

# Supreme Court of Pennsylvania

## Court of Common Pleas Civil Cover Sheet



Luzerne County

For Prothonotary Use Only:

Docket No:

The information collected on this form is used solely for court administration purposes. This form does not supplement or replace the filing and service of pleadings or other papers as required by law or rules of court.

SECTION A

### Commencement of Action:

- Complaint       Writ of Summons       Petition       Notice of Appeal  
 Transfer from Another Jurisdiction       Declaration of Taking

Lead Plaintiff's Name: Al Flora, Jr., Samantha Volciak, Yolanda Holman, Charles Hammond

Lead Defendant's Name: Robert C. Lawton

Check here if you are a Self-Represented (Pro Se) Litigant

Name of Plaintiff/Appellant's Attorney: Kimberly D. Borland, Esquire

Are money damages requested? :  Yes       No

Dollar Amount Requested: \_\_\_\_\_ within arbitration limits  
(Check one)      \_\_\_\_\_ outside arbitration limits

Is this a *Class Action Suit*?       Yes       No

SECTION B

**Nature of the Case:** Place an "X" to the left of the **ONE** case category that most accurately describes your **PRIMARY CASE**. If you are making more than one type of claim, check the one that you consider most important.

### TORT (do not include Mass Tort)

- Intentional  
 Malicious Prosecution  
 Motor Vehicle  
 Nuisance  
 Premises Liability  
 Product Liability (does not include mass tort)  
 Slander/Libel/ Defamation  
 Other:  
\_\_\_\_\_  
\_\_\_\_\_

### MASS TORT

- Asbestos  
 Tobacco  
 Toxic Tort - DES  
 Toxic Tort - Implant  
 Toxic Waste  
 Other:  
\_\_\_\_\_  
\_\_\_\_\_

### PROFESSIONAL LIABILITY

- Dental  
 Legal  
 Medical  
 Other Professional:  
\_\_\_\_\_  
\_\_\_\_\_

### CONTRACT (do not include Judgments)

- Buyer Plaintiff  
 Debt Collection: Credit Card  
 Debt Collection: Other  
\_\_\_\_\_  
\_\_\_\_\_  
 Employment Dispute:  
Discrimination  
 Employment Dispute: Other  
\_\_\_\_\_  
\_\_\_\_\_  
 Other:  
\_\_\_\_\_  
\_\_\_\_\_

### REAL PROPERTY

- Ejectment  
 Eminent Domain/Condemnation  
 Ground Rent  
 Landlord/Tenant Dispute  
 Mortgage Foreclosure  
 Partition  
 Quiet Title  
  
 Other:  
\_\_\_\_\_  
\_\_\_\_\_

### CIVIL APPEALS

- Administrative Agencies  
 Board of Assessment  
 Board of Elections  
 Dept. of Transportation  
 Zoning Board  
 Statutory Appeal: Other  
\_\_\_\_\_  
\_\_\_\_\_  
  
Judicial Appeals  
 MDJ - Landlord/Tenant  
 MDJ - Money Judgment  
 Other:  
\_\_\_\_\_  
\_\_\_\_\_

### MISCELLANEOUS

- Common Law/Statutory Arbitration  
 Declaratory Judgment  
 Mandamus  
 Non-Domestic Relations  
Restraining Order  
 Quo Warranto  
 Replevin  
  
 Other:  
\_\_\_\_\_  
\_\_\_\_\_

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Attorneys for Plaintiffs  
Additional Counsel Appear on Signature Page

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**IN THE COURT OF COMMON PLEAS OF  
LUZERNE COUNTY, PENNSYLVANIA**

AL FLORA, JR., in his capacity as  
Chief Public Defender of Luzerne County,

and

SAMANTHA VOLCIAK, YOLANDA  
HOLMAN, and CHARLES HAMMOND, on  
behalf of themselves and all others similarly  
situated,

Plaintiffs,

v.

LUZERNE COUNTY of the  
COMMONWEALTH OF PENNSYLVANIA  
and ROBERT C. LAWTON, COUNTY  
MANAGER, in his official capacity,

Defendants.

**APRIL TERM, 2012**

No.

**CLASS ACTION**

**NOTICE TO DEFEND**

**To Defendants Luzerne County and Robert C. Lawton, County Manager,**

YOU ARE HEREBY NOTIFIED TO FILE A WRITTEN RESPONSE TO THE  
ENCLOSED COMPLAINT WITHIN TWENTY (20) DAYS FROM SERVICE HEREOF OR  
JUDGMENT MAY BE ENTERED AGAINST YOU.

*15/ Stephen J. McConnell /jt*

COUNSEL FOR DEFENDANTS

Stephen J. McConnell, Esq.

Attorney I.D. No. 80583

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MANAGER, in his official capacity,

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**APRIL TERM, 2012**

**No.**

**CLASS ACTION**

**CLASS ACTION COMPLAINT**

**Introduction**

1. Plaintiffs file this action against Luzerne County (“the County”) and its County Manager (collectively “Defendants”) because Defendants have failed to allocate sufficient resources to provide constitutionally adequate representation for indigent adult criminal

defendants in the County. As detailed in this Complaint, this failure has led to a grossly underfunded and thus overwhelmed Office of the Public Defender (“the OPD”), resulting in the provision of sub-constitutional representation to many indigent criminal defendants and the complete deprivation of representation to many others.

2. Defendants’ deliberate indifference to the funding needs of the OPD has led to a variety of systemic problems, including severe understaffing, that has resulted in lawyers having overwhelming workloads and thus being unable to provide the basic elements of constitutionally adequate representation.

3. The Chief Public Defender and the lawyers in the OPD are dedicated and committed professionals whose inability to provide constitutionally adequate representation stems from the Defendants’ failure to provide adequate funding and resources. Given the volume of work, even the best lawyers would be unable to engage in 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.

4. Because of the above deficiencies, on December 19, 2011, the OPD instituted a policy of declining all applications for representation except in cases of homicide, felony sex offenses, extraditions, mental health, state parole, county probation/parole revocation, juvenile, and incarcerated adult defendants. As detailed in this Complaint, the OPD was forced to institute this policy because of the Defendants’ failure to fund the office adequately, which in turn has led to such high workloads that the OPD lawyers are unable to fulfill their professional, statutory, and constitutional obligations as defense counsel. Defendants’ failure to provide adequate resources for the defense of indigent adult criminal defendants has deprived numerous such

defendants, including Plaintiffs Samantha Volciak, Yolanda Holman, and Charles Hammonds, of representation, thereby violating their right to counsel under the Sixth and Fourteenth Amendments to the United States Constitution as well as their right to counsel under the Pennsylvania Constitution.

5. All Plaintiffs seek a Writ of Mandamus ordering the County, as a first step, to lift a hiring freeze that currently prevents Plaintiff Flora from filling even budgeted attorney positions in the OPD and, subsequently, to increase the OPD's funding to such a level that will permit the OPD to provide constitutionally adequate representation to all those entitled to counsel under the U.S. and Pennsylvania Constitutions.

6. Plaintiffs Volciak, Holman and Hammonds also bring this Complaint under the Civil Rights Act, 42 U.S.C. §1983 and Article I, § 9 of the Pennsylvania Constitution, on behalf of themselves and a class of persons who are similarly situated, namely, indigent adults in Luzerne County, who have been charged with crimes and are entitled to appointment of counsel, but who have been or will be declined by the OPD because of Defendants' refusal to provide sufficient resources to the OPD. Plaintiffs claim that the County's failure to provide them with any representation violates the U.S. and Pennsylvania Constitutions. Plaintiffs seek mandamus and injunctive relief ordering Defendants to allocate funds to allow for the appointment (and payment) of private counsel to provide immediate relief, namely, the appointment of competent counsel to represent them in their ongoing criminal proceedings, and, subsequently, to increase the OPD's funding to such a level that will permit the OPD to provide constitutionally adequate representation to all those entitled to counsel under the U.S. and Pennsylvania Constitutions.

## Parties

7. Plaintiff Al Flora, Jr. has been the Chief Public Defender in the OPD of Luzerne County, Pennsylvania since May 2010. As Chief Public Defender, Plaintiff Flora is responsible for managing the OPD, which includes overseeing its lawyers and employees, establishing its policies, managing its budget, and ensuring its compliance with constitutional, statutory, and professional/ethical guidelines.

