

## Holistic Defense, Effective Representation, & Improving Outcomes

Friday, September 23  
Oregon State Legislature  
11:30am - 1:30pm  
Room 50

- 11:30 Professor Janet Moore, University of Cincinnati College of Law  
Dr. Chris Campbell, Portland State University
- 12:05 Jeff Howes, First Assistant to the District Attorney, Multnomah County
- 12:15 Ed Monahan, Public Advocate, Kentucky Department of Public Advocacy
- 1:00: Amy Miller, Deputy General Counsel, Office of Public Defense Services  
Shannon Dennison, Assistant Attorney in Charge, Oregon Department of Justice
- 1:10 Alex Bassos, Director of Training and Outreach, Metropolitan Public Defender
- 1:20 Questions

*To access materials referenced in these presentations, please go to*  
<http://www.oregon.gov/OPDS/Pages/index.aspx>

Speakers will be referencing an article titled "*Unnoticed, Untapped, and Underappreciated: Clients' Perceptions of their Public Defenders*" by Christopher Campbell, Ph.D.\*, Janet Moore, J.D., M.A.†, Wesley Maier, M.S.‡ and Mike Gaffney, J.D.. For a copy of this article, please contact Ashley Kinney at: [Ashley.L.Kinney@opds.state.or.us](mailto:Ashley.L.Kinney@opds.state.or.us)

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## MAKE THEM HEAR YOU: PARTICIPATORY DEFENSE AND THE STRUGGLE FOR CRIMINAL JUSTICE REFORM\*

*Janet Moore,\*\* Marla Sandys,\*\*\* & Raj Jayadev\*\*\*\**

### I. INTRODUCTION

This article introduces participatory defense as a powerful new model for reforming public defense and challenging mass incarceration. Participatory defense amplifies the voices of the key stakeholders—people who face criminal charges, their families, and their communities—in the struggle for system reform. Participatory defense empowers these key stakeholders to transform themselves from recipients of services provided by lawyers and other professionals into change agents who force greater transparency, accountability, and fairness from criminal justice systems.

As a grassroots response to the public defense crisis, participatory defense offers new insights and perspectives that are unavailable through reform models described as client-centered, holistic, and community-oriented.<sup>1</sup> To be sure, when those models are supported with adequate resources for implementation, they can dramatically improve the “meet-’em-and-plead-’em” norms that infect many overloaded, underfunded public defense systems.<sup>2</sup> Nevertheless,

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\* This article was reviewed by graduate student editors from the University at Albany’s School of Criminal Justice under the supervision of Andrew Davies, Ph.D., and the Professional Board of Editors for *Miscarriages of Justice*. Because of the interdisciplinary nature of this special issue, the citations in this article use an APA-based alternative to the *Bluebook: A Uniform System of Citations*. “Make Them Hear You” is the title of a song in the musical *Ragtime* (lyrics by Lynn Ahrens and music by Stephen Flaherty).

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<sup>1</sup> See, e.g., Community Oriented Defender. (2010). *Statement of principles*. New York, NY: Brennan Center for Justice. Retrieved from <https://www.brennancenter.org/analysis/community-oriented-defender-cod-statement-principles>; Lee, C. G., Ostrom, B. J., & Kleiman, M. (2015). The measure of good lawyering: Evaluating holistic defense in practice. *Albany Law Review*, 78, 1215–1238.

<sup>2</sup> See, e.g., *Wilbur v. City of Mt. Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013).

participatory defense examines justice systems from a different set of perspectives—from the perspectives of the people who are facing charges, their loved ones, and their communities.

Part II introduces the principles and goals of the participatory defense movement. Parts III through VI analyze participatory defense from doctrinal, theoretical, and empirical perspectives. Part III connects participatory defense with the crisis-ridden constitutional history of the right to counsel, and with that doctrine's deep roots in the due process right to be *heard*. Part IV frames participatory defense within a democracy-enhancing theory of criminal justice. This approach emphasizes equality in the generation and administration of the governing law, and pairs effective self-governance with a shrinking carceral state. Part V applies these insights to recent reform litigation and policy advocacy, arguing that reformers should invoke due process and use new evidence of system failure that is exposed by the participatory defense movement. Part VI offers additional ways to obtain that evidence through rights-information and satisfaction-feedback tools.

## II. PARTICIPATORY DEFENSE: COMMUNITY ORGANIZING FOR REFORM

Participatory defense is a powerful community organizing model for people who face criminal charges as well as for their families and their communities. The term was coined by Raj Jayadev, a coauthor of this article, and describes a collective, grassroots effort begun in 2007 to improve public defense and check the spread of mass incarceration. The movement's success has led Jayadev to train defenders and communities around the country on its core principles and strategies, with the goal of embedding the approach into a national, reform-oriented culture. This article aims to spread the message while offering doctrinal, theoretical, and empirical analysis of this new approach to justice reform.

The first step of the participatory defense movement is for people who face criminal charges, their families, and their communities to transform themselves from service recipients to change agents. As discussed below in Parts II.A–C, they do so through three forms of mutual support. The first form of support is the family justice hub, where community members guide and coach each other through the stress, confusion, and frustration of confronting criminal charges. The second form of support changes “time served to time saved” as community members help defenders obtain the best possible outcome in specific cases. The third form of support is public

protest and celebrations, through which community members expose systemic flaws, force systemic change, and honor transformational successes.

These core principles and strategies of participatory defense are an evolution in public defense. They allow people facing charges, their families, and their communities to reciprocate and strengthen efforts of client-centered, holistic, and community-oriented defenders. They do so in two interrelated ways. First, participatory defense shifts the focus more fully from the agency of lawyers and other professionals to the agency of people and communities harmed most directly by the public defense crisis. Second, participatory defense offers a broader set of goals.

Participatory defense aims to rebalance power disparities in criminal justice systems. The movement forces greater transparency, accountability, and fairness from those systems for the people who have disproportionately high system contact, but disproportionately little voice in system creation and administration. Pivoting perspective on the identity of systems changers and what they can do—empowering the millions who face prison or jail each day along with their families and their communities through participatory defense—can transform people from fodder being fed into the criminal justice machine into change agents fated to bring the era of mass incarceration to its rightful end.

#### A. *Family Justice Hubs*

The best way to understand participatory defense is to participate. Opportunities arise each week during family justice hub meetings. These meetings occur at community centers and churches, and are coordinated through the Albert Cobarrubias Justice Project of Silicon Valley De-Bug in San Jose, California. De-Bug is a cutting-edge collaborative through which people use media, entrepreneurship, and politically-savvy advocacy to improve lives, strengthen communities, and promote justice reform.<sup>3</sup>

On entering a De-Bug family justice hub meeting, you might see thirteen-year-old Tony sitting shyly at the edge of a conference table next to his mother. Tony was just released after ninety-nine days in

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<sup>3</sup> De-Bug was engaged with the meetings and family organizing for several years when, in 2010, one of their members, Albert Cobarrubias, was killed in a random act of violence. De-Bug named the project after Albert so he would be present in each step forward toward greater justice.

juvenile hall. He responds respectfully to the “congratulations” and “welcome homes” directed to him from strangers around the table. Although these supporters have never met Tony, they know him through his mother’s stories and from seeing his name on the family justice hub whiteboard.

These meetings connect families whose loved ones are facing criminal charges. Tony is participating in the first of several ceremonies that were created by and are distinctive to the participatory defense movement. When a family brings a loved one home by helping defense lawyers obtain dismissals, acquittals, or a reduced sentence, the loved ones erase their names from the whiteboard.

The crowd of twenty people breaks into applause when Tony takes the eraser to his name. Tony’s mother thanks the community who walked with her and her son through the darkest ninety-nine days of their lives. She is in tears. Tony was facing years of incarceration, but due to her advocacy and the public defender’s lawyering, her son will be able to have his fourteenth birthday at home.

If tradition holds, Tony’s mother will continue attending the family justice hub meetings. She will help other families who find themselves in the frightening, stressful, and confusing position she once occupied. She will share with them what she learned from others in the participatory defense movement.

There is tremendous power in bringing a community organizing ethos to the otherwise deeply isolating experience of facing charges in a criminal or juvenile courtroom. The family justice hub meetings are now facilitated by people who first came for their own cases or cases involving their loved ones. The process has transformed volunteers like Gail Noble and Blanca Bosquez. Once isolated, anguished mothers who felt forced to sit idly as their sons were chewed up by the courts, Gail and Blanca are now vocal advocates who encourage other families and help them navigate daunting, complicated court processes. They travel and train communities across the country, speaking as both mothers and organizers who have learned the power and possibility of participatory defense.

In light of those developments, it is important to emphasize that the participatory defense movement has never conducted outreach to drum up attendance at the family justice hub meetings. People usually hear about the meetings from other families, often when they are visiting their loved ones at the local jail. There is a

common yearning among these families for support and help navigating criminal justice systems. They also share an inclination for discovering ways to help change the outcome of their loved one's case.

It also is important to emphasize that family justice hub meetings are not legal clinics. There are no lawyers in the room. In many respects, that is the point of this new reform model. From a movement-building perspective, the case outcome is not the only measuring stick. Instead, it is equally or even more important that the process transform each participant's sense of power and agency.

For this reason, the participatory defense movement shuns the word "client." That label reduces people into recipients of services, actions, or change provided or caused by another. In the participatory defense model, the key actors responsible for creating change are the people who face charges, along with their families and their communities. Therefore, when families first enter a justice hub meeting, they hear a consistent refrain. While the system intends to give their loved ones time served—that is, time incarcerated and away from family and community—they can turn time served into time saved. Participatory defense empowers families and communities to bring their loved ones and neighbors home.

Through the family justice hubs, participatory defense is therefore a pay-it-forward training for families and communities in how best to partner with or push the lawyers appointed to defend their loved ones. Participants learn to dissect, use, and challenge information in police reports and court transcripts. They learn to create social biography videos and use other media to obtain fairer and more productive case outcomes. They learn to engage in effective public protests that secure new resources for defenders facing overwhelming caseloads. Most importantly, they learn to build a sustained community presence in the courtroom to let judges and prosecutors know the person facing charges is not alone.

### *B. From Time Served to Time Saved*

As incarceration rates balloon to astronomical levels, with one out of every 100 adult Americans locked up,<sup>4</sup> participatory defense may

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<sup>4</sup> See Badger, E. (2014, April 30). The meteoric, costly and unprecedented rise of incarceration in America. *Washington Post*. Retrieved from <http://www.washingtonpost.com/bl ogs/wonkblog/wp/2014/04/30/the-meteoric-costly-and-unprecedented-rise-of-incarceration-in-america/>.

be the most productive way for affected communities to challenge mass incarceration and have the movement-building dynamic of seeing timely and locally relevant results of their efforts. Participatory defense penetrates the one domain that facilitates people going to prisons and jails, yet has been left largely unexplored by the movement to end mass incarceration. That domain is the courtroom. Participatory defense knows that there are Tonys across the country waiting to come home and communities that, if equipped with the necessary knowledge, skills, and strategies, can intervene in the courtroom domain to bring each Tony home.

Therefore, participatory defense uses strategies that are accessible to the people who are most directly affected by criminal justice systems. Social biography videos are an excellent example. Sometimes called mitigation videos, these films are a practical advocacy method that families and communities use to bring their loved ones home from court. These films vividly tell the life history of the person facing criminal charges. The videos can be made quickly and inexpensively. As demonstrated by accolades from judges and attorneys alike, they have helped to improve outcomes at every stage of the criminal process, from pretrial release through plea negotiations and sentencing.

Indeed, social biography videos allow families to avoid a regret that too often plagues them after sentencing. The common refrain that De-Bug organizers hear from families at that point is not “I wish this never happened,” but “I wish they knew him like we know him.” Social biography videos also address limitations that judges face when deciding another’s fate. Instead of freezing a person in the static moment of a charged offense, social biography videos show the dynamic lives of loved ones who have a past, a future, and the potential for change, redemption, and transformation like anyone else.

Thus, in the words of one trial court judge, the videos “humanize defendants, destroy stereotypes, and leave judges with a far better understanding of the persons standing before them.”<sup>5</sup> Gideon Project founder and MacArthur “Genius Grant” winner Jon Rapping<sup>6</sup> describes the additional, structural-reform potential contained in these videos. According to Rapping, the videos

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<sup>5</sup> Albert Cobarrubias Justice Project. (2014, June 4). *Social biography videos*. Retrieved from <http://acjusticeproject.org/social-biography-videos/>.

<sup>6</sup> MacArthur Fellows Program. (2014, September 17). *Jonathan Rapping*. Retrieved from <http://www.macfound.org/fellows/925/>.

mobilize an “army of advocates with a new tool to fight back against a system that has become complacent about processing people because it sees them . . . only as the crime with which they are accused.”<sup>7</sup>

The tangible impact of family and community participation on case outcomes is undeniable. The participatory defense model has led to acquittals, charges dismissed and reduced, and prison terms changed to rehabilitation programs. Even life sentences have been taken off the table. The movement recently celebrated a new benchmark by tallying the total transformation of “time served to time saved.” The tally compares the original maximum sentencing exposure faced by people charged with criminal offenses to the result after family and community intervention through the participatory defense model. The tally shows that, in just seven years, the movement has obtained over 1800 years of time saved.

These numbers indicate that participatory defense can create a new partnership of community and defender and be a real game-changer nationally. Eight out of ten of the roughly 2.5 million people currently incarcerated are eligible to receive public defense representation.<sup>8</sup> Improving public defense is arguably the least discussed, yet most promising, way to challenge mass incarceration. To that end, it is important to emphasize that participatory defense invariably finds ways for families and communities to partner with public defenders, or to push those lawyers if needed. Therefore, a third critical strategy of participatory defense pairs community action to promote system-wide reform through public protest and other advocacy with subsequent public celebration of shared successes.

### *C. Protest and Celebration*

Participatory defense holds criminal justice agencies accountable for their acts and omissions. For example, Gail Noble and her seventeen-year-old son Karim challenged both a defense lawyer’s failure to investigate and use available evidence of innocence and a judge’s racist assumptions that Karim’s summer job was “probably selling drugs.”<sup>9</sup> For Ms. Noble and her son, regardless of the

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<sup>7</sup> Albert Cobarrubias Justice Project, *supra* note 5.

<sup>8</sup> Harlow, C. W. (2000). *Defense counsel in criminal cases: Bureau of Justice Statistics special report*. Office of Justice Programs; U.S. Department of Justice, NCJ 179023.

<sup>9</sup> Noble, G. (2011, July 16). Standing up to the court. *Albert Cobarrubias Justice Project*. Retrieved from <http://acjusticeproject.org/keycases/standing-up-to-a-racist-court/>; *see also*

ultimate outcome “it was important to get all the issues my son had on record and for us to feel that we could speak and say something, instead of just allowing the racist behavior of the courts to continue, unchecked.”<sup>10</sup>

The participatory defense movement also has used public protest to spur systemic change. When the community learned that misdemeanor defendants were entitled to representation at arraignment, they met with the local defender leadership about the failure to provide that representation. When defender leadership explained that the office lacked resources to provide lawyers at arraignment, the community engaged in productive policy advocacy and joined forces with the local civil rights community to increase pressure for change. As a result, local authorities increased funding to provide the necessary representation.<sup>11</sup>

Finally, participatory defense celebrates success. For example, the Time Saved media project focuses on changing the negative narrative of the defender-community relationship. In fact, defenders often have the best justice success stories that the public never hears. De-Bug’s Time Saved documentaries tell those stories, as do the project’s public art works depicting time-served-to-time-saved transformations. Another major celebration was the Time Saved 1800 party, which gathered defenders and the community to thank one another for the years and lives saved through participatory defense.<sup>12</sup>

#### *D. Participatory Defense as a New Paradigm*

Many public defenders understand that the current moment offers historic opportunities for reform. Many are experiencing a shift of consciousness regarding the evolution of defense representation. They know that improving public defense is a

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Jayadev, R. (2008, January 16). Tales from a trial. *Metroactive*. Retrieved from <http://www.metroactive.com/metro/01.16.08/cover-0803.html>.

<sup>10</sup> See Noble, *supra* note 9.

<sup>11</sup> See Albert Cobarrubias Justice Project. (2012, January 30). *Santa Clara County courts: Now providing legal representation in misdemeanor court to anyone who can’t afford their own*. Retrieved from <http://acjusticeproject.org/2012/01/30/santa-clara-county-courts-now-providing-legal-representation-in-misdemeanor-court-to-anyone-who-cant-afford-their-own/>.

<sup>12</sup> Kaplan, T. (2014, December 18). Bay Area public defenders speak out for justice. *San Jose Mercury News*. Retrieved from [http://www.mercurynews.com/crime-courts/ci\\_27163533/bay-area-public-defenders-speak-out-justice](http://www.mercurynews.com/crime-courts/ci_27163533/bay-area-public-defenders-speak-out-justice). For coverage of the celebration, see Albert Cobarrubias Justice Project. (2014, December 20). *Video and media coverage of the Time Saved party: Celebrating 1862 years saved from incarceration!* Retrieved from <http://acjusticeproject.org/2014/12/20/photos-and-media-of-the-time-saved-party-celebrating-1862-years-saved-from-incarceration/>.

bigger task than they can tackle on their own. Limiting the discussion of criminal justice reform to lawyers is like leaving resolution of the health care crisis solely to doctors. Defenders are therefore seeking new strategies and new allies. Participatory defense offers both.

Evidence of this changing defender ethos includes the recent collaboration of several defender offices into a national Community Oriented Defenders Network. In this network, over 100 offices are sharing new approaches that challenge the status quo of indigent defense. In New York, the Neighborhood Defender Service of Harlem and the Bronx Defenders are practicing holistic defense, attacking the contextual issues of poverty that often force people into criminal justice systems. In the South, Gideon's Promise is giving elite training to defenders to face some of the toughest courts in the country. In California, the Alameda County Public Defender is now providing representation in immigration court, and the San Francisco office has launched a system-wide study of how racial discrimination plays out in the courts. Such programs are historically unprecedented approaches to public defense in that state.

But as forward-thinking as these developments are, they still focus on the question of what more lawyers can do instead of empowering those whom the lawyers represent to be change agents in their own right. Participatory defense can trigger exponentially greater change—indeed, a cataclysmic shake-up of the criminal justice system—by adding a huge number of strong new voices to the criminal justice reform movement.

Partnerships between defenders, on one hand, and people who are facing charges as well as their loved ones and communities, on the other, are powerful levers for opening up criminal justice systems and getting a good hard look under the hood. Community power can flex that lever to fix broken policies—whether those policies involve wrongful charging practices, mandatory sentences, or ensuring that defenders have the resources to do what the community needs them to do in order to bring their loved ones home.

All across the country, the infrastructure and organizing IQ necessary to practice and expand participatory defense already exists and is waiting to be tapped. Participatory defense can animate and challenge communities to step deeper into court processes that many thought were only the province of lawyers. In fact, the most effective participatory defenders may not necessarily

be those familiar with the criminal justice system, but the broader pool of community stakeholders. Thus, family justice hub meetings in San Jose are not held at a criminal justice reform organization, but rather at a church and a youth media center.

This broad network reflects the core question that drives the participatory defense movement: Who do people turn to, confide in, or call for solace when they learn they are facing a court case? Is it their family, their temple, the neighborhood association, the community organization at the corner block, their union? Any community touchstone can be a family justice hub simply by advocating for their loved one throughout the lifespan of the adjudication process. That same communicative action simultaneously and dramatically increases the number of people in the movement to challenge mass incarceration.<sup>13</sup>

Thus, preexisting community anchors already exist and often are already aware of their capacities for leveraging collective power to challenge powerful institutions that are injuring their congregant, neighbor, friend, or loved one. In marginalized communities, this is how schools get fixed, police agencies are held to account, and neighborhoods obtain investments of new resources. Participatory defense encourages community organizing intelligence and strength to penetrate and transform local court systems.

As you read this article, there are parents around the country sitting steadfast on courtroom back benches in solidarity with their children as they face a hearing. There are church pastors writing letters to judges to reduce an impending sentence. Such initiatives show the ubiquitous potential of participatory defense. If these actions are reimagined as part and parcel of a larger, named practice rather than isolated responses, then a more profound, sustained reshaping of the criminal justice system can occur—fueled by the people and communities most directly affected by crime and mass incarceration.

Consider the maturation of community-oriented defense. The first gathering of public defenders under this umbrella ten years ago had only eight participating offices. Over 100 offices were represented at the most recent gathering. Public defenders practiced community-oriented lawyering before they heard the term. Giving the practice a name promoted its growth and development.

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<sup>13</sup> Cf. Moore, J. (2014). Democracy enhancement in criminal law and procedure. *Utah Law Review*, 2014(3), 543–612, at 570–572.

In the same way, it is important not to freeze participatory defense as a static invention or program. Instead, participatory defense simply names an inclination that already exists in communities across the country as a way to advance its potency and impact. There is a forward-moving power in naming an impulse. As discussed in Part III, naming and claiming the justice-seeking impulse of participatory defense helps to locate the movement as one of several grassroots efforts that have shaped the historical development of right to counsel legal doctrine. More specifically, naming the impulse connects the movement closely with that doctrine's deep roots in the due process right to be *heard*.

### III. PARTICIPATORY DEFENSE, CONSTITUTIONAL CRISIS, AND THE DUE PROCESS RIGHT TO BE HEARD

Participatory defense is a logical response to the most recent phase of an ongoing public defense crisis.<sup>14</sup> People who face charges but cannot afford to hire lawyers comprise at least eighty percent of the criminal caseload in the United States.<sup>15</sup> The quality of public defense therefore has high salience in the best of circumstances. The current context is suboptimal. As indicated in Part II, defender systems are plagued with excessive workloads and underfunding. At the same time, the nation confronts the largest income and wealth gaps since the Gilded Age, increasingly insurmountable barriers to socioeconomic mobility, and record-breaking hyperincarceration patterns that disproportionately affect low-income people and people of color.<sup>16</sup>

In fact, the constitutional history of the indigent criminal defendant's right to counsel reveals that the right was born of a crisis in which it has remained enmired. The same history also reveals participatory defense to be the latest of several collective movements that have shaped the provision of defense services and, in turn, the content of the governing law. This phenomenon occurs as the Supreme Court gives a constitutional imprimatur to practices developed in the trenches by people who support and oppose the status quo operations of criminal justice systems.

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<sup>14</sup> See Moore, J. (2013). G forces: Gideon v. Wainwright and Matthew Adler's move beyond cost-benefit analysis. *Seattle Journal of Social Justice*, 11, 1025–1064, at 1026 n.4, 1058–1061 (discussing system failures).

<sup>15</sup> See Harlow, *supra* note 8.

<sup>16</sup> See Moore, J. (manuscript on file with author). Discrimination, democracy, and the Sixth Amendment right to choose.

Those constitutional imprimaturs have invoked the Due Process and Equal Protection Clauses of the Fourteenth Amendment as well as the Sixth Amendment “assistance of counsel” guarantee. The tangled doctrinal history traces to 1932, when *Powell v. Alabama*<sup>17</sup> was decided amid an increasingly international scandal over lynching in the United States.<sup>18</sup> Centrally at issue in *Powell* was the defendant’s due process right to be *heard*.<sup>19</sup>

*Powell* infamously involved nine young black men accused by two white women of the then-capital crime of rape.<sup>20</sup> The trial judge appointed the entire local bar to represent these young men, with the result that no attorney was individually accountable for any of their cases.<sup>21</sup> The Court described the resulting trials and death sentences as just shy of “judicial murder.”<sup>22</sup> The Court was otherwise circumspect about the highly-charged race, class, and gender identities at issue,<sup>23</sup> and about the battle between the Communist Party and the NAACP over control of the case.<sup>24</sup>

The Communists won that battle.<sup>25</sup> Party lawyers persuaded the Court to intervene in a previously sacrosanct sphere of state-controlled criminal procedure. *Powell* held that due process required appointment of counsel during the “critical period” of pretrial consultation and fact investigation, at least in capital cases with defendants who were young, illiterate, and far from home.<sup>26</sup>

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<sup>17</sup> *Powell v. Alabama*, 287 U.S. 45 (1932).

<sup>18</sup> Kelley, R. D. G. (1990). *Hammer and hoe: Alabama communists during the Great Depression*. Chapel Hill, NC: UNC Press, at 78–79; Carter, D. T. (1979). *Scottsboro: A tragedy of the American South*. Baton Rouge, LA: LSU Press, at 142–143.

<sup>19</sup> *Powell*, 287 U.S. at 57–58, 71.

<sup>20</sup> *Ibid.* at 64–65, 71. The youngest of the so-called Scottsboro Boys was 13; the eldest was 20. Klarman, M. J. (2006). *Powell v. Alabama: The Supreme Court confronts “legal lynchings.”* In C. B. Steiker (Ed.), *Criminal procedures stories* (pp. 1–44). New York, NY: Foundation Press/Thornton/West, at 1. The “boys” had names: Ozie Powell, Willie Roberson, Andy Wright, Olen Montgomery, Haywood Patterson, Charles Weems, Clarence Norris, Roy Wright, and Eugene Williams. Duru, N. J. (2004). The Central Park five, the Scottsboro boys, and the myth of the bestial black man. *Cardozo Law Review*, 25, 1315–1366, at 1320, 1334.

<sup>21</sup> *Powell*, 287 U.S. at 52–57.

<sup>22</sup> *Ibid.* at 72.

<sup>23</sup> Klarman, *supra* note 20.

<sup>24</sup> Kelley, *supra* note 18, at 80–91; Colbert, D. L. (1990). Challenging the challenge: Thirteenth Amendment as a prohibition against the racial use of peremptory challenges. *Cornell Law Review*, 76, 1–128, at 81 & n.406 (citing Carter, *supra* note 18; McNeil, G. R. (1983). *Groundwork: Charles Hamilton Houston and the struggle for civil rights*. Philadelphia, PA: University of Pennsylvania Press, at 109–111, 119–121).

<sup>25</sup> Kelley, *supra* note 18, at 78–81 (discussing class-based tension between organizations and backlash against party for promoting racial equality, opposing lynching, and representing black defendants accused of rape); *see also* Colbert, *supra* note 24 (discussing tension and collaboration between organizations).

<sup>26</sup> *Powell*, 287 U.S. at 57–58, 71.

Thus, in the wake of public protest and legal battles over the injustice of the Scottsboro convictions, the *Powell* Court turned inward to emphasize the unique nature of the relationship between people facing charges and their lawyers, as well as the special role of the communication that occurs within that relationship.<sup>27</sup> Describing that relationship and communication as bearing the “inviolable character of the confessional,”<sup>28</sup> the Court reasoned that the due process right to counsel is the right to be *heard* by and through a dedicated advocate—one who bears the awesome responsibility of giving voice to another’s interests and concerns.<sup>29</sup> *Powell* held that relationship to be the necessary foundation for fulfilling counsel’s core duties to communicate, investigate, and advocate.<sup>30</sup> *Powell* further held that there is no substitute for that intersubjective work, including judicial oversight at trial.<sup>31</sup>

The *New York Times* praised *Powell* for soothing “the rancor of extreme radicals while confirming the faith of the American people in the . . . integrity of the courts.”<sup>32</sup> A deeply dissatisfied Communist Party begged to differ. The party pilloried the Court for issuing a how-to primer on legal lynching.<sup>33</sup> *Powell*’s holding was hardly radical. To the contrary, the Court gave a federal constitutional imprimatur to the broad national consensus mandating appointment of counsel in capital cases.<sup>34</sup> Michael Klarman further argues that the “quality of defense representation for indigent southern blacks did not significantly improve as a result of *Powell*” as the decision “len[t] legitimacy to a system that remained deeply oppressive.”<sup>35</sup>

Indeed, the Court has repeatedly underscored the “peculiarly sacred” nature of the federal constitutional right to counsel.<sup>36</sup> While the right comprises an idiosyncratic mandate to distribute resources to people who need them, it is systematically dishonored in the breach.<sup>37</sup> The 1940 case of *Avery v. Alabama* is one example among

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<sup>27</sup> *Ibid.* at 57.

<sup>28</sup> *Ibid.* at 61.

<sup>29</sup> *Ibid.* at 68–69.

<sup>30</sup> *Ibid.* at 57.

<sup>31</sup> *Ibid.* at 68–69.

<sup>32</sup> Gerhardt, M. J. (2002). The rhetoric of judicial critique: From judicial restraint to the virtual Bill of Rights. *William & Mary Bill of Rights Journal*, 10, 585–645, at 607.

<sup>33</sup> *Ibid.*

<sup>34</sup> Moore, *supra* note 14, at 1053.

<sup>35</sup> Klarman, M. J. (2009). Scottsboro. *Marquette Law Review*, 93, 379–431, at 429–431.

<sup>36</sup> *Avery v. Alabama*, 308 U.S. 444, 447 (1940) (citing *Lewis v. United States*, 146 U.S. 370, 374–375 (1892)).

<sup>37</sup> Moore, *supra* note 14, at 1053.

many. In *Avery*, the Court celebrated the “peculiarly sacred” due process right to counsel by affirming a murder conviction and death sentence.<sup>38</sup> The Court did so despite counsel’s protests that the few hours available between appointment and trial were inadequate to communicate, investigate, and advocate for a man showing symptoms of serious mental illness.<sup>39</sup>

Less than twenty years later, Alabama was in the headlines again as mass arrests during protests against racial and economic segregation coincided with the height of the Cold War. As was the case in the 1930s, highly politicized international attention—this time including critical coverage by Soviet and Chinese Communists seeking allies among postcolonial nations—focused on hypocrisies and failures of capitalism and liberal democracy.<sup>40</sup>

It was in this heated context, just weeks before Martin Luther King Jr. issued his Letter from Birmingham City Jail<sup>41</sup> and television cameras captured Bull Connor’s deputies attacking black children with dogs and fire hoses, that the Supreme Court issued two blockbuster opinions expanding the federal constitutional right to appointed counsel. *Douglas v. California* invoked both due process and equal protection to mandate appointment of appellate counsel in jurisdictions providing a right of direct appeal in criminal cases.<sup>42</sup> *Gideon v. Wainwright* also relied on due process—but only as a mechanism for incorporating the Sixth Amendment mandate for appointed counsel in the federal setting into state cases involving felony charges.<sup>43</sup>

The right to appointed counsel gradually expanded to cover juveniles<sup>44</sup> as well as adult misdemeanor charges,<sup>45</sup> probation cases with potential for incarceration,<sup>46</sup> pretrial settings<sup>47</sup> including plea bargaining,<sup>48</sup> sentencing,<sup>49</sup> first-tier petitions for discretionary

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<sup>38</sup> *Avery*, 308 U.S. at 445, 447, 453.

<sup>39</sup> *Ibid.* at 447–453.

<sup>40</sup> See, e.g., Dudziak, M. L. (2002). *Cold War civil rights: Race and the image of American democracy*. Princeton, NJ: Princeton University Press, at 3–6, 11–14.

<sup>41</sup> King, M. L., Jr. (1995). Letter from Birmingham City Jail. In S. Lynd & A. Lynd (Eds.), *Nonviolence in America: A documentary history* (pp. 254–268). Maryknoll, NY: Orbis, at 254.

<sup>42</sup> *Douglas v. California*, 372 U.S. 353, 356–358 (1963).

<sup>43</sup> *Douglas*, 372 U.S. at 339.

<sup>44</sup> *In re Gault*, 387 U.S. 1, 41 (1967).

<sup>45</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

<sup>46</sup> *Alabama v. Shelton*, 535 U.S. 654, 658, 674 (2002).

<sup>47</sup> *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 194 (2008).

<sup>48</sup> See, e.g., *Lafler v. Cooper*, 132 S. Ct. 1376, 1390–1391 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1410–1411 (2012).

