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**Court of Appeals
State of New York**

KIMBERLY HURRELL-HARRING, JAMES ADAMS, JOSEPH BRIGGS, RICKY LEE GLOVER, RICHARD LOVE, JACQUELINE WINBRONE, LANE LOYZELLE, TOSHA STEELE, BRUCE WASHINGTON, SHAWN CHASE, JEMAR JOHNSON, ROBERT TOMBERELLI, CHRISTOPHER YAW, LUTHER WOODROW OF BOOKER, JR., EDWARD KAMINSKI, JOY METZLER, VICTOR TURNER, CANDACE BROOKINS, RANDY HABASHI, AND RONALD MCINTYRE, on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs-Appellants,

—against—

THE STATE OF NEW YORK,
GOVERNOR DAVID PATERSON, in his individual capacity,

Defendants-Respondents.

**BRIEF OF *AMICUS CURIAE*
THE LEGAL AID SOCIETY**

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INTEREST OF THE AMICUS CURIAE

The Legal Aid Society (“Legal Aid”) is the oldest and largest provider of legal services to indigent clients in the nation. Last year, Legal Aid provided legal assistance to low-income New Yorkers in more than 300,000 civil, criminal, and juvenile rights client matters. It now handles more than 230,000 criminal matters for clients annually, representing the majority of all indigent criminal defendants in New York City.

Because of its role, Legal Aid has a vital interest in the right of indigent criminal defendants to be represented by an effective court-appointed lawyer at all stages of a criminal proceeding. Legal Aid is also deeply concerned with the current indigent defense financing crisis that imperils the representation of indigent defendants in New York City and throughout New York State. Legal Aid thus has a strong interest in preserving appropriate legal remedies that may address insufficient State funding and resources for indigent defense and may forestall, wherever possible, the pervasive impairment of constitutional rights that will continue absent sufficient State support.

Legal Aid’s perspective on these issues is informed by its extensive experience with the needs of its indigent clients, including their need for effective representation of counsel throughout the criminal process. As a not-for-profit law firm working daily with indigent clients, Legal Aid has firsthand knowledge of the

many ways in which insufficient funding for a system of indigent defense can and does severely harm indigent defendants who have the constitutional right to effective assistance of counsel.

Legal Aid, its attorneys, and its indigent clients are among the beneficiaries of the recent case cap law that the State enacted in April 2009. See 2009 N.Y. Sess. Laws Ch. 56, pt. ZZ (A. 156-B) (McKinney 2009). It is a measure that holds significant promise for ameliorating the current crisis as to indigent defense in New York City. The law anticipates that the Chief Administrative Judge will establish case caps for indigent defense attorneys in New York City, and that the State will then provide the attendant funding. That funding will be phased in over four years and will permit indigent defense attorneys in New York City to have an average caseload that will afford each lawyer sufficient time to provide effective defense for clients. But, while the State – through that legislation – has taken action aimed at remedying systemic failures in New York City, the State has not addressed the systemic deficiencies in other counties in the State. Moreover, with respect to New York City, the enactment of the case cap legislation is only the first step toward eliminating the existing serious inadequacy of funding for indigent defense in the City. Ultimate success in achieving the legislation’s objectives will depend on, among other things, the State’s taking the contemplated steps to

provide the necessary funding over four years, and then sustaining essential funding going forward. Without the essential funding, there will continue to be a wholly inadequate number of lawyers available to provide effective representation to indigent defendants, and those defendants will continue to suffer the impairment of their rights that inevitably results.

Legal Aid thus believes it is imperative that interested organizations and individuals be able to seek judicial relief and be able to obtain necessary remedies when systemic deficiencies in indigent defense are not appropriately addressed.

PRELIMINARY STATEMENT

The manner in which the State has long chosen to support indigent defense representation fails to deliver on the constitutional guarantee of effective assistance of counsel. Due to inadequate funding and resources, the attorneys assigned to represent indigent defendants are overburdened by excessive caseloads that create a severe and unacceptably high risk that they will not provide clients the meaningful and effective assistance to which they are entitled.

Although the right to counsel is litigated frequently in post-conviction proceedings, it would substantially and unacceptably narrow the constitutional right to effective assistance of counsel to recognize an impairment of the right only in circumstances where there has been a criminal conviction. The constitutional

right to counsel is the right to meaningful and effective legal representation at least beginning at arraignment and continuing through all stages of a criminal case.

This and other Courts have recognized, and Legal Aid's experience and professional standards confirm, that indigent defendants are constitutionally entitled to and need effective assistance of counsel throughout the criminal justice process.

The availability of post-conviction relief, on which the Appellate Division appears to rely exclusively as a remedy for ineffective assistance of counsel, is plainly inadequate to enforce the State's constitutional obligation to provide the funding and resources necessary to enable effective assistance of counsel throughout a proceeding. Contrary to that decision, pervasive deficiencies due to lack of funding may be cured through the courts by issuance of an order or orders directing systemic relief.

It is, of course, a paramount and historic role of the courts to protect citizens from harm to their constitutional rights that results from the State's action or inaction. Particularly in this context, in which impairment of the constitutional right undermines the fairness of judicial proceedings, the Judiciary has a singular interest in assuring that the State fulfills its constitutional obligation. Because it would result in the courts having no role as to the constitutional right of indigent

defendants unless they are convicted, the Appellate Division's decision would preclude the courts from performing their historic role.

Whether the plaintiff be an individual defendant, a defense provider such as Legal Aid, or another party interested in the criminal justice process, a plaintiff's ability to seek prospective relief has long been recognized where it is necessary to remedy systematic failures in a State's fulfillment of its constitutional obligations to indigent criminal defendants. Consistent with those decisions, this Court should find that the Appellants do have standing to challenge systemic violations. If, for some reason, the Court does not make such a finding as to these plaintiffs, it is essential that the Court preserve the right of other representative parties, including Legal Aid and other providers, to bring such actions. Simply put, there must be a remedy for the pervasive impairment of constitutional rights.

ARGUMENT

POINT I.

THE RIGHT TO MEANINGFUL AND EFFECTIVE ASSISTANCE OF COUNSEL REPRESENTS FAR MORE THAN AVOIDANCE OF WRONGFUL CONVICTIONS

A. Criminal Defendants in New York State Have a Broad Constitutional Right to Meaningful and Effective Assistance of Counsel.

An indigent criminal defendant's right to counsel in New York is entrenched and expansive. See U.S. Const. amends. VI, XIV; N.Y. Const. art. I § 6; Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); People v. Witek, 15 N.Y.2d 392 (1965); People v. Hughes, 15 N.Y.2d 172 (1965); see also N.Y. CRIM. PROC. LAW § 170.10 (2009) (misdemeanors); id. § 180.10 (felonies). The United States Supreme Court has expressly recognized that the constitutional guarantee to effective counsel is a fundamental right, such that the denial of counsel in criminal proceedings deprives an individual of due process of law. See Gideon, 372 U.S. at 344 (“The right of one charged with crime to counsel may not be deemed fundamental in some countries, but it is in ours.”); see also Argersinger, 407 U.S. at 32-33; Powell v. Alabama, 287 U.S. 45, 67-68 (1932). Fulfillment of the right serves both to protect the individual criminal

defendant and to preserve the integrity of the criminal justice process as a whole.

See United States v. Cronin, 466 U.S. 648, 656 (1984).

The right to counsel is not satisfied simply by a court appointing an admitted attorney to speak on behalf of the defendant. Rather, both the New York State and United States Constitutions entitle every defendant to meaningful and effective assistance of counsel. See McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970) (holding that the Sixth Amendment protects the right to “the effective assistance of competent counsel”); People v. Droz, 39 N.Y.2d 457, 462-63 (1976) (holding that representation must be “meaningful” and “effective”); see also People v. Baldi, 54 N.Y.2d 137, 146 (1981); Witenski, 15 N.Y.2d at 395. In order for representation to be “effective,” the Supreme Court has held specifically that a defendant’s attorney must play a meaningful role in the adversary process. Strickland v. Washington, 466 U.S. 668, 685-86, 711 (1984); see also Cronin, 466 U.S. at 656-67.

This Court has been especially diligent in protecting the right to counsel and has extended its protections independent of, more broadly than, and often prior to, the recognition of rights under the United States Constitution. See People v. Settles, 46 N.Y.2d 154, 160-61 (1978) (explaining the history of the “cherished principle” of the right to counsel in this State and stating that such protections far

preceded Gideon); People v. Blake, 35 N.Y.2d 331, 335 (1974) (“[T]he right to counsel under the State Constitution has, in some areas, been interpreted more expansively than under the Fifth and Sixth Amendments as interpreted by the Supreme Court.”); see also People v. Ozuna, 7 N.Y.3d 913, 915 (2006) (noting that, in evaluating ineffective assistance of counsel claims, this Court has adopted a rule more favorable to defendants).

The ability of any individual to receive the effective assistance of counsel to which he or she is constitutionally entitled, however, is dictated to a significant extent by the manner in which the State has determined to provide for indigent defense. If, as is currently the case in New York, a pervasive lack of adequate funding leads to defense providers bearing excessive caseloads, indigent defendants are harmed because their attorneys cannot provide the meaningful and effective assistance that their clients require.

B. The Right to Counsel Guarantees Meaningful and Effective Assistance Throughout the Criminal Process.

The State’s obligation to assure meaningful and effective assistance of counsel applies throughout the criminal process, not just at trial. Both the New York State and United States Constitutions, as well as New York statutory law, require effective representation at all stages of a case. See Montejo v. Louisiana, --

- U.S. ---, 129 S. Ct. 2079, 2085 (2009) (“Once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all ‘critical’ stages of the criminal proceedings.” (internal citations omitted)); Maine v. Moulton, 474 U.S. 159, 170 (1985) (“[T]he assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.”); People v. Cunningham, 49 N.Y.2d 203, 207 (1980) (“This court has consistently exercised the highest degree of vigilance in safeguarding the right of an accused to have the assistance of an attorney at every stage of the legal proceedings against him.”); see also N.Y. CRIM. PROC. LAW §§ 170.10 (right to counsel “at the arraignment and at every subsequent stage of the action”), 180.10 (same).¹

Accordingly, indigent defendants in New York are entitled to effective representation at least at the following stages of a case:

¹ The very text of the New York State Constitution guarantees that the right to counsel will apply as soon as an individual is accused of a crime. Specifically, Article I, Section 6 of the New York State Constitution provides, in relevant part: “In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her.” N.Y. Const. art. I § 6 (emphasis added); see also U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.” (emphasis added)).

- At arraignment. See, e.g., Hamilton v. Alabama, 368 U.S. 52, 53-55 (1961); People v. Backman, 274 A.D.2d 432, 433, 710 N.Y.S.2d 122, 123 (2d Dep't 2000); N.Y. CRIM. PROC. LAW §§ 170.10, 180.10.
- When considering whether to waive rights during the criminal proceeding. See, e.g., Cunningham, 49 N.Y.2d at 207-08; Settles, 46 N.Y.2d at 162-63.
- When considering plea offers and entering pleas. See, e.g., McMann, 397 U.S. at 771 & n.14; Smith v. O'Grady, 312 U.S. 329, 334 (1941).
- From the time of arraignment through the time of trial, when thorough factual investigation and legal research are critical. See, e.g., Powell, 287 U.S. at 57; Droz, 39 N.Y.2d at 463; People v. Bennett, 29 N.Y.2d 462, 466-67 (1972); People v. Gil, 285 A.D.2d 7, 12-13, 729 N.Y.S.2d 121, 126 (1st Dep't 2001).
- At pre-trial hearings and at trial. See, e.g., People v. Berroa, 99 N.Y.2d 134, 142-43 (2002); People v. Carracedo, 214 A.D.2d 404, 404, 624 N.Y.S.2d 601, 601 (1st Dep't 1995).
- Prior to and at sentencing, to develop and to enable a proper presentation of mitigating factors. See, e.g., Rompilla v. Beard, 545 U.S. 374, 377 (2005); Wiggins v. Smith, 539 U.S. 510, 522-23 (2003); People v. Harris, 79 N.Y.2d 909, 910 (1992).

1. Legal Aid's Experience Confirms that Effective Representation Is Critical at All Stages of a Criminal Proceeding

Legal Aid's extensive experience in indigent defense is consistent with these holdings: counsel should play a critical role at every stage of a criminal case. Some of the critical stages during which effective representation is necessary are addressed in turn below.

(a) Arraignment

Effective assistance of counsel is essential at arraignment. Under provisions of New York and federal law, defendants who cannot afford their own attorneys are particularly likely to face serious collateral consequences such as eviction, deportation, or forfeiture of government benefits if convicted of any crime, including a misdemeanor or a violation.² Without the benefit of effective counsel, a defendant might plead guilty at arraignment in order to avoid protracted criminal proceedings, without knowledge or appreciation of the serious collateral consequences of such a plea. To be effective, and to appropriately advise the client, the lawyer needs sufficient time at arraignment to assess the relevant facts and potential collateral consequences.

As a further example, if a defendant does not plead guilty at arraignment, the court will then determine whether the defendant is to be jailed pending trial and on what conditions. Many defendants need an effective lawyer at that point to

² See, e.g., 18 N.Y. COMP. CODES R. & REGS. tit. 18, § 351.2(k)(3) (2010) (denying eligibility for public assistance to any individual violating a condition of probation or parole); N.Y. SOC. SERV. LAW § 384-b(3)(l) (McKinney 2010) (permitting social services, subject to exceptions, to file a petition to terminate parental rights of an individual incarcerated for more than fifteen months); 42 U.S.C. § 13661(b) and (c) (2006) (denying admission to public housing to a family if any person who is expected to be a member of the household has a criminal conviction); 20 U.S.C. § 1091(r) (2006) (denying federal financial aid to individuals with a drug conviction); Immigration and Nationality Act § 237(a)(2), 8 U.S.C. § 1227(a)(2) (2006) (setting forth grounds for deportation of an alien based on criminal conduct); United States v. Graham, 169 F.3d 787 (3d Cir. 1999) (holding that a petit larceny conviction that was a misdemeanor under New York State law was an aggravated felony (i.e., a basis for deportation) for immigration law purposes).

advocate on their behalf for pre-trial release or reasonable bail, and to do so, the lawyer needs to assess the information obtained in the initial meeting with the client, evaluate the charges against the client, and identify family members or other contacts to establish the client's community ties or assist with making bail.

Without effective representation by counsel, the defendant could remain incarcerated until trial even though the nature of the crime or the defendant's profile warrants pre-trial release.

(b) Pre-Trial Factual Development and Legal Research

To provide meaningful and effective assistance to a client after arraignment, an attorney is needed to investigate facts relevant to the criminal charges and the client's personal situation. By conducting a prompt and thorough investigation, an effective attorney can and should be able to identify and preserve evidence for use at trial and develop an overall case strategy, including which legal arguments to advance and the best approach to plea negotiations with the prosecution.

