IN THE SUPREME COURT OF PENNSYLVANIA

No. 57 MAP 2015
No. 58 MAP 2015

ADAM KUREN and STEVEN ALLABAUGH,
on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants

v.

LUZERNE COUNTY of the Commonwealth of Pennsylvania and
ROBERT C. LAWTON, County Manager, in his official capacity,

Defendants-Appellees

BRIEF FOR APPELLANTS

On Appeal from the October 14, 2014 Order of the Commonwealth Court at Nos. 2072 C.D. 2013 and 2207 C.D. 2013 (consolidated), Reargument Denied, December 2, 2014, Affirming the October 22, 2013 Judgment of the Court of Common Pleas of Luzerne County, No. 04517, April Term, 2012

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STATEMENT OF JURISDICTION

The Court has jurisdiction of this appeal pursuant to 42 Pa. Cons. Stat. § 724(a).

ORDER IN QUESTION

The October 14, 2014 Order of the Commonwealth Court affirming the Order of the Court of Common Pleas sustaining preliminary objections to Appellants' Complaint, reported at Flora v. Luzerne Cnty., 103 A.3d 125 (Pa. Commw. Ct. 2014) (attached as App. B) ("And now . . . the order of the Luzerne County Court of Common Pleas, dated October 22, 2013, is hereby affirmed.").

The Commonwealth Court denied Appellants' Petition for Reargument on December 2, 2014, available at 2014 Pa. Commw. LEXIS 549 (Pa. Commw. Ct. Dec. 2, 2014), and Appellants timely filed this appeal.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

In reviewing a trial court's grant of preliminary objections, the Court's standard of review is de novo and its scope of review plenary. Ciamaichelo v. Independence Blue Cross, 909 A.2d 1211, 1216 n.7 (Pa. 2006). The Court must accept as true all well-pleaded, material, and relevant facts alleged in the complaint, and every inference that is fairly deducible from those facts. Id. Preliminary objections may be sustained only when, based on the facts pleaded, it is clear and free from doubt that the complainant will be unable to prove facts legally sufficient to establish a right to relief. Id.

STATEMENT OF THE QUESTIONS INVOLVED

1. In a matter of first impression, do appellants state a claim for constructive denial of counsel under the Sixth and Fourteenth Amendments to the United States Constitution, and Article 1, Section 9 of the Pennsylvania Constitution, based on chronic and systemic deficiencies in the operation of Luzerne County‘s Office of the Public Defender that deprive them and the class they seek to represent of their right to effective assistance of counsel?

2. Do appellants state a claim of mandamus to compel appellees to provide adequate funding for Luzerne County’s Office of the Public Defender, as required by the Commonwealth’s Public Defender Act, 16 Pa. Stat. §§ 9960.1–9960.13 (hereinafter the "Public Defender Act")?

STATEMENT OF THE CASE

I. Form of Action and Procedural History

This appeal arises from the Commonwealth Court’s affirmance of the Luzerne County Court of Common Pleas’ dismissal of a class action complaint that seeks to remedy violations of indigent defendants’ right to counsel guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and by Article 1, Section 9 of the Pennsylvania Constitution. In the alternative, Appellants seek a writ of mandamus that would compel Luzerne County to meet its statutory obligation under the Public Defender Act “to provide adequate representation” for clients of the County’s Office of the Public Defender (“OPD”).

On April 10, 2012, Al Flora, Jr. ("Flora"), the former acting Public Defender of Luzerne County, and three indigent criminal defendants who had been denied representation by Luzerne's chronically underfunded OPD filed a Class Action Complaint. (R. 7a-11a.) The Complaint alleged deficiencies in the OPD's funding and operations that prevented the plaintiff class from being represented in a manner consistent with constitutional and ethical obligations. (R. 12a-40a.)

The Appellee-Defendants are Luzerne County ("County") and its County Manager, Robert C. Lawton ("Lawton"), who is named in his official capacity. (R. 854a at ¶¶ 12-13.) As Chief Executive Officer for the County's government (Id.), Lawton is responsible for the day-to-day functions of County government, including budgeting matters and allocation of County resources. (Id.)

Flora and the original class plaintiffs filed a motion for a peremptory writ of mandamus and for a preliminary injunction on April 12, 2012, seeking the resources necessary to correct the deficiencies in the OPD. (R. 134a-40a.) The Honorable Joseph Augello held a hearing on the motion on May 10, 2012. (R. 722a.) On May 16, 2012, after the preliminary injunction hearing, but before issuing its ruling, the trial court ordered the parties to engage in mediation. (R. 575a.) The County filed preliminary objections to the original Class Complaint, which were overruled in their entirety on May 24, 2012. (R. 583a-84a.)

On June 15, 2012, Judge Augello entered an Order and Opinion granting the motions for a peremptory writ of mandamus and for a preliminary injunction, (R. 719a-21a), and ordered the following:

> (a) Defendants shall not prevent the public defender from filling vacant positions;
>
> (b) Defendants shall review the operations and staffing of the county public defender's office and provide a plan to meet the constitutional obligations for indigent representation in accordance with the principles set forth in the foregoing opinion;
>
> (c) Defendants shall submit a report to this court within a reasonable time outlining its plan to meet its constitutional obligations in regard to the operation, staffing and expenses of the office of public defender;
>
> (d) The defendant, county manager, is directed to provide adequate office space in order to permit confidential communications between assistant public defenders and indigent criminal defendants within 30 days of the date of this order; and
>
> (e) The office of public defender is <u>not</u> permitted to refuse representation to qualified indigent criminal defendants.

(R. 719a-20a) (emphasis in original). In addition, Judge Augello ordered the following with regard to the individual plaintiffs:

> (a) defendants shall allocate sufficient funds to allow for the provision of private counsel to represent the named plaintiffs in their ongoing criminal proceedings; or
>
> (b) provide representation to the named plaintiffs in their ongoing criminal proceedings through an augmented office of public defender; or
>
> (c) secure pro bono counsel as available or conflict counsel if current case load assignments permits to represent the named plaintiffs in their ongoing criminal proceedings; and

(d) the office of public defender is not permitted to refuse representation to qualified indigent criminal defendants.

(R. 721a) (emphasis in original).

Mediation failed and the County produced neither the plan nor the report it had been ordered to prepare. Instead, on January 29, 2013, the County petitioned the court for a trial date. (R. 791a-95a.) On March 26, 2013, Judge Augello scheduled trial for June 24, 2013. (R. 807a-09a.)

The County's Board of Commissioners voted to replace Flora as Chief Public Defender in April of 2013.[1] On May 1, 2013, the plaintiffs filed a motion for leave to file an Amended Class Action Complaint. (R. 830a-33a.) In the new pleading, among other changes, class plaintiffs were substituted and allegations were changed where necessary to acknowledge developments in the case. (R. 850a-86a). However, the Amended Complaint's substantive allegations and requested relief remained essentially the same.[2] (Compare R. 47a-48a with R. 885a.) After argument, the trial court granted plaintiffs' motion to file the

[1] Flora filed an action in federal district court under the Civil Rights Act, 42 U.S.C. § 1983, claiming a violation of his right to free speech by this retaliatory dismissal. The case was dismissed by the district court but the Third Circuit Court of Appeals reversed, finding sufficient allegations to support the First Amendment claim. The matter was remanded to the district court where it is currently in litigation. See Flora v. Cnty. of Luzerne, 776 F.3d 169 (3d Cir. 2015).

[2] See Flora v. Luzerne Cnty., No. CIV.A. 3:13-1478, 2013 WL 4520854, at *3-4 (M.D. Pa. Aug. 26, 2013) (removal of appellants' case from state court was invalid because "the core claim of the complaint has not changed, that is that underfunding of the OPD is resulting in violations of indigent individuals' rights under the United States and Pennsylvania Constitutions").

Amended Class Action Complaint on May 7, 2013, but without prejudice to the County's filing preliminary objections. (R. 846a-47a.)

On May 15, 2013, Flora, appellants Kuren, Allabaugh and a third named plaintiff filed the Amended Class Action Complaint. (R. 850a-86a.) Now removed from office, Flora filed in his individual capacity. Appellants Kuren and Allabaugh, along with Charles Hammonds[3] and Joshua Lozano, sought to represent the revised class of OPD clients. Each of these plaintiffs had been deemed qualified for OPD representation and each had been assigned an OPD attorney. (R. 853a.) The class alleged that the OPD was unable to fulfill its constitutional role with regard to representing those and other OPD clients in that: (1) OPD was unable to provide representation at most preliminary arraignments and at various critical points of the prosecution, (R. 865a at ¶¶ 48-49; R. 866a at ¶ 53); (2) OPD could not "provide confidential counsel regarding [plaintiffs'] agreement to plead guilty," (R. 870a at ¶ 64); (3) OPD lawyers were unable to investigate cases or even confer with their clients (R. 864a at ¶ 45); and (4) that OPD attorneys often missed court appointments or showed up unprepared. (R. 867a at ¶ 55.)

[3] Charles Hammonds was included in the Original Complaint filed in this matter as an individual plaintiff. (R. 852a at ¶ 5 n. 1.) The other two plaintiffs named in the Original Complaint, with their permission, were dismissed. Appellants were unable to confer with Mr. Hammonds regarding dismissal of his claims despite counsel's best efforts. (Id.) The Amended Class Action Complaint proposes a modified plaintiff class and a class definition that does not necessarily include Mr. Hammonds. (Id.)

On May 31, 2013, appellees removed the case to the United States District Court for the Middle District of Pennsylvania, and moved to dismiss the Amended Complaint. Flora, 2013 WL 4520854, at *1. On June 12, 2013, plaintiffs moved to remand, and opposed the motion to dismiss. Id. On August 16, 2013, the motion to remand was granted, and the matter was returned to the Luzerne County Court of Common Pleas. Id.

On September 11, 2013, the County filed preliminary objections to the Amended Complaint and a motion to disqualify plaintiffs' counsel. On October 21, 2013, the court denied the County's motion to disqualify, and on October 22, 2013, the court sustained certain of the County's preliminary objections and dismissed the Amended Class Complaint. (R. 1085a; App. A.) Appellants filed a notice of appeal on November 20, 2013, and, on December 3, 2013, the County filed a cross-appeal from the order denying disqualification. (R. 1088a-99a.)

The Commonwealth Court affirmed the trial court's dismissal, holding that:

> 1) the indigent plaintiffs' constitutional claims for constructive denial of counsel should be dismissed because the federal and state constitutions do not recognize a pre-conviction right-to-counsel remedy under the circumstances alleged in the Amended Complaint;
>
> 2) the indigent plaintiffs lacked standing to pursue their mandamus claim because the claim was barred as a matter of law. The Court also held that Flora's mandamus claim did not meet the legal standard for a viable mandamus action; and

> 3) Flora was without personal standing to pursue his mandamus claim once he was replaced as Luzerne's Public Defender and that he did not meet the prerequisites for taxpayer standing.

(See App. B.) The Commonwealth Court declined to rule on the County's cross-appeal on the disqualification ruling. Petitioners applied for reargument before the panel or before the Commonwealth Count *en banc*; that application was denied on December 2, 2014. (See App. C.)

Flora and appellants petitioned this Court for allowance of an appeal. The petition was granted with regard to two of the three questions on which appellants sought review.[4]

II. Statement of Facts

A. Parties.

This action was commenced by three individual plaintiffs and by Al Flora, Jr. ("Flora"), the former acting Public Defender of Luzerne County. Flora served as the County's Chief Public Defender from 2010 to 2013. (R. 851a at ¶ 3; 853a at ¶ 7; 856a-57a at ¶ 22.) Flora initiated this litigation while he was still in office as Chief Defender, seeking a writ of mandamus that would have compelled the County to provide the resources OPD needed to provide constitutionally adequate representation to its clients. (R. 862a at ¶ 41.)

[4] This Court declined to hear Flora's appeal on the issue of his standing to continue as a party to this litigation. (See Order Granting Petition for Allowance of Appeal, Flora v. Luzerne Cnty., No. 951 MAL 2014 & 952 MAL 2014) (Pa. June 30, 2015)). The Court has also ordered a change in the caption to reflect this development.

At the time the Amended Class Action Complaint was filed, appellants Adam Kuren and Steven Allabaugh were facing criminal charges in Luzerne County and were represented by the OPD. (R. 853a-54a at ¶¶ 8-11.) Appellants brought claims in mandamus and under the Pennsylvania and United States Constitutions for equitable relief: specifically, they sought an "increase [in] . . . OPD's funding to such a level that will permit the OPD to provide constitutionally adequate representation for them and for all similarly situated individuals." (R. 852a at ¶ 6.) They sought certification of a class comprised of "all indigent adults in Luzerne County who are or will be represented by the Office of the Public Defender from this point until the Office of the Public Defender has the funding and resources necessary to enable it to meet ethical, legal, and constitutional standards of representation." (R. 851a-52a at ¶ 4.)

B. The Long-Standing Deficiencies in the Luzerne OPD

In his June 15, 2012 Order and Opinion granting Flora's motion for peremptory mandamus relief, Luzerne County Court of Common Pleas Judge Augello concluded, "[t]o describe the state of affairs in the Office of the Public Defender as approaching crisis stage is not an exaggeration." (R. 851a at ¶ 2) (quoting R. 738a.) As the Amended Complaint alleges and as the largely uncontested evidence at the preliminary injunction hearing demonstrated, the OPD as currently resourced cannot provide adequate or effective legal representation to

its indigent criminal defendants at all critical stages of the legal proceedings against them. (R. 865a-876a at ¶¶ 48-94.)

On average, OPD lawyers handle over 4,000 new criminal cases each year. At least half of these cases are felonies. (R. 868a at ¶ 58; 872a at ¶ 77.) More than 1,000 criminal cases typically carry over from year-to-year. (R. 872a at ¶ 77.) In addition to these criminal prosecutions, OPD lawyers are also required to represent clients in sentencing appeals, mental health cases and appeals, state parole cases and appeals, and county probation/parole revocation proceedings. (R. 872a-73a at ¶¶ 78-82.)

At the hearing on plaintiffs' motion for preliminary relief before Judge Augello, Norman Lefstein, Dean Emeritus and Professor of Law at Indiana University School of Law and a nationally-recognized expert on indigent defense, testified that as of December 19, 2011, eleven *part-time* OPD lawyers were handling an average of 73.6 felony cases and 33 misdemeanor cases *at one time*.[5] NT 186-87. (R. 634a-35a.) OPD's full-time lawyers were handling similar caseloads in December of 2011: 54 felony cases and 43.25 misdemeanor cases on average, for a total of 97.25 simultaneous cases per lawyer. These caseloads for

[5] In April 2012, OPD's adult unit employed 13 part-time attorneys, four full-time attorneys, three investigators, four secretaries, one receptionist, and one office administrator. Amended Complaint, at ¶ 38 (R. 861a.) Part-time OPD lawyers were contracted to work 1,000 hours a year. NT 186 (R. 634a.)

full-time OPD lawyers did not include 570 state parole and probation active violation cases.

Dean Lefstein testified that the caseloads for these lawyers exceeded acceptable standards for criminal defense attorneys. NT 191 (R. 636a.) As a result of these high caseloads and the lack of necessary administrative support, in Dean Lefstein's expert opinion, OPD lawyers engaged in "a form of triage representation, where you deal only with the most immediate problem of the day, because that is all you really can do." NT 196. (R. 637a.) In Dean Lefstein's view, OPD lawyers burdened with these conditions could not provide representation that met constitutional standards. NT 196-97 (R. 637a.)

The allegations, as supported by the testimony at the preliminary injunction hearing, show that OPD's overwhelming caseload, combined with the County's chronic and longstanding failure to provide the office with an adequate level of resources, prevents OPD lawyers handling their cases in a manner that ensures constitutional standards are met. (R. 865a at ¶ 49; 875a at ¶ 90.) This is not because of lack of effort or commitment on the part of these lawyers. (R. 856a-65a at ¶¶ 22-47; 865a-75a at ¶¶ 50-91.)

If this case is allowed to go to trial, the evidence will show that the problems arising from these deficiencies first manifest themselves during the pretrial stage of the OPD's representations. As the Amended Complaint alleges, OPD lawyers are

unable to provide representation or support at most preliminary arraignments, the point at which the right to counsel attaches under the law. (R. 866a at ¶ 53.) The OPD's heavy caseload combined with other factors regularly leads to scheduling conflicts, causing OPD lawyers to request continuances of critical proceedings, which lead to OPD clients remaining in pre-trial detention for longer periods than should be necessary. (R. 867a at ¶ 54.)