<sup>49</sup> See, e.g., *Williams v. Taylor*, 529 U.S. 362, 390–399 (2000).

appellate review,<sup>50</sup> state postconviction proceedings,<sup>51</sup> and advice on the collateral consequence of deportation that attaches to any potential plea agreement.<sup>52</sup>

Yet as the scope of the right expands, its enforceability with respect to the quality of representation remains weak. Thirty years ago, *Strickland v. Washington* established an onerous two-part test for people who challenge the quality of defense lawyering. They must prove both that their attorneys engaged in unreasonable acts or omissions according to prevailing professional standards, and a reasonable probability that those failures altered the outcome of their cases.<sup>53</sup> Under *Strickland* and accompanying cases,<sup>54</sup> constitutional standards are so low that lawyers hurdle them while asleep,<sup>55</sup> habitually drunk,<sup>56</sup> and (while awake and apparently sober) failing to investigate and present readily available evidence of actual innocence in capital murder cases.<sup>57</sup>

This brief doctrinal history reveals that, every thirty years or so, as this country's distinctively intransigent intersection of race, crime, and poverty<sup>58</sup> sparks another round of politicized and international uproar,<sup>59</sup> the right to counsel lurches in a new direction. The most recent cycle has seen heightened attention to the record-breaking hyperincarceration of low income and minority people in the United States.<sup>60</sup> That cycle has coincided with

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<sup>50</sup> *Halbert v. Michigan*, 545 U.S. 605, 610–611 (2005).

<sup>51</sup> See *Martinez v. Ryan*, 132 S. Ct. 1309, 1320–1321 (2012) (ineffective assistance on first-tier collateral review may defeat procedural default defense to federal habeas claim); see also *Maples v. Thomas*, 132 S. Ct. 912, 927 (2012) (applying *Martinez* where postconviction counsel abandoned client without notice).

<sup>52</sup> See *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478 (2010).

<sup>53</sup> *Strickland v. Washington*, 466 U.S. 664, 688 (1984).

<sup>54</sup> See, e.g., *Cuyler v. Sullivan*, 446 U.S. 335, 348–350 (1980) (establishing test for conflict of interest).

<sup>55</sup> See *Muniz v. Smith*, 647 F.3d 619, 623–625 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 1575 (2012) (discussing “sleeping lawyer” cases).

<sup>56</sup> *Frye v. Lee*, 235 F.3d 897, 907 (4th Cir. 2000), *cert. denied*, 533 U.S. 960 (2001) (affirming death sentence while “troubled” by capital defense lawyer’s “decades-long habit” of drinking “twelve ounces of rum” nightly during trial); see also Tabak, R. R. (2003). Why an independent appointing authority is necessary to choose counsel for indigent people in capital punishment cases. *Hofstra Law Review*, 31, 1105–1115, at 1112–1113.

<sup>57</sup> See *Scanlon v. Harkleroad*, 740 F. Supp. 2d 706, 728–730 (M.D.N.C. 2010), *aff’d per curiam*, 467 Fed. App’x 164 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 164 (2012) (denying defendant new trial despite ineffective assistance in guilt/innocence phase). The author represented Petitioner Donald Scanlon in state and federal appellate and postconviction challenges to his convictions and death sentence. *Ibid.* at 708.

<sup>58</sup> See Moore, *supra* note 13, at 551–563.

<sup>59</sup> See Dudziak, *supra* note 40.

<sup>60</sup> Wacquant, L. (2010). Class, race and hyperincarceration in revanchist America. *Daedalus*, 139(3), 74–90, at 78–79; see also Lacey, N. (2008). *The prisoner’s dilemma: Political economy and punishment in contemporary democracies*. Cambridge: Cambridge University

expansions of the right to appointed counsel in pretrial and posttrial settings.<sup>61</sup> As a result—and in keeping with the prescient recommendations of certain Antifederalists<sup>62</sup>—the right to counsel has largely been socialized, with the vast majority of criminal defendants facing felony charges receiving government-funded defense services.<sup>63</sup>

Of course, economic need seldom qualifies people for special constitutional consideration. To the contrary, as Julie Nice argues, poverty law has been effectively deconstitutionalized in the United States.<sup>64</sup> Nor are indigent criminal defendants typically viewed as among the “deserving poor.”<sup>65</sup> To the contrary, “[l]egislators have declined to protect criminal defendants, except in rare and narrowly circumscribed circumstances when powerful constituencies (the press, lawyers) have been threatened.”<sup>66</sup> In light of that observation, a cynic might explain the idiosyncratic constitutional mandate to provide government-funded criminal defense attorneys as a redistribution of assets to one set of lawyers (defenders) that makes life easier for other lawyers (prosecutors and judges) through a pro forma greasing of the carceral state’s machinery.

That explanation appears less cynical given the contemporary degradation of the “peculiarly sacred” right to counsel and the underlying fundamental due process right to be heard into a grim complex of plea mills<sup>67</sup> and debtor’s prisons.<sup>68</sup> For attorneys who

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Press, at xv, 156–169 (citing “general and depressing” agreement on inevitable export of U.S. “penal populism,” but disputing that thesis).

<sup>61</sup> See *supra* notes 48–49, 51–53 and accompanying text.

<sup>62</sup> Warren, C. (1911). *A history of the American bar*. Boston, MA: Little Brown, at 219, 221–223 (quoting Antifederalists who urged that the legal profession be “annihilated” or completely socialized through the creation of “a State Advocate-General, to appear for all persons indicted”).

<sup>63</sup> See Harlow, *supra* note 8.

<sup>64</sup> Nice, J. A. (2008). No scrutiny whatsoever: Deconstitutionalization of poverty law, dual rules of law, & dialogic default. *Fordham Urban Law Journal*, 35, 629–671, at 629–636; see also Barnes, M. L., & Chemerinsky, E. (2009). The disparate treatment of race and class in constitutional jurisprudence. *Law and Contemporary Problems*, 72, 109–130, at 122–126 (probing causes of varying judicial scrutiny afforded to class-based and race-based claims for redress).

<sup>65</sup> See, e.g., Dripps, D. A. (1993). Criminal procedure, footnote four, and the theory of public choice; Or, why don’t legislatures give a damn about the rights of the accused? *Syracuse Law Review*, 44, 1079–1102, at 1089–92; see also Moore, *supra* note 14, at 1028 & n.13 (discussing empirical research indicating that a significant minority of jurors believe defendants “must have done something” to warrant criminal charges).

<sup>66</sup> Lerner, C. S. (2004). Legislators as the “American criminal class”: Why Congress (sometimes) protects the rights of defendants. *University of Illinois Law Review*, 2004, 599–672, at 604–613. But see Wright, R. F. (2004). Parity of resources for defense counsel and the reach of public choice theory. *Iowa Law Review*, 90, 219–268, at 263–268.

<sup>67</sup> See, e.g., Wilbur v. City of Mt. Vernon, 989 F. Supp. 2d 1122 (W.D. Wash. 2013).

strive to provide not merely constitutionally effective but high quality defense services, onerous workloads and fee caps create agonizing choices. In 2006, for example, misdemeanor counsel in Knox County, Tennessee, averaged nearly 1700 cases each, and had less than an hour to spend on any given case.<sup>69</sup> Two points of contrast throw these statistics into sharp relief. First, the Tennessee lawyers were assigned nearly eight times the number of misdemeanor cases allowed under weighted workload standards in other states, such as Massachusetts.<sup>70</sup> Second, recent major weighted caseload studies indicate that the average misdemeanor case should take approximately twelve hours of competent, diligent attorney effort to reach a satisfactory level of representation.<sup>71</sup>

Unfortunately, workload standards remain rare. Enforceable standards are even rarer.<sup>72</sup> This is so despite the American Bar Association's 2006 Ethics Opinion requiring indigent defense attorneys to reject cases for which they cannot provide competent, diligent representation—with “competence” and “diligence” comprising the core duties to communicate, investigate, and advocate.<sup>73</sup> The costs of overloaded, underresourced indigent defense are significant. To cite one example, a Florida attorney was juggling fifty felony cases at a time, or nearly half the felony caseload that a Massachusetts lawyer may accept in an entire year.

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<sup>68</sup> See, e.g., *Fant v. City of Ferguson*, 4:15-cv-253 (E.D. Mo. Feb. 2, 2015) (class action complaint); Shapiro, J. (2014, August 25). In *Ferguson*, court fines and fees fuel anger. *NPR*. Retrieved from <http://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fue-l-anger>.

<sup>69</sup> National Right to Counsel Committee. (2009). *Justice denied: America's continuing neglect of our constitutional right to counsel*. Washington, DC: The Constitution Project and the National Legal Aid & Defender Association, at 68. Retrieved from <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf>.

<sup>70</sup> Committee for Public Counsel Services. (2011). *Policies and Procedures Governing Billing and Compensation*, Rule 16. Retrieved from [http://www.publiccounsel.net/private\\_counsel\\_manual/CURRENT\\_MANUAL\\_2010/MANUALChap5links3.pdf](http://www.publiccounsel.net/private_counsel_manual/CURRENT_MANUAL_2010/MANUALChap5links3.pdf).

<sup>71</sup> RubinBrown LLP for the ABA's Standing Committee on Legal Aid and Indigent Defendants. (2014). *The Missouri Project: A study of the Missouri defender system and attorney workload standards*. Chicago, IL: American Bar Association. Retrieved from [http://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/2014/ls\\_sclaid\\_5c\\_the\\_missouri\\_project\\_report.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_5c_the_missouri_project_report.authcheckdam.pdf); Carmichael, D., Clemens, A., Caspers, H., Marchbanks, M. P., & Wood, S. (2015). *Guidelines for indigent defense caseloads: A report to the Texas Indigent Defense Commission*. College Station, TX: Public Policy Research Institute, at 50 & Figure 8-1.

<sup>72</sup> Lefstein, N. (2011). *Securing reasonable caseloads: Ethics and law in public defense*. Chicago, IL: American Bar Association, at 42–48.

<sup>73</sup> ABA Committee on Ethics and Professional Responsibility, Formal Opinion 06-441. (2006, May 13). Retrieved from [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_ethics\\_opinion\\_defender\\_caseloads\\_06\\_441.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ethics_opinion_defender_caseloads_06_441.authcheckdam.pdf).

As a result, she failed to communicate a plea offer to a client. The prosecutor withdrew the offer, and the client's sentence was quintupled.<sup>74</sup>

Such system failures underscore the timeliness and importance of the participatory defense movement. This Part has sought to locate that movement within a crisis-ridden doctrinal history and, in particular, as closely linked to the fundamental due process right to be *heard*. Within that context, participatory defense holds promise as a form of grassroots lawmaking. Throughout the history of the right to counsel, public pressure has sparked legal change, often as the Supreme Court grants a constitutional imprimatur to practices and standards developed in the trenches of criminal justice systems.

Reform advocates should therefore welcome participatory defense as a new and powerful force for improving attorney performance standards. Raised performance standards should gradually improve *Strickland* and other legal rules that incorporate those practices into the substantive law. In addition, improved defense performances can rebalance power disparities badly skewed by historically unprecedented concentrations of prosecutorial authority.<sup>75</sup> That rebalancing in turn can strengthen rapidly diminishing rights, such as the right to jury trial and the due process right to be heard.<sup>76</sup>

In support of those goals, Parts IV through VI offer additional analysis of the participatory defense movement. Part IV offers a theoretical foundation, placing participatory defense within an innovative democracy-enhancing approach to criminal law and procedure. Part V reveals ways that participatory defense can strengthen reform litigation and policy advocacy by pairing the due process right to be heard with corresponding duties to communicate, investigate, and advocate. Part VI offers practical tools for amplifying the voices of people facing charges, their families, and their communities in the struggle for criminal justice reform.

#### IV. PARTICIPATORY DEFENSE AND DEMOCRACY ENHANCEMENT

The foregoing doctrinal discussion underscores the “peculiarly sacred” nature of the federal constitutional right to counsel as one that is systematically dishonored in the breach. Based on that history, the participatory defense movement and the due process

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<sup>74</sup> National Right to Counsel Committee, *supra* note 69, at 69.

<sup>75</sup> See Moore, *supra* note 13, at 555 & n.70 (citing authorities).

<sup>76</sup> See *supra* notes 67–75 and accompanying text.

roots of right to counsel doctrine may appear a barren source of amusement for reform advocates. This Part seeks to strengthen the case for participatory defense and the due process right to be heard by framing both within a democracy-enhancing theory of criminal justice.<sup>77</sup>

That theory moves beyond dominant utilitarian-retributive justifications for criminal law, as well as the dominant fairness-law enforcement justifications for criminal procedure. The theory does so in two interrelated ways. First, the theory emphasizes equality in the generation and administration of the governing law. Second, by promoting greater equality in effective personal and communal self-governance, the theory aims at reciprocal reductions in the scope and impact of the carceral state.<sup>78</sup>

The theory's commitments to equality and effective self-governance resonate with the core commitments of the participatory defense model and with the values embodied in the fundamental due process right to be heard. Those core commitments and values can in turn transform the currently minimal content of the constitutionally protected relationship between a lawyer and a person facing criminal charges. Reimagining that relationship in light of these core commitments and values opens a distinctive space for the vindication of human dignity. This is so in part because the relationship can and should serve as a bulwark against the concentrated power of the prosecuting governmental authority and the collective will that authority claims to represent.

Yet as indicated in Part III, within a democracy-enhancing theory of criminal justice the participatory defense model promises even more. The relationship between a person facing charges and his or her attorney is an important site for communicative action. Within that relationship, participants can acknowledge and critique the law while shaping its application. As indicated in Part II's discussion of the participatory defense movement, that communicative action may be cooperative or disruptive.<sup>79</sup> In either case, it can and should be seen as a form of grassroots lawmaking.<sup>80</sup>

Of course the immediate focus of this law formation and application will be the individual case at hand. Nevertheless, as a distinctive form of communicative action, relationships between lawyers and people facing criminal charges can yield broader and

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<sup>77</sup> See Moore, *supra* note 13, at 546 n.13, 563–573.

<sup>78</sup> *Ibid.* at 563–565.

<sup>79</sup> See *ibid.* at 543–612.

<sup>80</sup> Cf. Moore, *supra* note 16.

longer-term improvements in the accountability, transparency, and fairness of the law and its administration.<sup>81</sup> In the context of right to counsel doctrine, participatory defense provides the pressure necessary to push relationships between people facing criminal charges and their lawyers—and through those relationships, to push the constitutional content of the right to counsel—toward fuller vindication of the core rights and duties to communicate, investigate, and advocate.

Through this productive tension, participatory defense presses to improve standards of attorney performance. As those improved standards gain sufficient traction, they will redefine the substantive meaning of effective representation under *Strickland* as well as the content of *Powell*'s distinctive due process right to be heard. Thus, framing participatory defense within a democracy-enhancing theory of criminal justice takes the unique communicative action that is nascent in the right to counsel to a more powerful level. Viewed in that framework, the relationship connotes expressive activity that is as much a mode of democratic self-governance as participating in a debate at a town hall meeting, casting a ballot in a voter's booth, or deliberating over the application of law to evidence in a jury room.

To be sure, the grim history of the constitutional right to counsel dims any utopian visions. It also is true that the Supreme Court has openly denigrated the importance of the attorney-client relationship.<sup>82</sup> Nevertheless, reframed by a democracy-enhancing theory of criminal law and procedure that supplements Sixth Amendment doctrine with due process and equal protection principles, participatory defense is a new and powerful way to reshape the right to counsel as a unique form of politically effective intersubjectivity. This innovative model for criminal justice reform can strengthen partnerships between defense lawyers and people who face charges, their families, and their communities. Part V encourages reform advocates to apply these principles in future litigation and policy advocacy that aims to improve public defense systems while reducing the footprint of the carceral state.

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<sup>81</sup> See, e.g., Moore, J. (2012). Democracy and criminal discovery reform after Connick and Garcetti. *Brooklyn Law Review*, 77, 1329–1388, at 1332–1333, 1371–1387 (discussing litigation and policy history of full open file discovery reform).

<sup>82</sup> See Moore, *supra* note 16 (discussing *Montejo v. Louisiana*, 556 U.S. 778, 784 (2009), and *Morris v. Slappy*, 461 U.S. 1, 14 (1983)).

## V. PARTICIPATORY DEFENSE AND FOURTH-GENERATION PUBLIC DEFENSE REFORM

Parts II through IV introduced the core concepts and strategies of the participatory defense movement and analyzed that reform model within innovative doctrinal and theoretical frameworks. This Part discusses a recent wave of public defense reform projects and describes how reform advocates can strengthen future efforts by combining participatory defense with a renewed focus on the due process right to be heard. Part V.A surveys scholarly proposals for public defense reform. Part V.B identifies arguments that gained traction in the Missouri and Florida Supreme Courts. Part V.C discusses the relative inattention that courts and commentators have afforded to due process and to voices of the key stakeholders in the public defense reform movement: people facing charges, their families, and their communities.

### A. *Scholarly Reform Proposals*

Scholars have offered many constitutional solutions for the indigent defense crisis beyond the Sixth Amendment's demonstrably ineffective ineffectiveness test. Some invoke separation of powers doctrine, that is, a court's inherent authority and responsibility as an independent third branch of government to regulate judicial proceedings.<sup>83</sup> Others advocate equal protection claims grounded in the fundamental right of access to the courts.<sup>84</sup> Cara Drinan proposes federal legislative solutions,<sup>85</sup> while Ronald Wright describes how arguments for resource parity between prosecution and defense can yield reform.<sup>86</sup> Janet Moore, a coauthor of this article, points to additional strategies of vindicating the indigent defendant's right to choose an attorney<sup>87</sup> and adopting full open file discovery policies.<sup>88</sup>

Addressing the workload issue more specifically, scholars

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<sup>83</sup> Darwall, J., & Guggenheim, M. (2012). Funding the people's right. *New York University Journal of Legislation and Public Policy*, 15, 619–665, at 633–648; Logan, W. A. (2010). Litigating the ghost of Gideon in Florida: Separation of powers as a tool to achieve indigent defense reform. *Missouri Law Review*, 75, 885–906, at 903–906.

<sup>84</sup> See Lucas, L. S. (2013). Reclaiming equality to reframe indigent defense reform. *Minnesota Law Review*, 97, 1197–1267.

<sup>85</sup> Drinan, C. H. (2010). The National Right to Counsel Act: A congressional solution to the nation's indigent defense crisis. *Harvard Journal of Legislation*, 47, 487–522.

<sup>86</sup> Wright *supra* note 66, at 221, 253–262.

<sup>87</sup> Moore, *supra* note 16.

<sup>88</sup> *Ibid.*

highlight debiasing strategies to address counsel's cognitive blinders to their workload-created ethical dilemmas,<sup>89</sup> and suggest that *Cuyler v. Sullivan* offers a more forgiving conflict-of-interest standard through which to obtain reform.<sup>90</sup> Still others, despairing of the resources necessary to improve overloaded and underfunded systems, recommend overt triage by formally restricting the scope of the right to counsel<sup>91</sup> or by focusing resources on death penalty cases or colorable innocence claims.<sup>92</sup> Counterarguments favor reverse triage, which stems the tide of low-level cases that swamp criminal justice systems<sup>93</sup> at an astonishing cost.<sup>94</sup>

In what Professor Drinan presciently termed the "third generation of indigent defense litigation,"<sup>95</sup> some of the foregoing arguments are gaining traction in state courts. Recent decisions of the Missouri and Florida supreme courts are exemplary. Studying these cases reveals, however, that due process and the opportunity to be heard play as minor a role in the judicial analyses as they do in recent scholarship. Courts and commentators are similarly reticent regarding the experiences and perspectives of the key stakeholders: people facing criminal charges, their families, and their communities. In keeping with the analysis in Parts II through

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<sup>89</sup> Eldred, T. W. (2013). Prescriptions for ethical blindness: Improving advocacy for indigent defendants in criminal cases. *Rutgers Law Review*, 65, 333–394; see also Freedman, M. H. (2005). An ethical manifesto for public defenders. *Valparaiso Law Review*, 39, 911–923 (arguing against triage and urging defenders to withdraw and inform clients and courts when overload threatens competent and diligent performance); Robbennolt, J. K., & Sternlight, J. R. (2013). Behavioral legal ethics. *Arizona State Law Journal*, 45, 1107–1183 (noting cognitive blind spots that prevent attorneys from recognizing and acting on ethical problems).

<sup>90</sup> Anderson, H. R. (2012). Funding Gideon's promise by viewing excessive caseloads as unethical conflicts of interest. *Hastings Constitutional Law Quarterly*, 39, 421–456.

<sup>91</sup> Dripps, D. A. (2012). Up from Gideon. *Texas Tech Law Review*, 45, 113–137, at 124–130 (proposing reductions in scope of right and in credentialing of indigent defense service providers).

<sup>92</sup> See Mosteller, R. P. (2010). Protecting the innocent: Part of the solution for inadequate funding for defenders, not a panacea for targeting justice. *Missouri Law Review*, 75, 931–988, at 959–973 (critiquing proposals for triage or reassignment in, e.g., Brown, D. K. (2005). The decline of defense counsel and the rise of accuracy in criminal adjudication. *California Law Review*, 93, 1585–1646); see also Barton, B. H., & Bibas, S. (2012). Triage of appointed-counsel funding and pro se access to justice. *University of Pennsylvania Law Review*, 160, 967–994, at 990–995 (arguing for triage in counsel appointments).

<sup>93</sup> See generally Boruchowitz, R., Brink, M., & Dimino, M. (2009). *Minor crimes, massive waste: The terrible toll of America's broken misdemeanor courts*. Washington, DC: National Association of Criminal Defense Lawyers. Retrieved from [www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20808](http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20808).

<sup>94</sup> Braun, E. (2010). *\$42,000 for a courthouse hour: The cost of processing adult criminal cases in Hamilton County, Ohio*. Cincinnati, OH: Ohio Justice and Policy Center, at 6. Retrieved from <http://www.ohiojpc.org/text/publications/court%20cost.pdf>.

<sup>95</sup> Drinan, C. H. (2009). The third generation of indigent defense litigation. *New York University Review of Law and Social Change*, 33, 427–478, at 462.

IV of this article, this Part argues that reform advocates should strengthen their efforts by partnering with the participatory defense movement and renewing their focus on the indigent defendant's due process right to be heard.

*B. Prospective Relief and Triage in Missouri and Florida*

Missouri is one of the few jurisdictions in which attorneys may withdraw from or refuse cases due to overwhelming workloads.<sup>96</sup> In contrast, Florida expressly forbids lawyers from withdrawing from or declining cases due to case overload.<sup>97</sup> Yet in each of these jurisdictions, public defenders persuaded their state supreme court to vindicate counsel's duties to decline or withdraw from additional cases when workloads outstrip resources.<sup>98</sup>

These cases are remarkable in several respects. First, over sharp dissents, each court broke *Strickland v. Washington's* case-by-case, ex post stranglehold on right to counsel analysis to order class-based, prospective relief. Second, each court blended rules of ethics into this prospective Sixth Amendment analysis. Third, defenders and their allies made these rulings possible by building rich factual records that documented the degradation of the indigent defense lawyer into a mere mouthpiece for prosecutors' charging and plea decisions.<sup>99</sup>

Finally, in terms of remedy, each court required system stakeholders—including prosecutors and trial judges as well as defenders—to collaborate on reducing defender workloads. Those requirements raise significant separation of powers issues. They also intensify the burden of excessive caseloads on indigent defendants charged with lower-level offenses. The decisions

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<sup>96</sup> *Missouri Public Defender Commission v. Waters*, 370 S.W.3d 592, 599–601 (Mo. 2012) (discussing Mo. Code Regs. Ann. tit. 18, § 10-4.010 (2010)); Lefstein, *supra* note 72, at 42 (citing Langton, L., & Farole, D. J., Jr. *Public defender offices, 2007—Statistical tables*. Washington, DC: Bureau of Justice Statistics, U.S. Dept. of Justice, at tbl. 7a) (discussing comparable provisions in eight additional states)).

<sup>97</sup> Logan, *supra* note 83, at 886–887 (citing Fla. Stat. § 775.24(1) (2010); Colo. Rev. Stat. § 21-2-103(1.5)(b)–(c) (2009)).

<sup>98</sup> *Public Defender v. Florida*, 115 So. 3d 261 (Fla. 2013); *Waters*, 370 S.W.3d at 592; *cf. Wilbur v. City of Mt. Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013) (holding county systems unconstitutional); *see also Simmons v. State Public Defender*, 791 N.W.2d 69, 89 (Iowa 2010) (rejecting hard fee cap as unenforceable due to “chilling effect on the constitutional rights of criminal defendants”).

<sup>99</sup> *Public Defender*, 115 So. 3d at 273–274 & nn. 6–8 (noting that the twenty-six-volume record showed a “systemic inability of the public defender attorneys” to “interview clients, conduct investigations, take depositions, prepare mitigation, or counsel clients about pleas offered at arraignments”).

expressly contemplate diluting speedy trial rights for such defendants. They also threaten to create additional effective assistance issues by promoting inexperienced volunteer counsel as a “stellar example of creative problem-solving.”<sup>100</sup>

### 1. Missouri: A System Under Water

*Missouri Public Defender Commission v. Waters* arose after a public defender’s office was certified pursuant to an administrative rule to be unavailable for additional appointments due to excessive caseloads. A trial judge nevertheless concluded that he “had no choice” other than to assign Jared Blacksher’s case to a public defender from that overloaded office.<sup>101</sup> The public defender sought a writ of prohibition. The state supreme court reversed the trial court’s appointment order by the narrowest possible four-to-three margin.<sup>102</sup>

The majority and dissenting opinions clashed on two key points. The first was whether the case was moot because Blacksher pled guilty while the petition for the writ was pending. The second and related issue was whether the Sixth Amendment and cognate state constitutional law allowed class-based, prospective relief or instead required petitioners to prove that Blacksher was prejudiced by his lawyer’s unreasonable performance.

The majority applied the public interest exception to mootness doctrine. The court concluded that the issue was capable of repetition but evaded review, and noted that the threat of contempt hung over counsel forced to choose between complying with an appointment order, on one hand, or with the administrative rule, “their ethical obligations and the Sixth Amendment” on the other hand.<sup>103</sup> The majority further concluded that since the petition did not seek to vacate a conviction, *Strickland*’s case-by-case, ex post performance-and-prejudice test did not apply.<sup>104</sup>

The majority read U.S. Supreme Court Sixth Amendment cases as holding that, because the right to effective counsel applies at all critical stages of a case, it is “a prospective right to have counsel’s advice . . . and not merely a retrospective right to have a verdict or plea set aside if one can prove that the absence of competent counsel

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<sup>100</sup> *Waters*, 370 S.W.3d at 611.

<sup>101</sup> *Ibid.* at 597.

<sup>102</sup> *Ibid.* at 612.

<sup>103</sup> *Ibid.* at 604–605.

<sup>104</sup> *Ibid.* at 606–607.

affected the proceeding.”<sup>105</sup> Curiously, the majority cited *Missouri v. Frye*, which applied *Strickland*’s retrospective test to plea bargaining, and *Iowa v. Tovar*, which had little to do with effective assistance or excessive caseloads.<sup>106</sup>

After concluding that the Sixth Amendment required prospective analysis of attorney effectiveness, the *Waters* majority noted that ethical rules proscribe the conflicts of interest that “inevitably” result from excessive caseloads.<sup>107</sup> Notably, the majority did not cite *Cuyler v. Sullivan*’s onerous conflict-and-prejudice Sixth Amendment test. With respect to remedy, the majority invoked the courts’ inherent “authority and . . . responsibility to manage their dockets in a way that . . . respects the constitutional, statutory, and ethical rights and obligations of the defendant, the prosecutor, the public defender, and the public.”<sup>108</sup>

The majority stated that courts could use this inherent authority to “triage” cases involving the most serious charges or defendants unable to make bail.<sup>109</sup> The majority acknowledged the speedy trial implications of resulting delays for the presumably less culpable and dangerous indigent defendants who are charged with lower level offenses or are able to obtain pretrial release. The court anticipated “modify[ing] time standards” in such cases to accommodate “delays necessitated by the insufficient public defender resources.”<sup>110</sup>

The majority also advised trial courts to “hold meetings” with prosecutors and defenders on the record, with evidentiary hearings as needed, to resolve excessive caseload problems. The majority recommended this strategy despite the findings of a special master, whom the court appointed during the pendency of the *Waters* petition, that such discussions, although already mandated by the

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<sup>105</sup> *Ibid.* at 607.

<sup>106</sup> *Ibid.* at 606–607 (citing *Missouri v. Frye*, 132 S. Ct. 1399 (2012); *Iowa v. Tovar*, 541 U.S. 77 (2004)). *But see Frye*, 132 S. Ct. at 1408–1411 (applying *Strickland* standard); *Tovar*, 541 U.S. at 91–93 (addressing voluntary waiver issue).

<sup>107</sup> *Waters*, 370 S.W.3d at 607 (citing *In re Edward S.*, 92 Cal. Rptr. 3d 725, 746–747 (Ct. App. 2009)); *Waters*, 370 S.W.3d at 610 (holding that “the Sixth Amendment and this Court’s ethics rules require that a court consider counsel’s competency” before appointment).

<sup>108</sup> *Waters*, 370 S.W.3d at 610–611.

<sup>109</sup> *Ibid.* at 611.

<sup>110</sup> *Ibid.* at 611–612. For a telling example of indigent-defense jujitsu, see *People v. Roberts*, 321 P.3d 581 (Colo. App. 2013) (citing *Waters* to deny an indigent defendant’s speedy trial claim). Although Colorado bars counsel from withdrawing from or refusing cases due to excessive caseloads, see Colo. Rev. Stat. § 21-2-103(1.5)(b)–(c) (2009), the *Roberts* court reasoned that the trial court could have granted such a motion and therefore the defendant could not prove up his speedy trial claim.

administrative rules, were utterly fruitless.<sup>111</sup>

## 2. Getting Lucky in Florida

In *Public Defender v. Florida*, the state supreme court confronted a statute that expressly forbids trial judges from granting motions to withdraw by public defenders who claim that excessive caseloads create conflicts of interest. A five-to-two majority held the statute unconstitutional as applied.<sup>112</sup> The ruling was issued nearly a year after *Waters*, and shares threads of similar reasoning and remedies. But the Sunshine State court did not cite the work of its Show Me State sister court. Instead, the Florida court provided an arguably more compelling doctrinal analysis to support its ruling.

The reasoning of the cases was similar in several respects. Both courts cited ethical rules to support their decisions, as well as courts' inherent supervisory authority to intervene in the respective crises. The Florida court expressly cited separation of powers doctrine as well, no doubt due to that court's longstanding battle with the state legislature over indigent defense issues.<sup>113</sup> In terms of remedy, where *Waters* required stakeholder consultation to triage cases, the Florida trial court allowed defenders categorically to refuse appointments in low-level felony cases. Affirming the judge's authority to issue such an order, the state supreme court nevertheless remanded for the judge to reevaluate the situation and ensure that "the same conditions" still warranted that relief.<sup>114</sup>

The Missouri and Florida cases also are different in two significant doctrinal ways. The Florida Supreme Court relied heavily on *Luckey v. Harris*, a 1988 Eleventh Circuit decision, to transform *Strickland's* case-by-case, ex post performance-and-prejudice ineffectiveness test into a class-based, prospective avenue toward relief.<sup>115</sup> The Florida court also provided a more persuasive explanation for invoking *Missouri v. Frye* and related cases to work around *Strickland*.

In *Luckey*, a three-judge panel held that a Georgia defendant articulated an actionable civil rights claim under 42 U.S.C. § 1983. The defendant sought injunctive relief against an overloaded, underfunded state indigent defense system. The panel concluded

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<sup>111</sup> *Waters*, 370 S.W.3d at 610–611.

<sup>112</sup> *Public Defender v. Florida*, 115 So. 3d 261 (Fla. 2013).

<sup>113</sup> *Ibid.* at 271–272.

<sup>114</sup> *Ibid.* at 264, 280.

<sup>115</sup> *Ibid.* at 276–277 (citing *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988)).

that Luckey could proceed on his claim that this broken system created “the likelihood of substantial and immediate irreparable injury” in light of “the inadequacy of remedies at law.”<sup>116</sup>

Four years later, the case was dismissed on federal abstention grounds.<sup>117</sup> Nevertheless, the Florida Supreme Court found compelling the original panel’s conclusion that *Strickland’s* case-by-case, ex post performance-and-prejudice test was “inappropriate” for evaluating comparable claims of system-wide failure.<sup>118</sup> Equally compelling for the Florida court was the federal panel’s reasoning (expressed *sotto voce* in *Waters*) that the finality and other concerns animating *Strickland’s* rigorous test are not present in claims for prospective relief.<sup>119</sup> “The sixth amendment,” the Florida court approvingly quoted, “protects rights that do not affect the outcome of a trial.”<sup>120</sup>

By distinguishing the harm alleged from the relief sought, the Florida court framed *Missouri v. Frye* and other recent Supreme Court cases as modifying *Strickland’s* prejudice test to fit more precisely when effective assistance claims arise from pretrial processes such as plea bargaining. In keeping with that interpretation, the Florida court drew its ex ante prejudice standard for excessive caseload motions from the text of the ethical rule governing conflicts of interest. To prevail on the motion, claimants must show a “substantial risk that the representation of [one] or more clients will be materially limited by the lawyer’s responsibilities to another client.” The court found “substantial evidence to support the trial courts’ findings and conclusions of law to that effect.”<sup>121</sup>

### C. *The Sound of Silence*

*Waters* and *Public Defender v. Florida* are important ripples in the current wave in indigent defense reform. But these cases also raise difficult questions. At a practical level, these decisions

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<sup>116</sup> *Harris*, 860 F.2d at 1017.

