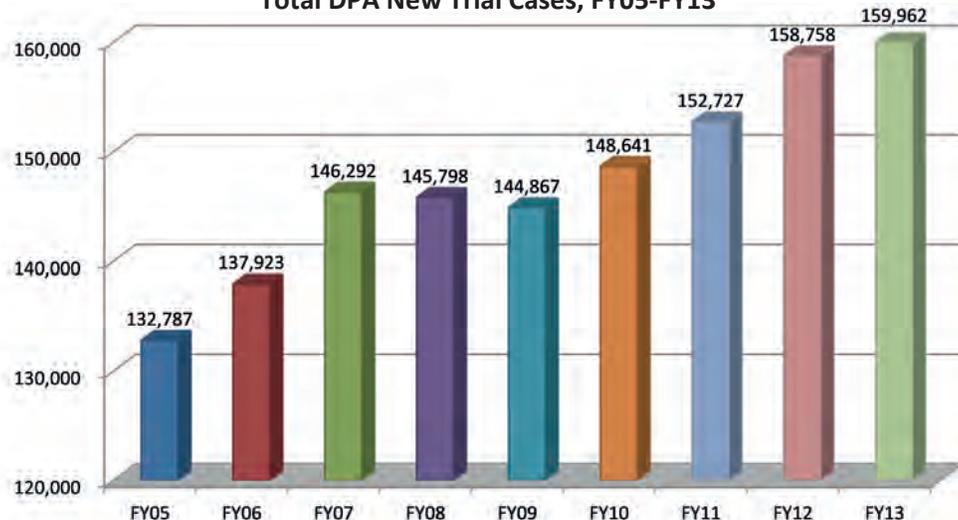
DPA had a \$1.7 million deficit last fiscal year and has a \$2.7 million deficit in the current fiscal year. These shortfalls have resulted from a combination of factors including increased court-ordered case appointments, a substantial workers comp bill due to the death of one of our investigators, and a continuing decline in revenue from the three fees that were projected to make up 11% of the DPA biennial operating budget.

The Governor continues to recognize Kentucky defenders' critical role in the operation of the criminal justice system and insuring public safety with his request for a \$4.4 million current year appropriation for DPA. Kentucky public defenders protect rights and advance justice while providing fiscal efficiency for the criminal justice system.

Cases increase while funding decreases

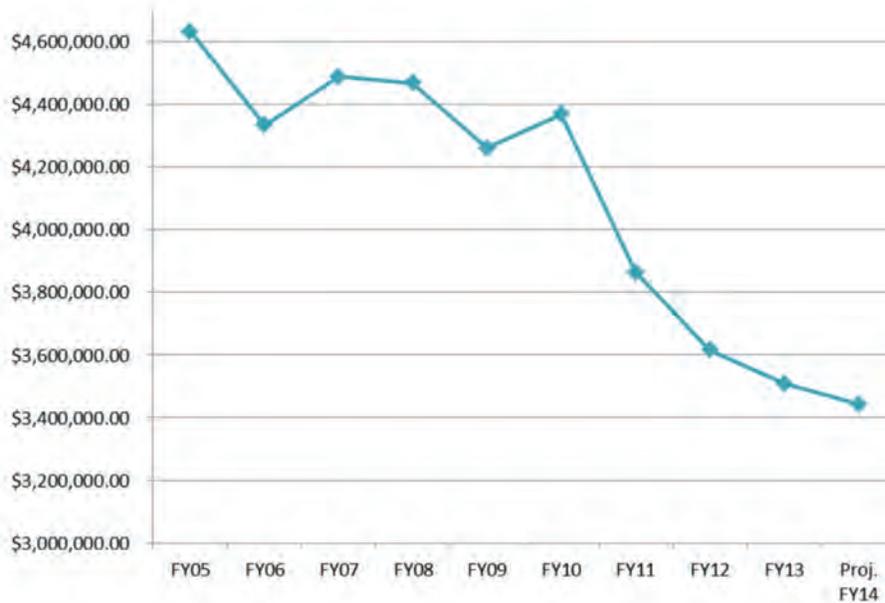
Just like Corrections, DPA does not control its workload and has no discretion in accepting court appointments. From FY 05-13, DPA court-ordered trial case appointments increased by 27,175.