A timely investigation may permit an effective attorney to obtain physical evidence such as surveillance videos, telephone records, or GPS data before it is lost or destroyed. An attorney can also locate witnesses and interview them while their memories are fresh and assess relevant locales as they existed at the time of the crime. Also, an investigation may reveal that a client suffers from a mental

illness, a mental disability, or a chemical dependency, and thus counseling or a treatment program is more appropriate than incarceration.

To provide meaningful assistance during this stage of the case, an attorney is needed to attend to formal discovery in order to promptly obtain evidence that the People might use in their case or that is only available through the prosecution, particularly if there is a risk of it being lost or destroyed (e.g., recordings of 911 calls). Likewise, an attorney is needed to conduct legal research regarding the elements of the charged crimes, available defenses, and the current state of the relevant law.

In some cases, the information that a defense attorney obtains before trial and presents to the prosecution may lead to the dismissal of the charges. In others, it may confirm the strength of the prosecution's case, thus enabling the attorney to more effectively counsel the client about pleading guilty before trial. That is possible only if the lawyer has sufficient time and resources to conduct a thorough investigation.

(c) Grand Jury Proceedings

In connection with grand jury proceedings, a lawyer is needed to advise the client about the advantages and disadvantages of testifying in the grand jury and, if the client chooses to testify, to fully prepare the client for testimony. Many

defendants charged with felonies want to testify before the grand jury because it is their first opportunity to recount the facts as they know them. In certain cases, and where properly prepared by counsel, a defendant's testimony in the grand jury can be extremely powerful and may result in no indictment being returned.

Grand jury testimony carries substantial risks. The defendant may damage his or her credibility if the testimony differs from that of other witnesses, even on relatively inconsequential facts or issues. Further, the defendant's testimony may inadvertently open the door to other matters of which the prosecution was previously unaware. Given the low burden of proof to obtain an indictment and the often marginal benefit to be gained from testifying, most defendants are advised by effective counsel not to testify in the grand jury. An effective attorney needs to evaluate whether this is the best course of action in a particular case and to conduct such client counseling.

(d) Plea Negotiations

An attorney who has a firm grasp of the pertinent law and facts is also needed to proactively engage in plea negotiations and to maintain a dialogue with the prosecution throughout the proceedings. An effective attorney is needed to promptly communicate to the client and evaluate any modifications to the People's offers, so that the client has adequate opportunity to consider each offer.

(e) Pre-Trial Motions

In the stages before trial, effective counsel will make good use of motion practice to litigate important legal issues before the Court. A successful pre-trial motion may, for example, result in the suppression at trial of illegally obtained evidence, statements, or identifications. Speedy trial motions under Section 30.30 of the Criminal Procedure Law or motions challenging the sufficiency of the charging instrument could lead to dismissal of some or all of the charges against the defendant. Such motions are possible only if attorneys have sufficient skill and time to prepare them.

(f) Trial

For cases that reach trial, the defense attorney's role is critical. Effective counsel should prepare for all aspects of trial, from jury selection through closing argument. Through preparation, the effective attorney can identify the key issues to address during voir dire; be in a position to introduce themes that support the defendant's theory of the case; structure an opening statement, witness examinations, and closing argument to build on those themes; anticipate the prosecution's arguments and evidentiary issues that may arise; and gather material from which to effectively cross-examine the prosecution's witnesses.

While it is ultimately the client's decision whether to testify at trial, when a defendant does testify, it invariably has a material impact on the trial. An effective

attorney is needed to fully advise the client of the potential advantages and risks of testifying and, when the client decides to testify, to thoroughly prepare the client for the testimony, particularly cross-examination.

(g) Post-Trial and Sentencing

Often indigent criminal defendants have mental health and/or substance abuse issues, for which alternatives to incarceration would be more appropriate than a prison sentence to rehabilitate that individual. Unless effective defense counsel identifies such issues, those alternatives may not be offered by the prosecution or the court.

An effective attorney is also needed to assess the suitability of mental health programs, drug treatment programs, and other potential alternatives to prison and advise the client accordingly. Counsel is then needed to advocate for the relevant available program and to persuade both the prosecution and the judge that a jail sentence should not be imposed.

In doing so, an effective lawyer may utilize a social worker or other expert to achieve the most appropriate disposition or sentence for the client. Often a social worker or other expert can more effectively elicit relevant information from the client and present an informed and persuasive case to the court that draws on the defendant's background and potentially mitigating factors. Without the benefit

of effective assistance from both the attorney and a mental health professional, a client may receive a longer sentence or lose the ability to enter a treatment program or other rehabilitation alternative.

2. Professional Standards Further Confirm the Need for Effective Assistance of Counsel Throughout a Case

This Court and the Supreme Court of the United States recognize that prevailing norms of professional conduct inform the scope of the constitutional right to counsel. See, e.g., Bobby v. Van Hook, --- U.S. ---, 130 S. Ct. 13, 16-17 (2009) (professional standards are useful guides for determining whether counsel's conduct was reasonable); Rompilla, 545 U.S. at 387 & n.7 (“[W]e long have referred to these ABA Standards [for Criminal Justice] as guides to determining what is reasonable.” (internal quotations and citations omitted)); Wiggins, 539 U.S. at 522, 524-25 (citing the ABA Standards for Criminal Justice); Strickland, 466 U.S. at 688-89 (same); Bennett, 29 N.Y.2d at 466-67 (same). Such standards further highlight the extent to which meaningful and effective representation throughout a criminal proceeding is essential to protect the defendant's rights and achieve a just result.³

³ See, e.g., American Bar Association (“ABA”), Eight Guidelines of Public Defense Related to Excessive Workloads (Aug. 2009), <http://www.abanet.org/legalservices/sclaid/defender/>; New York State Bar Association (“NYSBA”), Standards for Providing Mandated Representation (Apr. 2005), http://www.nysda.org/html/defense_services.html; New York State Defender

For example, standards promulgated by the New York State Bar Association state that “zealous, effective and high-quality representation” requires an attorney to “[p]rovid[e] the client with full information concerning such matters as . . . immigration, motor vehicle licensing and other collateral consequences under all possible eventualities.” NYSBA, Standards for Providing Mandated Representation, Standard I-7(e).⁴ Under American Bar Association standards, an effective counsel should “explain developments in the case to the extent reasonably necessary to permit the client to make informed decisions regarding representation.” ABA, Standards for Criminal Justice: Prosecution Function and Defense Function, Standards 4-3.8(b), 4-5.1.⁵

Association (“NYSBA”), Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (July 2004), http://www.nysda.org/html/defense_services.html; ABA, Ten Principles of a Public Defense Delivery System (Feb. 2002), <http://www.abanet.org/legalservices/sclaid/defender/>; National Legal Aid and Defender Association (“NLADA”), Performance Guidelines for Criminal Defense Representation (1995), http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines; ABA, ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993), <http://www.abanet.org/crimjust/standards/>; ABA, ABA Standards for Criminal Justice: Providing Defense Services (3d ed. 1992), <http://www.abanet.org/crimjust/standards/>; NLADA, Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services (1984), http://www.nlada.org/Defender/Defender_Standards/Negotiating_And_Awarding_ID_Contracts.

⁴ See also NLADA, Performance Guidelines for Criminal Defense Representation, Guideline 8.2 (stating that counsel should “be familiar with direct and collateral consequences of the sentence and judgment”); NYSBA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State, Standard VIII-A-7.

⁵ See also NYSBA, Standards for Providing Mandated Representation, Standard I-3 (“An attorney must . . . provide the client with the opportunity to make an intelligent and well-

With respect to investigations, the ABA standards provide:

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt

ABA, Standards for Criminal Justice: Prosecution Function and Defense Function,

Standard 4-4.1(a).⁶ According to New York State Bar Association standards, an effective attorney's preparation for trial entails:

(i) developing a legal and factual strategy, using whatever investigative and forensic resources are appropriate; (ii) preparing for cross examination of the People's witnesses and direct examination of defense witnesses; (iii) developing a foundation for the introduction of defense evidence; (iv) formulating an opening statement; and (v) drafting requests for jury instructions.

NYSBA, Standards for Providing Mandated Representation, Standard I-7(g).⁷

informed decision in those instances when a decision is to be made by the client (i.e., whether to plead guilty, whether to be tried by a jury or judge and whether to testify).”)

⁶ See also NLADA, Performance Guidelines for Criminal Defense Representation, Guideline 4.1; NLADA, Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services, Guideline III-9; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State, Standard VIII-A-6; NYSBA, Standards for Providing Mandated Representation, Standards H, I-7(b).

Protection of a defendant's right to such effective representation is essential if due process is to be provided throughout the proceeding.

C. The Right to Counsel Should Not Be Limited to Those Defendants Who Have Been Tried and Convicted.

As addressed above, neither this Court nor the Supreme Court of the United States limits the right to meaningful and effective assistance of counsel to representation at a trial. Yet the Third Department's holding defines the right solely by reference to post-conviction remedies and would, as a practical matter, limit the ability to enforce the constitutional right to counsel to those actually convicted of a crime. See Hurrell-Harring v. State, 66 A.D.3d 84, 86-88, 883 N.Y.S.2d 349, 351-52 (3d Dep't 2009). According to the Third Department:

As interpreted under both the U.S. and N.Y. Constitutions, this guarantee has been found to be synonymous with the right to the effective assistance of counsel, and is violated not whenever there is a flaw or "deficiency" in the quality of the legal representation provided indigent criminal defendants, but when that representation, taken as a whole, is so inadequate as to undermine the proper functioning of the adversarial process so that the trial cannot be relied on as having produced a just result.

⁷ See also ABA, Standards for Criminal Justice: Prosecution Function and Defense Function, Standards 4-7.2-4-7.8; NLADA, Performance Guidelines for Criminal Defense Representation, Guidelines 7.1-7.7; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State, VIII-A-8.

Id. (citing Strickland, 466 U.S. at 686).

Contrary to the Appellate Division's holding, the United States Supreme Court's decision in Strickland does not apply and was not intended to apply to cases that do not seek to set aside criminal convictions, including actions such as this, where Appellants seek to remedy systemic violations of constitutional rights that indisputably result from inadequate government resources and funding. Among other reasons, the policy considerations that underlie the application of a heightened standard in post-conviction proceedings do not apply where, as here, the court is being asked not to upset a fact finder's determination of a defendant's guilt in a particular case, but to address a chronic absence of sufficient resources. Those policy considerations – such as an interest in finality and judicial economy, proper deference to strategic choices of counsel, and the desire to encourage the acceptance of assigned cases, see Strickland, 466 U.S. at 689-93 – do not apply where a plaintiff seeks prospective relief from systemic inadequacies, rather than relief from a conviction in any particular case. See Wallace v. Kern, 392 F. Supp. 834, 845-46 (E.D.N.Y. 1973), rev'd on other grounds, 481 F.2d 621 (2d Cir. 1973) (“None of the reasons which support the imposition of strict standards in post-conviction cases is applicable in the posture in which the question of adequate

representation is presented here. The hesitancy to indulge in second-guessing previously made decisions is not an obstacle.”).⁸

In considering a similar challenge brought by court-appointed lawyers, the Supreme Court, New York County, reasoned correctly:

New York is concerned as much with the integrity of the judicial process as with the issue of guilt or innocence, and therefore this court finds the more taxing two-prong Strickland standard used to vacate criminal convictions inappropriate in a civil action that seeks prospective relief . . . Strickland’s reliance on postconviction review provides no guarantee that the indigent will receive adequate assistance of counsel under the New York Constitution in the context of this action. Accordingly, because the right to effective assistance of counsel in New York is much more than just the right to an outcome, threatened injury is enough to satisfy the prejudice element and obtain prospective injunctive relief to prevent further harm.

NYCLA v. State, 192 Misc. 2d 424, 431, 745 N.Y.S.2d 376, 384 (Sup. Ct. N.Y. Cty. 2002); see also NYCLA v. State, 294 A.D.2d 69, 73-74, 742 N.Y.S.2d 16, 19-20 (1st Dep’t 2002) (holding that cause of action is justiciable, even absent allegations of specific past violations, where facts demonstrate a prospective denial

⁸ Even in the context of post-conviction remedies, this Court has rejected strict adherence to Strickland’s two-part test, instead adopting a less onerous prejudice inquiry that focuses on “the fairness of the process as a whole.” See People v. Caban, 5 N.Y.3d 143, 155-56 (2005) (internal citations omitted); People v. Stultz, 2 N.Y.3d 277, 283-84 & n.12 (2004). The Third Department’s reliance on Strickland thus interprets this State’s constitutional protections more narrowly than this Court has defined them previously.

of the right to counsel); Duncan v. State, 284 Mich. App. 246, 305-10, 774 N.W.2d 89, 125-28 (Ct. App. 2009) (holding that the Strickland standard does not apply in a civil action where indigent defendants seek prospective relief for alleged systemic deficiencies); White v. Martz, No. CDV-2002-133, 2002 WL 34377577, at *7-8 (Mont. 1st Jud. Dist. Ct. July 25, 2002) (same).

POINT II.

A JUDICIAL REMEDY IS NECESSARY AND APPROPRIATE WHERE INEFFECTIVE ASSISTANCE OF COUNSEL IS SYSTEMIC

Notwithstanding Appellants' indisputably broad right to counsel, the Third Department in its decision held that Appellants cannot seek judicial relief through civil litigation when their constitutional rights are violated. Specifically, the Third Department expressed the concern that a favorable result in this action could disturb Appellants' underlying criminal proceedings. For the reasons articulated by Appellants and other Amici in their briefs, Legal Aid submits that, despite such concerns, criminal defendants like Appellants may rightfully seek prospective relief to address the pervasive lack of resources.

Because the State must provide counsel for indigent defendants statewide, it is also essential that representative parties – such as Appellants, bar associations, or indigent defense providers – be able to seek judicial relief when the State fails to provide appropriate funding and resources for indigent defense or otherwise fails to

assure the right to counsel. The justiciability of an action challenging systemic failures, including inadequate funding, is well founded: courts have long recognized the need to review and redress unconstitutional action or inaction by the political branches, and courts have the inherent authority to act when the judicial process itself is impaired.

This Court should thus reaffirm that courts possess the power to adjudicate such challenges. Even if, for some reason, this Court were to embrace the Third Department's concern as to these particular Appellants, it is essential for this Court to preserve the rights of other parties (including providers such as Legal Aid, who have a direct role and interest in the indigent defense system) to seek a judicial remedy for systemic failures that impair the constitutional rights of criminal defendants.

A. Courts in a Growing Number of Jurisdictions Have Recognized the Right to Prospective Relief from Violations of the Right to Counsel.