8. Plaintiff Samantha Volciak lives in Hazleton, Pennsylvania. At all times material hereto, Plaintiff Volciak was and is a resident of Luzerne County, Pennsylvania. Plaintiff Volciak is qualified for public representation. Unfortunately, because Defendants have failed to provide sufficient resources, including lawyers, staff, and investigators, the OPD is unable to provide Plaintiff Volciak with counsel, in violation of her constitutional rights. As a result, Ms. Volciak is utterly without counsel, despite being eligible for public representation.

9. Plaintiff Yolanda Holman lives in Hanover Township, Pennsylvania. At all times material hereto, Plaintiff Holman was and is a resident of Luzerne County, Pennsylvania. Ms. Holman is qualified for public representation. Unfortunately, because Defendants have failed to provide sufficient resources, including lawyers, staff, and investigators, the OPD is unable to provide Plaintiff Holman with counsel, in violation of her constitutional rights. As a result, Ms. Holman is utterly without counsel, despite being eligible for public representation.

10. Plaintiff Charles Hammonds lives in Clairton, Pennsylvania. At all times material hereto, Plaintiff Hammonds was and is a resident of Westmoreland County, Pennsylvania. Mr. Hammonds is qualified for public representation. Unfortunately, because Defendants have failed to provide sufficient resources, including lawyers, staff, and investigators, the OPD is unable to

provide Plaintiff Hammonds with counsel, in violation of his constitutional rights. As a result, Mr. Hammonds is utterly without counsel, despite being eligible for public representation.

11. Plaintiffs Samantha Volciak, Yolanda Holman, and Charles Hammonds are all indigent persons who have been charged with crimes by the Luzerne County District Attorney, but who have been declined representation by the OPD because Defendants have not provided sufficient resources to that office. As a result, they are currently without counsel, despite being eligible for public representation.

12. Defendant Luzerne County is a county of the Third Class located in northeastern Pennsylvania. Effective January 2, 2012, the County transitioned to Home Rule under the governance of the present Council. Prior to January 2012, the County had an elected Board of County Commissioners (“the Commissioners”).

13. Defendant Robert C. Lawton is the County Manager of Luzerne County, Pennsylvania. The County Manager maintains an office at 200 North River Street, Wilkes-Barre, PA 18711. Defendant Lawton assumed this position on February 29, 2012. He is sued in his official capacity. At all times hereinafter mentioned, these defendants were acting within the scope of their official duties and under color of state law.

### **Facts of the Case**

14. The Public Defender Act (“the Act”) requires that every county in Pennsylvania (except Philadelphia) appoint a public defender to provide representation for indigent criminal defendants prosecuted in its county. 16 P.S. § 9960.3.

15. The Act specifically mandates,

(a) The public defender shall be responsible for furnishing legal counsel, in the following types of cases, to any person who, for lack of sufficient funds, is unable to obtain legal counsel:



- (1) Where a person is charged with juvenile delinquency;
- (2) Critical pretrial identification procedures;
- (3) Preliminary hearings;
- (4) State habeas corpus proceedings;
- (5) State trials, including pretrial and posttrial motions;
- (6) Superior Court appeals;
- (7) Pennsylvania Supreme Court appeals;
- (8) Postconviction hearings, including proceedings at the trial and appellate levels;
- (9) Criminal extradition proceedings;
- (10) Probation and parole proceedings and revocation thereof;
- (11) In any other situations where [sic] representation is constitutionally required. . . .

(c) The public defender, when appointed by the court, shall furnish legal counsel to persons who are or may be subject to commitment in a proceeding under the act of October 20, 1966 (3rd Sp. Sess., P.L. 96, No. 6), known as the “Mental Health and Mental Retardation Act of 1966.”

*Id.* at § 9960.6(a), (c).

16. The Act presumptively requires that the representation satisfy the constitutional standards set forth in the Sixth and Fourteenth Amendments to the U.S. Constitution, as well as analogous provisions in the Pennsylvania Constitution. *See e.g., Gideon v. Wainwright*, 372 U.S. 335, 339 (1963); Pa. Const. art. I, § 9.

17. The United States Supreme Court has long recognized that,

when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment’s due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

*Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

18. The right to counsel anchors our criminal justice system: “Without counsel, the right to a trial itself would be ‘of little avail’ . . . . ‘Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability

to assert any other rights he may have.”” *United States v. Cronin*, 466 U.S. 648, 653-54 (1984) (citing *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

19. Other courts considering similar litigation have found that violations of the constitutional right to counsel cause harms beyond just unreliable convictions: “Wrongful convictions, however, are not the only injustices that command our present concern. As plaintiffs rightly point out, the 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. New York*, 930 N.E.2d 217, 228 (N.Y. 2010) (allowing class action to proceed on allegation that lack of funding resulted in failure to provide legal representation to indigent criminal defendants at all critical stages of the proceedings against them).

20. Plaintiff Flora is the Chief Public Defender in Luzerne County, Pennsylvania. He has been with the OPD as an attorney since 1980. He became the First Assistant Public Defender in 1990 and the acting Chief Public Defender in March 2010. In May 2010, he was appointed the Chief Public Defender by the Luzerne County Board of Commissioners.

21. The OPD is divided into two units, the Adult Unit and the Juvenile Unit. Plaintiff Flora oversees both units. The First Assistant aids Plaintiff Flora in supervising the Adult Unit (both Plaintiff Flora and the First Assistant are part-time employees). The Adult Unit currently employs thirteen part-time attorneys, four full-time attorneys, three investigators, four secretaries, one receptionist, and one office administrator.<sup>1</sup> One of the part-time attorneys handles state parole cases, and another part-time attorney is only assigned capital

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<sup>1</sup> The office administrator provides assistance to both the Adult and Juvenile Units.

and homicide cases. The Adult Unit presently has five vacant attorney positions, three full-time and two part-time. These vacancies are the result of three resignations in 2012 (two full-time, one part-time), the 2010 transfer of a full-time attorney from the Adult Unit to the Juvenile Unit, and the 2009 resignation of a part-time attorney. Four of these vacancies (three full-time, one part-time) are funded in the 2012 amended Luzerne County budget.

22. The Juvenile Unit is fully staffed at present with three full-time attorneys, two social workers, one investigator, and one secretary.

23. The OPD is charged with providing representation to indigent criminal defendants in seventeen magisterial districts, the Luzerne County Court of Common Pleas, and the state appellate courts (as needed). The OPD is also responsible for providing representation in state parole, county probation/parole revocation, and mental health civil commitment proceedings.

24. In addition to the OPD, some indigent criminal defendants in Luzerne County are represented by conflict counsel. The Luzerne County court system employs eleven part-time salaried attorneys to represent indigent defendants when a conflict of interest prevents the OPD from providing representation. In 2011, the eleven part-time conflict counsel collectively handled 278 cases.

#### Plaintiff Flora's Efforts to Improve the OPD

25. When Plaintiff Flora became Chief Public Defender in May 2010, the OPD was already plagued with problems due to years of insufficient funding. Plaintiff Flora's predecessor Basil Russin had tried in vain since 2007 to secure additional funding for the OPD from the County. From 2007 to 2010, Mr. Russin submitted weekly reports to the Luzerne County Board of Commissioners detailing the excessive OPD caseloads and staffing

deficiencies, which stemmed from insufficient funding. The reports also discussed the County's failure to fill vacancies in a timely fashion.

26. Plaintiff Flora's highest priority when he became Chief Public Defender was improving juvenile representation in the wake of the "kids for cash" scandal, in which two judges of the Luzerne County Court of Common Pleas were convicted or pled guilty to charges that they improperly accepted money from two private, for-profit juvenile detention facilities.

27. State records reveal that between 2003 and 2008, the time period during which the "kids for cash" scandal occurred, approximately 50 percent of juveniles appeared in Luzerne County Juvenile Court without the benefit of counsel—nearly ten times the state average. Virtually all of the unrepresented juveniles were adjudicated delinquent. According to the December 2011 report by Joint State Government Commission's Task Force and Advisory Committee on Services to Indigent Criminal Defendants, the OPD was unable to provide effective representation to juveniles during this time because of inadequate resources. Excerpts from the December 2011 report are attached to this Complaint as Exhibit A.