<sup>117</sup> *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992). The case’s tortuous history is discussed in, e.g., Citron, R. (1991). (Un)Luckey v. Miller: The case for a structural injunction to improve indigent defense services. *Yale Law Journal*, 101, 481–504, at 493–494.

<sup>118</sup> *Public Defender*, 115 So. 3d at 276–277.

<sup>119</sup> *Ibid.* at 276.

<sup>120</sup> *Ibid.* (quoting *Harris*, 860 F.2d at 1017).

<sup>121</sup> *Public Defender*, 115 So. 3d at 279 (citing *Lafler v. Cooper*, 132 S. Ct. 1376 (2012); *Missouri v. Frye*, 132 S. Ct. 1399 (2012); R. Regulating Fla. Bar 4-1.7(a)(2)); see also *Simmons v. State Public Defender*, 791 N.W.2d 69, 86–89 (Iowa 2010) (citing *Luckey* to impose ex ante effectiveness test and allow appointed counsel to challenge fee caps).

expressly or implicitly require prosecutors, defenders, and trial judges to cooperate in winnowing the defense workload down to a manageable burden. How are these stakeholders to negotiate separation of powers doctrine and other concerns that affect charging, plea, diversion, and sentencing decisions? How will speedy trial rights be protected? To what extent will overextended appointed counsel be called upon to fill the breach?<sup>122</sup> And perhaps most significantly, how will the voices of the key stakeholders—the people facing criminal charges, their families, and their communities—inform the process?

At a theoretical level, while the Florida Supreme Court's Sixth Amendment analysis bears more scrutiny than the reasoning in *Waters*, there is reason to be circumspect about the long-term prospects of a robust class-based, prospective *Strickland* standard. As discussed in Part III, on right to counsel issues the U.S. Supreme Court has acted consistently with its overall approach to constitutional criminal procedure rights; the Court gives with one hand only to take with the other. The Court establishes a right, then promptly ensures its weak enforceability—often with high-flown language and self-congratulations. *Gideon v. Wainwright*<sup>123</sup> and *Strickland*<sup>124</sup> form an illustrative pair in the right to counsel context. *Brady v. Maryland*<sup>125</sup> and *United States v. Bagley*<sup>126</sup> illustrate the same pattern with respect to prosecutorial discovery duties. Likewise, *Batson v. Kentucky*<sup>127</sup> and *Purkett v. Elem*<sup>128</sup> respectively proclaimed, then weakened, the equal protection rights of prospective jurors to be free from invidious discrimination.

Given the Court's constitutional give-and-take, the fourth generation of indigent defense reform litigation may find due process to be a critical complement to the Sixth Amendment in securing more robust assessment of, and prospective relief for, excessive workload claims. This may be especially true with respect to the due process duties to communicate and investigate, which are prerequisites for satisfying the duty to advocate. Yet due process is barely mentioned by the courts and commentators discussed above.

Most significantly, a due process strategy would actively involve

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<sup>122</sup> See, e.g., *Simmons*, 791 N.W.2d at 89.

<sup>123</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>124</sup> *Strickland v. Washington*, 466 U.S. 668 (1984).

<sup>125</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>126</sup> *United States v. Bagley*, 473 U.S. 667 (1985).

<sup>127</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>128</sup> *Purkett v. Elem*, 514 U.S. 765 (1995).

the reform movement's most powerful allies: the people engaged in participatory defense. Amplifying the voices of the most important stakeholders in the reform struggle promotes the fundamental due process right to be heard. This strategy also increases the transparency and accountability that are necessary for sustainable improvement not only in indigent defense systems themselves, but also in right to counsel doctrines that tend historically to emerge from in-the-trenches praxis.

Part VI dives into that practical application of this article's doctrinal and theoretical analysis. As discussed below, innovative empirical research offers new sources of support for reform advocates by amplifying the voices of people who face criminal charges along with the voices of their families and communities.

#### VI. "WHERE WAS I AT?!" PARTICIPATORY DEFENSE AND PRACTICAL TOOLS FOR REFORM

This article argues that participatory defense is a powerful new model for vindicating the due process right to be *heard* through public defense reform. Participatory defense demonstrates that some of the most important agents for change are the people with the most skin in the game: people facing charges, their families, and their communities. This Part offers practical tools for helping these stakeholders to understand the rights triggered by criminal charges and lawyers' corresponding duties. By using those tools, these key stakeholders will be in a better position to support lawyers' demands for the time and resources necessary to fulfill their ethical and legal obligations.

An easy way to amplify stakeholder voices is through rights-information and satisfaction-feedback procedures. This Part discusses two examples studied in Ohio and Indiana. The first was implemented through the Indigent Defense Clinic (IDC) at the University of Cincinnati College of Law. The IDC partners with the local public defender's office to provide every client with a succinct statement of the attorney's duties to communicate, investigate, and advocate. A wallet-size, trifold rights-information card is below.

RIGHT TO  
COUNSEL

If you are arrested and  
might go to jail or prison,  
you have the right to get  
help from a lawyer.  
You also have the right  
to talk to a lawyer before  
you talk to anyone else  
about your case.

**YOUR LAWYER SHOULD:**

**LISTEN TO YOU** about what you want to happen in your case and who or what might help

**TALK TO YOU** about what is happening in your case and how you can get in touch

**KNOW THE LAW** and be able to tell you why it matters in your case

**LOOK FOR INFORMATION** that can help you, including information police and prosecutors might have

**HELP YOU** get the best possible result in your case by:

- Trying to get you released if you are in jail before trial
- Trying to keep illegal evidence out of court
- Preparing for trial
- Arguing for the best plea and sentence possible

**YOU CAN ASK YOUR LAWYER TO DO THESE THINGS FOR YOU OR TO EXPLAIN WHY THEY ARE NOT BEING DONE**

The same jurisdiction successfully beta-tested a client satisfaction survey, which probed the extent to which indigent defendants understood their rights and counsel's efforts to fulfill corresponding duties.<sup>129</sup> The results of that research were sufficiently revealing that other jurisdictions agreed to serve as sites for broader implementation of the protocol.

The project relied on prior empirical research that highlights the importance of client trust in the criminal defense setting not only for attorney-client cooperation, but also for perceptions of system legitimacy and willingness to comply with the law.<sup>130</sup> The project included qualitative and quantitative analysis. A convenience sample of volunteers was drawn from people represented by the Hamilton County, Ohio, public defender's office. The qualitative analysis involved a small focus group discussion, while the quantitative analysis relied upon surveys.<sup>131</sup>

At about the same time, a similar study was conducted with a public defender agency in a rural Indiana county. For this project, everyone who had a public defender assigned to a current case was invited to participate in the study and respond to questions regarding satisfaction with counsel. The overwhelming majority of

<sup>129</sup> Campbell, C., Moore, J., Maier, W., & Gaffney, M. (in press). Unnoticed, untapped, and underappreciated: Clients' perceptions of their public defenders. *Behavioral Sciences and the Law*.

<sup>130</sup> See, e.g., Boccaccini, M. T., Boothby, J. L., & Brodsky, S. L. (2004). Development and effects of client trust in criminal defense attorneys: Preliminary examination of the congruence model of trust development. *Behavioral Sciences and the Law*, 22, 197–214; Tyler, T. R., Braga, A., Fagan, J., Meares, T., Sampson, R., & Winship, C. (2007). Legitimacy and criminal justice: International perspectives. In A. Braga, J. Fagan, T. Meares, R. Sampson, T. R. Tyler, & C. Winship (Eds.), *Legitimacy and criminal justice* (pp. 9–30). New York, NY: Russell Sage.

<sup>131</sup> Campbell, Moore, Maier, & Gaffney, *supra* note 129.

those who agreed to participate were in jail, awaiting case disposition. Participants were administered a questionnaire, one-on-one, in individualized visiting rooms at the beginning of their cases (T1). A second round of postdisposition (T2) surveys is underway.

The research results, regardless of jurisdiction, underscore the important ways that communication between people facing charges and their lawyers affects the charged individuals' level of satisfaction with the relationship and the process, as well as their perceptions of system fairness and legitimacy. The research also reveals that amplifying the voices of the most important stakeholders in the struggle for public defense reform—the people facing charges and incarceration—can provide new evidence and other support for reform advocacy.

#### *A. Focus Group Discussions: Ohio*

Comments from the Ohio focus group discussions reveal a sharp awareness that indigent defense attorneys are overworked and underresourced. One participant acknowledged that his public defender was “not making as much money” as private attorneys despite “a caseload that’s ridiculous,” and that his lawyer simply didn’t “have the time . . . to put into an individual.”<sup>132</sup> Another participant put it bluntly: “There’s not enough of ‘em to go around to all the guys that can’t afford attorneys so they’re using one public defender for a whole pile of people.”<sup>133</sup>

Participants were equally clear about the effects of system overload and, in some instances, defenders who appeared less than fully engaged, particularly with respect to attorney-client communication. One individual stated, “I feel like I was sold. I was sold to the judge. . . . We didn’t really sit down and talk about this case or nothing. Next thing I know when I came to court—‘sign this,’ which says ‘no contest.’”<sup>134</sup> The same person contrasted the experience of being “sold” to what he would have expected from a “paid lawyer”:

“You pay for this time, so what you want to do?” “I wanna do this.” He gonna sit back and listen. He ain’t gonna say nothing to you. He’s going to sit back and say nothing and after you tell him what’s going on, he’s gonna tell you our

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<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

best route. . . . Public defender ain't gonna do that.<sup>135</sup>

Still another participant expressly equated the lack of communication and advocacy with the lack of due process:

Again, my statement is due process and equal justice under the law. I mean come on, man. I understand I don't have the money to pay for this lawyer, and the state's payin' it, but I still deserve to be treated like anybody else . . . black, white, rich, yellow, it doesn't matter . . . . Fair is fair. And you all want me to state that I'm willing to give you the maximum where this other guy comes in with a paid lawyer, he gets probation. Wait a minute, hold up, back up.<sup>136</sup>

Yet another focus group participant linked the core duties to communicate, investigate, and advocate:

Will one of them take the time and say that, this is what I see we can do? Come to the cell block, talk to me and say, "Uh, ok, what happened here?" Have me explain exactly what happened, so he can get an idea of "Hey, I might actually have something to work with here." That don't happen.<sup>137</sup>

In a similar vein, one of the most poignant participant statements described the attorney-client relationship as an absence or erasure:

Once they see what you in there for, they already know, they just come down there with a paper and it's got your name on it, all your charges, all your history on it, and he's tellin' you, "We gonna plead this." Wait a minute, dude, we ain't even talk. "And if we plead this the judge already said that he would do this." When did that happen?! Where was I at?!<sup>138</sup>

### *B. Perceptions of the Ideal Attorney: Indiana*

The project in Indiana did not include a focus group.<sup>139</sup> Instead,

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<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> There was an attempt to conduct a focus group, as part of a class project, in order for people who were facing charges to have input in developing the data collection instruments. The attempt was unsuccessful because the invitees failed to attend the scheduled meeting with the students. Instead, Sandys took groups of students to the jail and met with pretrial detainees, one detainee at a time, to review the questionnaires. The primary purpose of those discussions was to determine whether the proposed instruments covered all aspects of attorney-client satisfaction, whether there were any additional questions that should be asked, and whether any of the questions were confusing or needed to be clarified.

participants in the Indiana study were asked to describe the ideal attorney. Their responses fell squarely within the duties of an attorney to communicate, investigate, and advocate. For example, the very first client interviewed responded that the ideal attorney would “fight for me, not the county.” In that simple sentence, the client expresses the importance of having an attorney who is a true advocate. That sentiment was echoed by another client, who described the ideal attorney as “someone that’s going to be on my side and fight for what’s in my best interests.” Another client went straight to the point: “Fight for me, try hard. Don’t just take the first offer. Be an advocate.”

While the participants in Indiana did not mention the term investigation specifically, several of them pointed to the importance of attorneys being familiar with the case. For example, one client noted that an ideal attorney would “have knowledge of my case, have helpful information pertaining to me and my case.” Another person said that an ideal attorney “takes time getting to know the case.” Likewise, another person pointed to the importance of “pay[ing] attention to what the case entails, listen[ing] to the story, facts, circumstances.”

Interestingly, several of the people with whom Marla Sandys, a coauthor of this article, spoke referenced paid attorneys in their descriptions of an ideal attorney. This fact is noteworthy because the survey question asked for a description of an ideal attorney; it did not ask for descriptions of an ideal public defender. Yet regardless of the precise framing of the question, several respondents provided their description of an ideal attorney as one who is paid for quality services. In the words of these respondents, such an attorney would:

Do everything they can do for me, just like a paid lawyer would. . . . Be on the ball with things, act like case was important, treat it the same as if they were being paid privately. . . . Care[] like a paid attorney, [be] concerned . . . tend to my case like he is paid.

Even more respondents, however, referenced the duty to communicate in their descriptions of an ideal attorney. In the view of these respondents, such a lawyer:

Comes to see me in a timely fashion; keeps me well-informed; takes notes, [and] acts interested. . . . Would just get back to you and let you know status of [your] case. [Would come] see you once in a while to let you know what’s going on. . . . Get[s] a hold of me, keep[s] me informed, let[s]

me know what's going to happen good or bad.

Yet another participant succinctly expressed the ethical duty of zealous advocacy by describing the ideal lawyer as “[s]omeone that listens and tries to understand [the] situation; [is] not afraid to fight for you in court.”

### C. Survey Results

A sample of 156 survey respondents was obtained in Ohio after reaching out to 568 clients through mail, telephone, and on-site distribution. The survey did not closely examine the connection between client experience, client satisfaction, and case outcome. While further research on this point is needed, prior analyses indicate a weak connection between satisfaction and outcome.<sup>140</sup> Instead, the variables focused on the extent to which clients felt their voices were heard.<sup>141</sup>

The resulting “client-centered representation scale” tended to corroborate the focus group reports. Client satisfaction was most closely linked with the extent to which attorneys listened to the clients, sought client input, investigated cases, and informed clients about case progress and possible consequences.<sup>142</sup> A majority (52.6%) of surveyed clients reported overall satisfaction with their public defenders’ performance.<sup>143</sup> Curiously, even larger percentages (63%) reported on one hand that they were not asked for their views on the issues in their cases, but on the other, that they felt their lawyers did investigate their cases.<sup>144</sup>

The findings from Indiana are similar even though those initial (T1) interviews were conducted while the case was ongoing. That is, findings from the T1 interviews in Indiana reveal what clients experience early on in their relationship with their attorney, whereas the findings from Ohio reflect experiences after the case was resolved.

Overall, at T1 the Indiana clients also were satisfied with their attorney (mean = 3.98 on 10-point scale with low numbers indicating greater satisfaction). Moreover, the clients expressed the greatest agreement with items that tapped into communication (“I want my lawyer to bring me every plea offer” and “it is important to

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<sup>140</sup> *Ibid.* (citing Tyler et al., *supra* note 130).

<sup>141</sup> Campbell, Moore, Maier, & Gaffney, *supra* note 129.

<sup>142</sup> *Ibid.*

<sup>143</sup> *Ibid.* at tbl. 3.

<sup>144</sup> *Ibid.*

me to know step-by-step what is going to happen in my case”) and being heard (“It is important that my lawyer listen to my story”).

One of the more interesting apparent anomalies to emerge across jurisdictions is the disconnect between consultation and investigation. While clients believe that their cases are being investigated, they also express concern that they are not consulted throughout the case. One explanation for this apparent anomaly may be a perceived distinction among survey respondents between consultation about the issues before and after investigation occurs, or between investigation and the plea bargaining or case resolution phases. Or, more generally, it may be that participants were uncertain as to what constitutes investigating a case. Granted, when cases go to trial, people who are facing charges should have had an opportunity to understand the evidence against them and to know the defense strategy. In contrast, in the vast majority of cases that are plea bargained, they may hear an offer but may be unaware of any investigation that went into securing that offer.

Such questions, along with the small sample size and early phase of data assessment, concededly warrant cautious interpretation and application of the research results. The fact that similar findings emerged regardless of jurisdiction, or stage of the case at which the interview was conducted, nevertheless suggests that investigating the role of client voice in a client-centered indigent defense setting warrants expansion through further research.

At minimum, the results suggest that indigent defendants who understand what the investigative process should look like, and who are communicating effectively with their attorneys, may be more likely to be satisfied with the representation that they received. It may also be true that the quality of representation under those circumstances will in turn be improved. It also is possible that when people who are facing charges are empowered with knowledge of their rights during the critical communication and investigation stages, they may be better positioned to make their voices heard in the ongoing struggle to improve indigent defense systems.

## VII. CONCLUSION

Participatory defense is a powerful new model for pursuing criminal justice reform generally and public defense reform specifically. The model is a crucial tool for expanding the due process right to be heard in criminal courts. That right is vindicated in part through communication between people who face

charges and their lawyers. That communication is a necessary foundation for fulfilling the related rights and duties of investigation and advocacy. Findings from studies in Ohio and Indiana reveal that people facing charges want, above all, substantive communication with their lawyers.

The participatory defense model harnesses that energy and offers an effective way to improve defense performance and, in turn, the governing legal standards that courts draw from in-the-trenches practice. Improved defense standards also can gradually rebalance skewed power disparities and strengthen diminishing cognate rights such as the right to jury trial. Thus, by making a new and powerful set of voices heard, participatory defense is an important mode of grassroots lawmaking that can force greater transparency, accountability, and fairness from criminal justice systems while reducing the footprint of the carceral state.

Ed Monahan

Public Advocate

Kentucky Department of

Public Advocacy

# KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY ALTERNATIVE SENTENCING WORKER PROGRAM

At least since 2011, Kentucky policy makers have been examining ways to reduce the costs of unessential incarceration of individuals whose crimes were mostly a result of substance abuse or mental illness. The Alternative Sentencing Worker (ASW) Program arose during the policy debates around incarceration costs and it responds to the perceived need for diverting those individuals into community services rather than merely warehousing them in correctional facilities. Thus, while the ASW Program gets people to the services they need, it also results in reducing incarceration costs.

## COST AND INCARCERATION OPTIONS

### IF THE ASW PROGRAM HAD NOT BEEN APPROVED



**15,004**

Total days likely incarcerated within the 12-month period



### WITH THE ASW PROGRAM



**2,131**

Total days actually incarcerated within the 12-month period



## STUDY METHOD

The basic method for this evaluation of return on investment was to examine the likely incarceration costs of sentences in the absence of the ASW Program and then to examine the actual days the ASW clients were incarcerated during the program year.

For examining charges and incarceration, a random sample of 50 clients (15.4%) was taken from the 324 ASW clients from SFY 2014. Of the 50 clients:

- 28 were sentenced to prison terms,
- 21 faced jail terms,
- One client was a 14-year old minor who was referred back to the Court Designated Worker by the court with no time sentenced
- Another client's case was dismissed

Since most individuals sentenced to prison for low-level felonies serve their time in local jails, To estimate the cost of incarceration, a conservative per diem amount was developed from the average of two county jail CTI per diem rates (\$32.92 for jails without a Substance Abuse Program (SAP) and \$41.92 for jails with a SAP) for SFY 2014.

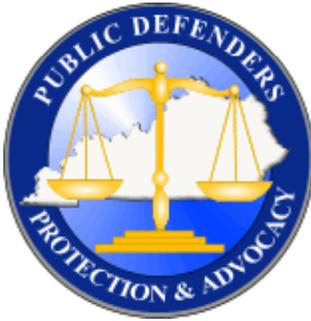
## RETURN ON INVESTMENT



SFY 2014 EVALUATION REPORT

KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY  
**ALTERNATIVE SENTENCING  
WORKER PROGRAM**

MAY 2016



COMMONWEALTH OF KENTUCKY

# DEPARTMENT OF PUBLIC ADVOCACY

5 Mill Creek Park • FRANKFORT, KENTUCKY 40601 • 502-564-8006 • FAX: 502-695-6766

May 2, 2016

John Tilley  
Secretary, Kentucky Justice & Public Safety Cabinet  
Office of the Secretary  
125 Holmes Street  
Frankfort, KY 40601-2108

Dear Secretary Tilley,

This independent Report documents the effects of the Department of Public Advocacy's Alternative Sentencing Worker Program (ASW Program). The Report summarizes Findings from the evaluation of the program regarding clients served during state Fiscal Year 2014. For the clients offered services in FY 2014, follow-up data collection from clients and official state data sources was conducted to examine program effects 12 months after the courts had accepted alternative sentencing plans.

The Report found program gains for the criminal justice system and in particular for the Justice and Public Safety Cabinet in two important ways: 1) 324 clients received badly needed services, thus providing a more humanitarian service than merely incarcerating them; and 2) Substantial returns on program investment were realized by greatly reducing incarceration costs for the year following court acceptance of the alternative sentencing plans.

The ASW Program is a strategic way the policy of 2011's HB 463, designed to reduce incarceration costs safely, is being realized. The ASW Program has worked to maximize the use of community-based services in lieu of incarceration. The reduced incarceration goals envisioned by HB 463 have been affected by very minimal growth of community-based services to provide alternatives to incarceration. The ASW Program has struggled with that problem, but has also found ways to navigate clients into these services to place our part achieving in the state's goals.

This evaluation was done by the University of Kentucky Center on Drug and Alcohol Research using data collected by our ASW Program staff and administrators. All analyses and conclusions represent the independent views of the evaluator.

Although DPA represents but a small part of the Cabinet's budget, the ASW Program has demonstrated an important role in not only meeting a mandate to provide quality legal representation to our clients suffering from substance abuse or a mental illness, but also to help meet key Cabinet goals regarding safely reducing the cost of incarceration.

Should you have any questions about this program or this Report, please feel free to contact me.

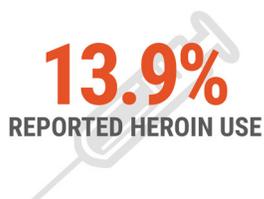
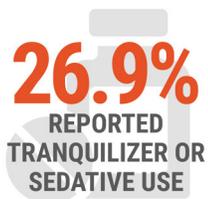
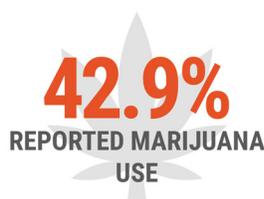
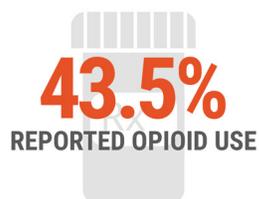
Sincerely,

Edward C. Monahan  
Public Advocate



## Executive Summary

In SFY 2014, The Department of Public Advocacy Alternative Sentencing Worker (ASW) Program served 324 clients charged with felonies and misdemeanors in eight districts in the state.



- » **79%** had been unemployed at the time of their arrest on current charges.
- » **18.5%** reported having had brain injury.
- » Almost half (**46.9%**) had been diagnosed at some time with a Depression Disorder.
- » **39.5%** had been diagnosed with an Anxiety Disorder.
- » **23.5%** had been diagnosed with Bipolar Disorder.
- » The clients had a lifetime average of **8.4** previous incarceration episodes.
- » **86.1%** of the clients were referred to substance abuse treatment.
- » **32.4%** were referred for mental health treatment.

Clients only ended up serving 1,595 days incarcerated out of the 11,292 days they would have served in the 12 months of the project follow-up – **a reduction of over 85%.**

**85%**  
REDUCTION IN DAYS  
INCARCERATED

**\$5.66**  
RETURN ON  
INVESTMENT

For every dollar spent on the ASW Program, there was a **\$5.66 return on investment** from incarceration costs that were avoided due to interventions.

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Kentucky Department of Public  
 Advocacy  
 Alternative Sentencing Worker  
 Program

SFY 2014 Evaluation Report  
 May 2016

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## **Introduction**

The Kentucky Department of Public Advocacy continues to provide a wide range of defense services for individuals in the Kentucky Criminal Justice System. Beginning with a small grant project, the DPA has placed continuing emphasis on the importance of a version of holistic defense that brings a multidisciplinary team into the defense idea with the task of providing alternatives to traditional incarceration sentences. In Kentucky, the passage of legislation designed to reduce excessive incarceration dovetails with defense interests in preserving individuals' liberty wherever possible. The singular value of the Alternative Sentencing Worker Program is that it achieves client buy-in to engage in rehabilitation, treatment, and other services in lieu of incarceration. The engagement with these services also aims at longer term reduction of problems such as substance abuse that often lead to arrest.

### **The Context of the Alternative Sentencing Worker Program**

Alternative Sentencing was developed in the context of rising rates of incarceration and increased use of plea bargaining in the criminal justice system. "Plea bargaining is a defining, if not the defining, feature of the federal criminal justice system" (Brown and Bunnell, 2006:1063) and it has likewise become a defining characteristic of the state systems as well. Among the concerns with plea bargaining is the degree to which the process is top-down with prosecutors using potentially long sentences to leverage rapid case clearing. Pretrial detention can have a strong effect on defendant decision to accept pleas – even those that might be overly strict. Defendants who are taken into custody are more likely to accept a plea and thus are less likely to have their charges dropped even though at trial they might have been found not guilty (Kellough and Wortley, 2002).

During the period for this study, the pretrial release rate was 68% (Administrative Office of the Court, as reported in DPA's Annual Report, 2014). Thus, a high number of individuals remain in custody and vulnerable to the conditions surrounding plea bargaining. More generally, legal characteristics such as a history of repeated offenses, increase the likelihood of accepting a plea although such a history might narrow plea outcomes. An estimated 90% - 95% of all federal cases, and likely more state cases are resolved through plea bargaining (Devers, 2011).

Devers (2011) reviews literature suggesting great need for reforming how plea bargaining is carried out in the United States. Greater participation of judges and defense counsel early in the process might result in greater balance of power among the key players in plea bargaining (Bibas, 2004). In addition, a focus on certain nonviolent crimes might be a wise area for more productive use of plea bargaining. One likely target for a relaxing of plea bargaining positions is in the area of substance abuse-related crimes. It is in this context that the Alternative Sentencing Worker Program assumes an important role. The goal of the Alternative Sentencing Worker Program is to maximize clients' liberty interest while at the same time attaining client engagement in constructive use of probation or diversion sentences in lieu of incarceration. This project offers a different way to defend clients while at the same time joining with state government objectives in reducing unnecessary incarceration.

# The Alternative Sentencing Worker Program

## What the Workers Do

For several decades court systems have made use of community alternatives to incarceration for drug offenders. The prevailing models of court-mandated treatment make use of the heavy hand of the law to direct individuals into treatment. One common vehicle for using alternatives to incarceration has been through Drug Courts, which, while being voluntary in the sense of individuals agreeing to participate, still carry a quality of mandates that originate with court action. While these forms of treatment have shown effectiveness, they have traditionally been under the purview of prosecution and have been used with an interest in maintaining control over offender behavior (Farabee & Leukefeld, 2001).

By contrast, the process by which Alternative Sentencing Workers develop alternative sentencing plans is different. It originates with defense initiatives. And, as part of the defense, clients play an active role in determining their degree of interest in seeking help through community services. Thus, the alternative sentencing plans include thinking of community-based services as part of the client's defense—but in a unique way. Defense teams are typically tasked with advocating on behalf of clients' liberty interests. What is different about this approach is that it takes a longer view of client liberty interests. That is, the attorney wants to work to help keep clients from incarceration, but also to be less likely to be re-arrested or fall back into state custody. The solution involves alternative sentencing plans built around careful assessment of needs for rehabilitating the individuals who are facing incarceration.

The fact that these alternative sentencing plans are developed as part of defense rather than being just a response to prosecution ideas means that client participation is typically much more robust. Instead of simply being directed to a program, the client and Alternative Sentencing Worker first work out what the person needs, then locate a program, then present a plan to the court.

After plans are accepted by the courts, Alternative Sentencing Workers assist in getting clients into the proposed programs. In addition, ASW Program staff complete follow-ups on clients 12 months after the court acceptance of the plan to see how they are doing.

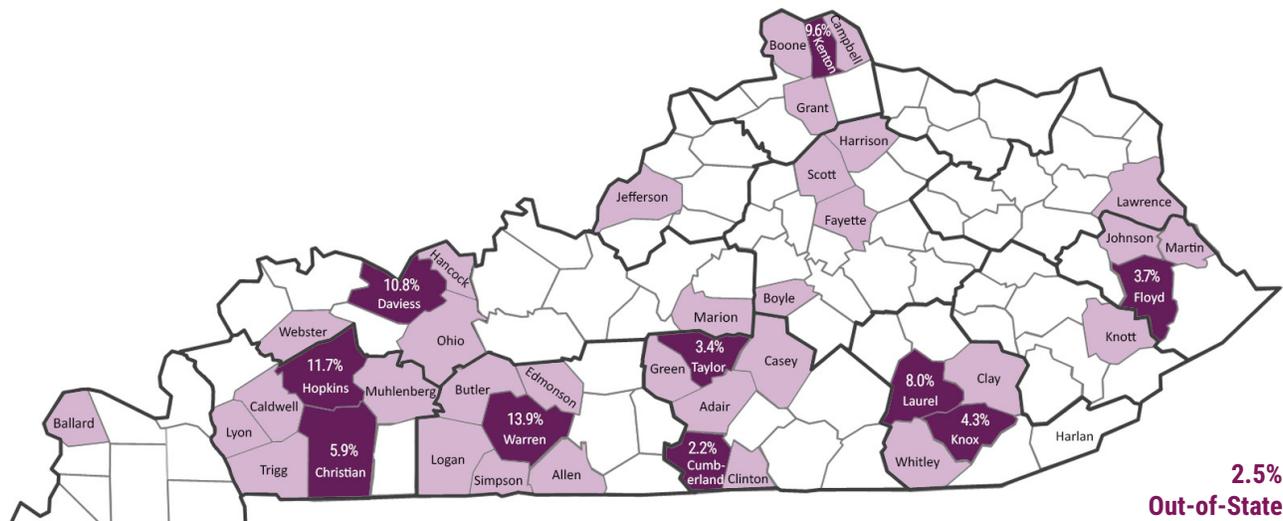
Alternative Sentencing Workers also spend time with community programs developing closer working relationships and referral procedures to enhance cooperation among service providers and the court system.

## Districts with DPA ASW Program Staff in SFY 2104

There were eight DPA field offices with Alternative Sentencing Workers assigned to the defense teams during SFY 2014. Those field offices were Owensboro, London, Prestonsburg, Covington, Madisonville, Columbia, Hopkinsville, and Bowling Green. The cost of the ASW Program in SFY 2014 was \$551,265, including all salaries (\$311,603), fringe benefits (\$167,758), and overhead costs (\$71,904). This program represents but 1.2% of the SFY 2014 DPA budget of \$44,992,300.

As shown in Figure 1, in SFY 2014, the eight Alternative Sentencing Workers served 324 clients who lived in 34 counties and three neighboring states at the time of their arrests. The county with the highest percentage of client residents was Warren County with 13.9% of all ASW clients in SFY 2014. Hopkins, Daviess and Kenton were close behind. Just over one-fourth (26.5%) of the ASW clients were from other counties and 8 were from out-of-state.

FIGURE 1. COUNTY OF CLIENT RESIDENCE AT TIME OF ARREST (N=324)



### The Specific Functions of the Worker

All cases for the DPA ASWs are referred by the client’s defense attorney. Essentially, the attorney believes that the client is in need of a rehabilitation or social service and needs a specialist to work up a plan for those services. ASW Program staff do not provide clinical services – a function left to the many organizations to which they refer clients. However, the ASWs assess service needs in order to make appropriate referrals to treatment and rehabilitation providers. ASW clients need to complete service needs assessments and service plans for presentation to the court by the DPA attorney. In these cases, the ASW interviews clients, assesses needs based on social history data collection, and, when indicated, consults with community providers to assess suitability for referral. At the time of initial interviews, 76.9% of the clients were incarcerated and 1.9% were on home incarceration. All others were released on a variety of conditions - some on their own recognizance and others on financial bail.