Earlier this decade, the First Department recognized that allegations of deficiencies in the State's system of indigent defense states a cause of action for prospective relief when there is a likelihood that criminal defendants will receive ineffective assistance of counsel. NYCLA, 294 A.D.2d at 73-74, 742 N.Y.S.2d at 19-20 (affirming trial court's denial of State defendants' motion to dismiss); see

also NYCLA v. State, 196 Misc. 2d 761, 780 & n.12, 763 N.Y.S.2d 397, 412 & n.12 (Sup. Ct. N.Y. Cty. 2003) (granting a permanent injunction and declaratory relief in favor of the plaintiff, an association of lawyers). In so holding, the First Department relied on prior decisions of this Court that recognized the justiciability of actions such as this and the appropriateness of prospective relief. NYCLA, 294 A.D.2d at 73-74, 742 N.Y.S.2d at 19-20 (discussing Swinton v. Safir, 93 N.Y.2d 758 (1999); Klostermann v. Cuomo, 61 N.Y.2d 525 (1984); Bruno v. Codd, 47 N.Y.2d 582 (1979)). Quoting Klostermann, 61 N.Y.2d at 538, the First Department reasoned that recognition of this cause of action was “particularly appropriate since ‘the primary purpose of declaratory judgments is to adjudicate the parties’ rights before a wrong actually occurs in the hope that later litigation will be unnecessary.’” NYCLA, 294 A.D.2d at 74, 742 N.Y.S.2d at 20.

The NYCLA case is only one example. Other jurisdictions continue to recognize causes of action based on a likelihood that criminal defendants will not receive the required effective assistance of counsel. See, e.g., Duncan, 284 Mich. App. at 301-03, 774 N.W.2d at 123-25 (denying the state’s motion to dismiss, holding that a class of indigent plaintiffs sufficiently alleged grounds for prospective relief, and reasoning that plaintiffs must show that “instances of deficient performance and denial of counsel are widespread and systemic and that

they are caused by weaknesses and problems in the court-appointed, indigent defense systems”); Best v. Grant Cty., No. 04-2-00189-0 (Wash. Super. Ct. Kittitas Cty. Oct. 14, 2005) (granting partial summary judgment for a class of indigent plaintiffs seeking prospective relief from systemic deficiencies in the public defense system); Lavallee v. Justices, 442 Mass. 228, 238, 812 N.E.2d 895, 905 (2004) (“Because the petitioners are seeking redress for the ongoing violation of their fundamental constitutional right that affects the manner in which the criminal case against them will be prosecuted and defended, it is enough that they have shown a violation of that right that may likely result in irreparable harm if not corrected.”); White, 2002 WL 34377577, at *7 (denying state defendants’ motion to dismiss and reasoning that “[i]n a suit for prospective relief the plaintiff’s burden is to show the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law” (internal citations and quotations omitted)); State v. Quitman Cty., 807 So. 2d 401, 410 (Miss. 2001) (recognizing a cause of action for prospective relief based on the failure of the existing system to provide indigent defendants with the tools of an adequate defense); Rivera v. Rowland, No. CV 95-0545629S, 1996 WL 636475, at *5 (Conn. Super. Ct. Oct. 23, 1996) (denying state defendants’ motion to dismiss and holding that “plaintiffs do not necessarily need to allege that they have already suffered harm as they would be

required to do in other types of cases, but rather that they are at imminent risk of harm if the court does not grant the relief requested”).⁹

While there are a few exceptions, see Platt v. State, 664 N.E.2d 357, 362 (Ind. Ct. App. 1996), the balance of jurisdictions that have addressed this issue over the past two decades have recognized a cause of action based on prospective ineffective assistance of counsel.

Where systemic deficiencies exist, moreover, courts permit various representative parties to seek prospective relief. For instance, courts have permitted classes of indigent defendants, like Appellants, to bring actions seeking prospective relief. See, e.g., Best v. Grant Cty., No. 04-2-00189-0 (Wash. Super.

⁹ Many of these cases have not been reviewed by the highest court of the respective state. This is often the case because favorable lower court rulings have spurred the desired reform. See, e.g., Press Release, NYCLA Settles Lawsuit Against N.Y. State and City Challenging Constitutionality of Compensation Rates for Assigned Counsel (Nov. 12, 2003), http://www.nycla.org/siteFiles/Publications/Publications116_0.pdf (describing settlement and legislative reform); White v. Martz, No. CDV-2002-133, 2006 Mont. Dist. LEXIS 136, *2 (Mont. 1st Jud. Dist. Ct. Jan. 25, 2006) (noting the enactment of the Montana Public Defender Act); Settlement Agreement, Best v. Grant Cty., No. 04-2-00189-0 (Wash. Super. Ct. Kittitas Cty. Nov. 2, 2005) (noting reforms such as increased training and supervision, reduced caseloads, and formal monitoring); Notice of Settlement, Rivera v. Rowland, No. CV 95-0545629S (Conn. Super. Ct. July 2, 1999) (noting implemented reforms such as funding increases, attorney caseload goals, increased compensation rates, and revised training programs); Settlement Agreement, Doyle v. Allegheny Cty. Salary Bd., No. 96-13606 (Pa. Ct. Common Pleas Allegheny Cty. May 15, 1998) (increasing the number of attorneys, supervisors, and support staff; requiring the development of practice standards; requiring increased supervision, monitoring, evaluation, and training; and increasing funding). Therefore, any absence of rulings from the highest court of a given jurisdiction does not signal a lack of acceptance of this cause of action; rather, it underscores the practical reality that indigent defendants and their attorneys are concerned with quickly implementing changes that will improve the provision of public defense.

Ct. Kittitas Cty. Oct. 14, 2005) (granting partial summary judgment for a class of indigent plaintiffs); White, 2002 WL 34377577 (denying state defendants' motion to dismiss complaint brought by class of indigent defendants). Courts also consistently permit defense providers and other organizations to bring such suits on behalf of their clients in order to correct deficiencies in the criminal justice system. See NYCLA, 294 A.D.2d at 75-76, 742 N.Y.S.2d at 21-22 (permitting a bar association to challenge the rates paid to assigned counsel in an effort to remedy systemic violations of the constitutional right to counsel of indigent defendants); Lavallee, 442 Mass. at 241, 812 N.E.2d at 907 (permitting the Committee for Public Counsel Services to bring suit for systemic reform on behalf of indigent criminal defendants and challenge level of funding for indigent defense services); Quitman Cty., 807 So. 2d at 405 (holding that the county had standing to sue the state for failure to provide funding on behalf of indigent defendants); Ind. Prot. & Advocacy Servs. Comm'n v. Comm'r, 642 F. Supp. 2d 872, 876-78 (S.D. Ind. 2009) (permitting protection and advocacy organization to challenge executive agency's practice of isolating and failing to provide sufficient treatment programs for mentally ill prisoners) (citing Oregon Advocacy Ctr. v. Mink, 322 F.3d 1101, 1109-11 (9th Cir. 2003)).

B. It Is a Court's Rightful Role To Adjudicate Disputes Involving State Action That Impairs a Constitutional Right.

Recognition of the entitlement to seek relief in these circumstances is also consistent with the historic role of this Court. The Judiciary has a critical role to ensure that the constitutional rights of citizens are protected from state action or inaction. For over two centuries, it has been settled that “every right, when withheld, must have a remedy, and every injury its proper redress.” Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803). It is squarely within the province of the courts to adjudicate claims that the State has failed to perform its constitutional obligation, to the detriment of individuals’ constitutional rights. See Marbury, 5 U.S. (1 Cranch) at 166 (“[W]here a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems . . . clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.”).

Despite these principles which are so firmly engrained in this country’s jurisprudence, the State asks this Court to leave Appellants with no remedy for the violation of their constitutional rights and to divorce itself from its rightful role. As the Michigan Court of Appeals wisely reasoned in rejecting similar arguments:

We cannot accept the proposition that the constitutional rights of our citizens, even those accused of crimes and too poor to afford counsel, are not deserving and worthy of any protection by the judiciary in a situation where the executive and legislative branches fail to comply with constitutional mandates and abdicate their constitutional responsibilities, either intentionally or neglectfully. . . . [I]f a chosen path taken by the executive and legislative branches in an effort to satisfy their constitutional obligations allegedly fails to meet minimum constitutional requirements, the judiciary must examine the allegations and adjudicate the dispute. The judiciary by so intervening is not acting with a lack of judicial modesty or in violation of the separation of powers; it is acting in accordance with its constitutional obligations, duties, and oaths of office.

Duncan, 284 Mich. App. at 255-56, 774 N.W.2d at 98 (citing Boumediene v. Bush, 553 U.S. ---, ---, 128 S. Ct. 2229, 2259 (2008); Marbury, 5 U.S. (1 Cranch) at 177-80); see also Campaign for Fiscal Equity, Inc. v. State, 100 N.Y.2d 893, 925 (2003) (Kaye, C.J.) (“We are, of course, mindful . . . of the responsibility . . . to defer to the Legislature in matters of policymaking. . . . By the same token, in plaintiffs’ favor, it is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them.”); Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 57 N.Y.2d 27, 39 (1982) (“With full recognition and respect . . . for the distribution of powers . . . among the legislative, executive and judicial branches, it is nevertheless the responsibility of the courts to adjudicate contentions that actions taken by the

Legislature and the executive fail to conform to the mandates of the Constitutions which constrain the activities of all three branches.”). Moreover, “concerns about costs and fiscal impact, . . . and concerns about which governmental body or bodies should operate an indigent defense system cannot be allowed to prevail over constitutional compliance.” Duncan, 284 Mich. App. at 256, 774 N.W.2d at 98; see also Klostermann, 61 N.Y.2d at 536-37 (“Defendants contend that the controversy is nonjusticiable because any adjudication in support of plaintiffs will necessarily require the expenditure of funds and a concomitant allocation of resources. . . . This defense is particularly unconvincing when uttered in response to a claim that existing conditions violate an individual’s constitutional rights.”).

The courts’ rightful role in remedying constitutional deficiencies is particularly important where those deficiencies impair the very system over which the judiciary presides. Courts are vested with the powers that are reasonably necessary to perform their judicial functions. Such inherent powers include the power to review state action or inaction that undermines the judiciary’s ability to function efficiently and effectively. As articulated by Justice Suarez in the NYCLA action:

The Court, as any court of competent jurisdiction, is vested under the inherent powers doctrine with all powers reasonably required to enable it to: perform efficiently its judicial functions, to protect its dignity,

independence, and integrity, and to make its lawful actions effective. Accordingly, when legislative appropriations prove insufficient and legislative inaction obstructs the judiciary's ability to function, the judiciary has inherent authority to bring the deficient state statute into compliance with the Constitution

192 Misc. 2d at 436-37, 745 N.Y.S.2d at 388 (internal citations and quotations omitted); see also NYCLA, 294 A.D.2d at 73, 742 N.Y.S.2d at 19 (“[A]t the heart of the present action is the demand that the court system ensure that its processes do not cause systemic violations of constitutional guarantees. We therefore conclude that the matter must be deemed justiciable.”); Wehringer v. Branningan, 232 A.D.2d 206, 206-07, 647 N.Y.S.2d 770, 771 (1st Dep’t 1996) (invoking inherent powers of judiciary to dismiss claim that, the court concluded, wasted judicial resources and flouted the court’s integrity); McCoy v. Mayor of the City of New York, 73 Misc. 2d 508, 509-11, 342 N.Y.S.2d 83, 84-86 (Sup. Ct. N.Y. Cty. 1973) (invoking the inherent powers of the court to redress City’s failure to appropriate proper level of funds to the newly created Housing Part).

To deny a judicial remedy for the stark impairment of constitutional rights at issue in this action, therefore, would divorce the courts from their rightful role as arbiters of constitutional violations and require the courts to turn a blind eye to systemic deficiencies that undermine the proper functioning of the judicial process.

POINT III.

SYSTEMIC DEFICIENCIES IN A SYSTEM OF INDIGENT DEFENSE CONSTRAIN THE ABILITY OF ASSIGNED COUNSEL TO SATISFY THEIR PROFESSIONAL OBLIGATIONS TO CLIENTS

As more fully articulated by other Amici, deficiencies in the State's system of indigent defense adversely affect not only indigent criminal defendants but also the attorneys who represent them.

Specifically, the New York Rules of Professional Conduct require every attorney to provide competent representation, and such representation "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." N.Y. Rules Prof'l Cond. (effective Apr. 1, 2009), R. 1.1(a). In addition, Rule 1.3 states that a lawyer "shall act with reasonable diligence and promptness in representing a client" and "shall not neglect a legal matter entrusted to the lawyer." Id. R. 1.3(a)-(b). Notwithstanding these Court-endorsed mandates, the state of indigent defense in New York – in particular the overwhelming caseloads that many attorneys are forced to carry – all too often prevents attorneys from fulfilling those professional obligations. Legal Aid's experience confirms that with lower caseloads and more time to dedicate to each indigent case, attorneys would prepare earlier and more thoroughly for court appearances, hearings, and trials. Because they carry such heavy caseloads, however, defense

attorneys in New York are constantly forced to prioritize those cases that involve more serious charges or those with quickly approaching deadlines, which necessarily works to the detriment of their other clients.

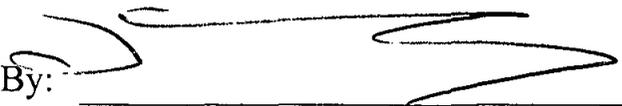
This Court should act to assure that such systemic conditions do not exist in New York's system of justice. The system cannot work as it should for all if defense lawyers are required – as they are now – to engage in such triage on a daily basis.

CONCLUSION

Given the current pervasive crisis in funding for indigent defense in New York State, it is imperative that this Court reaffirm that the right to effective assistance of counsel applies throughout criminal proceedings and that these Appellants and other interested organizations and parties retain their right to challenge serious deficiencies in the State's system of justice. To deny the claims of the Appellants, or similar claims by other interested organizations, would erect an impenetrable barrier to judicial scrutiny of the State's failure to comply with its constitutional obligation to provide effective assistance of counsel at every stage of a criminal proceeding.

Dated: New York, New York
February 5, 2010

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SUPERIOR COURT OF WASHINGTON FOR KITTTAS COUNTY

JEFFREY BEST, DANIEL CAMPOS and)
 GARY DALE HUTT, on behalf of)
 themselves and all others similarly)
 situated and GREGG HANSEN,)
)
 Plaintiffs,)
)
 vs.)
)
 GRANT COUNTY, a Washington County,)
)
 Defendant.)

No. 04 2 00189 0

MEMORANDUM DECISION

INTRODUCTION

On September 30, 2005 the parties argued cross-motions for summary judgment, more fully described herebelow. The court thereafter took the matter under advisement to consider the arguments of the parties and review the supporting materials.

DISCUSSION

1. Background. On August 26, 2004 by memorandum decision this court granted the plaintiffs' motion to certify this litigation as a class action against Grant County in the quest to seek injunctive and declaratory relief to protect the constitutional right of effective assistance of counsel of all present and future indigent criminal defendants in Grant County. On September 13, 2004 the court signed the order granting for class certification. Since that time the parties

have been engaged in very extensive and contentious discovery requiring several court hearings and producing probably the largest, most voluminous¹ court file in the history of the Kittitas County Superior Court.