Total DPA New Trial Cases, FY05-FY13



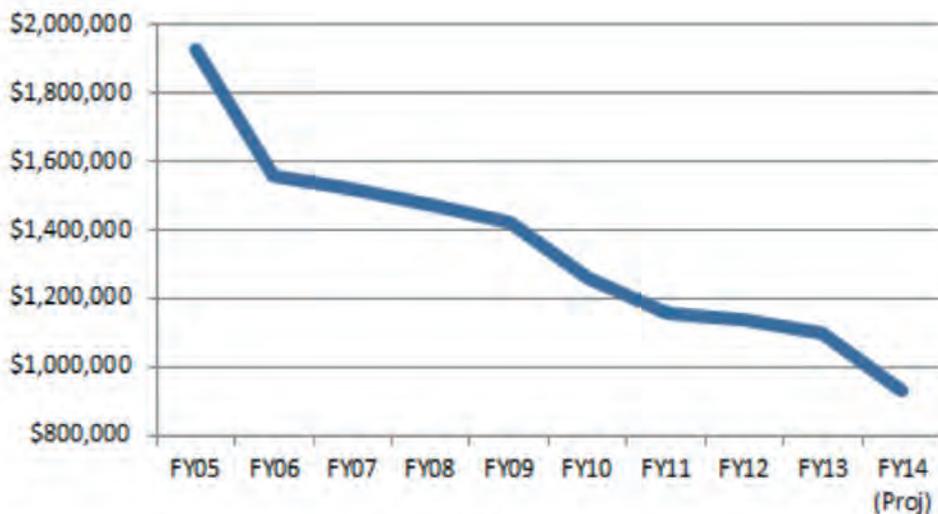
Since FY09, total revenue actually received by DPA dropped from \$4.2 million to a projected \$3.4 million in FY 14, a decline of almost 20%. The economic downturn and the significant drop in the number of cases in the criminal justice system no doubt explain this steady decline. However, the County Attorney Traffic Diversion Program has also amplified the decrease in court costs funding. In FY 13 some 18,279 traffic cases were taken out of the court system with no court cost placed on them when they were diverted.

DPA Revenue FY05 - FY14



DPA portion of court costs steadily declining

DPA receives 3.5% of total court costs collected, with DPA's portion capped by statute at no more than \$1.75 million, as authorized by KRS 42.320(2)(f)



DPA's dilemma

DPA's predicament is that its case appointments have steadily increased while DPA's actual funds have steadily decreased.

DPA's 4-Point Plan to protect rights and justice and advance fiscal efficiency

Further investment in public defenders will provide considerable cost savings for the criminal justice system and will bring lasting efficiencies. Support of the Kentucky Department of Public Advocacy's 4-point plan to meet Kentucky's constitutional right to counsel mandate will provide real, tangible, sustainable savings to the criminal justice system.

Additional funding is needed to continue DPA's innovative work and to meet national standards for the constitutional right to counsel. The DPA 4-Point Plan is:

1. **Creating more alternative sentencing options for judges across the state for persons who would otherwise serve their time in a jail or prison;**
2. **Increasing the time local conflict lawyers spend on conflict cases to have cases timely, completely, and fairly resolved;**
3. **Reducing caseloads of public defenders to insure cases are addressed sooner with quicker and final resolutions; and**
4. **Realigning the 32 DPA trial offices to 57 to reduce delays and improve the efficiency in the local justice communities.**

Alternative sentencing social worker program saves state millions; more savings possible

The DPA Alternative Sentencing Social Worker Program is a state-of-the-art, nationally recognized program that has saved Kentucky millions in jail and prison costs. It is poised to save millions more with a modest additional investment to increase its capacity.

This program is a practical, cost-efficient way to reduce corrections costs that required \$45.5 million over the last two years in unbudgeted necessary governmental expenses for a prison population above projections.

Harvard University's John F. Kennedy School of Government and its Ash Center for Democratic Governance and Innovation announced in May 2013 its top 25 award winners for 2013. The Kentucky Alternative Sentencing Social Worker Program was one of the top 25 innovators for 2013. The award brings additional national recognition to this innovative program. It follows on the 2011 recognition by the National Criminal Justice Association's award as an Outstanding Criminal Justice Program in the southern region.