### Alternative Sentencing Worker Approaches

Evidence-based practices (EBPs) for substance use disorders (SUDs) are now required in most substance abuse treatment settings such as outpatient, intensive outpatient, short and long-term residential, inpatient, and corrections-based approaches (Torrey, Lynde, & Gorman, 2005; Riekmann, Kovas, Cassidy, & McCarty, 2011). However, government programs have an increasing interest in the use of EBPs in all phases of intervention with substance abusers. The Alternative Sentencing Worker Program has incorporated evidence-based practices. All of the DPA ASW have been trained in the most relevant evidence-based practice for this kind of service – Motivational Interviewing (Carroll et al., 2006; Miller & Rollnick, 1991; 2002; Vader, Walters, Prabhu, Houck, & Field, 2010). The association of Motivational Interviewing with change-talk and open-endedness has been well established and it is an approach best conceived as a communication style, not a specific treatment protocol or fixed set of topics (Miller & Rollnick, 2009; Morgenstern, et al., 2012). This approach allows for a gentle eliciting of client desire for services and change rather than direct confrontation. It is very consistent in style with the entire philosophy of defense work as it hinges directly on client commitment to change processes and a willingness to participate in services. The technique facilitates rather than directs change processes. All eight of DPA ASWs in SFY 2014 held master’s degrees in social work.

## **Cost for the Alternative Sentencing Worker Program**

The Kentucky Department of Public Advocacy's annual budget made up but 3.29% of the total criminal justice system expenditures in SFY 2014. The Alternative Sentencing Worker Program represented 1.2% of the overall DPA budget for SFY 2014. The cost of the staff and operating expenses for the 8 ASW Program staff for SFY 2014 was \$551,265. During the same fiscal year, there were 324 ASW cases, for an average per-case cost of \$1,701 independent of attorney costs. The average per client legal defense cost for new trial cases in SFY 2014 was \$245, however this cost would be present with each ASW case irrespective of the ASW services.

The ASW Program staff ended up allocating time to community outreach, mitigation efforts, alternative planning for involuntary hospitalization cases, and consultation with their attorneys on client needs and approaches. All of these functions had the result of lowering caseload expectations to only a little over 50% of expected cases served for the year. One region in particular was absorbed by duties regarding involuntary hospitalization (over 880 cases referred for that alone). Overall, a total of 2,254 cases were presented to the ASW Program staff for some level of assistance with either mitigation, consultation, or hospitalization review. Of these, 1,374 were various cases in district or circuit court other than involuntary hospitalization cases. From the pool of referred cases, 324 become active ASW cases with plans accepted by the courts.

## **Method**

This evaluation study uses data collected by the Kentucky Department of Public Advocacy and is a secondary data analysis study.

### **Materials - Data Sources for This Report**

The Department of Public Advocacy has developed a case management data system called JustWare that manages all data related to DPA cases, including the ASW activities. ASW Program staff members collect data from clients during their interviews and then enter the data into JustWare. All the client-level data presented in this evaluation are derived from completed records that were entered into JustWare by the ASWs between 1 July 2013 and 30 June 2014. The data are principally client self-reports except the data on their charges, and actual sentences, which are from attorney/ASW data entries in JustWare.

The data on time spent in jails and prisons items are taken from court records and other data available to the DPA attorneys and DPA administrative staff. The DPA Supervisor for the ASW Program checked all incarceration data for each of the sampled clients for the 12 month period following alternative sentencing plan acceptance by the courts. The follow-up data on nights spent in jail were taken from independent data sources, including the Kentucky court's informational system, ("CourtNet"), the Kentucky Offender Management System (KOMS), and local jail data.

### **Human Subjects Protections**

All data for this report that were collected by DPA were transmitted to the University of Kentucky in de-identified form. Thus, this secondary data analysis evaluation study received approval from the University of Kentucky Medical Institutional Review Board.

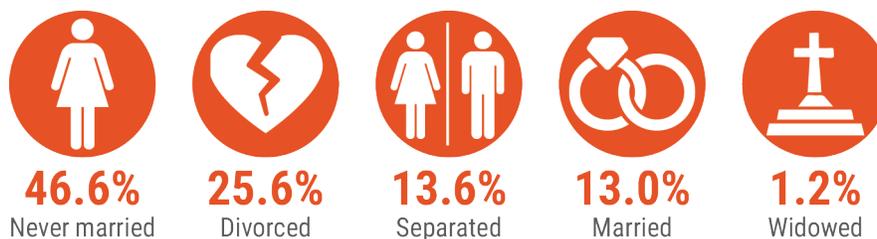
# Findings

## ASW Client Characteristics During Assessment of Needs by ASW Program Staff

### MARITAL STATUS

The average age of ASW clients in SFY 2014 was 33.6 years with a range of age 14 to age 69 and 59% (n=191) were male. As shown in Figure 2, very few of the clients were married (13%), almost half (46.6%) have never been married, while 25.6% were divorced and 13.6% were separated.

FIGURE 2. MARITAL STATUS (N=324)



### RACE/ETHNICITY

Table 1 below shows that the overwhelming number (n=287, or 88.6%) of ASW clients reported their race/ethnicity as white or Caucasian. A little over ten percent (n=33) reported being Black or African-America and the remaining four clients were Asian (n=1), Hispanic (n=1), or multi-racial (n=2).

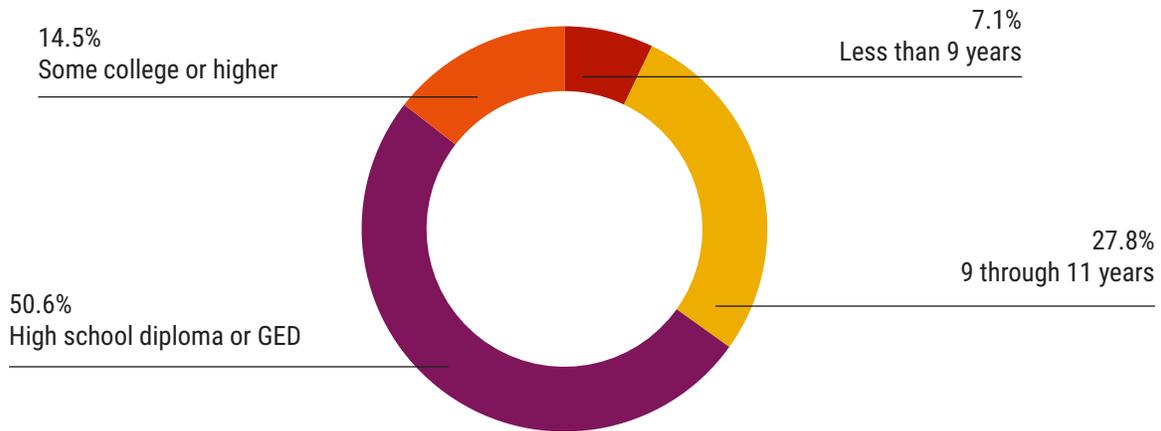
TABLE 1. SELF-REPORTED RACE/ETHNICITY (N=324)

Race or ethnicity	Number
White/Caucasian	287
Black/African American	33
Multiracial	2
Hispanic	1
Asian/Pacific Islander	1

### EDUCATION

Figure 3 shows the distribution of educational attainment as measured by number of years of schooling completed. Just over half (50.6%) had a high school diploma and almost 15 % had some college education. Importantly, almost 35% had less than a high school diploma or a GED and 7.1% had even less than 9 years education, thus suggesting limited employment potential.

FIGURE 3. EDUCATIONAL ATTAINMENT (N=324)



### EMPLOYMENT

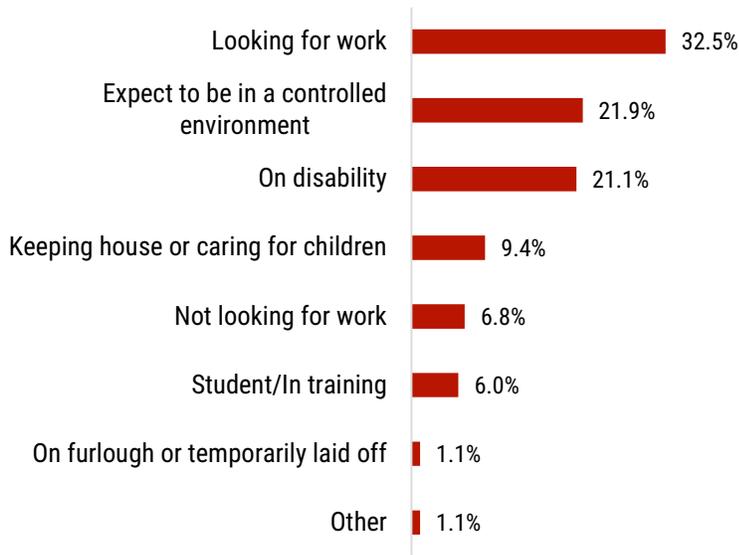
Table 2 shows the ASW clients’ employment status at the time of assessment of social service needs. Almost 80% were unemployed at the time of assessment but only 30.9% had been generally unemployed in the 12 months before assessment. During the 12 months before ASW assessment, 30.9% reported having been unemployed and 16% had been on disability. Interestingly, only 2.2% report having been in a controlled environment (residential facility, jail, prison, hospital) for most of the past 12 months and thus, being unable to work. Among the 42.2% who had some form of employment during the 12 months before the ASW assessment, almost half (19.4%) had held full time jobs.

TABLE 2. CURRENT EMPLOYMENT AND EMPLOYMENT IN THE PAST 12 MONTHS BEFORE ASSESSMENT (N=324)

<b>Current employment</b>	
Unemployed	79.0%
Full-Time	8.0%
Part-Time	7.7%
Irregular, seasonal	5.2%
<b>Usual employment in past 12 months</b>	
Unemployed	30.9%
Full-Time	19.4%
Part-Time	15.1%
Irregular, seasonal	7.7%
Homemaker or caregiver	4.9%
Student	3.7%
On Disability	16.0%
In a controlled environment	2.2%

Figure 4 shows that among the ASW clients who were unemployed for most of the past 12 months, 32.5% are currently seeking employment and only 6.8% are in situations where they are available to work and yet are not seeking employment. Also among those not in a position to seek employment were the 21.1% who were on disability and the 21.9% of clients who were in some form of controlled environment.

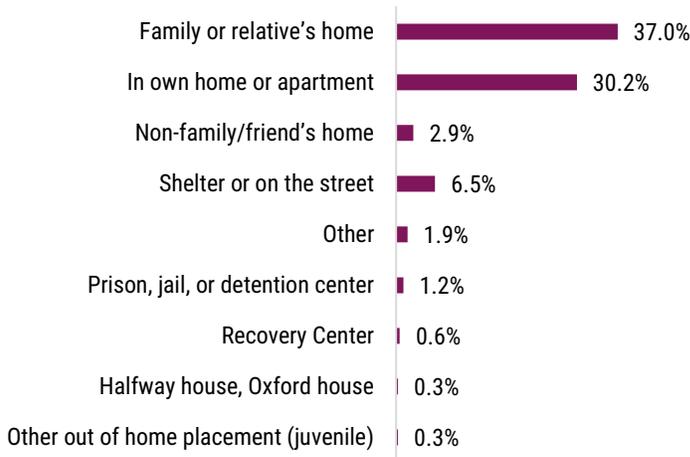
FIGURE 4. CURRENT EMPLOYMENT EXPECTATIONS AMONG THOSE WHO WERE NOT EMPLOYED AT THE TIME OF THE ASW ASSESSMENT (N=265)



**LIVING ARRANGEMENTS**

Figure 5 below shows that in the 12 months before their latest incarceration 37% of ASW clients lived in family or relatives’ homes while 30.2% lived in their own homes or apartments. Looking forward, 34.9% of clients also reported that they would likely be homeless once released from jail unless they had an alternative sentencing plan in place.

FIGURE 5. LIVING SITUATION IN THE 12 MONTHS PRIOR TO THIS INCARCERATION (N = 324)



**34.9%**  
**At risk for being homeless**  
**if no ASW plan in place**

**HEALTH AND BEHAVIORAL HEALTH**

Figure 6 shows the self-reported physical health problems of ASW clients at the time of assessment of service needs. The high percent of clients reporting a history of head injury is noteworthy as a possible contributing factor to employment problems and other behaviors that can affect criminal involvement. Over one-third (36.7%) also reported some chronic health problem and 21% reported having chronic non-malignant pain.

FIGURE 6. SELF-REPORTED PHYSICAL HEALTH PROBLEMS AT ASSESSMENT (N=324)

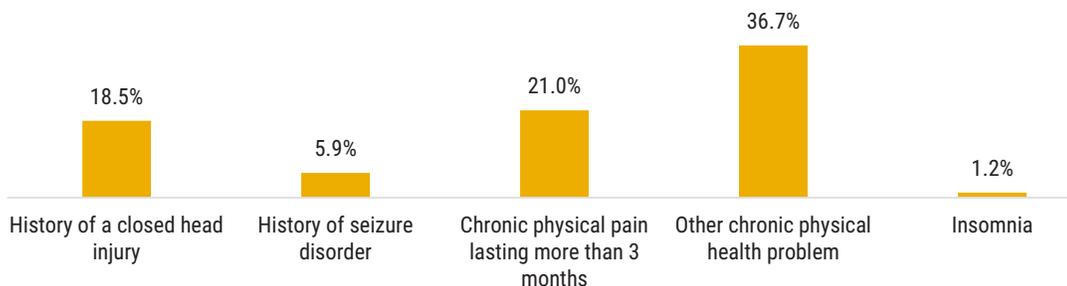
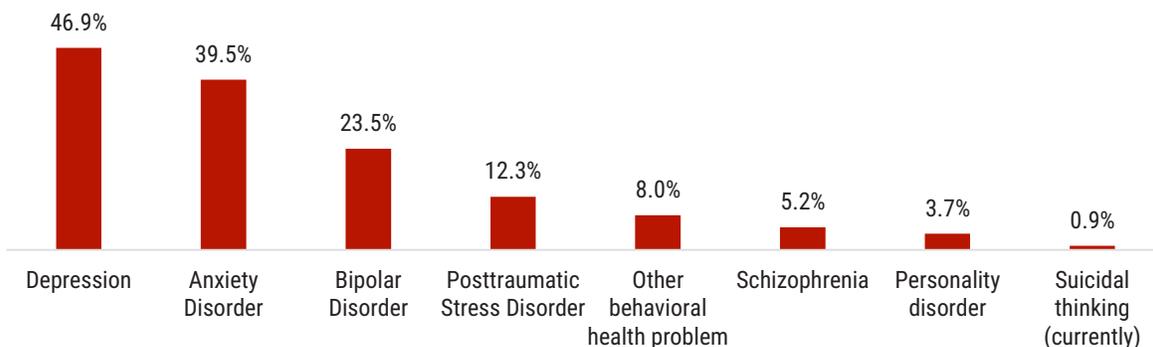


Figure 7 shows that nearly half (46.9%) of the clients reported having been told by a professional that they have depression and nearly the same percent reported having an Anxiety Disorder (39.5%). Surprisingly, almost one-fourth (23.5%) also reported having Bipolar Disorder - a diagnosis that is over-applied in many clinical settings. Only 5.2% reported having Schizophrenia and even fewer had been told they have a Personality Disorder (3.7%). Over ten percent (12.3%) reported having been told they had Posttraumatic Stress Disorder (PTSD) and 8.0% reported having some other behavioral health problem. Less than one percent reported currently having suicidal thoughts.

FIGURE 7. SELF-REPORTS OF DIAGNOSED BEHAVIORAL HEALTH DISORDERS (N=324)



Individuals are screened for self-reported disabilities and Figure 8 below shows that only 2.5% of the SFY 2014 clients reported having physical disabilities, although 22% reported various types of learning disabilities. Almost 8% reported having intellectual disabilities.

FIGURE 8. TYPES OF DISABILITIES (N=324)



**VICTIMIZATION EXPERIENCES**

Figure 9 below shows the percent of clients reporting some form of victimization. A surprisingly high percent (39.6%) reported having been the victim of physical violence in the past and 29.6% reported having been subjected to sexual violence and 41.1% reported having been psychologically abused.

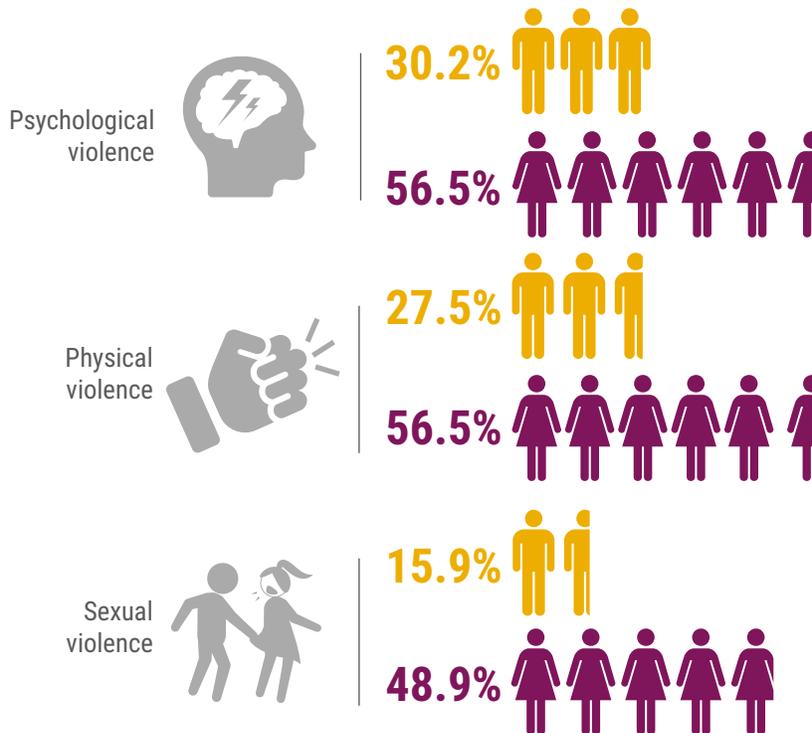
FIGURE 9. PERCENT OF CLIENTS WITH SELF-REPORTED VICTIMIZATION EXPERIENCES (N=321)<sup>1</sup>



<sup>1</sup>Three clients had missing data for these variables

When victimization experiences are examined by gender, important differences emerge. Figure 10 shows the difference is most evident with sexual violence victimization where 48.9% of women but only 15.9% of men reported having been victims of sexual violence. However, consistent with other research findings, women clients report more victimization experiences across all types.

FIGURE 10. SELF-REPORTED VICTIMIZATION BY GENDER (N=321)<sup>1</sup>



<sup>1</sup>Three clients had missing data for these variables

## SUBSTANCE USE

One of the key target programs for the Alternative Sentencing Worker Program is substance use. Table 3 shows that among the clients, heavy reports of substance use were the norm. Clients were interviewed about their use of substances during the 30 days prior to their last incarceration. Almost half reported using alcohol in that 30-day period and 31.5% used alcohol to intoxication. Consistent with other substance abuse research in Kentucky, almost the same percent of clients (43.5%) reported using opioid in the same 30-day period – even greater than the 42.9% percent who reported marijuana use. While heroin use has been reported as increasing in certain areas of the state, in SFY 2014, the percent of clients reporting heroin use was comparatively low at 13.9%. Also, consistent with other research on drug use in Kentucky, very few

clients reported using hallucinogens (2.8%), inhalants (1.9%), barbiturates (3.1%), and designer drugs (such as bath salts) (3.7%).

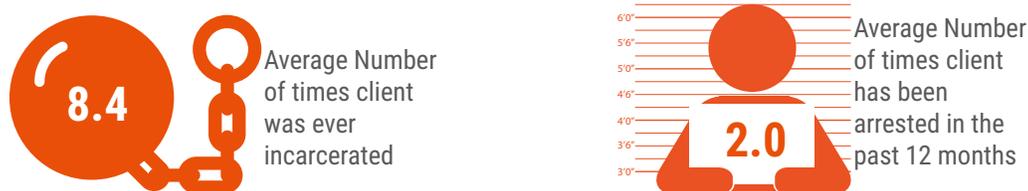
TABLE 3. SELF-REPORTED SUBSTANCE USE IN THE LAST 30 DAYS ON THE STREET (N=324)

Type of substance use	Percent
Alcohol	46.0%
Alcohol to Intoxication	31.5%
Opioids (prescription analgesics)	43.5%
Marijuana	42.9%
Stimulants (including methamphetamine and amphetamine)	35.2%
Sedatives, Hypnotics, Tranquilizers	26.9%
Cocaine/crack	15.4%
Heroin	13.9%
Methadone	12.3%
Designer Drugs (bath salts)	3.7%
Barbiturates	3.1%
Hallucinogens/Psychedelics	2.8%
Inhalants	1.9%

### INVOLVEMENT WITH THE CRIMINAL JUSTICE SYSTEM

One of the other target problems of the Alternative Sentencing Worker Program is chronicity of involvement in the criminal justice system. Figure 6 shows that clients self-reported an average of 8.4 lifetime incarcerations, thus suggesting a very high rate of recidivism risk. In addition, they reported an average of two incarceration episodes in the past 12 months. Not shown in Figure 11 is the additional finding that only 4.3% had any history of sex offenses and none were deemed violent offenders.

FIGURE 11. NUMBER OF TIMES CLIENTS HAVE BEEN INCARCERATED (N=324)



To assess, in detail, the charges at the time of assessment and at the one-year follow-up on what happened following a court acceptance of an alternative sentencing plan, we examined a random sample of 50 clients. For the follow-up sample of 50 individuals, we found that they were before the court on a total of 140 charges. Figure 12 shows that the individuals were charged with 66 felony offenses (of which 42 were Class D felony charges), 48 misdemeanors, 7 violations (to determine if fine should be imposed), and 19 revocation (to determine if suspended time should be imposed) charges.

FIGURE 12. SUMMARY OF CHARGE BEFORE THE COURT AT THE TIME OF ASSESSMENT (N=50)



Addendum B should be consulted to examine the complete list of charges for the 50 clients in the SFY 2014 follow-up sample.

## Service Recommendations to the Courts

### SERVICE NEEDS RECOMMENDED TO THE COURT

Table 4 shows the distribution of the most pressing service needs for the 324 ASW clients at the time of plan submission to the courts. To arrive at an estimate of client needs for services to include in the recommendations to the court, the needs assessment process identified a primary target for most immediate attention and then secondary targets for further attention once the problems in the primary area have been addressed. A primary program target is one recommended to the court as a pressing need that would be the focus of the first array of services for clients following court approval of alternative sentencing plans. The secondary suggestions were ones that would follow after the first service needs had been addressed. Consistent with the problems that were self-reported by the clients, substance abuse treatment was the overwhelmingly most identified primary service need with 86.1% of cases getting this recommendation. In addition, substance abuse treatment was also identified as a secondary service need for another 5.6% of clients. The second most cited primary service need was mental health care with 32.4% of clients needing that service as a primary concern given the likelihood of co-occurring mental health and substance use disorders.

TABLE 4. PRIMARY AND SECONDARY SERVICE NEEDS (N=324)

Target needs	Primary	Secondary
Education	1.5%	19.1%
Employment assistance (vocational rehab)	2.8%	41.7%
Housing assistance	8.6%	26.9%
Mental health treatment	32.4%	28.4%
Substance abuse treatment	86.1%	5.6%
SNAP (food stamps)	0.7%	8.0%
Getting social services or disability	0.9%	2.2%
Sex offender treatment	1.9%	0.3%
Intellectual disabilities and developmental disabilities services	0.9%	0.6%
Disability	1.2%	4.9%
Social services (nutritionist)	0.0%	0.6%
Social services (community agencies)	2.5%	18.8%
VA hospital	0.3%	0.9%
Committed to Cabinet - Permanency and protection (guardianship)	0.9%	0.3%
Other	5.6%	6.2%

## **Program Costs and Cost Offsets**

### **Return on Investment Method**

The evaluation of cost/benefit remains central to the overall evaluation of the effects of public policies. Central to the ASW Program's success is its return to the public in the form of cost savings. At least since 2011, Kentucky policy makers have been examining ways to reduce the costs of unessential incarceration of individuals whose crimes were mostly a result of substance abuse or mental illness. A variety of steps have been taken to lower the number of persons in state and local facilities and the ASW Program plays a role in achieving this state objective. The ASW Program arose during the policy debates around incarceration costs and it responds to the perceived need for diverting individuals into community services rather than merely warehousing them in correctional facilities – particularly when their primary problems are substance abuse and mental illness. Thus, while the ASW Program gets people to the services they need, it also results in reducing incarceration costs.

The method used for estimating the cost savings evaluated the effects of the ASW Program on incarceration time for the individuals who were clients in the ASW Program. The target for the ASW was two-fold: (1) to reduce the cost of unessential incarceration (i.e., not incarcerating nonviolent offenders with drug or related charges); and (2) to engage individuals in community-based services that might reduce their likelihood for future incarceration.

The basic method for this evaluation of return on investment was to examine the likely incarceration costs of sentences in the absence of the ASW Program and then to examine the actual days the ASW clients were incarcerated during the program year.

### **Sentencing and Incarceration in the 12 Months Following Alternative Sentencing Plan Acceptance**

For examining charges and incarceration, a random sample of 50 clients (15.4%) was taken from the 324 ASW clients from SFY 2014. Of the 50 clients, 28 were sentenced to prison terms, 21 faced jail terms, and one client was a 14-year old minor who was referred back to the Court Designated Worker by the court with no time sentenced. Another client's case was dismissed, thus 48 of the 50 faced likely incarceration time for much if not all of the 12 months post adjudication.

Table 11 shows the actual sentences handed down by the courts for the ASW clients during SFY 2014. These sentences reflect the likely time ASW clients would serve in jail or prison in the absence of an alternative sentencing plan.

The sentences included prison terms either expressed in years or months or jail terms but, for analysis, all sentences were converted to incarceration days. Combined, sentencing for the random sample of 50 ASW clients added up to a total of 44,400 days in jail or prison for a per client average of 888 days or 2.4 years.

To estimate the cost of incarceration, a conservative per diem amount was used based on a recommendation by the Governor's Office of the State Budget Director. Since most individuals sentenced to prison for low-level felonies serve their time in local jails (See 501 KAR 2:040, 501 KAR 2:060, and KRS 532.100), the standard jail per diem rates were used instead of the state institution rate. An average jail per diem rate of \$37.42 was developed from the average of two county jail CTI per diem rates (\$32.92 for jails without a Substance Abuse Program (SAP) and \$41.92 for jails with a SAP) for SFY 2014 (Department of Corrections, Cost to Incarcerate – FY14). This lower-end rate was considerably less than the average state institution rate of over \$60.

Figure 13 reflects the likely cost of incarceration for full terms (an average of 2.4 years) had the clients not been granted alternative sentencing plans. Thus, if the 50 clients in this follow-up sample had served the terms for which they were sentenced, the total cost over time would be \$1,661,448 or an average of \$33,229 for each client.

FIGURE 13. SENTENCING AMOUNTS AND COST OF INCARCERATION BY TYPE OF INCARCERATION (N=50)



Since this project examines ASW clients for a one-year follow-up period to estimate the near-term savings reductions for the state and county governments, all costs were adjusted to the 12-month period following plan acceptance by the courts. Thus, the examination of incarceration costs must be focused on the amount of time that could be served during the 12 months from the date of the alternative sentencing plan being accepted by the courts.

Figure 14 summarizes the costs of incarceration within the 12 months of follow-up from the date of alternative sentencing plan acceptance. Under this analysis, the 50 clients would have cost the state or county governments \$561,450 for the year, or \$11,229 per person, had an alternative sentencing plan not been approved. *These are costs over the 12-month period that the state and local governments would have incurred in the absence of the Alternative Sentencing Worker Program.*

FIGURE 14. SENTENCING AMOUNTS AND COST OF LIKELY INCARCERATION BY TYPE OF INCARCERATION ADJUSTED TO THE 12 MONTHS POST ALTERNATIVE SENTENCING PLAN ACCEPTANCE BY THE COURTS (N=50)



Figure 15 shows the number of days actually incarcerated by the follow-up random sample. The total cost of incarceration 12 months after the alternative sentencing plan acceptance was \$79,742. Of the 2,131 incarceration days, 137 were due to clients having to wait in jail for a bed in a community residential facility. The average per-client cost of actual incarceration for the 50 randomly selected clients for the 12 months following plan acceptance by the courts was \$1,595.

FIGURE 15. NUMBER OF DAYS ACTUALLY INCARCERATED IN THE 12 MONTHS SINCE PLAN ACCEPTANCE BY THE COURTS (N=50)



## Return on Investment

The public policy driving the development of the Alternative Sentencing Worker Program is embedded in the spirit of 2011's HB 463 and its call for reduced incarceration costs. This project accepted that call and incorporated it into public defender actions on behalf of individuals charged with crimes that can be best addressed by community services instead of incarceration. This report examines all the costs of the program in relation to the likely costs to state and local governments in the absence of the program.

Figure 16 shows the average costs per client for what the 12 months' worth of incarceration sentenced time would have cost the state and local governments (\$11,229) in the absence of an alternative sentencing plan. Next, the table shows the average per client cost of actual time served (\$1,595). This means that the courts' approval of the alternative sentencing plans resulted in an average savings of \$9,634 per client in the ASW Program for SFY 2014. When the program cost is shown in relation to the cost savings from reduced incarceration time, the result can be expressed as a 1 to 5.66 ratio. In other words, there is a return on investment of \$5.66 for each \$1.00 spent on the ASW Program.

FIGURE 16. INCARCERATION COSTS AS AVERAGES PER CLIENT (N=50)



### Other Costs

The ASW Program is grounded in 2011's HB 463 which set forth a mandate to reduce the costs of incarceration. The entire mission of the ASW Program is, therefore, aimed at using community-based services in lieu of correctional facilities. This evaluation clearly shows that the program does in fact greatly reduce incarceration costs. Some may be concerned that the program involves other costs due to the use of those community-based services. The kinds of costs for community-based services are typically supported by the state's Substance Abuse Prevention and Treatment (SAPT) Block Grant from the Federal Substance Abuse and Mental Health Services Administration (SAMHSA). In addition, under the Affordable Care Act and companion changes in Federal Medicaid Guidelines, many of the community treatment services are now covered by Medicaid at a 90% Federal cost-share basis. Thus, to the extent that some costs are shifted from incarceration to community services, the burden for those costs shifts mostly from state to federal sources. The burden on Kentucky taxpayers is greatly reduced.

# Conclusion

## Overall Effectiveness

While this evaluation has highlighted the cost incentives for continuation or even expansion of the ASW Program, there are other reasons for supporting the program. First, it has long been known that incarceration does nothing to change people's substance use disorders. Substance use disorders are acquired diseases like Type 2 Diabetes and there is nothing about incarceration that addresses the fundamental features of addiction. Thus, the use of community-based services is far more likely to result in changes in the management of addictive disorders than will jail or prison time. Second, it is a more humanitarian way of dealing with a complex social-psychological-economic problem. Third, it adds a useful component to what is now the predominant approach to clearing cases – the use of plea deals. The ASW adds more value to the plea process for clients and the state.

Thus the ASW Program results in significant cost-savings for the state and better outcomes for persons arrested on drug related charges or charges arising due to mental health problems. The program in SFY 2014 returned \$5.66 in savings for every \$1.00 in program cost. Thus, viewed as a return on investment, the program has achieved one of the major aims of the Justice and Public Safety Cabinet.

## Limitations

This report on the outcomes of the Alternative Sentencing Worker Program was developed from data collected by the Kentucky Department of Advocacy staff using interview data from clients and data from the Kentucky Department of Corrections and the Kentucky Administrative Office of the Courts. Client self-reports may be biased, although previous research suggests bias is least evident when information is revealed in confidential relationships. In addition, this report is dependent on the accuracy of the official incarceration data from the Kentucky Department of Corrections, Kentucky Administrative Office of the Courts, and data from local jails. However, both client self-reports and official incarceration data have been widely used to analyze criminal justice policy outcomes.