The plaintiffs seek partial summary judgments regarding the Grant County public defender system status, both before the filing date of this lawsuit of April 4, 2004 and with regard to the system since the date of filing. They contend there is no issue of material fact and that they are entitled as a matter of law to a declaration by this court that the Grant County public defender system, both before and after the filing of this lawsuit resulted in the rendering of ineffective assistance of counsel for indigent defendants. The defendants counter the plaintiffs' motions with their own motion for summary judgment of dismissal essentially contending the pre-filing facts surrounding the Grant County public defender system are irrelevant and that there is no evidence under the present new 2005 contract to show there has been a denial of effective assistance of counsel or that there is evidence to suggest a well-grounded fear of immediate harm under the 2005 contracts, thereby providing no basis to establish that Grant County's current public defender system is resulting or will result in actual or substantial injury to the plaintiffs' right to effective assistance of counsel.

2. Law of Summary Judgment. The purpose of a summary judgment is to avoid a useless trial. However, a trial is required and summary judgment must be denied whenever there are genuine issues of material fact. CR 56(c); Jacobsen v. State, 89 Wn.2d 104 (1977). Material facts are those facts upon which the outcome of litigation depends, either in whole or in part. Harris v. Ski Park Farms, 120 Wn.2d 727, 729 (1993). In a summary judgment the burden is always on the moving party regardless of where the burden would lie in the trial of the matter. Peninsula Truck Lines, Inc. v. Tooker, 63 Wn.2d 724 (1961). In ruling on a motion for summary judgment the court must consider all of the evidence and all reasonable inferences from the evidence in favor of the non-moving party. CR 56(c); Ohler v. Tacoma General Hospital, 92 Wn.2d 507 (1979). Summary judgment should be granted only if there is no genuine issue of material fact or if reasonable minds can reach but one conclusion on that issue based on the evidence construed in a light most favorable to the non-moving party. White v. State, 131 Wn.2d 1, 9 (1997); Weatherbee v. Gustafson, 64 Wn.App. 128 (1992).

¹ Boxes.

3. Law Regarding Declaratory Judgments and Injunctive Relief. This action is for injunctive and declaratory relief. A party seeking an injunction must show a clear, legal or equitable right, a well-grounded fear of invasion of their right, and actual substantial injury if the acts complained of are permitted to continue. In exercising its equitable power, the court should balance the relative interests of the parties and of the public, if appropriate. Tyler Pipe Industries v. Department of Revenue, 96 Wn.2d 785, 792 (1982); Port of Seattle v. International Longshoremen's and Warehousemen's Union, 52 Wn.2d 317, 319 (1958); Isthmian S.S. Company v. National Marine Engineer's Beneficial Association, 41 Wn.2d 106 (1952). Declaratory relief is appropriate if there is either an issue of major public importance or a judiciable controversy. Nollette v. Christianson, 115 Wn.2d 594, 598 (1990); Superior Asphalt v. Labor and Industries, 121 Wn.App. 601, 606 (2004).

4. Decision. Here, the plaintiffs allege the class members face a well-grounded fear their rights to effective assistance of counsel will be violated, to their profound injury. First, there is no dispute that the class members have a clear, legal and equitable right to effective assistance of counsel. Article 1, Section 22 of the Washington State Constitution; Sixth Amended to the United States Constitution; State v. Long, 104 Wn.2d 285, 288 (1985). A right to effective assistance of counsel is inherent in the guarantee of counsel and is essential to a fair trial. Strickland v. Washington, 466 U.S. 668, 685 (1984). The real issue presented is whether the class plaintiffs had and have a well-grounded fear of immediate invasion of their right to effective assistance of counsel.

It is undisputed that prior to this litigation being filed in April 2004, the caseloads of the Grant County Public Defenders were excessively high and exceeded any advisory guideline for caseload limits. It is also undisputed that Grant County did not provide meaningful supervision over the public defender system and that the Grant County Prosecutor's Office interfered with the ability of the public defenders to seek funds for retaining investigators and/or expert witnesses independent of the remuneration provided by contract for the public defenders. In fact, essentially all of the statement of facts outlined in plaintiffs' motion for partial summary judgment in paragraph II are uncontested. Moreover, regardless of whether one is of the opinion that the facts point to ineffective assistance of counsel and a well-grounded fear of continued invasion of that right or whether they simply point to a "terrible" public defense system is not the point on the request for injunctive relief. Evidence of past practices is certainly relevant and

admissible where there exists a possibility that the practices will continue and /or occur again. Braam ex. rel. v. State, 150 Wn.2d 689, 708, 709 (2003). The systemic deficiencies of the pre-filing public defense system in Grant County certainly created an atmosphere in which the class plaintiffs developed a well-grounded fear of immediate invasion of their respective rights to effective assistance of counsel and is evidence of an ongoing concern. The court should grant the class plaintiffs' motion for partial summary judgment on the pre-filing period but only as outlined above.

With respect to post-filing motion for partial summary judgment, the court makes similar observations. What the county did subsequent to the filing in hiring attorneys after April 4, 2004 and under the present 2005 contract is uncontested. Determining from that evidence as a matter of law, however, that the class plaintiffs are receiving ineffective assistance of counsel and will continue to do so and that the court should just focus on the remedies is beyond what this court is willing to do at this time. The court will grant the plaintiffs' motion for partial summary judgment regarding the Grant County public defense system after April 4, 2004 to the extent that the facts allow the court to conclude the atmosphere in which the class plaintiffs are being represented still creates a well-grounded fear of immediate invasion of the right to effective assistance of counsel.

The court by granting "partially" the class plaintiffs' motions for partial summary judgment is not ruling in favor of the class plaintiffs on their request for declaratory judgment that as a matter of law the Grant County Public Defender system deprives class plaintiffs of effective assistance of counsel. Creating an atmosphere in which there exists a well-grounded fear of immediate invasion of the right to effective assistance of counsel is not, at least in the court's mind, the same as owning a public defense system which in fact denies class plaintiffs of the effective assistance of counsel.

Having determined the plaintiffs' motions for partial summary judgment should be "partially" granted at this time, before the court addresses the defendant's motion, allow the court to advance the premise that it views the facts as to the actions of the county both before and after April 4, 2004 as being virtually uncontested; that the Grant County public defender system prior to April 4, 2004 suffered from systemic deficiencies and continues to suffer from problems after this action was filed; and that efforts with the 2005 contract have improved somewhat the conditions that existed prior to the institution of the lawsuit. The interrelationship of Grant

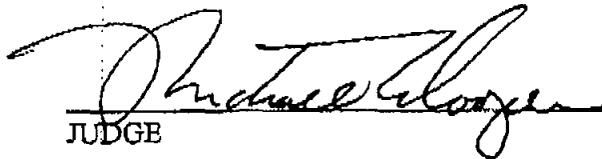
County Resolution No. 97-29-CC, the *Washington Defender Association Standards for Public Defense Services* and the *ABA Ten Principles of a Public Defense Delivery System* should form the basis for the court to determine how to eliminate that fear and prevent substantial harm from manifesting in actual ineffective assistance of counsel to the class defendants. Since the guidelines above referenced are advisory there is room to devise a Chevrolet system as opposed to a Cadillac system to meet the constitutional obligation to provide effective assistance of counsel. The focus of the trial should be on devising that system.

Turning now to the defendant's motion for summary judgment, this court denies the same. The court does not believe the Strickland test of Strickland v. Washington, supra is the appropriate test to apply to determine whether the Grant County public defender system creates an atmosphere in which there exists a well-grounded fear of immediate invasion of the right of effective assistance of counsel as an institution. Certainly on a case by case basis post-conviction relief complaining of ineffective assistance of counsel must apply the Strickland test. Here, however, complaint of the class is the ultimate systemic failure of the system and only prospect of relief is being sought to fix the system: As such, class plaintiffs do not have to demonstrate individual prejudice.²

CONCLUSION

Based on the foregoing, please present appropriate orders to reflect the court's decision³.

DATED: October 14, 2005


JUDGE

² See Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988), *cert. denied*, 495 U.S. 957, L.Ed. 2d 744, 110 S.Ct. 2562 (1990). See also Kenney A. ex. rel. Winn v. Perdue, 357 F.2d 1353, 1362 (N.D.Ga. 2005); see Nicholson v. Williams, 203 F.Supp. 2d 153, 240 (E.D. N.Y. 2002). (With respect to the declaratory judgment aspect of this case, however, see the court's discussion above).

³ Please heed the court's observation that many of the facts are uncontested. In effort to streamline the presentation during trial would certainly be appreciated, even to the point of developing a stipulation that would obviate the need for witnesses to be required to testify to give the uncontested facts.

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RECITALS

1. Plaintiffs Best, Campos, Hutt and Hansen filed a complaint on April 4, 2004 seeking injunctive and declaratory relief to remedy alleged deficiencies in Grant County's public defense system.

2. Grant County denied and continues to deny that there were any deficiencies in its public defense system.

3. The Court entered an order on September 13, 2004 certifying a plaintiff class consisting of "[a]ll indigent persons who have or will have criminal felony cases pending in Grant County Superior Court, who are appointed an attorney, and who have not entered into a plea agreement or been convicted."

4. The Court issued a Memorandum Decision on October 14, 2005, in which the Court denied the County's motion for summary judgment, granted in part the plaintiffs' two motions for partial summary judgment, found that class members have a well-grounded fear of immediate invasion of their rights to effective assistance of counsel, did not rule on whether the Grant County public defense system actually deprives class members of effective assistance of counsel, and ruled that the trial should focus on devising a public defense system that protects class members' rights. A copy of the Memorandum Decision is attached hereto as Appendix A.

5. The Parties believe that settlement of this lawsuit is in the best interests of all parties.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual obligations and agreements contained herein, and for good and valuable consideration, the receipt of which is hereby acknowledged, the Parties agree as follows:

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I. DEFINITIONS

For the purposes of this agreement, the following definitions shall apply:

A. "Public defense system" means any system or program under which Grant County provides, has provided or is obligated to provide for the criminal defense of any indigent person charged with a felony in Grant County Superior Court.

B. "Public defender" means any attorney who is hired by or contracts with Grant County to represent indigent persons charged with felony crimes in Grant County Superior Court.

C. "WSBA-Endorsed Standards" means the standards developed by the Washington Defender Association, adopted by the Washington State Bar Association and endorsed by the Washington Legislature, *see* RCW 10.101.030, and attached as Appendix B to this Agreement.

D. The "Monitor" is the individual selected under Section III of this Agreement.

E. The "Effective Date" of this Agreement shall be the date on which the Court enters an order approving the settlement pursuant to CR 23.

II. THE PUBLIC DEFENSE SYSTEM

A. Commitment to Provide Effective Assistance of Counsel

Grant County agrees to maintain and operate a public defense system that provides effective assistance of counsel to all indigent persons charged with felony crimes in Grant County.

B. Supervising Attorney

1. Grant County shall contract with or hire a full-time Supervising Attorney. The Supervising Attorney shall supervise the public defense system on behalf of Grant County. The Supervising Attorney's duties shall include but not be limited to: selecting

1 public defenders; drafting and negotiating contracts with public defenders; establishing
2 policies and procedures for public defense; assigning felony cases to public defenders in
3 accordance with this Agreement; supervising, training and mentoring public defenders;
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5 preparing reports concerning the public defense system; reviewing and tracking caseloads;
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7 establishing performance guidelines; responding to client complaints; ensuring that public
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9 defenders provide effective assistance of counsel; and providing information to the Monitor,
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11 to the Board of County Commissioners and (if needed) to the Grant County Superior Court.
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13 The Supervising Attorney shall not maintain his or her own caseload, except to act as co-
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15 counsel to other public defenders in accordance with this Agreement. The Supervising
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17 Attorney shall not engage in any private practice.
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21 2. The Supervising Attorney shall have experience in public defense, shall be
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23 qualified to handle Class A felonies within the meaning of the WSBA-Endorsed Standards
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25 and shall be qualified to fulfill the duties set forth herein. Grant County shall contract with
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27 or hire Alan White as the Supervising Attorney in 2006, with the understanding that he may
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29 require training and will require supervision and mentoring by the Monitor, in order to
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31 adequately carry out his supervisory duties. The compensation paid to the Supervising
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33 Attorney shall be not less than the compensation paid to Alan White in 2005, adjusted for
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35 cost of living increases as approved by the Board of County Commissioners equally for all
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37 represented and unrepresented employees. If in the future Grant County opts for an in-house
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39 public defense system, the compensation and benefits paid to the Supervising Attorney shall
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41 be comparable to those of the Grant County Prosecuting Attorney.

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43 3. The Monitor will oversee and assess the Supervising Attorney's performance
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45 and may conduct or recommend training on supervising a public defense system. The
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47 Monitor may recommend the Supervising Attorney's termination if the Monitor determines

1 that the Supervising Attorney lacks the skills, ability or other attributes necessary to
2 supervise the public defense system. If for any reason Alan White's role as Supervising
3 Attorney ceases, the County shall promptly contract with or hire a replacement Supervising
4 Attorney. The Monitor must approve any such replacement in writing.
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8 4. The Supervising Attorney must establish a complaint system that affords and
9 informs all indigent criminal defendants of the right to make complaints regarding the
10 quality of their public defense. This system must include a toll-free telephone line with a
11 message system in English and Spanish. All complaints shall be promptly logged and
12 investigated and be provided to the Monitor for review. Priority complaints shall include,
13 but not be limited to:
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17 a. failure to meet and interview defendants promptly;
18 b. failure to fully inform clients at all stages of the defense; and
19 c. failure to investigate cases.
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27 **C. Training and Qualifications of Public Defenders**