Where OPD lawyers are present for their clients' pretrial proceedings, they do not have time to prepare properly or to consult with their clients. OPD lawyers typically cannot meet with their clients until shortly before they appear for preliminary hearings. (R. 869a-71a at ¶¶ 61-70.) After the initial proceedings, OPD lawyers are unable to maintain regular communication with their clients, and they do not have the time and resources to develop their cases. (Id.) Moreover, OPD lawyers lack the time and resources necessary for trial preparation and strategy. (R. 869a-72a at ¶¶ 61-74.)

OPD's deficiencies are compounded by a lack of the tools needed to represent clients effectively. (R. 874a-76a at ¶¶ 85-94.) The OPD does not have the investigators, case managers, and support staff required to conduct adequate pre-trial investigation and discovery. (R. 867a-68a at ¶¶ 56-59.) The Adult Unit of the OPD has no social workers, paralegals, or trial assistants to assist with case preparation. (R. 874a at ¶¶ 85-86.) The OPD has only four secretaries to assist

twenty-one OPD lawyers. (Id.) At the time the Amended Complaint was filed, many OPD lawyers did not have their own desks, workspaces, or dedicated phone lines. (R. 874a-75a at ¶ 88.)

C. Flora Attempts to Correct the OPD's Problems

As the Amended Class Complaint alleges, upon his appointment as acting Chief Public Defender in May 2010, Flora attempted to secure the resources his office needed to function through Luzerne County's normal budgetary processes. (R. 857a at ¶ 23.) Flora's immediate priority after his appointment was improving juvenile representation in the wake of now well-documented difficulties involving the operations of Luzerne County's juvenile court system.[6]

However, Flora continually warned the County that OPD could not handle the increasing number of criminal cases involving indigent adult defendants. (R. 858a-59a at ¶¶ 29-31.) In June 2010, he provided the County with a status report on the OPD's representation of adults, which outlined the deficiencies hampering the effectiveness of OPD's Adult Unit. (Id.) His request for additional resources was denied. (Id.) In July 2010, Flora provided the County with a

[6] The issues facing the OPD with regard to its representation of juveniles in 2010 were outlined in the Report of the Interbranch Commission on Juvenile Justice at 33-35, 48-51 (May 2010), available at http://www.pacourts.us/assets/files/setting-2032/file-730.pdf?cb=4beb87. Commission members heard testimony from Flora's predecessor, Basil Russin, on how OPD's lack of resources and the County's lack of responsiveness to his requests for additional resources affected OPD's ability to represent juveniles. Id. at 48. See also Amended Complaint at ¶ 23 (recounting Russin's efforts to see more resources for OPD). (R. 857a at ¶ 23.)

detailed, short-term plan to correct the OPD's deficiencies, but this also was rejected. (Id.)

In his 2012 budget proposal, Flora again requested a modest expansion of OPD resources, but was refused. (R. 859a at ¶ 32.) When the 2012 budget was reopened during Luzerne County's transition to Home Rule, Flora renewed his request for additional funding and was again ignored. (R. 859a-60a at ¶¶ 32-35.) Flora followed these requests with repeated private and public appeals for adequate staff, office space, technology, desks, telephones, and other supplies. (R. 860a-62a at ¶¶ 36-39.) These requests also were denied. (Id.)

In December of 2011, faced with an unmanageable caseload and no sign of additional funding from the County, Flora adopted a policy that restricted the type of clients that the OPD would represent, essentially turning away applicants with lower-level offenses who were not incarcerated. (R. 860a at ¶ 33.) Flora took this step only after exploring other alternatives for reducing the office's workload to constitutionally acceptable levels. (Id.) With no alternative, on April 10, 2012, Flora and three indigent criminal defendants who were unrepresented due to the policy forced on OPD by the County's inaction initiated this lawsuit. (R. 850a-51a at ¶ 1; 862a at ¶ 41.)

SUMMARY OF THE ARGUMENT

The class plaintiffs have properly pleaded claims for constructive denial of counsel and for the denial of effective assistance of counsel, in violation of the United States and Pennsylvania Constitutions. The Sixth Amendment and Article I, Section 9 require that indigent defendants be represented by an attorney "who plays the role necessary to ensure that the trial is fair," Evitts v. Lucey, 469 U.S. 387, 395 (1985), and who has the ability to confer with and advise the client at every stage of the case. Avery v. State of Alabama, 308 U.S. 444, 446 (1940). The Amended Complaint alleges that Luzerne County's indigent clients are denied these basic rights by the County's refusal to provide adequate resources to the Public Defender's Office, which has resulted in severely excessive caseloads and "triage" representation of OPD clients. As the trial court observed in granting plaintiffs' claims for preliminary relief, the County Defendants' funding decisions are "inexorably linked to both the nature and actual representation of indigent criminal defendants" in Luzerne County. (R. 738a).

Numerous federal and state courts have ruled that the systemic failure to provide appointed counsel for indigent defendants with the resources necessary to provide competent representation at all stages of the criminal proceeding violates the right to counsel guarantee. In these cases, the courts have properly recognized a right to equitable relief directing the government to properly staff and resource

public defender offices or appointed counsel. Importantly, these courts ruled that the post-conviction remedy provided by Strickland v. Washington was not an exclusive remedy; rather, it provided a particular remedy—a new trial—on a showing of ineffective performance and prejudice.

The Commonwealth Court erred in ruling that the Pennsylvania Post-Conviction Relief Act provides the sole remedy for violating a criminal defendant's right to counsel and right to effective assistance of counsel. Retrospective post-conviction proceedings provide one type of remedy for Sixth Amendment violations, but that remedy is plainly inadequate to protect against systemic or structural barriers to effective assistance of counsel. The Commonwealth Court's ruling is inconsistent with the great majority of courts that have provided equitable relief for Sixth Amendment violations and the structure of judicial remedies for violations of constitutional rights, which always provide multiple, complimentary avenues of relief.

In the alternative, the Court should rule that the lower courts erred in refusing to allow the plaintiff class to proceed on its mandamus claim. Under Pennsylvania's law of mandamus, the courts have the authority to issue a writ that would compel the County to fund its Public Defender's Office at an "adequate" level—that is, at a level consistent with its constitutional and ethical obligations—as specifically required by the Public Defender Act. The Act directs counties to

"provide adequate representation" for persons charged with crimes "who for lack of sufficient funds are unable to obtain counsel." The Commonwealth Court erred in holding that mandamus was unavailable. First, the County does not have unlimited discretion under the Act to determine the level at which the Public Defender's office should be funded. Second, there are no legal remedies available to indigent defendants whose rights are adversely affected by the County's funding decisions. Third, the invocation of mandamus powers does not implicate separation of powers concerns. This is a fully appropriate case in mandamus, as appellants request only an order compelling a county to fund a governmental function delegated to it by the legislature at the level required by the statute.

ARGUMENT

I. Class Plaintiffs Have Properly Pleaded Claims For A Constructive Denial of Counsel and for the Denial of Effective Assistance of Counsel Resulting from the Defendants' Failure to Provide Adequate Resources to the Luzerne County Public Defender Office

A. Introduction

The Commonwealth Court made a fundamental doctrinal error in ruling that the Pennsylvania Post-Conviction Relief Act ("PCRA") provides the *sole* remedy for a violation of a criminal defendant's right to effective assistance of counsel. These rights were established by Gideon v. Wainwright, 372 U.S. 335 (1963), and Strickland v. Washington, 466 U.S. 668 (1984), and, as with *all* constitutionally guaranteed rights, the courts have adopted a number of complementary remedial measures to ensure their enforcement and implementation. In Pennsylvania, the right to effective assistance of counsel can be remedied under the PCRA if the defendant can show an absolute denial of counsel, "constructive" denial of counsel, or ineffective counsel. Ineffectiveness in a post-conviction context requires a showing that counsel failed to provide reasonably competent services and resulting prejudice, as defined as a reasonable probability of a different result if counsel had performed in a competent manner. Strickland, 466 U.S. at 686; United States v. Cronic, 466 U.S. 648 (1984); Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987).

However, as state and federal courts have repeatedly ruled, retrospective post-conviction proceedings are not the only means of vindicating Sixth

Amendment rights. To the contrary, as with all other rights guaranteed by the Bill of Rights and Fourteenth Amendment, there are multiple remedies available under the federal Civil Rights Act, 42 U.S.C. § 1983, including equitable relief designed to operate prospectively to prevent on-going, systemic denial of rights to individuals or a class of persons adversely affected by the policy or practice. Of course, in these cases, as in all matters seeking injunctive relief the plaintiff must show both the denial of a right and the need for an injunction to remedy on-going violations. See, e.g., Allee v. Medrano, 416 U.S. 802 (1974). In this case, as detailed below, the complaint more than adequately alleges all of these elements. The Commonwealth Court's ruling that no remedy other than post-conviction relief is available is a true outlier, and this Court should reinstate the Complaint and permit plaintiffs the opportunity to prove their case.

B. The Systemic Denial of Basic Guarantees Protected by the Sixth Amendment Caused by Lack of Adequate Resources for a Public Defender Office Provides a Basis for Equitable Remedial Relief

In Strickland v. Washington, the Court addressed two questions: (1) is there a right to effective assistance of counsel under the Sixth Amendment, and (2) if so, what are the standards for evaluating whether the right was violated *after a conviction and where the defendant seeks a remedy of a new trial*. In this context, the Court, in balancing the interests of the defendant in effective assistance, a defense lawyer's broad discretion in adopting strategic and tactical measures, and

the state's interest in avoiding a retrial where the incompetent performance did not prejudice the defendant, adopted the now well-established "performance" and "prejudice" standards. Pennsylvania has incorporated these standards in the PCRA and has authorized relief in the form of a new trial where these elements are proven. The post-conviction relief afforded under the Strickland standards is therefore a function of the competing interests that emerge *after* conviction where the central issue is whether the defendant is entitled to a new trial. As with virtually all rights of a criminal defendant, the violation of the right to effective assistance of counsel will result in a new trial only on a showing of some level of harm, as measured by the harmless error doctrine on appeal and the prejudice standard under the PCRA.

Importantly, the issues of (i) whether a right was violated and (ii) whether such a violation should result in a new trial or other remedy are quite separate. As an example,[7] a Fourth Amendment violation may result in: suppression of evidence (though not under all circumstances), compare Commonwealth v. Johnson, 86 A.3d 182 (Pa. 2014) (affirming suppression of evidence seized incident to arrest based on expired warrant) and Herring v. United States, 555 U.S. 135 (2009) (recognizing availability of suppression as a remedy in some situations, but not in circumstances of that case); equitable injunctive relief, City of Los Angles v. Patel,

[7] See infra at 35-36 for further examples.

576 U.S. ____, 135 S. Ct. 2443 (2015) (enjoining enforcement of unconstitutional municipal ordinance requiring hotel owners to produce records regarding their guests); and/or a damages claim. Monroe v. Pape, 365 U.S. 167 (1961) (reversing dismissal of claim for damages for violation of Fourth Amendment rights), overruled on other grounds by Monell v. Dep't of Social Services, 436 U.S. 658 (1978).[8] Thus, even in cases in which suppression is not granted or a new trial is denied on appeal on harmless error grounds, other remedies—including prospective civil remedies—are available.

Similarly, Gideon and Strickland establish a broader scope of rights under the Sixth Amendment than those that can be remedied on a post-conviction petition. A lawyer who fails to properly investigate the case, interview witnesses, file appropriate motions, communicate and consider plea offers, challenge the use of evidence obtained in violation of constitutional guarantees, conduct proper cross-examination of witnesses, and understand all of the legal issues—substantive, procedural and evidentiary—will deprive the client of Sixth Amendment rights, regardless of whether the errors in representation ultimately result in Strickland-type prejudice.

[8] In Pennsylvania the exclusionary rule under Article I, Section 8 of the Constitution provides greater protections for the criminal defendant than the Fourth Amendment. See, e.g., Johnson, 86 A.3d at 187-88.

Indigent defendants are entitled to be represented by an attorney "who plays the role necessary to ensure that the trial is fair." Lucey, 469 U.S. at 395. The pretrial phase of a prosecution is "perhaps . . . the most critical stage" of a lawyer's representation, because "it provides a basis upon which most of the defense case must rest." House v. Balkcom, 725 F.2d 608, 618 (11th Cir. 1984). See also Soffar v. Dretke, 368 F.3d 441, 473-76 (5th Cir.), amended on reh'g in part, 391 F.3d 703 (5th Cir. 2004) (failure to interview witnesses who would have corroborated defense theory is incompetent performance). The ability of counsel to confer with and advise the client at every stage of the case is an essential component of adequate representation. Avery, 308 U.S. at 446. See also Commonwealth v. Gadsden, 832 A.2d 1082, 1088 (Pa. Super. 2003). Plea negotiations are another "critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." Padilla v. Kentucky, 559 U.S. 356, 373 (2010); Commonwealth v. Hickman, 799 A.2d 136, 141 (Pa. Super. 2002).

The failure to perform any of these essential tasks constitutes a violation of the Sixth Amendment, whether or not it affects the outcome of the case. When viewed through the lens of Gideon *and* Strickland, "the Sixth Amendment right to counsel is broader than the question of whether a court must retrospectively set aside a judgment due to ineffective assistance of counsel." State ex rel. Mo. Pub.

Defender Comm'n v. Waters, 370 S.W. 3d 592, 607 (Mo. 2012). See also Public Defender, Eleventh Judicial Circuit of Fla. v. State, 115 So.3d 261, 276 (Fla. 2013) ("[D]eficiencies that do not meet the 'ineffectiveness' standard may nonetheless violate a defendant's rights under the sixth amendment" (quoting Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988) ("Luckey I"), dismissed on federal abstention grounds, 976 F.2d 673 (11th Cir. 1992)).

The Commonwealth Court improperly conflated the new trial remedy under Strickland v. Washington and the basic Sixth Amendment rights under Gideon and Strickland for an indigent defendant to be competently represented at all stages of the criminal proceeding. The PCRA provides a remedial mechanism for the former, but equitable relief may be essential in cases of systemic or structural violations of the latter. The nature of the PCRA relief provides further reasons for the need for alternative remedies. In Pennsylvania, the post-conviction remedy for ineffectiveness of counsel is even more limited than that authorized by Strickland. Not only must the defendant plead and prove incompetent performance and prejudice, but she must also show that the ineffectiveness "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." Commonwealth v. Kimball, 724 A.2d 326, 333 (Pa. 1999). Further, under the Act, a large number of defendants will have no opportunity to even file for PCRA relief as the Act does not permit relief for a person who has

completed her criminal sentence. This Court has ruled that in the absence of exceptional circumstances, ineffectiveness claims must await the PCRA process (following a direct appeal), see Commonwealth v. Grant, 821 A.2d 1246 (Pa. 2003), thus foreclosing relief for those who were sentenced to relatively short or probationary sentences. See 42 Pa. Cons. Stat. § 9543(a).

The Commonwealth Court's rejection of injunctive relief runs contrary to the rulings of almost every other court that has considered the issue. As the Court of Appeals for the Eleventh Circuit explained:

> The Sixth Amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the "ineffectiveness" standard may nonetheless violate a defendant's rights under the Sixth Amendment. In the post-trial context, such errors may be deemed harmless because they did not affect the outcome of the trial. Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief—whether the defendant is entitled to have his or her conviction overturned—rather than to the question of whether such a right exists and can be protected prospectively.

Luckey I, 860 F.2d at 1017 (allowing claims by a class of all indigent criminal defendants and all attorneys representing them for constitutionally inadequate indigent defense).[9]

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[9] The Commonwealth Court offered an alternative reason for the dismissal of plaintiffs' claims: that plaintiffs had failed to set forth a claim for constructive denial of counsel, and could not amend to do so, because they had not yet been convicted:

> The amended complaint does not allege facts to support the inference that the Indigent Clients have or will suffer irreparable

The Strickland emphasis on "prejudice" is a function of the relief sought in post-conviction proceedings and is not co-extensive with the Sixth Amendment right to counsel itself. "Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief—whether the defendant is entitled to have his or her conviction overturned." Luckey I, 860 F.2d at 1017. Plaintiffs have pleaded a claim that they will not be adequately represented as a result of the County's failure to provide a functioning OPD, and have pleaded that they will be harmed—regardless of the outcome of their cases—because of that failure of representation. While it is true that there is no "prejudice" under Strickland until there is a conviction, there is "harm" under both Gideon and Strickland whenever a criminal defendant faces a critical point in the proceedings without the effective assistance of counsel. And where there is harm, or, as relevant here, *threatened* harm, to a person's constitutional rights, there is a remedy under Section 1983.

