

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Twanda Marshinda Brown, <i>et al.</i> , Plaintiffs, v. Lexington County, South Carolina, <i>et al.</i> , Defendants.	Civil Action No. 3:17-cv-01426-MBS
--	---------------------------------------

**DECLARATION OF EDWARD C. MONAHAN IN SUPPORT OF PLAINTIFFS’
MOTION FOR SUMMARY JUDGMENT**

I, Edward C. Monahan, declare as follows:

1. I am a lawyer licensed to practice law in Kentucky.
2. Plaintiffs’ counsel retained me in this case as a testifying expert.
3. Attached to this declaration as Exhibit A is a true and accurate copy of the expert report that I prepared for this case. My full curriculum vitae is attached as an appendix to this report.
4. I signed the report on November 30, 2020.
5. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed in Lexington, Kentucky on this 30th day of March, 2022.

By: Edward C. Monahan
Edward C. Monahan

EXHIBIT A

**EXPERT REPORT OF
EDWARD C. MONAHAN**

TABLE OF CONTENTS

I. QUALIFICATIONS 1

II. SUMMARY OF FINDINGS AND RECOMMENDATIONS..... 2

III. DATA AND INFORMATION CONSIDERED IN FORMING OPINIONS 3

IV. FACTS, ASSUMPTIONS, AND METHODOLOGY 4

 A. 81 Sampled cases 4

 B. 35 Case files 8

V. OPINIONS AND BASES/REASONS FOR THEM 9

 A. Legal obligations of governments to provide counsel Right to counsel
when facing possibility of loss of liberty 9

 B. There are 8,725 cases in Lexington County Magistrate Courts
with charges for which incarceration is a possible sentence..... 15

 C. 5,312 to 6,185 indigents did not receive the assistance of counsel
in 2019 in Lexington County, South Carolina Magistrate Court..... 17

 D. Requirements for adequately funding and staffing public defense in
Lexington County’s Magistrate Courts..... 19

 1. National Standards for Public Defender Workloads..... 21

 2. Ethical Rules Require Reasonable Workloads 22

 3. ABA Workload Standard - National Maximum Standard
for Over Four Decades: 400..... 23

 4. NAC Caseloads Translated to Hours 23

 5. Maximum number of cases for a properly staffed attorney 23

 6. 13 - 16 attorneys are needed to adequately serve indigent
clients in Magistrate Court..... 25

 7. The ABA Ten Principles Workload Standard Is the Maximum
Number that Can Be Handled 25

- 8. Support staff.....26
- 9. 4 - 5 investigators are needed for the indigent defense cases in Magistrate Court26
- 10. 4 - 5 social workers are needed for the indigent defense cases in Magistrate Court27
- E. Practical considerations/reasons weigh in favor of provision of counsel and for adequate staffing.....28
- F. Staffing and funding of public defense in Lexington County’s Magistrate Courts is and has historically been inadequate31
 - 1. Lexington County has historically underfunded the Public Defender Office32
- G. Lexington County Magistrate Courts have structural, pervasive and serious constitutional deficiencies33
- H. An efficient, yet deeply problematic pattern and practice36
- I. Waiver of the right to counsel colloquies are deficient and trials in absentia are unusually high.....38
 - 1. Every reasonable presumption against waiver of counsel must be made.38
- J. The boilerplate waiver of counsel form is written at a college grade level and is not readily comprehensible to ordinary defendants.....39
- K. Rote, mechanical, automatic waivers.....43
- L. Trials in Absentia46
- M. Lack of counsel has deleterious effects for clients who face fines beyond their financial means, and lifelong collateral consequences that result from lack of counsel48
 - 1. Magistrate Judges must conduct meaningful ability to pay hearings ...49
 - 2. Collateral consequences of a conviction.....50
 - 3. At show cause hearings, convicted persons are unrepresented.....52

4.	Social and government costs.....	52
5.	Attorney at first appearance and value of an attorney: lawyers make a difference	53
N.	Lexington County’s practices lag behind other comparable South Carolina and national public defense county and city programs.....	56
1.	City of Beaufort and Town of Bluffton, South Carolina	56
2.	York County, South Carolina	57
3.	Denver, Colorado.....	57
4.	Aurora, Colorado	58
5.	Atlanta, Georgia.....	59
6.	National standards of practice.....	60
a.	Appointment and waiver.....	60
b.	Fines and fees.....	60
c.	ABA Ethics Opinion.....	62
d.	Workloads and support staff.....	63
VI.	SUMMARY OF FINDINGS AND CONCLUSIONS; RECOMMENDATIONS.....	63
VII.	FINDINGS.....	64
A.	Remedies, at a minimum, include.....	65
B.	Consequences of deficiencies	66
VIII.	ANTICIPATED FUTURE WORK	66
IX.	EXHIBITS	67

I, Edward C. Monahan declare:

I. QUALIFICATIONS

I have been asked by counsel for Plaintiffs to render an opinion on the provision of counsel in Magistrate Courts in Lexington County, South Carolina.

I served as a public defender with the Kentucky Department of Public Advocacy, the agency charged with the delivery of public defender services throughout Kentucky, for 38 years from 1976 to 2004 and from 2008 to 2017. I was the Public Advocate, which is the chief administrator of the Department of Public Advocacy, for Kentucky from September 1, 2008 until September 15, 2017. As the Public Advocate, I oversaw 545 full-time staff statewide. In the 2017 fiscal year, the Kentucky program provided representation in 162,485 cases at every level of the Kentucky criminal justice system. Major initiatives during my term as Public Advocate included reforms to pretrial release and expansion of alternative sentencing programs focused on alternatives to incarceration. Before that, I was Deputy Public Advocate from 1996 to 2008. I also served as Training Director from 1980 to 2001 with responsibility for developing and producing practice education and development programs and publications for Kentucky public defenders, investigators, paralegals, mitigation specialists, and legal secretaries for trial, appeal, and post-conviction levels.

Over the course of my career, I have personally represented criminal clients at trial, appeal, and post-conviction, including capital clients.

Since September 2017, I have worked as a criminal defense consultant, doing program evaluations, consulting with public defense programs, and training defenders and criminal defense lawyers. I serve on the National Association of Public Defenders (NAPD) Systems Builders, Workload, Fines and Fees, and Steering Committees. I am currently a member of the Kentucky Association of Criminal Defense Lawyers Board and co-chair of the Education Committee. I am chair-elect of the ABA Government and Public Sector Lawyers Division Council.

I am a graduate of the Columbus School of Law, The Catholic University of America, Washington, D.C.; Law Review, staff member 1974-1975, Associate Editor, 1975-1976; Degree: J.D., May 1976.

I previously provided an expert opinion in the 2018 litigation in Nevada, *Davis v. Nevada*, Case No. 170C02271B by affidavit in consideration of whether the case should be certified as a class action. In that litigation, I was asked to render an opinion on whether the public defense contracts were structured to provide meaningful representation of clients in the rural Nevada counties. I reviewed the contracts for requirements to comply with national and state norms including workload limits, adequate staffing, training, compensation, and independence.

Please see my curriculum vitae in the Appendix for more information about my experience, expert testimony, and publications.

I am being compensated by Plaintiffs' counsel at the rate of \$200 per hour for my work. My opinion is independent of the compensation I am receiving.

II. SUMMARY OF FINDINGS AND RECOMMENDATIONS

I found a series of significant deficiencies in the Lexington County Magistrate Court criminal legal system.

- A large number of persons who cannot afford counsel are convicted in Lexington County Magistrate Courts without a meaningful waiver of counsel process and without a ready option of appointment of counsel at their first appearance. Most cases are resolved by conviction, and a jail sentence suspended on the payment of fines/fees is usually imposed.
- Convicted persons are being threatened with jail and are then being jailed after their suspended sentence is reinstated upon their failure to comply with conditions of their suspended sentence.
- Convicted persons are not being represented at show cause hearings nor when a suspended sentence is reinstated, even if they were represented by appointed counsel at sentencing.
- I found no indication that any assessments of convicted persons' ability to pay were conducted at sentencing or at show cause hearings.
- I found no indication of alternatives for payment of fines/fees for those unable to afford the fines/fees being offered at sentencing or subsequently.
- Lexington County is substantially underfunding the public defender office.
- The Lexington County Public Defender Office attorneys providing representation in Magistrate Courts have an excessive workload and inadequate support staff.
- The appointment rate of public defenders to cases is quite low.
- Trials in absentia are very high. The number of jury trials is low. The dismissal rate is quite low.
- The waiver of counsel process is superficial.

It is my opinion that the deficiencies in the Lexington County Magistrate Court are resulting (and, unless corrected, will continue to result in) significant permanent injury to

defendants who are unable to employ counsel and are proceeding without legal assistance as well as to those clients who have an appointed counsel. Magistrate Court defendants fail to receive meaningful assistance of counsel with the required full adversarial testing of the prosecution's evidence, regardless of whether they are represented by counsel.

Waiver colloquies should be conducted in a meaningful manner at the comprehension level of the accused. Lexington County should provide more public defense funding, attorneys and support staff. Public defenders should continue to represent clients after conviction when clients face reinstatement or enforcement of a suspended sentence at a show cause or similar hearing.

III. DATA AND INFORMATION CONSIDERED IN FORMING OPINIONS

I reviewed the following information:

Beginning Document ID	Ending Document ID	Description
10204-A-0001	10204-A-0286	Documents produced by Defendants regarding Lexington County Sheriff's Dept, including booking reports.
10204-A-0315	10204-A-0329	Documents produced by Defendants regarding Lexington County Sheriff's Dept, including policies and procedures.
10204-B-0001	10204-B-0133	Documents produced by Defendants, including traffic tickets and court forms.
10204-B-0136	10204-B-0153	Documents produced by Defendants, including a case file.
10204-B-0164	10204-B-0178	Documents produced by Defendants, including correspondence, memoranda, orders, court forms, and case file.
10204-B-0180	10204-B-0193	Documents produced by Defendants, including correspondence, memoranda, orders, and forms.
10204-B-0251	10204-B-0264	Documents produced by Defendants, including correspondence, memoranda, orders, and forms.
10204-B-0281	10204-B-0313	Documents produced by Defendants, including revenue information related to magistrate courts.
10204-B-0380	10204-B-0382	Documents produced by Defendants, including information regarding fines and assessments.
10204-B-0424	10204-B-0430	Documents produced by Defendants, related to violation payments.
10204-B-0445	10204-B-0445	Documents produced by Defendants, including information regarding charges,

		finest, and assessments.
10204-C-0001	10204-C-0008	Documents produced by Defendants, including public defense agreements.
10204-D-0001	10204-D-0419	35 case files produced by Defendants.
DEFPROD_2018-11-15 000001	DEFPROD_2018-11-15 000014	Audio files produced by Defendants.
DEFPROD_2020-10-16 000001	DEFPROD_2020-10-16 000004	Audio files produced by Defendants.
MADSEN-SDT_000001	MADSEN-SDT_000382	Documents produced by Robert Madsen in response to subpoena duces tecum.
MONAHAN 000001	MONAHAN 000695	Case pleadings; court forms; Defendants' mediation production; ABA standards; data related to 2019 charges; Madsen caseload data; public defense budget information.
PL-PUBLIC-INDEX 000001	PL-PUBLIC-INDEX 000259	Lexington County public index records corresponding to select cases.

I communicated with the following persons:

- Katherine T. Cummings, Assistant Public Defender, Lexington County Public Defender's Office;
- Dillon McDougald, Assistant Public Defender, Lexington County Public Defender's Office;
- Robert M. Madsen, Eleventh Circuit Public Defender, Lexington, South Carolina;
- Shannon O'Cain, Case Manager, Lexington County Public Defender's Office;
- BJ Barrowclough, 16th Circuit Public Defender, York County, South Carolina;
- Alice L. Norman, MPD Chief Municipal Public Defender, Denver, Colorado;
- Kenneth Days, III, Director and Chief Public Defender, City of Atlanta Office of the Public Defender, Atlanta, Georgia;
- Doug Wilson, Aurora Chief Public Defender, Aurora Colorado.

IV. FACTS, ASSUMPTIONS, AND METHODOLOGY

In estimating the number of persons eligible for appointment of counsel in Magistrate Courts, I used the appointment rate in Sessions Court provided by Robert Madsen and comparable appointment rates for similar level of public defense work nationally from representative jurisdictions.

A. 81 Sampled cases

In formulating my opinions in this report, I was also provided with 81 case files of persons whose case did not go through bond court, which were randomly drawn from 2019 Magistrate Court data. For these 81 cases, the defendant's first appearance was in front of a magistrate in one of the seven district magistrate courts or DUI Court. Information about these cases was contained in data produced by Defendants on April 9, 2020, "2019 statistics (01179457xBE0C9).xlsx." This spreadsheet contained data from each magistrate court in

Lexington County concerning every charge that was disposed or resolved “nolle prosequi” in 2019. The spreadsheet provided a separate worksheet for each court and provided the following information for each charge: “Disposition Date,” “Case Number,” “Defendant,” “Case Type,” “Charge,” “Disposition,” and “Paid.”

The data was analyzed in order to determine the number of individual cases resolved in 2019 across all of Lexington County’s magistrate courts that concerned at least one charge punishable by jail according to South Carolina statute. The analysis shows that the magistrate courts of Lexington County resolved 8,725 cases involving at least one jailable offense in 2019, with the definition of “jailable” defined conservatively. The analysis did not include any cases resolved with the payment of fines and fees before the court hearing for the charge. Nor does the analysis include situations in which the only jailable charge in a case was a charge for which Defendants’ data did not provide enough information to determine whether the charge was jailable. For example, if the charge was a traffic offense that can only lead to jail if prosecuted as a second or subsequent offense, and the magistrate court records did not specify whether the charge was for a first, second, or subsequent offense, the charge was excluded altogether.

From these 8,725 cases, 1,986 were identified using the methodology below. From these 1,986 cases, 100 were randomly drawn, but as described below, only 81 could be used for this analysis.

Below are the analytic steps that were followed to identify and analyze these 81 cases:

1. All data from all worksheets in Defendants’ spreadsheet (“2019 statistics (01179457xBE0C9).xlsx”) was imported and consolidated into a data analyzing application.
2. All charges with “bond” in the Court field were filtered out of the set of data used to identify cases with jailable charges.
3. All charges that were resolved with “Forfeiture/Criminal Traffic” were filtered out of the data set (the “Forfeiture/Criminal Traffic” disposition signifies that the defendant paid the citation before the hearing date and the charge therefore did not come before a magistrate).
4. In this consolidated data set, the “Charge” field was used to identify traffic and criminal charges resolved by the magistrate courts in 2019 in order to determine which charges carry the possibility of jail time. The statute governing each charge was looked up to determine whether, according to South Carolina law, jail is a possible punishment for that charge. For each row in the consolidated spreadsheet, it is noted whether the charge is “Jailable” or “Non-Jailable.”
 - a. “Non-Jailable” charges are those for which the relevant statute does NOT permit jail as a punishment for the offense. Note that this designation is conservative because it does NOT count charges for which a judge initially imposes a fine, but then later imposes jail for nonpayment of the

- fine.
- b. “Jailable” charges are those for which the relevant statute either requires or permits jail as punishment for the offense. These include:
 - i. All criminal charges.
 - ii. Traffic charges that either permit or require jail as a punishment.
 - iii. The jailable traffic charges were further separated to identify traffic charges for which there was not enough information in the magistrate court records to determine whether the charge was jailable. These charges were excluded from the analysis, as described below to ensure that the analysis draws a conservative estimate of the number of jailable charges resolved by the magistrate courts in 2019.
- 5. Through this process, 12,120 charges against individuals were identified that were disposed or resolved nolle prosequi in the magistrate courts of Lexington County in 2019.
- 6. Among the 12,120 charges were many instances in which there were multiple charges relating to a single person that were disposed on the same day, signaling that a person had one “case” involving multiple charges that were disposed and/or resolved nolle prosequi in the same court on the same day.
 - a. When discussing the appointment of an attorney to represent an indigent defendant, the “case” and not each “charge” should be the focus. This is because a defendant facing three charges before the court on a given date will appear at one singular moment at which the court will need to determine whether to appoint counsel. Thus, the analysis uses the “case” as the operative proceeding that triggers appointment of counsel.
 - b. The data analyzing application was used to identify from the consolidated data set all defendants with multiple charges in the same court with the same disposition date. We assumed that these charges were all part of one “case.”
- 7. From the remaining data set, we identified 9,662 cases that involved at least one charge carrying the possibility of jail as a punishment.
 - a. In 937 of these cases, the only jailable charge was a charge that we could not definitively link to a statute authorizing jail as a punishment.
 - b. The data provided by Defendants only indicates “charge” and, at times, did not provide enough information to determine whether a person charged with one of these offenses faced the threat of jail time. For

example, if the charge was a traffic offense that can only lead to jail if prosecuted as a second or subsequent offense and the magistrate court records did not specify whether the charge was for a first, second, or subsequent offense, the charge was excluded altogether. The data also did not provide the defendant's criminal history, so in these instances, it could not be determined the numbered offense.

- c. Thus, the 937 cases in which the only jailable offense was one that could not be definitively linked to a statute authorizing jail as a punishment were excluded. This is another measure to ensure that estimate of jailable cases handled by the courts in 2019 is a conservative one. Surely some, if not a good number, of the excluded charges were brought against people who already had a conviction or plea to the same offense in the same court or a different court. Nevertheless, these cases were excluded.
8. Through exclusion of those 937 cases, 8,725 unique cases were identified that involved at least one charge for which jail may be imposed as a possible punishment.
9. Some of the 8,725 unique cases had some or all charges that originated in bond court. The filtered case data was then compared against the cases from bond court by Defendant, Court, and Disposition Date to determine which cases had charges that originated in bond court. If the Defendant, Court, and Disposition Date from the cases with jailable charges matched the same fields in the cases from bond court, that indicated the case had charges originating in bond court before being transferred to the magistrate court, so the case was removed from the data set. Through exclusion of these 756 cases, 7,969 cases remained.
10. 860 of the remaining cases listed the defendant as "Expunged, Expunged" for the first and last name, indicating the case would not be listed in the Public Index system. Cases not listed in the Public Index system could not be used for this analysis, so they were also deleted. This left 7,109 cases.
11. Finally, any case with a disposition that indicated the defendant did not appear in magistrate court (e.g., trial in absentia dispositions) or that the case would not appear in the Public Index to be evaluated (e.g., dismissals) was excluded. This brought the pool of cases down to 1,986.
12. Using the random sample tool in the data analyzing application, 100 cases were randomly selected from these 1,986.
13. Out of these 100 cases, it was discovered that 12 cases originated in bond court in 2018, a period for which Defendants did not provide case information and thus could not be used to exclude these cases in Step 8 above. Excluding these 12 cases reduced the number of randomly sampled cases to 88.

14. While all of the remaining cases should have appeared in Public Index system, there were 7 cases that could not be found. In at least two of these cases, it appears the defendant may have been a minor and thus the case was withheld from the Public Index. There is no obvious explanation for the remaining 5. In any event, the exclusion of these cases reduced the pool of cases analyzed to 81.
15. For each of these 81 cases, the case number in the magistrate court records was used to locate the case record in the Public Index system.¹ The information in the Public Index record was analyzed to determine the following:
 - a. Whether the case was disposed at the defendant's first appearance in the magistrate court.
 - i. If the record was unclear, it was assumed that the case was not disposed at first appearance. This was to ensure that any analyses and conclusions remain conservative.
 - b. Whether the defendant was represented by an attorney.
 - i. If so, whether the attorney was a public defender or a private attorney.
 - c. What sentence was imposed.
16. I drew my conclusions from the information that was discovered in Step 15.

B. 35 Case files

I also reviewed magistrate court files from 35 cases, which were produced by Defendants, in order to ascertain information about sentencing and representation across the seven division magistrate courts.² Each of these cases was disposed in 2019 or 2020 with at least two cases coming from each of the seven division magistrate courts and one case from Domestic Violence Court.

Having the case files allowed me access to information that is not typically available in Public Index records. For example, 100% of the 35 case files produced by Defendants contained sentencing information, compared to only 37% of the Public Index records for the 81 cases reviewed above. For the few defendants who were represented by counsel, there was also more information in the files about the representation than was available on the Public Index. These case files also contained copies of citations, Scheduled Time Payment Agreements, handwritten entries from magistrate judges about defendants, dispositions, and sentences, and other information that allowed me to analyze the case.

¹ See Bates Nos. PL-PUBLIC-INDEX_000078–259.

² See Bates Nos. 10204-D-00001–419; *see also* Bates Nos. PL-PUBLIC-INDEX_000001–77.

The factors used to analyze these records included:

1. The charge prosecuted
2. The disposition
3. The date the case was disposed
4. The magistrate court in which the case was disposed
5. Whether the case was disposed by bench trial or jury trial
6. Whether the case was disposed at the first appearance
7. Whether the defendant was represented by counsel and, if so, whether it was a private attorney or a public defender
8. Whether the court imposed a jail sentence suspended on payment of a fine
9. Whether a Scheduled Time Payment Agreement was entered into
10. Whether a Rule to Show Cause hearing was conducted
11. Whether the defendant failed to comply with the sentence imposed
12. Whether and how the magistrate court handled the defendant's failure to comply with the sentence

I drew my conclusions from the information that was discovered analyzing these factors.

V. OPINIONS AND BASES/REASONS FOR THEM

A. Legal obligations of governments to provide counsel Right to counsel when facing possibility of loss of liberty

My professional analysis and opinions are informed by and grounded in the guarantees of our Constitution, the application of those guarantees through the case holdings of the United States Supreme Court, and my experience during more than four decades as a public defender and public defense administrator, educator, and consultant.

Lawyers make a difference. Indeed, they are constitutionally required when an accused faces the possibility of incarceration, even when that incarceration is suspended on condition of compliance with payment of fines and fees or other conditions of the sentence. This is well settled. An accused “is entitled to appointed counsel at the critical stage when his guilt or innocence of the charged crime is decided and his vulnerability to imprisonment is determined.” *Alabama v. Shelton*, 535 U.S. 654, 674 (2002).³ *see also* U.S. Const., Sixth Amendment (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

When liberty is at risk, the guiding hand of counsel is essential because the law, like medicine, engineering, and science, is complicated. A lawyer is the gateway to safeguarding the other individual liberties of our constitutions. Lawyers know what the defenses are to criminal allegations, and they understand how to obtain and apply the facts to the law as detailed in statutes and decades of caselaw. Even highly educated lay persons are not skilled in knowing the

³ *See also* U.S. Const. amend. XI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

rules of evidence, the rules of procedure, or the science of the law. They are also not skilled in knowing the consequences of a conviction, the meaning of a lesser-included offense, the relative appropriateness of a plea offer, or the possibilities of dismissal or diversion. Lawyers extract and evaluate essential facts from the conflicting confusion of data that arise in individual cases, especially in cases that the system seeks to triage.

The representation provided to James Moore II in Lexington County Magistrate Court by a public defender appointed to represent him on October 22, 2019 is an example of the critical benefit of legal representation. Mr. Moore was charged on August 11, 2019 with drug possession. He was appointed counsel. His public defender filed a motion requesting discovery and a list of the state's witnesses. On January 14, 2020, with advice of counsel, Mr. Moore pled guilty to a \$50 nonwaivable court costs. His lawyer worked with the arresting officer to negotiate this outcome as she made the case that her client suffered from serious mental illness and was self-medicating.⁴

This outcome for Mr. Moore, who was represented by the public defender, is significantly more beneficial than many other outcomes of unrepresented defendants charged with drug possession during the same timeframe. For instance, my review of 35 case files⁵ disposed in 2019 and 2020 included several unrepresented persons convicted of drug possession charges who had fines and fees in the following amounts: \$419.73 for Rosa Francesca Argueta; \$633.45 for Kramin Bookard; \$765 for Xavier Quinshawn Brunson; \$787.95 for Jimmy Dale Buckley; and \$633.45 for Richard Tyler Creamer. Mr. Brunson, Mr. Buckley, and Mr. Creamer were also imposed jail sentences suspended on the payment of these fines and fees.

There is no less need for lawyers for offenses termed petty, as a conviction for those offenses brings many detrimental lifelong consequences that are far from trivial. The cases often need a lawyer to marshal the facts to prevail on a defense or advocate thorny constitutional challenges to charges. Speed too often prevails over care and attention. In courts with jurisdiction for the so-called petty offenses, the volume and speed often require an advocate for deliberate employment of process and procedure designed to ensure fair results. Volume begets rush that begets inadequate knowledge and preparation.

The critical role of lawyers has been confirmed again and again by our constitutions, United States Supreme Court caselaw, South Carolina statutes, guidance from the Chief Justice of the South Carolina Supreme Court, and common sense.

Governing legal frameworks have always informed the provision of public defense in my work as Kentucky Public Advocate, and they inform my analysis of the Lexington County Magistrate Courts proceedings.

In *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963), Mr. Gideon was convicted of a felony. The Court held that a person unable to employ counsel who is prosecuted by the state is entitled under the Sixth and Fourteenth Amendments to the United States Constitution to the

⁴ See Bates Nos. 10204-D-0007-23; Interview with Katie Cummings, Assistant Public Defender, Lexington County (Nov. 24, 2020).

⁵ See Bates Nos. 10204-D-00001-419.

assistance of counsel. In doing so the Court explained its reasoning:

- Our adversary system of criminal justice requires representation by counsel to ensure fair process and outcomes;
- Prosecutors are lawyers to ensure the public is protected;
- People with money hire lawyers when charged with crimes to make sure their defenses are fully presented;
- Lawyers in criminal courts are necessities, not luxuries, as indicated by governments and people of means hiring lawyers in criminal courts;
- To ensure that every defendant stands equal before the law, our constitutions greatly value procedural and substantive safeguards designed to assure fair trials before impartial tribunals;
- Fairness cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

The Court made clear in *Gideon* that the right of a person to be heard is meaningless, worthless, and hollow without the assistance of counsel and that even the most educated layman is not skilled in the law with all its intricacies.

Mr. Gideon was found not guilty on retrial with the assistance of counsel. Many thousands of defendants in Lexington County who are unable to employ counsel are not receiving the assistance of counsel as *Gideon* promised.

The United States Supreme Court has emphasized how very important procedure is to fair treatment and how much help a lawyer provides when liberty is on the line. The guiding hand of counsel ensures that the accused is able to use all procedural protections that promote valid outcomes. “[P]rocedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. Procedure is to law what ‘scientific method’ is to science.” *In re Gault*, 387 U.S. 1, 21 (1967) (internal quotation omitted).

Argersinger v. Hamlin determined that a person unable to hire counsel is entitled to counsel when charged with a misdemeanor because “[t]he assistance of counsel is often a requisite to the very existence of a fair trial,”⁶ and “[t]he Sixth Amendment . . . provides specified standards for ‘all criminal prosecutions.’”⁷ The Court held that “absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.”⁸ The Court laid out

⁶ *Argersinger v. Hamlin*, 407 U.S. 25, 31 (1972).