28. In 2009, the Pennsylvania General Assembly created the Interbranch Commission on Juvenile Justice to investigate the circumstances that led to the "kids for cash" scandal, restore public confidence in the administration of justice, and prevent similar events from occurring in Luzerne County or elsewhere in the Commonwealth.

29. In May 2010, the Interbranch Commission released its full report and recommendations. Its recommendations included the restoration of funding for the Victims of Juvenile Offenders program to 2005 levels; the creation of a Luzerne County Victims of

Juvenile Crime Restitution Fund; the creation of a state-based funding stream for indigent juvenile defense; and guaranteed access to defense counsel by deeming all juveniles indigent for purposes of appointing counsel, restricting the right of a juvenile to waive counsel, and requiring stand-by counsel if the juvenile waives counsel.

30. As part of his efforts to improve the quality of juvenile representation, Plaintiff Flora was able to obtain grant funding from the Pennsylvania Commission on Crime and Delinquency and the Luzerne-Wyoming Counties Mental Health/Mental Retardation Program. These grants allowed Plaintiff Flora to create a separate Juvenile Unit by hiring one attorney, two social workers, one secretary, and one investigator to exclusively handle juvenile cases.

31. Even with this grant funding, Plaintiff Flora was also forced to transfer a senior attorney from the Adult Unit to meet the staffing needs in the Juvenile Unit. Defendants have refused to authorize Plaintiff Flora to replace this attorney in the Adult Unit, despite the fact that funding for the position exists in the current budget.

32. With a full complement of staff in the Juvenile Unit, Plaintiff Flora has been able to implement a comprehensive process for handling juvenile cases and determining juvenile eligibility for OPD representation. The Juvenile Unit is now a model unit that has earned accolades from across the state and has been recognized by the Pennsylvania Commission on Crime and Delinquency as a “Model” Juvenile Defender Unit for the state. The senior attorney in the Juvenile Unit is a member of the Board of Directors of the Juvenile Defenders Association of Pennsylvania (“JDAP”). The Juvenile Unit adheres to JDAP’s Performance Guidelines for Quality and Effective Juvenile Delinquency Representation. With the resources provided by outside grant funding and the County, the OPD has been able to

intervene in juvenile cases at an early stage, thereby diverting these cases from court and preserving the resources of the Juvenile Unit, the County, and the judiciary.<sup>2</sup>

33. Despite the success of the Juvenile Unit, the County has refused to provide Plaintiff Flora with the necessary resources to make similar and badly needed improvements to the Adult Unit.

34. In June 2010, Plaintiff Flora provided Defendant County and its Commissioners with a report relating the significant resource shortfall at the OPD and its consequent inability to provide the representation required by the Public Defender Act and the U.S. and Pennsylvania Constitutions. The OPD's listed deficiencies included:

- i. Caseloads for OPD attorneys that far exceed national maximum caseload standards;
- ii. An insufficient number of clerical staff;
- iii. The County's failure to fill staff vacancies;
- iv. The lack of any appellate counsel, resulting in staff lawyers, many of whom are not versed or trained in appellate practice, doing their own appeals;
- v. Physical facilities that are undersized, overcrowded, poorly maintained and not suitable for client conferences or maintaining client confidentiality; and
- vi. Severely inadequate information technology.

35. At the conclusion of his report, Plaintiff Flora stated, "[a]bsent appropriate staff increases, the Office will begin declining applications for representation within 60 days."

Plaintiff Flora's June 2010 report is attached to this Complaint as Exhibit B.

36. In July 2010, Plaintiff Flora provided Defendant County and its Commissioners with a short-term plan to correct the OPD's staffing deficiencies and the resulting problems.

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<sup>2</sup> Plaintiffs do not challenge the constitutional adequacy of the representation provided by the OPD's Juvenile Unit at this time.

Recommendations included the creation of a Juvenile Unit, hiring appellate and additional trial attorneys, and active caseload monitoring. Plaintiff Flora's July 2010 plan is attached to this Complaint as Exhibit C.

37. In his 2011 budget proposal, Plaintiff Flora recommended hiring two attorneys to handle appeals because the trial attorneys, who had (and still have) little to no appellate experience, were responsible for their own appeals. He noted in his request that hiring two full-time appellate attorneys would "alleviate [sic] serious deficiencies in appellate practice in office and minimize county exposure to ineffective counsel claims . . . ." He also stated the need for an additional investigator and a secretary "to help alleviate staffing/caseload problems and provide better ratio of lawyers to support staff to insure effective assistance of counsel." The Commissioners denied his requests.

38. Plaintiff Flora's 2012 budget again requested two appellate lawyers, along with two secretaries, to start rectifying the severe staffing shortage in the Office.

Currently office has no appellate lawyers creating significant ethical issues for supervisory counsel. Two appellate lawyers would bring office into compliance with ABA standards on Public Defense Delivery Systems as relating to appeals. Office still understaffed on adult side re: trial lawyers and does not meet ABA standards. Two additional secretaries seriously needed on adult side given large volume of cases. Currently, office has 4 clerk steno's on adult side with each steno handling over 1,000 cases per year. Adequate support staff essential to allow counsel to [sic] perform duties effectively.

Plaintiff Flora's requests were once more denied.

39. Because of Defendants' refusal to provide minimum funding and resources to the OPD, Plaintiff Flora was forced to take action in order to provide constitutionally adequate criminal defense to at least some indigent defendants in Luzerne County.

The Public Defender's Office Has Been Forced To Decline Cases In Order To Comply With Ethical Rules And Professional Standards

40. On December 12, 2011, Plaintiff Flora sent a letter to the President Judge of the Luzerne County Court of Common Pleas stating that he would begin declining certain cases on December 19, 2011, because of a lack of OPD resources.

41. Beginning on December 19th, the OPD started declining cases, advising defendants in writing that although they were eligible for counsel, the OPD could not accommodate their request due to a lack of resources. The OPD currently approves new applications for representation only from indigent adult defendants with homicide or felony sex offense charges, or individuals who are incarcerated or subject to extradition. The OPD also continues to provide representation to individuals in mental health, state parole, county probation/parole revocation, and juvenile cases. The OPD has continued representation in all cases that the OPD was handling before December 19, 2011.

42. To date, the Office has declined representation to over three hundred (300) eligible criminal defendants.

43. To date, conflict counsel have not been appointed to represent defendants whom the OPD has declined to represent as a result of the December 19, 2011 policy. Upon information and belief, the Court does not have sufficient resources to provide conflict counsel for so many defendants.

44. Plaintiff Flora's policy to limit new cases to address excessive workloads is necessary in light of the ethical and constitutional rules under which Plaintiff Flora and the OPD operate. His policy is required by the Pennsylvania Rules of Professional Conduct and is in full compliance with the ethical guidance provided by the American Bar Association.



45. Pennsylvania Rule of Professional Conduct 1.1 states that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Plaintiff Flora’s policy is necessary to ensure that attorneys provide clients with representation involving sufficient preparation and thoroughness to satisfy the requirements of Rule 1.1.

46. Pennsylvania Rule of Professional Conduct 5.1 states that “[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.” Plaintiff Flora’s policy is necessary to ensure that the attorneys over whom Plaintiff Flora has supervisory authority comply with Rule 1.1.

47. American Bar Association Ethics Opinion 06-441 states that the Rules of Professional Conduct relating to competency “provide no exception for lawyers who represent indigent persons charged with crimes.”

48. American Bar Association Ethics Opinion 06-441 also provides that “[a] lawyer’s primary ethical duty is owed to existing clients. Therefore, a lawyer must decline to accept new cases, rather than withdraw from existing cases, if the acceptance of a new case will result in her workload becoming excessive.”

49. American Bar Association Ethics Opinion 06-441 further states that “[i]f any subordinate lawyer’s workload is found to be excessive, the supervisor should take whatever additional steps are necessary to ensure that the subordinate lawyer is able to meet her ethical obligations in regard to the representation of her clients.”

50. In January 2012, Luzerne County reopened its budget pursuant to its transition to Home Rule. The Interim County Manager gave all county offices a bottom-line figure within which to allocate their funding. The OPD was given \$2.36 million, a nearly twelve percent (12%) *decrease* from its \$2.68 million 2011 budget. The loss in funds would have required the OPD to cut four positions, jeopardizing the adequate staffing in the Juvenile Unit as some of its employees would have had to be shifted to the Adult Unit.