## Recommendations

The return on investment that is suggested by this study supports the idea of continued expansion of the Alternative Sentencing Worker Program into all districts in the state. In SFY 2016, several new positions were funded, bringing the number of ASW positions to 45, thus greatly expanding availability of these services to many more judicial districts. Policy makers should examine ways to foster greater development of community-based services that can be used as alternatives to incarceration. The seventeen Recovery Kentucky Centers certainly represent an important step in the right direction, but more services are needed. The successful reduction of persons serving time in jails and prisons will require some further investment in community services.

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# Addendum A

## Client Vignettes

### “WILLIAM”

William is a 25 year old, separated male. The DPA ASW interviewed William in the county jail. He was charged with Trafficking in Controlled Substance and Trafficking in Marijuana. He was not from the local area and had no support. He was homeless and had been kicked out of the local shelter for substance use. During the interview William expressed how much he had hoped to return to his home town, which was very far away. He had only limited opportunities there but he thought familiarity with the area would help him get on the right path. He was very forthcoming about his addiction, and expressed much gratitude having the opportunity to have his story heard. William had hopes of getting the much needed help that he had never been offered. He had very specific goals for himself, all of which he felt were attainable if given the opportunities. He asked for long-term treatment so he could be well prepared upon leaving the facility. The Judge agreed to the alternative sentencing plan and Roger entered a short-term treatment facility first. He completed this program successfully and then went directly into long-term treatment. He remains in long-term treatment where he holds a job, is furthering his education, and has independent housing. He hopes to continue being successful upon leaving the long-term facility as he has been given the skills and resources to do so.

### “DARIN”

Darin is a 25-year-old male who was incarcerated at the Adair Regional Jail for charges of Burglary 2nd Degree and Persistent Felony Offender. He was likely facing 8 years prison time (although he could have received a 20 year sentence). Darin had lived in his home county all of his life. He was raised by both of his parents and they were still married. He reported trauma that he had experienced through car wrecks. The highest grade that Darin reported to have completed was the 8th grade. He was married and had 2 daughters (age 2 & 7). Darin was a hard worker and when not incarcerated he always had a job. He did not report having any medical or mental health issues. But Darin was addicted to methamphetamine and it had taken control of his life. He smoked 1 gram of methamphetamine daily. He would also abused opioids and marijuana on a regular basis. Darin accepted a plea to serve 180 days and then complete a long term recovery program. On March 2, 2015 Darin went to The Healing Place in Campbellsville, Kentucky and completed the program.

### “ANDREW”

Andrew is a 24-year-old male who was incarcerated in a county detention center. He had violated his probation from a circuit court in a nearby county. Andrew grew up living with his mother, but he had no relationship with his father. The highest grade he had completed was the 8th grade. He was attending GED classes at the time of the ASW assessment. Andrew had previously been diagnosed with Attention Deficit Hyperactivity Disorder as a child. He did not report any other mental health problems. His only medical issues were pain from a series of accidents. Andrew had a history of intravenous drug use and he was addicted to OxyContin, Suboxone, methamphetamine, and marijuana. He was only 15 years old when he first took a Suboxone. Andrew said, “I have been battling the needle for 7 years”. He had not been to any type of substance abuse treatment before. He had dreams of getting clean, getting out of his home town, and hopefully joining the U.S. Marines. On December 23, 2014 Andrew entered treatment at Addiction Recovery Care.

# Addendum B

## All Charges for the Follow-up Sample (n=50)

Charge	Misdemeanor	Felony	Violation	Revocation
1110 – Disregarding a stop sign			1 (2.0%)	
1080 – Failure to or improper signal			1 (2.0%)	
3800 – No operators/moped license	1 (2.0%)			
4030 – Operating on suspended/revoked license	2 (4.0%)			
4350 – License to be in possession	1 (2.0%)			
4810 – Failure of owner to maintain required insurance (second offence)	1 (2.0%)			
5060 – Failure to use child restraint device in vehicle			2 (4.0%)	
5190 – Failure to produce insurance card			1 (2.0%)	
7950 – Assault 4th degree (no visible injury)	1 (2.0%)			
7960 – Assault 4th degree (minor injury)	3 (6.0%)			
8030 – Menacing	1 (2.0%)			
8200 – Terroristic threatening, 1st degree		3 (6.0%)		
8220 – Terroristic threatening 3rd degree	1 (2.0%)			
14010 – Criminal mischief 1st degree		6 (12.0%)		
14130 – Violating graves		1 (2.0%)		
16050 – Loitering for prostitution purposes (second offence)	1 (2.0%)			
16060 – Loitering for prostitution purposes (first offence)			1 (2.0%)	
17090 – Sexual abuse, 3rd degree	2 (4.0%)			
17540 – Indecent exposure 2nd degree	1 (2.0%)			
21110 – Operate motor vehicle under influence of alcohol/drugs, .08, aggravator, second offence	1 (2.0%)			
21120 – Operate motor vehicle under influence of alcohol/drugs, .08, third offence	1 (2.0%)			
21130 – Operate motor vehicle under influence of alcohol/drugs, .08, aggravator, 3rd	1 (2.0%)			
23010 – Alcohol intoxication in public place, third offence or within 12 months	1 (2.0%)			
23030 – Public intoxication in public place, third offence or within 12 months	2 (4.0%)			
23040 – Alcohol intoxication in a public place, 1st and 2nd offence			1 (2.0%)	
23710 – Disorderly conduct, 2nd degree	1 (2.0%)			
26280 – Driving on DUI suspended license, first offence	2 (4.0%)			
26680 – Probation violation (for felony offence)				6 (12.0%)
26800 – Probation violation (for misdemeanor offense)				3 (6.0%)
26910 – Probation violate (for technical violation)				10 (20.0%)
27630 – Violation of KY EPO/DVO	1 (2.0%)			

112210 – Sexual abuse, 1st degree, victim under 12 years of age		2 (4.0%)		
131200 – Assault, 3rd degree (EMS, fire, rescue squad)		1 (2.0%)		
214410 – False statement, misrepresentation to receive benefits > \$100		1 (2.0%)		
220610 – Burglary, 2nd degree		2 (4.0%)		
220620 – Burglary, 3rd degree		1 (2.0%)		
230390 – Theft by unlawful taking, shoplifting	2 (4.0%)			
232900 – Theft by unlawful taking		2 (4.0%)		
232990 – Theft by unlawful taking, all others	1 (2.0%)			
233010 – Theft by deception, incl. cold checks under \$10,000		1 (2.0%)		
233100 – Theft of identity of another without consent		1 (2.0%)		
250190 – Forgery, 2nd degree		7 (14.0%)		
250620 – Criminal possession of a forged instrument, 2nd degree		1 (2.0%)		
280310 – Receiving stolen property under \$500	1 (2.0%)			
280320 – Receiving stolen property under \$10,000		3 (6.0%)		
381130 – Unlawful transaction with minor, 1st degree, illegal controlled substance, under 16		1 (2.0%)		
418200 – Unlawful possession of meth precursor, 1st offence		4 (8.0%)		
420090 – Illegal possession of legend drug	3 (6.0%)			
420550 – Controlled substance prescription not in original container, 1st	2 (4.0%)			
420810 – Drug paraphernalia	7 (14.0%)			
422010 – Possession of a controlled substance, 1st degree, first offence (drug unspecified)		2 (4.0%)		
422030 – Possession of a controlled substance, 1st degree, first offence, cocaine		1 (2.0%)		
422050 – Possession of a controlled substance, 1st degree, first offence, heroin		2 (4.0%)		
422090 – Possession of a controlled substance, 1st degree, first offence, opiates		1 (2.0%)		
422150 – Possession of a controlled substance, 1st degree, first offence, methamphetamine		2 (4.0%)		
422450 – Possession of a controlled substance, 2nd degree, drug unspecified	3 (6.0%)			
422630 – Possession of a controlled substance, 3rd degree, drug unspecified	3 (6.0%)			
422990 – Manufacturing methamphetamine, 1st offence		1 (2.0%)		
422995 – Comp manufacturing methamphetamine, 1st offence		1 (2.0%)		
423300 – Possession of marijuana	3 (6.0%)			
423650 – Trafficking in illicit substances, 1st degree, first offence (>= 2 gms methamphetamine)		1 (2.0%)		

423660 – Trafficking in illicit substances, 1st degree, 1st offence (< 2 gms methamphetamine)		3 (6.0%)		
423700 – Trafficking in illicit substances, 1st degree, 1st offence (<4 gms cocaine)		4 (8.0%)		
423720 – Trafficking in illicit substances, 1st degree, 1st offence (>= 10 du opiates)		1 (2.0%)		
490100 – Driving motor vehicle while license suspended for DUI, 3rd or greater offense		1 (2.0%)		
702400 – Engaging in organized crime – criminal syndicate		3 (6.0%)		
731010 – Persistent felony offender, 1st degree		4 (8.0%)		
731020 – Persistent felony offender, 2nd degree		2 (4.0%)		
Total	48	66	7	19

# Kentucky Department of Public Advocacy

## Agency Leadership

**Edward C. Monahan**

Public Advocate

**Damon Preston**

Deputy Public Advocate

**Brad Holajter**

Law Operations Division Director

**Glenda Edwards**

Trial Division Director

**Tim Arnold**

Post-Trial Division Director

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Alternative Sentencing Program Supervisor

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# Department of Public Advocacy

www.dpa.ky.gov

June 2016

## *DPA's Defender Services Branch Alternative Sentencing Worker Program*

*Available Statewide, from Pikeville to Paducah*



*Alternative Sentencing Workers will be there.*



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

**Chris Cohron**, Commonwealth Attorney  
Bowling Green

"I love the DPA Alternative Sentencing Social Worker, Joanne Sizemore. If we had more Joanne Sizemores we could do so much more about drugs and other problems that plague those on court dockets. Having a social worker involved is making a difference, leading to genuine reform in people's lives, which is what we want."



**John Paul Chappell**, Chief Judge  
Knox and Laurel District Court

# National Center for State Courts Sentencing Attitudes Survey Findings

## Finding

Americans think rehabilitation is a more important priority than punishment and overwhelmingly believe that many offenders can, in fact, be successfully rehabilitated. But most see America's prisons as unsuccessful at rehabilitation.

## Finding

High levels of public support are found for alternatives to a prison sentence like probation, restitution, and mandatory participation in job training, counseling, or treatment programs, at least for non-violent offenders. The public is particularly receptive to using such alternatives in sentencing younger offenders and the mentally ill.

Sentencing Attitudes Survey (2006 National Poll of 1,502 randomly selected adults)

For Full Report: <http://www.ncsc.org/~media/Microsites/Files/CSI/The%20NCSC%20Sentencing%20Attitudes%20Survey.ashx>



"The DPA alternative sentencing social workers provide much needed individualized sentencing options to prosecutors and judges. The DPA program is a proven way to help defendants change behavior and not reoffend, saving the state significant incarceration costs. If the program is expanded, more defendants would be helped and more savings would result."

**Van Ingram**, Executive Director  
Kentucky Office of Drug Control Policy

## Why DPA?

A common thread spreading through most departments in the Cabinet for Justice and Public Safety is a vested interest in reducing incarceration. While the Department of Corrections, judges, prosecutors, and parole officers can all set up compulsory participation in community-based interventions; the defense can provide a unique role in doing this.

- Given a relationship built on trust, the defense's Alternative Sentencing Workers (ASWs) can gain the clients' active decisions to participate in rehabilitative interventions.
- Our ASWs use this defense advantage to get client buy-in rather than mere compliance with court orders.
- ASWs use Motivational Interviewing, an evidence-based practice, to facilitate the client's readiness to start the treatment process.
- With an ASW's involvement the court can mandate some form of supervised release following a defense motion rather than a governmental punishment.



## Enhances the Criminal Justice System by...

- Facilitating collaboration among agencies within the criminal justice system to support rehabilitation, reduced recidivism, and promote public safety
- Providing relevant mitigating information about the defendant's physical health, mental history, and social history
- Conducting comprehensive assessments and making referrals to address all the defendant's multiple needs beyond those apparent on the surface
- Providing additional alternatives to incarceration
- Creating individualized plans to address the defendant's unique characteristics and needs
- Providing more detailed information about community resources, services, and programs including eligibility guidelines and process to obtain services



**Kita Clement** of the Bowling Green Trial Office is the DPA's ASW Specialist. In addition to maintaining a caseload, Kita provides assistance to other ASWs including job shadowing and training in the field. Kita is also a liaison for ASWs with questions regarding medical insurance. Kita assists program leadership, by attending meetings and conferences at both the state and national level, presenting at training events, and is currently our lead ASW participating in the National Center for State Courts' Holistic Study of Defense.



**Elizabeth Young-Ortiz** of the Louisville-Jefferson County Public Defender's Office provides supervision to five other ASWs in Louisville, in addition to maintaining her caseload. As a liaison for her office, Elizabeth builds and maintains relationships with service providers in the community. She also tracks the data regarding office caseloads and provides the DPA with caseload data as requested.

## DPA Alternative Sentencing Workers are focused on creating positive lasting changes by...

- Breaking the cycle of substance abuse and jail.
- Diverting adults and juveniles with addiction and mental illness, to community-based treatment which in turn saves incarceration costs.
- Connecting clients to services and treatment to successfully transition into their communities and become productive citizens.
- Increasing clients' economic self-sufficiency so they may work, pay taxes, provide child support, pay restitution, and pay court costs.
- Reducing recidivism and promoting public safety.
- Changing lives by investing in human capital.

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# *Alternative*

*Advancing Public Safety*

# *Sentencing*

*Saving Counties and State Incarceration Costs*

# *Worker*

*Working with Community Partners*

# *Program*

*Promoting Rehabilitation*

## *Contact Information*



**Sarah G. Johnson** returned to the DPA Alternative Sentencing Program she helped create. Sarah holds a BSW from Morehead State University and a Masters of Social Work with a mental health concentration from the University of Kentucky. Mrs. Johnson started her career as a mental health and substance abuse treatment provider. She

was one of the three original social workers hired for the DPA Social Work Pilot Project in 2006 and worked five years in that capacity. During her previous time with DPA, Sarah was instrumental in establishing our social work program. Sarah excelled in leadership by helping to show the value of the program. In August 2011, Mrs. Johnson was appointed to the Kentucky Parole Board. She returned to DPA in December 2015 and is excited to be back to help lead our program as the Defender Services Branch Manager.

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**Cara Lane Cape** is the Alternative Sentencing Program Supervisor. Ms. Cape received both a BSW and a Masters of Social Work from Campbellsville University. Ms. Cape began her career at Protection and Permanency in Grayson County, where she was chief investigator. In 2010, Ms. Cape began working at DPA, where she held an administrative position in the Bowling Green Trial Office while completing her graduate degree. In 2011,

Ms. Cape transferred to DPA's main Frankfort Office, where she held positions in the Appeals Branch and Post-Trial Division Director's Office, until finally ending up in the Office of Public Advocate in 2013 as a policy analyst. While working in the Office of Public Advocate, Ms. Cape was an instrumental part of the JustWare Case Management Team. Through this role, Ms. Cape was directly involved in the implementation, customizing, and maintaining of DPA's case management system – JustWare, as well as provided training to all employees statewide. Ms. Cape assisted in streamlining data points within JustWare to be used in the Kentucky DPA Outcome Study through the Center for Drug and Alcohol Research at the University of Kentucky, in addition to providing ongoing data validation for the study.

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# Department of Public Advocacy

## Alternative Sentencing Worker Program

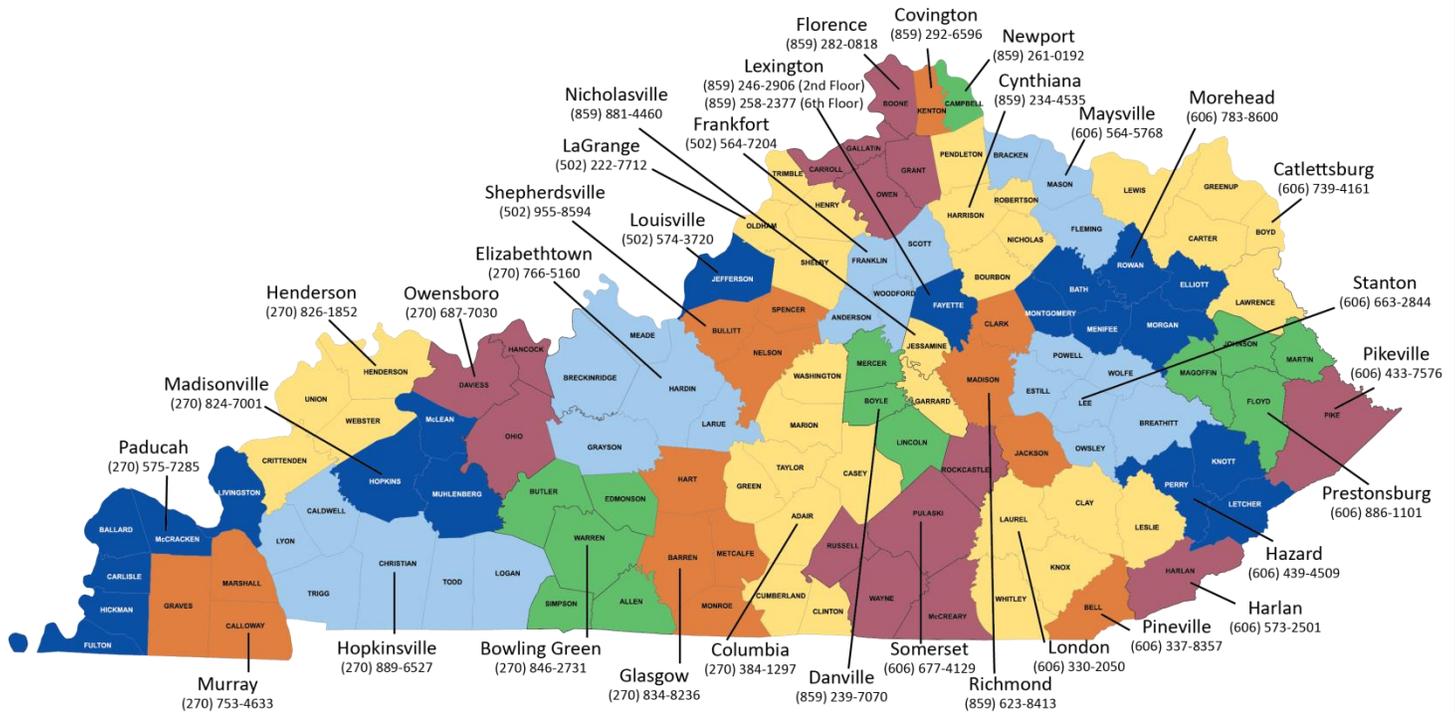
### ***Alternative Sentencing Worker Program***

- Started in 2006 as a pilot project with 3 Social Workers
- Program has expanded to include 45 positions at 35 locations across the state
- SFY 2014 Alternative Sentencing Worker Program Evaluation conducted by University of Kentucky Center for Drug and Alcohol Research found:
  - 8 ASWs served 324 clients
  - Clients served 1,595 days out of the 11,292 days they would have served in the 12 months following initial plan approval, for a reduction on 85%
  - For every \$1 spent on the ASW Program, there was a \$5.66 return on investment
  - 86.1% of clients served had substance abuse treatment as their primary service need, with another 5.6% having it as a secondary service need
  - 34.4% of clients served had mental health treatment as their primary service need, with another 28.4% having it as a secondary service need
  - 79% were unemployed at the time of their arrest on current charges
  - 18.5% reported having a brain injury
  - The 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

### ***Alternative Sentencing Workers' Role***

- Works as an agent of the defense attorney to assist clients charged with criminal offenses, specifically those with substance use disorders and/or mental health conditions
- Conducts comprehensive assessments of clients to identify clients' individualized needs
- Makes referrals and appropriate arrangements for treatment, services, and resources
- Assists clients with preparing Alternative Sentencing Plans to submit to the Court as an alternative to incarceration
- Uses Evidence-Based Motivational Interviewing to facilitate clients' readiness to start the treatment process
- Builds rapport and gains clients' active decisions to participate in rehabilitative interventions
- Provides crisis intervention strategies to clients and their families
- Educates families about the criminal justice system
- Enters data into the case management system and performs all other documentation processes needed to serve clients
- Conducts baseline and 12 month follow up interviews for program monitoring and evaluation
- Facilitates collaboration between agencies within the criminal justice system to support rehabilitation, reduce recidivism, and promote public safety
- Creates and updates community resource guides
- Provides more detailed information about community resources, services, and programs, including eligibility guidelines and process to obtain services

# Alternative Sentencing Worker Program Office Locations



## Contact Information



**Sarah G. Johnson** returned to the DPA Alternative Sentencing Program she helped create. Sarah holds a BSW from Morehead State University and a Masters of Social Work with a mental health concentration from the University of Kentucky. Mrs. Johnson started her career as a mental health and substance abuse treatment provider. She

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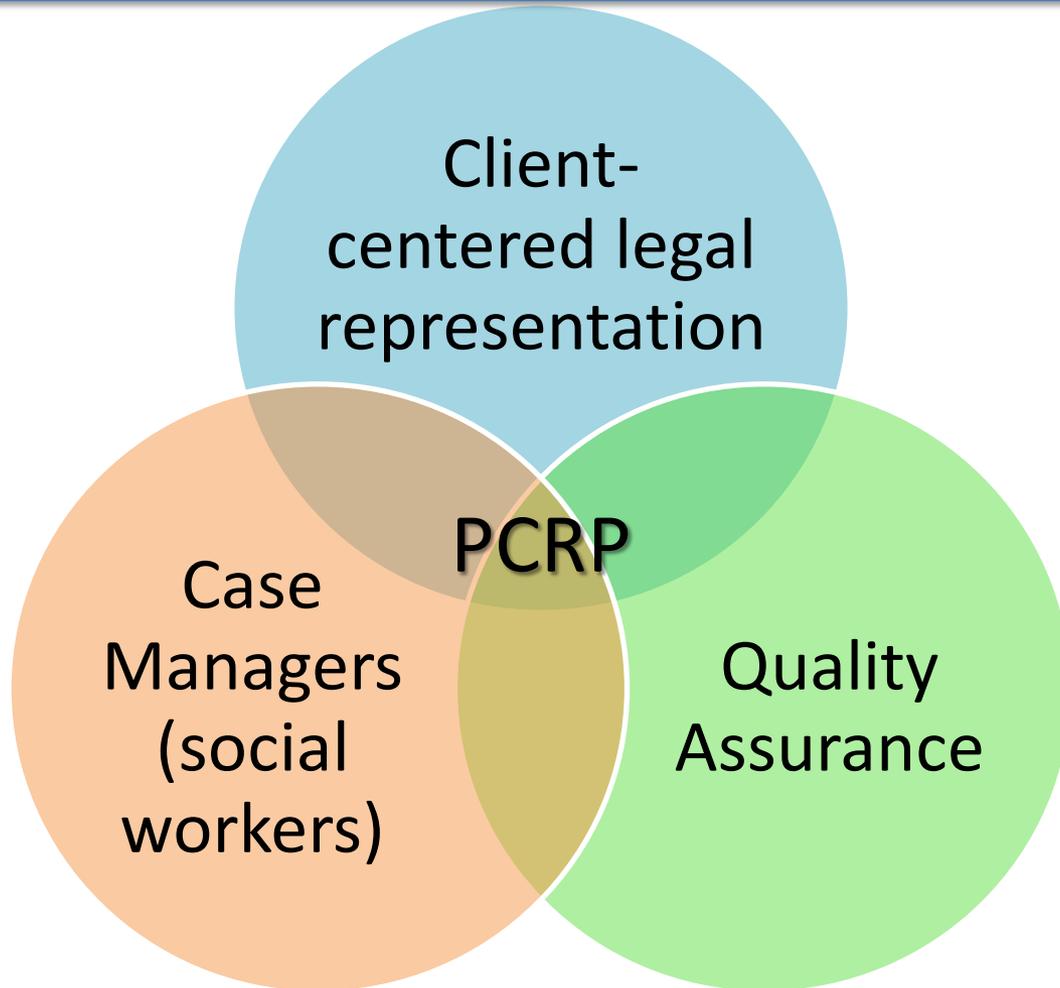
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Oregon Department of Justice

# Parent Child Representation Program



**Oregon**

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# Case Managers

## Structure

- Part of the legal team; “agents” of attorneys
- Complicated cases only (~12% of cases)
- Confidential, client focused resource

## Advantages

- “Provide clients with a confidential space to address barriers and develop solutions.” (Dana Brandon, MSW and PCRCP Case manager)
- Independent social workers help parents succeed: cases reach reunification more quickly and have a substantial cost savings. (Pilnik, 2009)
- Help keep parents engaged, follows-up on referrals, and encourages collaboration with DHS. (DHS Caseworker, Columbia County)
- Credited with reducing length of stay and increasing safe reunifications. (NY Center for Family Representation, Washington State Parent Representation Program)

## Types of work

- Access to stabilizing services (eg: housing, health care, education advocacy)
- Identifying and removing barriers which led to system entry
- Addressing trust issues with the agency; building bridges
- Modeling behavior & coaching

## Widely-adopted best practice

- Recommended by American Bar Association (criminal and juvenile dependency cases), National Juvenile Defender Center, and National Association of Counsel for Children
- 34% of ABA Parent Attorney National Compensation survey respondents reported having access to social workers (37 states reporting, 2015)



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# Case Managers: real life example

Father's case opened due to domestic violence and homelessness. The mother, father and their two children lost their housing when they stopped paying rent because the landlord did not provide proper maintenance. Due to a lack of income and eviction history, it would be difficult to find housing. The family tried to stay together, but the stress exacerbated the domestic violence and led to substance abuse. The two children were placed in foster care.

Father believed that without housing, he and mother could not successfully address their issues. DHS disagreed and emphasized the need for immediate service engagement. The parents enrolled on a number of housing wait-lists, but due to a lack of phone minutes and an inconsistent address, the housing authority had trouble staying in touch with the parents. The case manager would meet the parents when they had visitation (they never missed visits!) to make sure parents followed through on paperwork and applications.

Through the work of the case manager, parents became eligible for a special supportive housing program but nearly missed the chance because the program could not reach them. The program contacted the case manager who drove to where the parents were staying and worked with them to complete their application on-time. Parents moved into an apartment and are doing very well. Father is in domestic violence treatment, is clean and sober, and is reported as making fantastic process. One child has been returned and father is overjoyed.



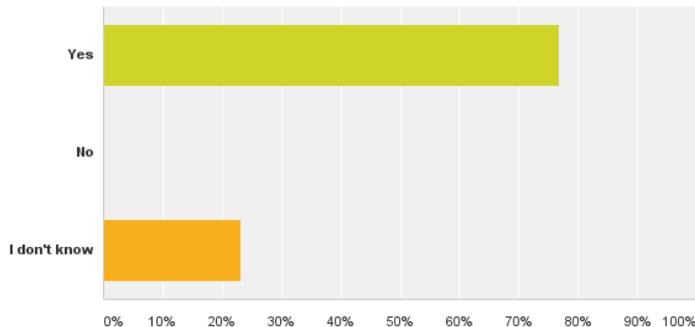
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# Case Managers: results

- 285 clients served (January 2015-June 2016)

Q15 If I had a case manager assigned, my case outcome was better due to my case manager's involvement.



Source: PCRCP Client Satisfaction Survey, 2015-2016

- 64% parents, 36% children
- 30% of dependency cases result in reunification
- 36% close due to lack of engagement/no contact
- Most common challenges:
  - Client distrust of DHS
  - System ambiguity
  - Inaccessible community resources
  - Housing/homelessness
  - Lack of suitable placements (children)



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# Notable Observations (2014-2015)

full report available at:

[http://www.oregon.gov/OPDS/docs/Reports/PCRP\\_report\\_PDSC\\_Jan\\_2016.pdf](http://www.oregon.gov/OPDS/docs/Reports/PCRP_report_PDSC_Jan_2016.pdf)

Reduced  
foster care

- Population in foster care
- Statewide increase .44%
- PCRP decrease 13%

Preservation of  
families  
whenever possible

- Exit foster care to reunification
  - Statewide rate of change: 1.7%
  - PCRP rate of change: 6.5%
- Exit foster care to guardianship
  - Statewide rate of change: 12.5%
  - PCRP rate of change: 111%

Improved quality  
of legal representation

- Presence at shelter hearings
- Fewer continuances
- Use of experts & investigators
- Multidisciplinary, team-based approach
- Attendance at case-related meetings



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# Annual Report 2014-2015

## PARENT CHILD REPRESENTATION PROGRAM



# Parent Child Representation Program

## Annual Report 2014-2015

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## Introduction

The Parent Child Representation Program was developed by the Office of Public Defense Services, and initially funded by the Oregon State Legislature in 2013, to enhance the quality of legal representation for parents and children in juvenile dependency and termination of parental rights cases. The program aims to ensure competent and effective legal representation throughout the life of the case by ensuring reduced attorney caseloads, the provision of specialized support services, and adherence to best practices for attorney performance. The goal of the program is to achieve positive outcomes for children and families through the reduction of the use of foster care and reduced time to permanency for children. Repeated studies show that when parents are represented by attorneys with reasonable caseloads, the attorneys spend more time with parents and, as a result, both parents and children have better experiences with the child welfare system.<sup>1</sup>

The PCRCP is a pilot program modeled on the highly successful Washington State Parent Representation Program (PRP) which, over the past 15 years, has increased the speed at which children achieve permanency and reduced the use of foster care. According to a 2011 study, the children served by the Washington PRP reach reunification one month sooner and other permanency outcomes one year sooner than those not served by the program.<sup>2</sup>

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<sup>1</sup> Laver, *Improving Representation for Parents in the Child-Welfare System*, American Bar Association Children's Rights Litigation (2013).

<sup>2</sup> Courtney, Hook & Orme, *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes*, 34(7) Children and Youth Services Review 1337 (2012).

The focus of the Oregon PCRCP is on providing high quality representation, including a caseload limit of 80 cases, additional oversight and training requirements, and multidisciplinary collaboration. The PCRCP began in Linn and Yamhill counties in August 2014.

Initial PCRCP results are encouraging, and significant improvements have been achieved in the first year of the program. One immediate gain was representation for parents and children at shelter hearings, the preliminary hearing in the case that occurs within 24 hours from the time a child is removed from a parent's custody. Prior to implementation of the PCRCP, parents and children were without an advocate during the initial, often traumatic, portion of the case. This was, in large part, due to excessive caseloads. In Yamhill County, prior to the PCRCP, attorneys handled caseloads that included up to 100 juvenile cases, in addition to many other case types. Due to high caseloads in both counties, attorneys were not consistently present at shelter hearings and initial client meetings were delayed. As a result of the PCRCP, parents and children in Yamhill and Linn counties are now consistently represented at initial shelter hearings by attorneys who have access to discovery and, in many cases, meet with their clients before the hearings.

Cases are also resolving more efficiently because attorneys with reasonable caseloads are requesting fewer continuances due to scheduling conflicts. PCRCP attorneys are able to maintain regular and consistent client contact throughout the life of the case.<sup>3</sup> Case managers, part of the legal representation team on 10-15% of cases, are

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<sup>3</sup> The attorneys within the PCRCP program report monthly time and activities to OPDS. The PCRCP contract addendum suggests attorneys dedicate approximately 1/3 of their time to meeting with clients, 1/3 of attorney time on case preparation, and 1/3 to court appearances and meetings.

working closely with attorneys on difficult cases to assess and address client needs, motivate parents, develop alternative safety and visitation plans, model appropriate behaviors, and identify solutions to expedite permanency for children. Attorneys report that they have time to identify, research, and adequately litigate legal issues. And, attorneys are more frequently conducting an independent investigation early in the case, prior to the hearing to determine whether the court should establish jurisdiction over a child.

In conjunction with the first anniversary of the implementation of the PCRCP, the Office of Public Defense Services (OPDS) began development of an annual PCRCP report. Creating an annual report is the first step toward establishing benchmarks, identifying trends, and initiating data-driven quality improvement principles to guide the growth of the PCRCP.