The substantial savings to Kentucky of this DPA program have been confirmed by a recent UK Study. An August 2013 University of Kentucky Center on Drug and Alcohol Research Report, *The Kentucky Department of Public Advocacy Social Worker Alternative Sentencing Program Pilot Evaluation Study 2013* conducted by Robert Walker, M.S.W., L.C.S.W., Jennifer Cole, M.S.W., Ph.D., and Jaime Miller, B.A. summarizes the preliminary findings from a pilot study of the outcomes of the DPA Alternative Sentencing Program. It used a convenience sample of 20 potential sentences for an outside range of possible costs of incarceration in the absence of any possible alternative sentencing arrangements. It found that for every dollar spent on an alternative sentencing plan recommended by DPA, there was a savings of \$4.47 to \$6.80.



Harvard University's John F. Kennedy School of Government and its Ash Center for Democratic Governance and Innovation recognized The Kentucky Alternative Sentencing Social Worker Program as one of the top 25 innovators for 2013.

An investment of \$2.8 million to expand the DPA Alternative Sentencing Social Worker program by adding 19 alternative sentencing social workers beginning January 1, 2015 and an additional 18 beginning October 1, 2015 would have a biennial cost of \$ 2.8 million. At a minimum, these social workers would lead to a yearly net incarceration savings to the state of \$3.7 million.



Left to right: Kita Clement (Bowling Green), Rena Richardson (Madisonville), Joanne Sizemore (London), Abena Amoah (Covington), Jessica Dial (Columbia), and Heather Stapleton (Prestonsburg). Not Pictured: Becky Gary (Hopkinsville)



Greg Stumbo

"As the state's revenues continue to improve, we will have to see if we can expand this nationally recognized program's reach even more."

Greg Stumbo, Speaker of the House



Jay Wethington

"DPA alternative sentencing social worker Rachel Pate continues to provide invaluable service to the court in Owensboro. Her work is consistently exemplary."

Jay Wethington, Chief Circuit Judge,
6th Judicial Circuit, Owensboro



Brian Wiggins

"The social work program has provided invaluable assistance to the judicial system. Ms. Richardson has routinely furnished this Court with evaluations and assessments of criminal defendants suffering from drug dependency. These assessments have assisted the Court in determining appropriate alternatives to incarceration. In addition, Ms. Richardson serves as a member of our drug court team and her insight during staff meetings is highly valued. For these reasons alone, the social worker program should continue."

Brian Wiggins, Circuit Judge,
45th Judicial Circuit, Greenville



Chris Cohron

"Mrs. Clement has built an excellent track record on finding treatment options for defendants that had exhausted all traditional avenues. Her work has provided all parties and the Court another viable option to appropriately address the issues of defendants."

Chris Cohron, Commonwealth Attorney,
8th Judicial Circuit, Bowling Green



J. Michael Brown

"The Kentucky Alternative Sentencing Social Worker Program received a national award from the National Criminal Justice Association as an innovative means to help promote criminal justice initiatives in the country, including a reduction in incarceration costs. There is no doubt that the DPA Alternative Sentencing Social Worker Program is one that actually does work and does produce."

J. Michael Brown, Secretary,
Justice and Public Safety Cabinet, Frankfort



Rep. John Tilley

"Good ideas don't implement themselves. The first time I heard the idea of the defender alternative sentencing pilot program, and saw it in action myself, I knew it was a winner and I think the numbers bear that out. So count me in on support for it."

Representative John Tilley, Hopkinsville



Andrew C. Self

"It is my privilege to work with an outstanding DPA staff here in Christian County. In my experience, the excellent work performed by the local DPA social worker is extremely beneficial to the court and certainly to the attorneys in that office as well. On a regular basis, I communicate with and often rely on the information obtained by the social worker in making important decisions regarding probation, treatment and incarceration. It would be a tremendous loss to my court and our community if the local DPA office did not have a social worker to provide so many essential services."