51. After the Council approved a two-percent tax increase, Plaintiff Flora was able rearrange his new allotment of \$2.5 million (a 6.7% decrease from 2011) to maintain current staffing levels. Preserving existing positions in the OPD required Plaintiff Flora to reduce his expert witness budget from \$100,000 to \$72,000. (The OPD spent approximately \$170,000 on expert witnesses in 2011.) This budget reduction will have a substantial impact on the OPD's ability to retain experts in capital and juvenile cases, both of which frequently require expert testimony. The OPD will likely have to petition the Court to direct the County to pay expert fees once the OPD has exceeded its budget for this expense.

52. Plaintiff Flora submitted his new budget under protest, declaring

Current staffing levels and existing caseloads, prevent this office from providing level of representation required by ethical standards and by Federal and State Constitutions. As such, office is ethically required to withdraw from existing cases or refuse new cases. Letter of January 3, 2012 from American Council of Chief Defenders to County Council supports position. Budget submitted in protest for reasons as already stated in previous memos and reports to County and Court. Cannot reduce staffing any further.

53. In February 2012, the Interim Manager permitted Plaintiff Flora to advertise the three funded attorney vacancies in the Adult Unit.<sup>3</sup> As the County had instituted a hiring

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<sup>3</sup> There are currently four funded vacancies due to the March 27, 2012 resignation of a full-time attorney in the Adult Unit.

freeze in February 2012, the Interim Manager did not allow Plaintiff Flora to fill these vacancies. Defendant Lawton, the new County Manager, has also not permitted Plaintiff Flora to fill these vacancies.

54. On February 28, 2012, Plaintiff Flora sent a letter to the President Judge of the Luzerne County Court of Common Pleas requesting “the court’s immediate assistance . . . to assign outside or conflict counsel to provide representation in [mental health] cases.” The part-time attorney who handled mental health cases resigned on February 20, 2012, and another attorney, largely untrained in mental health law, has been temporarily assigned to these cases. This is one of the four funded vacancies that Plaintiff Flora is seeking to fill.

55. On March 16, 2012, one of the OPD’s part-time attorneys advised Plaintiff Flora that he would no longer accept cases that had been reassigned due to current or upcoming vacancies. The attorney stated that he could not provide ethical representation to indigent defendants if he added more cases to his already heavy workload. Even with the December 19, 2011 policy in effect for three months, this part-time attorney had approximately 115 open cases as of March 16, 2012.

#### Current State of the Luzerne County Public Defender’s Office

56. National standards and Rules of Professional Responsibility define proper legal representation to indigent criminal defendants at all critical stages of the proceedings against them as requiring, among other things, that defense counsel: (a) have adequate knowledge of the relevant areas of the law; (b) be assigned to their clients as early in the criminal, delinquency, or mental health proceeding as possible; (c) be present at every critical stage of their clients’ proceedings; (d) conduct reasonable factual and legal pre-trial investigations into the charges against their clients, pursue available formal and informal discovery

procedures, and use appropriate and necessary experts; (e) consult with their clients to elicit relevant information about the case, to inform clients of their rights, and to enable clients to make informed decisions about the direction of their cases; and (f) perform their work with reasonable diligence and promptness.

57. Because Defendants have refused to provide the necessary funding and resources, the OPD cannot provide representation that satisfies the above standards and therefore cannot provide legal representation to indigent criminal defendants at all critical stages of the proceedings against them in accordance with its constitutional, statutory, and professional obligations.

***(a) Adequate Knowledge of the Relevant Law***

58. The OPD does not have the resources to provide adequate training to its Adult Unit attorneys. No formal introductory or basic training is provided to new attorneys at the outset of their work at the OPD. The only form of in-service training for junior-level attorneys is a mentoring program where senior attorneys provide guidance on cases. New lawyers also handle a lighter caseload for their first six months to a year. Plaintiff Flora has been able to secure some advanced training for Juvenile Unit attorneys by applying for scholarships and free training from organizations that focus on juvenile defense.

59. Pursuant to Pennsylvania Rule of Criminal Procedure 801, an attorney who wishes to be qualified to try capital cases must take a minimum of 18 credits of advanced training within a three-year period. Currently, attorneys in the OPD pay for this specialized training out of their own pockets.

60. The OPD does not have any designated attorneys to handle appeals. Consequently, trial attorneys with little or no appellate experience are responsible for any

appeals that arise out of their caseloads. Because of the complexity and time investment inherent in properly handling appeals, attorneys sometimes miss deadlines. When a deadline is missed, the attorney must seek leave from the local court to file *nunc pro tunc*.

Fortunately, this leave has often been granted. In other instances, appeals have been dismissed for failure to file docketing statements, 1925(b) statements, or for failure to file briefs. Most OPD attorneys are unfamiliar with the Pennsylvania Rules of Appellate Procedure and are otherwise unable to comply with appellate requirements. Moreover, since appeals are exceedingly time-consuming, these cases detract from the attorneys' efforts on behalf of other clients whom they represent.

61. The OPD currently does not have a lawyer trained to handle mental health cases, for which the OPD must provide representation pursuant to the Public Defender Act. 16 P.S. § 9960.6(c). The attorney who was trained to handle these cases resigned in February 2012. The attorney currently handling these cases shadowed the former attorney for a few weeks before he left the OPD, but does not have any other training in mental health law and consequently cannot provide adequate representation for the clients in these cases.

***(b) Early Assignment to Clients***

62. The OPD is unable to provide representation or support at 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 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).

***(c) Present at all Critical Stages of Clients' Proceedings***

63. The heavy caseloads regularly lead to scheduling conflicts, causing attorneys to request continuances of critical proceedings. These continuances can lead to clients remaining in pre-trial detention for longer periods than necessary.

64. The heavy caseloads also frequently result in the OPD attorneys' inability to consult with their clients prior to each stage of their case. Consequently, OPD attorneys participate in many stages of their clients' criminal proceedings without a full understanding of the facts and potential strategies for the case.

***(d) Conducting Reasonable Factual Investigations and Discovery***

65. OPD attorneys are often unable to conduct any discovery prior to the pre-trial hearing. When discovery is obtained, the attorneys are frequently unable to review the information. If discovery responses are inadequate or incomplete, attorneys rarely have time to follow up to obtain complete information. The performance guidelines promulgated by the National Legal Aid & Defender Association ("NLADA Guidelines") state that attorneys in criminal cases have a duty to pursue discovery as soon as practicable. Such discovery is necessary because it can provide exculpatory information, help develop defenses to criminal charges, and assist the attorney in developing a theory of the case. The absence of pre-trial investigation is the equivalent of the denial of counsel at a critical juncture in these defendants' proceedings.

66. OPD attorneys also rarely have time to conduct the necessary fact inquiry and investigation prior to preliminary hearings. Depending on the case, public defenders should

interview witnesses or otherwise gather additional facts prior to the preliminary hearing to obtain basic information about the case. They should furthermore arrange for the creation of the preliminary hearing transcript. Obtaining transcripts of preliminary hearings is necessary to ensure that a defendant can utilize any helpful statements or admissions made during the hearing in later stages of the defendant's criminal case.

67. The Adult Unit of the OPD has an insufficient number of investigators given the amount of cases it handles and the number of staff attorneys it employs. Investigators play a vital role in providing constitutionally adequate representation to indigent defendants because public defenders generally do not have time to conduct case investigations. The OPD currently employs three investigators to assist twenty-one attorneys (including the four funded vacancies) in the Adult Unit with over 4,000 new cases per year, plus cases carried over from the previous year. By contrast, the Luzerne County District Attorney's Office in 2010 had ten detectives assisting twenty-six attorneys. Thus, each investigator in the OPD must assist more than twice as many attorneys as a detective in the District Attorney's Office.

68. Moreover, because the OPD does not have a case manager or adequate support staff, the investigators must assume many responsibilities that detract from the amount of time they can commit to investigations. All of the investigators assist with inputting information into the case management system, updating files prior to preliminary hearings (including obtaining copies of criminal complaints and probable cause affidavits from magistrates), picking up discovery from the District Attorney's office, and conducting a daily mail run to the courthouse. They also cover the front desk when the receptionist or other secretaries are unavailable, assist with filing, contact magistrates' offices for new preliminary

hearing dates, and input full-time attorney assignments into Microsoft Outlook. In fact, one of the investigators spends the majority of her time on administrative tasks.