Shortly after the initial development of the PCRCP report, the American Bar Association Center on Children and the Law (ABA), in partnership with the Administration for Children Youth and Families (ACYF), released the *Indicators of Success for Parent Representation* evaluation tool.<sup>4</sup> The evaluation tool, which was developed, tested, and validated by the ACYF Federal Region IV states over a three-year period, is intended to be used to measure the impact of a rule, policy, or practice change on parent representation within a jurisdiction. The tool contains fourteen indicators, each with suggested measures and data sources intended to provide guidance for benchmarking and quality improvement.

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<sup>4</sup> *Indicators of Success for Parent Representation*, American Bar Association Center on Children and the Law, [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/ParentRep/Indicators-of-Success.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/Indicators-of-Success.authcheckdam.pdf) (2015).

In creating the structure of the PCRCP annual report, OPDS relied heavily on the indicators of success recommended by the ABA while following the ABA's guidance to appropriately adapt the measures to apply to jurisdiction-specific programs. According to the developers of the tool, there are four prioritized measures that will most assist jurisdictions in assessing the effectiveness of representation. The measures are: reasonable caseloads, access to multi-disciplinary staff, representation out of court, and quality representation decreases time to safe permanency.<sup>5</sup> The PCRCP annual report contains these priority indicators described above as well as a number of other measures intended to assist OPDS and policy-makers in determining whether the changes being made as a result of the PCRCP are having positive effects for parents and children.

***In their own words: Case Manager Perspective***  
*I am so lucky to work as a case manager for this program. Many of my clients think it is very important for them to have a case manager outside of DHS. So far I found many clients who have a hard time trusting their DHS caseworker and find working with me is helpful. In many cases, it is about communication and trust. Having a third party reduces the tension a bit, and they become able to start working together towards the goal. As we know, many studies have found that family engagement is the key for successful reunification. Sometimes the parents and the caseworkers hear better from me than from each other. I love watching my clients slowly learning what works and what does not. Some take a long time and some learn quickly.*  
—Chiho Gunton, LCSW

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<sup>5</sup> *Id.* at 1.

## Summary

This annual report provides detailed data on seven key indicators and fifteen measures. Data within the report is from a number of sources, both internal and external to the PCRCP.<sup>6</sup> The data is intended to show the quality of legal representation provided, and to assess whether the PCRCP's system changes are associated with positive effects. Caution should be used when interpreting the data described within the report; the PCRCP is in its infancy and there are a number of factors, in addition to the quality of legal representation, which could impact the measures contained within the report.<sup>7</sup>

The report is organized by program goals: to provide competent and effective legal representation throughout the life of the case; to provide meaningful representation of parents and children at all proceedings; and to improve outcomes for children and families. Each goal is divided into indicators and, in some cases, the indicators have a number of associated measures. Within each measure, the particular data source is identified and, when appropriate, described in further detail. At times, the PCRCP counties are compared with statewide metrics, similarly-sized

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<sup>6</sup> OPDS expresses sincere appreciation to the Oregon Judicial Department and the Department of Human Services for assistance in providing some of the data contained within this report.

<sup>7</sup> The juvenile dependency system is incredibly complex. Cases may have many parties and typically involve a number of state and local agencies, the court, and non-profit service providers. Improvement initiatives and system changes, in addition to those promulgated by the PCRCP, likely impact data and outcomes. Factors that may have influence on data measures include: staffing levels within the local Department of Human Services Child Welfare office; the role of the Attorney General and the District Attorney in prosecuting dependency cases; changes in judicial officers; the rollout of Differential Response in Linn County in April 2015; court data system conversion; and other initiatives occurring within the counties.

counties, or with counties with a similar percentage of children in foster care. These comparisons are provided in order to better educate the reader on variances and where the PCRCP counties fit within these variances.

### ***In their own words: Attorney Perspective***

*I feel that what the PCRCP program provides to our clients is phenomenal. As a result of the program, I have more time to handle the legal needs of clients which is where my training, expertise and experience are needed and best utilized. And, collaboration with case managers provides invaluable assistance in assessing legal strategies and needed services. The success of the program results from a team effort: lawyers, case managers, and local partners.*

*–Susan Isaacs, Attorney, Yamhill County*

## Notable Observations

The PCRCP is intended to serve as a vehicle for improved legal representation. However, improving representation is a process that takes time and consistent focus. The heightened expectations of the PCRCP and the change in the way OPDS contracts for legal services in PCRCP counties have required that program attorneys make rapid practice changes. Stakeholders within the PCRCP counties have also had to adapt to culture changes including improved advocacy, lawyers attending shelter hearings, and multi-disciplinary representation through case managers.

Recognizing that data interpretation should be done cautiously, three promising themes arise from the initial PCRCP data: improved quality of representation through practice changes, preservation of families through reunification and guardianship, and a reduction in the use of foster care.

Improved quality of legal representation has been achieved through the use of case managers, the appropriate use of investigators and experts, caseload limits, a focus on time spent with clients, and increased attorney participation in case-related meetings.

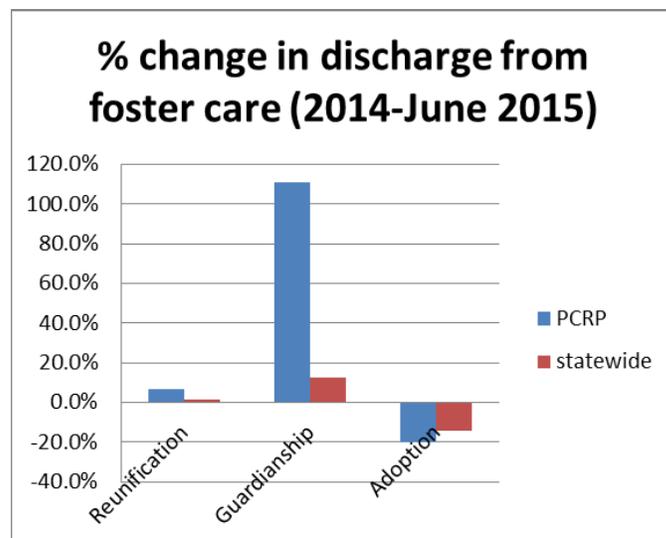
Because of the workload limitation of 80 open cases, the attorneys within the program now have adequate time to prepare cases for trial. PCRCP attorneys have embraced their obligation to investigate the facts of each case and, in 2014, used investigators nearly five times more frequently than non-PCRCP attorneys. PCRCP attorneys utilize experts ten times more frequently than non-PCRCP attorneys. Case managers are available to all PCRCP attorneys and have provided direct service to 150 clients within the first six months of implementation.

In addition, PCRCP attorneys are expected to spend one-third of their time in client contact outside of court. The PCRCP attorneys are spending closer to one-fourth of their time in out-of-court client contact, but when combined with case manager client contact hours, the legal representation team of case manager and lawyer spends over 70 hours per month in direct client out-of-court contact. Attorneys with reasonable caseloads have increased availability to attend the many case-related meetings necessary to ensure quality representation for parents and children. Lawyers are attending approximately twelve meetings per month, and the increase in meeting participation has been noted by stakeholders in both counties.

The Department of Human Services records the reason children are discharged from foster care. The reasons for discharge are reunification,

guardianship, adoption, discharge without attaining permanency, and unknown.<sup>8</sup>

From 2014 to June 2015, the statewide rate of change in children exiting foster care to reunification was 1.7% while in the PCRCP counties over the same time period the average rate of change was 6.5%. From 2014 to June 2015, the statewide rate of change in children exiting foster care to guardianship was 12.5% while in the PCRCP counties over the same time period the average rate of change was 111%. And, while the percentage of children discharged to adoption is decreasing within the PCRCP counties and across the state, the rate of decrease in the PCRCP counties is greater than it is across the state.<sup>9</sup>



On December 31, 2014, there were 7539 children in foster care in Oregon, including 118 in Yamhill County and 255 in Linn County. By June 30, 2015, there were slightly more children in foster

<sup>8</sup> Reunification is defined as “discharged to reunification including living with relatives.” Oregon Child Welfare Data See report CM.05 Discharge Reason (of those discharged), [https://rom.socwel.ku.edu/Oregon\\_Public/MyReports.aspx](https://rom.socwel.ku.edu/Oregon_Public/MyReports.aspx).

<sup>9</sup> For raw data and a graphical representation of the rate of change in discharge reason for those children leaving foster care, See Indicator: Case resolution, p 14 of this report.

care within the state (7571) but substantially fewer in Yamhill (105) and Linn (214) counties. The decline in the foster care population in Linn and Yamhill counties began in 2013, but the rate of decline has increased since the start of the PCRCP.

In summary, initial indicators from the PCRCP are encouraging. Although the indicators do not

establish a causal relationship between improved representation for parents and children and the metrics within this report, it is evident that the manner of legal representation of parents and children in Linn and Yamhill counties has changed for the better.

***In their own words: Client Perspective***

*As soon as I became aware I had a daughter, I realized my life had to change. I straightened out, got clean, stopped running from the police and took responsibility for my actions. I worked hard to change my behavior so I could provide a safe home for my daughter.*

*If I could give advice to any parents in the child welfare system it would be to talk to your lawyer. My lawyer knew exactly what to say to the court to make the judge understand my circumstances and my wishes in the case. She knew what to ask for in order to have my daughter placed with me as soon as possible. When I arrived at that first court hearing, it was scary and overwhelming. I wondered whether I even had a valid argument to make. My lawyer listened to me, explained my rights and the court process, and right away gave me the confidence to ask to have my daughter placed with me. I was overjoyed knowing that I did have a leg to stand on and getting my daughter returned to me was realistic.*

*Today, a few months after dismissal of the case, my daughter and I live with my parents. They provide a lot of support and encouragement for me and babysit my daughter at night while I go to work. It is a struggle to be a single father caring for an active toddler but I wouldn't trade it for the world. It is amazing how my daughter has impacted my life. I think about her before I make any decision. She is the most important thing in my life.*

*—Former Client, McMinnville*

# PCRP Program Goal: Competent and Effective Legal Representation Throughout the Life of the Case

## I. Indicator: Immediate and consistent access to multi-disciplinary staff

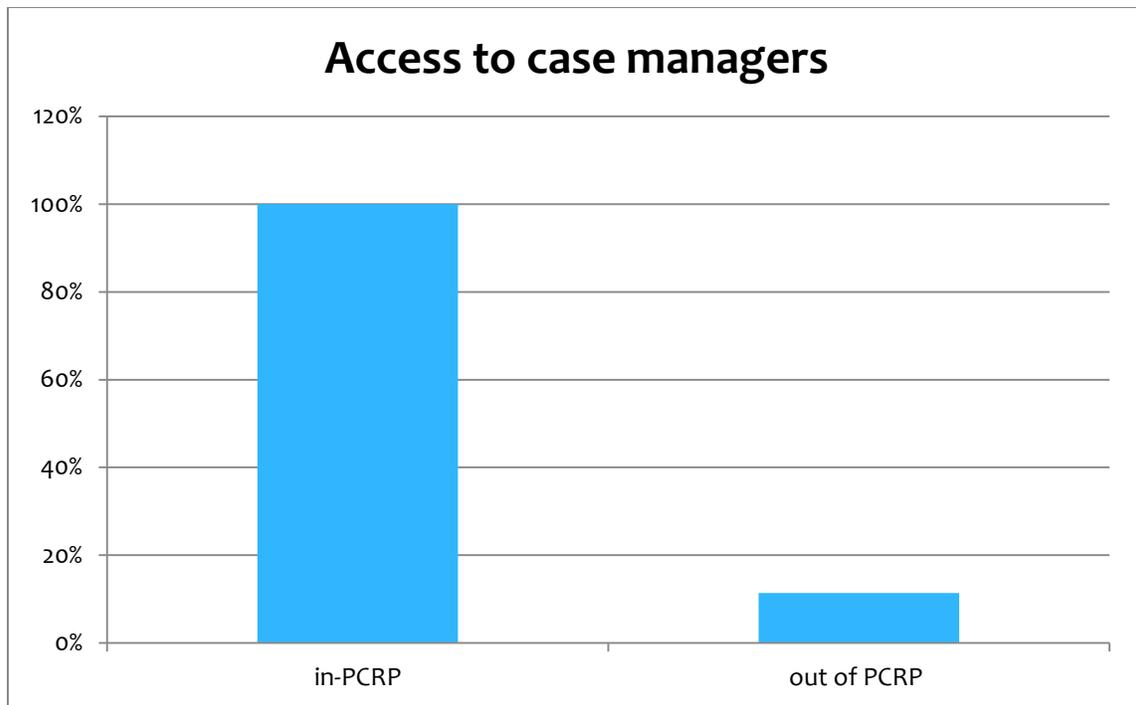
### a. Access to and use of case managers

*Measure:* Percentage of attorneys that have access to case managers as part of the legal team and percentage of cases in which a case manager is used.<sup>10</sup>

*Explanation:* When lawyers and social workers collaborate to help parents succeed in reunifying with their children, the entire child welfare system benefits. Case managers, who fulfill a function similar to a social worker, are working closely with PCRP attorneys to assess and address client needs, motivate parents, develop alternative safety and visitation plans, and identify solutions to expedite permanency for children. Case managers are a limited resource, and typically help resolve issues during a particularly difficult stage of a case, rather than throughout the entire case.

*Data:* In the PCRP, case managers work as part of the legal team on 10-15% of open cases and are available to work with clients from the moment an attorney is appointed. From January through June 2015, PCRP case managers served 150 clients.

During 2014-2015, 100% of the PCRP attorneys had access to case managers as part of the legal representation team. During 2014, 11% of the public defense attorneys who represented parents and children in dependency cases statewide had readily available access to social workers or case managers.



*Note:* A limited number of public defender offices maintain a social worker on staff. The Klamath Defenders, the public defense provider in Klamath and Lake counties, utilize case managers in a role similar to that of the PCRP.

<sup>10</sup> Data sources: PCRP attorney activity reports, case manager assignment spreadsheet, OPDS contract analysts.

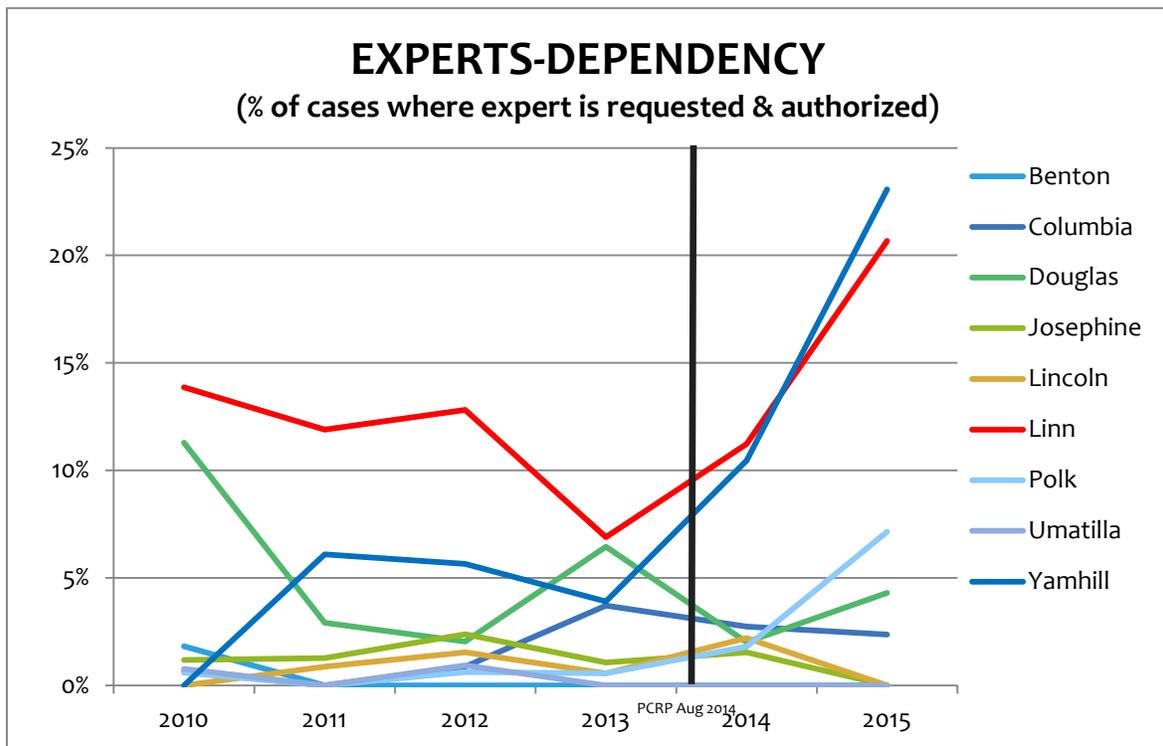
**b. Access to and use of expert witnesses**

*Measure:* Percentage of attorneys that have access to expert witnesses and percentage of cases in which an expert witness is requested and determined by OPDS to warrant funding as a necessary and reasonable expense.<sup>11</sup>

*Explanation:* Each attorney must have access to independent expert analysis to assess and present the client’s case and to challenge the state’s case. The right to court appointed counsel at state expense includes necessary and reasonable fees and expenses for the investigation, preparation, and presentation of the case.<sup>12</sup>

*Data:* All juvenile public defense attorneys have access to non-routine expense funds for case investigation, preparation, and presentation. In order to receive funding authorization, the attorney must document that the funds are both necessary and reasonable in the case at issue.

During 2014, in comparable counties, an expert was requested and authorized by OPDS in an average of 1% of the juvenile dependency cases. In the first six months of 2015, this number is 2%. In contrast, during 2014, in PCRCP counties, an expert was requested and authorized by OPDS in an average of 11% of the juvenile dependency cases. In the first 6 months of 2015, this number is 22%.



<sup>11</sup> Data sources: PCRCP attorney activity reports, OPDS non-routine expense data, OPDS case credit reports.

<sup>12</sup> ORS 135.055(3)(a) (2014).

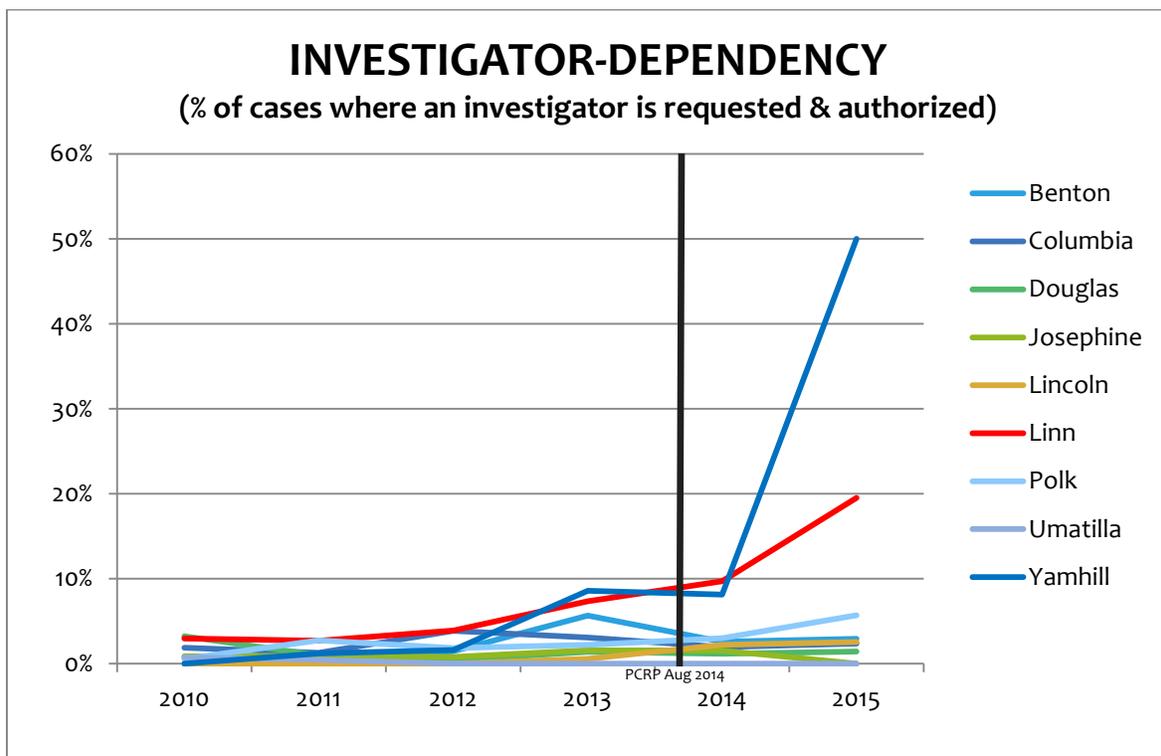
### c. Access to and use of investigators

*Measure:* Percentage of attorneys that have access to investigators and percentage of cases in which an investigator is requested and determined by OPDS to warrant funding as a necessary and reasonable request.<sup>13</sup>

*Explanation:* Each attorney must independently investigate the state's allegations and seek evidence that challenges the state's case. The right to court appointed counsel at state expense includes necessary and reasonable fees and expenses for the investigation, preparation, and presentation of the case.<sup>14</sup>

*Data:* All juvenile public defense attorneys have access to non-routine expense funds for case investigation, preparation, and presentation. In order to receive funding authorization, the attorney must document that the funds are both necessary and reasonable in the case at issue.

During 2014, in comparable counties, an investigator was requested and authorized by OPDS in an average of 2% of the juvenile dependency cases. In the first 6 months of 2015, this number is 2%. In contrast, during 2014, in PCRCP counties, an investigator was requested and authorized by OPDS in an average of 9% of the juvenile dependency cases. In the first 6 months of 2015, this number is 35%.



<sup>13</sup> Data sources: PCRCP attorney activity reports, OPDS non-routine expense data, OPDS case credit reports.

<sup>14</sup> ORS 135.055(3)(a) (2014).

## II. Indicator: Reasonable caseloads

*Measure:* Caseload limit for full- and part-time PCRCP attorneys; percentage of PCRCP attorneys who fall within the limit.<sup>15</sup>

*Explanation:* A reasonable workload allows attorneys to provide standards-based legal representation and meet their ethical obligations. Lawyers within the PCRCP are expected to have frequent client contact, attend all case-related meetings, conduct independent investigations throughout the life of the case, and advocate at all court and CRB hearings at every stage of the case.

*Data:* Within the PCRCP, attorneys are limited to a full caseload of no more than 80 open cases. The PCRCP caseload limitation requires attorneys to limit the number of non-PCRCP cases they handle, including privately retained work, so that they remain within the case limit.

During 2014-2015, juvenile attorneys in two of Oregon's counties, Linn and Yamhill, were subject to a caseload limit of 80 open cases. In the remainder of the counties, attorneys did not experience caseload limits imposed by OPDS.<sup>16</sup>

Another way of examining the scope of caseload limits is to compare the number of children in foster care represented by attorneys within the PCRCP with those children represented by non-PCRCP attorneys. On the last day of 2014, there were 373 children in foster care, approximately 5%, represented by attorneys in counties with caseload limits. The remaining 7166 children were represented by attorneys in counties without caseload limits.

## III. Indicator: Representation out of court

### a. Time spent in contact with clients outside of court hearings

*Measure:* Time spent with clients, outside of the courtroom, as reported by the PCRCP attorneys and PCRCP case managers.<sup>17</sup>

*Explanation:* Establishing and maintaining a relationship with the child client is the foundation of representation. It is often more difficult to develop a relationship of trust with a child client than with an adult. Meeting with the child personally and regularly allows the lawyer to develop a relationship with the client and to assess the child's circumstances. The child's position, interests, needs, and wishes change over time. A lawyer for a child must develop a relationship through frequent contacts.<sup>18</sup>

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<sup>15</sup> Data source: PCRCP attorney activity reports, Oregon Child Welfare Data Set report CM.02 Count of Children in Foster Care by Placement Type-Last Day of Period, [https://rom.socwel.ku.edu/Oregon\\_Public/MyReports.aspx](https://rom.socwel.ku.edu/Oregon_Public/MyReports.aspx).

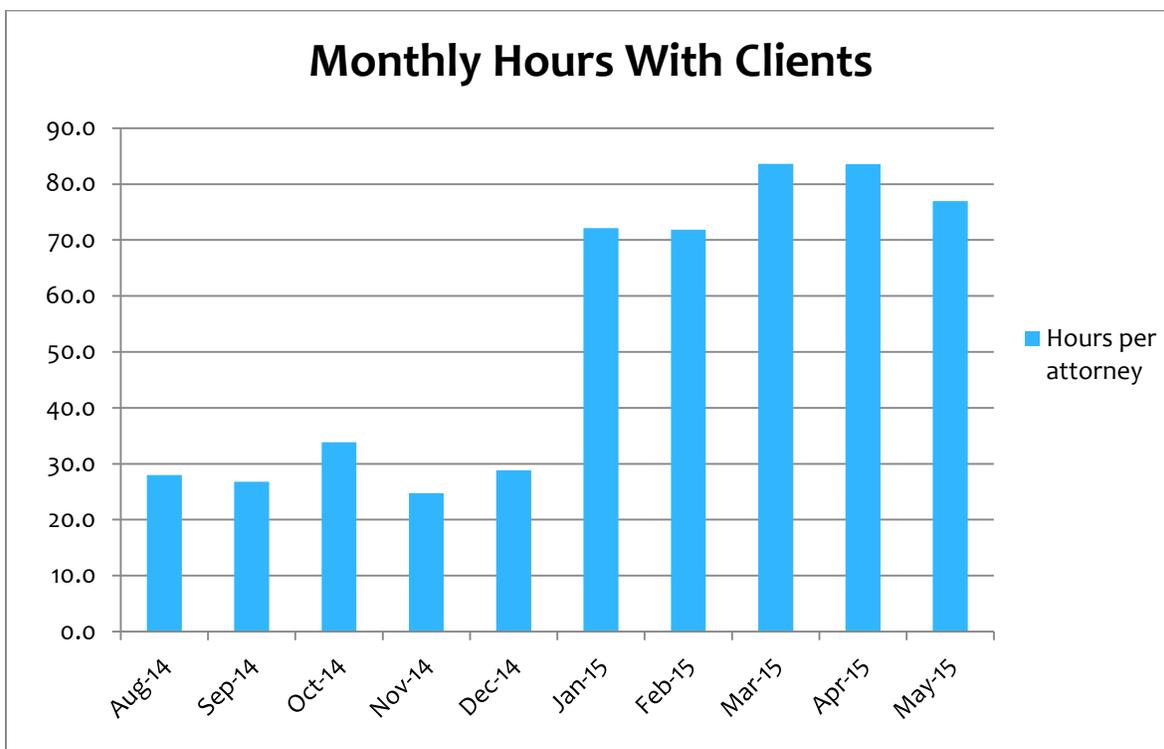
<sup>16</sup> The issue of high caseloads for public defenders has been repeatedly identified as a concern. See *Public Defense Services Commission Retreat Agenda and Objectives* (March 20, 2014) <http://www.oregon.gov/OPDS/docs/Agendas/03-20-14.pdf>. The Joint Interim Task Force on Juvenile Court Dependency Proceedings raised this issue during their meetings in 2014. Task Force members discussed the issue of caseloads, noting that in many counties, lawyers representing children and parents have well over 100 cases at any given time. And because there can be multiple children in each case, lawyers representing children can have many more clients than cases. See *Joint Interim Task Force on Juvenile Court Dependency Proceedings Final Report*, (December 3, 2014) <https://olis.leg.state.or.us/liz/201311/Downloads/CommitteeMeetingDocument/41222> (DRAFT COPY).

<sup>17</sup> Data source: PCRCP attorney activity reports, PCRCP case manager activity reports.

<sup>18</sup> Oregon State Bar Report of the Task Force on Standards of Representation in Juvenile Dependency Cases, *The Obligations of the Lawyer for Children in Child Protection Proceedings with Action Items and Commentary*, Standard 2-Relationship with the child client (2014).

Gaining a parent client’s trust and establishing ongoing communication are two essential aspects of representing the parent. The job of the lawyer extends beyond the courtroom. The lawyer should be a counselor as well as litigator. The lawyer should be available to talk with the parent to prepare for hearings, and to provide advice and information about ongoing concerns.<sup>19</sup>

*Data:* The goal of the PCRCP is for attorneys to spend 1/3 of their time with clients outside of the courtroom. Since the inception of the PCRCP, attorneys report spending closer to 1/4 of their time with clients. However, beginning in January 2015, case managers worked with clients as part of the legal representation team. As a result of case manager involvement, time spent with clients, per attorney team, has increased by an average of 172% over the average time spent with clients in the first five months of the program.



**b. Attorney presence at key case non-court events**

*Measure:* Number of case-related meetings attended; time spent in case-related meetings. Attorney presence at case-related meetings from a stakeholder perspective.<sup>20</sup>

*Explanation:* Lawyers should actively engage in case planning, including attending substantive case meetings, such as initial treatment planning meetings and case reviews of treatment plans.<sup>21</sup>

<sup>19</sup> Oregon State Bar Report of the Task Force on Standards of Representation in Juvenile Dependency Cases, *The Obligations of the Lawyer for Parents in Child Protection Proceedings with Action Items and Commentary*, Standard 2-Relationship with the parent client (2014).

<sup>20</sup> Data source: PCRCP attorney activity reports, April 2015 PCRCP Stakeholder survey results.

<sup>21</sup> Oregon State Bar Report of the Task Force on Standards of Representation in Juvenile Dependency Cases, *The Obligations of the Lawyer for Parents in Child Protection Proceedings with Action Items and Commentary*, Standard 4-General principles governing conduct of a case (2014).

Many important decisions in a case are made outside of the courtroom in case-related meetings. Advocacy at case planning meetings is an essential part of effective legal representation. PCRCP attorneys are expected to attend case-related meetings unless a court appearance is scheduled at the same time.

*Data:* From August 2014-May 2015, PCRCP attorneys attended a total of 1255 case-related meetings, an average of 12 meetings per month. At times, a staff assistant or case manager may attend a case-related meeting at the attorney's request. However, for purposes of this report, only attorney attendance at meetings is reported.

Interestingly, although attorney participation in case-related meetings is significant, a number of system partners within the PCRCP counties report it is insufficient to meet case planning needs. In April 2015, OPDS surveyed juvenile court stakeholders within both counties. When asked about attorney participation in case-related meetings, 63% of respondents in Linn County and 18% in Yamhill County found the level of participation to be sufficient. But, in both counties, respondents noted an increase in the level of participation since the beginning of the PCRCP. In Linn County, 41% of respondents noted a participation increase; in Yamhill, 75% noted a participation increase.

# PCRP Program Goal: Meaningful Representation of Parents and Children at all Proceedings

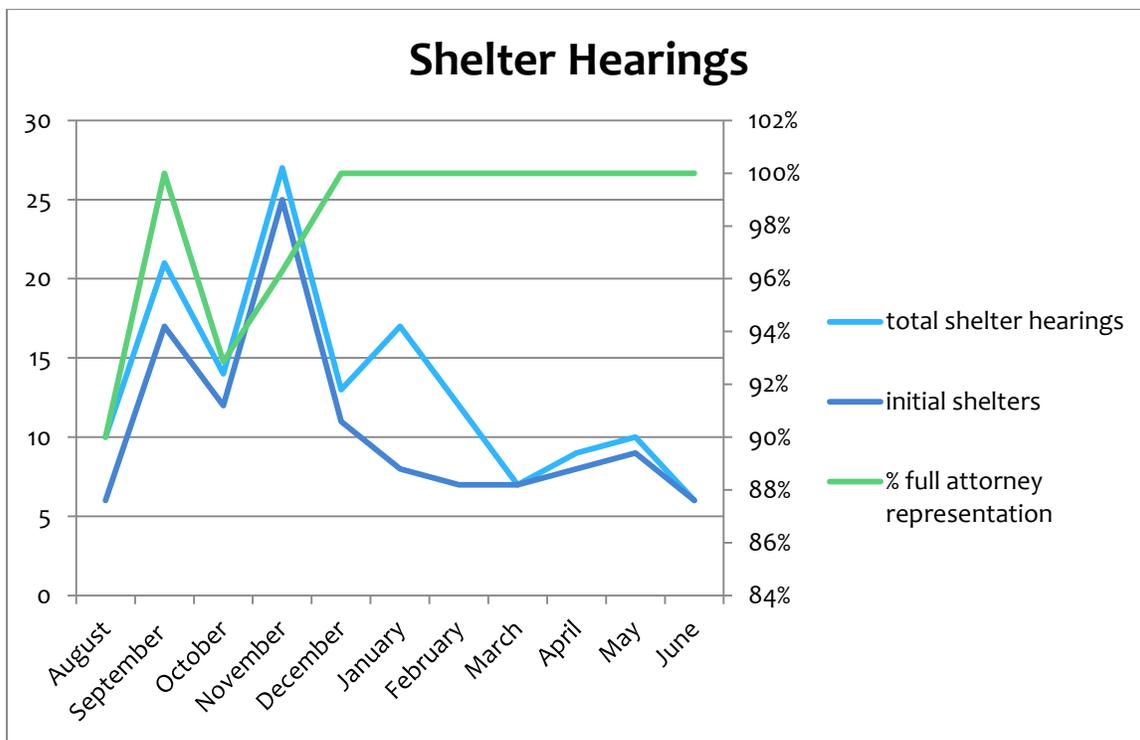
## I. Indicator: Shelter hearing representation

*Measure:* Percentage of parties represented by an attorney at shelter hearings.<sup>22</sup>

*Explanation:* PCRP attorneys are required to provide representation at the initial hearing, called a shelter hearing, in each case. Prior to the PCRP, attorneys in Linn and Yamhill counties were not consistently present at shelter hearings and, as a result, parents attended these hearings, where children were often removed from their care, without an advocate. And children, who have their own legal rights and often substantial needs, had no voice in the proceeding.