⁷ *Id.* at 27 (quoting U.S. Const. amend. XI).

⁸ *Id.* at 37.

the practical reasons for why counsel is necessary:

- Legal and constitutional questions involved in misdemeanor cases can be complex;
- As an example, vagrancy cases “often bristle with thorny constitutional questions”⁹;
- When deciding on whether to plead guilty, “[c]ounsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution”¹⁰;
- The volume of misdemeanor cases “may create an obsession for speedy dispositions, regardless of the fairness of the result”¹¹;
- Too often with large dockets, “speed often is substituted for care, and casually arranged out-of-court compromise . . . is substituted for adjudication. Inadequate attention tends to be given to the individual defendant, whether in protecting his rights, sifting the facts at trial, deciding the social risk he presents, or determining how to deal with him after conviction. The frequent result is futility and failure”¹²;
- “There is evidence of the prejudice which results to misdemeanor defendants from this ‘assembly line justice.’ One study concluded that ‘(m)isdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel.’”¹³
- The possibility of incarceration, no matter how short, is not petty, trivial, or inconsequential for someone facing lifelong damage to his career and reputation.¹⁴

This reasoning is particularly relevant to understanding the systematic deficiencies occurring in the Lexington County Magistrate Courts. For instance, the speed with which Lexington County magistrates handle waiver of counsel is a hallmark that erodes defendants’ right to counsel.

Scott v. Illinois, 440 U.S. 367, 373-74 (1979), determined that “the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance

9 *Id.* at 33.

10 *Id.* at 34.

11 *Id.* at 34.

12 *Id.* at 35.

13 *Id.* at 36 (citing American Civil Liberties Union, Legal Counsel for Misdemeanants, Preliminary Report 1 (1970)).

14 *See id.* at 37.

of appointed counsel in his defense.”

Counsel tests the prosecution’s case and enables access to the other individual constitutional guarantees. *United States v. Cronin*, 466 U. S. 648, 656 (1984), recognized that the “right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” It reiterated the necessity of lawyers: “An accused’s right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases ‘are necessities, not luxuries.’ Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be ‘of little avail,’ as this Court has recognized repeatedly. ‘Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.’” *Id.* at 653-54 (internal citations omitted).

Even when public defenders are appointed in Lexington County Magistrate Courts, they cannot fully test the prosecution’s case because their workloads are excessive and they do not have sufficient investigative and social worker assistance.

Appointment of counsel is required when a charge *could potentially* result in loss of liberty, not simply when incarceration is imposed. *Alabama v. Shelton*, 535 U.S. 654, 658 (2002), analyzing *Argersinger and Scott*, held that “a suspended sentence that may ‘end up in the actual deprivation of a person’s liberty’ may not be imposed unless the defendant was accorded ‘the guiding hand of counsel’ in the prosecution for the crime charged.” (quoting *Argersinger*, 407 U.S. at 40).

Shelton made clear that a person unable to afford counsel “is entitled to appointed counsel at the critical stage when his guilt or innocence of the charged crime is decided and his vulnerability to imprisonment is determined.” 535 U.S. at 674. This is because the conviction “has never been subjected to ‘the crucible of meaningful adversarial testing,’ *United States v. Cronin*, 466 U.S. 648, 656 (1984). The Sixth Amendment does not countenance this result.” *Shelton*, 535 U.S. at 667.

The appointment of counsel must be timely made. *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008), reaffirmed that “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”

South Carolina statutory law confirms that counsel shall be appointed for a person who faces a loss of liberty and who is unable to retain counsel:

SECTION 17-3-10. Persons entitled to counsel shall be so advised; when counsel shall be provided.

Any person entitled to counsel under the Constitution of the United States shall be so advised and if it is determined that the person is financially unable to retain counsel then counsel shall be provided

upon order of the appropriate judge unless such person voluntarily and intelligently waives his right thereto. The fact that the accused may have previously engaged and partially paid private counsel at his own expense in connection with pending charges shall not preclude a finding that he is financially unable to retain counsel.¹⁵

The South Carolina Supreme Court has the authority to establish rules to implement the indigent defense provisions of the South Carolina statutes:

SECTION 17-3-110. Power of Supreme Court to establish rules and regulations.

The Supreme Court of South Carolina is hereby empowered to establish such rules and regulations as are necessary for the proper administration of this chapter.¹⁶

In the September 15, 2017, Memorandum of Supreme Court of South Carolina Chief Justice Donald W. Beatty¹⁷ addressing “Sentencing Unrepresented Defendants to Imprisonment,” the Chief Justice reiterated to all South Carolina Magistrates that it is illegal to sentence a person to incarceration who is not represented by counsel, or who has not waived counsel, that an indigent must be informed of the right to the appointment of counsel, and that magistrates must consider a person’s ability to pay when imposing fines.

It has continually come to my attention that defendants, who are neither represented by counsel nor have waived counsel, are being sentenced to imprisonment. This is a clear violation of the Sixth Amendment right to counsel and numerous opinions of the Supreme Court of the United States. All defendants facing criminal charges in your courts that carry the possibility of imprisonment must be informed of their right to counsel and, if indigent, their right to court-appointed counsel prior to proceeding with trial. Absent a waiver of counsel, or the appointment of counsel for an indigent defendant, summary court judges shall not impose a sentence of jail time, and are limited to imposing a sentence of a fine only for those defendants, if convicted. When imposing a fine, consideration should be given to a defendant's ability to pay. If a fine is imposed, an unrepresented defendant should be advised of the amount of the fine and when the fine must be paid. This directive would also apply to those defendants who fail to appear at trial and are tried in their absence.

I am mindful of the constraints that you face in your courts, but these principles of due process to all defendants who come before you

15 S.C. Code Ann. § 17-3-10.

16 S.C. Code Ann. § 17-3-110.

17 Memorandum from Chief Justice Donald W. Beatty to Magistrates and Municipal Judges (Sept. 15, 2017), <https://www.sccourts.org/summaryCourtBenchBook/MemosHTML/2017-09.htm>.

cannot be abridged.

A March 14, 2018 memorandum of South Carolina Court Administration Staff Attorney Renee Lipson concerning “Procedures for Disposition of UTTs/Warrants and the Right to Counsel” followed the Chief Justice’s September 15, 2017 Memorandum with documents to implement the directive.¹⁸

There is a clear legal obligation to provide counsel to indigents facing the possibility of incarceration. South Carolina law recognizes the counties’ responsibility to procure funds beyond the state allocation of funding.¹⁹ Revenue generated from fines imposed under the looming threat of jail sentence provides financial benefits for the County.²⁰

Alabama v. Shelton instructs that persons without means are entitled to counsel when facing the *possibility* of loss of liberty. The fact that an accused is not incarcerated when sentenced does not lessen the right to prompt appointment of counsel. It is the *possibility* of incarceration that triggers the right. In South Carolina, a suspended jail sentence conditioned on payment of the fine or fee that is unfulfilled or not timely fulfilled can result in incarceration.

Incarceration without counsel is happening in Lexington County. A clear violation of the right to counsel occurring in Lexington County is illustrative of the degree of the system’s deficiencies. I have been informed that one Magistrate is finding persons who fail to appear in contempt and issuing a bench warrant for their arrest. When arrested, the person either sits in jail for days or is brought before the court and sentenced to 30 days in jail for contempt—all without the appointment of a lawyer or without notifying the lawyer who has been previously appointed.²¹

Each person unable to afford counsel is guaranteed meaningful assistance of counsel with the required full adversarial testing of the prosecution’s evidence. That guarantee is not being met in Lexington County.

B. There are 8,725 cases in Lexington County Magistrate Courts with charges for which incarceration is a possible sentence

While the Magistrate Court does not have jurisdiction over the most serious criminal cases in South Carolina, its jurisdiction includes cases that impose lifetime harm on clients, including misdemeanor traffic, property, DUI, and domestic violence offenses that allow significant fines and terms of incarceration and have major direct and collateral consequences for individuals.²² Additionally, these Magistrate Court convictions, when enhanced by future

¹⁸ Memorandum from Renee Lipson to Summary Court Judges and Staff (Mar. 14, 2018),

<https://www.sccourts.org/summaryCourtBenchBook/MemosHTML/2018-03.htm>.

¹⁹ See S.C. Code Ann. § 17-3-540 (“Maintenance and staffing of county public defender offices.”).

²⁰ See S.C. Code Ann. § 14-1-207 (“Additional assessment, magistrates court; remittance; disposition; annual audits.”).

²¹ Interview with Katie Cummings, Assistant Public Defender, Lexington County (Nov. 24, 2020).

²² According to the South Carolina Judicial Branch web page, “[t]here are approximately 311 magistrates in South Carolina, each serving the county for which he or she is appointed. They are appointed by the Governor upon the advice and consent of the Senate for four year terms and until their successors are appointed and qualified. (Art. V, §

convictions, bring substantial penalties.

In 2019, the Magistrate Courts of Lexington County resolved 8,725 cases involving jailable offenses.²³

The dispositions of these cases indicate 35 jury trials, a rate of 0.40%. There were 2,177 trials in absentia, a rate of 24.95%. There were 151 dismissals, a rate of 1.73%.²⁴

This is a very high rate of trials in absentia, a low rate of jury trials and a low rate of dismissals. In Kentucky in FY20 (July 1, 2019 -June 31, 2020), 7.3% of misdemeanor cases resulted in a complete unconditional dismissal.²⁵ The Aurora Public Defender Office, which represents 3,000 clients per year, averages 80 dismissals per month, which is the equivalent to the rate of 32% annually. In 2020, the Aurora Office has conducted 27 jury trials with 63% of its clients found not guilty and no cases are tried in absentia.²⁶ In 2018, approximately 70% of the cases set for trial by the Denver Municipal Court Public defender Office were dismissed on the day of trial after investigation undermined the prosecution's case.²⁷

The vast majority of cases in Magistrate Court are offenses where incarceration is explicitly authorized by South Carolina statutes.

Most of the persons sentenced in Magistrate Court receive fines with a certain number of days in jail suspended on condition that the fines and fees are timely paid. This *possibility* of jail triggers the Sixth Amendment right to counsel. A “suspended sentence that may ‘end up in the actual deprivation of a person's liberty’ may not be imposed unless the defendant was accorded ‘the guiding hand of counsel’ in the prosecution for the crime charged.”²⁸

26, S.C. Const., and S.C. Code Ann. § 22-1-10). Anyone seeking an initial appointment as magistrate must pass an eligibility examination before they can be recommended to the Governor by the senatorial delegation. S.C. Code Ann. § 22-2-5. Magistrates must also attend an orientation program, pass a certification examination within one year of their appointment, and attend a specified number of trials prior to conducting a trial. Magistrates have criminal trial jurisdiction over all offenses which are subject to the penalty of a fine not exceeding \$500.00 or imprisonment not exceeding 30 days, or both. (S.C. Code Ann. § 22-3-550). Some traffic and criminal statutes grant the summary courts greater jurisdiction. These statutes will specify that the magistrate court can try cases with a higher penalty provision. Examples include, but are not limited to, domestic violence, third degree (S.C. Code Ann. § 16-25-20(D)(1); third offense driving under suspension (S.C. Code Ann. §56-1-460(d); and forgery, no dollar amount involved (S.C. Code Ann. § 16-13-10(C)). In addition, S.C. Code Ann. § 22-3-545 provides that magistrates may hear cases transferred from general sessions, the penalty for which does not exceed one year imprisonment or a fine of \$5,500, or both, upon petition by the solicitor and agreement by the defendant. Magistrates have civil jurisdiction when the amount in controversy does not exceed \$7,500. (S.C. Code Ann. § 22-3-10). In addition, magistrates are responsible for setting bail, conducting preliminary hearings, and issuing arrest and search warrants. Unlike circuit courts and probate courts, magistrate courts are not courts of record. Proceedings in Magistrate Court are summary. (S.C. Code Ann. § 22-3-730).” *The South Carolina Judicial System*, South Carolina Judicial Branch, <https://www.sccourts.org/summaryCourtBenchBook/displaychapter.cfm?chapter=GeneralA#:~:text=There%20are%20approximately%20311%20magistrates,successors%20are%20appointed%20and%20qualified..>

23 See Bates No. MONAHAN_000690; see also Sec. 3, “81 Sampled cases,” Steps 1–8, *supra*.

24 *Id.*

25 Email Interview with the Kentucky Public Advocate (Nov. 24, 2020).

26 Interviews with Doug Wilson, Aurora Chief Public Defender (Oct. 29-30, 2020).

27 Phone and Email Interviews with Alice L. Norman, MPD Chief Municipal Public Defender (Oct. 22, 30, 2020).

28 *Alabama v. Shelton*, 535 U.S. 654, 658 (2002).

The fact that most Magistrates suspend jail sentences does not lessen the right-to-counsel guarantee because those persons with suspended jail sentences face the real possibility that they will be jailed upon a Magistrate determining that they have not made timely payments. In fact, Magistrates rely on this threat of future jail when rendering the sentence. Magistrates want the possibility of actual jail as leverage to seek payment of fines and fees. The Supreme Court in *Alabama v. Shelton* recognized this threat as one which mandates appointment of counsel.

Lexington County does not appear to have made any legally enforceable commitment to take jail off the table for individuals appearing in Magistrate Court. To the contrary, the recordings²⁹ I reviewed demonstrate that when sentencing a person who has pled guilty, Magistrates tell many unrepresented persons that they can and will enforce a failure to pay with jail.

My review of files for 35 Magistrate Court cases disposed in late 2019 and in 2020 indicate that the Lexington County Magistrate Courts continue upon arrest to impose significant bond amounts and continue upon conviction to impose jail sentences suspended on condition of full payment of the financial portion of the sentence, includes a 3% collection fee on top of the fines and fees if defendants cannot immediately pay. These records also show that the Courts continue to levy substantial and maximum fines, and the Courts continue to require high monthly payments toward those fines.

These 35 files show that when the financial penalties are not timely paid, the Courts continue to conduct show cause hearings. Convicted persons are not represented by counsel at these show cause hearings. This is true even if they had counsel appointed to the case, because the public defender's representation ends upon its disposition.³⁰

Convicted persons are also being incarcerated for failure to comply with the conditions of the sentence. When persons who have been convicted and who have had their sentence suspended on condition of payment of substantial fees appear at show cause hearings for failure to pay the amounts due, they are also not represented by counsel at these hearings even if they were represented by a public defender at their initial sentencing.³¹

At sentencing and at show cause hearings for failure to comply with the sentencing conditions, I saw no evidence that magistrates are making meaningful determinations of defendants' ability to pay nor any consideration of alternatives to imposing fines and fees.

C. 5,312 to 6,185 indigents did not receive the assistance of counsel in 2019 in Lexington County, South Carolina Magistrate Court

Without precise data being available on the number of the 8,725 cases ofailable offenses that involved persons who were indigent, it is necessary to estimate the number using reasonable comparisons.

²⁹ See Bates Nos. DEFPROD_2018-11-15_000001-14.

³⁰ Interview with Katie Cummings, Assistant Public Defender, Lexington County (Nov. 24, 2020).

³¹ *Id.*

One comparison is the percentage of persons for which public defenders are provided in Lexington County's General Sessions courts. The Lexington County Public Defender's Office reports that it represents 70% of all adults charged with General Sessions' crimes.³²

Another reasonable comparison is other similar courts nationally. For instance, the Eugene Municipal Court Case Filings and Appointment of Counsel had appointment rates for FY2015-FY2019³³ as follows:

	FY2015	FY2016	FY2017	FY2018	FY2019
Misdemeanor Filings	3,728	3,654	3,989	4,251	3,731
Court Appointed Cases (CAC)	2,857	2,699	2,983	3,408	3,016
% CAC Case Filings	77%	74%	75%	80%	81%

For context, the Eugene, Oregon Population in 2020 is 178,329.³⁴ Lexington County, South Carolina Population 2020 is 303,460.³⁵

A realistic estimate of the number of indigent cases among the 8,725 cases involving jailable offenses in Lexington County, South Carolina Magistrate Court in 2019 is at least at the rate of 70% to 80% or 6,107 to 6,980.

The actual number of cases to which the Public Defender was appointed in 2019 in Lexington County, South Carolina Magistrate Court was 795.

This means that 5,312 to 6,185 persons were indigent but did not receive the assistance of counsel in 2019 in Lexington County, South Carolina Magistrate Court.

A 9% appointment rate in Lexington County is substantially lower than other jurisdictions doing similar types of cases.

32 Interview with Robert Madsen, Eleventh Circuit Public Defender (Oct. 29, 2020); *see also* Bates Nos. MADSEN-SDT_000378, 382.

33 Marea Beeman, Rosalie Joy, Michael Mrozinski & Nat'l Legal Aid & Defender Assoc., Review of the Municipal Court Indigent Defense Service Delivery Eugene, Oregon 13 (Sept. 2020) http://www.nlada.org/sites/default/files/pictures/NLADA_indigent_defense_service_delivery_Eugene_OR_11_17_20.pdf.

34 *See Eugene, Oregon Population 2020*, World Population Review, <https://worldpopulationreview.com/us-cities/eugene-or-population>.

35 *See Lexington County, South Carolina Population 2020*, World Population Review, <https://worldpopulationreview.com/us-counties/sc/lexington-county-population>.

D. Requirements for adequately funding and staffing public defense in Lexington County’s Magistrate Courts

The lack of adequate resources for the public defense system in Lexington County creates a number of problems across the Lexington County criminal legal system. The excessive caseloads and inadequate support staff have significant ramifications for clients and the system.

In this section, I first evaluate the number of cases and then make recommendations for the number of attorneys needed to satisfy prevailing national norms and the number of support staff necessary to provide adequate resources for the representation of clients.

I offer an opinion on two aspects of the counsel and support staff deficiencies in Lexington County. The first focuses on the workload and staffing for the current two defenders. The second focuses on the attorneys and support staff necessary to meet the needs of those unable to afford counsel and who are not being appointed counsel.

A summary of my conclusions are:

1. Current resources for adequate representation are insufficient.

The current two public defenders assigned to Magistrate Court have too many cases and not enough support staff. They should not be assigned more than 400 open cases and should be provided additional support staff: an investigator, social worker, and an administrative assistant, each of whom are not assigned to more than 3 attorneys.

2. Large numbers of indigent defendants are going unrepresented

There were between 5,312 to 6,185 persons who are indigent in the 2019 cases in the Magistrate Courts of Lexington County, South Carolina, and there is no indication that these figures will be reduced in the future. The County should provide the following staffing to ensure meaningful representation of all eligible persons unable to afford counsel: 13 - 15.5 attorneys; 4 - 5 investigators; and 4 - 5 social workers.

The analysis I made to arrive at these conclusions follows.

The Public Defender responsible for Lexington County reports the following annual case appointments in the County’s Magistrate Courts by calendar year:

- 2015: 425³⁶
- 2016: 388³⁷
- 2017: 373³⁸

36 See Bates Nos. MADSEN-SDT_000257–300.

37 *Id.*

38 *Id.*

- 2018: the Public Defender Office opened 432 Magistrate cases, closed 387, and had 297 open cases;³⁹
- 2019: the Public Defender Office opened 795 Magistrate cases, closed 496, and had 378 active cases open.⁴⁰

The increase in Magistrate Court case appointments from 432 in 2018 to 795 in 2019 is noteworthy. The increase may have multiple explanations. One explanation is that there were more appointments by Magistrate Judges in cases in 2019 because there were a greater number of cases of the type for which they were traditionally making appointments. It could also be explained by Magistrate Court Judges being aware of the pendency of this lawsuit. Yet another possibility is that there was increased consciousness and implementation of both the South Carolina Chief Justice's September 15, 2017 Directive and the March 14, 2018, memorandum of South Carolina Court Administration Staff Attorney Renee Lipson concerning "Procedures for Disposition of UTTs/Warrants and the Right to Counsel."

But based on my decades of public defender experience in Kentucky, the most likely explanation is that the availability of a second public defender staffing the Magistrate Courts resulted in the Magistrate Court Judges believing it feasible to make more appointments because there now was an attorney who could handle these additional appointments. In my decades of public defense work, I have found judges are more willing and likely to make appointments if there are additional public defenders available to staff cases.

The increase in the number of Magistrate Court cases handled by public defenders in 2019 is a positive sign for the appointment process and for clients. But the overall appointment of counsel for persons unable to afford counsel remains woefully deficient as many thousands of persons unable to afford counsel are unrepresented.

As noted above, in §4.C., a reasonable estimate is that at least 70% of the people being prosecuted are unable to afford counsel, yet only 9% received assistance of counsel in 2019, the highest percentage in any of the past five years, assuming the total cases in those years was comparable to 2019.

Until 2019 there was one public defender for Magistrate Court cases. A second public defender began September 23, 2019. Currently, the two public defenders assigned to represent indigent defendants in Magistrate Court cases in Lexington County have a total of 876 open cases. One attorney has been in this position for a number of years. That attorney currently has 418 open cases with 223 being domestic violence cases. After the resignation of a second attorney doing work in Magistrate Court, one of the attorneys transferred from General Sessions court work into this position in June 2020 and has 458 open cases with approximately 88 of these being DUI cases, and 100 or so being General Sessions cases.⁴¹

³⁹ See Bates Nos. MADSEN-SDT_000301–356.

⁴⁰ See Bates Nos. MADSEN-SDT_000357–377.

⁴¹ Email and Phone Interviews with Robert Madsen, Eleventh Circuit Chief Defender, two Magistrate Court Public Defenders, and Public Defender Magistrate Court Case Manager (Oct. 27-30, Nov. 2, 2020).

The first meeting by the attorney with a client generally takes place at the clients next court appearance after appointment which ranges from 1-2 months from arrest.

There are no investigators and no social workers assigned to the attorneys doing work in Lexington County Magistrate Court. Both Magistrate public defenders have a paralegal assisting them. Each paralegal works for a total of 3 attorneys. The other two attorneys do work in General Sessions court.

Discovery is not always timely provided. One court will no longer continue cases even after being notified that discovery has not been satisfied and the officer's time to comply has not expired. This refusal to continue results in many clients making unnecessary trips to court with exposure to COVID19, costs of transportation, costs of lost wages, and the stress of appearing in court. Sometimes clients end up wanting to plea and resolve just so they do not have to come back to court again because they cannot afford that expense of multiple appearances at court. Sometimes when discovery is provided at the initial court appearance, the court will seek to have the public defender review it very quickly, discuss it with the client, and move forward with resolution of the case. One Court that no longer grants continuances because a case is brand new and the defense is awaiting discovery has said more than once, "Well, you can talk to the client, since everyone is here, and see what they want to do" or "Since everyone is here, see what can get worked out." This places both clients and the public defenders in a legally and ethically inappropriate situation of trying to have the case resolved before discovery is provided. The public defender's representation cannot be a mere formality.

Space contributes to the ability to handle the work of representing clients. "Meaningful representation of public defense clients requires proper professional space, adequate supporting equipment, ability to conduct confidential communications, and adequate services. These factors directly affect the number of clients an attorney can ethically and competently represent and the effectiveness of the work that the attorney can do for the clients."⁴² The Lexington County Public Defender's Office does not have adequate space. Multiple people are in the front office and two people share the conference room, along with it being the file room.

1. National Standards for Public Defender Workloads

All public defense providers should have workload limits that are based on an empirical study conducted according to the best methodology to properly determine how much work can be reasonably done by each attorney and the office as a whole. Short of that, there are longstanding national standards that provide *maximum* numbers of cases a defender can handle. The *National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States* (1976) require defender programs to set *maximum* caseloads based on the relevant factors:⁴³

42 NAPD Policy Statement on Proper Professional Space, Equipment, Confidential Communications with Clients, Supporting Services for Public, Nat'l Assoc. for Public Defense (2020), https://www.publicdefenders.us/files/Space_FINAL.pdf.

43 "The Commission's charter was to utilize the standards developed by the National Advisory Commission on Criminal Justice Standards and goals in 1973 as a basic underpinning for an extensive study of defense services

In order to achieve the prime objective of effective assistance of counsel to all defender clients, which cannot be accomplished by even the ablest, most industrious attorneys in the face of excessive workloads, every defender system should establish maximum caseloads for individual attorneys in the system. Caseloads should reflect national standards and guidelines. The determination by the defender office as to whether or not the workloads of the defenders in the office are excessive should take into consideration the following factors:

- (a) objective statistical data;
- (b) factors related to local practice; and
- (c) an evaluation.

Principle 5 of the ABA *Ten Principles*⁴⁴ states: “Defense counsel’s workload is controlled to permit the rendering of quality representation. Counsel’s workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. 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.”

2. Ethical Rules Require Reasonable Workloads

The South Carolina Rules of Professional Conduct⁴⁵ describe mandatory ethical responsibilities of a lawyer, including Rule 1.1, Competence; Rule 1.2, Scope of Representation and Allocation of Authority Between Client and Lawyer; Rule 1.3, Diligence; Rule 1.4., Communication; Rule 1.7, Conflict of Interest: Current Clients; and Rule 1.16, Declining or Terminating Representation.

The ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 06-441, Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation (2006) reviewed these ethical responsibilities⁴⁶ and determined that public defenders had a responsibility not to

aimed at preparing a blueprint of guidelines and procedures which would meet the nation’s indigent defense needs.” Guidelines for Legal Defense Systems in the United States, Nat’l Legal Aid & Defender Assoc. (1976), http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf (internal citation omitted).

44 Ten Principles of a Public Defense Delivery System, American Bar Association (2002), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf (internal citations omitted) (“The Principles constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.”).

45 South Carolina Rules of Professional Conduct, South Carolina Judicial Branch, <https://www.sccourts.org/courtReg/>.

46 “Model Rules of Professional Conduct 1.1, 1.2(a), 1.3, and 1.4 require lawyers to provide competent representation, abide by certain client decisions, exercise diligence, and communicate with the client concerning the subject of representation. These obligations include, but are not limited to, the responsibilities to keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients;

take on excessive workloads, stating: “The Rules provide no exception for lawyers who represent indigent persons charged with crimes.”

Attorneys with large caseloads have been disciplined for failure to competently represent clients.⁴⁷

3. ABA Workload Standard - National Maximum Standard for Over Four Decades: 400

If a public defender office has proper staffing, including attorneys, investigators, and social workers, and they are all well trained and actively supervised, then as reaffirmed by the American Bar Association’s Principle 5 of the ABA *Ten Principles of a Public Defense System* (2002) the 1973 NAC Caseload Standard is a *starting* place to determine *maximum* workloads, “Numerical caseload limits are specified in NAC Standard 13.12 (maximum cases per year: ... 400 misdemeanors....”).