28 1. Grant County shall hire or contract with enough full-time public defenders to
29 handle all felony case assignments in accordance with the caseload limitations set forth in
30 the following Section D of this Agreement. Notwithstanding the foregoing, Grant County
31 may contract with or hire up to two (2) part-time public defenders with prior approval of the
32 Monitor.
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35 2. All public defenders must satisfy the NLADA Performance Guidelines for
36 Criminal Defense Representation, attached as Appendix C to this Agreement.
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38 3. No public defender may be assigned to handle a case that he or she is not
39 qualified to handle according to the WSBA-Endorsed Standards. Notwithstanding the
40 foregoing, with the approval of both the Supervising Attorney and the Monitor, a public
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1 defender may be assigned up to five (5) cases each year for which he or she lacks the
2 requisite qualifications under the WSBA-Endorsed Standards, provided that: (a) no lawyer
3 with less than two (2) years of felony prosecution or defense experience may be assigned a
4 Class A felony or persistent offender case under any circumstance; (b) the Supervising
5 Attorney must co-counsel with the public defender on all aspects of the case; and (c) the
6 assignment of such a case must receive advance written approval from the Monitor. Under
7 no circumstances will a public defender be assigned a death penalty case unless the public
8 defender meets the minimum professional qualification standards of the WSBA-Endorsed
9 Standards.
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19 4. Until qualified under the WSBA-Endorsed Standards, Jeffrey Goldstein and
20 Elizabeth Vasiliades may only be assigned up to 130 Class C felony case equivalents each,
21 provided that the Monitor approves the case assignments or the assignments conform to
22 guidelines established by the Monitor. Under no circumstances may Mr. Goldstein or Ms.
23 Vasiliades be assigned a Class B, Class A or persistent offender felony unless qualified to
24 handle the case according to the WSBA-Endorsed Standards.
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31 5. The County shall in no event hire or otherwise contract with the persons
32 listed on Exhibit A (which is to be filed under seal) to provide indigent defense services.
33 The County agrees to prohibit all public defenders from hiring the persons listed on Exhibit
34 A or to in any way employ them in connection with any matter related to the public defense
35 system.
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41 6. The public defense system and each public defender shall satisfy the NLADA
42 Defender Training and Development Standards, attached to this Agreement as Appendix D,
43 except where inconsistent with this Agreement or determined to be not applicable by the
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1 Supervising Attorney and the Monitor. The Supervising Attorney shall be responsible for
2 ensuring that training requirements are satisfied.
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5 **D. Caseloads of Public Defenders**
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7 1. Each public defender's caseload shall in no event exceed 150 case equivalents
8 per year. The County shall prohibit full-time public defenders from engaging in private
9 practice, provided however, that a full-time public defender may maintain a limited private
10 practice not to exceed 120 hours per year, provided that (i) the private practice does not
11 interfere with the performance of his or her duties, (ii) there is a reduction of 10 case
12 equivalents in the public defender's maximum caseload limit, and (iii) the private practice is
13 approved in advance by both the Supervising Attorney and the Monitor.
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21 2. Case equivalents shall be calculated as follows:
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Type of Case	Case equivalent
Material witness	1/3 case equivalent
Probation violation	1/3 case equivalent
Contempt	1 case equivalent
First or second degree murder	2 case equivalents
Extraordinary cases	1 case equivalent for each 15 hours spent on case
All felony cases not enumerated above	1 case equivalent

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37 3. The following cases will be considered "extraordinary cases" for the purposes
38 of determining case equivalents:
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- 40 a. Persistent offender cases;
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42 b. Fraud cases that have over five (5) counts or where the total alleged
43 loss exceeds \$250,000;
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45 c. Aggravated murder cases with or without a death notice; and
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1 d. Any other case determined by the Supervising Attorney, subject to
2 review by the Monitor, to be extraordinary in light of the amount and complexity of
3 the evidence, complexity of the legal issues, number of defendants, length of trial, or
4 similar factors.
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9 **E. Compensation and Payment for Services Other than an Attorney**

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11 1. Compensation. Each full-time public defender's yearly compensation may
12 vary according to his or her experience and qualifications, as long as the average yearly
13 compensation for all public defenders is at least \$97,500 in 2006. The Supervising
14 Attorney's compensation shall not be included in calculating the average yearly
15 compensation for public defenders. Part-time public defenders will receive no less than
16 \$650 per case equivalent in compensation. In addition to the yearly compensation, Grant
17 County shall pay each public defender \$350 per diem for each day (or portion thereof) in
18 trial. The yearly compensation and per diem amount will be adjusted for cost of living
19 increases as approved by the Board of County Commissioners equally for all represented
20 and unrepresented employees during the period of the Agreement. If at any time during the
21 term of this Agreement Grant County creates an in-house public defense system, public
22 defenders under that system must receive compensation and benefits comparable to their
23 counterparts at the Grant County Prosecuting Attorney's Office.
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37 2. Investigators: Grant County shall provide funds for one (1) full-time
38 investigator for every four (4) full-time public defenders. Investigators shall be paid by the
39 County from funds separate from those that pay public defender compensation. The County
40 shall pay for additional investigators as needed to: (a) avoid conflicts of interest on the part
41 of any full-time investigator contracted with or hired by the County; and (b) ensure that a
42 ratio of one (1) full-time investigator for every four (4) full-time public defenders is
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1 maintained. (Thus, for example, if the County contracts with or hires six (6) full-time public
2 defenders, then the County must provide the services of one full-time investigator plus
3 another 20 hours per week, on average, of investigative services from other sources.) Each
4 public defender shall have the authority to retain an investigator with approval of the
5 Supervising Attorney and shall not be required to seek court approval of the retention of an
6 investigator. Before the County or a public defender may contract with or hire any
7 investigator, the Monitor shall review the investigator's experience and qualifications and
8 determine that the contracting or hiring of the investigator for felony defense investigations
9 is appropriate. In determining the qualifications of the investigator, the Monitor shall take
10 into consideration his or her ability to speak Spanish.
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21 3. Experts. Grant County shall pay reasonable compensation for expert
22 witnesses necessary for the defense of indigent defendants, including investigation,
23 preparation and trial of a case. Expert witness fees shall be allocated from funds separate
24 from those provided for public defender compensation and the County will not limit such
25 funds in any way. The budget for expert witness fees shall have no impact on selection or
26 contracting or hiring of experts. Public defenders shall obtain funds for expert witness fees
27 by *ex parte* motion to the Grant County Superior Court. Motions for payment of experts
28 shall be filed with the Grant County Superior Court under seal. Public defenders shall be
29 free to retain experts of their choosing and the County shall in no event publish a list of pre-
30 approved experts. Under no circumstances may members of the Grant County Prosecuting
31 Attorney's Office be given access to motions for the appointment of experts or to invoices
32 submitted by experts to the County for payment. Public defenders may redact billing entries
33 (other than an indication of the hours spent and rate charged) from expert invoices for
34 purposes of submitting them for payment by the County.
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4. Administrative Support. Each public defender shall maintain a minimum of ¼-time secretarial/paralegal support unless and until the Monitor concludes that a given public defender does not require such administrative support. Each public defender shall maintain appropriate documentation of that public defender's arrangements for staff support and shall provide copies of that documentation to the Supervising Attorney. Each public defender will maintain a bilingual (English-Spanish) telephone and message system or other comparable system that allows incarcerated clients and other clients to leave messages.

5. Translation Services. Grant County shall provide funds for court-certified translators to interpret for public defenders at the Grant County Jail and at other locations at all times when public defenders need access to interpreter services. Interpreters shall be paid by Grant County from funds separate from those that pay public defender compensation. No public defender shall use jail trustees to provide translation services under any circumstances. Public defenders shall use translation services provided at County expense. Whenever possible, public defenders shall use translation services other than those provided by the translator for the Grant County Superior Court.

6. Initial Appearances. Grant County shall provide representation at initial appearances for all indigent defendants and shall provide representation at all other critical stages of felony criminal prosecutions.

F. Conflicts of Interest

1. The Supervising Attorney and each public defender shall design and implement a conflicts-check system and procedure. This conflict-check system and procedure must be approved by the Monitor.

2. The County will maintain a list of attorneys who satisfy the WSBA-Endorsed Standards, who are approved by the Monitor, and who have agreed to represent indigent

1 defendants in the event that all full-time public defenders have conflicts ("Conflicts
2 Counsel"). In no event may any person listed on Exhibit A serve as Conflicts Counsel.
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4 3. When the Supervising Attorney determines that no full-time public defender
5 can handle the defense of a case due to a conflict of interest, he or she will assign that case
6 to Conflicts Counsel and immediately report the assignment to the Monitor. The Monitor
7 may reject the assignment of any case to Conflicts Counsel if he or she believes that
8 assignment is inappropriate.
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10 4. Grant County shall compensate Conflicts Counsel a minimum of \$650 per
11 case equivalent plus \$350 per diem for each day (or portion thereof) in trial, but is free to
12 provide greater compensation as negotiated with Conflicts Counsel.
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21 **G. Involvement of the Prosecuting Attorney's Office**

22 The Grant County Prosecuting Attorney's Office, or any other Prosecuting Attorney's
23 Office, shall not have any involvement in any issue relating to the public defense system.
24 This includes, but is not limited to: establishing, designing, operating or structuring the
25 public defense system; drafting or negotiating of public defense contracts; drafting
26 resolutions, guidelines, procedures or other documents concerning public defense; selecting,
27 managing, overseeing, disciplining, or terminating public defenders; evaluating or assessing
28 potential or actual public defenders; evaluating or commenting upon requests for payment or
29 for the incurring of costs by public defenders; and determining compensation for public
30 defenders.
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41 **H. WSBA-Endorsed Standards**

42 Except as expressly set forth in this Agreement, the Grant County public defense
43 system and its public defenders shall comply at all times with the WSBA-Endorsed
44 Standards.
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III. MONITORING AND ENFORCEMENT

A. Monitor

1. Duties. The parties shall select a Monitor with experience in the field of public defense in the manner set forth in paragraph 2 below. The Monitor shall have the duty and authority to ensure that Grant County implements the terms of this Agreement. To that end, the Monitor shall have the power and authority to receive and obtain information, make recommendations and reports to the Court and to resolve disputes among the parties concerning this Agreement and concerning the operation of the public defense system consistent with the terms of this Agreement. The Monitor's powers shall be limited to those powers necessary to carry out the Monitor's duties hereunder, and the Monitor shall not have authority to oversee or monitor any operations of Grant County other than the public defense system.

2. Selection. The Parties shall select the Monitor as follows:

a. Within fifteen (15) days after the Effective Date of this Agreement, Plaintiffs will identify five (5) candidates for the position of Monitor and will so notify the County. The candidates (i) shall not have served as an expert in this case for any party or as counsel for any party, (ii) shall not have represented any party or counsel for any party in this case, (iii) shall not have worked for or been engaged by any of Plaintiffs' counsel in connection with any other case seeking structural challenges to a public defense system, and (iv) shall not be a current officer or employee of counsel for any party in this case. The County may strike any candidate who does not meet these criteria, in which case the Plaintiffs shall promptly identify a replacement candidate.

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b. Within 15 days of receiving notice pursuant to subparagraph (a), Grant County may strike up to three (3) of the candidates for any reason or no reason. In order to assist Grant County to determine whether to strike a candidate, Grant County shall have the right to ask the candidate to provide a curriculum vitae and to personally interview each candidate at Grant County's own expense.

c. Plaintiffs will promptly select one (1) candidate from the remaining candidates.

d. The Monitor shall serve for the term of this Agreement. The Monitor shall not be removed unless (i) the Monitor resigns, (ii) the parties stipulate and agree in writing that the Monitor should be removed, or (iii) the Court determines that the Monitor engaged in fraudulent or dishonest conduct with respect to the Monitor's duties hereunder. In the event that the Monitor resigns or is otherwise removed under this paragraph before the expiration of the term of this Agreement, the parties shall select a new Monitor using the same procedure as set forth herein, provided, however that Plaintiffs will have 30 days from notice of the resignation or removal of the Monitor to identify five (5) replacement candidates and to so notify the County.

3. Payment. Grant County shall pay the Monitor's reasonable fees and actual expenses, including access to translation services. Fees shall be charged at the Monitor's usual and customary rates. Grant County's obligation to pay the Monitor shall not be subject to any limit or cap. Nothing in this section precludes the County from requesting an anticipated budget for future work.

4. Access to Information. The Monitor shall have access to all information in the possession, custody, or control of Grant County, the Grant County Superior Court

1 Clerk's records, the Supervising Attorney and all public defenders concerning the public
2 defense system (excluding privileged communications and protected work product),
3 including but not limited to access to all documents, reports and data concerning the public
4 defense system and the right to interview all persons with knowledge about the public
5 defense system. Grant County shall cooperate with the Monitor and shall promptly provide
6 information requested by the Monitor. Grant County shall require the Supervising Attorney
7 and public defenders to cooperate fully with the Monitor and promptly to provide all
8 information (excluding privileged communications and protected work product) requested
9 by the Monitor.
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18 5. Monthly Reports by the County. Grant County (or the Supervising Attorney
19 on behalf of Grant County) shall submit monthly written reports to the Monitor and
20 Plaintiffs' counsel. Such reports shall include: (i) current data concerning the case
21 assignments and caseloads (including number and type of cases) of each public defender; (ii)
22 a summary of all complaints received by the Supervising Attorney or Grant County
23 concerning the public defense system or any representation provided by any public
24 defender; (iii) a representation by the Supervising Attorney that, to the best of his or her
25 knowledge, Grant County has complied, during the period covered by the report, with all of
26 its obligations under this Agreement; (iv) copies of all policies and procedures that have
27 been created for the purposes of complying with this Agreement or managing the public
28 defense system; and (v) such other information as the Monitor may request concerning the
29 public defense system.
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42 6. Quarterly Reports by the Monitor. The Monitor shall provide the Court,
43 Plaintiffs' counsel, and Grant County with quarterly reports regarding the public defense
44 system and Grant County's implementation of this Agreement. Reports for the preceding
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1 three calendar months shall be due April 15, July 15, September 15, and January 15 of each
2 year during the Term of this Agreement
3

4 7. Termination. The duties of the Monitor shall terminate at the end of the term
5 of this Agreement.
6

7 8. Changes. The Monitor must approve any change to the form of the public
8 defense system not addressed in this Agreement, including but not limited to the
9 implementation of an in-house or non-profit public defense office. No such change shall
10 relieve the County of its obligations under this Agreement, including but not limited to its
11 obligations to comply with the WSBA-Endorsed Standards, NLADA Performance
12 Guidelines for Criminal Defense Representation and the NLADA Defender Training and
13 Development Standards. All proposed changes must be submitted to the Monitor and
14 Plaintiffs' counsel at least 120 days prior to the enactment of the change.
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24 **B. Enforcement**

25 1. Access to Information. Until the lawsuit is dismissed by the Court pursuant
26 to Section III.C. below, Grant County shall provide to Plaintiffs' counsel all documents
27 requested in writing within ten (10) days of the request, which shall be copied to Grant
28 County's counsel. Plaintiffs' counsel may communicate directly with the Monitor, the
29 Supervising Attorney, public defenders, public defense clients and counsel for Grant County
30 concerning any matter related to the public defense system or the performance of this
31 Agreement.
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40 2. Informal Resolution. Any party may informally raise questions concerning
41 compliance with this Agreement with the Monitor. The Monitor shall attempt to informally
42 resolve any questions so raised.
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1 3. Submission of Formal Disputes to Monitor. In the event that a dispute
2
3 between the Parties arises concerning the implementation or performance of this Agreement,
4
5 the public defense system or any amounts due pursuant to this Agreement, the Parties shall
6
7 submit the dispute, in writing, with a copy to other Parties and their counsel, in the first
8
9 instance to the Monitor, who shall rule on the dispute within 14 days. Either party may
10
11 respond in writing to the complaint and ask the Monitor to make formal findings of fact and
12
13 recommendations to resolve the question. Whenever requested to do so, the Monitor shall
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15 make findings of fact and recommendations. If the Monitor does not rule on the dispute
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17 within 14 days, either party may move the Court for appropriate relief.