As a result of the PCRP, parents and children are now consistently represented at initial shelter hearings by attorneys who have access to discovery and, in many cases, meet with their clients before the hearings. Research underscores the importance of early engagement in juvenile court cases. Families are more likely to be reunified when parents, mothers in particular, and attorneys are present and involved in early stage hearings.<sup>23</sup> The direction a case takes early on often predicts whether a child will return home.<sup>24</sup>

*Data:* Between December 2014 and June 2015, PCRP attorneys have been present, on behalf of all parties, at shelter hearings.



<sup>22</sup> Data source: PCRP attorney activity reports, Oregon e-Court case information system.

<sup>23</sup> National Council of Juvenile and Family Court Judges, *Effects of Parental and Attorney Involvement on Reunification in Juvenile Dependency Cases*, PPCD Research Snapshot (2011), [http://www.ncjfcj.org/sites/default/files/Parental%20Involvement%20One%20Pager\\_Final\\_0.pdf](http://www.ncjfcj.org/sites/default/files/Parental%20Involvement%20One%20Pager_Final_0.pdf).

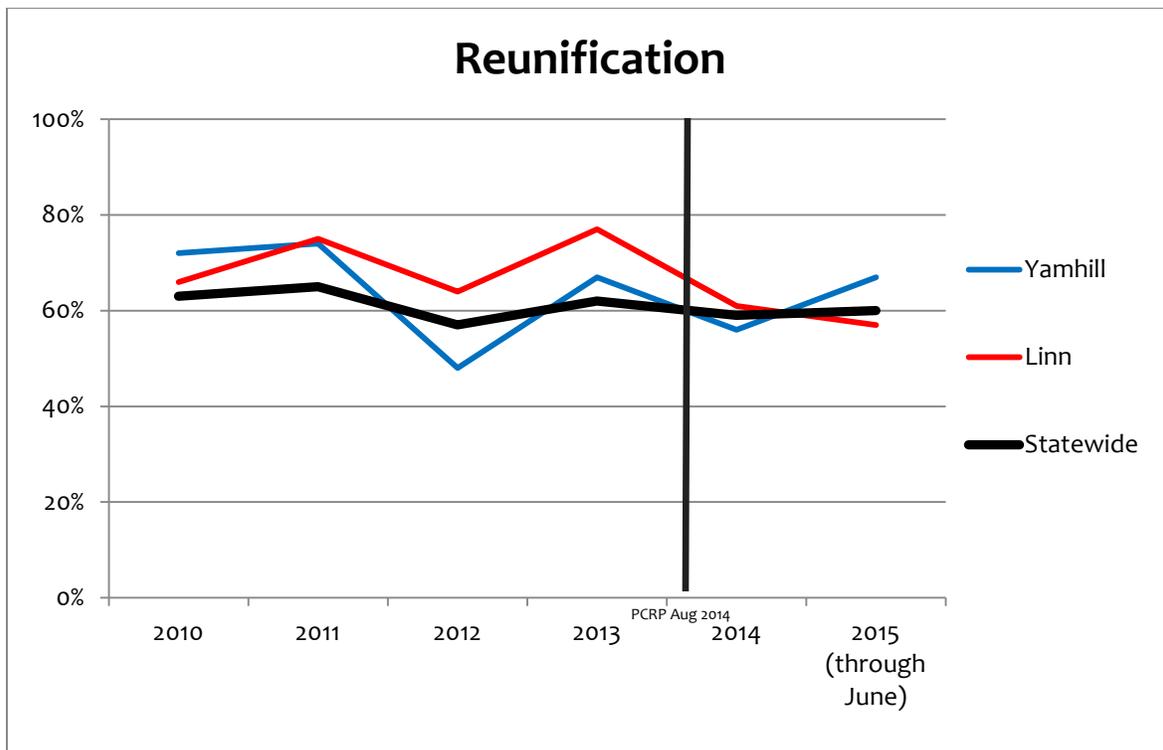
<sup>24</sup> Cohen and Cortese, *Cornerstone Advocacy in the First 60 Days: Achieving Safe and Lasting Reunification for Families*, ABA Child Law Practice (2009).

## II. Indicator: Case resolution

*Measure:* Discharge reason for those children leaving foster care.<sup>25</sup>

*Explanation:* High-quality legal representation for parents, in which attorneys have adequate time to devote to their client's case, and parents have access to independent social workers as part of their legal team, has been shown to reduce the time children spend in foster care.<sup>26</sup> Washington state's Parent Representation Program, which began in 2000 and is similar to the PCRCP, has increased safe reunifications by 36%.<sup>27</sup>

*Data: Reunification:* The State of Oregon expresses a strong preference that children live in their own homes with their own families when possible.<sup>28</sup> Since 2012, the statewide percentage of children who were reunified with a parent upon discharge from foster care has averaged 60%. From 2014 to June 2015, discharge to reunification increased by 1.7% across the state. In the PCRCP, over the same time period, the percentage of children leaving foster care to reunification increased by an average of 6.5%.



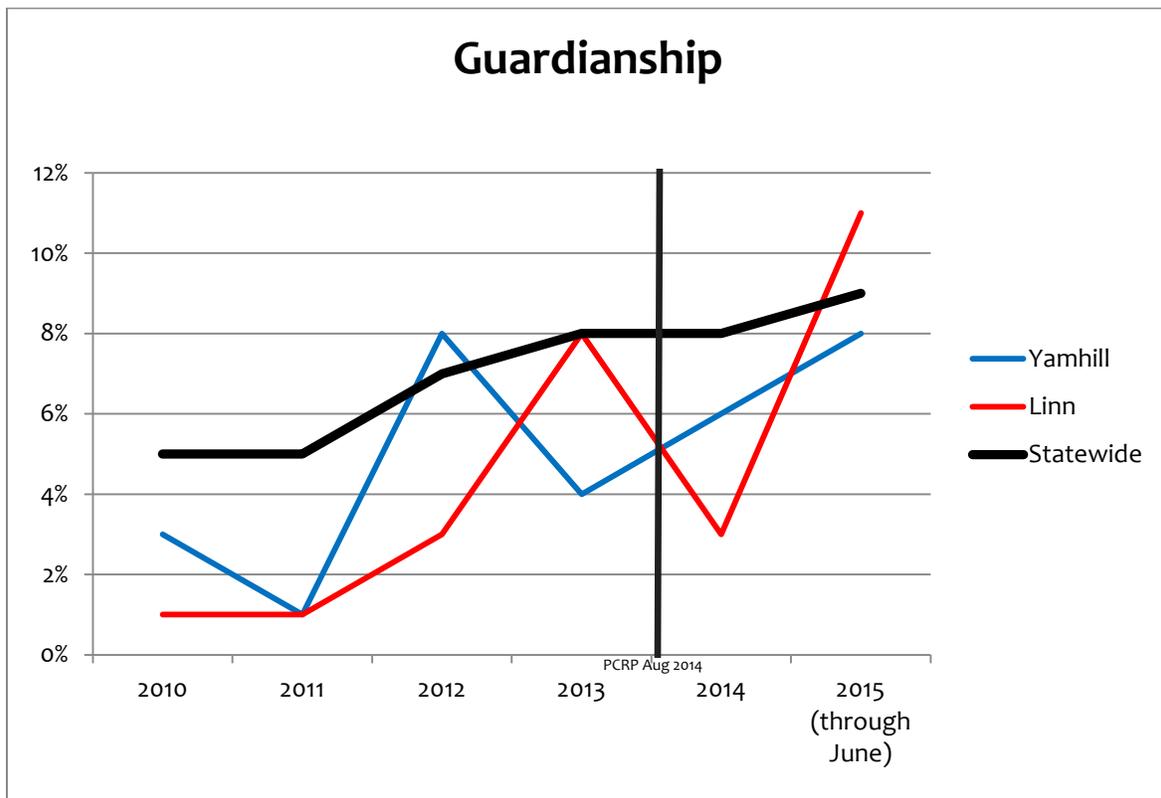
<sup>25</sup> Data source: Oregon Child Welfare Data Set report CM.05 Discharge Reason (of those discharged), [https://rom.socwel.ku.edu/Oregon\\_Public/MyReports.aspx](https://rom.socwel.ku.edu/Oregon_Public/MyReports.aspx).

<sup>26</sup> Courtney, Hook & Orme, *supra n.2*.

<sup>27</sup> American Bar Association, *National Project to Improve Representation for Parents Fact Sheet*, <http://schubert.case.edu/files/2014/02/ABAFactsheet.pdf>.

<sup>28</sup> ORS 419B.090(5) (2015).

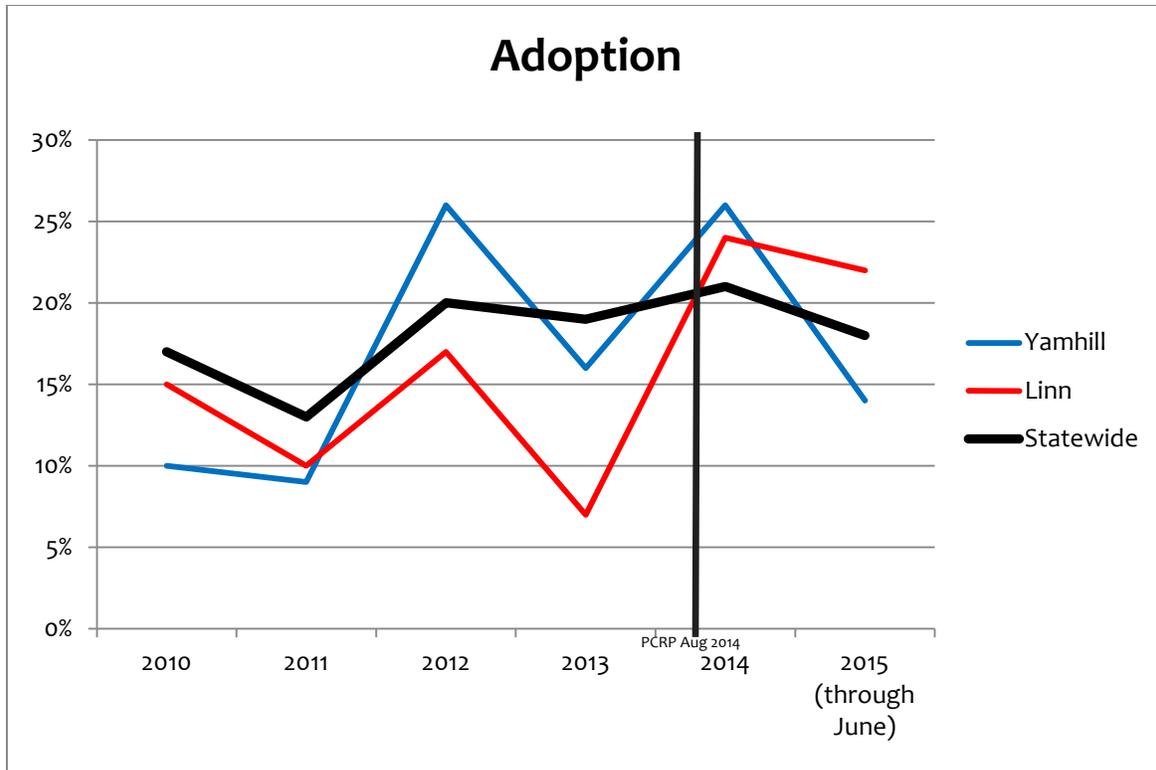
Guardianship: Guardianship is an important measure of permanence which allows children to be discharged from foster care and has the added benefit of maintaining the legal parental relationship between the child and his or her birth parents.<sup>29</sup> The statewide percentage of children who entered a guardianship upon leaving foster care has been increasing steadily since 2010. In 2010, 5% of children entered guardianships, and by June, 2015, the number has increased to 9%. In the PCRCP counties, for 2014, both counties had a guardianship rate below the statewide average (Linn 3% and Yamhill 6%). However, the rate of guardianship has increased substantially since the inception of the PCRCP in August 2014. From 2014 to June, 2015, the statewide rate for discharge to guardianship increased from 8% to 9%, an increase of 12.5%. Within the PCRCP, over the same time period, the average rate for discharge to guardianship increased from 4.5% to 9.5%, an increase of 111%.



<sup>29</sup> Guggenheim and Sankaran, *Representing Parents in Child Welfare Cases* 303 (American Bar Association 2015).

Adoption: Children have a legal right to permanency with a safe family.<sup>30</sup> Adoption is the most permanent alternative for children after reunification. However, the termination of parental rights, while necessary in some cases, can have severe negative consequences for a child.<sup>31</sup> Between 2012 and 2014, the statewide percentage of children who discharge from foster care to adoption has averaged 20%. In the first 6 months of 2015, the statewide percentage decreased to 18%, a decrease of 14.3% over 2014. In the PCRCP counties, the percentage of children who discharge from foster care to adoption has been decreasing at a rate higher than the statewide average.

In 2014, in the PCRCP counties, an average of 22.5% of children leaving foster care exited to adoption and in the first half of 2015, an average of 18% of children leaving foster care exited to adoption. From 2014 to June, 2015, the average percentage decrease in adoption as a discharge reason in Linn and Yamhill counties is 20%.



<sup>30</sup> ORS 419B.090(2) (2015).

<sup>31</sup> Guggenheim and Sankaran, *supra n.29*, at 311.

# PCRP Program Goal: Improved Outcomes for Children and Families

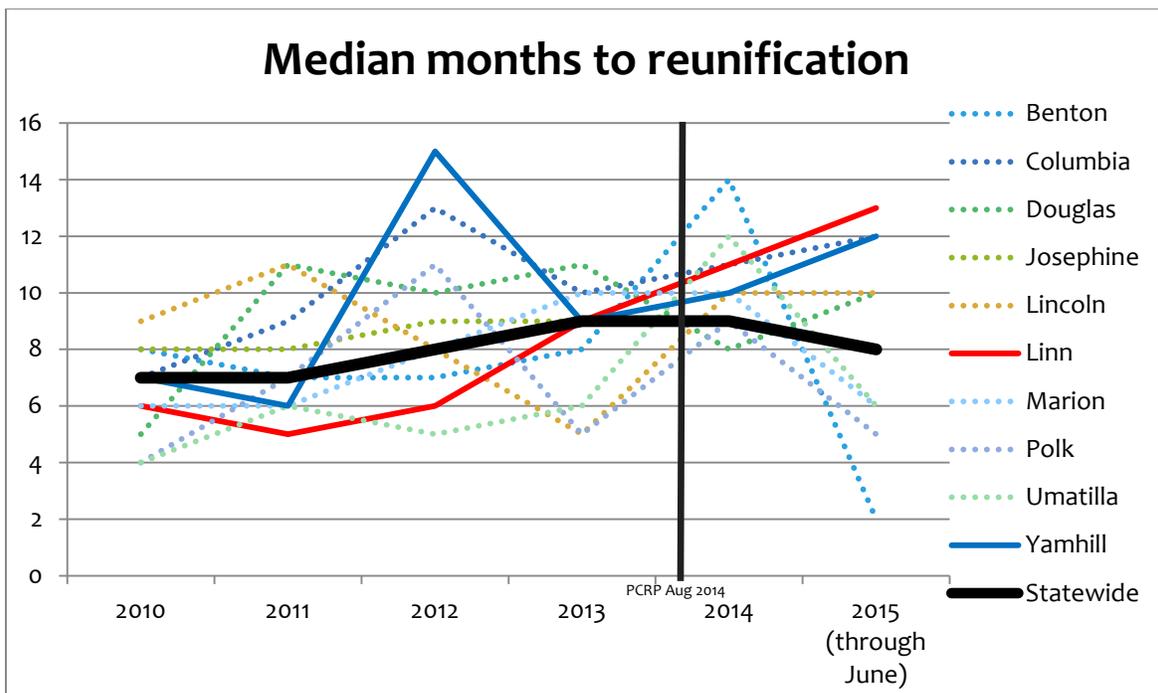
## I. Indicator: Quality representation decreases time to safe permanency

### a. Median time to reunification

*Measure:* Median months of those reunified within the time period sampled.<sup>32</sup>

*Explanation:* Reunification occurs when children leave foster care to be reunified with parents or families. In 2014, 58.5% children who left foster care were reunited with families.<sup>33</sup> An attorney's advocacy for frequent visitation, parent engagement, and the right service plan helps steer the case toward early reunification.<sup>34</sup>

*Data:* Statewide, between 2010 through June, 2015, the median number of months to reunification averages 8 months. Beginning in 2013, both Linn and Yamhill counties have seen an increase in the median number of months to reunification. In 2014 and, through June of 2015, the number of months to reunification is well above the statewide average. And, it appears that time to reunification continued to increase after the start of the PCRP. When compared to similarly-sized counties, Linn County's 13 months for 2015 is the highest.



### b. Median time to adoption

*Measure:* Median months of those adopted within the time period sampled.<sup>35</sup>

<sup>32</sup> Data source: Oregon child welfare data set report FO.01.2 Median Months to Reunification-of those reunified, [https://rom.socwel.ku.edu/Oregon\\_Public/MyReports.aspx](https://rom.socwel.ku.edu/Oregon_Public/MyReports.aspx).

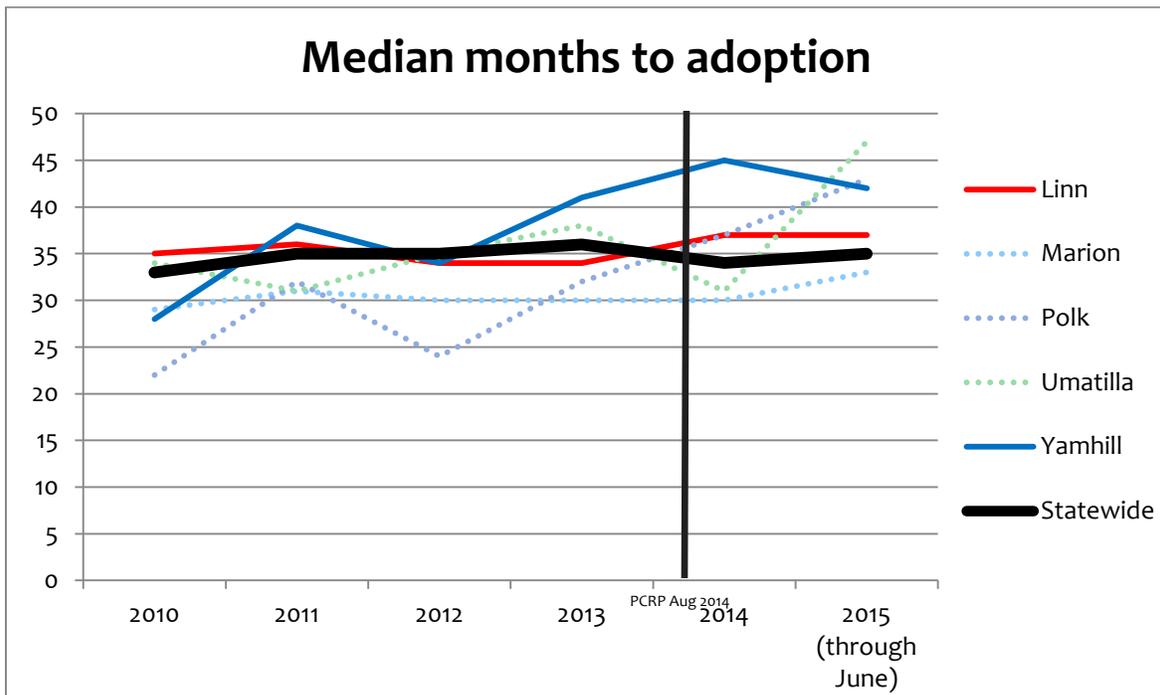
<sup>33</sup> Department of Human Services, 2014 Child Welfare Data Book (2014).

<sup>34</sup> Cohen and Cortese, *supra* n. 24.

<sup>35</sup> Data source: Oregon child welfare data set report FO.02.2 Median Months to Adoption-of those adopted, [https://rom.socwel.ku.edu/Oregon\\_Public/MyReports.aspx](https://rom.socwel.ku.edu/Oregon_Public/MyReports.aspx).

*Explanation:* Focused advocacy by attorneys for children and parents is needed to expedite the achievement of permanency for children. Research conducted on Washington State’s parent representation program has found that the availability of adequate legal representation speeds reunification with parents, and for those children who do not reunify, it speeds achieving permanency through adoption and guardianship.<sup>36</sup>

*Data:* Since 2010, the statewide average is 34.6 months. Linn and Yamhill counties have seen an increase in the median months to adoption since 2013. In 2013, the median months to adoption in Linn and Yamhill counties was 34. For the first half of June, 2015, Linn County had a median of 37 months and Yamhill 42 months. In Yamhill County, since the start of the PCRCP in 2014, median months have declined by 6.6%. Linn County remains unchanged at 37 months. When compared to similarly sized counties with a similar foster care population percentage, the time to adoption is remaining steady or falling while the comparison counties show a sharp rise in the median months to adoption.



**c. Time to achieve permanency**

*Measure:* Percentage of children who achieved permanency within 24 months of removal.<sup>37</sup>

*Explanation:* When consistent with the client’s interests, the lawyer should take every appropriate step to expedite proceedings. Delaying a case often increases the time a family is separated and can reduce the likelihood of reunification.<sup>38</sup> Research shows that the effectiveness

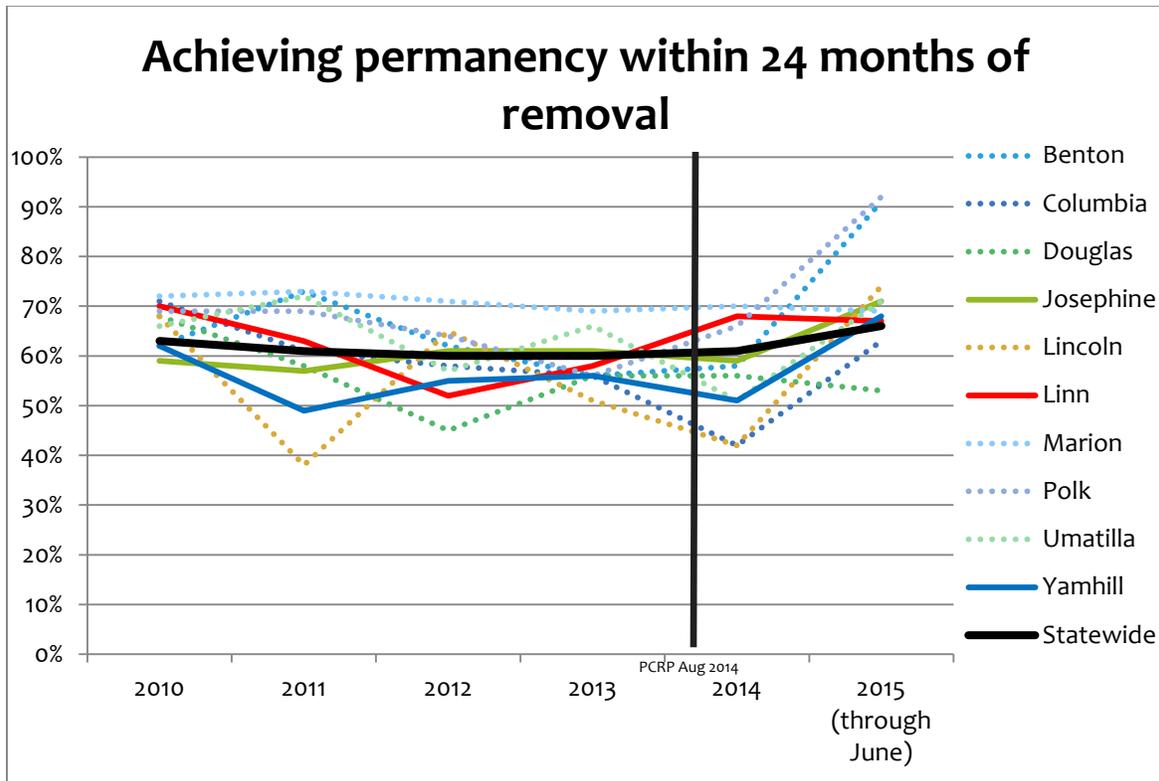
<sup>36</sup> Courtney, Hook & Orme, *supra* n.2.

<sup>37</sup> Data source: Oregon child welfare data set report PO.02. Permanency in 24 mos-of those entered care 24 mos ago, [https://rom.socwel.ku.edu/Oregon\\_Public/MyReports.aspx](https://rom.socwel.ku.edu/Oregon_Public/MyReports.aspx).

<sup>38</sup> Oregon State Bar Report of the Task Force on Standards of Representation in Juvenile Dependency Cases, *The Obligations of the Lawyer for Parents in Child Protection Proceedings with Action Items and Commentary*, Standard 4-General Principles Governing Conduct of a Case (2014). Oregon State Bar Report of the Task Force on Standards of Representation in Juvenile Dependency Cases, *The Obligations of the Lawyer for Children in Child Protection Proceedings with Action Items and Commentary*, Standard 4-General Principles Governing Conduct of a Case (2014).

of foster care diminishes over time. The longer children remain in foster care, the less effective foster care is in meeting children's needs.<sup>39</sup>

*Data:* From 2010 through 2014, the statewide average hovered at 61%. In the first half of 2015, the statewide average increased by 8.2%. Before the start of the PCRCP, both Linn and Yamhill counties had rates lower than the statewide average. However, the percentage of children who achieve permanency within 24 months has been increasing in the PCRCP counties; for the first six months of 2015, both counties have rates higher than the statewide average.



**d. Rate of re-entry after discharge from foster care**

*Measure:* No re-entry into custody of those discharged 12 months ago.<sup>40</sup>

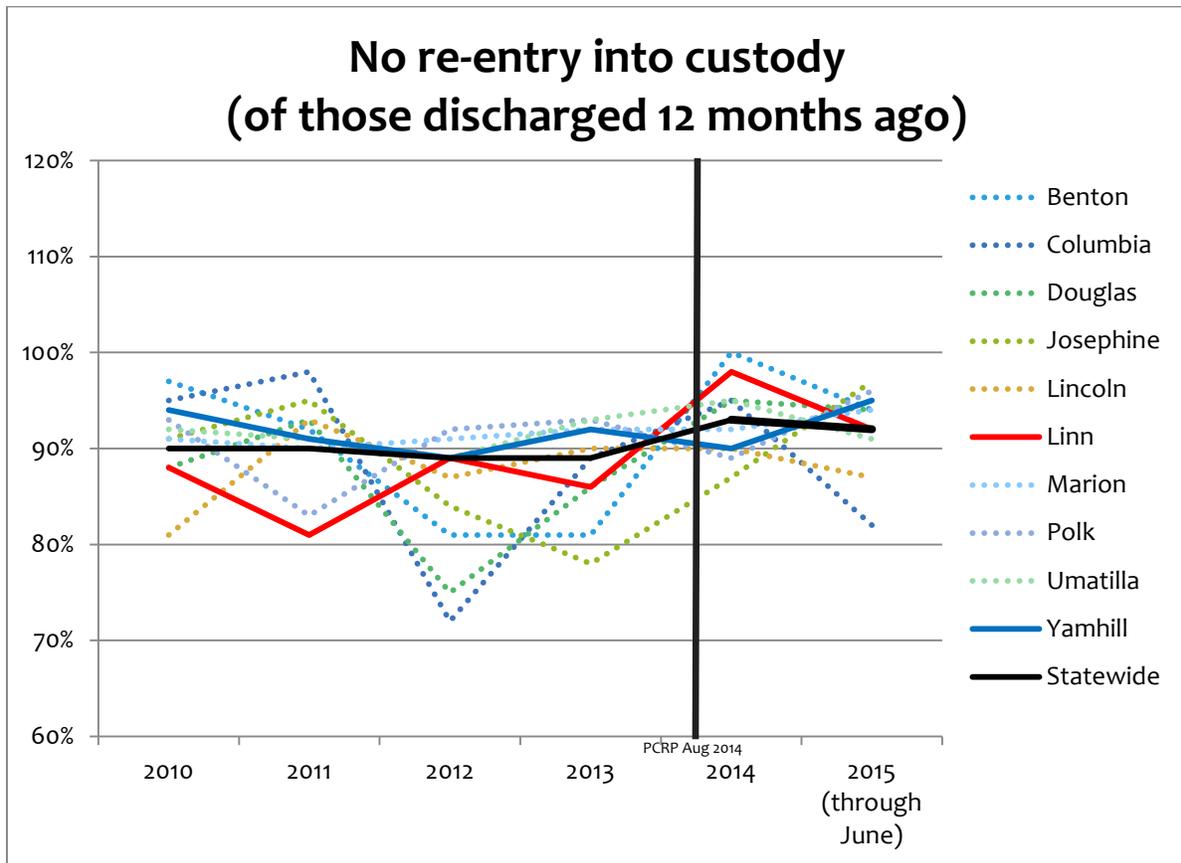
*Explanation:* Safe reunification, as shown by no re-entry into custody within 12 months of discharge from foster care, is a necessary measure when determining whether cases have resolved appropriately, whether parents have remediated the issues which led to foster care placement, and whether services provided to families were appropriate and effective.

*Data:* Between 2010 and 2014, the statewide percentage of children who were safely reunified (or placed into guardianship or adoption) upon discharge from foster care hovered between 89% and 90%. In 2014 and the first half of 2015, the percentage of children who were discharged from foster care and did not re-enter foster care within twelve months of discharge increased to 93% in 2014 and 92% in 2015.

<sup>39</sup> Joint Interim Task Force on Juvenile Court Dependency Proceeding Final Report (December 3, 2014), <https://olis.leg.state.or.us/liz/201311/Downloads/CommitteeMeetingDocument/41222> (DRAFT COPY).

<sup>40</sup> Data source: Oregon child welfare data set report CM.06 No Re-entry into Custody-of those discharged 12 mos ago, [https://rom.socwel.ku.edu/Oregon\\_Public/MyReports.aspx](https://rom.socwel.ku.edu/Oregon_Public/MyReports.aspx).

In 2014, Yamhill County had a safe reunification rate of 90%, below the statewide average. In the first half of 2015, the percentage of safe reunification increased to 95%, well above the statewide average. On the other hand, Linn County's rate was 98% in 2014, and during the first half of 2015 is consistent with the statewide average.