4. NAC Caseloads Translated to Hours

It is helpful to convert the NAC caseload maximums into hours needed per case by type. The absolute maximum number of regular hours available to an attorney per year is 2,080.⁴⁸ However, that number of available hours is high because it does not account for holidays, vacation leave, sick leave and time to be trained. If a government employee is provided 11 holidays plus 20 vacation days or more plus sick leave, that means at most 1,832 regular hours⁴⁹ of work are available each year for public defender attorneys. The ABA 10 Principles standard case maximums translate into hours as follows.

	<u>2,080 hours year</u>	<u>1,832 hours year</u>
Misdemeanors: 400 cases	5.2 hours/case	4.6 hours/case

communicate effectively on behalf of and with clients; control workload so each matter can be handled competently; and, if a lawyer is not experienced with or knowledgeable about a specific area of the law, either associate with counsel who is knowledgeable in the area or educate herself about the area.” ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 06-441, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation* (2006).
⁴⁷ “In a number of states, public defense attorneys have been disciplined for violating ethical rules by handling excessive caseloads and neglecting their clients. The California Supreme Court, for example, suspended two defenders for failures related to excessive caseloads. A contracted public defender in San Bernito County handled approximately 1,000 lower level cases per year, plus some felony cases, while subcontracting another lawyer to handle approximately 250 felony cases. According to the bar discipline case, the attorneys did not provide minimally adequate legal services with this caseload and failed to conduct virtually any discovery, investigation, or prepare their cases for court. Similarly, the Washington Supreme Court disbarred a former public defender in part due to charges of “voluntarily maintaining an excessive caseload” which the state bar deemed “prejudicial to the administration of justice.” Robert C. Boruchowitz, Malia N. Brink & Maureen Dimino, *Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts* 24 (2009)..

⁴⁸ 40 hours per week x 52 weeks = 2,080 working hours per year.

⁴⁹ 5 x 52 = 260 – 31 vacation and holidays = 229 work days x 8 hours per day = 1,832 working hours per year.

5. Maximum number of cases for a properly staffed attorney

The number of cases an attorney can handle in a year assumes proper staffing is available to the attorney, and travel times to and from the courthouses are reasonable. In Lexington County, neither Magistrate Court public defender has proper support staff and one of the attorneys has substantial travel time. As further detailed below, this means that the national standard of maximum cases, 400, is too high for those attorneys.

Indeed, both Lexington County Magistrate Court attorneys reported that they were, because of the lack of adequate support staff, doing substantial work that would better be done by an investigator, paralegal, or other assistant.

For instance, one attorney related that much time was spent sending failure to appear letters to clients. Another attorney reported that the review of DUI videos was extremely time consuming with the videos of arrest, transporting the accused to the jail and of the breathalyzer wait time and the breathalyzer test consumed 3-4 hours per DUI case. On top of this work is the work reviewing discovery, client communications, discussions with the prosecutor, and 3-4 court appearances. That attorney provides representation in the following courts, Traffic Court, Swansea Magistrate Court, Cayce/West Columbia Magistrate Court and Batesburg/Leesville Magistrate Court.⁵⁰

Another attorney spends 12-28 hours per month traveling to and from the various courthouses. That attorney is responsible for Domestic Violence Court with full dockets of half or whole days 2-3 times per week, Check Court once a month, Irmo Magistrate Court currently twice a month for an entire day, Oak Grove Magistrate currently twice a month for an entire day, Lexington Magistrate Court usually several times per week with 13 scheduled appearances in November 2020 that number will likely increase as additionally clients are appointed to her, the occasional hearing at Cayce/West Columbia Magistrate Court or Batesburg Magistrate Court and 2-8 Bench Warrant hearings per month handled at Bond Court usually for allegations the client violated the terms of their bond. The Bench Warrant hearings are often a challenge because notification is at the last minute. One recent week of work for one attorney involved 9 court appearances for 61 clients.⁵¹

The work of the paralegal includes entering files into the Defender Data electronic case management system, doing the initial interview of the client, preparing and sending the opening documents including the letter of representation, the Rule 5 and *Brady* discovery requests, assembling the physical files and managing the court appearance calendar, responding to court requests for changing court dates, placing returned discovery into files, and responding to phone calls from clients and family.

The two Magistrate Court attorneys have two paralegals supporting them and no other support staff. No investigators. No social workers. No other administrative assistance. Each paralegal has two other attorneys they are responsible for assisting. Both of those attorneys do

⁵⁰ Phone and Email Interviews with Two Magistrate Court Public Defenders and Public Defender Magistrate Court Case Manager (Oct. 27-30, Nov. 2, 2020).

⁵¹ *Id.*

General Sessions work.

As noted above, in § 4.C, between 5,312 to 6,185 persons were likely indigent but were not appointed counsel in 2019 cases in Lexington County Magistrate Courts. Assuming these figures will stay steady in the future,⁵² it is my professional opinion that at least

6. 13 - 16 attorneys are needed to adequately serve indigent clients in Magistrate Court.

At the low-end estimate of approximately 5,300 cases, 13 attorneys would be required to handle indigent clients at a rate of roughly 400 cases per attorney. At the higher-end estimate of approximately 6200 cases, 16 attorneys would be needed at a rate of roughly 400 cases per attorney.

7. The ABA Ten Principles Workload Standard Is the Maximum Number that Can Be Handled

It is important to note from that 13-16 attorneys is a conservative estimate of the attorneys needed in Lexington County's Magistrate Courts. This is because the NAC's standard of 400 cases per attorney is now viewed as the upper limit on the workload for adequate indigent defense. That standard remains the only national caseload standard available and a relevant metric. But the NAC's analysis was incomplete and out of date. The 1973 National Advisory Council method of merely counting the number of cases is no longer a valid measurement.

New workload studies indicate these case maximums are still too high to ensure meaningful representation. Merely counting cases does not adequately account for the work necessary, as it does not account for such things as the level and complexity of the case, the experience and skills of the attorney, and the sufficiency of staffing. The current "breed of workload studies is more rigorous than its predecessors."⁵³

The American Council of Chief Defenders issued a statement in 2007 calling for "each jurisdiction [to] develop caseload standards for practice areas that have expanded or emerged since 1973 and for ones that develop because of new legislation. Case weighting studies must be implemented in a manner which is consistent with accepted performance standards and not simply institutionalize existing substandard practices."⁵⁴

Workload methodology continues to evolve and increase in accuracy.⁵⁵ Four workload studies using the most developed methodology have been conducted by the American Bar

⁵² From my experience, it is likely that Lexington County will continue to have this number or more of indigent cases in future years.

⁵³ Geoffrey T. Burkhart, *How to Leverage Public Defense Workload Studies*, 4 Ohio St. J. Crim. L. 403, 429 (2017).

⁵⁴ American Council of Chief Defenders, Statement on Caseloads and Workloads 1 (2007), https://jjie.org/wp-content/uploads/2018/08/ls_sclaid_def_train_caseloads_standards_ethics_opinions_combined.authcheckdam.pdf.

⁵⁵ See Norman Lefstein, ABA Securing Reasonable Caseloads: Ethics and Law in Public Defense 140-60 (2011), <https://www.ils.ny.gov/files/Securing%20Reasonable%20Caseloads.pdf>.

Association Standing Committee on Legal Aid and Indigent Defendants in Missouri, Rhode Island, Louisiana and Colorado. They use the most sophisticated methodology, which is proving that previous workload studies have substantially underestimated the amount of work need to competently represent a client.⁵⁶ The Missouri Project has a National Blueprint for a workload study included at the end of that report.⁵⁷

In its 2015 *NAPD Statement on the Necessity of Meaningful Workload Standards for Public Defense Delivery Systems* (2015)⁵⁸, The National Association for Public Defense stated: “the time has come for every public defense provider to develop, adopt, and institutionalize meaningful workload standards in its jurisdiction.” Workload standards should be “derived and institutionalized through ongoing, contemporaneous timekeeping by public defense providers.”⁵⁹

A workload study specific to representation in Lexington County Magistrate Courts should be conducted to determine reasonable workloads so that, going forward, the Lexington County Magistrate Court public defender attorneys are not too overloaded to provide constitutionally adequate services to their clients. Without such a study, the NAC Standard is the absolute maximum number of cases that should be permitted.

8. Support staff

Furthermore, each Magistrate attorney should have access to the support of a paralegal, administrative assistant, investigator, and social worker in representing their clients.

The leading national standard on minimum public defense staffing is the *NAPD Policy Statement on Public Defense Staffing* (May 2020).⁶⁰ This national standard requires at least “one investigator for every three lawyers, one mental health professional, often a social worker, for every three lawyers, and one supervisor for every 10 lawyers. Additionally, there should be one paralegal and one administrative assistant for every 4 lawyers. Public defense organizations must have adequate staff or have access to adequate staff who perform necessary financial, IT, and human resource services.”

⁵⁶ See The Rhode Island Project (2017), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ri_project.pdf; The Colorado Project (2017), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_co_project.pdf; The Louisiana Project (2017), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf; The Missouri Project (2014), https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.pdf.

⁵⁷ American Bar Association, The Missouri Project 11-21 (2014), https://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.pdf.

⁵⁸ *NAPD Statement on the Necessity of Meaningful Workload Standards for Public Defense Delivery Systems*, Nat’l Assoc. for Public Defense (Mar. 19, 2015), http://www.publicdefenders.us/files/NAPD_workload_statement.pdf.
⁵⁹ *Id.* at 1-2.

⁶⁰ *NAPD Policy Statement on Public Defense Staffing* (May 2020), Nat’l Assoc. for Public Defense (May 2020), https://www.publicdefenders.us/files/NAPD_Policy%20Statement%20on%20Public%20Defense%20Staffing.pdf.

9. 4 - 5 investigators are needed for the indigent defense cases in Magistrate Court

In today's criminal legal system, attorneys need adequate support staff to competently represent clients. Lawyers need administrative and investigative support along with assistance from a social worker.

Investigation is necessary in all cases before disposition. Attorneys should use investigators routinely, because the responsibility to investigate every case is a core duty of the attorney representing the client. As stated in the ABA *Criminal Justice Standards for the Defense Function* (4th ed. 2017), Standard 4-4.1 Duty to Investigate and Engage Investigators, "Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges."

The duty to investigate is not subject to exception. Standard 4-4.1 provides: "***The duty to investigate is not terminated by*** factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, ***a client's expressed desire to plead guilty*** or that there should be no investigation, or statements to defense counsel supporting guilt."⁶¹ (Emphasis added).

NLADA *Performance Guidelines for Criminal Defense Representation*, Guideline 4.1 addresses the investigation responsibility of counsel: "(a) Counsel has a duty to conduct an independent investigation regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as promptly as possible."

The Guideline details the investigation responsibilities of the charging documents, interviews with the client, potential witnesses, police and prosecution, the scene and experts.

10. 4 - 5 social workers are needed for the indigent defense cases in Magistrate Court

The majority of clients plead guilty to the charged offense or a lesser included offense. In light of these pleas, one of the most important responsibilities of a public defender is to advocate for a reasonable sentence, including presenting a developed affirmative sentencing proposal, often a community-based alternate sentence to incarceration or fines.

National standards require defense-generated alternative sentencing plans⁶², sometimes

61 See also ABA Criminal Justice Section Standards, *Pleas of Guilty*, Standard 14- 3.2. (responsibilities of defense counsel are "(b) [t]o aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and address considerations deemed important by defense counsel or the defendant in reaching a decision. Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.")

62 See National Legal Aid & Defender Association, *Performance Guidelines for Criminal Defense Representation*, Guideline 8.1 Obligations of Counsel in Sentencing; 8.2 Sentencing Options, Consequences and Procedures; 8.3 Preparation for Sentencing; the Defense Sentencing Memorandum; 8.7 The Sentencing Process (1994). See also American Bar Association, *Standards for Criminal Justice: Prosecution and Defense Function* (4th ed. 2015)

(Standard 4-8.3 Sentencing, "...(d) Defense counsel should gather and submit to the presentence officers, prosecution, and court as much mitigating information relevant to sentencing as reasonably possible; and in an appropriate case, with the consent of the accused, counsel should suggest alternative programs of service or

termed a Defense Sentencing Memorandum.

National Legal Aid and Defender *Performance Guidelines for Criminal Defense Representation* (1994), Guideline 8.6, The Defense Sentencing Memorandum, sets out the substantial minimum responsibilities of the public defender: “(a) Counsel should prepare and present to the court a defense sentencing memorandum where there is a strategic reason for doing so. Among the topics counsel may wish to include in the memorandum are: (1) challenges to incorrect or incomplete information in the official presentence report and any prosecution sentencing memorandum; (2) challenges to improperly drawn inferences and inappropriate characterizations in the official presentence report and any prosecution sentencing memorandum; (3) information contrary to that before the court which is supported by affidavits, letters, and public records; (4) information favorable to the defendant concerning such matters as the offense, mitigating factors and relative culpability, prior offenses, personal background, employment record and opportunities, education background, and family and financial status; (5) information which would support a sentencing disposition other than incarceration, such as the potential for rehabilitation or the nonviolent nature of the crime; (6) information concerning the availability of treatment programs, community treatment facilities, and community service work opportunities; (7) presentation of a sentencing proposal.” The current Lexington County Magistrate Court public defenders do not have the capacity or expertise to fulfill this duty.

Both Lexington County Magistrate Court attorneys report that a substantial percentage of their clients have substance abuse or mental health issues that are entangled with the case.

E. Practical considerations/reasons weigh in favor of provision of counsel and for adequate staffing

There are significant consequences when there are not enough public defense lawyers or those lawyers have too many cases and not enough support staff and access to necessary resources.

Many clients go unrepresented because there is no capacity to adequately represent them. Clients pay the costs of representation that is not meaningfully provided.

The Lexington County criminal legal system pays the costs of delayed resolutions or resolutions that occur in an unfair manner.

The Lexington County public has less reason to have confidence that the process is properly adversarial and produces results that are reliable and valid.

Public defender attorneys who do not have the investigator, social worker, or expert services to support their representation have far less capacity to provide meaningful

rehabilitation or other non-imprisonment options, based on defense counsel’s exploration of employment, educational, and other opportunities made available by community services.”); American Bar Association, *Standards for Criminal Justice: Sentencing* (3d ed. 1994).

representation to each client.

On the other hand, systems that have proper staffing of public defenders, investigators, social workers, and administrative assistants, as well as access to expert services, provide significant public value, validity, and reliability to the legal process.

National sentencing standards direct that courts consider alternative sentences to incarceration developed by defense counsel.⁶³ When implemented through the recommendation of defense attorneys and experienced social workers, these plans provide cost-saving alternatives to incarceration. They are effective investments.

When public defense providers have inadequate resources that cause excessive workloads and inadequate social worker staff, attorneys are unable to produce well-developed sentencing plans for each client even though national performance standards require that level of sentencing advocacy. When sentencing advocacy is subpar, clients suffer the most; but Lexington County loses out when forced to pay excessive and counterproductive costs for unnecessary incarceration at initial sentencing or at failure to pay revocation proceedings.

As described above, an essential responsibility of competently representing a client is to provide thorough sentencing advocacy including developing and presenting sentencing alternatives according to national norms.

In a properly functioning public defense system, public defenders and alternative sentencing workers identify clients who suffer from substance abuse and/or mental health disorders and offer community-based, individualized treatment options to the court in lieu of incarceration or as a community service alternative to fines that a person is unlikely to be able to eventually pay. The value of these services is enhanced through the use of a skill called Motivational Interviewing, which engages an individual's willingness to start treatment, thus improving the odds that treatment will be beneficial and effective. This Motivational Interviewing is done by masters-level social workers within the protection of the attorney-client privilege allowing for frank conversations. The goal is to motivate individuals to acknowledge they have a problem that needs to be addressed, and to participate actively in their treatment and rehabilitation.⁶⁴

63 National Legal Aid and Defender *Performance Guidelines for Criminal Defense Representation* (1994), Guideline 8.1 Obligations of Counsel in Sentencing; 8.2 Sentencing Options, Consequences and Procedures; 8.3 Preparation for Sentencing; the Defense Sentencing Memorandum; 8.7 The Sentencing Process. American Bar Association *Standards for Criminal Justice: Prosecution and Defense Function* (4th ed. 2015), Standard 4-8.3 Sentencing, "... (d) Defense counsel should gather and submit to the presentence officers, prosecution, and court as much mitigating information relevant to sentencing as reasonably possible; and in an appropriate case, with the consent of the accused, counsel should suggest alternative programs of service or rehabilitation or other non-imprisonment options, based on defense counsel's exploration of employment, educational, and other opportunities made available by community services."; American Bar Association *Standards for Criminal Justice: Sentencing*, (3d ed. 1994).

64 The program is further explained at: *Alternative Sentencing Workers*, Dep't Public Advoc., https://dpa.ky.gov/who_we_are/ASW/Pages/default.aspx (last visited Nov. 30, 2020) and also at: *More Alternative Sentencing Worker Information*, Dep't Public Advoc., https://dpa.ky.gov/who_we_are/ASW/Pages/News.%20Resources%20and%20Reports.aspx (last visited Nov. 30, 2020).

Public-defense-employed social workers help motivate clients into participating actively in treatment and rehabilitation. This is critical because while courts can mandate treatment and this order can result in individuals attending treatment, whether individuals actually benefit from treatment requires that they be willing, motivated, and ready to accept new information. Through Motivational Interviewing, social workers help cultivate that willingness and therefore improve the odds that treatment will have beneficial effects.

The research supports this effect.⁶⁵ Motivational Interviewing has a lengthy history in the substance abuse field. It is used widely for substance abuse clients who are referred by the criminal justice system. More specifically, it has been shown to increase engagement with treatment and staying in treatment.

This approach to sentencing works better for clients and for the system as a whole. Studies demonstrate cost savings for those with many previous incarcerations. As an example, every \$1.00 spent on the Kentucky public defender alternative sentencing program had a return in FY2014 of \$5.66.⁶⁶ The findings of this independent evaluation demonstrate the value of this program. The clients in the study had many criminal justice engagements, and challenging social issues including:

- 79% were unemployed at the time of their arrest on current charges
- 18.5% reported having a brain injury
- Clients had a lifetime average of 8.4 previous incarceration episodes
- Almost 35% of clients had less than a high school diploma or GED and 7.1% had even less than 9 years of education
- 34.9% were at risk for being homeless if no alternative sentencing plan was in place
- 39.6% were victims of physical abuse, 29.6% were victims of sexual abuse, and 41.1% were victims of psychological abuse

Subsequent studies have shown that the cost savings identified in the FY2014 study were not an aberration. In FY2015, Kentucky's public defense social workers presented 2,389 plans to the

65 Baer, J.S., & Peterson, P.L. (2002). Motivational interviewing with adolescents and young adults. In W.R. Miller & S. Rollnick (Eds), *Motivational Interviewing: Second Edition*. New York, NY: Guilford Press, 320-332.
Carroll, K.M, Ball, S.A., Nich, C., Martino, S., Frankforter, T.L., Farentino, C., Kunkel, L.E., Mikulich-Gilbertson, S.K., Morgenstern, J., Obert, J.L., Polcin, D., Snead, N., & Woody, G.E. (2006). Motivational interviewing to improve treatment engagement and outcome in individuals seeking treatment for substance abuse: A multisite effectiveness study. *Drug and Alcohol Dependence*, 81, 301-312. Ginsburg, J.D.I., Mann, R.E., Rotgers, F., & Weekes, J.R. (2002). Motivational interviewing with criminal justice populations. W.R. Miller & S. Rollnick (Eds), *Motivational Interviewing: Second Edition*. New York, NY: Guilford Press, 320-332. Lundahl, B. & Burke, B.L. (2009). The effectiveness and applicability of motivational interviewing: a practice-friendly review of four meta-analyses. *Journal of Clinical Psychology*, 65, (11) 1232-1245. Miller, W.R. & Rollnick, S. (1991). *Motivational Interviewing: Preparing People to Change Addictive Behavior*. New York, NY: Guilford Press. Miller, W.R. & Rollnick, S. (2002). *Motivational Interviewing: Second Edition*. New York, NY: Guilford Press.

66 Robert Walker, M.S.W., L.C.S.W., University of Kentucky Center on Drug and Alcohol Research, SFY 2014 Evaluation Report: Kentucky Department of Public Advocacy Alternative Sentencing Worker Program 20 (May 2016), https://dpa.ky.gov/who_we_are/ASW/PublishingImages/Pages/ASW%27s-in-the-News/DPA%20ASW%20UK%20Outcome%20Study%20FY%202014.pdf.

court, 1,771 were accepted, and these accepted plans returned \$3.76 to \$5.66 for every \$1 invested. The program is offsetting over \$10 million in incarceration costs.⁶⁷ It has proven public value.

Unless social workers are incorporated into the Lexington County public defender regular representation practices, clients will continue to be underserved and Lexington County will continue to spend money imprudently.

To ensure competent representation, Lexington County should have one social worker for every three attorneys according to national staffing guidelines published by the National Legal Aid and Defender Association, Guidelines for Legal Defense Systems in the United States (1976) and the Bureau of Justice Assistance, U.S. Department of Justice, Keeping Defender Workloads Manageable (Jan. 2001).⁶⁸ Currently, the Lexington County public defense system has no social workers for its two attorneys in Magistrate Court.

When public defense offices do not have social workers, attorneys are less likely to be able to produce well-developed sentencing plans for each client even though national performance standards require that level of sentencing advocacy. When sentencing advocacy is subpar, clients suffer the most; but counties and the state also lose out when forced to pay excessive and counterproductive costs for unnecessary incarceration at initial sentencing or at revocation proceedings.

F. Staffing and funding of public defense in Lexington County’s Magistrate Courts is and has historically been inadequate

Chief Public Defender Robert Madsen advises that a public defender was first assigned exclusively to Magistrate Court September 16, 2013. A second attorney was funded by the County in September 2019. Both Magistrate Court attorneys have a paralegal assigned to them. One attorney’s paralegal also works for a second lawyer whose caseload is in General Sessions Court. The other attorney’s paralegal works for 2 other attorneys whose caseloads are in General Sessions Court. There are no investigators or social workers assigned to the work of the Magistrate Court Public Defenders.

67 Cara Lane Cape, M.S.W. Kentucky Department of Public Advocacy & Robert Walker, M.S.W., L.C.S.W. University of Kentucky Center on Drug and Alcohol Research, SFY 2015 Evaluation Report: Kentucky Department of Public Advocacy Alternative Sentencing Worker Program 16 (Sept. 2017), found at:

https://dpa.ky.gov/who_we_are/ASW/Documents/DPA%20ASW%20Outcome%20Study%20FY%202015.pdf

68 Guidelines for Legal Defense Systems in the United States, 10,

https://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf; Keeping Defender Workloads Manageable, <https://www.ncjrs.gov/pdffiles1/bja/185632.pdf>. See also Sixth Amendment Center, The Right to Counsel in Rural Nevada: Evaluation of Indigent Defense Services 123 (Sept. 2018),

http://sixthamendment.org/6AC/6AC_NV_report_2018.pdf (Support staff necessary for effective representation “includes one supervisor for every ten attorneys; one investigator for every three attorneys; one social service caseworker for every three attorneys; one paralegal for every four felony attorneys; and one secretary for every four felony attorneys.”).

1. Lexington County has historically underfunded the Public Defender Office

Lexington County is the sixth largest county in South Carolina.

The Lexington County Public Defender Office represents 70% or more of the adults charged with General Sessions crimes. However, the Office receives only 24.4% of the funding Lexington County provides to prosecutors.

Chief Public Defender Robert Madsen has consistently requested funding for an amount that is the average of the county funding received by the public defender offices in Horry County, which is the fifth largest county, and York County, which is the seventh largest county. Mr. Madsen’s requests have been repeatedly denied.

Given the comparisons to other South Carolina counties, the data is clear that the Lexington County Public Defender Offices is underfunded. This means that the Lexington County Public Defender Office is not receiving the minimally adequate financial resources to provide meaningful representation to all eligible clients in Lexington County Magistrate Courts.

The following financial information about the Lexington County Public Defender’s Office and its comparison to other comparable counties demonstrates both the longstanding inequity with prosecution funding and the underfunding of actual needs. For 2020, Chief Defender Madsen requested \$1,129,537.50. He received \$785,614.⁶⁹

<u>Public Defender</u>	<u>Solicitor</u>	<u>%</u>
FY14 \$ 514,306	\$ 2,622,571	19.6%
FY15 \$ 514,306	\$ 2,768,909	18.5%
FY16 \$ 514,306	\$ 2,853,952	18.0%
FY17 \$ 543,932	\$ 2,743,456	19.8%
FY18 \$ 543,932	\$ 2,853,718	19.0%
FY19 \$ 543,932	\$ 2,952,409	18.4%
FY20 \$785,614	\$ 3,216,617	24.4%

Solicitor’s budget increase over the last 7 years

Solicitor’s budget increase from 2014 to 2020	\$ 594,046
Public Defender entire contribution for 2020	\$ 785,614

The Solicitor’s Office increase alone is more than 75% of the Public Defender’s entire budget allocation for 2020.

69 Communication with Robert M. Madsen, Eleventh Circuit Public Defender, Lexington, South Carolina on October 29, 30, 2020, and materials presented by Robert Madsen to the Lexington County Council April 2019. See Bates Nos. MADSEN-SDT_000378, 382.

Disparate funding as compared to similarly sized South Carolina counties

County	Funding	Population (2010)
4. Spartanburg	\$1,184,035	284,307
5. Horry	\$1,268,800	269,291
6. Lexington	\$785,614	262,391
7. York	\$1,799,762	226,073

In addition, the data from comparable public defender jurisdictions demonstrate substantially more funds per case than Lexington County, South Carolina. For example, Aurora and Denver report spending substantially more per case than Lexington County.

G. Lexington County Magistrate Courts have structural, pervasive and serious constitutional deficiencies

Several cases graphically illustrate the depth of the pervasive structural constitutional deficiencies in the operation of the Lexington County Magistrate Court criminal legal system. Deficiencies discussed demonstrate how critical public defenders are to ensuring proceedings are constitutionally conducted.

1. Nora Corder

The 53-year-old Nora Corder was charged with uninsured motor vehicle fee violation, first offense, and diving under suspension for DUI, first offense.⁷⁰ On her arrest, she told the officer that she had run on hard times. She was summonsed to be present but was not in court. Instead of issuing a bench warrant, the Magistrate proceeded to try her in absentia and found her guilty on all charges. She was sentenced to 30 days suspended on payment of \$647.50 on the DUS conviction, plus 30 days suspended on payment of \$440 on the uninsured motor vehicle conviction, and 30 days suspended on payment of \$232.50 on the temporary license conviction. The entire court proceeding lasted 3 minutes and 41 seconds, with some of the time taken up with questions about her address. An appointed counsel could have helped ensure Ms. Corder's presence, could have explained her absence, could have explained her limited financial means and sought financial consequences at a lower amount, and could have aided Ms. Corder in gaining her license back.