69. The OPD's expert budget is severely underfunded. The OPD exceeded its \$100,000 expert budget in 2011 by approximately \$70,000, but was forced to cut this line item to \$72,000 in 2012 to prevent layoffs. It is unlikely that the OPD will be able to provide adequate counsel in all its cases while adhering to this expert budget given the increasing role of forensics, particularly DNA testing, in criminal cases. Expert expenses are likely to be particularly high in capital cases, where mitigation and mental health experts are necessary in virtually every case. Mental health experts are typically required in juvenile cases as well.

*(e) Consulting with Clients*

70. The OPD's office lacks sufficient space to conduct intake interviews in private areas. Client interviews therefore frequently take place in public spaces where they can be overheard by staff in the office as well as any visitors in the reception area, thereby compromising client confidentiality.

71. The OPD's office also lacks the resources to conduct in-person intake interviews at prison facilities. Instead, investigators interview incarcerated clients via video. These interviews are conducted while prison staff and other inmates are in the room with the client. This lack of confidentiality affects the questions that can be asked and the value of the interview.

72. Furthermore, OPD attorneys do not have time to meet with clients before preliminary hearings, except in certain instances for a few minutes immediately prior to the hearings in a non-secure area of a district magistrate's office. These brief meetings are not sufficient to gather information about a case to provide constitutionally adequate



representation. Pre-hearing interviews are supposed to allow attorneys to develop at least a cursory understanding of the facts of the case and any available defenses. The attorney should also use this first meeting to fulfill his or her obligation to advise the client about the criminal justice process and to caution the client about not inadvertently waiving rights, such as by making non-privileged communications to non-attorneys.

73. In Luzerne County, incarcerated indigent criminal defendants often participate in their preliminary hearings via video from prison, instead of being transported to the magistrate's office for in-person participation. When this occurs, any consultation between the OPD attorney and the client must take place via video, in open court, with no opportunity for confidential discussion. In some cases, OPD attorneys negotiate plea deals at the preliminary hearing. When this occurs, the attorneys do not have any opportunity to consult confidentially with their clients regarding the plea agreement, its terms, or expected consequences, as the communications between client and counsel can be heard by the court and the prosecutor. Any questions the client has must be asked publicly. These incarcerated defendants are therefore deprived of any opportunity to obtain confidential counsel regarding their agreement to plead guilty to criminal charges.

74. The attorneys are often unable, due to their overwhelming workloads, to contact their clients at any point between the preliminary hearing and the status conference, which is generally scheduled at least three months after the preliminary hearing.

75. In addition, the attorneys are often unable, again because of overwhelming workloads, to contact their clients at any point between the status conference and the pre-trial hearing, which is generally held approximately one month after the status conference.

76. In fact, the attorneys are often unable to conduct meaningful and comprehensive interviews with clients until the eve of trial, if the case proceeds that far.

77. OPD attorneys are often unable to meet with clients prior to sentencing hearings. They frequently lack adequate time to engage in advance preparation for sentencing, which involves obtaining letters of support or other mitigation materials and submitting written statements in cases presenting serious legal or factual issues regarding sentencing. OPD attorneys typically review the pre-sentencing report at or shortly before the actual hearing. As a result, the ability to effectively advocate at sentencing is seriously compromised.

78. In addition, OPD attorneys are unable to file notes of all meetings and log all telephone conversations with clients and witnesses.

79. Overall, OPD attorneys are unable to maintain regular contact with their clients and to follow up on client attempts to communicate with them. Regular contact is mandated by professional standards, and failure to maintain such contact constitutes inadequate counsel as it leaves the attorney without sufficient information to assess the prosecution's case or analyze discovery and impairs factual analysis and the development of defenses. It also prejudices plea negotiations by leaving the attorney without critical information necessary to make judgments and provide counsel to the client.

***(f) Performing Work with Reasonable Diligence and Promptness***

80. In addition to serious problems with client communication and lack of investigation and discovery, OPD attorneys are unable to perform their work with reasonable diligence and promptness in other ways.

81. Pursuant to Pennsylvania Rule of Criminal Procedure 579, attorneys are required to file an Omnibus Pretrial Motion within 30 days after arraignment. Because of their

excessive workloads, OPD attorneys often file these motions late and/or based upon incomplete information due to a lack of investigation and discovery.

82. Due to their massive caseloads, OPD attorneys are unable to familiarize themselves sufficiently with their clients' cases before the pre-trial hearing. The pre-trial hearing is often the last meaningful opportunity to negotiate a plea and avoid trial. Nor can OPD attorneys, without having had an opportunity to confer with the client, discuss the case, engage in discovery, file pre-trial motions, and, if needed, utilize an investigator to meet with witnesses, canvass crime scenes, and secure 9-1-1 tapes, surveillance videos, and the like.

83. If no plea agreement is reached at the pre-trial hearing, then OPD attorneys begin trial preparation in earnest. By this time, however, it may be too late to provide effective counsel as damaging evidence cannot be suppressed and crucial witnesses and evidence may have disappeared. In short, OPD attorneys simply do not have the time for necessary trial preparation and strategy.

***(g) Excessive Workloads***

84. OPD attorneys are unable to provide constitutionally adequate representation because of the workloads that overwhelm the Adult Unit and impact every aspect of the OPD's operations.

85. The American Bar Association has stated that **full-time** attorney caseloads should not exceed 150 felonies, 400 misdemeanors, 200 mental health cases, *or* 25 appeals **per year**.

86. In 2011, the OPD's office received well over 4,000 new adult applications, of which approximately 250 were rejected for lack of indigency and 278 were forwarded to conflict counsel. In addition to applications from adult indigent defendants, OPD attorneys are directly appointed to cases by county judges.

87. The OPD generally handles over 4,000 new criminal cases per year (4,065 in 2011 and 4,187 in 2010). Of this total, well in excess of 2,000 are felony cases. In addition, more than 1,000 pending cases carry over from the previous year (1,475 from 2010 and 1,350 from 2009).

88. In addition to the 4,065 cases noted above, the OPD also litigated 23 adult sentence appeals, 479 mental health cases and appeals, and 64 state parole cases and appeals in 2011. The mental health and state parole cases were each handled by one part-time attorney who specializes in that area of the law.

89. Including appeals, state parole, and mental health cases, the OPD thus handled a total of 4,631 *new* cases in 2011. If the currently funded vacancies were filled, the OPD would have the equivalent of 14 full-time attorneys. The average caseload would therefore be approximately 331 cases per attorney based on 2011 caseload data. Using this same analysis with 2010 caseload data, the average would be approximately 340 cases per attorney. With carryover cases, the per attorney caseloads would be 436 and 437, respectively. Since none of the attorneys handle a caseload comprised entirely, or even primarily, of misdemeanors, these caseloads well exceed the maximum caseload standards set by the American Bar Association.

90. Despite the fact that the caseloads handled by OPD attorneys regularly exceed American Bar Association guidelines, these caseloads do not fully reflect the workload that confronts OPD attorneys, especially the full-time attorneys.

91. Each OPD attorney has substantial responsibilities beyond the normal caseload. In addition to their regular caseloads, the full-time attorneys back up the part-time attorneys and handle warrant, bail, and miscellaneous hearings. They are also assigned homicide cases

periodically. The part-time attorneys are sometimes assigned to homicide cases as well, which are extraordinarily time-intensive and require two attorneys per case.

92. The OPD's full-time attorneys are also responsible for county probation/parole revocation proceedings. In 2011, there were 1,172 of these proceedings.<sup>4</sup> These hearings are critical stages of a criminal case and can lead to substantial prison sentences, thus requiring efforts on behalf of counsel similar to those that should be made at sentencing.

93. Furthermore, OPD attorneys must devote a substantial amount of time to work-related travel since most of the attorneys are assigned to cover preliminary hearings in one or two magisterial districts with the full-time attorneys also rotating to cover Central Court in Wilkes-Barre. Luzerne County's seventeen magisterial districts are spaced as far as 40 miles apart from one another.