As the Michigan Court of Appeals ruled,

> It is entirely logical to generally place the decisive emphasis in a court opinion on the fairness of a trial and the reliability of a verdict when addressing a criminal appeal alleging ineffective assistance *because the*

> harm, but only the fear that they will not be adequately represented.

Opinion at 16. As stated in Luckey I and other cases, see infra at 26-31, lack of adequate representation *is* a violation of the Sixth Amendment, whether or not that failure of representation gives rise to a claim for a new trial under Strickland.

> *appellant is seeking a remedy that vacates the verdict and remands the case for a new trial.*

Duncan v. State, 774 N.W.2d 89, 125 (Mich. App. 2009) (emphasis in original), aff'd on other grounds, 780 N.W.2d 843 (Mich.), reconsideration granted, order vacated, 784 N.W.2d 51 (Mich.), rev'd, 784 N.W.2d 51 (Mich.), order vacated on reconsideration, 790 N.W.2d 695 (Mich.), order reinstated, 790 N.W.2d 695 (Mich.), order vacated on reconsideration, 790 N.W.2d 695 (Mich.), reconsideration denied, 791 N.W.2d 713 (Mich. 2010).[10] But "[a]pplying the two-part test from Strickland . . . as an absolute requirement defies logic, where . . . the requested remedy in the form of prospective relief seeks to curb and halt continuing acts of deficient performance," not to overturn a conviction already obtained. Id.

The Supreme Court of Florida, reaching the same conclusion, explained:

> [T]here are powerful considerations in the postconviction context that warrant the deferential prejudice standard. . . . These considerations do not apply when only prospective relief is sought. "Prospective relief is designed to avoid future harm. Therefore, it can protect constitutional rights, even if the violation of these rights would not affect the outcome of a trial."

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[10] The complicated history of Duncan resulted in an affirmance of the trial court's refusal to dismiss the claims of a class of indigent defendants who alleged that three counties' public defender systems failed to provide constitutionally sufficient representation. The Court explained that "[t]his case is at its earliest stages and, based solely on the plaintiffs' pleadings in this case, it is premature to make a decision on the substantive issues." Duncan, 780 N.W.2d at 844. The same holds true here.

Public Defender, Eleventh Judicial Circuit of Fla., 115 So.3d at 276 (quoting Luckey I, 860 F.2d at 1017 (internal citation omitted)).[11]

The Supreme Court of Iowa echoed these concerns in upholding a contract attorney's right to prospective relief from compensation rates so low that they prevented him from providing meaningful representation. Although "[t]he most familiar avenue for enforcement of the right to effective assistance of counsel is through a post-conviction challenge to an underlying conviction . . . [t]here is, however, a second potential avenue for enforcement of the right to counsel." Simmons v. State Pub. Defender, 791 N.W.2d 69, 75-76 (Iowa 2010). This second avenue, also known as a systemic or a structural challenge, "is based on the notion

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[11] The Florida Supreme Court mentioned allegations of failure of counsel strikingly similar to those in this case:

> Attorneys are routinely unable to interview clients, conduct investigations, take depositions, prepare mitigation, or counsel clients about pleas offered at arraignment. Instead, the office engages in "triage" with the clients who are in custody or who face the most serious charges getting priority to the detriment of the other clients.

Public Defender, Eleventh Judicial Circuit of Fla., 115 So. 3d at 274 (footnote omitted). In a footnote, the court observed that the evidence presented:

> was not evidence of isolated incidents, but of systemic inability of the public defender attorneys to perform these functions on a regular basis. The United States Supreme Court once warned that the "denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution . . . ."

Id. at 274 n.8 (quoting Avery, 308 U.S. at 446).

that in order to ensure effective assistance of counsel for indigent defendants, the state has *an affirmative obligation to establish a system of indigent defense that is reasonably likely to provide for zealous advocacy on behalf of the criminal defendant*." Id. (emphasis added).

> We conclude that the Strickland prejudice test does not apply in cases involving systemic or structural challenges to the provision of indigent defense counsel that do not involve efforts to vacate criminal convictions. As pointed out in Luckey, the weighty policy reasons for the high Strickland bar—namely, finality in criminal judgments and the fear of a rash of ineffective-assistance claims—are simply not present here.

Simmons, 791 N.W.2d at 85 (footnote omitted).

The highest court in New York State has also ruled that a court does not need to wait for the outcome of a prosecution to determine that criminal defendants who have counsel in name only are harmed:

> [T]he absence of representation at critical stages is capable of causing grave and irreparable injury to persons who will not be convicted. Gideon's guarantee to the assistance of counsel does not turn upon a defendant's guilt or innocence, and neither can the availability of a remedy for its denial.

Hurrell-Harring v. State, 930 N.E.2d 217, 227 (N.Y. 2010).

This Court has, likewise, recognized that systemic deficiencies in indigent defense cannot be relegated to individual post-conviction proceedings. In Commonwealth v. McGarrell, Nos. 77-79 EM 2011 (Pa. Sept. 28, 2011), this Court

granted a pre-trial request for extraordinary jurisdiction on a petition filed on behalf of defendants facing capital charges in Philadelphia who argued that the fee schedule for appointed counsel was so inadequate as to likely lead to ineffective assistance of counsel. The Court ordered an evidentiary hearing on this issue and the trial court made findings that the "existing compensation system unacceptably increases the risk of ineffective assistance of counsel" and was "grossly inadequate." Report of Judge Benjamin Lerner, McGarrell, No. 77 EM 2011 (Feb. 21, 2012).[12] The Court of Common Pleas then raised the allowable fees for appointed capital counsel and on appeal this Court affirmed (with the Justices divided only on the issue of whether the fee increase was sufficient to cure the systemic denial of effective counsel). Commonwealth v. McGarrell, 87 A.3d 809 (Pa. 2014). Justice (now Chief Justice) Saylor dissented, finding that the systemic problems remained and that "Pennsylvania's capital punishment regime is in disrepair." Id. at 811 (Saylor, J., dissenting). See also id. at 812 (McCaffrey, J. dissenting) (finding "abundant evidence" of "chronic underfunding").

In addition, opinions of this Court have noted the systemic failings of indigent defense in Pennsylvania in specific contexts. See, e.g., Commonwealth v. King, 57 A.3d 607, 635-38 (Pa. 2012) (Saylor, J., concurring) ("Of greatest concern, these sorts of exceptionally costly failures, particularly as manifested

[12] Available at http:// www.atlanticcenter.org/images/LernerReport.pdf.

across the wider body of cases, diminish the State's credibility in terms of its ability to administer capital punishment and tarnish the justice system, which is an essential component of such administration."); Commonwealth v. Johnson, 985 A.2d 915, 928 (Pa. 2009) (Saylor, J., concurring). See also Thomas G. Saylor, Death-Penalty Stewardship and the Current State of Pennsylvania Capital Jurisprudence, 23 Widener L.J. 1, 38, 40 (2013) ("Funding of indigent defense services, obviously, is a major source of concern. . . . This kind of decentralized arrangement risks inequalities, in tension with the kind of non-arbitrary treatment the Supreme Court of the United States has been looking for since Furman."). "As numerous statewide indigent defense studies have shown, when counties primarily fund indigent defense, there are certain to be inequities among the locally funded systems." See The Constitution Project, Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel 54-55 (2009), available at http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf.

The United States Department of Justice has joined the courts that have recognized the validity of pre-trial constructive deprivation of counsel claims. In a Statement of Interest filed with the Hurrell-Harring trial court, the Justice Department opined that a court could find a constructive denial of counsel when:

> (1) on a systemic basis, counsel for indigent defendants face severe structural limitations, such as a lack of resources, high workloads, and under staffing of public defender offices; *and/or*

> (2) indigent defenders are unable or are significantly compromised in their ability to provide the traditional markers of representation for their clients, such as timely and confidential consultation, appropriate investigation, and meaningful adversarial testing of the prosecution's case.

Statement of Interest of the United States at 7, Hurrell-Harring v. New York, No. 8866-07 (N.Y. Sept. 25, 2014), available at http://www.justice.gov/sites/default/files/crt/legacy/2014/09/25/hurrell_soi_9-25-14.pdf (hereinafter "Hurrell-Harring Statement of Interest") (emphasis in original).[13]

C. The Availability of Multiple Remedies for a Constitutional Violation is a Characteristic of Our Constitutional System

As noted above, supra at 20-21, the constitutional guarantees embedded in the Bill of Rights and the Fourteenth Amendment are enforceable by a complementary set of remedial mechanisms. Thus, in the Fourth Amendment context, as noted above, supra, at 20-21, a violation of the Fourth Amendment may

[13] Subsequent to the DOJ's submission, Hurrell-Harring was settled with a Stipulation and Order that provides for: 1) a commitment by the defendants that within 20 months each indigent criminal defendant in the affected counties will be represented by counsel at arraignment; 2) commitments by New York state to the creation of a system that would keep track of caseloads, and to the enactment of appropriate caseload standards; 3) a commitment that any caseload standard adopted as a result of this process would be consistent with the guidelines adopted by the National Advisory Commission on Criminal Justice Standards and Goals; 4) the adoption of plans for hiring additional staff as may be necessary to meet the guidelines; and 5) other measures meant to improve the quality of indigent defense in the affected counties. See Stipulation and Order of Settlement, Hurrell-Harring v. State of New York, et al., No. 8866-07 (N.Y. Oct. 21, 2014).

result in the suppression of evidence before trial, or a new trial on appeal if there is no showing of harmless error. Alternatively, a court can order injunctive relief to enjoin a pattern or practice of violations of the Fourth Amendment, or award damages for proven violations, all independent of any criminal prosecutions or considerations of application of the exclusionary rule.

The Fifth Amendment right against self-incrimination, likewise, gives rise to several different avenues of relief. A violation of the right may be remedied by a suppression ruling, e.g., Miranda v. Arizona, 384 U.S. 436 (1966), a claim for damages for false or coerced confessions, see, e.g., Halsey v. Pfeiffer, 750 F.3d 273 (3d Cir. 2014), or by an injunction prohibiting police from engaging in conduct that will result in the denial of Fifth Amendment rights. See, e.g., California Attorneys for Criminal Justice v. Butts, 195 F.3d 1039 (9th Cir. 2000). As with the Fourth Amendment, the damage and equitable remedies are entirely independent of suppression rights or the issue of ordering a new trial where a coerced or involuntary confession has been used to secure a conviction.

The same is true for the right to be free from the use of fabricated or false evidence. See, e.g., Pyle v. Kansas, 317 U.S. 213 (1942) (due process reversal of conviction for knowing use of false testimony); Halsey, 750 F.3d 273 (damage claim for this violation); the Brady claim for disclosure of exculpatory evidence, Brady v. Maryland, 373 U.S. 83 (1963) (new trial granted on appeal); Poventud v.

City of New York, 750 F.3d 121 (2d Cir. 2014) (damages claims for Brady violation); the right against cruel and unusual punishment, see, e.g., Glossip v. Gross, 576 U.S. ____, 135 S. Ct 2726 (2015) (addressing issue in injunctive proceeding as to the constitutionality of lethal injection process); Hope v. Pelzer, 536 U.S. 730 (2002) (damages claim for cruel and unusual prison conditions); and for claims of racial discrimination in the administration of justice. See Whren v. United States, 517 U.S. 806 (1996) (racially motivated seizure violates Fourteenth Amendment, but not the Fourth Amendment); Batson v. Kentucky, 476 U.S. 79 (1986) (reversal of conviction for racially based peremptory jury challenges); Floyd v. City of New York, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (injunctive relief for systemic racial bias in policing).[14]

D. Plaintiffs Have Properly Alleged Both Constructive Denial of Counsel and Denial of Effective Assistance of Counsel Due to Chronic and Systemic Underfunding of the Luzerne County OPD

The systemic barriers to effective assistance of counsel that have been the basis for court intervention in injunctive proceedings are present in the Luzerne County Public Defender's Office. There is evidence of record that the OPD's caseloads are "clearly excessive" and that as a result OPD could provide only

[14] For liberties not directly associated with the criminal justice system, e.g., First Amendment rights of free speech and association and for the Second Amendment right to bear arms, the same is true. See, e.g., Hague v. CIO, 307 U.S. 496 (1939) (injunctive relief for systemic violations of free speech rights); Amnesty Int'l v. Battle, 559 F.3d 1170 (11th Cir. 2009) (damage claim for First Amendment violation); City of Houston v. Hill, 482 U.S. 451 (1987) (reversing criminal conviction based on overbroad statute).

"triage representation" at its current level of funding. (Opinion at 13-14, R. 734a-35a.) As set forth in the Statement of the Case, supra at 4-5, 10-11, at the hearing for preliminary relief, the trial court found that the evidence presented by Petitioners showed the seriously adverse impact of lack of resources on defender representation to be "in large measure uncontroverted and uncontradicted." (Id. at 16, R. 730a-32a.)

The Amended Complaint, which is based in part on that evidence, sets forth numerous routine failures of representation by OPD attorneys, beginning with the complete lack of representation at preliminary arraignments, a literal denial of counsel (see R. 866a at ¶ 53), and continuing through every stage of pretrial representation, trial itself, and plea negotiations:

> 106. Defendants' refusal and failure to provide the OPD with the necessary funding and resources prevents OPD lawyers from providing representation at all critical phases of their cases for all adult indigent defendants in Luzerne County. Specifically, attorneys in the office were, and continue to be, frequently:
>
> a. Unable to interview or meet with clients prior to preliminary hearings;
>
> b. Unable to contact their clients between court appearances;
>
> c. Unable to conduct significant, if any, investigation or discovery;
>
> d. Unable to engage in significant, if any, motion practice;

e. Unable to gather adequate information to engage in effective plea negotiations;

f. Unable to engage in sufficient trial preparation; and

g. Unable to properly litigate appeals because of a lack of appellate experience.

(R. 881a at ¶ 106.)

The Amended Complaint provides extensive detail concerning these failures of representation. (See generally R. 865a-71a). Under these circumstances, "*even the best lawyers are unable to engage in many of the basic functions of representation, including conferring with clients in a meaningful way prior to critical stages of their legal proceedings, reviewing client files, conducting discovery, motion practice, and factual investigation, as well as devoting necessary time to prepare for hearings, trials, and appeals.*" (R. 864a at ¶ 45) (emphasis added). These allegations and evidentiary proof are precisely of the kind that the Department of Justice has stated will support claims seeking prospective remedies for the constructive denial of counsel and for the denial of effective assistance of counsel. See Hurrell-Harring Statement of Interest at 7.[15]

In addition, plaintiffs' allegations are indistinguishable from the claims numerous appellate courts have found to state valid claims for injunctive relief.

[15] While we believe that these allegations are sufficient to support the legal claims, to the extent that the Court disagrees, plaintiffs should be given the usual right to amend their pleadings. See Connor v. Allegheny Gen. Hosp., 461 A.2d 600, 602 (Pa. 1983) (noting that "the right to amend should be liberally granted").

For instance, in Hurrell-Harring, the court recognized a right to prospective relief where the plaintiffs alleged that their appointed lawyers were uncommunicative, made very little or no efforts on the clients' behalf subsequent to arraignment, waived important rights without consulting the client, acted as mere conduits for plea offers, and were often unprepared to proceed when they made court appearances. Hurrell-Harring, 930 N.E.2d at 224. The New York Court of Appeals explained that "[a]ctual representation assumes a certain basic representational relationship" and that the allegations by the indigent defendants raised the "distinct possibility that merely nominal attorney-client pairings" were occurring with regularity. Id. In Hurrell-Harring, as here, "the basic constitutional mandate for the provision of counsel to indigent defendants at all critical stages *is at risk of being left unmet because of systemic conditions, not by reason of the personal failings and poor professional decisions of individual attorneys*." Id. at 226 (emphasis added).