2. Twanda Brown

As Twanda Brown's case demonstrates, Magistrates use jail as a threat for compliance with the suspended sentence conditions.⁷¹ The 39-year-old Ms. Brown⁷² was charged with driving under a suspended license, third offense, and tag light violation. In the blink of an eye, the Magistrate asked Ms. Brown if she understood that she could have an attorney or request a jury trial, asked her what she wanted to do, and asked her if she wanted to plead guilty or not guilty. Ms. Brown pled guilty and the Magistrate said, "So you waive your right to an attorney and a trial." (0:43-0:47). There was no audible response from Ms. Brown. Under questioning by

⁷⁰ See Bates No. 10204-A-0142.

⁷¹ See Bates No. DEFPROD_2020-10-16_000003.

⁷² See Bates No. 10204-A-0114.

the Magistrate, Ms. Brown said she never had a license. The Magistrate recited the traffic tickets that Ms. Brown failed to pay in the past. After learning that Ms. Brown had 7 children and employment issues, the Magistrate sentenced Ms. Brown to 90 days in jail suspended on payment of fines and fees totaling more than \$2,400.⁷³

The Magistrate decreed, “I am serious as a heart attack with you. You’ve got to pay at least \$100 a month. Because you’re going to owe me almost \$2,500. It’s a \$2,100 fine. I’m not having another hearing. If you miss a payment, normally I send a letter to come to court and talk to me. If you miss a payment, I’m sending this officer straight to arrest and you’re going to do 90 days in jail . . . I don’t care if you have 17 children. You need to think about that when you get up in the morning and you decide to break the law . . . If you think I won’t put you in jail in a New York minute, you are dead wrong. I don’t care if you have to get 5 jobs to pay my tickets off.” (5:34 – 6:48).

The assistance a public defender supported by a social worker could provide to Ms. Brown is obvious. The public defender could persuasively explain the inability to meet these financial penalties and could seek alternatives, especially alternatives that a social worker could develop.

3. Xavier Goodwin

As Mr. Goodwin’s case demonstrates, the Magistrates’ use of jail as a threat for compliance with the suspended sentence conditions is not an isolated occurrence.⁷⁴ The 31-year-old Xavier Goodwin, who had 6 dependents,⁷⁵ was charged with driving on a suspended license, third offense, and had been in jail for 61 days on another charge. The waiver of the right to counsel was less than perfunctory. The Magistrate sentenced Mr. Goodwin to pay \$2,100 and credit for time served. She ordered him to set up a payment plan. She told him that if he did not pay the fine, she would put him in jail. This financial penalty is likely a burdensome amount that would have been lower with the aid of counsel.

4. Sasha Darby

The Magistrate presiding over Sasha Darby’s trial gave her an 8-second colloquy about waiving all of her rights, followed by a defenseless trial.⁷⁶ The Magistrate said she did not have a sheet from Ms. Darby. Ms. Darby said she filled one out. The magistrate said, “well, I don’t have it.” (0:17). Without looking at how Ms. Darby filled out the sheet, the judicial officer in 8 seconds (0:20-0:28) informed Ms. Darby that she had a right to remain silent, right to an attorney, and right to a jury trial, that she was charged with assault. She asked if Ms. Darby understood her rights and then asked her how she pled, if she wanted a bench or jury trial. Ms. Darby pled not guilty and said she wanted a bench trial. The Magistrate never asked Ms. Darby if she waived the right to appointment of counsel. This bench trial lasted 11 minutes and 9 seconds. The Magistrate interrupted both the complaining witness when testifying and the

⁷³ *Id.*; see also Bates No. 10204-B-0105

⁷⁴ See Bates No. DEFPROD_2020-10-16_000004.

⁷⁵ See Bates No. 10204-A-0001.

⁷⁶ See Bates No. DEFPROD_2020_10-16_000002.

defendant's questioning of the complaining witness. The Magistrate told Ms. Darby to limit her questions without allowing Ms. Darby to fully provide the context of the matter.

The 21-year-old Ms. Darby, who was a single mother with one child,⁷⁷ testified on her own behalf and talked about the argument, discussing the rumors and defamation of character at her job. "We weren't getting along because of over charges in the way the bills were split." There was an insinuation by the complaining witness that Ms. Darby would hurt the complaining witness's daughter. "When she was talking to me, she was OK about taking my money from me and using my stuff. She was putting her hands up. The previous time we had a disagreement in the kitchen she had stepped to me and went up in my face and I stepped back and I said, 'That's the wrong thing to do, why would you walk up to me, I'm not trying to put my hands on you?'" Again, the Magistrate interrupted Ms. Darby's testimony and said, "Can we get to, talk about August 4 whether or not you assaulted her or not."

Ms. Darby: I did hit her, yes, ma'am.

Magistrate: And we're having this trial, why?

Ms. Darby: She wanted to push for it.

Magistrate: You're the one who asked for the trial.

Ms. Darby: I'm not sure, I'm not really familiar with legal terms. I just.

Magistrate: Well you know guilty, not guilty, we know what that means, right?

Ms. Darby: Yes ma'am.

Magistrate: OK, so you pled not guilty, you wanted a trial, that's what we're doing.

Magistrate: OK, anything else you want to tell me?

Ms. Darby: No ma'am.

....

Magistrate: Well, I'm going to find you guilty by your own admission. Why would you do that, why would you hit her and all like that? That's stupid.

Ms. Darby: I mean, looking back at it, it definitely was the wrong thing, I think I need to work on my anger and as far as feeling like someone's putting me back up into a corner. There was a lot of things happening that led up to that.

Magistrate: It doesn't matter, you leave, you walk away from it.

Ms. Darby: I was trying to but she was wanting money.

After asking if she had a job and preferred to pay a fine or do jail time, the Magistrate sentenced her to 30 days in jail suspended upon payment of \$1,000.

This case unambiguously illustrates that the shallow, insincere, rote waiver process and the truncated bench trial without a defense lawyer in Lexington County are a part of an unconstitutional scheme.

On top of that vital defect, this was not a trial that allowed the evidence to be fully presented by the uninformed pro se defendant in a persuasive manner. A fundamental right of an accused is the "right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). Assault cases among people who know each other and live with each other are often a matter of he said, she said evidence. The person charged often

⁷⁷ See Bates No. 10204-A-0085.

has a persuasive defense that can lead to acquittal if offered with the guiding hand of counsel. Ms. Darby did have a real defense. There was a story to tell that provided context and eliminated or mitigated blameworthiness. Ms. Darby, who stated and evidenced through her comments and actions with high unfamiliarity with the criminal legal process, made it clear that a lawyer is a necessity, not a luxury. She was in this pickle because the Magistrate used a perfunctory waiver process that did nothing to advise Ms. Darby of the dangers of self-representation. The unfairness was exacerbated by the Magistrate's aggressive shutting down of the questioning and the testimony to demonstrate the context of the situation, Ms. Darby's defense.

H. An efficient, yet deeply problematic pattern and practice

The proceedings of Nora Corder, Tawanda Brown, Xavier Goodwin, and Sasha Darby and the discussion in this Report that precedes this section, demonstrate that the structure and implementation of the Lexington County, South Carolina Magistrate Court system has fundamental flaws that undermine its ability to meet minimum constitutional requirements.

None of the Magistrate Judges are lawyers. Almost all, if not all, of the lay Magistrate Judges are former or retired law enforcement. It is significant that Magistrate Judges are not lawyers when evaluating the full and fair implementation of statutory law and case law, which often requires professional interpretation and judgment in their application. This may help explain the high number of trials in absentia. It may help explain why the waiver of counsel process is so rudimentary and inconsistent with requirements delineated by the United States Supreme Court.

The importance of having a trained public defender in the courtroom is considerably higher when none of the presiding Magistrates are themselves lawyers. Otherwise the risk of constitutional violations or other abuses in the disposition of cases is much higher. Lawyers must satisfy considerable requirements to obtain and maintain their license to practice law. They have substantial ethical responsibilities and are trained to exercise sophisticated professional judgments in complex situations when competing legal values are at issue. "Sometimes analogized to Aristotelian practical wisdom, professional judgment is 'neither a matter of simply applying general rules to particular cases nor a matter of mere intuition' but a process of bringing coherence to conflicting values within the framework of general rules and with sensitivity to highly contextualized facts and circumstances."⁷⁸

There are significant systematic deficiencies in the criminal legal system in Lexington County, South Carolina. The indicators of a constitutionally defective Lexington County, South Carolina Magistrate Court system are many and have been persistently present. The prominent pattern and practices undermine the right of indigents appearing before these courts to the meaningful representation assured by the Sixth Amendment.

The Lexington County Magistrate Court systematic failures include:

- Failing to conduct the constitutionally required procedural steps to verify a

⁷⁸ Katherine R. Kruse, *Professional Role and Professional Judgment: Theory and Practice in Legal Ethics*, 9 U. St. Thomas L. J. 250 (2011). <https://ir.stthomas.edu/cgi/viewcontent.cgi?article=1273&context=ustlj>

defendant's knowing, intelligent, and voluntary waiver of counsel. Using an efficient scheme to disincentivize a layman from requesting appointment of an attorney, and to expedite the docket at defendants' expense.

- Disposition of a case before a Magistrate often takes merely minutes.
- Overreliance on waiver documents that are above the grade level of most of the persons coming before the court.
- Prosecuting officers are nearly always the arresting officer, not a lawyer who is independent of the arresting function.
- Inadequate funding of the provision of counsel for indigents.
- Only 9% of the indigent cases receiving appointment of counsel, resulting in 91% of Lexington County's Magistrate Court cases prosecuted with the defendant not being afforded a lawyer.
- Public defenders are not appointed at the bond court stage;
- No public defender presence in all Magistrate Court dockets available for appointment;
- Absence of investigation, use of social workers, and use of experts.
- Few jury trials being conducted.
- No meaningful inquiry into the financial ability of a person to afford the imposed financial sentence.
- A pattern of suspending jail time as the threat for compliance with a payment plan.
- A lack of ability to pay proceedings.
- Failure to consider alternatives to payment of fines.
- A lack of legally enforceable assurance that a person who does not have the ability to meet the financial fines and fees will not be incarcerated.
- Pressure to resolve cases before discovery is provided.
- A dearth of relevant data that is routinely communicated to the criminal legal system and the public.
- Trials in absentia at a very high rate instead of the issuing of bench warrants for purposes of having the defendant present for the proceeding.
- Repeated, intentional decision by the Lexington County Council to underfund the Public Defender's Office and to fund it at great disparity with the Solicitor's Office.

This is the tragic picture of the pattern and practice of systematic denials of constitutional rights in Lexington County Magistrate Courts.

I. Waiver of the right to counsel colloquies are deficient and trials in absentia are unusually high

1. Every reasonable presumption against waiver of counsel must be made.

Given the overarching importance of counsel, the law holds that there is a presumption against waiver. In *Johnson v. Zerbst*, 304 U.S. 458, 464–65 (1938), a case originating in Charleston, South Carolina over eight decades ago, it was decided that “‘courts indulge every reasonable presumption against waiver’ of fundamental constitutional rights and . . . ‘do not presume acquiescence in the loss of fundamental rights.’ A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused. . . . The constitutional right of an accused to be represented by counsel . . . imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.”

It is the “solemn duty” of a judge “before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right at every stage of the proceedings. . . . This duty cannot be discharged as though it were a mere procedural formality.” *Von Moltke v. Gillies*, 332 U.S. 708, 722 (1948).⁷⁹ There must be a record of the waiver. In **Error! Bookmark not defined.** *Von Moltke*, the defendant who had no money and was without counsel stood before a judge and “told him that the indictment had been explained to her, signed a paper stating that she waived the ‘right to be represented by counsel at the trial of this cause,’ and then pleaded guilty.” *Id.* at 709. This was on the advice of an FBI lawyer-agent.

Most defendants are laypersons who seldom fully understand the criminal justice process, the full range of their choices, and all potential consequences of their decisions absent the help of a professional, their lawyer, who sees their situation through their eyes and interests, and who provides frank and full advice protected within the attorney-client privilege.

For there to be a knowing, intelligent, voluntary waiver of counsel, it is essential that:

- There is an authentic colloquy, not the mere signing of a form;
- The words used are at the comprehension level of the accused;
- The person knows that if unable to afford counsel that counsel will be appointed;
- That appointment of counsel is a real and present option that will be timely afforded;
- The person understands the dangers and disadvantages of self-representation.⁸⁰

⁷⁹ The Court reversed the case for a further hearing to determine whether the defendant did have the requisite understanding and competently waived counsel. *Von Moltke*, 332 U.S. at 727.

⁸⁰ “To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand.

After reviewing a sampling of the recordings of proceedings in Magistrate Court, it is my opinion that Lexington County Magistrates are not conducting the constitutionally required procedural steps to verify a determinant's knowing, intelligent, and voluntary waiver of counsel. The waiver of counsel process, the signing of a waiver form written at college-level reading comprehension, and the colloquies with defendants each lack the constitutionally minimum requirements necessary to ensure the decision by the accused is fully knowing, intelligent, and voluntary. Furthermore, Lexington County's trials in absentia lack minimal assurances of adherence to constitutional guarantees.

The constitutional deficiencies in the recorded proceedings I reviewed are significant. The fact that a defendant says he is informed of his right to counsel and wishes to waive the right does not automatically end a Magistrate's duties. Contrary to governing standards, Magistrates appear to be making every presumption *in favor of* waiver. Some of the overarching problems include 1) Magistrates relying on boilerplate waiver of counsel forms, 2) extremely cursory, rote waiver colloquies with defendants, 3) determination of knowing, voluntary waiver of counsel even where defendants are absent without evidence that they were notified of the hearing.

J. The boilerplate waiver of counsel form is written at a college grade level and is not readily comprehensible to ordinary defendants.

Faretta v. California, 422 U.S. 806, 807, 832–34 (1975), held that a “defendant . . . has a constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so,” but it emphasized that “the help of a lawyer is essential to assure the defendant a fair trial” and that “defendants could better defend with counsel's guidance than by their own unskilled efforts.” Before waiving counsel, a defendant “should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that ‘he knows what he is doing and his choice is made with eyes open.’” *Id.* at 835.

Magistrates are not making sure that defendants are aware of the dangers and disadvantages of self-representation.

To have any confidence in the process of a defendant reading and signing a waiver form, it must be at the defendant's reading level to ensure comprehension. When I was the Kentucky chief public defender for the statewide public defense program, I served on a working group of district court judges, county attorneys, private criminal defense lawyers, and public defenders. The workgroup addressed a number of issues including the colloquy for waiver of counsel by an accused. The workgroup examined current waiver colloquies being conducted by using the readability analysis provided in Microsoft Word as an important guide for the simplicity and transparency of the forms. Judges changed their colloquy practices as a result of learning that the colloquies were above the likely grade level of those appearing in court. The workgroup issued a

The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid[,] such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.” *Von Moltke*, 332 U.S. at 723–24.

best-practices manual and conducted a training at a subsequent Kentucky District Court judicial college.⁸¹

From my experience in Kentucky, it is highly unlikely that the waiver form that is being used in Lexington County is being understood by most defendants. For instance, the form used in Judge Buck’s Lexington County Central Traffic Magistrate Court on Nov. 15, 2018 is:

State vs. _____
Ticket/Warrant Number(s) _____
Offense(s) Charged _____
Penalty: _____

FARETTA WARNINGS

You have been charged with the criminal offense(s) listed above. Before you can plead guilty or not guilty to this charge(s) or proceed to trial, you must be informed that you have the right to an attorney. If you cannot afford an attorney (and meet certain income guidelines established by the Court), an attorney will be appointed to represent you, if you so choose. If you do not meet the eligibility guidelines to have an attorney appointed to represent you, you still have the right to an attorney to represent you on the charge(s) listed above, however the attorney must be retained at your own expense.

You do have the constitutional right to represent yourself and proceed without an attorney; however, I must inform you of the following:

- Self-representation can be dangerous and you have the right to have the assistance of a lawyer at all stages of the proceedings, and if you cannot afford a lawyer, a lawyer can be appointed to represent you.
- Criminal defense is a highly specialized and technical area of the law.
- There may be certain factual, legal, or other defenses to the charge(s) you are facing and if you choose to proceed without the services of a licensed attorney, you may not be aware of certain defenses.
- There may be issues related to the conduct of trial or a guilty plea that could arise in the future that you may not be aware of and it would be your attorney’s responsibility to be aware of those issues and how to properly address them before the Court, and, if necessary, preserve the issues for appellate review.
- There may be collateral consequences of a conviction or plea that you are not aware of, including, but not limited to, you could face increased penalties for subsequent offenses, suspension of your driver’s license, the restriction of the right to possess firearms and/or ammunition, or your immigration status may be affected.
- If you exercise your right to proceed without the services of an attorney, you are responsible for complying with all applicable rules of court, including rules of evidence, procedural

⁸¹ See, Recitation of Rights in Criminal Cases: A Kentucky Best Practices Guide (July 2012), https://dpa.ky.gov/Public_Defender_Resources/Documents/Best%20Practices%20-%20Recitation%20of%20Rights.pdf.

rules, and proper behavior before the Judge and/or Jury.

- You understand that if you waive screening for a court-appointed attorney, that you are responsible for hiring a private attorney if you want one.

I state that I have fully and completely read this document regarding self-representation and I have had any and all of my questions answered to my complete satisfaction.

Signature of Defendant	Date	Signature of Judge	Date
------------------------	------	--------------------	------

When a readability analysis is conducted on this waiver document,⁸² it shows that the document is written at the college level with a Flesh-Kincaid grade level of 14.1 and the Flesch reading ease is 43.9.⁸³

The following examples of the use of the college-level waiver form, combined with the minimalist exchanges between Judge Buck and defendants, with the judge using compound sentences and not warning about the dangers and disadvantages of self-representation, almost ensures that the exchanges are not a knowing, voluntary waiver of counsel by the accused. These waiver interactions are the antithesis of a thorough, meaningful waiver colloquy. These exchanges eschew the constitutional “solemn duty.” They are a mere formality to get past in order to convict and sentence defendants.

1. Jared White

Jared White was charged with open container of beer/wine in a motor vehicle and possession of marijuana.⁸⁴ The open container charge was not prosecuted in exchange for Mr. White pleading guilty.

Magistrate: I see that you signed this piece of paper called *Faretta* warning. That means you have read it. Do you understand it?

Mr. White: Yes

Magistrate: Do you have any questions about it?

Mr. White: No

Magistrate: Has anybody promised you anything or threatened you in any way outside the negotiations with the state in exchange for your guilty plea?

Mr. White: No

Magistrate: Are you under the influence of anything that would affect your ability to make a decision today?

Mr. White: No

Magistrate: Do you realize that by entering this plea you are giving up the right to remain silent, your right to a jury trial, your right to call your own witnesses, and the

⁸² Readability statistics from Microsoft Word.

⁸³ Rudolf Flesch, *How to Write Plain English* (1979),

https://web.archive.org/web/20160712094308/http://www.mang.canterbury.ac.nz/writing_guide/writing/flesch.shtml

⁸⁴ See Bates No. DEFPROD_2018-11-15_000008 at 2:08–5:00.

right to cross-examine the state's witnesses?

Mr. White: Yes.

Magistrate: Are you entering this plea because you are guilty?

Mr. White: Yes.

He served four days before he bonded out of jail. He was sentenced on 30 days suspended to four days credit for time served.

2. Antoine Hilton

The 20-year-old Mr. Hilton was charged with possession of marijuana.⁸⁵ He was sentenced to \$407.50 and informed that failure to make payments risks a bench warrant and 30 days in jail.

3. Christopher Hodges

Mr. Hodges was tried in absentia, sentenced to 30 days in jail on driving on a suspended license and 30 days in jail for possession of marijuana to be served concurrently with a bench warrant issued for his arrest.⁸⁶

4. Zachary Bickley

Mr. Bickley, who was 18, was arrested.⁸⁷ He was a passenger in a Honda vehicle and charged with not wearing a seat belt, possession of marijuana, open container in a motor vehicle, underage possession of beer. He was tried in absentia and found guilty. He was sentenced to \$260 possession of beer, \$260 open container, \$650 possession of marijuana, and \$25 seat belt.

5. Christopher Frazee

Mr. Frazee pled guilty to driving with suspended license and open container.⁸⁸ He was sentenced to time served on open container and to 90 days and \$2,100, paying \$200 per month on the suspended license charge. Mr. Frazee said he was not able to get a driver's license because he did not have the money and had other family court obligations.

Magistrate: Do you understand you have a right to an attorney, and if you can't afford one, one can be appointed to represent you?

Mr. Frazee: Yes sir.

Magistrate: Did you want to get an attorney?

Mr. Frazee: No sir, I can't.

The Magistrate did not investigate Mr. Frazee's statement the he could not get counsel and instead accepted his guilty plea.

⁸⁵ *Id.* at 22:10–25:21.

⁸⁶ *Id.* at 30:15–33:31.

⁸⁷ *Id.* at 33:32–37:17.

⁸⁸ Bates No. DEFPROD_2018-11-15_000014 at 2:40–6:05.

6. Eric Looney

Charged with possession of marijuana.⁸⁹ No info about having been given *Faretta* waiver. Asked if he wanted an attorney but not informed if he could not afford one, one would be appointed for him.

Sentenced to 30 days suspended on payment of a \$615 fine at \$100/month.

In my experience as a public defender, describing legal concepts on a boilerplate waiver form written using college-level language does not result in the average lay person understanding the right being waived. For “an act to be an informed consent . . . it must be an authorization that is intentional, substantially noncontrolled, and based on substantial understanding. . . . Problems with understanding sometimes occur . . . because . . . [the] subject has *no* relevant interpretations of meaning. That is, the person’s knowledge base is too impoverished to interpret the information provided by the professional. Because new information is understood through old information, communications about alien or completely novel situations or concepts are extremely difficult to process. . . . The hearer does not have the conceptual database, cognitive constructs, or categories from which to make the appropriate interpretations.”⁹⁰ In my opinion, the waiver practices used by Lexington County’s Magistrate Courts would not be readily understood by the vast number of people entering the system. The Magistrate’s conclusory request, using compound questions, that defendants sign a college-level *Faretta* form will not advise the typical client of the importance of the rights being waived. Rather, it appears to be intended to extract waivers of counsel from laypersons in as efficient a manner as possible. Mechanical waivers on a boilerplate form that cannot be readily understood leaves minimal confidence that a layperson will fully comprehend the decision being made and the results of that decision. This is an uninformed waiver of counsel process.⁹¹

K. Rote, mechanical, automatic waivers

1. Carlene Hughes

In this 13-minute, 13-second proceeding, Ms. Hughes received a deficient 26-second waiver of counsel colloquy.⁹² After informing Mrs. Hughes of the charges and asking her if she understood those charges, the following waiver of attorney exchange took place:

⁸⁹ *Id.* at 14:22–16:47

⁹⁰ Ruth R. Faden & Tom L. Beauchamp, *A History and Theory of Informed Consent* 298, 318 (1986).

⁹¹ “Time after time, courts made clear to defendants that they must waive counsel to proceed. There were no inquiries into the education or sophistication of the defendants and very few efforts to warn defendants regarding the dangers of self-representation or the kind of assistance counsel could provide. Often the waiver was incorporated into the first part of the proceeding and was presented as a rhetorical, compound question directed at whether the defendant wanted to dispose of the case quickly. The judge asked the defendant something like, ‘You are waiving counsel and wish to proceed now, right?’ and the defendant responded, ‘Yes.’” Robert C. Boruchowitz, Malia N. Brink & Maureen Dimino, *Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts* 15, *Nat’l Ass’n Criminal Def. Lawyers* (Apr. 2009), <https://www.nacdl.org/getattachment/20b7a219-b631-48b7-b34a-2d1cb758bdb4/minor-crimes-massive-waste-the-terrible-toll-of-america-s-broken-misdemeanor-courts.pdf>.

⁹² *See* Bates No. DEFPROD_2018-11-15_000001 at 6:35-19:48.

Magistrate: Do you understand that you have a right to a trial by jury, a right to an attorney, a right to be present at your trial, and a right to remain silent at your trial? Do you understand that if you are found guilty of the charges you face criminal penalties? If you are found not guilty of the charges, you can have them removed from your record. At this point in time ma'am, you understand the importance of legal representation?

Mrs. Hughes: Yes

Magistrate: Are you waiving your right to an attorney to go before this court today?

Mrs. Hughes: Yes.

She then pleaded no contest. Her defense was that her neighbor intentionally aggravated her dogs, rode on her property, and refused to talk to resolve the matter. Mrs. Hughes was fined \$150. After judgment was rendered, she was informed that a subsequent offense could result in a sentence of \$3,000 and 90 days in jail.⁹³

This waiver exchange took 26 seconds, from 7:22-7:48. There was no information about appointment of counsel if unable to afford to pay counsel. The colloquy lacked the constitutionally required penetrating and comprehensive examination necessary to ensure that the relinquishment of the critically important right to counsel occurred with full knowledge and understanding.

2. Marcellus Armor

Marcellus Armor appeared on charges of no driver's license, no proof of insurance and no registration.⁹⁴ In 12 seconds, he was summarily asked if he signed the waiver of his rights document, wanted to plead guilty, and if he understood his rights. He said he did.⁹⁵ He was summarily sentenced to 30 days in jail suspended to \$232.50 on no driver's license, 10 days suspended to \$232.50 on failing to register, 30 days in jail suspended to \$232.50 on no insurance, totaling 70 days and \$697.50. The Magistrate declared that if payment was not made, she would issue a bench warrant.

3. Matthew Martin

Matthew Martin, an unemployed disabled Vet on VA disability, received a 9-second, less-than-perfunctory waiver colloquy from the presiding Magistrate.⁹⁶ Mr. Martin pled guilty to shoplifting and was sentenced to 30 days in jail suspended upon payment of \$1,054 in restitution and \$500 fine and ordered not to trespass into the store again. The waiver exchange was less than minimal. The Magistrate asked for the sheet. Mr. Martin said he did not receive any sheet. The Magistrate had a sheet given to him, waited until he filled it out, and then this exchange took place:

⁹³ *Id.* at 18:40–18:48.

⁹⁴ *See* Bates No. DEFPROD_2018-11-15_000007 at 19:55–25:17.

⁹⁵ *Id.* at (20:03–20:15).

⁹⁶ *Id.* at 40:10–47:34.

Magistrate: Mr. Martin, you're charged with shoplifting. You understand what you are charged with?

Mr. Martin: Yes ma'am.

Magistrate: And you do not want an attorney?

Mr. Martin: No ma'am.

Magistrate: And you want to plead guilty, is that correct?

Mr. Martin: Yes ma'am.

The oral waiver of rights exchange took 9 seconds.⁹⁷

Later, the Magistrate said Mr. Martin didn't fill out the rest of the form.