Andrew C. Self, Circuit Judge,
3rd Judicial Circuit, Hopkinsville



Bryan Sunderland

"Our members are interested in it from a budgetary standpoint, as you all well know from our Leaky Bucket Report and our work in support of HB463, in support of that. We want to look at it as making sure our spending priorities in the state are in order. When the Public Advocate came to the Kentucky Chamber of Commerce, I think my initial reaction when Dave Adkisson and I met with him was, we don't come asking for line item appropriations, we look at the big picture, how the state operates and how that impacts the businesses across the state. But one thing that we've shared with you is our spending principles and the idea that state government ought to be investing and we ought to be looking at a fact based, results first, type approach, like we worked with the PEW Foundation. We reviewed the materials from the U of L study and this is completely consistent with HB 463, the idea that we can invest a small amount for a larger return. This is a way to honestly help implement HB 463, so I don't stand here as a member of the business community asking for a specific dollar amount, but I do encourage you as you all look at the budget to seriously consider this program because it certainly looks like a way to help continue implement HB 463."

Bryan Sunderland, Vice President of Public Affairs,
Kentucky Chamber of Commerce

More funding for private conflict counsel would increase efficiency

KACDL and KBA ask for support



William E. Johnson

KBA President-Elect

Chair KBA Task Force on Conflict Representation

Based on the Kentucky Bar Association's study chaired by KBA President-Elect Bill Johnson, the Kentucky Department of Public Advocacy is seeking an increase in money provided to private criminal defense attorneys doing conflict work for cases DPA is unable to handle.

The proposal for additional funds would provide vital funding to local private attorneys to handle conflict cases, improve efficiency and reduce costs to county jails and the criminal justice system. The problem is so serious that \$5,682,375 each year of the biennium is needed.

Kentucky Bar Association evaluation and recommendations. The KBA Board of Governors unanimously adopted a resolution at its November 18, 2011 meeting endorsing findings and recommendations that call for the Governor and the General Assembly to improve the system for the representation of indigents in conflict cases. The nine recommendations relate to the funding and structure of the system, including allocation of an additional \$5+ million to implement changes that will bring the system into compliance with the ethical and constitutional requirements of the Kentucky Supreme Court and with the professional standards set out by the ABA.

KBA President Tom Rouse sent a letter to the Governor dated December 20, 2013 asking the Governor to include \$5+ million in his budget request to the 2014 General Assembly to implement the KBA recommendations.

The KBA noted that Kentucky's current conflict system is unconstitutional and vulnerable to disruptive legal challenge.

The Kentucky Association of Criminal Defense Lawyers formally endorsed the KBA recommendations

In a December 6, 2013 letter to Governor Steve Beshear, KACDL President Larry Simon said, "We urge you in your 2014 biennial budget request to the General Assembly to support the November 29, 2011 Findings and Recommendations of the *Kentucky Bar Association's Task Force on the Provision and Compensation of Conflict Counsel for Indigents* by providing a request for sufficient funding to ensure adequate compensation to allow attorneys the time and resources necessary to competently represent their contracted indigent clients in capital and noncapital cases." This reiterates the KACDL Resolution of November 29, 2011 expressing support.

President Simon also said, "Kentucky remains vulnerable to legal action, which has been successful in other states, challenging the constitutional adequacy of both the level of funding and the fixed cap. In *Jones v. Commonwealth*, 457 S.W.2d 627 (Ky. 1970) Kentucky's highest court recognized that "[s]ince the providing of counsel for indigent defendants in criminal prosecutions in the state courts is an obligation imposed on the state by the constitutions it would appear that the payment of reasonable compensation to such counsel would be in the category of an essential governmental expense," and that "it would seem that the state would be left with the choice either of not prosecuting indigents or of providing compensation for appointed counsel."

The KBA and KACDL letters are found at: tinyurl.com/conflictltrs

The burdens of the current system fall on counties, courts, and indigent defendants

The lack of adequate funding for conflict cases costs counties and the criminal justice system tangible money because local lawyers doing cases with negligible compensation are unable to devote the time to insure efficient processing of the cases. County jails pay more money because clients remain in jail longer. Courts cannot advance dockets as quickly as preferred and more continuances are required. Indigent defendants who are entitled to counsel have to wait for their case to be resolved.

The current system is cracking

Complications across the state are increasing. Judges have expressed concerns about the delays in conflict cases, either because DPA attorneys have to travel from other offices or because DPA cannot find a local attorney willing to take a case quickly enough. There have been some complaints about the quality of the conflict attorneys willing to work for DPA's inadequate rates. In one case, the Court of Appeals found a conflict attorney's representation to be so inadequate that his client was given a new trial. In another case, a Circuit Judge has required DPA to hire a private conflict attorney after prohibiting DPA from using full-time staff in a capital case despite DPA's assurance that ethical concerns were being met.