The United States District Court for the Western District of Washington allowed claims to proceed on behalf of a class of indigent defendants who alleged:

> that Mount Vernon and Burlington have implemented a system of public defense that is inadequately funded, imposes unreasonable caseloads on the individual attorneys, fails to provide representation at critical stages of the prosecution, and is not properly monitored. Plaintiffs also allege that the municipalities have known of the structural deficiencies in their public defense

> systems for many years and yet continue the system without substantive change.
>
> . . .
>
> Having realized that they were effectively unrepresented against the prosecuting municipalities, plaintiffs can seek judicial intervention. They do not have to persevere through trial and a potentially disastrous outcome in order to perfect their Sixth Amendment claims.

Wilbur v. City of Mount Vernon ("Wilbur II"), No. C11-1100RSL, 2012 WL 600727, at *1, 3 (W.D. Wash. Feb. 23, 2012) (footnote omitted).[16] See also Luckey I, 860 F.2d at 1018 (although ostensibly represented, plaintiffs' allegations that they lacked actual representation at critical points in the criminal process suffice to state a claim); Duncan, 774 N.W.2d 89; Lavallee v. Justices in Hampden Superior Court, 812 N.E.2d 895, 904 (Mass. 2004) (allowing indigent defendants to challenge the constitutionality of the fee rates that discouraged lawyers from taking their cases).[17]

[16] The Wilbur plaintiffs proved their claims and obtained injunctive relief to improve the representation provided by the public defender. Wilbur v. City of Mount Vernon ("Wilbur III"), 989 F. Supp. 2d 1122, 1134-37 (W.D. Wash. 2013) (entering injunction requiring defendant city to reevaluate its provision of public defense services, and requiring the hiring of a supervisor to oversee and evaluate public defense services).

[17] Only one other court has dismissed a challenge to an underfunded public defense system on the ground that Strickland requires a showing of prejudice for any claim regarding the provision of indigent defense, apparently disregarding Strickland's acknowledgement that denial of counsel claims do not require such a showing. See Platt v. State, 664 N.E.2d 357, 363 (Ind. Ct. App. 1996).

This Court should reverse the holdings of the Commonwealth Court and remand the case for the development of the record on plaintiffs' constitutional claims.

II. The Pennsylvania Courts Have Mandamus Authority to Compel the Provision of Adequate Resources for the Luzerne County Office of Public Defender

Independent of providing an equitable remedy for the violation of the Sixth Amendment right to effective assistance of counsel, the courts of this Commonwealth have the authority to issue a writ of mandamus directing Luzerne County to fund its Public Defender Office pursuant to the Public Defender Act at a level that will ensure "adequate" resources for representation of its clients. "*Mandamus* is a high prerogative and remedial writ, the appropriate functions of which are the enforcement of duties to the public, by officers and others, who either neglect or refuse to perform them." Commonwealth ex rel. Armstrong v. Comm'rs of Allegheny, 37 Pa. 277, 279 (1860) (emphasis in original); see also Meadville Area Sch. Dist. v. Dep't of Public Instruction, 159 A.2d 482, 500 (Pa. 1960) ("The law is clear that an action of mandamus will lie to compel public officials to perform their duties in accordance with the law"); Clark v. Meehan, 80 A.2d 64, 66 (Pa. 1951) ("The writ of mandamus lies to compel a public official to perform his duties in accordance with the law"). Luzerne County's failure to provide OPD with the personnel and resources it needs to defend its clients at a

level consistent with Gideon's guarantees and consistent with the professional ethical responsibilities of criminal defense lawyers is a violation of the Public Defender Act that may be corrected by the grant of appropriate mandamus relief.

Mandamus is available where the moving party has a clear right, the government body has a corresponding duty, and no remedy at law is adequate. See Seeton v. Pa. Game Comm'n, 937 A.2d 1028, 1033 (Pa. 2007); Dombrowski v. City of Phila., 245 A.2d 238, 244, 249 (Pa. 1968). Appellants are entitled as a matter of constitutional and statutory law to adequate criminal defense representation by the Luzerne OPD and mandamus provides a remedial mechanism for the allocation of the funds necessary to ensure that the legal representation provided for indigent defendants by the OPD meets constitutional and ethical standards.

A. Under the Public Defender Act, Luzerne County is Required to Provide Adequate Resources to Ensure that Appellants and Similarly Situated Indigent Defendants are Provided Effective Assistance of Counsel

The County's duty to provide an adequate defense for each indigent defendant is plain from the language of the Public Defender Act, 16 Pa. Stat. §§ 9960.1-9960.13. Under the Act, every county (except Philadelphia) is required to appoint a Public Defender, who is charged with providing representation to indigent defendants and others under the circumstances designated by the Act's

provisions.[18] See 16 Pa. Stat. § 9960.6. The preamble to the Public Defender Act makes clear that the county has a duty to provide indigent defendants with a constitutionally "adequate" defense:[19]

> An Act to provide for the office of public defender, authorizing assistants and other personnel and to provide *adequate* representation for persons who have been charged with an indictable offense or with being a juvenile delinquent who for lack of sufficient funds are unable to obtain legal counsel.

Public Defender Act of Dec. 2, 1968, P.L. 1144, No. 358 (emphasis added).

To ensure that the Public Defender can fulfill this obligation, the Act directs counties to provide public defenders with sufficient funding for the personnel and equipment necessary to perform these duties. With regard to the hiring of personnel, the Act states:

> The public defender, with the approval of the appointive body, may provide for as many full or part time assistant public defenders, clerks, investigators, stenographers and other employees as *he may deem necessary to enable him to carry on the duties of his office.*

16 Pa Stat. § 9960.5(a) (emphasis added). The statute establishes a collaborative process for approving budgets for the Public Defender's office and specifically

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[18] Luzerne County operates under a Home Rule Charter which requires the County to appoint a public defender charged with providing legal representation to clients "as required by applicable law," which would include the Public Defender Act. See Home Rule Charter, § 6.04.

[19] Under rules of statutory construction prescribed by the Pennsylvania Assembly, "The title and preamble of a statute may be considered in the construction thereof." 1 Pa. Cons. Stat. § 1924.

recognizes the Public Defender's role in determining what level of resources will be necessary to provide effective assistance of counsel. The statutory language evinces the legislature's unmistakable intent: to provide public defenders with the personnel "necessary to enable [him or her] to carry on the duties of [his or her] office." Id.

In addition, the Act directs each County's Board of Commissioners to provide "office space, furniture, equipment and supplies for the use of the public defender suitable for the conduct of the business of that office." Id. § 9960.9. Again, the statute is explicit: the County must provide the public defender with an office and resources that are "suitable" for the task delegated, i.e., a staff and equipment sufficient to provide indigent defendants with "adequate" representation.

This Court has ordered mandamus relief under statutes or other laws with comparable mandates. In Dombrowski v. City of Philadelphia, a Philadelphia employee sought an order in mandamus compelling the city to appropriate sufficient funds to maintain its retirement system in an "actuarially sound" condition, as required by Philadelphia's Home Rule Charter. See Dombrowski, 245 A.2d at 240. After a review conducted by a special master, a trial court ordered the city to make the necessary allocations. This Court affirmed, in a ruling

that required Philadelphia to allocate a sum totaling $60,000,000 over the course of a two-year period to remedy the discrepancy. Id. at 251.

In Dombrowski, the City Charter provision required Philadelphia's pension fund for public employees be maintained at a level defined as "actuarially sound." Id. at 240. In this case, the Public Defender Act requires comparable funding to ensure that public defenders have the personnel and resources necessary to provide clients with an "adequate" defense. As the Pennsylvania courts may require a city to allocate the funding necessary to maintain its retirement accounts in an "actuarially sound" condition, they also have the authority to order a county to allocate enough funding to provide an "adequate" legal defense for indigents accused of crime.

Indeed, the mandamus remedy is necessary precisely in those situations, as here, where a county government has misinterpreted statutory duties. See, e.g., Seeton, 937 A.2d at 1034 (holding mandamus an appropriate remedy to direct a state Commission to comply with its statutory mandate "to the extent it misapprehends it"); Volunteer Firemen's Relief Ass'n of City of Reading v. Minehurt, 203 A.2d 476, 479-80 (Pa. 1964) ("[M]andamus will lie to compel action by an official where his refusal to act in the requested way stems from his erroneous interpretation of the law"). Moreover, a county's funding obligation cannot be excused by budgetary limitations. See Commonwealth ex rel. Central

Bd. of Education of Pittsburg v. City of Pittsburg, 58 A. 669, 670 (Pa. 1904) (per curiam) (holding that when a public duty is "imposed by statute upon the municipality, mere inconvenience of compliance is not sufficient reason for refusal to enforce obedience by mandamus"); Kistler v. Carbon Cnty., 35 A.2d 733, 734 (Pa. Super. 1944) ("County commissioners, . . . cannot, by adopting a budget, limit or avoid liabilities imposed upon the county by the Constitution or by statutes. The call of the Constitution or of a statute is paramount, and they must respond to it by providing sufficient appropriations").

This statutory duty is particularly significant in light of the fact that Pennsylvania has made the legislative policy choice to impose funding obligations for the constitutionally required appointment of counsel in criminal cases on the counties. There are policy arguments that favor state funding, see, e.g., A Constitutional Default: Services to Indigent Criminal Defendants in Pennsylvania, Report of the Task Force and Advisory Committee on Services to Indigent Criminal Defendants (December 2011) (recommending the creation of a statewide, independent, non-partisan Office of Indigent Defense, and that funding for indigent defense be provided primarily by the Commonwealth).[20] But whatever the merits of this issue, county funding is the current operational standard. Accordingly, the

[20] Relevant pages from the Report were attached to the original Class Action Complaint; a full copy is available at http://jsg.legis.state.pa.us/resources/documents/ftp/documents/Indigent%20Defense.pdf.

statutory commands of the Public Defender Act require "adequate" funding and mandamus should be available to enforce this legislative directive.

B. The Commonwealth Court's Reasons for Dismissing the Mandamus Claims Are Without Merit

The Commonwealth Court ruled that mandamus did not provide a ground for relief because: 1) a county has full and final discretion with regard to funding the OPD; 2) appellants have other legal remedies; and 3) ordering the relief requested would violate separation of powers principles. None of these reasons withstand scrutiny.

1. The Public Defender Act's Requirement that an "Adequate" Defense Be Provided For Indigent Defendants Is a Mandatory Duty

Without reasoned analysis, the Commonwealth Court accepted Luzerne County's argument that "its funding of the Office of Public Defender is inherently discretionary and cannot be compelled by a writ of mandamus." Flora, 103 A.3d at 138. This was error as the Public Defender Act requires the Public Defender to provide an "adequate" defense to indigent defendants. The plain meaning of the word "adequate" is "sufficient . . . equal to what is required." Black's Law Dictionary 36 (5th ed. 1979).[21] Under this standard, a court must look to the constitutional and professional ethical standards that have been adopted in

[21] Pennsylvania law requires that words and phrases "be construed according to rules of grammar and according to their common and approved usage." 1 Pa. Cons. Stat. § 1903(a).

determining the level of representation that provides effective assistance of counsel. See, e.g., Missouri v. Frye, 556 U.S. ____, 132 S. Ct. 1399, 1408-09 (2012); Rompilla v. Beard, 545 U.S. 374, 387 (2003); Strickland, 466 U.S. 668; Pierce, 527 A.2d 973; ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006); ABA, Ten Principles of a Public Defense Delivery System (Feb. 2002).[22] And it cannot be that a county could decide, without any judicial oversight, to severely underfund a defender office to the point, as alleged here, of effectuating a constructive denial of counsel or a system in which clients will be denied effective assistance.

Courts in other jurisdictions have ruled under similar circumstances that "[w]hile criminal defendants are not entitled to perfect counsel, they are entitled to a real, zealous advocate who will fiercely seek to protect their interests within the bounds of the law." Simmons, 791 N.W. 2d at 75. An indigent defense system that promotes "triage" representation of clients by tolerating excessive lawyer caseloads is inadequate under Gideon. See, e.g., Public Defender, Eleventh Judicial Circuit of Fla., 115 So.3d at 266-67; State ex rel. Mo. Pub. Defender Comm'n, 370 S.W. 3d 592; see also Hurrell-Harring Statement of Interest at 9-14. In short, the Public Defender Act is violated where a public defender system, such

[22] Available at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf

as that in Luzerne County, operates in a manner that either constructively denies counsel or provides ineffective assistance on a systemic basis.

As interpreted by the Commonwealth Court, the Public Defender Act would give counties unfettered discretion in determining the level of public defender funding, without regard to the obligations imposed by either Gideon or ethical rules, thus effectively immunizing counties that fail to adequately fund indigent defense. In assessing this ruling, and in interpreting the Act, this Court should be guided not only by the plain language of the statute, but also the mandate to construe statutes in a manner that avoids unreasonable interpretations and constitutional infirmities.[23] See 1 Pa. Cons. Stat. § 1922; see also Commonwealth v. Bennett, 930 A.2d 1264, 1273 (Pa. 2007) (noting that the Statutory Construction Act requires courts "to employ the presumption that the General Assembly does not intend to violate the United States or Pennsylvania Constitutions"). The Commonwealth Court erred in its statutory analysis and this Court should reinstate the Amended Complaint to ensure enforcement of the Public Defender Act.

[23] It should be noted that the Commonwealth Court's conclusion on the issue of county discretion differed from that of Judge Augello. In his opinion on plaintiffs' motion for preliminary relief, Judge Augello properly held that in determining the appropriate level of funding for Public Defenders' offices under the Act, a county government's discretion "is circumscribed by the Constitution, applicable legislation, applicable appellate precedent and the Pennsylvania Rules of Professional Conduct." (R. at 738a, ¶ 15.) Judge Augello based his dismissal of the named plaintiffs' mandamus claim on what he characterized as appellants' lack of standing. See Opinion of October 22, 2013, at 13-14 (App. A).

2. Appellants Have No Adequate Remedy at Law

The Commonwealth Court erroneously dismissed the mandamus claim on the additional ground that appellants had access to legal remedies. See Flora, 103 A.3d at 138. As we discussed above (supra, at 23-33) the panel's conclusion that indigent clients have an alternative remedy through Strickland claims (Flora, 103 A.3d at 138) is mistaken. As numerous courts have held, and as discussed, post-conviction claims under Strickland are not an adequate remedy for systemic failures in indigent defense that compromise the rights of numerous clients. See, e.g., Luckey I, 860 F.2d at 1017-18; Hurrell-Harring, 930 N.E.2d at 224, 227; Lavallee, 812 N.E.2d at 905-06; see also Hurrell-Harring Statement of Interest.

Further, the Commonwealth Court's suggestion that an adequate remedy to the County's refusal to remediate OPD's systemic deficiencies could be found in the provision of the Public Defender Act that allows public defenders to appoint pro bono counsel to assist them is manifestly without support. While the Act authorizes the use of volunteer lawyers, "[i]n lieu of, or in addition to assistant public defenders," to assist public defenders' offices in providing indigent services, 16 Pa. Sat. § 9960.5(b), there is no basis in this record or in the experience of any modern defender office—and the Commonwealth Court fails to provide even a hint of such evidence—to suggest that deployment of "volunteer" lawyers could alleviate systemic under-funding of indigent defense. To the contrary, no system

of adequate criminal defense can be built on the quicksand of inexperienced and otherwise untrained "volunteers." See Simmons, 791 N.W. 2d at 86 (soliciting volunteers is no remedy for structural deficiencies in indigent defense). Indeed, use of such untrained and inexperienced "volunteers" would only worsen the problem.

3. Enforcing the Public Defender Act Would Not Violate the Separation of Powers Doctrine

Finally, the Commonwealth Court erred in suggesting that the grant of mandamus relief "may violate the doctrine of separation of powers." Flora, 103 A.3d at 138-39. To reach this conclusion the Commonwealth Court construed the Public Defender Act as a statute that tied the public defender function to the judiciary. See id. at 138 & n.8. On that theory, the Commonwealth Court ruled that the courts of Pennsylvania could issue a mandamus for funding of a function related to the "administration of justice" only in the most extreme circumstances. See id. at 138-39. But whatever the limits imposed by reason of the separation of powers doctrine where *courts* seek to order the legislative or executive branches to support judicial functions, that doctrine is inapplicable where, as here, mandamus would simply order a local governmental unit to follow the dictates of a statute where the party seeking enforcement is not engaging in any judicial function. Accordingly, the Commonwealth Court's reliance on Beckert v. Warren, 439 A.2d 638 (Pa. 1981), is entirely misplaced.