Mr. Martin said he took some of the merchandise but not all of it. The Magistrate asked Mr. Martin why he pled guilty to something he did not do. Mr. Martin said he did not take any bullets. He said he looked at the bullets and put the package back. The police officer responded that there was video of the incident that he had reviewed and that Mr. Martin was seen opening boxes of bullets and putting "a couple" bullets in his pocket and returning the bullets back on the shelf. There is no indication that the Magistrate viewed the video.

The individual engagement of Mr. Martin was less than superficial. It lacked the Magistrate explicitly making Mr. Martin aware of the dangers and disadvantages of self-representation, especially when Mr. Martin indicated he did not take all the claimed merchandise.

Imagine what assistance from a lawyer might have provided. It would be reasonable to presume that a lawyer advocating for Mr. Martin would have been able to influence the degree of the sentence given the statement by Mr. Martin that he had not taken \$1,054 worth of merchandise.

4. Tyshien Douglas

Mr. Douglas similarly received an 8-second rote waiver at his trial.⁹⁸ He was charged with unlawful turning, driving on a suspended license, operating without insurance and failure to register. He was sentenced to 30 days suspended to a fine of \$647 on driving on a suspended license; 30 days suspended to a fine of \$440 on operating uninsured; \$232.50 for unlawful turn with \$32.50 suspended; 10 days suspended to a fine of \$232.50 with the entire fine suspended for failure to register. He was ordered to pay \$75 per month or face 80 days in jail.

Mr. Douglas said he was driving his pregnant girlfriend to a doctor and there was no one else to take her. He said Uber or a taxi was too pricey for being out of town and he did not have that amount of money.

The waiver exchange lasted 8 seconds:⁹⁹

⁹⁷ *Id.* at 42:04–13.

⁹⁸ *Id.* at 55:25–1:00:26.

⁹⁹ *Id.* at 55:51–59.

Magistrate: And you listened to your rights?
 Mr. Douglas: Yes, ma'am.
 Magistrate: And you don't want an attorney?
 Mr. Douglas: No, ma'am.
 Magistrate: And you want to plead guilty, is that correct?
 Mr. Douglas: Yes, ma'am.

L. Trials in Absentia

The number of cases tried without the defendant being present is extremely high: 2,177 in 2019, a rate of 24.95%. In my experience, Magistrates convicting defendants who are not present and have entered no plea is an outlier of the standard practice. Normally, a court that has a defendant who fails to appear would issue a bench warrant for the defendant to appear before further proceedings are conducted. When the defendant is brought before the court, the judicial officer would inquire why the defendant previously failed to appear. Was it an intentional decision by the defendant or was there an innocent explanation such as lack of actual accurate notice, lack of transportation, illness? In Kentucky, trials in absentia are very rare. In comparable jurisdictions nationally, Aurora, Colorado, Denver, Colorado, Atlanta, Georgia, there are no or very few trials in absentia.¹⁰⁰

“One of the most basic of the rights guaranteed by the Confrontation Clause is the accused’s right to be present in the courtroom at every stage of his trial.” *Illinois v. Allen*, 397 U.S. 337, 338 (1970). In a nation that promises fair process, this is not a trivial matter. The Magistrates in Lexington County appear to ignore the fundamental value of physical presence and often conduct trial without the presence of the defendant.

1. William Partain

Mr. Partain was convicted in his absence based on little more than two minutes of testimony in a proceeding that lasted all of 7 minutes and 3 seconds.¹⁰¹ Mr. Partain’s case of disorderly conduct was called. Mr. Partain was not present. The case was tried in his absence. He was found guilty of disorderly conduct based on the 5-minute-2-second testimony of a law enforcement officer.¹⁰² Of this testimony, 2 minutes and 47 seconds were taken up with the discussion between the judge and testifying/arresting law enforcement officer about the two addresses that both the judge and officer found to be “odd.”¹⁰³ That left the substantive testimony of the officer at 2 minutes 13 seconds. The Magistrate instantly found Mr. Partain guilty and issued a bench warrant for his sentencing.

The Magistrate stated that Mr. Partain failed to appear, a citation was issued with a court

100 Communications by phone and email with Aurora Chief Public Defender Doug Wilson, October 29, 2020; Kenneth Days, III, Director and Chief Public Defender, City of Atlanta Office of the Public Defender; Alice L. Norman, MPD Chief Municipal Public Defender, October 22, 2020.

101 *See* Bates No. DEFPROD_2018-11-15_000002 at 0:55–7:58.

102 *Id.* at 2:41–7:43.

103 *Id.* at 2:57–4:44.

date, the court date was continued, and Mr. Partain was re-notified of the new date at the address provided on his bond with his rights, which he had initialed. In a highly abnormal finding, the Magistrate inferred Mr. Partain had waived presence at the proceeding even though there was no proof that Mr. Partain had actual notice of his court date. In fact, the Magistrate discussed the critically relevant matter that there were two addresses for the defendant at issue. The law enforcement officer said there was confusion about these addresses, and the Magistrate found it odd that the two addresses were both 1008 Windmill Rd Leesville Lexington and 1008 Windmill Trail Anderson. There was no appointment of counsel for Mr. Partain. Instead, the Magistrate summarily decided that Mr. Partain had waived his right to counsel because “[h]e has an extensive criminal record in General Sessions Courts that have also landed him on probation and no doubt he was represented or had been qualified by those courts, substantially qualified to represent himself and know his, the rights for an attorney. This Court has nothing but to consider that he has just avoided the Court and that he has waived by conduct under caselaw both federally and within the state of South Carolina....”¹⁰⁴

Mr. Partain was convicted in absentia entirely on the basis of the prosecuting officer’s testimony. The prosecuting police officer said his office received a call from Mr. Partain’s mother who told them her son was acting up, threatening to break out windows in her car and she was very concerned with his irrational behavior. When the officer arrived, Mr. Partain said he did not want to harm himself and wanted to leave to avoid any confrontation with his mother and law enforcement. The prosecuting officer stated that when Mr. Partain walked away, he shouted profanities and was overtly belligerent towards law enforcement. Mr. Partain was then arrested.

Mr. Partain’s proceeding had the following significant deficiencies:

- Disorderly conduct of the nature described in the unrebutted brief testimony of the officer raises the highly relevant question of the unexplored mental status of Mr. Partain.
- Both the Magistrate and the testifying/arresting/prosecuting officer found the addresses for the defendant odd.
- There was no proof that Mr. Partain received actual notice of the trial date.
- There was no showing that there were any attempts to locate and inform Mr. Partain of the trial date.
- The Magistrate did not inquire as to whether there was a reasonable probability to obtain the presence of Mr. Partain within a reasonable time.
- There was no assurance that Mr. Partain knowingly, intelligently, voluntarily waived his right to counsel for a trial. While the Magistrate reported that Mr. Partain had initialed his rights and that he was no doubt substantially qualified in General Sessions Courts on other matters, there is no proof that there was a colloquy with the constitutionally required penetrating and comprehensive

¹⁰⁴ *Id.* at 1:55–2:35.

examination with the law requiring a presumption against waiver.

- No bench warrant was issued to bring him before the court.

Trials without the presence of the accused raise significant constitutional questions and threaten the public's confidence in the nature of the criminal legal system. "There are reasons why a criminal trial in absentia is so jarring to American sensibilities. The constitutional status of a defendant's right to be present furthers basic and profound societal values.... Extending well beyond the fundamental ability of a defendant to avail him or herself of the attributes of the trial process, two societal values served by a criminal defendant's constitutional right to be present stand out most prominently. Most significant are society's interest 'in an accurate determination of guilt' and society's need for 'public confidence in the judiciary as an instrument of justice.'"¹⁰⁵

The Lexington County police prosecutor did not prove that there was no reasonable likelihood that Mr. Partain's presence could be attained. The police prosecutor made no showing of futility in obtaining Mr. Partain's presence or any compelling reason for why a trial was necessary on this date. If a bench warrant can be issued, as it was in this case, for bringing Mr. Partain before the court for sentencing, then a bench warrant could have been issued to bring Mr. Partain before the court for the trial.

There was no clear and convincing showing that the defendant's absence was intentional, knowing, and voluntary. There was no clear and convincing showing that the defendant intentionally waived his right to be present. And the Magistrate's attempt to secure a waiver of counsel from an absent defendant reveals the substantial gap between the knowing, voluntary waivers required by the Constitution and the practices of Lexington County's Magistrate Courts. Practices such as these significantly erode public confidence in a system with so little assurances about the validity and reliability of its results, especially for people without means.

"The right to defend, personal in nature and so obviously furthered by the defendant's presence, ultimately serves the critical ability of our adversarial system to determine truth.... The value of public confidence in the fairness of this process also continues to be of perennial importance."¹⁰⁶

M. Lack of counsel has deleterious effects for clients who face fines beyond their financial means, and lifelong collateral consequences that result from lack of counsel

There are particular areas where lawyers provide support to clients such as educating the court on a client's limited financial ability to pay fines and fees, negotiating the type of conviction in light of the collateral consequences or possibility for enhancement in the future, and beginning the representation promptly to ensure preservation of the evidence and access to

¹⁰⁵ Eugene L. Shapiro, *Examining an Underdeveloped Constitutional Standard: Trial In Absentia and the Relinquishment of a Criminal Defendant's Right to be Present*, 96 Marq. L. Rev. 591, 619-20 (2012), found at: <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=5155&context=mulr>

¹⁰⁶ *Id.* at 620.

it. The lack of counsel often has lifelong harmful results for those who are unrepresented. Defendants are sentenced to more serious sentences, more jail time, more fines and fees, and face more collateral consequences of the conviction.

Conversely, lawyers provide significant value to the client's liberty interests, the court's legal responsibilities and the public's confidence in the reliability and validity of the results in our criminal justice system. This manifests itself in Lexington County, South Carolina Magistrate Courts in a number of ways.

I was provided with 81 case files of persons whose case did not go through bond court, which were randomly drawn from 2019 Magistrate Court data produced by Defendants in this matter.¹⁰⁷ The vast majority of cases—71 out of 81—were disposed at the accused's first appearance. In 57 of those 71 cases (80%), the accused was not represented by counsel. Of the 14 defendants who were represented by counsel,¹⁰⁸ only 3 defendants (4% of the 71 cases) were represented by a public defender. Of the 28 cases where sentencing information was available, 22 cases (79%) resulted in a sentence of jail suspended on the payment of fines and fees.

These outcomes are not isolated to just one magistrate judge or court. Rather, they occur in all seven district magistrate courts, indicating the issues addressed in this report are widespread across the entire Lexington County Magistrate Court system. For example, of the 116 cases I reviewed (the 81 randomly selected plus the 35 case files), 86% were resolved at first appearance during 2019 and 2020, and this happened in each of the seven district magistrate courts. Eighty-four percent of the cases were disposed without the accused having representation, and this also happened in each of the seven district magistrate courts. Finally, sentences of jail suspended on the payment of fines and fees were imposed in six of the seven district magistrate courts. Thus, it is clear that these issues are ongoing and not limited to the actions of one magistrate judge but are systemwide.

Magistrates have statutory authority to exercise discretion when imposing the amount of a fine and the length of a jail sentence.¹⁰⁹ When an attorney represents a client, the attorney is aware of that discretion and can advance arguments in favor of exercising that discretion to the benefit of the client. It would not be surprising to learn that none of the unrepresented defendants understood that the Magistrate had discretion to reduce their sentence.

1. Magistrate Judges must conduct meaningful ability to pay hearings

My review of the recordings do not indicate that meaningful ability to pay hearings are being conducted at all.

The recordings that I reviewed show scant inquiry by the Magistrate into the ability of a person to pay the amount set as the fine/fee, and I saw no evidence of any consideration of

¹⁰⁷ See Bates Nos. PL-PUBLIC-INDEX_000078–259.

¹⁰⁸ All 14 defendants who were represented by counsel faced charges in the DUI Court. This means that none of the other 57 defendants whose cases were disposed at first appearance in the other seven district magistrate courts were represented by counsel.

¹⁰⁹ *South Carolina Summary Court Bench Book § H.13*, South Carolina Judicial Branch, <https://www.sccourts.org/summaryCourtBenchBook/displaychapter.cfm?chapter=CriminalH#H13a>

alternatives to financial penalties.

If the person were represented by an attorney, the lawyer would be responsible for raising the issue of the person's ability to pay considering income, liabilities, the person's family, housing, transportation, medical and other financial obligations. South Carolina has an Affidavit of Indigency form for General Sessions Court cases.¹¹⁰ Other jurisdictions provide judicial officers with more comprehensive financial information, especially for financial obligations. For instance, in Kentucky a two-page Affidavit of Indigency records a person's type of employment, total income by category, total monthly expenditures by category.¹¹¹ This presents a clear set of information on an individual's ability to absorb an additional expenditure.

2. Collateral consequences of a conviction

As *Argersinger* observed, "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation."¹¹²

When a person is convicted of a criminal offense, there are practical and legal consequences beyond that particular sentence. Convictions can have deleterious effects on retaining or obtaining employment. Many employers do not want to risk the potential liability of hiring or retaining a person with a record. Housing can be lost or more difficult to obtain as many landlords do not want the risk of liability of renting to a person with a conviction. The loss of the ability to drive for work and family matters.

Defense counsel has substantial responsibility to identify and advise clients about the collateral consequences of a conviction and through litigation and negotiation work at "avoiding, mitigating or later removing the consequence."¹¹³ This duty includes immigration consequences.¹¹⁴

The collateral consequences in South Carolina of a conviction are many and are consequential, including the following examples.¹¹⁵

A guilty plea to shoplifting without advice of counsel might seem trivial. But such a plea has present and future consequences. Three shoplifting offenses bring great legal risk and penalty enhancement. "A person convicted of an offense for which the term of imprisonment is contingent upon the value of the property involved must, upon conviction for a third or

110 South Carolina Affidavit of Indigency And Application for Counsel (Defense of Indigency Act, Form No.2), <https://www.sccourts.org/forms/pdf/SCACRVIFORM02GS.pdf>

111 See KY AOC Form AOC-350, Financial Statement, Affidavit of Indigency, Request For Counsel And Order (Criminal Cases), <https://kycourts.gov/resources/legalforms/LegalForms/350.pdf>

112 *Argersinger*, 407 U.S. at 24, 37.

113 ABA Standards for Criminal Justice: For the Defense Function, Standard 4-5.4 (4th Ed 2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/

114 *Id.*, at Standard 4-5.5 Special Attention to Immigration Status and Consequences.

115 *Collateral Consequences Of Criminal Convictions Dismantling Barriers To Opportunity South Carolina*, South Carolina Appleseed Legal Justice Center (2013), https://www.scjustice.org/wp-content/uploads/2013/05/collateral_consequences_guide_april-2013-edits.pdf

subsequent offense, be punished as prescribed for a Class E felony.”¹¹⁶ A Class E felony carries a sentence of up to 10 years.

If someone is convicted of Domestic Violence or Assault and Battery with a household member, that person loses their right to own or possess a firearm under federal law. If it is a Domestic Violence conviction, the person is subject to a state law 3-year firearm prohibition as well. Domestic Violence convictions are also able to be enhanced. One prior conviction within 10 years carries up to 3 years in prison. If someone has 2 prior convictions within 10 years there is a potential sentence of 10 years in prison. Domestic Violence convictions can greatly impact someone’s chances of employment, especially when compared to a candidate without a Domestic Violence conviction.

Accruing three major traffic offense within 3 years results in being designated a habitual traffic offender and having one’s driver’s license suspended for 3 to 5 years. Driving on a suspended license is a major traffic offense.¹¹⁷

A first offense of drunk driving has a sentence up to 90 days and fines of \$1,000. If the sentence is probated then there are conditions that must be complied with. There is a requirement to carry SR-22 insurance for at least 3 years, pay for ignition interlock device fee and its monitoring, and a reinstatement fee to the DMV.¹¹⁸

The conviction results in lifelong consequences including difficulty obtaining employment, or being discharged from current employment. The driver’s license can be suspended for 6 months or more and may even be permanently revoked. A person is not be able to regain their license until an alcohol and drug safety action program is completed. If the blood alcohol content is .15%, the person will be sentenced to mandatory jail time or community service. A person attending school can be sanctioned by the educational institution. A DUI conviction could result in a school imposing penalties from mandatory counseling and treatment up to expulsion. The conviction can never be expunged. A conviction enhances penalties for a subsequent conviction.¹¹⁹

Fines and fees are just the beginning of the sentence. Persons caught up in these sentences “live through layers of punitive treatment that can outweigh and outlast any legal sentence. The experiences of being arrested, jailed, fined, and supervised, telling your family,

116 S.C. Code § 16-1-57 (Classification of third or subsequent conviction of certain property crimes).

117 The Habitual Traffic Offender statute is S.C. Code § 56-1-1020 et seq.

118 DUI representation requires counsel experienced in this special area of the law as it has a level of complexity. People can receive between \$400-\$1000 fine based on alcohol concentration. A driver under 21 with a blood alcohol content between .02% and .08% may the license suspended for 3 months or 6 months for a second offense within five years. Refusal of a chemical test results in license suspension for 6 months or suspension for a year if there is another refusal within 5 years. A first offender with a blood alcohol content below .1%, can be sentenced to a \$400 fine, and a jail sentence between 2-30 days with the driver’s license suspended for six months. A first offender with a blood alcohol content between .1% and .15%, can be sentenced to a \$500 fine, and a jail sentence between 3-30 days with the driver’s license suspended for 6 months. A first offender with a blood alcohol content above .15%, can be sentenced to a \$1000 fine, and a jail sentence between 30-90 days. The driver’s license cannot be reinstated until an ignition interlock device has been successfully installed for 6 months.

119 See S.C. Code § 56-5-4420 (2012).

fearing to tell your employer, getting a criminal record, and potentially losing your job, credit, welfare benefits, immigration status, or housing – all of these taken together amount to an enormous burden....And it can kick in regardless of whether the person deserves it or has committed anything resembling a blameworthy or dangerous offense. This is punishment without a crime.”¹²⁰

3. At show cause hearings, convicted persons are unrepresented

I saw no evidence of persons who were convicted having representation of counsel at show cause hearings, even if they had representation on the charged offense. I was informed that the public defender’s representation ends at sentencing and the public defender is not notified of show cause hearings or appointed to provide representation even for clients they represented through sentencing.

The show cause hearings for persons who had their jail sentence suspended on condition of timely paying their fines/fees are the equivalent of a probation revocation hearing. My experience is that many clients suffer from substance abuse or a mental illness and these contribute to failure to comply with conditions of their sentence.

Persons unable to afford counsel are constitutionally entitled to the appointment of counsel at these hearings where reinstatement of the suspended sentence is at risk.

In deciding that counsel was required for indigents facing probation revocation, the United States Supreme Court in *Mempa v. Rhay*, 389 U.S. 128, 135 (1967) observed, “the necessity for the aid of counsel in marshaling the facts, introducing evidence of mitigating circumstances, and in general aiding and assisting the defendant to present his case as to sentence is apparent.”

If the client has a substance abuse disorder or a mental illness, there is a responsibility to explore development of an alternative to incarceration that provides community-based treatment and support for the client to succeed and not violate conditions of probation. Public defender offices that employ social workers are developing and presenting alternative sentencing plans for clients charged with probation violations.

4. Social and government costs

The process of imposing fines and fees on persons without means has direct social costs. There is a substantial cost to governments in their efforts to collect money from those who have little.

Fines and fees have counterproductive consequences. A defendant’s criminal legal system “debt represents a significant barrier to a person’s chances of successfully reentering society following a conviction. It also hurts the families of those who are incarcerated, depriving

¹²⁰ Alexandra Natapoff, *Punishment Without Crime* 8 (2018)

them of a wage earner while adding new court costs to the defendant's criminal debts."¹²¹

On average, the jurisdictions studied in a 2019 Brennan Center report on fines and fees “spent more than \$0.41 for every dollar they collected over the period studied. Because of a lack of available data, this figure counts only in-court and jail costs. If all costs were measured—including the sizable cost to law enforcement for warrant enforcement and arrests, the cost to Department of Motor Vehicles (DMV) offices for processing suspended licenses, and the cost to parole and probation officers for fee and fine compliance—it would be even higher.”¹²²

Defendants have sentences of hundreds and thousands of dollars and are on monthly payment plans. They often do not have regular employment, reliable transportation, and many have unmet human needs of housing, medical treatment, and family costs. Taking the small amounts of money that an indigent person possesses directly harms or undermines that person's other financial responsibilities and social stability.

“The assumption that court user fees provide a valuable revenue source ignores the vast expenditures incurred in attempts to collect fees, mostly from people unable to pay. Policymakers must also consider direct costs of collection, such as the salary and time for the clerks, probation officers, attorneys, and judges who will be involved in fee collection processes.”¹²³

5. Attorney at first appearance and value of an attorney: lawyers make a difference

Appointment of counsel at first appearance with the representation beginning promptly is the national best practice.

When asked about the importance of public defenders being present at all first appearance dockets, the Denver Municipal Court Chief Public Defender observes, “We can save people from themselves.”¹²⁴

As discussed earlier, the vast majority of cases where a person receives a citation to appear in Magistrate Court are disposed of at first appearance. Most receive a suspended jail sentence. With this practice in Lexington County Magistrate Courts, it is essential that appointment of counsel begin at this first appearance.

Representation beginning at first appearance allows the lawyer to begin to provide legal advice to the benefit of lay clients who almost always do not understand their legal options. For example, a client who faces a charge of driving with a suspended license can receive more

121 Matthew Menendez, Michael F. Crowley, Lauren-Brooke Eisen, and Noah Atchison, *The Steep Costs of Criminal Justice Fees and Fines A Fiscal Analysis of Three States and Ten Counties*, Brennan Center for Justice, 6 (November 21, 2019), https://www.brennancenter.org/sites/default/files/2020-07/2019_10_Fees%26Fines_Final.pdf
122 *Id.* at 9.

123 Roopal Patel and Meghna Philip, *Criminal Justice Debt A Toolkit for Action*, Brennan Center for Justice, 5 (2012), https://www.brennancenter.org/sites/default/files/2019-08/Report_Criminal%20Justice%20Debt.pdf

124 Communications by phone and email with Alice L. Norman, MPD Chief Municipal Public Defender, October 22, 30, 2020.

beneficial dispositions if they promptly address what needs to be done to obtain reinstatement of the license before a determination is made in their case. This type of advice is critical in light of the enhancement provisions for a subsequent conviction. A lawyer at first appearance also increases the possibility of dismissal at first appearance for an appropriate percentage of cases. Lexington County's unusually low dismissal rate may be explained by the prevalence of unrepresented clients at first appearance.

The Office of the Municipal Public Defender, City and County of Denver, Colorado is being appointed to 100% of those jailed and 77% of the remaining cases with an indigent person. Its attorneys are present in all courts in its jurisdiction or at the first appearance of a person. The attorneys in the office are in court at all failure to appear cases.¹²⁵

Once a client appears in bond court in Lexington County and the decision is made by the Magistrate to appoint counsel, the client then must call the public defender office. The public defender office does not receive any of the court's information that was done for its screening of the defendant for financial eligibility. A paralegal obtains basic information from the client. The attorney files requests for discovery and information that the prosecuting officer, a police officer or a prosecuting lawyer, intends to introduce in the case in chief, and a letter that the client is being represented by the public defender and should not be further communicated with by law enforcement officer or other prosecutor. The paralegal checks to see the next court date for the client and calendars it for the public defender attorney. For many or most clients, the public defender assigned to Magistrate Courts in Lexington County does not speak to the client for an extended period of time, often weeks, after appointment until receiving discovery.

There are important reasons for appointment and representation to begin at first appearance. Representation by a lawyer:

- Increases the likelihood of pretrial release;
- Increases the understanding of the defendant about the charge(s), defenses, probable cause determination;
- Allows for immediate obtaining of information to develop and advocate for an alternative sentence;
- Increases an awareness of the full nature of the consequences of a plea of guilty, the collateral consequences to a plea for time served or to a suspended sentence, chances at a trial;
- Increases the efficiency of the proceedings.

In other words, lawyers make a difference for clients. In an empirical study¹²⁶ looking at

¹²⁵ Communications by phone and email with Alice L. Norman, MPD Chief Municipal Public Defender, October 22, 30, 2020.

¹²⁶ Douglas L. Colbert, Ray Paternoster, and Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 *Cardozo L. Rev.* 1719 (2002).

the difference between persons who had a lawyer representing them at the initial appearance pretrial release proceeding or not, the study found significant differences between being represented and being unrepresented. Having the representation of an attorney had the following objective and subjective benefits.

A criminal defendant with a lawyer at first appearance:

- Is 2 ½ times more likely to be released on own recognizance;
- Is 4 ½ times more likely to have the amount of bail significantly reduced;
- Serves less time in jail (median reduction from 9 days jailed to 2, saving county jail resources while preserving the clients' liberty interests); and
- More likely feels that they had been treated fairly by the system.¹²⁷

The study presents “convincing empirical data that the benefits of representation are measurable and that representation is crucial to the outcome of a pretrial release hearing. Moreover, the study revealed that early representation enhances defendants’ respect for the system’s overall fairness and confidence in assigned counsel.”¹²⁸

While this study focuses on lawyers at pretrial release proceedings, the results are reasonably transferable to the value lawyer provides to the client and the criminal legal system at subsequent proceedings.

The study substantiates what is common sense. Criminal defense lawyers provide value to clients, courts, prosecution and the public. They advocate for the benefit of their client, promptly investigate the facts of the case, provide additional information to the prosecuting officer. The lawyer investigates a client’s prior history, financial capacity, challenges evidence, and advocates for alternative sentences. The lawyer presents the client’s side of the story. This results in courts having a fuller set of information about the matter, reduces the risk of an erroneous decision, and increases the likelihood that any sentencing is proportionate to the financial ability of the defendant.

This is why presence at first appearance is the national standard of practice. The ABA *Criminal Justice Standards for the Defense Function* (4th Ed 2017), Standard 4-2.3 Right to Counsel at First and Subsequent Judicial Appearances states, “A defense counsel should be made available in person to a criminally-accused person for consultation at or before any appearance before a judicial officer, including the first appearance.”¹²⁹

¹²⁷ *Id.* at 1720, 2002.

¹²⁸ *Id.* at 1720.

¹²⁹ ABA Standards for Criminal Justice: For the Defense Function, Standard 4-2.3.

N. Lexington County's practices lag behind other comparable South Carolina and national public defense county and city programs

Other jurisdictions with representation responsibilities comparable to the level of the offenses in the jurisdiction of the Lexington County, South Carolina Magistrate Courts provide public defense representation with more resources that results in more meaningful representation of clients. I do not intend to suggest that these jurisdictions' policies concerning appointments of public defenders are ideal or flawless. Rather these comparisons emphasize a variety of ways that jurisdictions have endeavored to provide meaningful support to public defender's offices representing people charged with misdemeanors.