DPA conflict compensation to local lawyers is highly inadequate

In FY13, courts appointed DPA to 15,158 cases that created a conflict of interest, meaning that the client was entitled to a different attorney than the one DPA would normally assign. In 3,858 of these cases, DPA was required to find counsel outside the local office. Most were assigned to private attorneys who enter into contracts with DPA for a single case or a number of cases at a capped amount, e.g., \$250 for a misdemeanor, \$500 for a felony. On average, these cases, most of which are felonies, were compensated at \$384 per case.

Many private attorneys view DPA conflict cases as *pro bono* cases in light of the minimal compensation by DPA. Given that many of these cases involve multiple court and jail appearances, travel, support staff time and resources, and the significant other time requirements involved in defending a criminal case, private attorneys are hardly compensated at all for their work for indigent defendants. This is especially true in cases of a serious nature, such as homicide, where pretrial motions proceedings and trials involve multiple court appearances and many hours of investigation and preparation.

Handling conflicts through an adjoining DPA office increases costs to counties, courts and DPA

In hundreds of cases in FY13, conflict cases were assigned to attorneys in other DPA offices who traveled for court dates, investigation, and client meetings. While this option provides for coverage by full-time public defenders, it only adds to delays in cases being processed. This increases costs to counties, courts, and DPA. Once travel and communication expenses are considered, this method of covering conflict cases provides no real savings over assignment of private counsel.

Given the low level of compensation provided, many private attorneys are unwilling to accept cases. Among those who do, many are unable to provide the level of service an indigent criminal defendant deserves. Cases where a conflict of interest exists, through no fault of the defendant, are often handled with less professionalism than cases where no conflict exists. "Inevitably, economic pressure must adversely affect the manner in which at least some cases are conducted." *Jewell v. Maynard*, 383 S.E.2d 536, 544 (W.Va. 1989). This undermines the reliability of the process for these defendants.

Retaining employees

The Governor’s budget request to the General Assembly provides for increases in salary for all state employees. This will help all employees better face their fiscal challenges.

However, since 2005 DPA has lost 312 attorneys. This turnover rate is very expensive for DPA. A 2011 survey of state public defenders in the 7 surrounding states indicates that Kentucky defender salaries are below the average and explains in significant part why the turnover is so great.

	<u>Kentucky</u>	<u>Average</u>	<u>Difference</u>
Entry Salary for New Public Defender	\$38,770	\$45,015	14% below avg. (2 nd lowest)
Average Salary after 1 year	\$40,709	\$47,767	15% below avg. (Lowest)
Average Salary after 2 years	\$46,907	\$49,242	5% below average
Average Salary after 3 years	\$49,252	\$51,101	4% below average
Average Salary after 5 years	\$52,817	\$55,285	5% below average
Average Salary for Capital Attorney	\$55,390	\$80,291	31% below average (Lowest)
Minimum Salary for Supervisor	\$55,815	\$73,264	24% below avg. (2 nd lowest)
Average Salary of Head of Local Office	\$68,527	\$103,511	34% below average (Lowest)

An additional investment of \$1.3 million would enable DPA to increase attorney salaries as follows: Entry salary – raise beginning salary from \$38,770 to \$42,000 (effective January 1) and \$44,000 (effective July 1). Current staff attorneys and supervisors – Provide a one-time increase of 10% on January 1 to raise current salaries. Starting salary for future supervisors – raise minimum salary for supervisor from \$55,815 to \$62,145, the current midpoint of a Grade 17 position.

Reduction of excessive, unethical caseloads is necessary to increase efficiency

DPA trial attorneys opened an average of 476 new cases in FY 13. Trial case appointments increased by 4,086 in FY 11, 6,031 in FY 12 and 1,204 in FY 13. To insure competent representation that is provided timely and efficiently, caseloads must be reduced.