18 4. Court Review. A party may seek Court review of any ruling or
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20 recommendation by the Monitor within 30 days. The party challenging the ruling or
21
22 recommendation shall bear the burden of persuasion. Grant County shall pay all fees and
23
24 costs incurred by Plaintiffs' counsel in connection with any such review unless the Court
25
26 finds that Grant County is the substantially prevailing party with respect to the matter under
27
28 review.

29
30 **C. Jurisdiction, Stay and Dismissal**

31 1. Upon approval by the Kittitas County Superior Court, the Parties agree to a
32
33 stay of this litigation for the term of the Agreement, provided however, that the Kittitas
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35 County Superior Court will retain jurisdiction over all matters that relate to the performance
36
37 of this Agreement or for which a party seeks review under Section III.B.
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39 2. Thirty (30) days before the conclusion of the term of the Agreement, the
40
41 Monitor shall determine whether the County has substantially performed the terms of the
42
43 Agreement and shall report the determination to the Court. If the Court finds that the
44
45 County has substantially complied with the Agreement, the Court shall dismiss the lawsuit
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47

1 with prejudice. If the Court does not find that the County has substantially performed the
2 terms of the Agreement, the Court may order such further relief as it determines to be
3 appropriate.
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6 IV. APPROVAL AND TERM OF AGREEMENT

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9 1. Approval. The parties agree that this Agreement will be of no force and
10 effect unless and until approved by the Kittitas County Superior Court. Counsel for the
11 Plaintiffs shall move the Court for approval of the settlement pursuant to CR 23. Grant
12 County shall bear all costs incurred in connection with approval by the Court and any notice
13 in connection with such approval, excluding the attorneys' fees incurred by the Plaintiffs.
14

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17 2. Interim Stay. In order to permit the parties to seek Court approval of this
18 settlement, the parties shall move the Court for a stay of this action pending the Court's
19 ruling on whether to approve the settlement.
20

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23 3. Effect of Non-Approval. In the event that the Court does not approve the
24 Parties' settlement, the interim stay shall automatically be lifted, and this Agreement shall be
25 null and void and of no force and effect whatsoever.
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29 4. Term. Subject to Section V.2. below, the term of this Agreement shall be six
30 (6) years from the Effective Date, provided however, that if, at the end of five (5) years, the
31 Monitor and the Court find that Grant County has fully complied at all times with its
32 obligations under this Agreement, the Agreement will terminate five (5) years after the
33 Effective Date.
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40 V. ATTORNEYS' FEES AND COSTS

41
42 1. Base Payment. Not later than two weeks after the Effective Date, Grant
43 County shall pay Plaintiffs' counsel the sum of \$500,000 in partial payment of the attorneys'
44 fees and costs incurred by Plaintiffs' counsel during the litigation of this action.
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1 2. Additional Payments. At the end of each calendar year during which this
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3 Agreement is in effect, not to exceed the initial six years, Grant County shall pay to
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5 Plaintiffs' counsel the amount of \$100,000 (the "Annual Payment") in further partial
6
7 payment of the attorneys' fees and costs incurred by Plaintiffs' counsel prior to settlement of
8
9 this action, provided however, that Grant County need not pay an Annual Payment if, during
10
11 the prior year, Grant County was in full compliance with Sections II(B)(1) and (2), (C)(1),
12
13 (C)(3)-(5), (D), (E) (F)(2) and (4) and (G) and in substantial compliance with the remaining
14
15 sections of this Agreement as determined by the Court. For purposes of this provision only,
16
17 Grant County will be considered in full compliance with Sections II(B)(1) and (2), (C)(1),
18
19 (C)(3)-(5), (D), (E) (F)(2) and (4) or (G) unless: (a) Grant County has breached any such
20
21 section, and (b) Grant County has failed to cure the breach within the cure period. Grant
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23 County will be considered in substantial compliance with the remaining sections of this
24
25 Agreement unless (a) Grant County is not in substantial compliance with one or more of
26
27 those sections, and (b) Grant County has failed to cure the non-compliance within the cure
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29 period. The maximum cure period for any breach that occurs on or before December 31,
30
31 2007 shall be three (3) months from the date of receipt of the Monitor's findings of fact
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33 and/or recommendations, or such earlier date as the Monitor may designate. The maximum
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35 cure period for any breach that occurs after December 31, 2007, shall be one (1) month from
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37 the date of receipt of the Monitor's findings of fact and/or recommendations, or such earlier
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39 date as the Monitor may designate. If the Monitor finds that Grant County has not been in
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41 full compliance with this Agreement at any time after December 31, 2007, the Monitor may
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43 extend the term of the Agreement by up to one year (for a total of seven years).
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this Agreement, and any ambiguities shall not be construed against any Party on account of such drafting.

6. Notice. Any Notice to be given to a party under this Agreement, shall be sent to the following addresses in accordance with the Court's Order regarding service in this action:

1 For the Plaintiff Class:

2
3 Joachim Morrison
4 Columbia Legal Services
5 101 Yesler Way, Suite 301
6 Seattle, WA 98104
7 [joe.morrison@](mailto:joe.morrison@columbialegal.org)
8 columbialegal.org

Nancy L. Talner,
American Civil Liberties Union of Washington
705 Second Avenue, Suite 300
Seattle, WA 98104
talner@aclu-wa.org

11 Donald B. Scaramastra
12 Garvey Schubert Barer
13 1191 2nd Avenue #1800
14 Seattle, WA 98101
15 dscar@gsblaw.com

David F. Taylor
Perkins Coie LLP
1201 Third Avenue, 48th Floor
Seattle, WA 98101-3099
dftaylor@perkinscoie.com

18 For Defendant Grant County:

21 Francis S. Floyd
22 Floyd & Pflueger, P.S.
23 2505 Third Avenue, Ste 300
24 Seattle, WA 98121
25 ffloyd@floyd-pflueger.com

Jerry J. Moberg
451 Diamond Drive
Ephrata, WA 98823
JerryMoberg@canfield-associates.com

28 Michael E. McFarland
29 Evans, Craven, & Lackie, P.S.
30 818 W. Riverside, Ste 250
31 Spokane, WA 99201
32 MmcFarland@ecl-law.com

34 7. Admissibility of Agreement. The Parties agree that this Agreement and the
35 negotiations and discussions surrounding this Agreement shall not be admissible in any
36 lawsuit, arbitration, action, or other proceeding brought by any Party to this Agreement
37 against any other Party to this Agreement, except as shall be necessary to apply or enforce
38 the terms of this Agreement.
39

40 8. Applicable Law. This Agreement shall be governed by Washington law,
41 without regard to any rules regarding choice of law. Any action arising from or relating to
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1 this Agreement shall be brought in Kittitas County Superior Court, which shall be the
2 exclusive venue for any such action.
3

4
5 9. Entire Agreement. This Agreement constitutes the full and complete
6 settlement of all litigation under the Kittitas County Superior Court case, *Best et. al v. Grant*
7 *County*, Case No. 04-2-00189-0. This Agreement, along with Appendices A-D, constitutes
8 the full agreement of the parties and no other agreements or provisions exist. Nothing in this
9 Agreement shall release any claim held by any individual member of the class certified
10 herein, including but not limited to claims for damages or for the reversal, vacation or
11 modification of any criminal conviction or sentence.
12

13
14 10. Counterparts. This Agreement may be executed in several counterparts
15 (including by facsimile transmission) by one or more of the Parties named herein and all
16 such counterparts once so executed shall together be deemed to constitute one final
17 agreement, as if one document had been signed by all parties hereto; and each such
18 counterpart, upon execution and delivery, shall be deemed a complete original, binding the
19 parties to this Agreement.
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Entered into this ____ day of _____, 2005.

COLUMBIA LEGAL SERVICES

**AMERICAN CIVIL LIBERTIES UNION
OF WASHINGTON**

By _____
Joachim Morrison, WSBA #23094

By _____
Nancy Talner, WSBA #11196

GARVEY SCHUBERT BARER

PERKINS COIE LLP

By _____
Donald B. Scaramastra, WSBA #21416
Justin Dolan, WSBA #33000
Charles L. Cottrell, WSBA #31984

By _____
David F. Taylor, WSBA #25689
Beth A. Colgan, WSBA #30520
Breena M. Roos, WSBA #34501

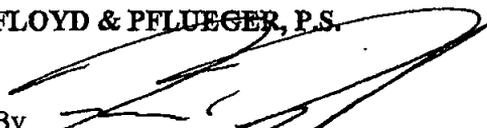
Attorneys for Plaintiffs Jeffrey Best and
Daniel Campos

On behalf of the American Civil Liberties
Union of Washington

Attorneys for Plaintiffs Gary Dale Hutt and
Greg Hansen

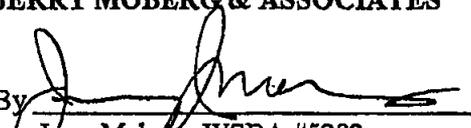
Entered into this 2nd day of November, 2005.

FLOYD & PFLUEGER, P.S.

By 
Francis S. Floyd, WSBA #10642

Attorneys for Defendant Grant County

JERRY MOBERG & ASSOCIATES

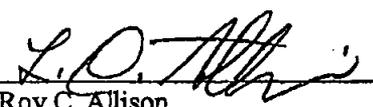
By 
Jerry Moberg, WSBA #5282

Attorneys for Defendant Grant County

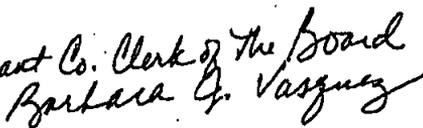
EVANS, CRAVEN, & LACKIE, P.S.

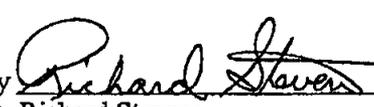
By 
Michael E. McFarland, WSBA #23000

Attorneys for Defendant Grant County

By 
LeRoy C. Allison
Grant County Commissioner

By Excused by Grant Co. Clerk of the Board
Deborah Moore
Grant County Commissioner


Barbara G. Vasquez

By 
Richard Stevens
Grant County Commissioner

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY,
PENNSYLVANIA

THOMAS DOYLE, et al.)	CIVIL DIVISION
)	
Plaintiffs,)	No. 96-13606
)	Code No. 011
v.)	
)	
ALLEGHENY COUNTY SALARY)	
BOARD, et al.,)	
)	
Defendants.)	

SETTLEMENT AGREEMENT

I. BACKGROUND

In this class action lawsuit, Plaintiffs allege that severe understaffing, excessive caseloads, inadequate policies and procedures, and other systemic deficiencies in the operation of the Allegheny County Public Defender's Office ("Office") make it unlikely that the Office's clients will receive adequate representation in criminal, juvenile delinquency and involuntary civil commitment proceedings. Plaintiffs further allege that unless fundamental changes are made in the way the Office is staffed, structured and operated, significant numbers of indigent persons represented by the Office are in imminent danger of having their liberty taken in violation of the Sixth and Fourteenth Amendments to the United States Constitution and various provisions of Pennsylvania state law.

Since the inception of this lawsuit, Allegheny County and other defendants named in the Third Amended Complaint have categorically denied that there are systemic deficiencies in the operation of the Public Defender's Office and that the rights of class members are at immediate risk of being abridged.

Despite the deeply contested nature of this lawsuit and the parties' profoundly differing views of the merits of Plaintiffs' claims, the parties now believe that it is in their respective interests to resolve their dispute through a comprehensive settlement rather than through further, protracted litigation of the issues raised in the Third Amended Complaint. For that reason, and without admission or implication of liability on the part of any party, they have entered into this Settlement Agreement and Consent Decree, the terms of which are catalogued below.

II. TERMS

A. CONSENT DECREE

1. This Settlement Agreement and Consent Decree shall be presented promptly to the Honorable Robert Horgos of the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division (the "Court"), for approval pursuant to Pa.R.Civ. P. 1714. Once approved, the Settlement Agreement and Consent Decree shall remain on the Court's active docket until December 31, 2003, at which time it shall be placed on the inactive docket.

B. Staffing

2. Staffing Levels: Allegheny County, through its Commissioners and Salary Board (collectively, the "County"), shall increase the number of attorneys and support staff employed by the Public Defender's Office to the levels and by the dates set forth in Table A. Although nothing in this Settlement Agreement and Consent Decree shall preclude the County from hiring more attorneys or support staff than prescribed by Table A, the County shall not permit the number of attorneys or support staff employed by the Public Defender's Office to fall below the levels set forth in Table A while the case remains on this Court's active docket.

Table A

DATE	FULL-TIME EQUIVALENT ATTORNEYS	FULL-TIME EQUIVALENT SUPPORT STAFF
By July 1, 1998	53	22
By January 1, 1999	57	33.5
By January 1, 2000	62 (see ¶10)	41
By January 1, 2001	69 (see ¶10)	48.5
By January 1, 2002	79 (see ¶10)	56

3. The attorneys and support staff of the Public Defender's Office -- with the exception of the investigator positions established under this Settlement Agreement and Consent Decree -- shall be employees of Allegheny County. The County may, at its discretion, retain independent contractors to fill the investigator positions contemplated herein. For purposes of this Settlement Agreement and Consent Decree, each full-time equivalent investigator position shall constitute a minimum of 40 hours of work each week for the Public Defender's Office. All independent contractors or outside agencies retained for this purpose shall be required to maintain a regular and frequent presence at the Public Defender's Office. Any individual performing investigative services for the Office, whether as an independent contractor or as an employee, shall be required to adhere to the practice standards for investigators promulgated pursuant to this Settlement Agreement and Consent Decree. In addition, the County and/or the Office shall provide investigators with the same training, supervision and monitoring whether they are independent contractors or County employees.

4. **Short-Term Deployment:** Attorneys and support staff added to the Public Defender's Office by January 1, 1999, shall be deployed as follows: **Table B**

1998 DEPLOYMENT	
Position	Number of Additions
Mental Health Attorneys	1
Trial Attorneys	3
Juvenile Attorneys	3
Probation/Parole Attorneys	1
Appeals Attorneys	1
Secretaries	1
Clerk Typists	2
Social Workers	1
Law Clerks	
Full Time	2
Part Time	.5
Investigators (full-time-equivalent)	3
Intake Clerks	2

5. **Long-Term Deployment Plan:** The Chief Public Defender, with the advice and assistance of the Consultant retained pursuant to this Settlement

Agreement and Consent Decree, shall devise a plan for the deployment of the attorneys and support staff who are added between January 1, 1999, and January 1, 2002. Within 180 days of the approval of this Settlement Agreement and Consent Decree, the Chief Public Defender shall file the plan with this Court. At a minimum, the plan shall provide for the following:

- (A) The appointment within each division (*e.g., Mental Health, Probation, Appeals, Juvenile, Trial, etc.*) of at least one supervisory attorney, who shall supervise all attorneys and support staff assigned to that division. The caseloads of the respective supervisors shall be adjusted downward in accordance with the magnitude of their supervisory responsibilities.
- (B) The allocation of attorneys throughout the Office in an equitable fashion that takes into account the particular needs of each division.
- (C) The allocation of support staff - consisting of secretaries, clerk typists, investigators, law clerks, intake clerks and social workers - throughout the Office in such numbers that each attorney is provided with access to meaningful secretarial, clerical, investigative and para-professional assistance. At a minimum, there shall be one (1) full-time equivalent investigator for every six (6) attorneys.
- (D) The delegation to the investigators of traditional investigative services such as assessing crime scenes, serving subpoenas, and locating and interviewing witnesses. The investigators shall not be responsible for determining the eligibility of potential clients for indigent defense services.