1. City of Beaufort and Town of Bluffton, South Carolina

These Municipalities are changing their practices on appointment of counsel, waiver proceedings, fines and fees, and other significant practices. As a result of an October 7, 2019 federal court Order, they are implementing a system that ensures counsel at pretrial release hearing, that waives or reduces from the outset the application fee for court appointed counsel. The cities will provide appointed counsel at every stage of the legal proceedings, including first appearance, motion hearings, trial, sentencing, show cause hearings and other post-sentencing proceedings. Costs related to representation, including an investigator, administrator, and funds to hire social workers and experts when appropriate. The terms of the Public Defender Contract shall ensure that no Public Defender is assigned more than 400 cases per calendar year. When any individual who has indicated a preference to proceed without Counsel at any proceeding at which Counsel is required, a colloquy must be conducted with the defendant about the pending charge(s), maximum sentence(s), and potential collateral consequence(s) of a conviction. Each defendant must, at minimum, receive actual notice of the right to counsel and to be present in court when a trial date is set, including at a bond hearing, and must receive actual notice of future court appearances, including the trial date.

If a defendant who received actual notice does not appear for trial, and the Municipal Court has determined that the defendant is not in custody, a warrant shall issue and, upon arrest or appearance, a bond hearing shall be conducted as soon as practicable and the individual's counsel shall be notified. If the individual is Indigent and does not have Counsel and is facing charges that carry the possibility of a sentence of incarceration, the individual shall be advised of his or her right to counsel and, if the Indigent individual requests Counsel, Counsel shall be appointed. The Municipalities shall not conduct any trial or sentencing proceedings without the defendant in court when that defendant is facing charges that carry the possibility of a Sentence of Incarceration.

For any Indigent defendant, whether in or out of custody, who may face the possibility of a Sentence of Incarceration, the Municipalities, and their agents and employees, shall (1) provide notice to the defendant at the initial appearance (if summoned to court) or at the bond hearing (if detained upon arrest) of the potential Sentence of Incarceration; (2) provide written as well as oral advisement to the defendant of their right to counsel (consistent with Paragraph V(1)(vi) of this Agreement); (3) upon request, provide the Indigent defendant with Counsel; (4) continue the defendant's case for 30 days to allow Counsel to begin representation of the defendant and (5)

never impose a Sentence of incarceration on any defendant at their first appearance.

Only when the Municipal Court judge makes a finding on the record that a defendant will not receive a Sentence of Incarceration shall the Municipalities have the option of not appointing Counsel to an Indigent defendant. At the time of imposition of any Monetary Penalty, a Municipal Court or its staff shall assess an individual's Ability to Pay any Fines, Fees, and Restitution imposed for an offense. Upon this assessment, if the Municipal Court or its staff determines that a defendant is unable to currently pay the Monetary Penalty, the court may either (1) consider alternatives to imposing the full Monetary Penalty, including a reduction in Fines or Fees, a waiver or suspension of Fines or Fees, community service, completion of a program Gob skills, drug treatment, etc.), or any other disposition deemed just and appropriate in the discretion of the Municipal Court, pursuant to applicable law; (2) offer an extension of the amount of time to pay; or (3) offer an installment payment agreement, necessary and sufficient to fit the individual's financial circumstances. If a Municipal Court offers an extension or an installment payment agreement and, thereafter, upon assessment the court finds that the individual is still unable to pay the Monetary Penalty, the court shall, pursuant to applicable law, consider alternatives to imposing the full Fine, Fee, or Restitution, including a reduction in Fines or Fees, a waiver or suspension in Fines or Fees, community service, completion of a program job skills, drug treatment, etc., or any other disposition deemed just and appropriate, in the discretion of the Municipal Court.¹³⁰

2. York County, South Carolina

The York County Public Defender Office has more funding from the county and cities than does Lexington County Public Defender Office. In 2020, funding for York County is \$1,799,762 with a population of 226,073. Rock Hill pays \$87,714 and another four municipalities pay \$78,500. To provide representation in the 8 Magistrate Courts and 5 Municipal Courts, the York County Public Defender Office has 4 attorneys who in 2019 opened 1,774 cases. Two support staff are dedicated to these 4 attorneys. The Office has 3 investigators who do investigation for General Session and Magistrate/Municipal Court cases. The Rockville Municipal Court appointment rate is approximately 75% and the Public Defenders in that court average 2-4 jury trials each jury trial week.¹³¹

3. Denver, Colorado

The Office of the Municipal Public Defender, City and County of Denver, Colorado is being appointed to 100% of those jailed and 77% of the remaining cases with an indigent person. Its attorneys are present in all courts it has responsibility or at the first appearance of a person. These courts meet 7 days a week. The attorneys in the office are in court at all failure to appear cases, and the Outreach Court.¹³² The Office uses investigation resources provided through

¹³⁰ Order, *Bairefoot v. City of Beaufort, South Carolina*, 312 F. Supp. 3d 503 (D.S.C. October 7, 2019)

¹³¹ Communications by phone and email on October 29, 2020 and November 2, 2020 with BJ Barrowclough, 16th Circuit Public Defender.

¹³² Tom McGhee, *New homeless Outreach Court meets people where they are — at Denver Rescue Mission: Court has been so effective that Homeless Court at city hall has closed down*, The Denver Post (January 27, 2017) <https://www.denverpost.com/2017/01/27/homeless-outreach-court-denver-rescue-mission/>. (“Denver had a dedicated Homeless Court held in the Denver City and County Building for years. But what makes Outreach Court

contracts with two firms who do witness interviews, obtain records, videos, electronic data, text messages. Some 80% of the Office's cases receive investigative assistance. The Office tries approximately 24 cases per year to a jury. In 2018, approximately 70% of the cases set for trial were dismissed on the day of trial after investigation undermined the prosecution's case. There are 325 requests for competency evaluations per year. These evaluations are funded at \$600 per evaluation.

The Office also contracts with an attorney who has a specialty in immigration issues. It has received a grant to start a social worker and peer navigator services. These persons will assist in helping clients with underlying issues including mental health, substance abuse, housing, employment, transportation, homelessness, applying for public assistance. They will provide ongoing support. The Office files 7-10 appeals per year and represents persons who were convicted pro se in post-conviction actions. The Office hires experts in several cases per year. The Office attorneys has approximately 100 writs pending on the failure of clients' cases to be timely resolved. The Office has pay parity with prosecutors. Reflecting on the value of having her attorneys present at all first appearance dockets, the Denver Chief Defender said, "We can save people from themselves."¹³³

4. Aurora, Colorado

The Aurora Public Defender's Office¹³⁴ represents 3,000 clients per year and has 11.5 attorneys, 1 paralegal, 1 investigator, and 3.5 support staff. The Office contracts with conflict attorneys at \$80.00 per hour with a maximum of \$1500 per case. Municipal Court Appeals are funded at 12 per year and are contracted out to a private attorney. The Office's attorneys are present at all in custody court dockets. The representation begins on appointment at the first appearance of the client. The staff investigator does investigation on a significant number of the Office's cases, interviewing witnesses, serving subpoenas, working on video/computer evidence and exhibits. The Office contracts with mental health professions who conduct approximately 20-25 competency evaluations each year. The Office selects and pays for the mental health expert and controls distribution of the mental health evaluation upon completion.

Each year approximately 15-20 clients are determined to be incompetent to proceed to trial. No cases are tried in absentia. When a person fails to appear, a bench warrant is issued. The person then is present and his case is addressed in his presence upon execution of the bench warrant. Discovery is received within 7-10 days. The Office averages 80 dismissals per month. In 2020, the Office has conducted 27 jury trials with 63% of its clients found not guilty. Currently, the Office is litigating the constitutionality of refusal to obey lawful orders, and seeks

different — and more effective — is the courtroom is in the familiar, comfortable environment of the rescue mission, increasing the likelihood that the homeless, who frequently miss their court cases, will make it to court. The reasons the homeless miss court dates can range from something as simple as a lack of bus fare to mental illness or substance abuse problems that make entering the courthouse intimidating.")

133 Communications by phone and email on October 22 & 30, 2020 with Alice L. Norman, MPD Chief Municipal Public Defender.

134 Communications by phone and email with Aurora Chief Public Defender Doug Wilson on October 29 & 30, 2020; *see also: Public Defender, Aurora Colorado*, https://auroragov.org/residents/public_safety/courts_detention/public_defenders.

sanctions for the prosecution's failure provide necessary discovery. The Office has worked with judges to be automatically appointed in cases if the person is in custody or receiving federal assistance and for those who are at 150% of the federal poverty level. This permits cases to move quicker than the previous application process that resulted in delayed appointments and failure to appear by defendants.

5. Atlanta, Georgia

The City of Atlanta Office of the Public Defender, Atlanta, Georgia appears before 10 judges. The Municipal Court Public Defender's Office has the responsibility of representing indigent defendants who are accused of violating any city ordinance for which a criminal penalty can be imposed, as well as certain misdemeanors that the court has concurrent jurisdiction with the State Court of Fulton County and state traffic misdemeanors including DUIs.¹³⁵ In 2018 there cases included 3,000 DUIs, 1000 in the Community Court (Mental Health/Homelessness), and 8,000 in custody cases. The Office uses an Interdisciplinary team-based holistic defense model of delivering services to clients.¹³⁶ It is staffed with attorneys, social workers, investigators, client advocates and administrative personnel. The model is employed by all staff with 40% of staff time implementing the work of the holistic model. The attorneys are present and appointed at first appearance and the model is implemented with the initial interview.

The Office works with many clients for 6 months after the case is resolved in court in order to ensure the client's underlying issues are addressed. Recidivism has been reduced as a result of this model. The services to clients include community-based treatment, employment, housing, mental health, substance abuse services. The Office partners with local nonprofits to perform these services. With the trust that the clients have developed through the in-court representation, the referrals have more engagement of the clients in succeeding with the help

¹³⁵ See *Public Defender*, Aurora Colorado, <https://court.atlantaga.gov/public-defender/>

¹³⁶ The traditional representation model has been that an individual attorney represents clients on their charged offenses in the courtroom. Increasingly, client representation is provided by a team. Good lawyering makes a difference but lawyers cannot do what is needed for clients without robust assistance from a team of professionals supporting the representation. Interdisciplinary team-based holistic defense model of delivering services to clients is proving to be the effective delivery model. Under the holistic team-based defense model that has emerged over the last several decades, public defense programs create representation teams (attorney, investigator, social worker). The attorney remains ethically ultimately responsible for the representation and leads the team that provides assistance to the client through collaboration of the defense team which has diverse skills and expertise to address the legal charge and the consequences of the conviction. These include housing, employment, medical assistance, custody, immigration, underlying issues of mental illness or addiction, expungement. Operationalization of the holistic model is based on the tenets that 1) risk factors such as poverty and addiction must be addressed, 2) relationships with clients are collaborative, recognizing strengths and 3) legal and social services are integrated and dynamic. The holistic team model reflects an ecological perspective, recognizing the interaction of legal representation, individual conditions, socio-economic structure and environmental circumstances. Criminal behavior is viewed as symptomatic of personal, psychological and social dynamics that have coalesced in the life of the individual. By addressing clients' legal and psychosocial needs, the holistic model assists clients in achieving maximum self-sufficiency and avoiding future criminal behavior. The model seeks justice for the client, while working to reduce recidivism and empower clients to become productive members of the community. Interdisciplinary team-based holistic defense provides services to clients to address what really is affecting their ability to live crime free. In addition to the significant benefit for clients, there is a tangible benefit to the public. This model with adequate support staff promotes a fuller resolution of the cases and associated social contexts, timely resolution of cases which reduces costs for jails and reduces frustrations by clients, client families, victims, prosecutors, judges.

offered for their social needs. The Office files 20-25 appeals per year. Trials in absentia do not occur. Pleas in absentia are rare and are reserved for special cases where the court, solicitor and defense mutually agree that the circumstances merit such. Kenneth Days, III, Director and Chief Public Defender, City of Atlanta Office of the Public Defender said, “Through our use of this holistic model, we have demonstrated that prevention is cheaper than punishment.”¹³⁷

6. National standards of practice

National standards set out the effective, legal approach to the imposition of fines and fees, the fairness of their amounts, the critical nature of counsel for the decision to invoke the right to counsel or waive it, and the solemn legal and ethical responsibility of judicial officers.

a. *Appointment and waiver*

For nearly three decades the best practice requires that “[n]o waiver of counsel be accepted unless the accused has at least once conferred with a lawyer.”¹³⁸ The “process of offering counsel” should be done before a judge with “a thorough inquiry into the accused’s comprehension of the offer and capacity to make the choice intelligently and understandingly has been made.”¹³⁹

First appearance is a critical moment for defendants. “Provision of counsel at first appearance (“CAFA”) is recognized in law and standards as an effective way to defend the presumption of innocence in the pretrial phase and fulfill defense attorneys’ duties to their clients throughout the course of their representation. The American Bar Association, the National Legal Aid & Defender Association, the Sixth Amendment Center, the Pretrial Justice Institute, and the Constitution Project National Right to Counsel Committee are among the national justice organizations that have called for implementation of CAFA throughout the country. A growing body of research is now demonstrating that counsel at a person’s first appearance in court is an essential practice for preventing unnecessary incarceration and its harmful short- and long-term effects.”¹⁴⁰ A public defender must “be made available in person to a criminally-accused person for consultation at or before any appearance before a judicial officer, including the first appearance.”¹⁴¹

b. *Fines and fees*

The American Bar Association *Ten Guidelines on Court Fines and Fees* (2018) re-emphasize the importance of counsel at ability to pay proceedings and the necessity of a person

137 Communication by phone and email on October 29 & 30, 2020 with Kenneth Days, III, Director and Chief Public Defender, City of Atlanta Office of the Public Defender.

138 ABA *Standards for Criminal Justice: Providing Defense Services*, Standard 5-8.2(b) (In-Court Waiver), (3d Ed. 1992),

https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/providing_defense_services.pdf

139 *Id.*, 5-8.2(a).

140 *Access to Counsel at First Appearance A Key Component of Pretrial Justice*, National Legal Aid & Defender Association National Legal Aid and Defender Association (February 2020), <http://www.nlada.org/node/34531>

141 ABA *Standards for Criminal Justice: For the Defense Function*, Standard 4-2.3

to consult with counsel before waiving their right to counsel at an ability to pay proceeding: “GUIDELINE 8: Right to Counsel. An individual who is unable to afford counsel must be provided counsel, without cost, at any proceeding, including ability-to-pay hearings, where actual or eventual incarceration could be a consequence of nonpayment of fines and/or fees. Waiver of counsel must not be permitted unless the waiver is knowing, voluntary and intelligent, and the individual first has been offered a meaningful opportunity to confer with counsel capable of explaining the implications of pleading guilty, including collateral consequences.”¹⁴²

It is not enough for judicial officers to simply ask how much a person can pay monthly and if a person is employed or not (the current practice in Lexington County Magistrate Courts). There is more to making a fair determination of the ability to pay when assessing an amount. The *ABA Ten Guidelines on Court Fines and Fees* “GUIDELINE 7: Ability-to-Pay Standard. Ability-to-pay standards should be clear and consistent and should, at a minimum, require consideration of at least the following factors: receipt of needs-based or means-tested public assistance; income relative to an identified percentage of the Federal Poverty Guidelines; homelessness, health or mental health issues; financial obligations and dependents; eligibility for a public defender or civil legal services; lack of access to transportation; current or recent incarceration; other fines and fees owed to courts; any special circumstances that bear on a person’s ability to pay; and whether payment would result in manifest hardship to the person or dependents.”

The Task Force on Fines, Fees and Bail Practices¹⁴³ of the Conference of Chief Justices, a joint effort of the Conference of State Court Administrators, the State Justice Institute, the Bureau of Justice Assistance, and the National Center for State Courts, has published a model “bench card.”¹⁴⁴

The Task Force found that any fine or fees should be minimized and narrow. “Principle 1.6. Fees and Surcharges: Nexus to the “Administration of Justice.” While situations occur where user fees and surcharges may be necessary, such fees and surcharges should always be minimized and should never fund activities outside the justice system. Fees and surcharges should be established only for “administration of justice” purposes. “Administration of justice” should be narrowly defined and in no case should the amount of such a fee or surcharge exceed the actual cost of providing the service. The core functions of courts, such as personnel and salaries, should be funded by general tax revenues.”

The Task Force urges financial amounts to be based on ability to pay. Lexington Magistrates do not evidence this type of decision-making. “Principle 6.2. Judicial Discretion with Respect to Legal Financial Obligations. State law and court rule should provide for judicial discretion in the imposition of Legal Financial Obligations. State courts should avoid adopting

142 *Ten Guidelines on Court Fines and Fees*, The American Bar Association (2018), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_ind_10_guidelines_court_fines.pdf

143 *Principles on Fines, Fees, and Bail Practices*, National Task Force on Fines, Fee, and Bail Practices (2019), https://www.ncsc.org/data/assets/pdf_file/0020/14195/principles-1-17-19.pdf

144 *Lawful Collection of Legal Financial Obligations A Bench Card for Judges*, https://www.ncsc.org/data/assets/pdf_file/0026/17396/benchcard-reformatted-3-13-19.pdf

mandatory Legal Financial Obligations for misdemeanors and traffic-related and other low-level offenses and infractions. Judges should have authority and discretion to (1) waive or decline to assess fees or surcharges; (2) impose Legal Financial Obligations based on an individual's income and ability to pay; (3) modify sanctions after sentencing if an individual's circumstances change and his or her ability to comply with a Legal Financial Obligation becomes a hardship; and (4) impose modified sanctions (e.g., reduced or eliminated interest charges, reduced or eliminated fees, reduced fines) or alternative sanctions (e.g., community service, successful completion of an online or in-person driving class for moving violations and other non-parking, ticket-related offenses) for individuals whose financial circumstances warrant it.”

The Task Force urges alternatives and leniency, something that Lexington County Magistrates are not doing. “Principle 6.3. Enforcement of Legal Financial Obligations. As a general proposition, in cases where the court finds that the failure to pay was due not to the fault of the defendant/respondent but to lack of financial resources, the court must consider measures of punishment other than incarceration. Courts cannot incarcerate or revoke the probation of a defendant/respondent for nonpayment of a Legal Financial Obligation unless the court holds a hearing and makes one of the following findings: (1) that the defendant's/respondent's failure to pay was not due to an inability to pay but was willful or due to failure to make bona fide efforts to pay; or (2) that even if the failure to pay was not willful or was due to inability to pay, no adequate alternatives to imprisonment exist to meet the State's interest in punishment and deterrence in the defendant's/respondent's particular situation.”

Contrary to the Task Force's recommendation, the Lexington County Magistrates are extending the time of legal jeopardy for defendants based on lengthy payment schedules. “Principle 6.6. Probation. Courts should not order or extend probation or other court-ordered supervision exclusively for the purpose of collecting fines, fees, or costs.”

c. *ABA Ethics Opinion*

Lexington County's legal and financial structure violates a person's right to counsel in Magistrate Courts. The best national thinking on fines and fees is that the threat of incarceration should not be used as an inducement when fines and fees are at issue.

The American Bar Association has issued a formal ethics opinion on the ethical obligations of judicial officers under the Model Code of Judicial Conduct, Rules 1.1 and 2.6, “to undertake a meaningful inquiry into a litigant's ability to pay court fines, fees, restitution, other charges, bail, or civil debt before using incarceration as punishment for failure to pay, *as inducement to pay or appear*, or as a method of purging a financial obligation whenever state or federal law so provides.”¹⁴⁵

The ABA Opinion calls for policies, practices, and procedures should be adopted to make sure procedural justice is fulfilled. “Ways to ensure observance of basic procedural safeguards

145 *Formal Opinion 490: Ethical Obligations of Judges in Collecting Legal Financial Obligations and Other Debts*, ABA (March 24, 2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_490.pdf

include, for example, (i) using a “bench card” that provides judges and other staff relevant instructions on ability-to-pay inquiries, including a workable definition of indigence and alternatives to incarceration, (ii) providing advance notice to litigants of their ability-to-pay hearing and emphasizing that financial means will be “a critical issue” covered at the hearing, (iii) distributing a form “to elicit relevant financial information,” and (iv) providing a meaningful opportunity to address questions about the litigant’s ‘financial status’ at the hearing.”

d. *Workloads and support staff*

A defender’s workload cannot be excessive. “Defense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client’s interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations. A defense counsel whose workload prevents competent representation should not accept additional matters until the workload is reduced, and should work to ensure competent representation in counsel’s existing matters.”¹⁴⁶

“A *sine qua non* of quality legal representation is the support personnel and equipment necessary for professional service.”¹⁴⁷ The public defense program must have provided “investigatory, expert, and other services necessary to quality legal representation.”¹⁴⁸

VI. SUMMARY OF FINDINGS AND CONCLUSIONS; RECOMMENDATIONS

Lexington County has the constitutional responsibility to ensure that counsel is readily available to be appointed when the person is brought before the Magistrate.

“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” The right to counsel is the foundational guarantee of our Sixth Amendment. “This is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. The Sixth Amendment stands as a constant admonition that, if the constitutional safeguards it provides be lost, justice will not ‘still be done.’ It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious.”¹⁴⁹

¹⁴⁶ ABA *Standards for Criminal Justice: For the Defense Function*, Standard 4-1.8

¹⁴⁷ ABA *Standards for Criminal Justice: Providing Defense Services* 5-1.4 (3d Ed. 1992), Commentary

¹⁴⁸ *Id.* 5-1.4.

¹⁴⁹ *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938).

VII. FINDINGS

A summary of my findings includes that Lexington County:

- Is intentionally underfunding public defense counsel. Only 9% of the indigent cases receiving appointment of counsel, resulting in 91% of its cases prosecuted with the defendant not being afforded a lawyer.
- The Magistrate Public Defenders have too many cases and insufficient support staff.
- Has a scheme intentionally designed to impede, deter, disincentivize requests for appointment of counsel and for appointment of counsel.
- Has a system that is not appointing counsel to eligible indigents.
- When a person appears before a Magistrate here is no real and present option of appointment of counsel that will be presently afforded.
- Waiver proceedings are superficial and the written form is above the comprehension level of those appearing before the judges.
- Has a scheme that explicitly or implicitly is coercive in obtaining waivers of counsel from a person.
- The waiver form is not readily comprehensible as it is at the college level.
- Every reasonable presumption against waiver of counsel is not being made.
- Pressure to resolve cases before discovery is provided.
- Failure to pay hearings for indigents do not have counsel representing those brought before the court.
- Absence of investigation and use of experts.
- Trials in absentia are occurring at a high level; they should occur very rarely, if at all.
- Rather than trials in absentia, the judges should issue bench warrants and bring the person before the court.
- Other than a payment plan, alternatives to fines and fees are not being offered to those unable to pay.
- The dismissal rates are unusually low.

- The jury trials are low.
- Any person charged in the Lexington County Magistrate Court with an offense that has the *possibility* of jail is constitutionally entitled to the appointment of counsel.

My findings are not limited to one judge or court or one timeframe. Rather, they are a pattern of the information across all judges and courts and timeframes that I reviewed.

A. Remedies, at a minimum, include:

1. Magistrate Court public defenders should not be assigned to more than 400 open cases.
2. For the 5,312 to 6,185 persons who are indigent in the 2019 cases in Lexington County, South Carolina Magistrate Court, the County must provide funding to effectuate the provision of counsel for all indigents appearing in Magistrate Court who are subject to the possibility of incarceration, including the provision of investigators, administrators, and social workers and experts when appropriate as follows:
 - 13 - 16 attorneys
 - 4 - 5 investigators
 - 4 - 5 social workers
3. Public defense counsel should be present in the courtroom at the time an accused appears and shall be available to consult with any indigent before that person makes a decision on appointment of counsel, plea, sentencing, and at failure to pay proceedings.
4. Public defense counsel must begin representation of a client upon appointment.
5. No person who is unable to afford counsel shall be charged with criminal, non-criminal traffic, or ordinance violations without the ability to talk with appointed counsel before deciding whether to waive counsel.
6. When appointed to a case, the public defender's representation should not cease at sentencing; rather, the public defender should provide representation at show cause hearings and any hearing where reinstatement or enforcement of the suspended sentence may occur.
7. Lexington County should publicly report no less frequently than monthly the number of Magistrate Court appointments.

B. Consequences of deficiencies

When a public defense system is under-resourced, clients will suffer as the “ordinary injustice”¹⁵⁰ of processing cases in a deficient fashion becomes routine. That is what is occurring in Lexington County, South Carolina Magistrate Courts.

In order to have meaningful defense representation, the defense must put the prosecution’s case through the “crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656-57 (1984). The traditional markers of meaningful representation include an adequate number of attorneys to represent the indigent defendants, appropriate number of investigators to conduct necessary investigation, access to expert assistance when an expertise is necessary to test the government’s evidence, a capacity through social workers to develop and present alternative sentencing proposals, trials by jurors in the community, filing of an appeal or writ when appropriate.

Lexington County Magistrate Court proceedings lack these indicators. The representation of indigents is compromised in significant ways system-wide.

Due to the inadequate resources, Lexington County’s public defense system lacks the minimally adequate resources necessary serve indigent clients appearing in Magistrate Court.

After reviewing the information provided to me, it is my professional opinion that the deficiencies present the probability of significant permanent injury to those many persons who have no counsel representing them and to some of the clients who have appointed counsel. Neither are receiving meaningful assistance of counsel with the required full adversarial testing of the prosecution’s evidence.

Lawyers in criminal cases are necessities, not luxuries. Clients are harmed, often for their life, when they do not have a lawyer at the pretrial release proceeding, at their first appearance, at show cause hearings, and all other proceedings, upon plea, and at sentencing.

VIII. ANTICIPATED FUTURE WORK

I remain available to perform further work as necessary, especially if additional relevant information is provided to me.

¹⁵⁰ See Amy Bach, *Ordinary Injustice: How America Holds Court* (2009).

IX. EXHIBITS

I have not yet prepared any exhibits. To the extent such exhibits are prepared for use in summarizing and supporting the opinions I have set forth in this report, those exhibits will be derived from this report and from the data, information, and assumptions considered by me in preparing this report.