**e. Number of children in foster care**

*Measure:* Count of children in foster care by placement type.<sup>41</sup>

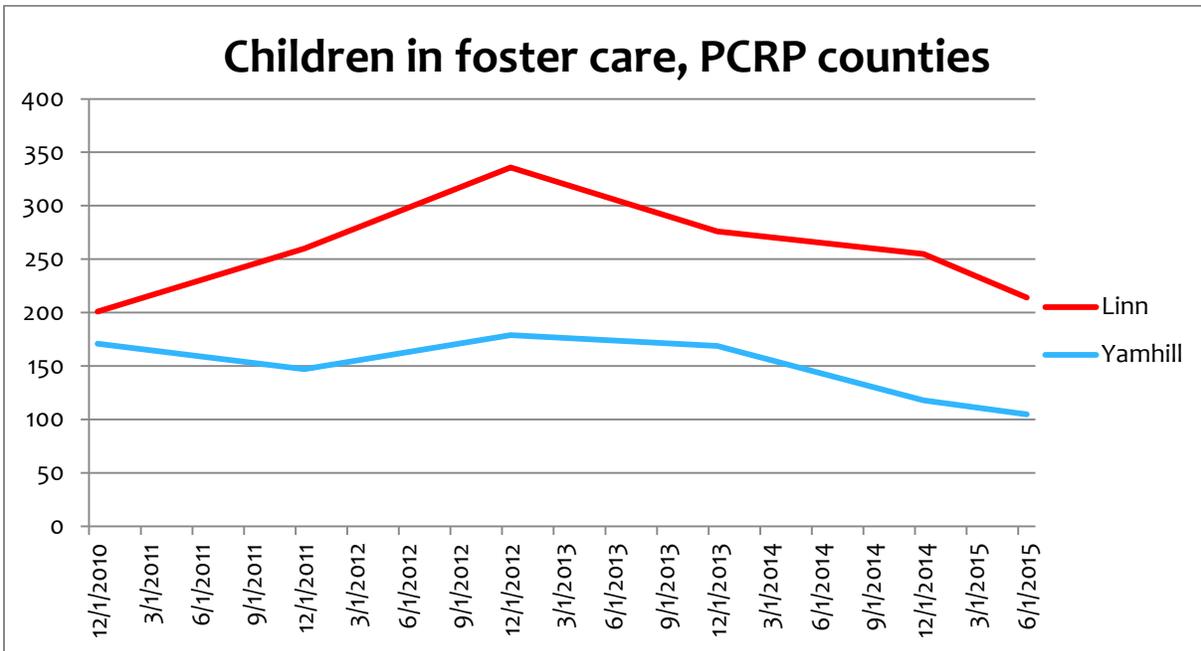
*Explanation:* According to Partners for Our Children, a Washington state research and policy organization, jurisdictions that want to improve parental representation and potentially shorten the time children are in foster care should consider a program focused on improved legal representation similar to Washington's parent representation program.<sup>42</sup> Reducing the use of foster care is a goal of the Parent Child Representation Program.

*Data:* Across the state, the number of children in foster care has been steadily declining from 2010 (8722 children in care on December 31, 2010) to June, 2015 (7572 children in care on June 30, 2015). From 2013-2014, the number of children in foster care decreased by 4.33%, and from January 2015-June 2015, there was an increase of .44%.

<sup>41</sup> Data source: Oregon child welfare data set report CM.02 Count of Children in Foster Care by Placement Type-Last Day of Period, [https://rom.socwel.ku.edu/Oregon\\_Public/MyReports.aspx](https://rom.socwel.ku.edu/Oregon_Public/MyReports.aspx).

<sup>42</sup> Courtney, Hook & Orme, *supra n.2*.

In Linn and Yamhill counties, the number of children in care has been declining since the end of 2012. On December 31, 2012, there were 336 children in foster care in Linn County and 179 in Yamhill County. By June 30, 2015, there were 214 children in foster care in Linn County and 105 in Yamhill. Although the number of foster children had been declining even prior to the start of the Parent Child Representation Program, the *rate* of reduction has increased since the PCRCP began and, the rate of reduction has outpaced the statewide rate. The average rate of reduction in children in foster care for PCRCP counties was 19% in 2014 and 13% for the first six months of 2015. In contrast, the number of children in foster care statewide decreased by 4.33% in 2014 and increased by .44% between January 2015 and June 2015. The graph below reflects the number of foster children in Linn and Yamhill counties over the past 5 years.



## II. Indicator: Client satisfaction

*Measure:* Percentage of former PCRCP clients who report overall satisfaction with the representation provided by their attorney.<sup>43</sup>

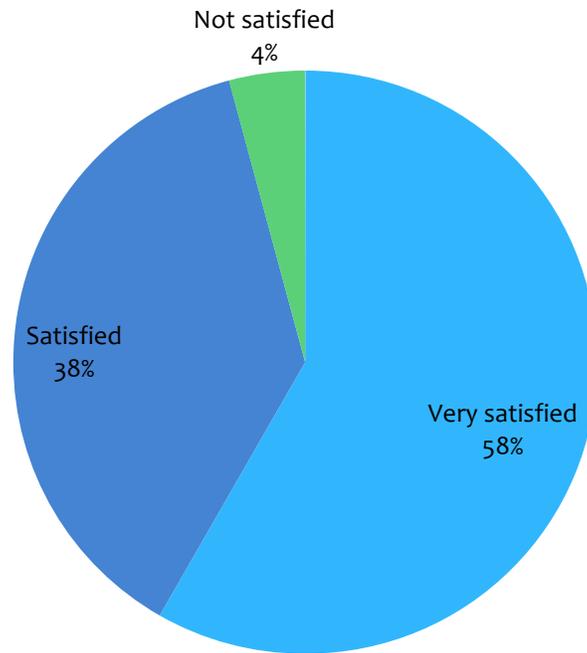
*Explanation:* Client satisfaction, trust and participation are important elements of any successful legal representation. Without these elements, there is a high probability that the client will not fully cooperate with or confide in his or her attorney and could jeopardize the effectiveness of the client's defense.<sup>44</sup> Client satisfaction is an important component in assessing attorney competence and effectiveness. Within the PCRCP, an attempt is made to contact each former client regarding their experience.

*Data:* Former clients are asked questions related to attorney responsiveness, thoroughness, communication, and investigation. Client satisfaction surveys began in April 2015 and, as of September 2015, 24 former clients have completed the survey with the majority reporting being very satisfied with the quality of representation.

<sup>43</sup> Data source: PCRCP client satisfaction survey.

<sup>44</sup> Washington State University, *Hamilton County Customer Satisfaction Pilot Project* (May 31, 2010), [http://www.americanbar.org/content/dam/aba/events/legal\\_aid\\_indigent\\_defendants/2014/ls\\_sclaid\\_3d\\_%20janet\\_moore\\_indig\\_def\\_ref\\_proj.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_sclaid_3d_%20janet_moore_indig_def_ref_proj.authcheckdam.pdf).

## Overall client satisfaction



Alex Bassos  
Director of Training  
and Outreach  
Metropolitan Public  
Defender

# Holistic Needs Checklist

## Basic Needs

- Immediate Shelter
- Stable Housing
- Food
- Clothing/Coats/Boots
- Safety (DV Victim, e.g.)
- Identification
- Shower
- Transportation
- A Dependent Is Stranded
- A Pet Is Stranded
- Employer Needs to Be Called
- School Needs to Be Called
- 

## Treatment Needs

- Medical Issues
  - Pregnant
  - On Meds
- Drug/Alcohol
- Mental Disorder/Cognitive Issues
  - Aid and Assist
  - Defenses
  - Refer to Services
  - Needs Medications
- Gambling

## Immediate Investigation Needs

- Pics of Injuries
- Video That Might Disappear
- Witness That Might Disappear
- Evidence That Might Disappear

## Legal Needs

- Immigration
- Parent Representation (i.e. has kids)
- On Probation/Parole
- Lives/Works Out of State
- Eviction (or other legal housing need)
- Restraining Order Hearing
- Property (Forfeiture/Evidence/Jail Property)
- Child Support
- Garnishment of Wages
- Out of State Case/Warrant
- Out of County Case/Warrant
- Screen for Sex Offender Registration Relief
- Vehicle Impounded
- Screen for Administrative Appeal
  - Gang Designation
  - Tri-Met Exclusion
  - DUI license hearing
- Suspended License
- Preservation of Lawsuit against city/police
- Bail Forfeiture
- Violations Open or Recently Defaulted
- 

## Possible Accommodations Needed

- Disability
  - Hearing
  - Vision
  - Physical
  - Learning/Cognitive
  - Mental Illness
- Needs Interpreter
- Literacy

## Is Client:

- A Veteran
- A Registered Sex Offender
- A Sexual Assault or DV Survivor
- 

## Benefits Needed

- OHP/Cover Oregon
- Food Stamps
- SSD/SSI
- Obamaphone
- Honored Citizen Pass
- 

## Priority Needs

- 1.
- 2.
- 3.

- Client is Receiving Services
- Caseworker to contact
- Records to Get

# Pre-Entry Program

## Reducing Barriers to Re-Entry Before Incarceration

**Mackenzie Shearer (Tulane Law '18) & Josh Looney (Harvard Law '18)**  
**with Alex Bassos, Director of Training and Outreach**  
**Metropolitan Public Defender**  
**Portland, Oregon**

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## INTRODUCTION

The goal of the Pre-Entry Program is to prepare our clients who are entering a long term of incarceration for their eventual re-entry to the community. Upon re-entry, our clients often have difficulty securing housing and employment with a felony conviction, an accumulation of debt, and bad credit. By interviewing them before incarceration as close to sentencing as possible, we can uncover specific obligations to suspend or defer while the client is incarcerated. Taking care of these obligations before incarceration can reduce clients' accumulation of debt, improve their credit, and reduce the number of barriers to a successful re-entry to the community. We have developed a Pre-Entry Checklist of these obligations to discuss with clients before incarceration.

The Pre-Entry Program's ideal client is one who faces a long term of incarceration (>1 year) and is currently in custody awaiting a plea deal or sentencing. However, we can easily modify items on the Pre-Entry Checklist for clients who are out of custody, who have already been sentenced, who have recently been transferred to prison, or who face shorter terms of incarceration (<1 year). Attorneys, legal assistants, interns, or a combination of the three could implement this program.

This binder includes (a) a checklist of obligations we may suspend/defer/etc. for clients, (b) steps to take before interviewing clients, (c) an outline of questions for interviewing clients, (d) an explanation of such obligations, (e) other considerations that may be added to the Pre-Entry Checklist in the future, and (f) a number of common forms required to suspend/defer/etc. such obligations. The Pre-Entry Checklist of obligations is nowhere near exhaustive. We should include additional pre-entry obligations we discover and continually update and refine the checklist.

This program begins with a brief scan through the client's files in Defender Data and/or eCourt. Record whatever pertinent information you can gather from these files, such as whether the client is married or has children, whether the client is an immigrant or

a veteran, whether the client owes money to the court, or anything else you feel would help you understand the totality of the client's circumstances.

The next step is interviewing the client. This may be an in-person interview at the jail or a phone interview. Explain the purpose of the Pre-Entry Program to the client and provide an example of one obligation on the checklist (e.g., "For example, if you are paying rent we can try to negotiate a settlement with your landlord to avoid an eviction on your record"). Use the **Interview Questions** form (or something similar) to discover which obligations we can address pre-entry. Ensure that the client understands the types of obligations and ask if there is anything else the client would like to take care of. We should update the Pre-Entry Checklist and the Interview Questions form to reflect new obligations we discover through these interviews.

If the client needs to file any forms, fill out as much information as possible during the initial interview. Some forms may require copies of court orders, previous tax returns, recent pay stubs, proof of insurance/disability, etc. These may take some ingenuity to acquire. Gather as much information as possible to help you to acquire these items and start making some phone calls. If the form requires the client's signature, you will likely need to visit the jail to get the client's signature. Furthermore, if you need the address of the correctional facility and/or the client's prison identification number, you may need to wait until after sentencing to fill out that field and send the form. Keep the form in a safe place and set a reminder.

After the interview, check the **Explanations** section of this binder if you have questions regarding how to deal with the client's specific obligations. Update this section frequently as we learn more about how to best implement the pre-entry program. Follow up with the client after suspending or deferring her obligations. Explain where you were successful and where you were unsuccessful.

## PRE-ENTRY CHECKLIST

- Notify Client's **Employer**
  - Avoid poor work references in the future
- Notify Client's **Bank/Financial Accounts**
  - Savings/Checking Accounts
  - Credit Cards
  - Safe Deposit Boxes
- Notify **Court Collections**
  - Inquire about outstanding balances
    - Multnomah Co.: (503) 988-3957
    - Washington Co.: (503) 846-8888
  - Request a hold on client's account
- Avoid an **Eviction**
  - Contact client's renter and arrange settlement
- Cancel Client's **Utility Accounts**
  - Electric/Gas/Water
  - Internet/Cable
  - Cell Phone
- Cancel Any Other Accounts
  - Monthly Memberships (Gym, Netflix, etc.)
  - Post Office Box
- Put a Hold on **Child Support**
  - *CSF 01 0100: Uniform Income and Expense Statement*
    - OAR 137-055-3300: Support order may be modified if the client will be incarcerated for more than six months and gross income is less than \$200 per month
  - *CSF 01 0142A: Request for Review – Modification or Termination*
- Contact **Veterans Association**
  - Notify Veterans Justice Outreach (VJO) Program
    - Portland: (503) 721-1025
- Notify Any Other Government Assistance Programs
  - Social Security, Unemployment, SNAP/TANF, etc.
- Avoid **Default or Collections**
  - Student Loans
    - *Income-Driven Repayment Plan Request*
      - Government backed loans *only*
  - Private Loans
    - Extended repayment plan/loan consolidation
    - Deferment/Forbearance
- Protect **Identification Documents**
  - Driver's license, SS card, birth certificate, immigration papers, children's documents, etc.

## BEFORE CALLING

1. Check eCourt Warrant Search
  - a. Are there any new warrants?
  - b. Are there any probation violations?
2. Check eCourt Calendar
  - a. Are there any upcoming appointments or appearances to cancel?
3. Check OJD ePay
  - a. Are there any outstanding balances?
4. Check Discovery and Notes in client's case file on Defender Data:
  - a. Is the client a citizen?
  - b. Is the client a veteran?
  - c. Was the client employed before the arrest?
  - d. Does the client have any children?
  - e. Is the client married?

## INTERVIEW QUESTIONS

1. Do you have a job? Y / N
  - a. Where? \_\_\_\_\_
  - b. Has anyone contacted your employer? Y / N
    - i. Would you like me to contact him/her? Y / N
    - ii. What's your employer's name? \_\_\_\_\_
    - iii. Do you know how I could contact them? \_\_\_\_\_
2. Do you have any bank accounts? Y / N
  - a. Has anyone notified your bank? Y / N
  - b. Checking/Savings/Safe Deposit Box? Y / N
    - i. Where? \_\_\_\_\_
  - c. Credit Cards? Y / N
    - i. Where? \_\_\_\_\_
3. Do you owe any money to the court? Y / N
  - a. Has anyone contacted the court about your payments? Y / N
4. Where are you living? \_\_\_\_\_
  - a. Who do you live with? \_\_\_\_\_
  - b. Are you paying rent? Y / N
    - i. Has anyone contacted your landlord? Y / N
      1. Do you know how I could contact them? \_\_\_\_\_
5. Do you need to cancel any utility accounts in your name? Y / N
  - a. Gas/Electric/Water? Y / N
    - i. Company? \_\_\_\_\_

- b. Internet/Cable? Y / N
  - i. Company? \_\_\_\_\_
- c. Cell Phone? Y / N
  - i. Company? \_\_\_\_\_
- 6. Do you pay any other bills weekly/monthly/yearly? Y / N
  - a. Monthly Memberships (Gym, Netflix, etc.)? Y / N
    - i. Where? \_\_\_\_\_
  - b. Post Office Box? Y / N
    - i. Where? \_\_\_\_\_
- 7. Do you pay child support? Y / N
  - a. *Fill out Uniform Income and Expense Statement and Request for Review – Modification or Termination*
- 8. Are you a veteran? Y / N
  - a. Do you receive veteran's benefits? Y / N
- 9. Do you receive any other government assistance or benefits (SNAP, SSI, etc.)? Y / N
  - a. What kind? \_\_\_\_\_
- 10. Do you have any loans? Y / N
  - a. Student Loans? Y / N
    - i. Are they government-backed? Y / N
      - 1. *Fill out Income-Driven Repayment Plan Request*
  - b. Do you have any private loans? Y / N
    - i. Where? \_\_\_\_\_

11. Do you know where all of your identification documents are (driver's license, birth certificate, Social Security card, immigration papers, etc.)? Y / N

a. Do you know who is going to hold on to those for you? Y / N

12. Is there anything else that we could take care of for you at this point? Y / N

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## EXPLANATIONS

### Notifying Employer

Often when clients are arrested no one notifies their employer, leading to poor work references upon their re-entry. With the number of barriers already preventing convicted felons from attaining gainful employment, a bad reference can seriously worsen their chances. Ask the client if they would like us to contact their employers. If so, call the employer and explain the client's current situation and why the client felt it important for us to call.

### Notifying Bank/Financial Accounts

For clients facing long terms of incarceration, bank accounts often get neglected. The remedies available will depend on the bank. Call the client's bank and discuss the best course of action to avoid closing accounts or sending debt to a collection agency.

### Notifying Court Collections

If the client owes money to the court and can no longer make payments while incarcerated, call the court to see if we can avoid having the balance sent to an outside collection agency. When a balance is sent to an outside collection agency, the court imposes a "referral fee" that amounts to 28% of the balance at the time of referral. While we have not been able to test whether the collections department can place a hold on the client's account, we ought to explore our options. Unpaid balances to the court can prevent the client from reinstating their driver's license upon re-entry, adding yet another barrier to attaining employment.

### Avoiding an Eviction

Finding housing is another common difficulty that convicted felons face upon re-entry. If the client is in a rental agreement when they are arrested, we ought to contact their landlord and attempt to negotiate a settlement. A formal eviction is neither ideal for the client or for the landlord. The client does not want an eviction on their record and the landlord does not want to go through a lengthy eviction process. A settlement is in everyone's best interest. Ask the client if they have

notified their landlord and if they are comfortable with us negotiating a settlement on their behalf. Even if a settlement is not possible, notifying the landlord of the client's situation could help to avoid a poor housing reference upon re-entry.

### Canceling Utility Accounts

If the client has utility accounts in their name, call the utility company and cancel the account to avoid future charges, accumulation of debt, and a referral to collections. While we are able to cancel the account for the client, we are not able to transfer it to another person. If the client lives with other people who rely on those utilities, contact them and ensure that they switch the account themselves. This may require a follow-up call to the utility company to verify that the account is no longer in the client's name.

### Canceling Other Accounts

Ask the client if they pay any other membership fees. It is easy for clients to overlook their Netflix memberships, but protecting their credit ratings is crucial for successful re-entry. The process for cancelling these accounts will likely mirror that for cancelling utilities.

### Placing a Hold on Child Support

Suspending the client's child support payments during incarceration is as simple as filing a form, but failing to do so can be devastating for their re-entry. Child support payments cannot be suspended retroactively and the accumulation of back payments over the term of incarceration can even become grounds for a new criminal charge. It is crucial that we place a hold on the order before the client enters incarceration. There are two forms to file to suspend the client's child support order:

- (1) *CSF 01 0100: Uniform Income and Expense Statement*
- (2) *CSF 01 0142A: Request for Review – Modification or Termination*

These forms require a significant amount of information from the client. Fill out as much of the form as possible during the initial interview. Whenever possible, get the client's signature before he or she is transferred to the prison. Since these forms

require the correctional facility's address and the client's inmate number, they cannot be sent until after sentencing. Keep them somewhere safe and set some sort of reminder to send these forms when we can fill out the address and inmate number fields.

### **Contacting Veterans Association**

If the client is a veteran, contact the local Veterans Justice Outreach (VJO) specialist. The VJO program ensures that eligible, justice-involved veterans have timely access to Veterans Health Administration (VHA) services. VJO specialists provide direct outreach, assessment and case management for justice-involved veterans in local courts and jails and work as a liaison with local justice system partners.

### **Notifying Other Government Assistance Programs**

Ask the client if they receive any other type of government assistance (SNAP, TANF, SSI, unemployment, disability, etc.) and whether they have notified those agencies. Contact these agencies and notify them of the client's upcoming incarceration. Some benefits may need to be transferred to family members while some need to be cancelled altogether.

### **Avoiding Default or Collections**

If the client has student loans, ask whether the loans were government-backed or through a private lender. If the client doesn't know, you may need to contact the school to find out. If the loans are government-backed, fill out the *[Income-Driven Repayment Plan Request](#)* during the initial interview. This form needs to be signed by the client before it can be sent to the lender. In order to find out where to send the request, call the client's school and ask for a mailing address.

### **Protecting Identification Documents**

It is very important that the client has decided where to store their identification documents. It might be beneficial to keep identification documents with someone the client trusts. Although not common, there have been instances of corrections

officers stealing inmates' identities from identification documents kept at correctional facilities. Consider this on a case-by-case basis. Wherever the client decides to keep their documents, make sure that they know where the documents are.

## OTHER CONSIDERATIONS

We felt more research and experience was needed before including the following items on the Pre-Entry Checklist. We leave these for future Pre-Entry Program workers to research and consider.

### Power of Attorney

We considered advising clients to delegate powers of attorney to a caretaker – a close family member or a trusted friend – while they are incarcerated. However, it is plausible that a client may delegate these powers to someone untrustworthy or to someone whose relationship with the client may change during the client’s incarceration. Given the significance of delegating powers of attorney, we were hesitant to include this in the Pre-Entry Checklist. Rather, power of attorney should be considered on a case-by-case basis and only recommended to clients that would have a sturdy and healthy relationship with their caretaker.

In the **Common Forms** section, we have included three example forms for delegating specific powers of attorney: (1) a general power of attorney, (2) a vehicle power of attorney, and (3) a medical power of attorney. These forms are only examples and may be edited to suit the client’s specific needs as you see fit.

A client may want someone to have legal care of their property or belongings, or to pursue legal claims on their behalf, where it may be useful to delegate *general* power of attorney to a reputable caretaker. The general power of attorney form at the back of this binder includes an extensive list of powers that the client may pick and choose to delegate. Similarly, a client may wish to delegate power of attorney for their vehicle, allowing a caretaker to act on the client’s behalf in matters involving the Department of Motor Vehicles. For clients with significant medical needs, it may be useful to delegate medical power of attorney in case of a medical emergency.

### Delegation of Parental Authority

For clients that have children in their custody, we sometimes recommend that they sign a delegation of parental authority. Similar to a power of attorney, a delegation of parental authority grants a caretaker specific rights regarding the care of the client’s children. However, a delegation of parental authority grants the caretaker

very limited rights such as signing the children up for school and authorizing medical decisions. A delegation of parental authority is valid for six months and can be revoked at any time.

Because a delegation of parental authority does not necessarily improve the client's chances of a successful re-entry, we did not add this to the Pre-Entry Checklist. However, if you are working with a client that has some parental rights over their children then you may consider discussing a delegation of parental authority for peace of mind.

## COMMON FORMS

### Child Support

*CSF 01 0100: Uniform Income and Expense Statement*

*CSF 01 0142A: Request for Review – Modification or Termination*

### Student Loans

*Income-Driven Repayment Plan Request*

### Powers of Attorney

*General Power of Attorney*

*Medical Power of Attorney*

*Vehicle Power of Attorney*

### Parental Authority

*Delegation of Parental Authority*

Speaker  
Biographical  
Information

Janet Moore teaches Criminal Law, Criminal Procedure, Evidence, and Civil Rights Litigation at the University of Cincinnati College of Law. She received J.D. and M.A. (Philosophy) degrees from Duke University and a M.A. in Divinity from the University of Chicago. At Duke, she served as Editor-in-Chief of *Law & Contemporary Problems* and, after graduation, clerked for the Hon. J. Dickson Phillips, Jr., on the Fourth Circuit Court of Appeals. Her scholarship is forthcoming or has been published in journals such as *Washington Law Review*, *Brooklyn Law Review*, *Utah Law Review*, and *Behavioral Sciences & the Law*. Professor Moore's scholarship identifies conditions that empower stakeholders to obtain greater transparency and accountability from carceral systems. Her work is informed by critical theory as well as long experience in capital defense and criminal justice reform research and advocacy. The impact of her scholarship is evident in her work co-convening the Indigent Defense Research Association, a national organization of indigent defenders, empirical researchers, and teachers who use data to improve public defense, and service as an advisor on empirical research for the Indigent Defense Commissions of Michigan and Texas. Professor Moore's scholarship also led to her roles co-chairing a national task force on discovery reform, drafting a model criminal discovery reform bill, and serving as an advisor during the drafting and passage of the groundbreaking Michael Morton Act, which reformed criminal discovery procedures in Texas. Awards include a 2007 Open Society Institute Senior Justice Advocacy Fellowship, which focused on reforming indigent defense systems in Ohio and led to Professor Moore's appointment to the Ohio Public Defender Commission. Additional awards include two University of Cincinnati College of Law Goldman Prizes for Teaching Excellence (2012 and 2015) and a Junior Scholar Paper Competition Award sponsored by the Criminal Justice Section of the Association of American Law Schools.

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Dr. Christopher Campbell

*Christopher M. Campbell*, Ph.D. is an Assistant Professor for the Department of Criminology and Criminal Justice at Portland State University. Dr. Campbell earned his doctorate in Criminal Justice and Criminology from Washington State University. At Portland State University, Dr. Campbell teaches courses on research methods, juvenile delinquency, and community-based treatment, among others. His research emphasizes the use of mixed (quantitative and qualitative) methods in evaluation and explanatory research related to evidence-based practices. Dr. Campbell's most recent work has focused on the causes of crime, identifying risk factors for recidivism in community corrections, and examining client perceptions toward public defenders. Broadly, his work investigates the how mechanisms of procedural justice intersects with other processes of what is known to "work" in criminal justice. Dr. Campbell's work can be found in journals such as *Criminal Justice and Behavior*, *Behavioral Sciences and the Law*, and most recently *Criminology and Public Policy*.

Jeff Howes received his undergraduate degrees from Portland State University in 1990 and his JD from University of Oregon School of Law in 1995. He has worked for the Multnomah County District Attorney's Office for 21 years. Jeff has prosecuted nearly every type of criminal case – including spending 7 years prosecuting major felony domestic violence cases followed by 4 years in the child abuse unit. In 2009, Jeff worked with stakeholders in Multnomah County to start the county's Mental Health Court.

Since 2008, Jeff has been assigned as the office liaison to the Portland Police Bureau Cold Case Homicide Unit – successfully prosecuting cases that range from 12 to 40 years old. Jeff has served as an adjunct professor at Lewis and Clark Law School and has been a member of the Oregon Board of Bar Examiners for 10 years – twice yearly drafting and grading the bar exam taken by prospective Oregon lawyers.

In 2012, Jeff was appointed to serve as the First Assistant to Multnomah County District Attorney Rod Underhill.

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## Edward C. Monahan, Public Advocate



**Edward C. Monahan** began as a public defender in 1976. He was appointed Kentucky Public Advocate by the Governor September 1, 2008 to a four year term and reappointed to a second four year term September 2012. The Department of Public Advocacy (DPA) is the statewide public defender program under KRS Chapter 31 <http://www.lrc.ky.gov/KRS/031-00/CHAPTER.HTM> He is a member of the American Council of Chief Defenders (ACCD) and a member of its Executive Committee

(2008-present), chaired its Leadership and Education Committee (2008-2010) and chaired its Executive Committee (2010-2012). He chaired ACCD's Pretrial Release Workgroup that recommended ACCD's June 4, 2011 *Policy Statement on Fair and Effective Pretrial Justice Practices*

[http://www.nlada.org/Defender/Defender\\_ACCD/ACCDpretrialrelease](http://www.nlada.org/Defender/Defender_ACCD/ACCDpretrialrelease)

ACCD is a section of the National Legal Aid & Defender Association comprised of chief defenders from across the nation dedicated to securing a fair justice system and ensuring high quality legal representation for poor people who face loss of life, freedom or family. Monahan is a member of the National Association of Criminal Defense Lawyers and co-chairs its Committee on Pretrial Release Advocacy. Ed is a charter board member of the Kentucky Association of Criminal Defense Lawyers (1986 - present), was its president (2011) and chairs its Education Committee (2011-present), is past chair of the Kentucky Bar Association's (KBA) Criminal Law Section, was a member of the KBA Ethics Committee (2000-2007; 2008-2011). From 2004 - 2008, Monahan was Executive Director of the Catholic Conference of Kentucky serving as liaison to government and the legislature, and coordinating communications and activities between the church and secular agencies, and doing the public policy work for the Kentucky Catholic bishops on a variety of social justice areas including criminal justice, immigration, Medicaid, children's health insurance, restoration of voting rights for ex-felons, the death penalty. Monahan served as Deputy Public Advocate from 1996-2004 coordinating DPA's legislative efforts and was a public defender with the Kentucky Department of Public Advocacy from 1976 - 2004, representing capital clients at trial, on appeal, and in post-conviction in state and federal courts. He was co-counsel in *Gall v. Parker*, 231 F.3d 265 (6th Cir. 2000) and *Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1990) (en banc) both granting federal habeas relief to clients sentenced to death. Monahan was counsel in *Binion v. Commonwealth*, 891 S.W.2d 383 (Ky. 1995) where 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



[Ed Monahan, Ernie Lewis, and David Norat discuss the history of the DPA.](#) 

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." Ed grew up in Ludlow, Kentucky and is a 1976 graduate of Washington D.C.'s Catholic University of America's Columbus School of Law and a 1973 graduate of Thomas More College. He served as a Kentucky appellate defender from 1976-80. In 1980, he headed up DPA's Local Assistance Branch, which provided supervision of DPA trial representation services. From 1981 - 2001, he directed DPA's nationally recognized statewide public defender education and development program that features an annual conference, a newly-hired attorney education program, a week long litigation persuasion institute, quarterly leadership education for DPA's supervisors. Ed edited *The Advocate*, DPA's journal of education and research, from 1984 - 2004, and was vice-chair or co-chair of the National Legal Aid and Defender Association's training section from 1990 - 2004. His publications include:

- Criminal Defendant's Pretrial Discovery Right to a Lineup, Casenote, 24 Cath. U.L. Rev. 360 (1975)
- Deciding to Train for Quality Service: Quality is the Only Acceptable Standard, NLADA Cornerstone, Vol. 14, No. 3 (Fall 1992).
- 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).
- Excessive Workload ethics article co-authored with James J. Clark, MSW in ABA Ethics Manual for Public Defenders (1994). 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 (3d ed 2007)
- The Mental Health Expert: Eight Steps to Integrating a Specialist into Your Case, ABA Criminal Justice, Vol. 11, No. 2 (Summer 1996) at 2, 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) at 16, co-authored with James J. Clark, Ph.D.
- Boundaries Between Attorneys & Clients, NLADA Cornerstone, Vol. 19, No. 1 (Spring 1997) at 14.
- 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).
- At the Millennium Will We Be Settlers or Pioneers?, New York State Defenders Association's The Defender (July 1997) at 52.

- Strategic Planning for Defender Organizations: Creating Our Future the Common Sense Way, NLADA Cornerstone, Vol. 20, No. 1 (Spring 1998) at 4.

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Amy Miller serves as Deputy General Counsel at the Office of Public Defense Services. In this role, she manages the Parent Child Representation Program and is responsible for monitoring and improving the quality of trial court representation of parents, children and youth in juvenile court. She graduated with Honors from Georgia Tech in 1997 with a Bachelors of Industrial Engineering and earned her J.D. in 2006 from Lewis and Clark Law School. Prior to her role at OPDS, she represented parents and children in dependency and delinquency cases in circuit and tribal court. When not at the office she is on her paddleboard, snowboard, or at the top of a mountain.

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**Shannon Dennison.** *Assistant Attorney in Charge - Department of Justice, Civil Enforcement Division Child Advocacy Section, Salem.*

Ms. Dennison spent 10 years as a public defender with Legal Aid Services of Oregon/Native American Program representing parents and children in juvenile dependency cases. She is currently the Assistant Attorney in Charge for the Salem Child Advocacy Section in the Civil Enforcement Division of the Oregon Department of Justice. She advises and appears on behalf of the Oregon Department of Human Services, Child Welfare.

Alex Bassos, Director of Training and Outreach, Metropolitan Public Defender

Alex has been a public defense attorney since he graduated from Indiana University in 1995. He is the Director of Training and Outreach at the Metropolitan Public Defender and an adjunct professor at Lewis and Clark Law School. In addition to developing the training, student and volunteer programs, he is in charge of all of MPD's community and social service grants, including projects involving veterans, homelessness, poverty reduction, immigration and reentry. Alex is on the executive and steering committees of the National Association of Public Defense. He is also the author of Mental Health and Criminal Defense and an expungement guide.