The legislative history of the Public Defender Act makes clear that the Pennsylvania Assembly rejected a process under which county public defender offices would be considered a part of the judicial branch or as serving a judicial function. The Public Defender Act was introduced in 1968 as Senate Bill No. 1769 with provisions requiring public defenders to be appointed "by the Board of County Commissioners and in Philadelphia by City Council." Pa. S.B. 1769, General Assembly of Pa., 1968 Session, November 7, 1968 (Printer's No. 2333). The Senate adopted an amendment that required public defenders to be appointed by the Board of County Commissioners, but "with the approval of the Court or Courts of Common Pleas." Pa. S.B. 1769, General Assembly of Pa., 1968 Session, as amended on Third Consideration, November 13, 1968 (Printer's No. 2382).

This amendment was rejected by the House. See Pa. S.B. 1769, General Assembly of Pa, 1968 Session, November 18 & 21, 1968 (House Reprint Nos. 2399 and 2418). Supporters of the House version relied on policy considerations that favored giving county government sole control over the public defender's appointment. See 1968 Pa. Legislative Journal—House, at 1762 (November 20, 1968). See also id. at 1778-79 (November 21, 1968). The Senate agreed, and it was the House version that was signed into law. Id. at 735-36 (November 22, 1968).

The General Assembly created the Public Defender's Office as a "county" office, to be governed independently of the judiciary.[24] Thus, an order compelling Luzerne County to fund its Office of the Public Defender at an adequate level would not constitute a judicial order to fund a "judicial" function; rather, it would simply direct the County to perform a duty delegated by the legislature in the manner prescribed by the statute.[25] As we have shown, such an order is well within the Court's authority to grant writs of mandamus as that authority has been defined historically by decisional law. See, e.g., Clark, 80 A.2d at 66 ("The writ of mandamus lies to compel a public official to perform his duties in accordance with the law").

In these circumstances, applying well-established mandamus principles, appellants' burden on remand would be to prove that their requests for additional resources for the OPD are "reasonably necessary." See Medico v. Makowski, 793 A.2d 167, 170-71 (Pa. Commw. Ct. 2002) (citing Jiuliante v. Cnty. of Erie, 657 A.2d 1245, 1250 (Pa. 1995)).

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[24] This determination is consistent with the provisions of the Pennsylvania Constitution, which expressly includes "public defenders" in its list of county officers." See Pa. Const. Art. 9, § 4.

[25] In a related context, the United States Supreme Court, while recognizing that public defenders are paid by the state, held that these officials are not state actors and do not act under color of state laws for purposes of liability under the Civil Rights Act, 42 U.S.C. § 1983, as they operate as adversaries of the state in the same manner as private lawyers. Polk Cnty. v. Dodson, 454 U.S. 312 (1981).

In light of these factors, it is not surprising that courts in other jurisdictions have ruled that issues of proper funding of defender offices are justiciable, and that the courts have the authority to address and if necessary order remedies for systemic deficiencies in indigent defense programs. See, e.g., Public Defender, Eleventh Judicial Circuit of Florida, 115 So.3d at 271-74; State v. Quitman Cnty, 807 So.2d 401, 409-10 (Miss. 2001).

Mandamus provides an appropriate and necessary alternative to the Sixth Amendment remedy under the Civil Rights Act.

CONCLUSION

Courts have the duty to protect constitutional and statutory rights when the political process has failed to secure and implement these rights, as has been and continues to be the case in Luzerne County. The County's indigent defendants are constitutionally entitled to a system that provides a lawyer in more than name only. Aside from the obvious public policy reasons, ensuring effective legal representation for indigent defendants is a constitutional and statutory requirement. This Court should reverse and remand this matter to the Court of Common Pleas for discovery and trial on the constitutional and mandamus claims for relief.

Dated: September 10, 2015

Respectfully submitted,

/s/ David Rudovsky

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CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to Pennsylvania Rule of Appellate Procedure 2135, I hereby certify that the foregoing Brief for Appellants contains 12,333 words as counted by the word-count function of Microsoft Word, exclusive of the Rule 2135(b) supplementary matter (cover, table of contents, table of authorities, this certificate, certificate of service, and exhibits), and complies with the word count limit set forth in Rule 2135(a).

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APPENDIX A

COPY

IN THE COURT OF COMMON PLEAS

OF LUZERNE COUNTY

AL FLORA, JR., and JOSHUA LOZANO, ADAM KUREN and STEVEN ALLABAUGH, on behalf of themselves and all others similarly situated, Plaintiffs vs. LUZERNE COUNTY of the COMMONWEALTH OF PENNSYLVANIA and ROBERT C. LAWTON, COUNTY MANAGER, in his official capacity, Defendants	NO. 04517 OF 2012 CLASS ACTION

ORDER

NOW THIS 22nd day of October, 2013, upon argument held on October 8, 2013 in consideration of Defendants' Preliminary Objections to the Amended Complaint, the response thereto and the briefs of the parties, it is hereby **ORDERED, ADJUDGED AND DECREED**:

1. Preliminary Objection I, challenging Plaintiff's Flora's standing, is **SUSTAINED**.

2. Preliminary Objection II, challenging individual Plaintiffs' standing, is **SUSTAINED**.

3. Preliminary Objection III, alleging that the Luzerne County Office of Public Defender is an indispensable party, is **OVERRULED**.

4. Preliminary Objection IV, alleging that Plaintiffs' Mandamus claim fails to state a cause of action, is **SUSTAINED**.

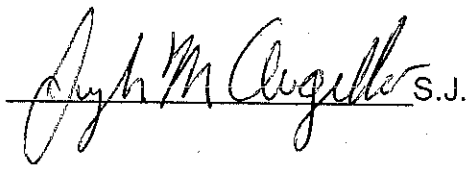
5. Preliminary Objection V, alleging that Plaintiffs' pre-conviction Sixth Amendment Claims fails to state a cause of action, is **SUSTAINED**.

6. Preliminary Objection VI, alleging that Plaintiffs cannot purse official capacity claims against the County Manager, are **OVERRULED**.

7. Plaintiffs' Amended Complaint is **DISMISSED**.

8. The Prothonotary of Luzerne County is directed to mail a copy of this Order and Opinion to all Counsel of Record or each party if unrepresented pursuant to Pa.R.C.P. No. 236.

BY THE COURT,



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IN THE COURT OF COMMON PLEAS

OF LUZERNE COUNTY

AL FLORA, JR., and JOSHUA LOZANO, ADAM KUREN and STEVEN ALLABAUGH, on behalf of themselves and all others similarly situated, Plaintiffs vs. LUZERNE COUNTY of the COMMONWEALTH OF PENNSYLVANIA and ROBERT C. LAWTON, COUNTY MANAGER, in his official capacity, Defendants	NO. 04517 OF 2012 CLASS ACTION

OPINION

I. Background

Al Flora, Jr., ("Flora") and Joshua Lozano, Adam Kuren, and Steven Allabaugh ("Individual and/or Class Plaintiffs"), collectively sometimes referred to as Plaintiffs, filed an Amended Complaint on May 15, 2013 subject to the Preliminary Objections of Defendants that are presently before the court.

The original Complaint was filed on April 10, 2012 by Mr. Flora, then in his capacity as Chief Public Defender of Luzerne County and different individual and putative Class Plaintiffs. The Amended Complaint followed, *inter alia*, to reflect the change in Mr. Flora's employment status as he was no longer serving as Chief Public Defender in Luzerne County as well as naming new Class Plaintiffs. Our previous

Order of Court dated May 7, 2013 in this regard granted Plaintiffs' Motion to Amend without any prejudice unto Defendants relative to the filing of appropriate preliminary objections and/or raising affirmative defenses by way of answer.

Defendants then removed the matter to the United States District Court for the Middle District of Pennsylvania where said Court on August 26, 2013, granted Plaintiffs' Motion to remand to the Luzerne County Court of Common Pleas. Presently before the Court are Defendants' Preliminary Objections to Plaintiffs' Amended Complaint that were filed on September 11, 2013 together with a Brief in Support thereof. Plaintiffs filed an Answer and Memorandum of Law in opposition thereto, followed by Defendants' Reply Brief. Additionally, oral Argument on the Defendants' Preliminary Objections was held on October 8, 2013.

II. Preliminary Objections and Standard of Review

Defendants' have filed preliminary objections to Plaintiffs' Amended Complaint based upon the following issues: 1) Plaintiff Flora lacks legal standing; 2) the individual Plaintiffs lack legal standing; 3) Plaintiffs' have failed to join an indispensable party (namely the current Chief Public Defender and the Office of Public Defender in Luzerne County); 4) Plaintiffs' Mandamus Claim fails to state a cause of action; 5) Plaintiffs' Pre-Conviction Sixth (6^{th}) Amendment Claims fail to state a cause of action; and 6) Plaintiffs cannot pursue "official capacity" claims against the County Manager.

When reviewing preliminary objections the Court must confine its analysis to the pleadings and must accept as true all well-pleaded facts provided in the Plaintiffs' Complaint, and any reasonable inferences that may be drawn from those facts. Furthermore, preliminary objections should be sustained when they are clear from

doubt. **Reardon v. Allegheny College**, 926 A.2d 477, 480 (Pa. Super. 2007). However, the court will not accept as true conclusions of law, unwarranted inferences from the facts, argumentative allegations, or expressions of opinion. **Penn Title Ins. Co. v. Deshler**, 661 A.2d 481, 483 (Pa. Cmwlth. 1995).

III. Plaintiff Al Flora, Jr.'s Standing

Defendants' have preliminarily objected to Plaintiff Flora in the present lawsuit, under Pa.R.C.P. 1028(a)(1), for lack of jurisdiction over the subject matter of the action or the person of the defendant and Pa. R.C.P. 1028(a)(5) for his lack of capacity to sue. For the reasons that follow, we sustain Defendants' Preliminary Objection that Plaintiff Flora lacks legal standing; for both a want of being "aggrieved," and also because he does not retain legal standing by way of exception in his individual capacity and, therefore, he lacks the capacity to sue pursuant to Pa.R.C.P. 1028(a)(5).

A. Plaintiff Flora is not aggrieved in that he no longer has a direct, immediate or substantial interest in the matter.

Pa.R.C.P. 1028(a)(5) allows the Defendant to preliminarily object to Plaintiff's Complaint for lack of capacity to sue. As a threshold matter, a party seeking judicial resolution of a controversy must first establish that he or she has standing to maintain the action. **Nye v. Erie Ins. Exch.**, 504 Pa. 3, 5, 470 A.2d 98 (1983); **Treski v. Kemper Nat'l Ins. Cos.**, 449 Pa. Super. 620, 674 A.2d 1106, 1111 (Pa. Super. Ct. 1996). Generally, to have standing, a party must satisfy the following test:

> "One must show a direct and substantial interest and a sufficiently close causal connection between the challenged action and the asserted injury to qualify the interest as "immediate" rather than "remote." A substantial interest requires some discernible adverse effect to some interest other than an abstract interest of all citizens in having others comply with the law. Direct simply means that the person claiming to be aggrieved must show causation of the harm to his interest. The immediacy or remoteness of the injury is determined by the nature of the

causal connection between the action complained of and the injury to the person challenging it." **DeFazio v. Civil Serv. Comm'n of Allegheny County**, 562 Pa. 431, 434, 756 A.2d 1103, 1105 (2000).

A controversy is worthy of judicial review only if the individual initiating the legal action has been "aggrieved." An "aggrieved" interest is one that is direct, immediate and substantial. An interest is "substantial" if in resolving the claim it would "surpass the common interest of all citizens in procuring obedience to the law." **In re Hickson**, 573 Pa. 127, 821 A.2d 1238, 1243 (2003); **Bergdoll v. Kane**, 557 Pa. 72, 731 A.2d 1261, 1268 (1999); and **Pittsburgh Palisades Park, LLC v. Commonwealth of PA**, 585 Pa. 196, 888 A.2d 655, 659 (2005). Additionally, a "direct" interest requires that a party establish that the matter complained of "caused harm to the party's interest, i.e. a causal connection between the harm and the violation of law." The keystone to standing is that the person must be negatively impacted in some real and direct fashion." **Pittsburgh Palisades**, 888 A.2d at 659-660. Finally, an interest is "immediate" if the causal connection is not remote or speculative. **City of Philadelphia v. Commonwealth of Pennsylvania**, 575 Pa. 542, 838 A.2d 566, 577 (2003).

The principle that *"a controversy is worthy of judicial review only if the individual initiating the legal action has been aggrieved"* is based upon the practical reason that unless one has a legally sufficient interest in a matter, the courts cannot be assured there is a legitimate controversy. **Pittsburgh Palisades**, 888 A.2d at 659-660 citing **In re Hickson**, 821 A.2d at 1243; and **City of Philadelphia**, 838 A.2d at 577.

Confining our analysis to the pleadings and accepting all well-pleaded facts as true, and drawing any reasonable inferences from those facts, depicts that Mr. Flora is not "aggrieved" as said legal term of art is defined herein above, and where this defect

cannot be cured by way of further amendment or pleading. Averment seven (7) of Plaintiffs' Amended Complaint acknowledges that Mr. Flora is no longer the Chief Public Defender in Luzerne County and is accurately authored in the past tense prose as follows:

> *7. Plaintiff Al Flora, Jr., **was** the Chief Public Defender in OPD of Luzerne County, Pennsylvania from May 2010 until his abrupt and illegal dismissal in April 2013[1]. As Chief Public Defender, Plaintiff Flora **was** responsible for managing the OPD, which included supervising its lawyers and other employees, establishing its policies, managing its budget, and ensuring its compliance with constitutional, statutory, and professional/ethical standards.* (our emphasis added)

The corollary to the above averment relating to Mr. Flora is that the present Chief Public Defender is now responsible for managing the Office of Public Defender (hereinafter "OPD") in Luzerne County which includes all of the aforesaid enumerated duties and obligations that Mr. Flora once had or enjoyed. Of particular assistance in reasoning that Mr. Flora, who arguably once had legal standing and standing without issue or objection when he was the Chief Public Defender, but now lacks same, is the Commonwealth Court case of **Bradford Timbers v. H. Gordon Roberts**, 654 A.2d 625 (1995).

Plaintiff Timbers filed his petition in his official capacity as a district justice and the sufficiency of his petition depended on his continuing to act in that position. Namely, at the time Timbers filed his petition, he asserted a clear right to appoint personal staff; however subsequent to said filing, the Supreme Court relieved him of all judicial and administrative duties and, resultantly, Timbers no longer possessed the right to appoint staff. The Commonwealth Court reasoned that although Timbers correctly asserted that

[1] Mr. Flora has a pending direct cause of action regarding his termination in Federal Court at the time of this Opinion and that fact together with his proper legal standing to that action is also not in dispute here.

the suspension was temporary and not the equivalent to removal from the office of district justice, that distinction does nothing to change the fact that Timbers ***currently*** has no right to appoint staff. Accordingly, as a result of the Supreme Court's suspension order, Timbers no longer had standing to assert the rights of a district justice or to seek mandamus. ***Id***. at 625.

Similarly, the fact that Mr. Flora was once the Chief Public Defender and may or may not prevail in his separate and distinct lawsuit in federal court relative to his termination does nothing to change the fact that he ***currently*** has no right, (as averred in the Amended Complaint), to manage the OPD; no right to supervise its lawyers and other employees; no right to establish policies; no right to manage its budget; and no right to ensure its compliance with constitutional, statutory, and professional/ethical standards. Plaintiff Flora is not aggrieved in that he no longer has a direct, immediate or substantial interest in the matter and, succinctly, no longer has standing to assert the rights of a Chief Public Defender.

Finally, we are cognizant of Plaintiff Flora's argument claiming Defendants are only able to claim Flora's lack of standing after they (the Defendants) have removed him from his position as Chief Public Defender. As noted above, **Bradford Timbers v. H. Gordon Roberts**, 654 A.2d 625 (1995) addresses this notion.