Edward C. Monahan
4317 Clemens Drive
Lexington, Kentucky 40514

Appendix

Curriculum Vitae of Ed Monahan

CURRICULUM VITAE (September 1, 2020)

Edward C. Monahan
4317 Clemens Drive
Lexington KY 40514
edmonahan7@gmail.com
859-317-3149

Admissions to the Bar

Attorney, admitted to: Kentucky Bar October 11, 1976; Supreme Court of the United States, November 26, 1979; United States Court of Appeals for the Sixth Circuit, June 4, 1980; United States District Courts: Eastern, September 19, 1979 and Western, April 11, 1979 Districts of KY

Education

- **Columbus School of Law, The Catholic University of America**, Washington, D.C.; Law Review, staff member 1974-1975, Associate Editor, 1975-1976; Degree: J.D., May 1976
- **Thomas More University**, Crestview Hills, Kentucky; Degree: A.B., May 1973

Professional Associations, Boards, Committees

Criminal Defense

KY Association of Criminal Defense Lawyers, 1987-present; President, 2011; Board of Directors, 1987-present; Treasurer, 1987, 1988; Education Committee Chair, 1987, 1989-1994; 2008-2016 National Association for Public Defense: Steering Committee, 2013-present, Education Committee Chair, 2013-2018, Co-Chair 2020-present; Member of Systems Builder, Fines and Fees, Workload Committees
National Association of Criminal Defense Lawyers, 1985 Subcommittee on Pretrial Release Advocacy Co-Chair
Pretrial Justice Institute Research Advisory Committee, 2018-present
American Council of Chief Defenders-Executive Committee, Member, 2008-16; Chair, 2010-12
National Legal Aid & Defenders Assoc., Training Section Vice-Chair, 1990-99; Co-Chair 1999-2004
Parents of Murdered Children Task Force, 1989-1991

Kentucky Bar Association

Kentucky Bar Association Criminal Law Section, Chair, 1991-1992; 2002-2003
Kentucky Bar Association Ethics Committee, 2000-2007
KBA Task Force on the Provision and Compensation of Conflict Counsel for Indigents, 2011
KBA Task Force on Proper Compensation of Prosecutors and Public Defenders, 2015

American Bar Association

Task Force on the Preservation of the Justice System, co-chaired by Ted Olsen and David Boies, Member, 2011-2012
Death Penalty Due Process Review Project, Member 2014-2017
Government and Public Sector Lawyers Division Council, Member 2014-present; Treasurer

2017-2018; Secretary 2018-2019; Vice Chair 2019-present; *The Public Lawyer* Editorial Board Chair, 2019-present

Kentucky

Kentucky Criminal Justice Council, Capital Committee, 2000-2004; Council Member, 2008-2017 Appalachian Legal Defense Fund, Board of Directors; chair, Fundraising Committee, 2008-2017 Catholic Archdiocese of Louisville's *The Record* - Editorial Board, 2009 - present
KY Governmental Services Advisory Committee, Certified Public Manager Program, 1994– 2004
Kentucky Coalition Against the Death Penalty, Member 1983-Present
League of Women Voters of Lexington, Member, 2018-present; State Board Member, chair, Felony Disenfranchisement Committee, 2019-present

Professional Experience

Criminal defense consultant and trainer (September 2017 – present)

Program evaluation and consulting with public defense programs, training public defenders and criminal defense lawyers.

Executive Director, NAPD Fund for Justice, Inc. (2018-present), a 501(c) tax-exempt foundation advancing the right to counsel nationally, see <https://fundforjustice.org/>

Public Advocate, Commonwealth of Kentucky (September 1, 2008 – September 15, 2017)

Chief public defender for Kentucky's statewide public defender program, the Department of Public Advocacy, which represented clients in 162,485 cases in FY17 in all of the state's 120 counties at all levels, district court, circuit court, Court of Appeals, Kentucky Supreme Court, including state capital trial, appeal, postconviction and federal capital habeas petition and appeal responsibilities with 545 staff and an annual budget of \$57 million. Duties beyond management of the Department and its functions, making policy recommendations to the General Assembly and the Secretary of the Justice and Public Safety Cabinet, Commonwealth of Kentucky, liaison with other key Justice Cabinet commissioners and directors, developing community service provider networks, liaison with community corrections agencies, and jails. Major initiatives included:

- Pretrial release: DPA attorneys present for first appearances, seeking the decision on appointment *before* the release ruling and then immediately advocating for the pretrial release of our clients. Because of this and changes in the law and a number of other advances, the pretrial release rate increased statewide since 2011 while the public safety rate and failure to appear rate have stayed the same or improved, saving counties scores of millions of dollars. On September 16, 2013 the National Association of Pretrial Service Agencies' John C. Hendricks Pioneer Award was presented to the DPA for the statewide public defender program's strategic commitment to advance public defender pretrial release advocacy across Kentucky.
- Expansion of DPA's Alternative Sentencing Worker (ASW) program, developed from a pilot of 5 in 2006 to 45 ASWs who presented over 3,293 alternative sentencing plans in FY 17 with a return of \$3.76-\$5.66 for every \$1 invested. This program offset over \$10 million in incarceration costs. This initiative has received three national awards:
 - National Criminal Justice Association 2011 Outstanding Criminal Justice Program Award;
 - Harvard University's John F. Kennedy School of Government Ash Center for

Democratic Governance and Innovation Top 25 Innovation in Government Award in 2013;

- The American Bar Association's Section of State and Local Government Law 2017 Jefferson Fordham Society Accomplishment Award.

Executive Director, Catholic Conference of Kentucky (CCK), (March 2004- August 2008) Responsible for representing the Kentucky Catholic Bishops in matters of public policy, serving as liaison to government and the legislature, and coordinating communications and activities between the church and secular agencies. Reported to the Bishops of the four dioceses of Kentucky who are CCK's Board of Directors; registered lobbyist. Key accomplishment included legislation on human trafficking, bullying, and raising the minimum wage. Advocacy on criminal justice issues including opposition to private prisons, increased rehabilitation, opposition to the death penalty, increase of Medicaid coverage and funding, progressive tax policy.

Deputy Public Advocate, Kentucky Department of Public Advocacy (October 1996-August 2004, 6 month overlap between DPA and CCK) Responsible for overseeing the Department's defender education and strategic planning, coordinating legislative and Kentucky Supreme Court rules advocacy, overseeing the General Counsel function on legal positions and agency litigation, publishing *The Advocate* and *Legislative Update*, serving as chief of staff for office of public advocate workgroup, serving as chief policy advisor to the Commissioner. Developed and produced DPA leadership education. Supervised the Post-Trial Division Director. Formerly oversaw the Administrative Division Director.

Assistant Public Advocate, Kentucky DPA (October 1976 - October 1996).

Director of Education & Development, Kentucky DPA (1980-2001) (held concurrently with position as Chief of the Trial Services Branch). Responsible for developing and producing practice education and development programs and publications in Kentucky's statewide public defender program for DPA attorneys, investigators, paralegals, mitigation specialists, and legal secretaries at trial, appeal and post-conviction levels. Responsible for capital and non-capital case representation at trial, appeal and federal levels. Editor of the Department of Public Advocacy's bimonthly legal education and research journal, *The Advocate*, 1984-2004. Supervised DPA professional staff recruitment (1993-1995). Developed and produced strategic planning process for DPA (1989-2001).

Chief, Department of Public Advocacy's Trial Services Branch (October 1980 - March 1982) Supervised 5 attorneys and 5 support staff with responsibility for the administration of and legal assistance to the local public defender systems in Kentucky's 120 counties.

Department of Public Advocacy Staff Appellate Attorney (1976-1980) Represented appellate clients, in capital and noncapital cases.

Chair, Department of Public Advocacy Death Penalty Task Force (1976-1982).

Legal Writing Instructor (1982-1983), University of Kentucky Law School, Lexington, Kentucky.

Department of Public Advocacy Legal Assistant (May-October, 1976) Represented clients on appeal under supervision of other attorneys.

Department of Public Advocacy Law Clerk (summer 1975) Provided research assistance to trial and appellate attorneys.

Publications

Books, Book Chapters, Law Review Articles

- *Tell the Client's Story: Mitigation in Criminal and Death Penalty Cases*, American Bar Association book (2017), co-edited with Jim Clark, Ph.D. LCSW; Dean and Professor, College of Social Work, Florida State University. Authored with Lorinda Meier Youngcourt chapter on The Law and Practice of Voir Dire of Capital Jurors; with James Clark chapter on Creating and leading the Mitigation Team; with Robert Walker *et al* chapter on Mitigation Practice: Turing Defendants into Persons; chapter on Communicating a Client's Mitigation in the Court of Public Opinion: A Comment on "No Comment"
- American Bar Association's *Ethical Problems Facing the Criminal Defense Lawyer: Practical Answers to Tough Questions*, Edward C. Monahan and James Clark, Chapter 23, "Coping With Excessive Workload," (1995). Reviewed in *Beyond A Book Review: Using Clinical Scholarships in Our Teaching*, 2 Clinical L. Rev. 251, 271-72 (1995); Book Review, *ABA Criminal Justice*, Vol. 10, No. 4 (Winter 1996) at 22; reprinted in Taslitz & Paris, *Constitutional Criminal Procedure* (1997) and in *Constitutional Criminal Procedure* (3rd ed 2007)
- *Preparing the New Law Graduate to Practice Law: A View from the Trenches* (co-authored with Rodney J. Uphoff and James J. Clark, Ph.D., 64 Univ. Cin. L. Rev. 381 (1997)
- *Criminal Defendant's Pretrial Discovery Right to a Lineup*, Casenote, 24 Cath. U.L. Rev. 360 (1975)

Articles in National Publications

- Monahan and Vito, *A Comparison of Executions and Death to Life Commutations in Kentucky, 1901-2019: A Critical Review of the Process*, accepted for publication in *The Prison Journal* (forthcoming).
Kheibari, A., Walker, R., Clark, J., Victor, G., & Monahan, E. (2019). Forensic social work: Why social work education should change. *Journal of Social Work Education*. DOI: 10.1080/10437797.2019.1671257
- Walker, R., Clark, J., Monahan, E.C., Shechet, A., Agharkar, S., Kheibari, A., & Victor, G. (2018). Developmental impairments in moral competence as mitigation in capital cases. *Journal of Behavioral Sciences and the Law* 36, (4), 437-456.
- *Mitigation is the Heart and Soul of Just and Merciful Sentencing*, ABA Human Rights magazine, Vol. 42 No. 4 p. 17 (2017)
- *Children are Constitutionally Different: Neuroscience Developments Bring Smart Changes*, American Bar Association Government and Public Sector Lawyers Division, *The Public Lawyer*, Vol 24 No. 2 (Summer 2016) p. 6. Reprinted in *The Advocate* (May 2017)
- *Strategic Planning for Defender Organizations: Creating Our Future the Common-Sense Way*, NLADA *Cornerstone*, Vol. 20, No. 1 (Spring 1998)
- *Boundaries Between Attorneys & Clients*, NLADA *Cornerstone*, Vol. 19, No. 1 (Spring

1997)

- *At the Millennium Will We Be Settlers or Pioneers?*, New York State Defenders Association's *The Defender* (July 1997)
- *Funds for Defense Expertise: What National Benchmarks Require*, *The Champion* (1997) co-authored with James J. Clark, Ph.D.)
- *Boundaries Between Attorneys & Clients*, NLADA *Cornerstone*, Vol. 19, No 1 (Spring 1997)
- *The Mental Health Expert: Eight Steps to Integrating a Specialist into Your Case*, ABA *Criminal Justice*, Vol. 11, No. 2 (Summer 1996) co-authored with James J. Clark, Ph.D.
- *Coaching Defenders: Developing a Helping Relationship*, NLADA's *Cornerstone*, Vol. 18, No. 2 (1996) (co-authored with James J. Clark, Ph.D.)
- *Performance Coaching: Strategies for Defender Managers*, NLADA's *Cornerstone*, Vol. 18, No. 3 (1996) (co-authored with James J. Clark, Ph.D.)
- *Funds for Resources for Indigent Defendants Represented by Retained Counsel*, NACDL's *The Champion*, Vol. 20, No. 10 (Dec. 1996) co-authored with James J. Clark, Ph.D.
- *Funds for Resources for Indigent Defendants Represented by Retained Counsel*, NACDL's *The Champion*, Vol. 20, No. 10 (Dec. 1996) at 16, co-authored with James J. Clark, Ph.D.
- *The Fiend Unmasked: Developing the Mental Health Dimensions of the Defense*, ABA *Criminal Justice*, Vol. 8, No. 2 (Summer 1993) co-authored with James J. Clark, MSW, and Lane J. Veltkamp, MSW, reprinted in *Indiana Defender* (August 1998)
- *Deciding to Train for Quality Service: Quality is the Only Acceptable Standard*, NLADA *Cornerstone*, Vol. 14, No. 3 (Fall 1992)
- *Kentucky, Not Its Lawyers, Must Fully Fund Indigent Criminal Defense*, *Kentucky Bench & Bar*, Vol. 56, No. 2 (Spring 1992), co-authored with Vince Aprile
- *Attorneys Must be Paid Fairly: Defense Attorneys Are Entitled to Fair Market Value*, ABA *Criminal Justice*, Vol. 5, No.2 (Summer 1990) Reprinted in *Indiana Defender* (Dec. 1990); *New York State Defender* (March 1991). Cited in *State v. Peart*, 621 So.2d 780, 790 (La. 1993)
- *Who is Killing the Sixth Amendment?*, ABA *Criminal Justice*, Vol. 6, No. 2 (Summer 1991). Cited in Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1852 (1994)
- *Pro Bono Service in Criminal Cases is Neither Mandatory nor Ethical*, co-authored by Vince Aprile, ABA *Criminal Justice*, Vol. 5, No. 3 (Fall 1990). Reprinted in the *New York State Defender* (March 1991). Cited in ABA Standards for Criminal Justice Providing Defense Services (3d Ed. 1990) at 35 n.7
- *Obtaining Funds for Experts in Indigent Cases*, NACDL's *The Champion*, Vol. 13, No. 7 (August 1989); Reprinted *Ohio State Defender's Report* (September 1989); *Indiana Defender* (May 1990) & (June 1990)
- *Deciding to Train for Quality Service: Quality is the Only Acceptable Standard*, NLADA *Cornerstone*, Vol. 14, No. 3 (Fall 1992)

Articles in Kentucky Publications

- *Public Value of Public Defense*, *The Advocate* (September 2017)
- *Kentucky's Prison and Parole Data: An Update*, *KACDL News* (September 2017)
- *Proclamation in Support of Objective Pretrial Release Assessments*, *KACDL News* (June 2017)

- *Kentucky Department of Public Advocacy Proclamation in Support of Objective Pretrial Release Assessment*, The Advocate (May 8, 2017)
- *Kentucky continues to spend more than necessary to incarcerate our clients*, KACDL News (April 2017)
- *Alternative Sentences: Judges Must Consider and Defense Attorneys Must Present: Sentencing advocacy is consequential*, KACDL News (February 2017)
- *Our Ph.Ds. in media criminology mislead: Contrary to public opinion, crime is historically low as prisons keep filling up*, KACDL News (November 2016)
- *Waste in Kentucky's Correctional System: \$46M*, KACDL News (September 2016)
- *KY Criminal Justice Reform: the time is now*, KACDL News (July 2016)
- *It is Time for Criminal Justice Reform in Kentucky* co-authored with Damon Preston, The Advocate (June 2016)
- *Common Sense Reforms are Needed, Now*, KACDL News (May 2016)
- *More Reforms are Necessary*, The Advocate (December 2015)
- *More Reform is Needed to Reduce Waste and to Safely Save Counties and the State Millions*, KACDL News (September 2015)
- *Waste in Kentucky Capital Prosecutions is Significant, 2011 Statewide Audit: Implement Charging Recommendation Process to Reduce Waste, Abuse, and Error*, The Advocate (March 2015)
- *It is time to enact common sense felony expungement provision Senator Paul and Greater Louisville Incorporated support felony expungement in KY*, KACDL News (March 2015)
- *Waste in Kentucky Capital Prosecutions is Significant 2011 Statewide Audit: Implement Charging Recommendation Process to Reduce Waste, Abuse, and Error*, The Advocate (February 2015)
- *Promoting smart sentences, reducing waste, Broadening National Bipartisan Conversation on Our Responsibility to Reduce Incarceration, Commonsense Opportunities to Reduce Waste in the KY Criminal Justice System in 2015*, The Advocate (January 2015)
- *Opportunities for Reducing Waste in 2015 Broadening national bipartisan conversation on our obligation to reduce incarceration*, KACDL News (January 2015)
- *Five Ways to Reduce Error, Waste, Abuse in Capital Prosecutions in Kentucky*, The Advocate (August 2014)
- *Kentucky is Increasing Pretrial Release Safely Millions Saved by Counties*, The Advocate (June 2014)
- *Parole in Kentucky: Parole Declines and KY Parole Board's Regulations being Challenged as Arbitrary*, KACDL News (May 1, 2014)
- *KY Defenders: Protecting Rights and Justice, Providing Fiscal Efficiency; 10 Common sense ways to reduce waste in Kentucky's criminal justice system: Lasting and Unrealized Benefits of HB 463*, The Advocate (March 2014, Parts 1 and 2).
- *More funding for private conflict counsel sought*, KACDL News (January 2014)
- *Public Safety at Risk: Caseload Relief Needed to Keep the System from Unraveling*, The Advocate (February 2012)
- *A Satisfying Year as KACDL President*, KACDL News (December 2011)
- *Nation's Chief Defenders Call for Improving Pretrial Release*, The Advocate (October 2011)
- *Nation's Chief Defenders Call for Improving Pretrial Release*, KACDL News (Summer 2011)

- *Catholic Leaders Seek Help on Education Issues from Kentucky's Congressional Members*, CCK Witness (Spring 2008)
- *Opportunities to Make a Difference Await Us*, CCK Witness (Winter 2007)
- *Opportunities to Support Pregnant Women in 2008*, CCK Witness (Fall 2007)
- *Bishops Adopt Two Statements; Offer Guidance to Catholics about Political Activity and HPV Vaccine*, CCK Witness (Summer 2007)
- *The 2007 KY General Assembly: Uncommon Advances Amidst Continued Disappointments*, CCK Witness (Spring 2007)
- *Let Your Light Shine; New Opportunities to Make a Difference in Our State and Nation Await Us*, CCK Witness (Winter 2006)
- "Prayer that Storms the Heavens...", CCK Witness (Fall 2006)
- *Promote Human Life: Say NO to Tobacco*, CCK Witness (Summer 2006)
- *Opportunities for Life Has New Director*, CCK Witness (Spring 2006)
- *Health Care for All Is a Moral Right*, CCK Witness (Winter 2005)
- *Welcome Ex-felons Home: Restore Right to Vote*, CCK Witness (September 2005)
- *Charitable Gaming in the Commonwealth*, CCK Witness (June 2005)
- *Focus on Dignity of the Person*, CCK Witness (March 2005)
- *Social Security: A Social Insurance Program that Helps the Elderly, Children and the Disabled*, CCK Witness (March 2005)
- *Helpful Coaching by Case Review Method*, The Advocate Volume 26, No. 3 (May 2004)
- *Providing Conflict Counsel to Kentucky Indigent Criminal Defendants: Balancing Ethical, Legal, and Fiscal Realities to Provide Quality Representation*, The Advocate, Volume 26, No. 1 (January 2004)
- *Confidential Request for Funds: 2002 General Assembly Recognizes that Lack of Money Does Not Mean Less Protection*, The Advocate, Volume 24, No. 6 (September 2002)
- *How Does Kentucky Compare to the National Consensus on Fair Administration of Death Penalty?*, The Advocate, Volume 24, No. 1 (January 2002)
- *Bail on Appeal*, The Advocate, Volume 23, No. 5 (September 2001)
- *Acknowledging the Prevalence of Severe Mental Illness on Death Row co-authored with Eric Drogin*, The Advocate, Volume 23, No. 3 (May 2001)
- *10 Factors to Make the Threshold Showing for Funds*, The Advocate, Volume 22, No. 6 (November 2000)
- *The Right to Present the Defense Evidence*, The Advocate, Volume 22, No. 5 (September 2000)
- *The Scope of the Right to Counsel in Kentucky Post-Conviction Proceedings co-authored with Rebecca Ballard Diloreto*, The Advocate, Volume 22, No. 4 (July 2000)
- *Confidential Request for Funds: lack of money does not mean less protection*, The Advocate, Volume 20, No. 2 (March 1998)
- *Are We Settlers or Pioneers? Case Review Process: Helping Attorneys Help Clients*, The Advocate, Volume 20, No. 1 (January 1998)
- *Funds for Experts & Resources for Indigent Defendants Represented by Retained Counsel with Jim Clark, Ph.D.*, The Advocate, Vol. 19, No. 5 (September 1997) at 44; reprinted in *Indiana Defender* (1998)
- *Effectively Seeking Funds for a Defense Statistical Expert: Factfinding in the Face of Uncertainty co-authored with Jeff Sherr and Tim Arnold*, Kentucky DPA The Advocate, Vol. 18, No. 6 (Nov. 1996) at 43

- *Funds for Firearms and Gunshot Wounds Experts*, Kentucky DPA *The Advocate*, Vol. 18, No. 4 (July 1996)
- *Funds for Defense Forensic Pathologists*, Kentucky DPA *The Advocate*, Vol. 18, No. 3 (May 1996)
- *Funds for Defense DNA Experts Required*, Kentucky DPA *The Advocate*, Vol. 18, No. 2 (March 1996)
- *Funds for Experts in Drug Cases*, Kentucky DPA *The Advocate*, Vol. 18, No. 1 (Jan. 1996)
- *Failure to Employ or Present Defense Experts: Ineffective Assistance*, Kentucky DPA *The Advocate*, Vol. 17, No. 5 (Nov. 1995)
- *Funds for Defense Experts & Resources: What National Benchmarks Require*, *The Advocate*, Vol. 17, No. 3 (June 1995)
- *Funds for Consulting Experts*, Kentucky DPA *The Advocate*, Vol. 17, No. 2 (April 1995) at 30, co-authored with James J. Clark
- *Confidential Request for Funds for Experts & Resources*, Kentucky DPA *The Advocate*, Vol. 17, No. 1 (Feb. 1995)
- *Funds for Resources: Persuading and Preserving*, Kentucky DPA *The Advocate*, Vol. 16, No. 6 (Jan. 1995)
- *Indigent's Right to Independent Defense Expert Help*, Kentucky DPA *The Advocate*, Vol. 16, No. 5 (Oct. 1994)
- *Funds for Independent Defense Experts*, Kentucky DPA *The Advocate*, Vol. 16, No. 4 (Aug. 1994)
- *A Sisyphean Indictment of Criminal Defense Attorneys*, KACDL's *The Kentucky Criminal Defense Lawyer*, Vol. 3, No. 4 (December 1990)
- Kentucky Department of Public Advocacy's, *Obtaining Funds for the Defense of Indigents Accused of Crimes Manual* (June 1990), cited in ABA Standards for Criminal Justice Providing Defense Services (3d Ed. 1990) at 23 n.9
- *The Right to Funds for Experts: Its Continued Expansion*, Kentucky DPA's *The Advocate*, Vol. 12, No. 3 (April 1990)
- *Obtaining Funds for Experts in Criminal Defense Cases: Making the Threshold Showing*, Kentucky DPA's *The Advocate*, Vol. 12, No. 2 (February 1990)
- *DPA Death Penalty Manual* (February 1990) articles: Motion Practice in Capital Cases, Experts, Publicity and Venue, Clients, Investigation, Psychological/Psychiatric, Extreme Emotional Disturbance, Religion, Judge Sentencing, Post-Trial Juror Interviews, Summary by Topic of U.S. Supreme Court Capital Cases
- *Criminal Defense Attorneys Expand the Concept of Judicial Recusals*, Kentucky DPA's *The Advocate*, Vol. 11, No. 4 (June 1989)
- *Fees for Attorneys Representing Indigent Criminal Defendants*, Kentucky DPA's *The Advocate*, Vol. 12, No. 1 (December 1989) Reprinted in *Ohio State Defender's Report* (June 1990)
- *Capital Punishment: Shall We Be Christians or Survivors?* *The Messenger* (August 3, 1980)
- *The Death Penalty After Lockett v. Ohio*, Newsletter of Kentucky Prisoners' Support Council of the Southern Coalition on Jails and Prisons, March/April, 1979
- DPA Death Penalty Manual, editor 1978, 1979 editions

Op-Eds

- *Marsy's Law would wreak havoc on Kentucky's criminal justice system*, Nina Ginsberg and Ed Monahan, Courier-Journal, February 13, 2020
- *Misinformation has led to costly policy in Kentucky criminal justice system*, Lexington Herald-Leader, November 22, 2019
- *Without prosecutors in the lead, true criminal-justice reform won't happen*, Lexington Herald-Leader, September 10, 2017
- *Great U.S. criminal justice system should work for all*, Lexington Herald-Leader, July 26, 2015
- *Public defenders are crucial to fair criminal justice system*, Lexington Herald-Leader, May 1, 2014
- *At liberty's core: right to counsel - poor defendant won for all 50 years ago* co-authored with Dan Goyette, Lexington Herald-Leader, March 17, 2013
- *Justice system in danger of unraveling*, Lexington Herald-Leader, February 4, 2009
- *A tsunami's coming to Kentucky. What will we do?*, Courier-Journal, February 22, 2005
- *In Death Penalty Cases, Delays Aren't a Stalling Tactic of Defendants*, Lexington Herald-Leader, March 1, 1995, co-authored with Ernie Lewis
- *Inadequate Funding Denies Justice to State's Poor*, Kentucky Post, July 15, 1993
- *Use Resources to Prevent Violence, Not Extend It*, The Paducah Sun, March 16, 1992
- *Defense of Capital Case is Legal System Brain Surgery*, The Paducah Sun, July 8, 1991
- *Death Warrant: A Case of Politics in which Nothing is Furthered*, Response to Editorial, Lexington Herald Leader, August 8, 1986, co-authored with Erwin W. Lewis
- *Confronting Morality of Capital Punishment*, Book Review, Lexington Herald-Leader (October 6, 1985)

Presentations, Coaching

Webinars

The public value of public defense...Reflections, National webinar sponsored by National Association for Public Defense, October 11, 2019

Assisting Chief Defenders: stimulating increased awareness, options, capacity, National webinar sponsored by National Association for Public Defense, March 19, 2018 with James Clark, Ph.D.

Tell the Client's Story: Developing and leading effective sentencing mitigation teams in serious criminal cases and capital cases, National webinar sponsored by the ABA Center for Professional Development, October 10, 2017 with James Clark, Ph.D.

Developing and Leading Effective Mitigation Teams, National webinar sponsored by National Association for Public Defense May 24, 2017, with James Clark, Ph.D.

The Ethics of Representing Clients Competently in the Court of Public Opinion, National webinar sponsored by National Association for Public Defense, May 5, 2017

Unlocking Justice: Strategizing for Reform – State Campaign Successes, National webinar sponsored by The sentencing Project, October 5, 2016

Strengthening indigent defense: Understanding state and federal resources, U.S. Department of

Justice/ National Criminal Justice Association Webinar, January 22, 2013

National Programs

Resilient Leadership course, Developed with Ernie Lewis the National Association for Public Defense *Resilient Leadership* practice education offered August – October 2020. A course for Defender Chiefs, Deputies, and Leadership Team Members conducted completely online. Participants produce a plan for addressing a current adversity, complexity, crisis in their office. The plan is built on their strengths and take advantages of additional options on how they see and approach adversities, complexities, crises. There are 7 sessions. The first 6 sessions are over 6 consecutive weeks followed by a final session one month after the sixth session. Each session has videos and other materials to review. Each session has an assignment that is based on the organization's situation and the participant as a leader. The videos and assignments are discussed in a weekly small Zoom group with a structured discussion for an hour and a half. Through the course, participants learn commonsense models for what leaders can choose to do in dealing with an unpredictable adversity, complexity, crisis.