6. Within twenty (20) days of the filing of the plan, each party to the litigation, with the exception of the Chief Public Defender, shall file a response indicating its agreement or disagreement with the plan. If any party disagrees with the plan, its submission must set forth the reasons for its objections. The Court, at its election, may convene an evidentiary hearing to consider the objections, hear argument without receiving evidence, or take whatever other steps it believes are necessary to resolve the dispute. Thereafter, the Court shall enter an Order accepting, rejecting or amending the proposed deployments.

7. Once approved by the Court, the deployment plan, in its original or amended form, shall be implemented in accordance with its terms, absent further order of the court.

8. Private Practice: No attorney hired into the Public Defender's Office after December 31, 1998, shall be permitted to maintain a private legal practice or to engage in any practice of law outside of the Public Defender's Office. No attorney appointed to a supervisory position after December 31, 1998, shall be permitted to maintain a private legal practice or to engage in any practice of law outside of the Public Defender's Office.

9. Unless otherwise agreed pursuant to collective bargaining, attorneys employed by the Public Defender's Office as of December 31, 1998 shall be permitted to maintain a private legal practice or to engage in the practice of law outside of the Public Defender's Office as long as the practice does not conflict with work assignments made by the Public Defender's Office, reasonable schedules set by the Office or preclude timely and satisfactory completion of assignments given by the Office. The Chief Public Defender shall monitor the activities of such attorneys to determine whether they are complying with the terms of this provision and shall take

appropriate administrative action, not inconsistent with any collective bargaining agreement, to correct violations of this provision.

10. Any attorney with a private practice after December 31, 1999 shall be counted as 3/4ths of a position for purposes of calculating the full-time equivalent attorney positions required by this Settlement Agreement and Consent Decree.

11. The County shall not enter into any collective bargaining agreement inconsistent with the Consent Decree.

C. Policies and Procedures

12. **Job Descriptions:** Within six (6) months of the Court's approval of this Settlement Agreement and Consent Decree, and for each category of personnel employed by the Office, the Chief Public Defender, with the advice and assistance of the Consultant, shall develop and post a written job description tailored to the Office's particular needs.

13. **Job Qualifications:** Within six (6) months of the Court's approval of this Settlement Agreement and Consent Decree, the Chief Public Defender, with the advice and assistance of the Consultant, shall develop and post written job qualifications for each category of personnel employed by the Office. The job qualifications shall be designed to enable the Office to hire, on a system-wide basis, qualified individuals for each available position. The Office shall not employ persons who do not meet the prescribed qualifications.

14. **Personnel Policies:** Within eighteen (18) months of the Court's approval of this Settlement Agreement and Consent Decree, the Chief Public Defender, with the advice and assistance of the Consultant, shall develop and implement written personnel policies for all attorney and support staff positions in the

Office. At a minimum the personnel policies shall contain the job descriptions developed pursuant to ¶12 above, and describe the program of supervision and monitoring developed pursuant to ¶17-18. The policies shall be distributed to all employees.

15. **Practice Standards:** Within eighteen (18) months of the Court's approval of this Settlement Agreement and Consent Decree, the Chief Public Defender, with the advice and assistance of the Consultant, shall develop written practice standards for attorneys and support staff in the Office to assist the Office in providing constitutionally and statutorily adequate representation to its clients. All attorneys and support staff shall be expected to adhere to the practice standards for their positions.

16. The standards shall be: (A) modeled after national standards, such as those set forth in the Performance Guidelines for Criminal Defense Representation adopted by the Board of Directors of the National Legal Aid and Defender Association in December 1994; and (B) designed to correct and preclude the development of deficiencies in the legal representation provided by the Public Defender's Office in the full spectrum of its cases, including, but not limited to, capital cases. The standards shall make clear that neither the Office nor individual public defenders shall accept workloads that, by reason of their excessive size, interfere with the provision of adequate legal representation or lead to the breach of professional obligations. If, in the exercise of his or her professional judgment, the Chief Public Defender concludes that the Office's workload or the workload of individual attorneys preclude the provision of adequate legal representation, the Office may petition the criminal court for permission to withdraw from pending cases or to cease appointing the Public Defender's Office as counsel of record in future cases until the workload decreases. Notwithstanding the above, the practice standards shall not require the County to

hire more staff than that contemplated by Tables A and B of this Settlement Agreement and Consent Decree, or require the County or the Public Defender's Office to adopt specific caseload limits.

17. **Supervision:** Within eighteen (18) months of the Court's approval of this Settlement Agreement and Consent Decree, the Chief Public Defender, with the advice and assistance of the Consultant, shall develop and implement a system in which all supervisory personnel monitor, with an adequate degree of frequency, the job performance of the attorneys and support staff under their supervision. The purpose of the monitoring system shall be to ensure that attorneys and support staff are adhering to the Office's practice standards for their specific positions

18. The monitoring and evaluation process shall include: (A) comprehensive supervision of new attorneys and support staff during the initial stages of their employment by the Office; (B) periodic and systematic monitoring of the job performance of all attorneys and support staff; and (C) annual written evaluations of attorneys and support staff. Among other things, performance monitoring shall consist of periodic reviews of case files (both prior to and after disposition), and review of the in-court performance of attorneys. The Chief Public Defender shall take appropriate and timely action, not inconsistent with any collective bargaining agreement, to correct any deficiencies in the performance of any attorney or support staff member. Any disciplinary action taken against any employee covered by a collective bargaining agreement shall be subject to the grievance and arbitration provisions of that agreement.

D. Training

19. **General:** Within eighteen (18) months of the Court's approval of this Settlement Agreement and Consent Decree, the Chief Public Defender, with the

advice and assistance of the Consultant, shall develop and implement: (A) a comprehensive mandatory training program for new staff; (B) an orientation and training program for existing staff; and (C) a mandatory training program for attorneys who represent defendants in capital cases. The parties recommend that in designing the program, the Chief Public Defender and the Consultant review the Defender Training and Development Standards promulgated by the National Legal Aid and Defender Association in March 1997.

20. New Staff. At a minimum, the new staff training program shall include: (A) instruction on the Office's practice standards, recordkeeping systems and relevant aspects of practice and procedure in adult criminal proceedings, juvenile delinquency proceedings, parole and probation revocation proceedings and involuntary commitment proceedings; (B) a trial advocacy component for attorneys; and (C) a period of extensive on-the-job supervision following completion of the formal training program. No new attorney hired after December 31, 1999, regardless of his or her prior experience, shall be assigned to a case prior to receiving appropriate training by the Office.

21. Existing Staff. Within eighteen (18) months of the Court's approval of this Settlement Agreement and Consent Decree, all existing attorneys and support staff shall have attended an orientation program developed by the Chief Public Defender, with the advice and assistance of the Consultant. The orientation program shall provide attorneys and staff with a working knowledge of the policies, procedures and recordkeeping systems promulgated pursuant to this Settlement Agreement and Consent Decree.

22. After the completion of the orientation program, the Office shall provide training to the support staff on an as-needed basis. During each calendar year, the Office shall provide to attorneys periodic and regular in-house and/or outside

training on subjects relevant to the Office's practice. All attorneys shall be expected to attend.

23. **Capital Cases:** Within twelve (12) months of the Court's approval of this Settlement Agreement and Consent Decree, the Chief Public Defender, with the advice and assistance of the Consultant, shall design and implement an appropriate training program for attorneys who will handle capital cases. The training program shall address, among other things, effective communication with the client and his or her family, the development and preparation of a defense, the selection of a jury, the selection and utilization of witnesses, and the utilization of experts, including mitigation experts. After June 30, 1999, no attorney shall be assigned as lead counsel in either the liability or the penalty phase of a capital case unless he or she has completed this training program.

E. Case Files and Record Keeping Systems

24. Because accurate and detailed recordkeeping is critical to the Office's ability to provide constitutionally and statutorily adequate legal representation, the Chief Public Defender, with the advice and assistance of the Consultant, shall review the Office's current recordkeeping system and make any changes necessary to ensure that the Office, and each of its employees, maintains accurate and detailed records of client interactions, of work done on behalf of the clients, and of the status of cases as they proceed through the court system.

F. Resources

25. The County shall provide the Public Defender's Office with the physical facilities, equipment and supplies needed to perform its duties. By June 30, 2000, the facilities, equipment and supplies provided to the Office shall be reasonably comparable to those provided to the Allegheny County District Attorney's Office as

they exist on the date that this Settlement Agreement becomes effective. At a minimum, the County shall ensure that:

- (A) attorneys have the ability to meet and confer privately with clients in the Public Defender's Office and the various facilities in which they practice;
- (B) the office has an information management system that enables it to (1) determine conflicts of interest at the outset of any criminal or delinquency proceeding; (2) determine, manage, monitor and track the Office's caseload and the caseloads of individual attorneys; and (3) effectively access relevant information from computerized information systems maintained by the County, its agencies, and the courts. The system shall be computerized unless the Chief Public Defender, with the advice and assistance of the consultant, determines that certain components of the system may operate more efficiently if done manually; and
- (C) each division within the Public Defender's Office has sufficient access to fax machines, word processors, telephones, copiers, and the tools needed to conduct timely and efficient legal research (federal and state).

After June 30, 2000, the Allegheny County District Attorney's Office shall not be used as a point of reference in determining the adequacy of facilities, equipment and supplies provided to the Public Defender's Office.

26. The Chief Public Defender, with the advice and assistance of the Consultant, shall explore and determine the availability of alternative sources of funding for the Office (including, but not limited to, foundation and federal funding) and, where appropriate, take the steps necessary to obtain such funding.

G. Professional Services

27. While this case remains on the Court's active docket, the County shall provide the Office with seventy-five thousand dollars (\$75,000) per year for purposes of securing professional services (e.g., consultants, experts, tests) determined to be necessary or advisable by the Chief Public Defender for the representation of the Office's clients. Funds that are not expended during any particular year shall be carried over into future years. The total amount budgeted for professional services for any given year, including amounts carried over, shall not exceed one hundred thousand dollars (\$100,000).

28. Should the Chief Public Defender or any of the parties determine, at some point, that the amount budgeted does not enable the Office to procure necessary or advisable professional services, the Chief Public Defender or any of the parties may file a petition with this Court seeking to increase the budgeted amount. Such a petition shall be accompanied by documentation or other evidence demonstrating why the budgeted amount is not sufficient.

H. Consultant

29. The Court shall appoint a Consultant for a three-year term commencing ninety (90) days after its approval of this Settlement Agreement and Consent Decree. The County (or its insurer) shall pay the Consultant a maximum total fee of one hundred thousand dollars (\$100,000), payable as services are provided. Provided the Consultant operates within the established budget, the Consultant may form a team or hire additional experts to assist with the work contemplated by this Agreement and Decree.

30. The Consultant shall have a background in the administration of indigent defense programs and services. The Chief Public Defender, the County and

Plaintiffs' counsel shall attempt to agree on the Consultant and that Consultant's fee. If they do not agree within thirty (30) days of the Court's approval of this Settlement Agreement and Consent Decree, the Court shall select a Consultant from among names of candidates submitted by the Chief Public Defender, the County and Plaintiffs' counsel. In selecting the Consultant, the Court shall consider:

- (a) whether the candidate has worked in a public defender agency in which he or she was responsible for overseeing the day-to-day operations of the office, and the training and supervision of attorneys who were providing indigent defense services;
- (b) the candidate's familiarity with attorney practice standards; and
- (c) the candidate's prior experience in assessing, evaluating, providing technical assistance to, or studying the components of public defender programs or comparable court systems.

31. The Consultant shall address the issues and make the recommendations identified in the Settlement Agreement and Consent Decree and may address any other issues identified by the Chief Public Defender as requiring the Consultant's expertise and attention. In addition, the Consultant may call to the attention of the Chief Public Defender or the County any problems or deficiencies in the Office that he or she believes should be remedied. In performing the duties contemplated by this Settlement Agreement and Consent Decree, the Consultant shall be given reasonable access to relevant records, files and personnel of the Public Defender's Office and the County. Any access to such records by the Consultant shall be made with due regard for, and consistent with, any protections afforded by the attorney-client privilege.

32. Every six months during his or her three-year term, the Consultant shall file a written report with the Court. The report shall address matters relating to implementation of and compliance with the terms of the Settlement Agreement and Consent Decree. Upon motion of any party or counsel to any party, the Court shall determine the adequacy of implementation or compliance and enter any necessary orders. In making this determination, the Court may appoint a special master and assign to the special master any responsibilities it deems necessary or desirable.

I. Jurisdiction Over the Consent Decree

33. This case shall remain on this Court's active docket and the Court shall retain continuing jurisdiction over it for all purposes relative to the implementation and enforcement of the Settlement Agreement and Consent Decree until December 31, 2003. At that time, the case shall be transferred to the Court's inactive docket.

34. After this case is transferred to this Court's inactive docket, the County shall have a continuing obligation under this Settlement Agreement and Consent Decree to: (A) employ a sufficient number of attorneys and appropriate support staff in the Public Defender's Office; (B) deploy the attorneys and support staff in an equitable manner among the Office's various divisions; (C) adequately supervise and monitor the attorneys and support staff; and (D) maintain adequate policies, procedures, training programs, funds for professional services and testing, facilities, equipment and supplies -- so that the Office is systematically able to provide constitutionally and statutorily adequate assistance of counsel to persons who are represented by it.

35. If the County fails to comply with the terms and conditions of the Settlement Agreement and Consent Decree, Plaintiffs' counsel may apply to the Court for a finding of contempt or other appropriate relief. Prior to making any such motion or application, however, Plaintiffs' counsel shall advise the County's counsel in writing of the alleged contemptuous conduct or inadequate condition(s), and the County shall have four weeks to provide a written response to Plaintiffs' counsel. After the County responds, the parties shall meet in an effort to resolve the dispute. If the dispute cannot be resolved within ten (10) days of the County's filing of its response, the parties shall submit the dispute to this Court for resolution. Further, in the event the Court finds the County in contempt for a violation of the terms of this Settlement Agreement and Consent Decree within a period of time running from January 1, 2003 to December 31, 2003, the Settlement Agreement and Consent Decree shall remain on the active docket for a period of twelve (12) months from the date of the contemptuous conduct.

36. Terms of this Settlement Agreement and Consent Decree shall be binding upon the parties hereto, their agents, their successors-in-interest and their assigns.