B. Plaintiff Flora does not retain legal standing in his individual capacity as his interest does not surpass the common interest of all taxpaying citizens.

Plaintiff argues under the **Biester** line of decisions that Plaintiff Flora's legal standing remains viable. We disagree. In **Biester v. Thornburgh**, 409 A.2d 848 (Pa. 1979) the court re-affirmed the principle that, "certain cases exist which grant standing

to taxpayers where their interest in the outcome of the suit surpasses the common interest of all citizens in procuring obedience to the law."

The application of **Biester** and its "conditions" has been borne out in the Supreme Court case of **Pittsburgh Palisades Park, LLC v. Commonwealth of PA**, 585 Pa. 196, 888 A.2d 655 (2005). The recognition of standing based upon taxpayer status is an exception to traditional requirements of standing. The once liberal approach granting individuals standing based upon their interest as taxpayers was rejected by the Supreme Court in the seminal decision of **Application of Biester**, 487 Pa. 438, 409 A.2d 848 (1979), which reinvigorated the traditional requirements of standing that an individual must establish an interest in an action that surpasses the common interest of all taxpaying citizens. **Pittsburgh Palisades**, *Id.* citing **Biester** at 851-852. **Biester** recognized that one who was not "aggrieved" so as to satisfy standing requirements might nevertheless be granted standing as a taxpayer if certain preconditions were met. In essence, the meeting of the preconditions amount to an "exception" that relaxes the general rules regarding standing and the requirement of a substantial, direct, and immediate interest in the challenge. It is policy driven and revolves around the concept of giving standing to enable the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the standing requirement. ***Id.*** at page 207. Consistent with this policy, five (5) requirements have subsequently emerged as the preconditions necessary to satisfy the **Biester** exception for taxpayer standing:

1) the governmental action would otherwise go unchallenged;

2) those directly and immediately affected by the complained of matter are beneficially affected and not inclined to challenge the action;

3) judicial relief is appropriate;

4) redress through other channels is unavailable; and

5) no other persons are better situated to assert the claim.

Consumer Party of Pennsylvania v. Commonwealth, 510 Pa. 158, 507 A.2d 323, 329 (1986) summarizing **Biester** taxpayer exception standing requirements.

Moreover, all of the conditions need to be met, hence are "preconditions," for standing to be granted. Plaintiff Flora is unable to meet such stringent criteria so as to avail himself to the **Biester** exception. More Specifically, the current holder of office - the Chief Public Defender, is facially better situated to assert claims concerning the office he oversees relative to funding, staffing, workload, effectiveness, and the judgment and decisions over these matters are no longer Plaintiff Flora's to exercise and/or assert.

Additionally, there exist other channels available to address the issues in Plaintiffs' Complaint where redress may be sought shy of a lawsuit but notwithstanding, it would be up to the current Chief Public Defender to seek those other avenues within the Home Rule Charter of Luzerne County for a remedy and then upon impasse, can always initiate a lawsuit. Implicit therein however, is that the current Chief Public Defender may not be of the same opinion as Plaintiff Flora that judicial relief is appropriate or necessary, or whether any action is currently needed. Once an individual (or individuals) are identified as better situated to assert the claim (other than Flora), then the legal analysis comes full circle in that the current Chief Public Defender is best

postured to be ultimately "aggrieved" as defined above and therefore he would not need to attain standing indirectly by exception through the **Biester** conditions. In other words he would have attained a direct, immediate or substantial interest in the matter so as to *directly* achieve legal standing.

Nor can we find that the governmental action would otherwise go unchallenged. Rules of Professional Responsibility and ethical duties require the current Chief Public Defender to challenge county funding schemes that would serve to impair the effectiveness of the OPD. There is no reason to conclude the current Chief Public Defender would *not* adhere to Rules of Professional Conduct, including ethical rules to ensure that effective assistance of legal counsel is being maintained in the OPD, including acceptable workloads of the staff attorneys. In fact, case law in the Commonwealth illustrates that Public Defenders are most capable and more than willing to challenge governmental action by way of initiating suit in an array of matters. The Dauphin County Public Defender's Office sued the Court of Common Pleas of Dauphin County relating to an administrative order of the Court dictating eligibility requirements for criminal defendants seeking representation by the public defender's office. **Dauphin County Public Defender v. Court of Common Pleas of Dauphin County**, 578 Pa. 59, 849 A.2d 1145 (2004). The Public Defender's Office of Venango County sued the Venango County Court of Common Pleas seeking to invalidate a decision by the Court to appoint a public defender as standby counsel for a pro se criminal defendant who previously had been denied public defender representation because his annual income exceeded the financial guidelines established by the Venango County Public Defender's

Office. **Public Defender's Office of Venango County v. Venango County Court of Common Pleas**, 586 Pa. 317, 893 A.2d 1275 (2006). Kevin G. Sasinoski, the public defender of Allegheny County, sued the county manager when he was, without prior notice, placed on paid administrative leave. **Sasinoski v. Cannon**, 696 A.2d 267 (Cmwlth. 1997).

Further, we find the prospect of illegal termination lawsuit proceedings (i.e. should the current Chief Public Defender sue and be met with termination and removal) to be sufficient deterrent, in and of itself, of unscrupulous, illegal administrative firings.

IV. The Individual (Class) Plaintiffs' Standing and Capacity to Sue

Defendants' have preliminarily objected to the individual Class Plaintiffs for lack of legal standing to contest budgeting priorities and, therefore, lack the capacity to sue pursuant to Pa.R.C.P. 1028(a)(5).

The argument in favor of the Class Plaintiffs lack of standing, and resulting lack of capacity to sue may be summarized as follows, that individual clients of the Public Defender's office lack standing to bring *prospective* 6th Amendment claims (as they currently have legal counsel) seeking a remedy for alleged Office of Public Defender chronic underfunding resulting in systematic deficiencies that *may* serve to deprive those clients of their right to counsel prospectively in the future.

As pleaded, the Class Plaintiffs averments resemble that of which, if true, the corresponding remedy lies within **Strickland v. Washington**, 466 U.S. 668, 104 S. Ct. 2052 (1984), not **Gideon v. Wainwright**, 372 U.S. 335, S. Ct. 792 (1963). The distinction being that the former presumes an indigent criminal defendant has legal counsel but may not have received meaningful (effective) assistance thereof post-

conviction, where the latter is, concisely, the indigent's right to counsel and where he/she has been denied legal counsel.

A case that would seemingly advance Class Plaintiffs' position that they have standing and the capacity to sue lies in the non-persuasive, non-binding (upon this Court), New York State Court of Appeals case of **Hurrell-Harring v. State of New York**, 15 N.Y. 3d 8 (2010). Notwithstanding however, the **Hurrell** case is clearly distinguished from the pleadings in the present case before this court in that the high court in the State of New York was reviewing an alleged outright denial of legal counsel, (not effective assistance) at various stages of prosecution within a host of counties in the state including Washington, Onondaga, Ontario, Schuyler and Suffolk and where said court found the Complaint stated a claim for *"constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of **Gideon**."* *Id.* at 304. That is most discernible from the pleadings in the Class Plaintiffs' case herein where it has been averred in Plaintiffs' Amended Complaint as follows:

> 8. Plaintiff Joshua Lozano is facing criminal charges in the Luzerne County Court of Common Pleas **and has been assigned an attorney to represent him in that case by the Luzerne County OPD.** He has been charged with unlawful possession of a firearm, reckless endangerment and assault. (our emphasis added)
>
> 9. Plaintiff Adam Kuren is facing criminal charges in the Luzerne County Court of Common Pleas **and has been assigned an attorney to represent him in that case by the Luzerne County OPD.** He has been charged with burglary, criminal trespass, theft, receiving stolen property and related conspiracy charges. (our emphasis added)
>
> 10. Plaintiff Steven Allabaugh is facing criminal charges in the Luzerne County Court of Common Pleas **and has been assigned an attorney to represent him in that case by the Luzerne County OPD.** He has been charged with statutory sexual assault, involuntary deviate sexual intercourse with a minor and related charges. (our emphasis added)

> 11. The Class Plaintiffs are all indigent persons who have been charged with crimes by the Luzerne County District Attorney and for whom the County bears the responsibility of providing constitutionally adequate representation. As a result of Defendants' failure to provide sufficient resources to the OPD or to otherwise provide resources for indigent representation, however, **the Class Plaintiffs and all members of the proposed Class are likely to receive representation in their criminal cases that falls below the constitutionally required minimum level of adequacy**. (our emphasis added)

Accepting the above well-pleaded facts as true, Class Plaintiffs admittedly are not currently suffering a denial of legal counsel, rather, they are enjoying pre-conviction constitutionally (presumed) adequate legal representation. The pleadings amount to improper pre-conviction deprivation of Sixth Amendment rights where in fact, an indigent criminal defendant cannot pursue a pre-conviction attack on the effectiveness of the representation he is receiving, absent a showing of obvious and substantial prejudice amounting to a *constructive denial of counsel.* **Strickland v. Washington**, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).

Whether a defendant received ineffective assistance of counsel under **Strickland** or is entitled to a presumption of prejudice under **Cronic**[2] is a determination that can *only be made after the criminal proceeding has ended* as they amount to prospective violations of their Sixth Amendment rights. Notably, the Plaintiffs' Amended Complaint does not raise a claim for constructive denial of counsel and that ironically, illustrates evidence to the exact contrary. Nor are we of the opinion that Plaintiffs can "cure" by way of further amended pleading because Plaintiffs indeed have legal counsel. It would now be fundamentally inapposite and factually inaccurate for Plaintiffs to counter with a **Gideon** argument that legal counsel has been denied to the Class Plaintiffs.

[2] **United States v. Cronic**, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) decided the same day as **Strickland** recognizes a "narrow exception" to Strickland's requirement that a defendant asserting an ineffective assistance of counsel claim must demonstrate a deficient performance and prejudice.

Parenthetically, had Plaintiffs averred a Gideon denial of legal counsel styled complaint, then the current Chief Public Defender would be an indispensible party as only the current holder of said office has the authority to appoint and provide legal counsel to the affected indigent criminal adult defendants. Our rationale is thus bolstered inasmuch the current office holder need not be compelled to appoint legal counsel to the Class Plaintiffs as they are already represented by presumed competent legal counsel. Therefore we have ordered, consistent with our rationale herein, that the current Chief Public Defender is not an indispensible party hereto and Defendants' Preliminary Objection in that regard is overruled.

Based upon the foregoing rationale, we sustain Defendants' Preliminary Objection that the individual (Class) Plaintiffs lack legal standing to contest Office of Public Defender budgeting priorities and, therefore, lack the capacity to sue pursuant to Pa.R.C.P. 1028(a)(5).

V. Resolution of the remaining Preliminary Objections

Plaintiffs seek relief in the form of Mandamus. "Mandamus" is an extraordinary remedy designed to compel official performance of a ministerial act or mandatory duty where there exists a clear legal right in the plaintiff and a corresponding duty in the defendant and where there is no other adequate remedy at law. **County of Allegheny v. Commonwealth**, 518 Pa. 556, 544 A.2d 1305 (1988); and **Banfield v. Cortes**, 922 A.2d 36 (Cmwlth. 2007). Since we have found there is no legal standing resulting in the lack of capacity to sue relative to Plaintiff Flora as well as the Class Plaintiffs, it corresponds that there can be no Mandamus relief in favor of the Plaintiffs and therefore the Preliminary Objections in this regard are also sustained; namely, Plaintiffs'

Mandamus Claim fails to state a cause of action and Plaintiffs' Pre-Conviction Sixth (6th) Amendment Claims fail to state a cause of action.

The remaining Preliminary Objection relative to Plaintiff's inability to pursue "official capacity" claims against the County Manager is overruled. The County Manager is integrally involved in the funding of the Office of the Public Defender and, if mandamus relief were to be granted, the County Manager is indispensable to carry out the governmental function so compelled, whether that be the official performance of a ministerial act or mandatory duty. Home Rule Charter of Luzerne County Sections 4.07(A)(4) and 4.08(A).

Accordingly and for the reasons set forth herein, Plaintiffs' Amended Complaint is Dismissed, and we enter the following order:

ORDER IS ATTACHED SEPARATELY AS PAGE NO. 15.

APPENDIX B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Al Flora, Jr., and Adam Kuren and Steven Allabaugh, on behalf of themselves and all others similarly situated, Appellants	:	
v.	:	No. 2072 C.D. 2013
Luzerne County of the Commonwealth of Pennsylvania and Robert C. Lawton, County Manager, in his official capacity	:	
Al Flora, Jr., and Adam Kuren and Steven Allabaugh, on behalf of themselves and all others similarly situated	:	
v.	:	No. 2207 C.D. 2013
	:	Argued: June 16, 2014
Luzerne County of the Commonwealth of Pennsylvania and Robert C. Lawton, County Manager, in his official capacity, Appellants	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE MARY HANNAH LEAVITT, Judge

OPINION
BY JUDGE LEAVITT FILED: October 14, 2014

Al Flora, Jr., Adam Kuren, and Steven Allabaugh appeal the order of the Luzerne County Court of Common Pleas (trial court) granting the preliminary objections of Luzerne County and County Manager Robert C. Lawton (collectively County) to their amended complaint. The amended complaint asserts that, due to inadequate funding, the Office of Public Defender of Luzerne County is unable to represent indigent clients adequately, thereby depriving those clients of their right to counsel guaranteed by the Sixth Amendment. The trial court sustained the County's objections that the plaintiffs lacked standing, for separate reasons, and that the complaint failed to state a cause of action. The trial court overruled the County's objection that the plaintiffs should have joined the current Chief Public Defender as an indispensable party. The County cross-appeals the trial court's denial of its motion to disqualify an attorney representing the plaintiffs on the basis of her alleged ethics violations.

Background

On April 10, 2012, Al Flora, Jr., in his official capacity as acting Chief Public Defender of Luzerne County, and three indigent criminal defendants filed a class action complaint against the County for depriving the three indigent criminal defendants of their right to counsel under the Sixth Amendment of the United States Constitution and Article 1, Section 9 of the Pennsylvania Constitution. The complaint was amended on May 15, 2013, *inter alia*, to aver that Flora was suing in his individual capacity because he was no longer employed by the County as Chief Public Defender. It also replaced the original indigent criminal defendant plaintiffs with Joshua Lozano,[1] Kuren and Allabaugh (Indigent

[1] Joshua Lozano was named in the amended complaint as a potential class representative but he is not a party to this appeal.

Clients) as representatives of a class comprised of "all indigent adults in Luzerne County who are or will be represented by the Office of the Public Defender from this point until the Office of the Public Defender has the funding and resources necessary to enable it to meet ethical, legal, and constitutional standards of representation." Amended Complaint, ¶4; Reproduced Record at 851a-52a (R.R. __).

The amended complaint asserted that the Office of Public Defender, as currently funded, cannot provide adequate legal representation to indigent criminal defendants. The amended complaint generally alleged that public defenders carry caseloads that exceed the standard recommended by the American Bar Association; lack basic office resources such as individual desks and phone lines; and lack sufficient support staff. More specifically, the amended complaint alleged that public defenders are unable to provide representation at most preliminary arraignments and often must request continuances of critical proceedings, leading to longer incarcerations than might be otherwise necessary. Amended Complaint, ¶¶48-49, 53-54; R.R. 865a-67a. It further alleged that public defenders in Luzerne County are unable to prepare properly for their clients' defense or to consult with them in confidence. Amended Complaint, ¶¶61-70; R.R. 869-872. The amended complaint requested the following relief:

> [a] writ of mandamus and permanent injunction compelling [the County] to provide necessary funding to allow the [Office of Public Defender] to hire additional trial attorneys and support staff as well as upgrade the physical and technological resources such that the [Office of Public Defender] is capable of providing representation to all qualified indigent defendants prosecuted in Luzerne County that satisfies standards set by the U.S. and Pennsylvania Constitutions.

Amended Complaint, Prayer for Relief ¶1; R.R. 885a. Notably, the amended complaint alleged that Flora had attempted numerous times to obtain additional resources from the County through the normal budgetary process. Amended Complaint, ¶¶29-37; R.R. 858a-61a. However, his requests were denied. In response, Flora adopted a policy in December 2011 that limited the clients of the Office of Public Defender to those defendants charged with homicide or felony sex offenses or who are facing extradition. Amended Complaint, ¶33; R.R. 860a.