Coach, National Association for Public Defense, Executive Leadership Institute, Los Angeles CA, December 8-11, 2019

Coaching and case review, NAPD Executive Leadership Institute, Austin Texas, October 17, 2019

Helping Staff Help Clients, Supervising, Coaching, and Retaining, Georgia Public Defender Leadership Institute, Macon Georgia April 29, 2019 with James J. Clark, Ph.D., Dean & Prof College of Social Work, Fla State Univ

Social Work and Holistic Defense, NAPD Executive Leadership Institute, April 2019 with Justine Olderman and Caitlin Becker

Investigations in Criminal Defense: Why the State's Theory Should Not Be Your Focus, Louisiana Defender Trial Skills Training Institute, September 16, 2018 – September 21, 2018, Baton Rouge, LA

Working together effectively as a capital team, and Client communication and related challenges: building a relationship with your client, Texas Office of Capital and Forensic Writs, Austin, TX, September 13, 2018

Creating Public Value, TN District Public Defender Conference, Franklin TN, June 13, 2018

Coach, National Association for Public Defense, Train the Trainer Institute, Frankfort, KY, May 16-18, 2018

Setting Up and Growing a Social Worker program and coach at National Association for Public Defense, Executive Leadership Institute, Frankfort, KY, May 13-16, 2018

Defenses & Mental Health Courts in the Criminal Justice System, Course Corrections, National Public Defenders Summit, March 28, 2018, Denver Colorado

Brainstorming – Why It's Critical to Your Defense, and Building a Relationship with Your Client, and small group coach, Louisiana Defender Trial Skills Training Institute, February 17,

2018 – February 23, 2018, Baton Rouge, LA

Developing Strategies: Legislative, Demand Side, Media, National Association for Public Defense Workload Conference, November 17, 2017, St Louis MO

Leading a public defense organization during a time of complexity, and small group coach, National Association for Public Defense Executive Leadership Institute 2017 April 2-5, 2017, Frankfort, KY

DPA Alternative Sentencing Worker Program: Holistic Defense, Effective Representation, & Improving Outcomes, Oregon legislative seminar, September 23, 2016

Representing Children, Oregon Public Defense Services Commission, Thursday, September 22, 2016

Reflective Practice and Critical Incidents, National Association for Public Defense Executive Leadership Institute 2017, Valparaiso, Indiana, June 23, 2015 with Cait Clarke

Finding a way, Tenth Annual Summit on Indigent Defense Improvement, Thurgood Marshall School of Law, Houston, Texas, February 7, 2015

Increasing pretrial release safely, where there is a will there is a way, VCCJA Pretrial Symposium, Richmond, Virginia, May 30, 2014

Can you increase pretrial release safely, Recognizance Release of detention-Is there Anything Else?, National Institute of Corrections, August 7-8, 2013, Aurora, Colorado

Developing a strong management team turning challenges into successes with Lisa Freeland Federal Defender for the Western District of Pennsylvania, Federal Directing Attorney Education, January 26, 2011

Case review: helping staff tackle tough problems, Federal Capital Habeas Conference, April 2010

Coaching: The better the coach...he better the performance, Dayton Ohio, Ohio Defender Leadership Education, April 2010

Learning Objectives why they are important how to craft them, Federal Defender Trainer Education, November 2010, Santa Fe, NM

Transfer of Learning to the Job: Supervisor, Trainer, Employee, NLADA Train the Trainer, St. Louis MO, March 2008

Obtaining Resources for, and Working with Experts with Dr. Gelbart and Dr. Ostrowski; *Direct Examination of Expert Witnesses; Direct Examination of a Mental Health Expert Demonstration* with Dr. Gelbart, NLADA *Skillfully Handling Scientific Evidence and Expert Witnesses at Trial*, Altamonte Springs, Florida, February 1997,

Performance Appraisal Orientation: How to Discuss Expectations with Your Staff, Developing a Coaching Plan (with Kevin Curran), Missouri Public Defenders, Lake of the Ozarks, Missouri, December, 1996

Presentation on Ethics & the Media, 1993 Wisconsin State Public Defender Criminal Defense Conference, Oconomowac, Wisconsin, October 22, 1993

Coaching Skills for Public Defender Managers (with Laura Kelsey Rhodes & Lisa Wayne); *Compassion Fatigue* (with Lee Norton, Ph.D.); *No Comment? - The Care and Feeding of the Media* (with Carol Honsa, NLADA Defender Management Training Conference, Baltimore, Maryland, June 1996

Advanced Interviewing Skills Workshop (with Kathy Wayland); *Working with Experts - Advanced* (with Jim Clark); *Advanced Brainstorming: Theory & Theme* (with Joe Guastaferro); *Advanced Jury Selection* (with Steve Rench); *Advanced Direct Examination of Mitigation Witness* (with Steve Rench); *Advanced Penalty Phase Opening Statement* (with Rick Kammen), NLADA Life in the Balance VIII: Defending Death Penalty Cases, St. Louis, Missouri, March, 1996

First Year Transitions from the Law School to the Courtroom: A Paradigm of Value & Ethical Conflicts Faced by New Professionals and Their Educators, Third International Conference on Social Values, St. Catherine's College, University of Oxford, Oxford, England, July 1995

Small Group Facilitator, Missouri Public Defender Capital Litigation Conference, A New Look at Mitigation, Clayton, Missouri, July, 1995

"No Comment." The Care and Feeding of the Media (with Carol Honsa); *Making It Work and Implementing New Ideas*; *Coaching Skills for Defender Managers* (with Marilyn Bednarski and Thom Allena), NLADA Defender Management Training Conference, San Diego, California, June 1995

Appellate Case Review Process; Workshops on *Issue Framing and Argument, Argument Headings, Statement of Facts, Argument, Oral Argument*, NLADA Appellate Defender Training, Estes Park, Colorado, May, 1995

Saving Your Client's Life by Persuasively Presenting It (with Vince Aprile and Lee Norton); *Advanced Brainstorming Workshop*; *Litigating Your First Case* (with Kelly Gleason); *Closing Argument Workshop* (with Charlie Rogers and Marla Sandys), NLADA Life in the Balance VII: Defending Death Penalty Cases, Kansas City, Missouri, March, 1995

Quality Representation of Indigents: Begin with the End in Mind, Tennessee District Public Defenders Conference, Gatlinburg, Tennessee, June, 1994

Brainstorming: The Difficult Client (with Meg Gaines) and small group coach, New York State Defenders Association Defender Institute, Basic Trial Skills, Rensselaer Polytechnic Institute, Troy, New York, June, 1994

Attorney-Client Relationships and Communications Demonstration; Creative Idea Expression: Brainstorming the Case; Improving the Product: The Arts of Giving and Receiving Criticism and Self-Editing (with Melinda Pendergraph); small group workshop leader on attorney-client relationships and oral argument; and faculty critiquer training; NLADA Appellate Defender Training, New Orleans, Louisiana, May, 1994

Training: Complex Case Management (with Deborah Ezbitski, Chris Johns, Phyllis Subin); *Making It Work: Implementing New Ideas*, NLADA Defender Management Training, Chicago, IL, April, 1994

Legal Ethics and the Public Defender Manager/Supervisor: Protecting Your Lawyers, Their Clients and the Public Trust; Ensuring Quality Representation and Quality Management: Coaching by Critiquing and Case Review; Being the Best: Laudable Aspiration or Obtainable Goal? (with Vince Aprile), Tennessee Public Defender Conference, Chattanooga, Tennessee, June 9-11, 1993

Presentation on Brainstorming and Media: Representing Our Clients Well; Small Group Critiquer, Wisconsin State Public Defender Trial Skills Seminar, Oconomowac, Wisconsin, May 9-15, 1993

Appellate Brainstorming Presentation; Workshops on Oral Argument; Brainstorming, NLADA Appellate Defender Conference, New Orleans, Louisiana, April, 1993

Designing a Public Defender System for the 21st Century in a Hostile Economic and Political Environment (with Vince Aprile); *Defending Training is a Decade of Funding Shortages* (with Vince Aprile); *Statewide Defender Programs: Training A No Lose Proposition* (with Kate Puyear); *Critiquing: The Unique Skill for Manager, Supervisor, Trainers and Litigators* (with Phyllis Subin & Kate Puyear); *The Case and Feeding of the Media by Defenders* (with Vince Aprile), NLADA 70th Annual Conference, Toronto, Ontario, Canada, November 12-14, 1992

Case Review; Creative Brainstorming, New Mexico Public Defender Annual Training Conference, Angel Fire, New Mexico, September 14 & 15, 1992

Creative Brainstorming: A Quality Process for Envisioning and Creating Solutions to Difficult Problems Presentation; Critiquer for Workshops on 1) Brainstorming, 2) Difficult Experts, 3) Juror Interviews, and 4) Mitigation Witnesses, Federal Capital Resource Training, Chicago Illinois, June 6-9, 1992

Media Relations: Putting Your Spin on the Story; Training: Making a Good Staff Better; Critiquing Workshop, NLADA Defender Management Training Conference, Albuquerque, New Mexico, May 14, 16, 1992

Creative Appellate Litigation: Avoiding the Affirmance Train (with Rhonda Long-Sharp); *Mental Health Issues on Appeal* (with Rhonda Long-Sharp); *Client Relationships and Issue Selection Workshop; Setting the Scenes: How to Frame the Issues Workshop*, NLADA Appellate Defender Training, Nashville, Tennessee, April 1992

Issue Spotting, Oral Argument Demonstration, Panel on Issue Spotting & Fertilizing, Missouri State Public Defender Appellate/Post-Conviction Conference, Columbia, Missouri, March, 1992

Human Resource Development to Empower Excellent Client Service, Critiquing, Brainstorming, Case Review, Missouri State Public Defender System's Defender Management Conference, Clayton, Missouri, June 14, 1991

Empowering Excellent Service Through Critiquing Presentation and Workshop on Case Review and Critiquing, NLADA Defender Management Conference, San Francisco, California, June 2, 1991

Training: The Key to Staff Development; Brainstorming, Case Review, Critiquing Workshops, NLADA Defender Management Training Conference, San Francisco, California, May 18, 1991

Creative Appellate Litigation Practice Presentation and Brainstorming Workshop, NLADA Appellate Defender Training, Kansas City, Missouri, April, 1991

Litigating for Auxiliary Resources and Other Assigned Counsel Issues, New York State Defenders Association, Lake Placid, New York, July 14, 1990

Training: The Key to Staff Development, NLADA Defender Management, Philadelphia, Pennsylvania, June 2, 1990

Training and Training Workshops, NLADA Defender Management Training, New Orleans, Louisiana, May 18-21, 1988

Assessing Training Needs; Long Range Planning of Training and Setting Goals and Objectives for Training Programs, Public Defender Trainers Meeting, Indianapolis, Indiana, December 12, 1986

Criminal Appeals: Problems and Prospects, Graduate Law Enforcement Class, Department of Criminal Justice, Xavier University, Cincinnati, Ohio, October, 1986

Disseminating Information: Training and Publications, NAACP Legal Defense Fund, Capital Punishment Conference, Warrenton, Virginia, August 9, 1986

Capital Resources and Training, NAACP Legal Defense Fund, Capital Punishment Conference, Warrenton, Virginia, July 10-13, 1985

Coalition Building/State and Local Level, NLADA Death Penalty Seminar, Atlanta, Georgia, November, 1981

Penalty Phase of Death Penalty Trial, Southern Prisoners' Defense Committee Improving Special Criminal Defense Skills, Nashville, Tennessee, October, 1981

Keeping Your State in Control - Statewide Issue Preservation, NAACP Legal Defense Fund Post-Conviction in Capital Litigation Conference, Warrenton, Virginia, May, 1981

Death Penalty Cases - Team Approach, Motion Practice, Bifurcated Trials, and Developing the Theory of the Homicide Case, New Mexico Public Defender Homicide Seminar, Albuquerque, New Mexico, December, 1979

Kentucky Programs

Evolution of Cannabis Regulation Panel, 2019 Howard L. Bost Memorial Health Policy Forum, Does legalization of marijuana for medical purposes adversely affect public health in terms of crime?, September 23, 2019

Panel on Systematic practices from racial profiling to a flawed grand jury system that insulates unjustified violence and police misconduct from scrutiny at trial, University of Louisville Brandeis School of Law, Dismantling Structural Inequality: Lock ups, Systematic Chokeholds, and Race-Bases Policing, March 23, 2018

Reducing County Jail Costs Through Criminal Justice Reform, KCJEA/KMCA Joint Summer Conference Galt House, Louisville, June 29, 2016

2015 commonsense suggestions to reduce WASTE, 15th Annual KCJEA Fall Conference, Griffin Gate, Lexington, KY, October 9, 2015

Finding a Way, DPA-NAPD defender management Institute, August 20-22, 2014

The value of public defenders & commonsense, cost effective suggestions for 2014, Pikeville Rotary, February 12, 2014

Reducing jail costs for counties while protecting public safety, KCJEA Winter Conference Wednesday February 5, 2014

Commonsense, cost effective suggestions for 2014, Paducah Rotary, November 6, 2013

Lawyers make a difference at first appearance, KY District Judges College, Lake Barkley State Park, September 18, 2012

Let us rise to the occasion, Law Day address, Bowling Green/Warren County Bar Association, May 26, 2011

Client's Case - Attorney/Client Relationship with Jim Clark, workshops on *Issue Framing and Argument Headings, Statement of the Facts, Argument, Oral Argument*, and faculty training on learning formats, October, 1996

Begin with the End in Mind, University of Kentucky, Master Level Social Work Seminar, Lexington, Kentucky, June 1994

Capital Jury Instructions (with Kelly Gleason), 22nd Annual Public Defender Conference, Radisson Inn Airport, Greater Cincinnati Airport, June, 1994

Brainstorming, Kentucky Bar Association Annual Conference, Lexington, Kentucky, June, 1994

Panel on Managing Violence & Mental Illness: The Kentucky Experience, The Kentucky Department for Mental Health and Mental Retardation Services' 5th Mental Health Institute, Louisville, Kentucky, October 5, 1993

Great Stories in Legal Life, panel, University of Louisville Law School, AOC, October 1, 1993
Produced with Dan Goyette and moderated panel on *A delicate Balance: The Rights of the Accused & Society's Commitment to the Elimination of Child Sexual Abuse* with panel of Kim Allen, Judge William Stewart, Carol Jordan, Cynthia Dember, Brent Caldwell, Bob Lotz, KBA Annual Convention, Louisville, Kentucky, June 16, 1993

Produced with Dan Goyette and Moderated *Funding the Criminal Justice System* with presentation by Randolph Stone and panelists: Karen Caldwell, Kevin Hable, Joe Clarke, Jack Lewis, Dan Goyette, Judge Michael McDonald. KBA Annual Convention, Lexington, Kentucky, June 6, 1992

Panel on Criminal Justice for the Mentally Ill: The Unreached Challenge, 1991 KBA Annual Convention, Louisville, Kentucky, June 8, 1991

Panel on Conflicts of Interest in the Criminal Courts, 1991 KBA Annual Convention, Louisville, Kentucky, June 7, 1991

The Death Penalty: A Question of Life?, Central Christian Church Shalom Symposia, November, 1988

The Death Penalty: Retribution, Deterrence, and Justice by Violence, Capital Punishment Symposium, Christians for Peace and Justice, Thomas More College, Edgewood, Kentucky, November 10, 1984

Jury Perspectives Seminar, University of Kentucky Law School, Lexington, Kentucky, Fall, 1981

Recent Decisions Affecting Criminal Law and Effective Trial Advocacy in Criminal Cases, Carroll County Bar Association, Criminal Law Seminar, Carrollton, Kentucky, March, 1981

Legal Rights of Pretrial Detainees, Bureau of Corrections Jailer Training Seminar, Florence, Kentucky, October, 1980

Volunteer Faculty, Nine-Day Intensive Course in Trial Advocacy, University of Kentucky, Lexington, Kentucky, June, 1980

Small Group Coach, DPA's Trial Practice Institutes, 1981- 2001

Education Developed and Produced

As DPA's Director of Education & Development, developed and produced from 1981 until 2001 DPA's Trial Practice Persuasion Institutes, Annual Conferences, capital training, including Death Penalty Practice Institutes, death row seminars, New Attorney Training, Defender Leadership and Management, programs, training for DPA investigators and secretaries, and joint Alternate Sentencing training for judges, prosecutors, probation and parole officers, defenders, sentencing

specialists.

Expert Witness Analysis and Testimony

July 27 & 29, 1994. Post-guilty plea, presentencing testimony in *Commonwealth v. Thurman Hitch*, No. 93-CR-595, Kenton Circuit Court, Third Division for the defendant on the issue of standards of practice in criminal defense and capital defense and effective assistance of counsel. Counsel for the client was Kelly Gleason.

January 19, 1995 - Testimony in state post-conviction proceeding of *David Leon Woods v. State*, Lebanon, Indiana for the defendant on the issue of the effectiveness of the assistance of trial counsel in 1984-95 capital case. Counsel for the client was David Stebbins.

April, 1996. Expert analysis in state post-conviction proceeding of *Larry Potts v. State*, No. 3CR-170-1087-676, Lake County for the defendant on the issue of the effectiveness of the assistance of appellate counsel in 1992. *See Potts v. State*, 594 N.W.2d 438 (Ind. 1992). Counsel for the client was David Stebbins.

May 10, 1999. Testified in *Commonwealth v. Karu Gene White*, Powell Circuit Court Case no 79-CR-24, Powell Circuit Court for the defendant on the issue of the performance of the client's trial defense counsel. Current post-conviction counsel is Margaret O'Donnell.

April 30, 2018. Declaration, DIANE DAVIS, RYAN ADAM CUNNINGHAM, and JASON LEE ENOX, on behalf of themselves and all others similarly situated, Plaintiffs vs. STATE OF NEVADA; BRIAN SANDOVAL, Governor, in his official capacity, Defendants. Case No. 170C02271B, THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR CARSON CITY Dept. No. II

Program Assessments and Chief Defender Hiring Consultations

October – present 2020 – Assistance with Melody Brannon to the Kansas Board of Indigents' Defense Services on the recruiting and hiring of the Chief Defender of Sedgwick County Public Defender in Wichita, Kansas

July - October 2020 Assistance with Hilary Potashner to Harris County Texas on the recruiting and hiring of the Managed Assigned Counsel Director

November 2019 – February 2020 Assistance to Travis County Texas with Doug Wilson on the recruiting and hiring of a County Chief Public Defender

April 30, 2018 – Assessment of the Texas Office of Capital and Forensic Writs, conducted with Doug Wilson through National Association for Public Defense

November, 1989 - *Riverside, California Public Defender Academy*, Trial Practice Institute, Evaluator for first week.

March, 1990, 1991, 1992 - *Riverside, California Public Defender Academy*, Trial Practice

Institute, Evaluator for both weeks.

Capital Case Representation

1976-1977 - *Wallace Boyd v. Commonwealth*, 550 S.W.2d 507 (Ky. 1977) Boyd County (appeal from reply brief stage)

1978-present - *Eugene Gall, Jr. v. Commonwealth*, 607 S.W.2d 97 (Ky. 1980), 702 S.W.2d 37 (Ky. 1985) Boone County; *Warden v. Gall*, 865 F.2d 786 (6th Cir. 1989); *Gall v. Scroggy* (E.D.Ky. 1991) (appeal, RCr 11.42, federal habeas); *Gall v. Scroggy*, 6th Circuit oral argument pending

1980-1991 - *Commonwealth v. Kordenbrock* (trial; sentenced to death July 1981); *Paul Kordenbrock v. Commonwealth*, 700 S.W.2d 384 (Ky. 1985) Boone County; *Kordenbrock v. Scroggy*, 680 F.Supp. 867 (E.D.Ky. 1988); *Kordenbrock v. Scroggy*, 889 F.2d 69 (6th Cir. 1989) *vacated* 896 F.2d 1457 (6th Cir. 1990); *Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1990) (*en banc*) (trial, appeal, federal habeas, federal habeas appeal); *Commonwealth v. Kordenbrock* (plea to life, December, 1991).

1981-1982 - *Commonwealth v. Jackie Wiley*, McCracken County (trial, second chair to Ernie Lewis)

1982-1983 - *Commonwealth v. Robert Crawford*, Leslie County transferred to Clay County (trial, appeal) Co-counseled with Debbie Hunt.

1984-1993 - *Mitchell Willoughby v. Commonwealth*, 730 S.W.2d 921 (Ky. 1987), Fayette County (appeal, RCr 11.42) Co-counseled with Larry Marshall.

1985-1986 - *Commonwealth v. Elzie Morton*, Fayette County (trial) Co-counseled with Ernie Lewis.

1985-1986 - *Commonwealth v. Kevin Fitzgerald*, Carroll Co. (trial) Co-counseled with Bette Niemi.

1986-1988 - *Randy Haight v. Commonwealth*, 760 S.W.2d 84 (Ky. 1988)

Garrard County (appeal) Co-counseled with Ernie Lewis & Ken Taylor.

1990 - *Commonwealth v. Carl Miller*, Clark County (trial) individual voir dire assistance to Ernie Lewis.

1993-1994 - *Commonwealth v. Fred Grooms*, Lyon County transferred to Fulton County (retrial). Co-counsel with Kelly Gleason.

1994 - 1997 - *Randy Haight v. Commonwealth*, 938 S.W.2d 243 (Ky. 1997), Garrard County transferred to Jefferson County (appeal). Co-counsel with Allison Connelly and Bobby Simpson.

1980-1991 - *Commonwealth v. Kordenbrock* (trial; sentenced to death July 1981); *Paul Kordenbrock v. Commonwealth*, 700 S.W.2d 384 (Ky. 1985) Boone County; *Kordenbrock v. Scroggy*, 680 F.Supp. 867 (E.D.Ky. 1988); *Kordenbrock v. Scroggy*, 889 F.2d 69 (6th Cir. 1989) *vacated* 896 F.2d 1457 (6th Cir. 1990); *Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1990) (*en banc*) (trial, appeal, federal habeas, federal habeas appeal); *Commonwealth v. Kordenbrock* (plea to life, December 1991).

1978-2004 - *Eugene Gall, Jr. v. Commonwealth*, 607 S.W.2d 97 (Ky. 1980), 702 S.W.2d 37 (Ky. 1985) Boone County; *In Re Warden v. Gall*, 865 F.2d 786 (6th Cir. 1989); *Gall v. Scroggy*

(E.D.Ky. 1991) (appeal, RCr 11.42, federal habeas); *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2000).

Published Non-Capital Cases

- *Binion v. Commonwealth*, 891 S.W.2d 383 (Ky. 1995) (The Kentucky Supreme Court recognized the need for defense experts: "We are persuaded that in an adversarial system of criminal justice, due process requires a level playing field at trial.... [T]here is a need for more than just an examination by a neutral psychiatrist. It also means that there must

be an appointment of a psychiatrist to provide assistance to the accused to help evaluate the strength of his defense. To offer his own expert diagnosis at trial, and to identify weaknesses in the prosecution's case by testifying and/or preparing counsel to cross-examine opposing experts.")

- *Commonwealth v. Wirth*, 936 S.W.2d 78 (Ky. 1996)
- *Commonwealth v. Raines*, 847 S.W.2d 724 (Ky. 1993)
- *Norris v. Commonwealth*, 668 S.W.2d 557 (Ky.App. 1984)
- *Stamps v. Commonwealth*, 648 S.W.2d 868 (Ky. 1983)
- *Hopewell v. Commonwealth*, 641 S.W.2d 744 (Ky. 1982)
- *Henderson v. Commonwealth*, 636 S.W.2d 648 (Ky. 1982)
- *Gully v. Commonwealth*, 600 S.W.2d 458 (Ky. 1979)
- *Commonwealth v. Gully*, 586 S.W.2d 266 (Ky. 1979)
- *Dick v. Commonwealth*, 585 S.W.2d 379 (Ky. 1979)
- *McIntosh v. Commonwealth*, 582 S.W.2d 54 (Ky.App. 1979)
- *Workman v. Commonwealth*, 580 S.W.2d 206 (Ky. 1979)
- *Robinson v. Commonwealth*, 572 S.W.2d 606 (Ky.App. 1978)
- *Daugherty v. Commonwealth*, 572 S.W.2d 861 (Ky. 1978)
- *Relford v. Commonwealth*, 566 S.W.2d 154 (Ky. 1978)
- *Kotas v. Commonwealth*, 565 S.W.2d 445 (Ky. 1978)
- *Wainscott v. Commonwealth*, 562 S.W.2d 68 (Ky. 1978)
- *Stewart v. Commonwealth*, 561 S.W.2d 660 (Ky. 1977)
- *Adams v. Commonwealth*, 560 S.W.2d 825 (Ky.App. 1977)
- *Relford v. Commonwealth*, 558 S.W.2d 75 (Ky.App. 1977)
- *Mishler v. Commonwealth*, 556 S.W.2d 676 (Ky. 1977) rev'd *Mishler v. Commonwealth*, (W.D. Ky.) (unpublished)
- *Davidson v. Commonwealth*, 555 S.W.2d 269 (Ky. 1977)
- *Murphy v. Commonwealth*, 551 S.W.2d 838 (Ky. App. 1977)
- *Parido v. Commonwealth*, 547 S.W.2d 125 (Ky. 1977)

Selected Awards and Recognition

- National Legal Aid and Defender Association's Defender Services Award for outstanding accomplishments as assistant public advocate and training director, 1987
- Kentucky Association of Criminal Defense Lawyers Presidential Award for Outstanding Contribution as Education Chair, 1992, 2004
- Kentucky Association of Criminal Defense Lawyers Frank E. Haddad, Jr. Award for contributions to practice of criminal defense law in Kentucky, 1995
- Kentucky Department of Public Advocacy's *Gideon* Award, 1998
- Kentucky Department of Public Advocacy's Lincoln Leadership Award, 2002
- Madonna Manor Sister Benedict Bunning Award, 2006
- Kentucky Council on Problem Gambling Award for leadership on education and treatment for compulsive and problem gambling, 2011
- KY Personnel Cabinet's Anderson Laureate Award for working to reduce racial discrimination in the criminal justice system and promoting diversity within the statewide public defender program, 2015
- Kentucky Department of Public Advocacy's Nelson Mandela Award, 2017
- Appalachian Research and Development Rosenberg Honoree, 2019