94. Not only do OPD caseloads exceed ABA standards, but they are excessive compared to the caseloads of public defender attorneys in comparable Pennsylvania counties. For example, the Berks County Public Defender's Office had 24 full-time attorneys handling 4,900 adult and juvenile cases for a per attorney caseload of approximately 204 in 2009. The Dauphin County Public Defender managed 6,000 adult and juvenile cases in 2009 with 23 full-time attorneys for about 261 cases per attorney. During the same period, the Lancaster County Public Defender had the equivalent of 26 full-time attorneys handling 6,200 adult and juvenile cases for a per attorney caseload of approximately 238.

***(h) Additional Problems Due to Insufficient Funding***

95. The Adult Unit has no social workers, paralegals, or trial assistants to assist the attorneys in adequately preparing their cases at various stages. By comparison, the District

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<sup>4</sup> These proceedings are included in the 2011 and 2010 new case totals discussed above.

Attorney's Office in 2010 had 6 trial assistants, 1 case manager, and 7 victim coordinators in addition to its attorneys, investigators, and clerical staff.

96. The OPD also has an insufficient amount of clerical staff. Currently, a receptionist and 4 secretaries assist 21 attorneys (including funded vacancies). Thus, each secretary is assigned to 4 or 5 attorneys. Given the caseloads of the attorneys, it is impossible for the secretaries to adequately assist all the attorneys to which they are assigned. In contrast, the District Attorney's Office in 2010 had 1 executive secretary, 10 clerk typists, and 1 administrative assistant. With 26 assistant district attorneys, the ratio of lawyers to clerk typists was less than 3 to 1. In 2009, the York County Public Defender's Office had 7 legal assistants, plus 2 prison liaisons, for 19 full-time attorneys. Dauphin County had 4 secretaries, 4 paralegals, and a law clerk for 23 full-time attorneys, and Lancaster County had 8 secretaries for 27 attorneys.

97. The OPD lacks appropriate scheduling software to keep track of important case deadlines and provide reminders. Due to their massive workloads, OPD attorneys sometimes face scheduling conflicts because they are supposed to appear in both a magisterial and a Common Pleas courtroom simultaneously. In other instances, attorneys may be scheduled to appear in two different magisterial districts at the same time. Inadequate scheduling software only exacerbates this problem.

98. The OPD lacks an appropriate computerized data or case management system to track cases and provide meaningful breakdowns of attorney caseloads.

99. Many attorneys do not have their own desks or workspaces. Plaintiff Flora and the office administrator are the only individuals with dedicated offices. All other OPD employees share rooms, cubicles, or whatever space is available.

100. The OPD lacks the necessary equipment to enable attorneys to adequately represent their clients. Between the two units, eight attorneys have no computers and ten have desktop computers with an older operating system. The Adult Unit does not have a scanner, which is particularly problematic given the growing trend of electronic court filings. Finally, the OPD does not possess any audio/visual equipment for trial presentations.

101. Due to the time-consuming caseloads, Plaintiff Flora and his First Assistant are unable to provide consistent, ongoing supervision of the attorneys. Supervision and oversight occur only when a serious issue is brought to the attention of Plaintiff Flora.

102. As a result, the Adult Unit does not have any performance standards or guidelines for its attorneys. Given the lack of resources and associated excessive workloads in the OPD, Adult Unit attorneys would frankly be incapable of complying with any substantive standards or guidelines that Plaintiff Flora would institute.

103. The NLADA Performance Guidelines require criminal defense attorneys, in part:

- a. To have “sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. . . . [and] to keep the client informed of the progress of the case . . . .” Guideline 1.3.
- b. To engage in an initial interview with their clients. During this interview, the attorney is expected to “be familiar with the elements of the offense and the potential punishment, where the charges against the client are already known” and to have obtained all available relevant documents. Guideline 2.2.
- c. To appear at the arraignment. Guideline 3.1.
- d. To be familiar with the facts of the case prior to appearing at the preliminary hearing. Guideline 3.2.

- e. To promptly conduct an independent investigation of the facts of the case, including interviewing witnesses and retaining experts, when necessary.

Guideline 4.1.

- f. To pursue formal and informal discovery as soon as practicable. Guideline 4.2.
- g. To file a variety of pretrial motions, when appropriate. Guidelines 5.1-5.3.
- h. To engage in comprehensive trial preparation. Guideline 7.1.

104. OPD attorneys are clearly unable to meet the NLADA Performance Guidelines due to the excessive workloads they face.

105. The December 2011 report by the Joint State Government Commission's Task Force and Advisory Committee on Services to Indigent Criminal Defendants found that the OPD is operating under excessive workloads and would require an additional 8.5 full-time attorneys to meet nationally recognized standards. This number does not account for the four (4) funded vacancies in the Adult Unit that Plaintiff Flora has not been authorized to fill.

106. Given the demands placed on the OPD beyond its criminal caseload numbers, the OPD would need more than 8.5 additional full-time attorneys to fulfill its constitutional and statutory obligations.

#### **Class Action Allegations**

107. Pursuant to Rule 1701, *et seq.*, of the Pennsylvania Rules of Civil Procedure, Plaintiffs Samantha Volciak, Yolanda Holman, and Charles Hammonds bring this action on behalf of themselves and a class of all other similarly situated persons who are or will in the future be adversely affected by the unlawful and unconstitutional practices of Defendants and who seek equitable relief from the Defendants' failure to ensure that the OPD is able to



provide constitutionally adequate assistance of counsel to all those individuals eligible for and entitled to its services.

108. The class consists of all persons who have been or will be charged with criminal offenses in Luzerne County who qualify for public representation but who have been or will be refused representation by the OPD due to the Defendants' refusal to provide necessary funding and resources to enable the OPD to meet ethical, legal, and constitutional standards of representation.

109. The requirements of Rule 1702 are met in that:

- a. The class is so numerous that joinder of all members is impracticable, as there are approximately three hundred (300) members of the class.
- b. There are questions of law or fact common to the class. Specifically, each member has been deprived of his or her right to counsel, guaranteed by the U.S. and Pennsylvania Constitutions, as a result of Defendants' failure to provide the legally required adequate system of indigent defense.
- c. The claims or defenses of the representative parties are typical of the claims or defenses of the class.
- d. The representative parties will fairly and adequately assert and protect the interests of the class.
- e. A class action provides a fair and efficient method for adjudication of this controversy pursuant to the criteria established by Rule 1708. Specifically:
  - i. Trying these actions separately would create a risk of inconsistent and incompatible adjudications with respect to individual members of the class.

- ii. No litigation has been commenced by or against members of the class involving the same issues.
- iii. Common questions of law and fact predominate over any questions affecting individual members.
- iv. Luzerne County is an appropriate forum for the litigation of the claims of the entire class, as each class member has been charged with a crime in Luzerne County and has been denied their right to counsel, guaranteed by the U.S. and Pennsylvania Constitutions, by Defendants Luzerne County and Luzerne County Manager.
- v. The class is numerous enough to render joinder of all members or the maintenance of separate suits impracticable, and the difficulties likely to be encountered in the management of this action as a class action are minimal.
- vi. Defendants have refused to act on grounds generally applicable to all members of the class.

110. The representative parties will fairly and adequately assert and protect the interests of the class pursuant to Rule 1709, in that:

- a. Attorneys for the representative parties are experienced in class action litigation and will adequately represent the interests of the class.
- b. The representative parties do not have a conflict of interest in the maintenance of the class action.

- c. The attorneys are representing the parties *pro bono*. The attorneys for the representative parties have adequate financial resources to assure that the interests of the class will not be harmed.

*Class Representative Samantha Volciak*

111. Named Plaintiff Samantha Volciak is a lifelong resident of Luzerne County and is currently a full-time student at Bloomsburg University. Ms. Volciak is studying English and aspires to be a teacher. Ms. Volciak has nearly completed her degree. She needs only one more semester of classroom work and a period of student teaching before she can graduate.

112. On December 27, 2011, Samantha Volciak was charged by mail with DUI General Impairment – Incapable of Safe Driving under 75 Pa. C.S.A. § 3802(a)(1), DUI High Rate Alcohol – BAC .10 to .159 under 75 Pa. C.S.A. § 3802(b), and Back Up Vehicle Improperly under 75 Pa. C.S.A. § 3702(a).

113. Samantha Volciak applied to the OPD for legal assistance on January 4, 2012. On January 9, 2012, the OPD notified Ms. Volciak that although she qualified for public defender representation, the OPD had to deny her application at that time because it lacked the necessary resources to provide her with adequate assistance of counsel as required by law. Ms. Volciak is currently without counsel.