With their complaint, the plaintiffs filed a request for preliminary injunction, and this was granted on June 15, 2012, after a hearing. The trial court ordered the County to provide funding for unfilled vacancies within the Office of Public Defender and to provide office space adequate to allow confidential communication between public defenders and their clients. Additionally, the trial court ordered the County to appoint a lawyer to represent each of the original indigent criminal defendant plaintiffs, who had been deprived counsel under Flora's December 2011 policy, and ordered Flora to discontinue that policy. Finally, the trial court ordered the parties into mediation, which proved unsuccessful.

On April 17, 2013, the County dismissed Flora and appointed a new Chief Public Defender.[2] On May 31, 2013, the County removed the amended complaint to the United States District Court for the Middle District of Pennsylvania, but the case was remanded to the trial court on August 16, 2013.

[2] Flora filed an action in federal court alleging retaliation claims under state and federal law and seeking reinstatement as Chief Public Defender. The action was dismissed. Flora is appealing the dismissal of the federal claim and will refile his state law claims in the trial court.

On September 11, 2013, the County filed preliminary objections to the amended complaint and a motion to disqualify one of the Indigent Clients' attorneys, Mary Catherine Roper, Esq. The trial court held a hearing on October 8, 2013, on both issues. Regarding the motion to disqualify, the parties stipulated to several facts, specifically that Roper: (1) met with the Indigent Clients individually in April 2013 knowing that some of them were represented by public defenders in their criminal cases, (2) did not inform the public defenders that she was meeting with their clients and (3) brought retainer or fee agreements to the meetings that were executed afterwards.

On October 21, 2013, the trial court denied the County's motion to disqualify Roper. On October 22, 2013, the trial court sustained several of the County's preliminary objections and dismissed the amended complaint. Specifically, the trial court held that both Flora and the Indigent Clients lacked standing and that the amended complaint failed to state a cause of action. The trial court also held that the current Chief Public Defender is not an indispensable party. Flora and the Indigent Clients have appealed the order sustaining the County's preliminary objections, and the County has cross-appealed the denial of its motion to disqualify Roper.

On appeal,[3] Flora and the Indigent Clients raise two issues. First, they contend that the trial court erred in holding that Flora lacked standing in his

[3] In reviewing a trial court's grant of preliminary objections, this Court's standard of review is *de novo* and the scope of review is plenary. *Mazur v. Trinity Area School District*, 961 A.2d 96, 101 (Pa. 2008). The court must accept as true all well-pleaded, material, and relevant facts alleged in the complaint and every inference that is fairly deducible from those facts. *Id.* Preliminary objections should be sustained only when, based on the facts pleaded, it is clear and free from doubt that the complainant will be unable to prove facts legally sufficient to establish a right to relief. *Id.*

individual capacity. Second, they argue that the Indigent Clients have standing to allege a deprivation of their Sixth Amendment right to counsel before a deprivation has actually occurred. On cross-appeal,[4] the County argues that Attorney Roper violated several rules of professional conduct and that the trial court erred in refusing to disqualify her.

Flora's Standing

We consider, first, whether Flora has standing to pursue his claim that the Office of Public Defender is inadequately funded. The plaintiffs contend that Flora has standing under the traditional standing test and also as a taxpayer under *Application of Biester*, 409 A.2d 848 (Pa. 1979).

To have standing, a party must establish "that he has a substantial, direct, and immediate interest in the outcome of the litigation." *Pittsburgh Palisades Park, LLC v. Commonwealth*, 888 A.2d 655, 660 (Pa. 2005). An interest is "substantial" if the party's interest "surpasses the common interest of all citizens in procuring obedience to the law." *Id.* A "direct" interest requires a showing of a causal connection between the matter complained of and the party's interest. *Id.* Finally, an "immediate" interest requires the causal connection to not be remote or speculative. *Id.* The key is that the person must be "negatively impacted in some real and direct fashion." *Id.*

The plaintiffs argue that Flora is "aggrieved" under the traditional standing test because "his right to bring a mandamus suit was deliberately frustrated by a discharge he contends is retaliatory." Plaintiffs' Brief at 55. Therefore, they argue that Flora should be permitted to continue as a plaintiff

[4] This Court exercises plenary review of a trial court's disposition of an attorney disqualification motion. *Vertical Resources, Inc. v. Bramlett*, 837 A.2d 1193, 1201 (Pa. Super. 2003).

unless and until the federal court rules on his retaliation claims. They also contend that the trial court erred in relying upon *Bradford Timbers v. H. Gordon Roberts*, 654 A.2d 625 (Pa. Cmwlth. 1995). Plaintiffs argue that *Ambron v. Philadelphia Civil Service Commission*, 458 A.2d 1055 (Pa. Cmwlth. 1983), is a more applicable precedent because it dealt with the standing of a plaintiff challenging his removal, as is the case with Flora.

In *Bradford Timbers*, a district justice petitioned for a writ of mandamus to compel the county to make a clerical appointment to his personal staff. After the district justice filed his petition, our Supreme Court suspended him. This Court held that the district justice lacked standing to proceed with his mandamus action because he no longer had the authority to carry out the act he sought to compel. *Bradford Timbers*, 654 A.2d at 626. In *Ambron*, four police detectives challenged their transfer from the district attorney's office to the Philadelphia police department. After three of the four officers resigned, the complaint was challenged as moot. This Court held that because the plaintiffs were "not incapable of reinstatement," their claims were not moot. *Ambron*, 458 A.2d at 1056.

As the trial court noted, Flora was once Chief Public Defender and may succeed in challenging his termination as retaliatory. However, he *currently* has no right to manage the Office of Public Defender in any way whatsoever. In *Bradford Timbers*, this Court held that the suspended district justice lacked standing even though his removal was temporary. The case is stronger, here, because Flora's removal from office is permanent. *Ambron* is distinguishable because Flora's potential reinstatement is not an issue in the present litigation. We therefore agree with the trial court's reliance on *Bradford Timbers*.

We conclude that Flora lacks traditional standing because he is not personally aggrieved by the County's alleged failure to fund the Office of Public Defender adequately. He is not directly impacted by the County's actions any more than other individual citizens. As a result, his interest is not substantial, direct, or immediate.

Alternatively, the plaintiffs argue that Flora has taxpayer standing under *Biester*, which created an exception to the traditional standing requirements. Under this exception, a taxpayer, even one not personally aggrieved, may challenge a governmental action provided he satisfies the following requirements: (1) the governmental action would otherwise go unchallenged, (2) those directly and immediately affected by the complained of expenditures are beneficially affected and not inclined to challenge the action, (3) judicial relief is appropriate, (4) redress through other channels is unavailable, and (5) no other persons are better situated to assert the claim. *Consumer Party of Pennsylvania v. Commonwealth*, 507 A.2d 323, 329 (Pa. 1986), *abrogated on other grounds by Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 877 A.2d 383 (Pa. 2005). All the conditions must be satisfied for a taxpayer to have standing.

The plaintiffs argue that Flora satisfies the first *Biester* requirement because the County could dismiss any Chief Public Defender who attempts to address the alleged funding deficiencies to the Office. Second, they argue that the public defenders and their clients will be benefited by the lawsuit, and they are either unable or unlikely to bring litigation due to the County's past firing of Flora. Third, the plaintiffs contend that judicial relief is particularly appropriate in the present case because it involves constitutional questions. Fourth, they argue that

relief through other channels is unavailable because, again, the County can stop the Chief Public Defender from filing a lawsuit by firing him. They also note that Flora spent two years lobbying the County for additional resources before filing the current lawsuit. Finally, the plaintiffs contend that a decision by the Chief Public Defender to bring a lawsuit similar to the present one would be "futile" because the County would fire him to prevent the lawsuit from going forward. In any case, because the current Chief Public Defender has not acted, Flora should be permitted to proceed with this action to fulfill the intent of *Biester*.

The County responds that Flora lacks standing under *Biester* because relief is available through other channels. The current Chief Public Defender may bring a claim under the Public Defender Act[5] or seek to have attorneys appointed on a case-by-case basis. Individual indigent criminal defendants may obtain relief under the Post Conviction Relief Act[6] should they receive ineffective assistance of counsel in their criminal trials.

The trial court did not err in holding that Flora lacks standing under *Biester*. First, whether the County has provided the Indigent Clients effective assistance of counsel will be addressed in their criminal cases. Likewise, the current Chief Public Defender may challenge the County's actions. *See, e.g.*, *Dauphin County Public Defender's Office v. Court of Common Pleas of Dauphin County*, 849 A.2d 1145, 1148 (Pa. 2004) (holding that public defender has standing to challenge administrative order which affects statutory obligation "to provide legal representation to financially eligible criminal defendants"). Redress is also available through the regular budgetary process. The plaintiffs' primary argument

[5] Act of December 2, 1968, P.L. 1144, *as amended*, 16 P.S. §§9960.1-9960.13.

[6] 42 Pa. C.S. §§9541–9546.

is that the County will dismiss a Chief Public Defender who files a lawsuit, but this is speculation. Notably, if Flora is successful in his retaliation claim against the County and is reinstated, he can then bring a lawsuit in his official capacity.

In sum, we hold that Flora lacks standing in his individual capacity and the trial court properly sustained the County's preliminary objection on this ground.

Indigent Clients' Standing/Failure to State a Claim

Next, we consider whether the trial court erred in finding that the Indigent Clients lacked standing. They argue that they adequately pled a constructive denial of counsel claim in the amended complaint, which alleges that the County's public defenders are unable to: interview or meet with clients prior to preliminary hearings; contact clients between court appearances; conduct meaningful investigation or discovery; engage in motion practice; gather the information needed to do effective plea negotiations; engage in sufficient trial preparation; or properly litigate appeals due to lack of experience. Amended Complaint, ¶106, R.R. 881a. Because they have been constructively denied counsel, the Indigent Clients believe they have a substantial, direct, and immediate interest in the resources provided to the Office of Public Defender. They explain that their action does not seek to alter how the Chief Public Defender allocates the resources available to him, but rather to compel the County to provide sufficient resources to satisfy its statutory and constitutional obligations. Additionally, the Indigent Clients contend that the amended complaint raises an actual denial of counsel claim because the Office of Public Defender does not provide representation at preliminary arraignments, the point in the criminal process where the right to counsel attaches.

The County counters that none of the Indigent Clients have yet been convicted and, therefore, have not suffered any prejudice. In addition, the County argues that mandamus relief is not available because the Indigent Clients seek to compel the appropriation of additional funds for the Office of Public Defender, which is a discretionary act. Finally, the County contends that the amended complaint's allegations that its public defenders will not devote sufficient time to their representation do not give rise to a claim for either an actual denial or constructive denial of counsel.

The argument on standing merges with the question of whether the amended complaint states a claim upon which relief can be granted. Accordingly, we decide the two issues together.

Right to Counsel

The Sixth Amendment of the United States Constitution states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The United States Supreme Court has held that states must provide indigent criminal defendants with appointed counsel. *Gideon v. Wainwright*, 372 U.S. 335 (1963). The right to counsel attaches once the criminal defendant is actually charged at a preliminary arraignment. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). Therefore, an indigent criminal defendant who does not receive appointed counsel may bring an actual denial of counsel claim. *United States v. Cronic*, 466 U.S. 648, 659 (1984).

Appointed counsel must provide effective representation. If an indigent criminal defendant's appointed lawyer is ineffective, the defendant is entitled to a new trial. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

Under *Strickland*, a defendant must prove that his attorney performed below a standard of objective reasonableness and that counsel's performance resulted in actual prejudice to the defendant. *Id.* An ineffective assistance of counsel claim may be brought only after the defendant has been convicted. *See id*.

In *Cronic*, 466 U.S. 648, decided the same day as *Strickland*, the Supreme Court noted that there are some cases where

> the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

Cronic, 466 U.S. at 659-60. In *Cronic*, the defendant's retained counsel withdrew weeks before the case went to trial. His newly appointed counsel was a young lawyer with a real estate practice who had 25 days to prepare for the complex fraud case that had taken the government over four years to prepare. Nevertheless, the Supreme Court held that these facts were not sufficient to establish a presumption of prejudice. Instead, the Court cited *Powell v. Alabama*, 287 U.S. 45 (1932), as an example of where a presumption of prejudice will be shown. In *Powell*, the defendant's counsel was from out-of-state and did not know the local rules of court or even the facts of the case. In these circumstances, the Supreme Court held that it can be presumed that the criminal defendant is prejudiced and, effectively, has been denied counsel.

Notably, both *Strickland* and *Cronic* were criminal appeals where the defendants were seeking to overturn their convictions; they did not seek prospective relief.

Constructive Denial of Counsel

The Indigent Clients ask this Court to recognize a new civil remedy to improve funding to a public defender's office. In *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), the first case to recognize such a remedy, a class of indigent criminal defendants in Georgia sought to require state government to provide the funding for their defense. After the dismissal of the case, the Eleventh Circuit Court of Appeals reversed, reasoning that a criminal defendant's "lack of counsel" claims might not rise to the level of "ineffective assistance" but the defendants could still suffer harm. Nevertheless, the court held that criminal defendants asserting that they will suffer from a lack of meaningful representation in the future must show a likelihood of substantial and immediate irreparable injury and the inadequacy of a remedy at law to proceed. *Luckey* was never litigated to completion because it was dismissed on grounds of abstention. *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992).

The New York Court of Appeals considered a constructive denial of counsel claim in *Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y. 2010). There, several indigent criminal defendants brought a civil action asserting that they had been constructively denied their constitutional right to counsel because of the inadequate funding of several county public defender's offices. In a 4 to 3 decision, the New York Court of Appeals allowed the case to proceed and reversed the lower court's dismissal. The court reasoned that *Strickland*'s holding that a defendant must be convicted before he brings an ineffective assistance of counsel claim was premised on the supposition that *Gideon* was being faithfully applied by the states. The question decided in *Strickland* was "not [] whether ineffectiveness has assumed systemic dimensions, but rather [] whether the State has met its

foundational obligation under *Gideon* to provide legal representation." *Id.* at 222. The New York Court of Appeals noted that the complaint alleged that appointed counsel served in name only because they were chronically unavailable, unresponsive to urgent inquiries, waived important rights without consulting their clients, missed court appearances, and appeared in court unprepared to proceed. *Id.* These allegations, the New York court held, "raise serious questions as to whether any [attorney-client] relationship may be really said to have existed." *Id.* at 224. Thus, the court distinguished *Strickland*. The New York Court of Appeals allowed the case to proceed, but it has not been litigated to judgment.

Similarly, in *Duncan v. Michigan*, 774 N.W.2d 89 (Mich. Ct. App. 2009), *aff'd on other grounds* 780 N.W.2d 843 (Mich. 2010),[7] a class of indigent criminal defendants challenged the funding to several county public defender offices as so inadequate as to violate the Sixth Amendment. Specifically, the plaintiffs alleged that the county systems were "wholly lacking" regarding client eligibility standards; attorney hiring, training and retention programs; written performance and workload standards; monitoring and supervision of appointed counsel; conflict of interest guidelines; and independence from the judiciary and prosecutorial offices. *Id.* at 99. The Michigan Court of Appeals noted that the allegations in the complaint were detailed on specific instances of inadequate

[7] The appellate history of *Duncan* is complex. Initially, the Michigan Supreme Court on April 30, 2010, vacated and remanded in part and affirmed in part the Court of Appeals' decision. Regarding the constructive denial of counsel issue, the Supreme Court stated that "[t]his case is at its earliest stages and, based solely on the plaintiffs' pleadings in this case, it is premature to make a decision on the substantive issues." *Duncan*, 780 N.W.2d 843, 844 (Mich. 2010). Therefore, the Court held that summary disposition was inappropriate. The Court subsequently granted and vacated several reconsideration orders. Ultimately, the court reinstated its original April 30th order. *Duncan*, 790 N.W.2d 695 (Mich. 2010) ("[W]e REINSTATE our order in this case dated April 30, 2010, because reconsideration thereof was improperly granted.").

representation, limited interaction between the public defenders and their clients and waivers of client rights by counsel.