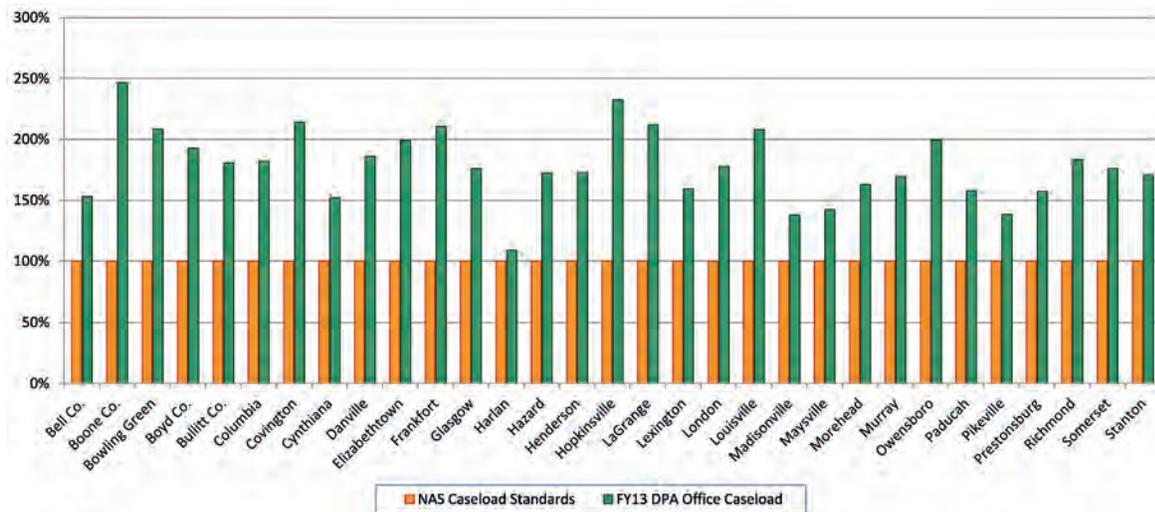
The minimum national standards require representation be continuously provided by the same lawyer from initial court appearance through trial, sentencing or dismissal. Further, an attorney representing a criminal defendant must spend sufficient time to accomplish the following:

- Interview and counsel clients;
- Seek pretrial release of incarcerated clients;
- Conduct necessary investigations;
- Pursue formal and informal discovery from the prosecution and file appropriate motions;
- Undertake sufficient legal research;
- Prepare and conduct for pretrial hearings and trials; and
- Prepare for and conduct hearings at which clients are sentenced.

See ABA Formal Opinion 06-441 *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation* (May 13, 2006); ABA *Eight Guidelines of Public Defense Related to Excessive Workloads* (2009).

Application of national workload standards to the caseloads in DPA offices reveals that all DPA offices exceed these standards as demonstrated by the following graph.

Every DPA Office Exceeds National Standards, FY13



Capital Representation

The ABA’s *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Kentucky Death Penalty Assessment Report* issued December 2011 after two years of analysis by an independent team of respected Kentucky professionals and criminal justice experts found major deficiencies that undermine the integrity of our state’s system including criticism of DPA for its failure to insure attorneys representing capital clients have caseloads according to national standards. Forty-five cases are being handled by DPA attorneys in field offices with attorneys average caseloads of 476 newly opened noncapital cases. This is unprofessional and must begin to be addressed by creating an additional group of capital litigation specialists that only handle capital cases.

Commonsense Savings

I have been asked by legislators to identify cost savings in the criminal justice system through commonsense criminal justice reforms that would not adversely affect public safety. Here are 10 commonsense ways to reduce criminal justice waste. Much money could be saved through modest reforms.

Ed Monahan, Public Advocate

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Defenders have high value: An effective public defense system protects innocent people from wrongful convictions; reduces the cost of pretrial detention by making sure bail proceedings are proper and sensible and release for defendants pretrial is secured for appropriate defendants; reduces the cost of incarceration by identifying defendants who are appropriate for cost-effective alternative sentencing and developing commonsense alternatives to incarceration; and insures that plea agreements and sentences are fair and not excessive under state law, which helps reduce our correctional population.

There are unrealized benefits for Kentuckians. When Kentucky's statewide defender program is able to continue and enhance its pioneering, nationally-recognized, innovative work with full staff and full funding, Kentucky taxpayers will see lower costs for the criminal justice system overall.

I am very proud of our Kentucky public defenders who protect the rights of individuals, advance justice, and provide fiscal efficiency to the criminal justice system.

**Jerry Cox, Chair,
Kentucky Public Advocacy Commission**