114. Ms. Volciak is experiencing ongoing harm as a consequence of the denial of her constitutional right to counsel. An attorney capable of providing the adequate defense to which Ms. Volciak is entitled would inquire into the facts, investigate the allegations, including the interviewing of witnesses, consider and file necessary pre-trial motions, consider sentencing mitigation and alternatives, counsel the client about the process and her rights, fight for a favorable plea agreement, and, if the case cannot be pled, prepare a constitutionally vigorous defense.

*Class Representative Yolanda Holman*

115. Named Plaintiff Yolanda Holman is a wedded mother of four children and has been a resident of Luzerne County for five and one-half years.

116. On November 18, 2011, the Office of Inspector General charged Yolanda Holman with Fraudulently Obtaining Food Stamps/Assistance under 62 P.S. § 481(a).

117. Yolanda Holman applied for legal assistance through the OPD on January 5, 2012. On January 5, 2012, the OPD notified Ms. Holman that although she qualified for public defender representation, the OPD had to deny her application at that time because it lacked the necessary resources to provide her with adequate assistance of counsel as required by law. Ms. Holman is currently without counsel.

118. Ms. Holman is experiencing ongoing harm as a consequence of the denial of her constitutional right to counsel. An attorney capable of providing the adequate defense to which Ms. Holman is entitled would inquire into the facts, investigate the allegations, including the interviewing of witnesses, consider and file necessary pre-trial motions, consider sentencing mitigation and alternatives, counsel the client about the process and her rights, fight for a favorable plea agreement, and, if the case cannot be pled, prepare a constitutionally vigorous defense.

*Class Representative Charles Hammonds*

119. Named Plaintiff Charles Hammonds is a resident of Westmoreland County.

120. Mr. Hammonds was charged with Theft by Deception-False Impression under 18 Pa. C.S.A. § 3922(a)(1) on July 6, 2011.

121. On January 10, 2012, Mr. Hammonds applied for legal assistance through the OPD. Mr. Hammonds was informed that although he qualified for public defender representation, the OPD had to deny his application at that time because it lacked the

necessary resources to provide him with adequate assistance of counsel as required by law. Mr. Hammonds is currently without counsel.

122. Mr. Hammonds is experiencing ongoing harm as a consequence of the denial of his constitutional right to counsel. An attorney capable of providing the adequate defense to which Mr. Hammonds is entitled would inquire into the facts, investigate the allegations, including the interviewing of witnesses, consider and file necessary pre-trial motions, consider sentencing mitigation and alternatives, counsel the client about the process and his rights, fight for a favorable plea agreement, and, if the case cannot be pled, prepare a constitutionally vigorous defense.

123. The right to counsel is fundamental to a fair trial. The indigent criminal defendant has the same right to adequate representation by an active advocate as a defendant who can afford private counsel. This right includes the obligations to confer with the client, to thoroughly investigate the relevant facts and the governing law, to compel the attendance of witnesses, to advise the accused, and to otherwise strategize and prepare the case for trial.

124. The class plaintiffs have been denied adequate assistance of counsel because they have no counsel at all. Because they cannot afford private counsel and the OPD has been denied the resources to provide constitutionally adequate representation to all eligible adult indigent criminal defendants prosecuted in Luzerne County, class plaintiffs are currently navigating the criminal justice system alone, in violation of their constitutional rights.

### **Causes of Action**

#### **Count I-Mandamus (by Plaintiffs Individually against all Defendants)**

125. Paragraphs 1 through 124 are incorporated herein by reference as if pleaded in full.

126. This Court has jurisdiction to hear this petition for writ of mandamus pursuant to Rule 1092(c)(1) and (2) of the Pennsylvania Rules of Civil Procedure.

127. “Mandamus is an extraordinary remedy designed to compel official performance of a ministerial act or mandatory duty . . . .” *County of Allegheny v. Commonwealth*, 490 A.2d 402, 408 (Pa. 1985). In order to justify the use of this remedy, Plaintiffs must demonstrate “a clear legal right to relief, a corresponding duty to act in the defendant, and the lack of any other adequate remedy.” *Medico v. Makowski*, 793 A.2d 167, 169 (Pa. Commw. Ct. 2002).

128. Plaintiffs have a clear right to relief. Plaintiff Flora has a statutory and constitutional obligation as the Chief Public Defender to provide adequate counsel to the indigent defendants represented by the OPD, and Plaintiffs Volciak, Holman, and Hammond have a constitutional right to representation in their pending criminal proceedings.

129. Plaintiff Flora in his capacity as Chief Public Defender of Luzerne County has a responsibility under the Public Defender Act to provide constitutionally competent representation to all individuals in Luzerne County who are facing criminal charges and cannot afford counsel. 16 P.S. § 9960.6. Defendants’ refusal and failure to provide Plaintiff Flora with the necessary funding and resources prevents him from providing representation at all critical phases of their cases for all adult indigent defendants in Luzerne County. Specifically, attorneys in the office are 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.

130. Since December 19, 2011, Plaintiff Flora has notified over three hundred (300) adult indigent defendants in Luzerne County that, even though they are eligible for representation, the OPD is unable to provide them with counsel due to a lack of resources.

131. Many of these individuals currently remain without representation in violation of their right to counsel under the U.S. and Pennsylvania Constitutions. *See Gideon*, 372 U.S. at 339; U.S. Const. amends. VI, XIV; Pa. Const. art. I, § 9. They have not waived their right to counsel.

132. Class Plaintiffs Samantha Volciak, Yolanda Holman, and Charles Hammonds are several of the numerous individuals who are currently facing criminal charges in Luzerne County without counsel in violation of their constitutional rights.

133. Defendants have a duty to act. The Public Defender Act commands counties to provide indigent defense through a public defender as required by the U.S. and Pennsylvania Constitutions. 16 P.S. § 9960.3.

134. Defendants' legal obligation to fund a constitutionally adequate indigent defense system for Luzerne County may be fulfilled in ways other than through the OPD. For instance, the County could appropriate money to hire private attorneys on a contractual basis to supplement the OPD's services. Defendants have, however, failed to provide adequate resources to fund the OPD or any alternate system to represent indigent criminal defendants.

135. Pennsylvania courts have repeatedly stated that mandamus may be used to compel state and local governments to provide the necessary resources for government officials to

perform their duties to constitutional and statutory standards. *Medico*, 793 A.2d at 171; *PA State Ass'n of County Comm'rs v. Commonwealth*, 681 A.2d 699, 702-03 (Pa. 1996); *County of Allegheny*, 490 A.2d at 406; *Leahey v. Farrell* 66 A.2d 577, 579-80 (Pa. 1949); *Kistler v. Carbon County*, 35 A.2d 733, 735 (Pa. Super. Ct. 1944).

136. Defendants have repeatedly denied Plaintiff Flora's requests for additional funding and have thus been deliberately indifferent to Plaintiffs' constitutional rights.

137. Defendants have also refused to fill funded vacancies in the Adult Unit of the Public Defender's Office, further devastating the OPD's resources and ability to comply with statutory and constitutional mandates.

138. Plaintiffs have no other adequate remedy at law or equity that can protect their rights and interests.

139. Plaintiff Flora has no other adequate remedy available to him to secure the resources needed to perform his statutory and constitutional duties as Defendants have refused to provide Plaintiff Flora with sufficient funding.

140. Plaintiffs Volciak, Holman, and Hammonds have no other adequate remedy available to them to rectify the deprivation of their constitutional right to counsel in criminal proceedings.

141. As Defendants have refused to meet their statutory and constitutional obligation to provide Plaintiff Flora with the necessary funds to fulfill his constitutional and statutory duties and have thereby denied Class Plaintiffs Volciak, Holman, and Hammonds their constitutional right to counsel, mandamus is the appropriate remedy under Pennsylvania law to compel Defendants to provide the requisite funds for Plaintiff Flora to fulfill his



constitutional and statutory responsibilities and restore Plaintiffs' constitutional right to counsel.

Count II – United States Constitution, Sixth and Fourteenth Amendments, and 42 U.S.C. § 1983 (by Class Plaintiffs against all Defendants)

142. Paragraphs 1 through 141 are incorporated herein by reference as if pleaded in full.

143. Defendants' failure to provide adequate resources for indigent defense in Luzerne County violates Class Plaintiffs' right under the Sixth and Fourteenth Amendments to the U.S. Constitution to counsel in a criminal prosecution.