In a 2 to 1 decision, the Michigan Court of Appeals explained, first, that mandamus was available to compel governmental action because the plaintiffs were not seeking to compel an appropriation but, rather, to compel the state to provide adequate representation. The court acknowledged that funding and legislation "would seemingly appear to be the measures needed to be taken to correct constitutional violations," but stated that "we are not prepared to rule on the issue whether the trial court has the authority to order appropriations, legislation, or comparable steps." *Id.* at 111. The court allowed the case to proceed to allow plaintiffs the opportunity to show the

> existence of widespread and systemic instances of actual or constructive denial of counsel and instances of deficient performance by counsel, which instances may have varied and relevant levels of egregiousness, all causally connected to defendants' conduct.

Id. at 124. The court rejected the argument that post-conviction relief, as set forth in *Strickland*, provided the exclusive and proper remedy. The case has not been litigated to judgment.

The dissents in *Hurrell-Harring* and *Duncan* are also worthy of review. The dissenting judge in *Hurrell-Harring* reasoned that inadequacies in the public defender system do not constitute a Sixth Amendment claim. The dissent noted that "[c]onstructive denial of counsel is a branch from the *Strickland* tree, with *Cronic* applying only when the appointed attorney's representation is so egregious that it's as if [the] defendant had no attorney at all." *Hurrell-Harring*, 930 N.E.2d at 229 (Pigott, J., dissenting). The dissent concluded that "[p]laintiffs'

mere lumping together of 20 generic ineffective assistance of counsel claims into one civil pleading does not ipso facto transform it into one alleging a systemic denial of the right to counsel." *Id.* at 230 (Pigott, J., dissenting).

In *Duncan*, the dissenting judge concluded that the relief sought by the plaintiffs would violate separation of powers because they

> sought in their complaint to have the judiciary override the Michigan system of local control and funding of legal services for indigent criminal defendants.

Duncan, 774 N.W.2d at 153-54 (Whitbeck, J., dissenting). Because the plaintiffs had not yet been convicted, they had not suffered prejudice, which is necessary to pursue a Sixth Amendment claim. The plaintiffs' right to pursue an ineffective assistance of counsel claim post-conviction, under *Strickland,* provided an adequate remedy. This made mandamus or injunctive relief inappropriate. Finally, the dissent noted that the Sixth Amendment does not guarantee criminal defendants an attorney of a particular level of skill.

In the present case, the trial court explained that *Hurrell-Harring* was distinguishable because the New York court was "reviewing an alleged outright denial of legal counsel (not effective assistance)" at points in the criminal process where counsel was required. Trial Court op. at 11. By contrast, the amended complaint alleged that some indigent criminal defendants did not have counsel at their preliminary arraignment, which is a point in the criminal process *before* the right to counsel attaches. This made the claims of the Indigent Clients different from those of the plaintiffs in *Hurrell-Harring.* Accordingly, the real question raised by the amended complaint was not a denial of counsel but, rather, a denial of effective counsel. The trial court concluded that whether counsel was ineffective can only be determined after the criminal proceedings have ended.

We find persuasive and so accept the analyses of the dissenting judges in *Hurrell-Harring* and *Duncan* and reject as not persuasive the majority opinions in those cases. We do so for several reasons.

First, there is no precedent from the United States Supreme Court acknowledging that a constructive denial of counsel claim may be brought in a civil case that seeks prospective relief in the form of more funding and resources to an entire office, as opposed to relief to individual indigent criminal defendants. *Strickland*, *Cronic*, and *Gideon* were all cases where the defendants sought a new trial. As explained in the *Duncan* dissent, the "United States Supreme Court in *Gideon* and *Strickland* was concerned with results, not process. It did not presume to tell the states *how* to ensure that indigent criminal defendants receive effective assistance of counsel." *Duncan*, 774 N.W.2d at 153 (Whitbeck, J., dissenting). It is unclear that such a claim will be held cognizable in any state.

Second, even assuming, *arguendo*, that a Sixth Amendment claim for more funding to the public defender's office is cognizable, the amended complaint does not satisfy the requisite standard. The amended complaint alleges that attorneys from the Office of Public Defender meet only briefly with indigent clients, rarely contact clients between court appearances, do not conduct significant investigation or discovery, do not engage in sufficient trial preparation, and cannot properly litigate appeals due to lack of experience. Amended Complaint, ¶106, R.R. 881a. These allegations do not create circumstances that are "so likely [to create prejudice] that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, 466 U.S. at 692. Notably, constructive denial of counsel was not found in *Cronic* where the lawyer assigned to the complex white collar criminal case was

new to the profession, did real estate law and was appointed 25 days before the trial for which the government had prepared for four years.

The amended complaint does not allege facts to support the inference that the Indigent Clients have or will suffer irreparable harm, but only the fear that they will not be adequately represented. This is speculation, a deficiency in the pleading that cannot be cured by amendment. *Kennedy v. Carlson*, 544 N.W.2d 1, 6-8 (Minn. 1996) (holding that public defender's claims were too speculative and hypothetical to pursue a denial of effective assistance of counsel). We agree with the *Hurrell-Harring* dissent that the "mere lumping together of 20 generic ineffective assistance of counsel claims into one civil pleading does not ipso facto transform it into one alleging a systemic denial of the right to counsel." *Hurrell-Harring*, 930 N.E.2d at 230 (Pigott, J., dissenting).

Third, as noted by the Supreme Court in *Strickland*, "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, 466 U.S. at 693. Indeed, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is *simply to ensure that criminal defendants receive a fair trial*." *Id.* at 689 (emphasis added). These observations compel our disposition of the instant appeal. Criminal defendants are guaranteed effective assistance of counsel so that they receive a fair trial; they are not guaranteed perfect counsel or a perfect trial. Accordingly, we will not infer a presumption of prejudice in the present case.

Should the legal representation assigned to the individual Indigent Clients prove ineffective and cause them prejudice, their recourse is to bring a post-conviction *Strickland* claim.

Mandamus

Mandamus is an extraordinary remedy used to compel the performance of a ministerial act or mandatory duty. *Chesapeake Appalachia, LLC v. Golden*, 35 A.3d 1277, 1280 n.7 (Pa. 2012). Mandamus requires a showing that: (1) the petitioner has a clear legal right to relief, (2) the official owes the petitioner a duty, and (3) there are no other adequate remedies at law. *Wilson v. Pennsylvania Board of Probation & Parole*, 942 A.2d 270, 272 (Pa. Cmwlth. 2008). The essence of an action in mandamus is that a specific actor has a non-discretionary duty to perform a particular act. *Finn v. Rendell*, 990 A.2d 100, 106 (Pa. Cmwlth. 2010). Similarly, because a mandatory injunction compels a defendant to perform an act, rather than to refrain from acting, courts will grant a mandatory injunction only upon a very strong showing that the plaintiff has a clear right to relief. *Department of Public Welfare v. Portnoy*, 566 A.2d 336 (Pa. Cmwlth. 1989).

Here, the amended complaint does not present a clear right to relief. The Indigent Clients have an alternative remedy either through a claim under *Strickland* or the Post Conviction Relief Act. Similarly, the Chief Public Defender may seek relief under the Public Defender Act, which authorizes him to

> arrange for and make use of the services of attorneys at law admitted to practice before the Supreme and Superior Courts of this Commonwealth and the court of common pleas of the county or counties in which they may serve, when such attorneys volunteer to act as assistants, without compensation, to enable him to carry out the duties of his office.

16 P.S. §9960.5.

The amended complaint seeks the appropriation of additional funding to the Office of Public Defender to hire additional lawyers and staff. The County counters that its funding of the Office of Public Defender is inherently discretionary and cannot be compelled by a writ of mandamus. We agree with the County.

In addition, the writ of mandamus sought in the amended complaint may violate the doctrine of separation of powers. Our system of government is based on the concept that the legislative, executive and judicial branches of government are independent and co-equal with each other. *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193, 196 (Pa. 1971). Accordingly, no branch of government may exercise the function committed to another branch. *Wilson v. Philadelphia School Districts*, 195 A. 90, 93 (Pa. 1937). Nevertheless, in rare circumstances one branch of government may prevent another branch from usurping the powers committed to the other branches. *Beckert v. Warren*, 439 A.2d 638, 642 (Pa. 1981).

The judicial power, for example, is vested exclusively in the courts, and the taxing and spending powers are vested in the legislature. *Id.* at 642-43. As a "check," however, the courts may "compel expenditures necessary to prevent the impairment of [the court's] exercise of the judicial power or of the proper administration of justice." *Id.* at 642. Therefore, in limited and exceptional circumstances, the courts may order an appropriation of funds when the legislature's funding makes it impossible for the judiciary to comply with its statutory and constitutional obligations. *Id.* at 643. Specifically, our Supreme Court has held that in such a case,

> [t]here must be a genuine threat to the administration of justice, that is, a nexus between the legislative act and the injury to the judiciary, not merely a theoretical encroachment by the legislature.

Id. Stated otherwise, the lack of an appropriation must, itself, be an unconstitutional omission. "Absent such circumstances, the courts are not empowered to review discretionary acts of the legislature." *Id.*[8]

The amended complaint did not allege facts to show such an extreme refusal of the County to appropriate funds. The Indigent Clients' right to relief is far from clear. The County has provided indigent criminal defendants with counsel. Simply stated, the appropriation of additional funds to the Office of Public Defender is a discretionary act that cannot be compelled by a writ of mandamus.

Actual Denial of Counsel

We next consider whether the amended complaint has pled an actual denial of counsel claim. Paragraph 53 of the amended complaint states:

> [t]he [Office of Public Defender] is unable to provide representation or support at most preliminary arraignments, which the U.S. Supreme Court recently reaffirmed to be the point at which the right to counsel attaches. *See Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008) ("[A] criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings

[8] Courts may compel additional funding if the appropriated amount is inadequate to comply with statutory or constitutional obligations. *See Kistler v. Carbon County*, 35 A.2d 733, 735 (Pa. Super. 1944) (holding that county commissioners cannot "limit or avoid liabilities imposed upon the county by the Constitution or by statutes"). The "administration of justice" must be construed more broadly than involving just the courts. Related entities, such as the Office of Public Defender, also participate in the administration of justice.

> that trigger attachment of the Sixth Amendment right to counsel.") The right to counsel under the Pennsylvania Constitution attaches at the same time as the right to counsel provided by the Sixth and Fourteenth Amendments to the U.S. Constitution. *Commonwealth v. Arroyo*, 723 A.2d 162, 170 (Pa. 1999).

Amended Complaint, ¶53; R.R. 866a. The plaintiffs argue that this allegation raises an actual denial of counsel claim.

The United States Supreme Court has established that the right to counsel attaches at the preliminary arraignment, which is the point that the defendant enters the criminal prosecutorial system. *Montejo*, 556 U.S. at 786. Under Pennsylvania Rule of Criminal Procedure 540, several events occur at a preliminary arraignment. The criminal defendant is presented with a copy of the criminal complaint and, if the defendant was arrested pursuant to a warrant, a copy of the warrant and supporting affidavits. PA. R.CRIM.P. 540(C), (D).[9] The defendant is read the complaint and informed of his right to counsel, including the right to have counsel assigned; the right to a preliminary hearing; and the type and conditions of release on bail, if applicable. PA. R.CRIM.P. 540(F). The defendant is not questioned about the charges. *Id.* Finally, a date for the preliminary hearing is determined, unless the right to the preliminary hearing is waived by a defendant

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[9] They state:

> (C) At the preliminary arraignment, a copy of the complaint accepted for filing pursuant to Rule 508 shall be given to the defendant.
>
> (D) If the defendant was arrested with a warrant, the issuing authority shall provide the defendant with copies of the warrant and supporting affidavit(s) at the preliminary arraignment, unless the warrant and affidavit(s) are not available at that time, in which event the defendant shall be given copies no later than the first business day after the preliminary arraignment.

PA. R.CRIM.P. 540(C), (D).

represented by counsel. PA. R.CRIM.P. 540(G). After the preliminary arraignment, the defendant is given the opportunity to post bail, secure counsel, and notify others of the arrest. PA. R.CRIM.P. 540(H).

The right to counsel *attaches* at the preliminary arraignment, but the defendant does not have a right to counsel to represent him *at* the preliminary arraignment. In *Rothgery*, the case cited in the amended complaint, the United States Supreme Court held that

> [o]nce attachment occurs, the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings; what makes a stage critical is what shows the need for counsel's presence. Thus, counsel must be appointed within a *reasonable time after attachment* to allow for adequate representation at any critical stage before trial, as well as at trial itself.

Rothgery, 554 U.S. at 212 (emphasis added). Justice Alito in a concurring opinion further explained that the Court has "rejected the argument that the Sixth Amendment entitles the criminal defendant to the assistance of appointed counsel at a probable-cause hearing." *Rothgery*, 554 U.S. at 216 (Alito, J., concurring). Rather, the Sixth Amendment requires "the appointment of counsel only after the defendant's prosecution has begun, and then only as necessary to guarantee the defendant effective assistance at trial." *Id.* at 217 (Alito, J., concurring).

Pennsylvania's Rules of Criminal Procedure governing the appointment of counsel in criminal cases conform to *Rothgery*. Rule 122 states that counsel shall be appointed "in all court cases, *prior to the preliminary hearing* to all defendants who are without financial resources or who are otherwise unable to employ counsel." PA. R.CRIM.P. 122(A)(2) (emphasis added). At a preliminary arraignment, the defendant is advised of the charges against him, given a copy of

the warrant and bail is set. These events do not require the presence of counsel because no rights are affected and there is no impact on the effectiveness of counsel's representation at trial. Therefore, there is no right to counsel *at* the preliminary arraignment.

In short, we conclude that the amended complaint does not state a cause of action for actual denial of counsel. It alleges that public defenders do not represent indigent defendants at every preliminary arraignment. However, it is only thereafter that the indigent criminal defendant has a right to counsel.

Conclusion

The amended complaint does not state a cause of action for either constructive or actual denial of counsel, and the trial court correctly sustained the County's preliminary objections. The funding at any office of public defender presents a series of political and public policy challenges, as do all programs established to serve society's less fortunate. These questions are better resolved in the political process, which includes the County's budgetary processes.

For these reasons, we affirm the order of the trial court sustaining the County's preliminary objections and dismissing the amended complaint.[10]

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MARY HANNAH LEAVITT, Judge

[10] Because we affirm the trial court's dismissal of the amended complaint, we need not address the question of whether the current Chief Public Defender was an indispensable party or the County's cross-appeal.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Al Flora, Jr., and Adam Kuren and Steven Allabaugh, on behalf of themselves and all others similarly situated, Appellants	:	
v.	:	No. 2072 C.D. 2013
Luzerne County of the Commonwealth of Pennsylvania and Robert C. Lawton, County Manager, in his official capacity	:	
Al Flora, Jr., and Adam Kuren and Steven Allabaugh, on behalf of themselves and all others similarly situated	:	
v.	:	No. 2207 C.D. 2013
Luzerne County of the Commonwealth of Pennsylvania and Robert C. Lawton, County Manager, in his official capacity, Appellants	:	

O R D E R

AND NOW, this 14th day of October, 2014, the order of the Luzerne County Court of Common Pleas, dated October 22, 2013, is hereby AFFIRMED.

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MARY HANNAH LEAVITT, Judge

APPENDIX C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Al Flora, Jr., and Adam Kuren and Steven Allabaugh, on behalf of Themselves and all others similarly situated, Appellants	:	**CASES CONSOLIDATED**
v.	:	
Luzerne County of the Commonwealth of Pennsylvania and Robert C. Lawton, County Manager, in his official capacity	:	No. 2072 C.D. 2013
Al Flora, Jr., and Adam Kuren and Steven Allabaugh, on behalf of themselves and all others similarly situated	:	
v.	:	
Luzerne County of the Commonwealth of Pennsylvania and Robert C. Lawton, County Manager, in his official capacity, Appellants	:	No. 2207 C.D. 2013

ORDER

NOW, December 2, 2014, having considered designated appellants, Al Flora, Jr., Adam Kuren and Steven Allabaugh's application for reargument, and appellees' answer in opposition thereto, the application is denied.

Dan Pellegrini

DAN PELLEGRINI,
President Judge

Certified from the Record
DEC 0 2 2014
And Order Exit

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two copies of the foregoing Brief of Appellants upon the persons indicated below by electronic mail and First Class Mail, which service satisfies the requirements of Pennsylvania Rules of Appellate Procedure 121 and 2187:

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Dated: September 10, 2015