144. At all times relevant herein, Defendant Lawton acted under color of state law in his official capacity as the Luzerne County Manager.

145. Class Plaintiffs' requests for counsel in their criminal proceedings were denied because the OPD lacks sufficient funding and resources to represent competently all eligible indigent criminal defendants prosecuted in Luzerne County.

146. The right to counsel is clearly established under the Sixth Amendment to the U.S. Constitution, as applied to the states by the Fourteenth Amendment. *Gideon*, 372 U.S. at 339. The right attaches at "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction . . . ." *Rothgery*, 554 U.S. at 213.

147. Class Plaintiffs have appeared before judicial officers without counsel when they were constitutionally entitled to representation. Class Plaintiffs have not waived their right to counsel. Because Class Plaintiffs have not waived their right to counsel but have been compelled to appear before judicial officers without representation, their Sixth and Fourteenth Amendment right to counsel has been violated.

148. Defendants are directly responsible for the violation of Class Plaintiffs' Sixth and Fourteenth Amendment right to counsel.

149. Defendants have refused to provide the OPD with the necessary funding and resources to supply counsel, who have the time and resources to provide adequate representation and prepare a proper defense, to all eligible indigent criminal defendants prosecuted in Luzerne County. Defendants have also refused to permit Plaintiff Flora to fill four (4) funded vacancies within the OPD due to a County-instituted hiring freeze or to appropriate monies necessary to hire additional staff sufficient to enable the OPD to provide services that satisfy Sixth and Fourteenth Amendment requirements.

150. Defendants have a duty under the Public Defender Act to provide the OPD with the necessary funding and resources to fulfill its constitutional and statutory duties. 16 P.S. §§ 9960.3, 9960.5(a), 9960.7, 9960.9.

151. Defendants' legal obligation to fund a constitutionally adequate indigent defense system for Luzerne County may be fulfilled in ways other than through the OPD. For instance, the County could appropriate money to hire private attorneys on a contractual basis to supplement the OPD's services. Defendants have, however, failed to provide adequate resources to fund the OPD or any alternate system to represent indigent criminal defendants.

152. Therefore, Defendants have caused the violation of Class Plaintiffs' Sixth and Fourteenth Amendment right to counsel, by failing to provide the necessary funding and resources to serve indigent criminal defendants in Luzerne County, be it through the OPD or some alternate system of assigning competent counsel.

Count III – Pennsylvania Constitution, Art. I, § 9 (by Class Plaintiffs against all Defendants)

153. Paragraphs 1 through 152 are incorporated herein by reference as if pleaded in full.

154. Defendants' failure to provide adequate resources for indigent defense violates Class Plaintiffs' right under Article I, § 9 of the Pennsylvania Constitution to counsel in criminal prosecutions.

155. Class Plaintiffs' requests for counsel in their criminal proceedings were denied because the OPD lacks sufficient funding and resources to represent all eligible indigent criminal defendants prosecuted in Luzerne County.

156. 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.

157. Class Plaintiffs have appeared before judicial officers without counsel when they were entitled to representation under the Pennsylvania Constitution. Class Plaintiffs have not waived their right to counsel. Because Class Plaintiffs have not waived their right to counsel but have been compelled to appear before judicial officers without representation, their right to counsel under the Pennsylvania Constitution has been violated.

158. Defendants are directly responsible for the violation of Class Plaintiffs' right to counsel under the Pennsylvania Constitution.

159. Defendants have refused to provide the OPD with the necessary funding and resources to supply counsel to all eligible indigent criminal defendants prosecuted in Luzerne County. Defendants have also refused to permit Plaintiff Flora to fill four (4) funded vacancies within the Office due to a County-instituted hiring freeze or to appropriate monies

necessary to hire additional staff sufficient to enable the Public Defender to provide services that satisfy constitutional requirements.

160. Defendants have a duty under the Public Defender Act to provide the OPD with the necessary funding and resources to fulfill its constitutional and statutory duties. 16 P.S. §§ 9960.3, 9960.5(a), 9960.7, 9960.9.

161. Defendants' legal obligation to fund a constitutionally adequate indigent defense system for Luzerne County may be fulfilled in ways other than through the OPD. For instance, the County could appropriate money to hire private attorneys on a contractual basis to supplement the OPD's services. Defendants have, however, failed to provide adequate resources to fund the OPD or any alternate system to represent indigent criminal defendants.

162. Therefore, defendants have caused the violation of Class Plaintiffs' right to counsel under the Pennsylvania Constitution, by failing to provide the necessary funding and resources to serve indigent criminal defendants in Luzerne County, be it through the OPD or some alternate system of assigning competent counsel.

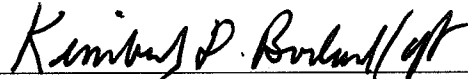
### **Prayer for Relief**

WHEREFORE, Plaintiffs request the following relief:

1. An order requiring Defendants to promptly appoint private or conflict counsel when the OPD declines representation of any adult defendant due to excessive workloads or lack of resources;
2. An order requiring Defendants to lift the hiring freeze and authorize Plaintiff Flora to fill the four (4) funded vacancies in the OPD;
3. An order allowing Plaintiff Flora to continue the December 19, 2011 policy until such time as the OPD has adequate resources to represent all indigent adult criminal defendants prosecuted in Luzerne County;

4. An order requiring Defendants to authorize Plaintiff Flora to hire two (2) attorneys to handle appellate cases and one (1) secretary to help with office administration;
5. A peremptory judgment under Pennsylvania Rule of Civil Procedure 1098 compelling Defendants to provide necessary funding to allow the OPD to hire additional trial attorneys and support staff as well as upgrade the physical and technological resources such that the OPD 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;
6. Attorneys' fees and costs pursuant to 42 U.S.C. § 1988;
7. Any other such relief deemed appropriate by the Court.

Dated: 4/10/12

  
\_\_\_\_\_  
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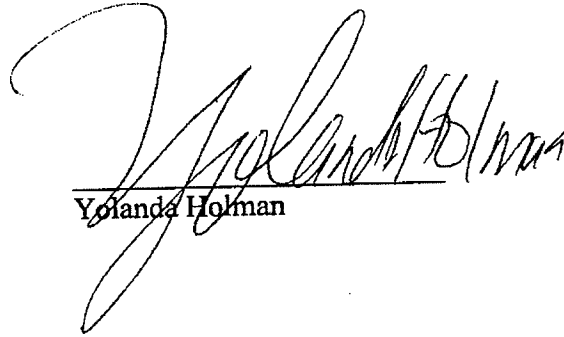
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**VERIFICATION**

I, Yolanda Holman, verify that the facts set forth in the foregoing Complaint relating to me are true and correct to the best of my information, knowledge and belief. I understand that the statements contained herein are subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities.



Yolanda Holman

Dated: April 6, 2012

**VERIFICATION**

I, Samantha Volciak, verify that the facts set forth in the foregoing Complaint relating to me are true and correct to the best of my information, knowledge and belief. I understand that the statements contained herein are subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities.

  
Samantha Volciak

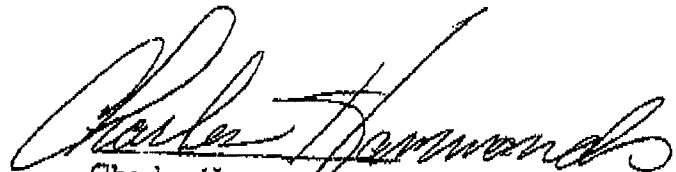
Dated: April 6, 2012



**VERIFICATION**


I, Charles Hammond, verify that the facts set forth in the foregoing Complaint to me are true and correct to the best of my information, knowledge and belief. I understand that the statements contained herein are subject to the penalties of 18 Pa. C.S.A. 4904 relating to unsworn falsification to authorities.

Dated: April 9, 2012

  
Charles Hammond

**VERIFICATION**

I, Al Flora, Jr., verify that the facts set forth in the foregoing Complaint relating to the Luzerne County Public Defender's Office are true and correct to the best of my information, knowledge and belief. I understand that the statements contained herein are subject to the penalties of 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities.

  
Al Flora, Jr.

Dated: April 9, 2012