37. The terms of this Settlement Agreement and Consent Decree may not be enforced by individual members of the plaintiff class acting independently of counsel for the plaintiff class.

38. The terms of this Settlement Agreement and Consent Decree do not create substantive legal rights or causes of action for declaratory, injunctive or monetary relief independent from those that might otherwise exist under 42 U.S.C. § 1983 or other federal or state law.

39. Severability: If any provision of the Settlement Agreement and Consent Decree is declared void and/or unenforceable by any court of competent jurisdiction, for any reason, the remainder of the Settlement Agreement and Consent Decree shall remain in full force and effect.

ACCEPTED:

Counsel for Plaintiffs

By: Claudia Davidson
Robin Dahlberg
Claudia Davidson
Jere Krakoff
Witold J. Walczak

Date: 5/15/98

Attest:

Alex M. Cannon @
Chief Clerk

Counsel for Defendants

By: Eric N. Anderson
Eric N. Anderson

Date: 5/14/98

County of Allegheny:

By: Mike Donato

Board of County Commissioners

Approved As To Form:

Michael McArthur
County Solicitor
Michael McArthur
Assistant County Solicitor

Not Reported in A.2d, 1996 WL 636475 (Conn.Super.), 18 Conn. L. Rptr. 117
(Cite as: 1996 WL 636475 (Conn.Super.))

H

UNPUBLISHED OPINION. CHECK COURT
RULES BEFORE CITING.

Superior Court of Connecticut.
Carlos RIVERA et al.
v.
John ROWLAND, Governor, et al.
No. CV 950545629S.

Oct. 23, 1996.

MEMORANDUM OF DECISION ON DEFEND-
ANTS' MOTION TO DISMISS DATED APRIL
13, 1995

LAVINE.

*1 Pursuant to a January 5, 1995 class action complaint, plaintiffs have filed suit alleging in substance that minimally adequate legal representation is not being provided to various categories of indigent defendants in criminal cases due to high case loads and lack of sufficient resources.

Plaintiffs, alleging a variety of statutory and constitutional violations under both state and federal law, FNI have moved for class certification pursuant to a motion not addressed in this memorandum of decision on behalf of indigent defendants whose cases have been brought in the Geographical Area (G.A.) courts, the Judicial District (J.D.) courts, the juvenile courts, and on behalf of convicted prisoners who have filed habeas corpus claims.

FNI. Plaintiffs allege violations of their rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article First, Sections 1, 8, 10, 12 and 20 of the Connecticut Constitution. They also allege violations of 42 U.S.C. Section 1983, and Connecticut General

Statutes Section 51-289 et seq.

The Sixth Amendment to the United States Constitution states as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution states as follows in relevant part:

Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article First, Sections 1, 8, 10, 12 and 20 of the Connecticut Constitution, respectively, state as follows in relevant part:

Sec. 1. All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community.

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Sec. 8. In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel; to be informed of the nature and cause of the accusation; to be confronted by the witnesses against him; to have compulsory process to obtain witnesses in his behalf; to be released on bail upon sufficient security, except in capital offenses, where the proof is evident or the presumption great; and in all prosecutions by indictment or information, to a speedy, public trial by an impartial jury. No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law, nor shall excessive bail be required nor excessive fines imposed.

Sec. 10. All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

Sec. 12. The privilege of the writ of habeas corpus shall not be suspended, unless, when in case of rebellion or invasion, the public safety may require it; nor in any case, but by the legislature.

Sec. 20. No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his civil or political rights because of religion, race, color, ancestry, natural origin, sex or physical or mental disability.

42 U.S.C. Section 1983 states as follows:

§ 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Connecticut General Statutes Section 51-289 states as follows in relevant part:

Sec. 51-289. Public defender services commission established. Judicial department to provide facilities in courts. Compensation plan. (a) There is established a Public Defender Services Commission which shall consist of seven members appointed as follows: (1) The chief justice shall appoint two judges of the superior court, or a judge of the superior court and any one of the following: A retired judge of the superior court, a former judge of the superior court, a retired judge of the circuit court, or a retired judge of the court of common pleas; (2) the speaker of the house, the president pro tempore of the senate, the minority leader of the house and the minority leader of the senate shall each appoint one member; (3) the governor shall appoint a chairman.

(b) The chairman shall serve for a three-year term and all appointments of members to replace those whose terms expire shall be for terms of three years.

(c) No more than three of the members, other than the chairman, may be members of the same political party. Of the four nonjudicial members, other than the chairman, at least two shall not be members of the bar of any state.

(d) If any vacancy occurs on the commission, the appointing authority having the power to make the initial appointment under the provision of this chapter shall appoint a person for the unexpired term in accordance with the provisions of this chapter.

(e) Members shall serve without compensation but shall be reimbursed for actual expenses incurred while engaged in the duties of the commission. Members of this commission shall not be employed or nominated to serve as public defenders or in any other position created under this chapter.

(f) The commission may adopt such rules as it deems necessary for the conduct of its internal affairs.

(g) The commission shall be responsible for carrying out the purposes of this chapter and to carry out those purposes it shall adopt rules relating to the operations of a division of public defender services and shall provide any facilities other than those provided in the courts by the judicial department necessary for the carrying out of those services. Public defender services shall consist of those duties carried out by superior court and court of common pleas public defenders prior to July 1, 1978, and those responsibilities provided for by this chapter. Public defender services shall be executed by a chief public defender, a deputy chief public defender, public defenders, assistant public defenders,

deputy assistant public defenders, investigators and other personnel which the commission deems necessary.

(h) The judicial department shall provide adequate facilities for public defenders, assistant public defenders and deputy assistant public defenders in the various courts.

(i) The commission shall establish a compensation plan comparable to that established for the division of criminal justice in chapter 886, as it may be amended, and shall make rules relative to employees serving under the chapter, including sick leave and vacation time.

(j) The commission shall be an autonomous body within the judicial department for fiscal and budgetary purposes only.

Defendants-the Governor, the Public Defender Services Commission, and the members of the commission, sued in their official capacities-have moved pursuant to Practice Book Sections 142 et seq. to dismiss the complaint in a Motion to Dismiss dated April 13, 1995 in which it is claimed that the Court lacks subject matter jurisdiction over this case. Plaintiffs oppose the motion.

The parties have filed numerous supplemental and supporting memoranda and affidavits in connection with the motion to dismiss addressing the issues raised in light of past precedents as well as recent reported decisions in Connecticut and elsewhere. Extensive oral argument was held on the Motion to Dismiss on August 5, 1996. Following argument, the Court ordered the parties to file additional supplemental briefs, addressing certain legal issues which required further analysis. These additional memoranda have been received and reviewed.^{FN2} For the reasons stated below, the motion to dismiss is denied.

FN2. The issues raised in the motion to

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dismiss have been thoroughly and excellently briefed and argued by both sides.

Legal Discussion

The defendants make two fundamental arguments in support of their motion to dismiss, raising important and legitimate concerns.

First, they argue that the case should be dismissed due to the doctrine of sovereign immunity, which prohibits certain legal claims against the state from being pursued.

Second, they argue that the case should be dismissed because it is not justiciable. In substance, defendants' nonjusticiability argument contains three separate prongs. First, defendants argue that the named defendants can afford the plaintiffs no relief. Second, defendants argue that the separation of powers doctrine prevents the court from ordering the relief requested. Third, defendants argue that none of the plaintiffs' claims are ripe for review in the absence of alleging and proving "injury-in-fact" or "actual harm." These arguments will now be discussed.

A. Sovereign Immunity

Defendants correctly cite numerous cases for the undisputed proposition that the state generally cannot be sued without its consent. *Barde v. Board of Trustees*, 207 Conn. 59, 64 (1988). They also concede that certain exceptions to the doctrine of sovereign immunity have evolved over the years, including cases involving claims for declaratory or injunctive relief based on an allegation that a state official has acted in an unconstitutional manner. *Sentner v. Board of Trustees*, 184 Conn. 339, 343 (1981) ("In a constitutional democracy sovereign immunity must relax its bar when suits against the government complain of unconstitutional acts"). Because of the manner in which the complaint has been pleaded, defendants argue, this case does not fall within any exception to the general rule barring

actions against the state. Defendants rely upon a lengthy discussion of, and attempted refutation of, some of the statistics relied upon in the complaint in support of their argument,^{FN3} which plaintiffs have in turn attempted to refute. The Court does not find defendants' argument persuasive.

FN3. In their memoranda in support of the motion to dismiss, the defendants have on occasion tended to blur the distinction between adequately *pleading* certain allegations, and *proving* them at trial. At this early stage of the case, of course, for purposes of ruling on the Motion to Dismiss, the Court must assume that the allegations as pleaded are true and does not inquire into the merits of the case. *Lamposna v. Jacobs*, 209 Conn. 724, 728 (1989). Whether plaintiffs are able to prove any or all of the allegations set out in the complaint must, of course, await trial, should this case proceed to trial.

*2 An enlightening discussion of the genesis of the doctrine of "sovereign immunity" is made by Justice Cotter in *Textron, Inc. v. Wood*, 167 Conn. 334, 340 (1974), in which he states: Rooted in the ancient common law, the doctrine of sovereign immunity from suit was originally premised on the monarchical, semi-religious tenet that "the King can do no wrong." Borchard, "Government Liability in Tort," 34 Yale L.J. 1, 2. In modern times, it is more often explained as a rule of social policy, which protects the state from burdensome interference with the performance of its governmental functions and preserves its control over state funds, property, and instrumentalities.

Where a substantial claim is put forth that parties acting pursuant to state authority are acting unconstitutionally, sovereign immunity does not require dismissal. *Antinerella v. Rioux*, 229 Conn. 479, 487-88 (1994); *Does v. Heintz*, 204 Conn. 17, 31 (1987); *Duguay v. Hopkins*, 191 Conn. 222, (1983). The complaint in this case alleges in part that the named defendants are acting unconstitutionally,

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pursuant to both state and federal law, in numerous respects. This court must consider the pleadings "broadly and realistically" in ruling on the pending motion to dismiss, *Beaudoin v. Town Oil Co.*, 207 Conn. 575, 588 (1988). As noted in *Horton v. Meskill*, 172 Conn. at 624-25, quoting Block, "Suits against Government Officers and the Sovereign Immunity Doctrine," 59 *Harv.L.Rev.*, 1060, 1080:

In those cases in which it is alleged that the defendant officer is proceeding under an unconstitutional statute or in excess of his statutory authority, the interest in the protection of the plaintiff's right to be free from the consequences of such action outweighs the interest served by the sovereign immunity doctrine. Moreover, the government cannot justifiably claim interference with its functions when the acts complained of are unconstitutional or unauthorized by statute.

In rejecting a claim of sovereign immunity, the court in *Horton v. Meskill* noted the many occasions when it had considered the merits of appeals from judgments in actions in which state officials had been parties. *Id.* at 625-26. The court further noted that while the doctrine of sovereign immunity is deeply rooted in our common law, "it has, nevertheless, been modified and adapted to the American concept of constitutional government where the source of governmental power and authority is not vested by divine right in a ruler but rests in the people themselves who have adopted constitutions creating governments with defined and limited powers and courts to interpret these basic laws." *Id.* at 623. The court decided that a holding to the contrary "would foreclose proper judicial determination of a significant and substantial constitutional question the determination of which is manifestly in the public interest." *Id.* at 628. Mindful "of the proper limits on judicial intervention," see *Horton v. Meskill* at 627, I conclude that the principles set out in that seminal case and other cases cited by plaintiffs militate against dismissing this case on grounds of sovereign immunity in light of the signi-

ficant constitutional questions raised in the complaint, the determination of which is manifestly in the public interest.

B. Justiciability

*3 Defendants put forth a number of claims in support of their argument that this case is nonjusticiable.

As defendants point out, "Justiciability requires (1) that there be an actual controversy between or among the parties to the dispute ...; (2) that the interests of the parties be adverse ...; (3) that the matter in controversy be capable of being adjudicated by judicial power ...; and (4) that the determination of the controversy will result in practical relief to the complainant." *Pellegrio v. O'Neill*, 193 Conn. 670, 674 (1984), quoting *State v. Nardini*, 187 Conn. 109, 111-12 (1982). Defendants note that courts apply the principles of nonjusticiability on a "case-by-case inquiry." *Baker v. Carr*, 369 U.S. 186, 210-11 (1962); *Nielsen v. Kezer*, 232 Conn. 65, 75 (1995).

Defendants' claims of nonjusticiability will now be discussed.

1. Claimed Inability of Named Defendants to Afford Plaintiffs Relief.

Defendants claim that neither the Governor nor the Public Defender Services Commission can afford the plaintiffs the relief they seek. The Court disagrees.^{FN4}

FN4. In the prayer for relief in the January 5, 1995 class action complaint, plaintiffs state their demand for relief as follows:

WHEREFORE, plaintiffs respectively request this Court to grant the following relief:

1. Assume jurisdiction over this action;

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2. Issue a preliminary and permanent injunction requiring defendants to provide a statewide indigent defense system which will protect plaintiffs rights under the Sixth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. Section 1983, Article First, Sections 1, 8, 10, 12 and 20 of the Connecticut Constitution, and C.G.S. Section 51-289 et seq., and include but not be limited to:

a. placing uniform and appropriate caseload/workload limitations for the appointment of counsel in all cases and directing defendants to increase the number of public defenders to meet caseload/workload standards;

b. promulgating and adopting appropriate uniform standards governing the representation of indigents;

c. providing an adequate rate of payment for special public defenders consistent with a constitutionally adequate quality of representation;

d. providing adequate investigative, expert, and support services to public defenders and special public defenders to meet their constitutional and statutory obligations;

e. providing adequate conditions in public defender offices, client interview areas, waiting rooms, libraries, and courtroom holding areas.

3. Award to plaintiffs costs and attorneys fees under 42 U.S.C. Section 1988.

4. Grant such other and further relief as this Court deems necessary or proper.

As noted, the complaint requests, *inter alia*, the issuance of preliminary and permanent injunctions

requiring defendants to provide a statewide public defender system which will guarantee minimal protection of the constitutional rights of accused indigents.

Taken collectively, the named defendants-sued in their official capacities-are among those principally responsible for supervising the functions of government being challenged in the complaint. The Governor is constitutionally obligated to "take care that the laws be faithfully executed," Connecticut Constitution, Article Fourth, Section 12, and is also authorized by statute to "investigate into, and take proper action concerning, any matter involving the enforcement of the laws of the state and the protection of its citizens." Connecticut General Statutes, Section 3-1. As a practical matter, litigation of this kind, in Connecticut and other states, as well as in a federal forum, frequently involves named defendants who are public officials at the local, state or federal level. See, e.g., *Sheff v. O'Neill*, 238 Conn. 1 (1996); *New York State Ass'n for Retarded Children v. Carey*, 631 F.2d 162 (2d Cir.1980). *Foe v. Cuomo*, 700 F.Supp. 107 (E.D.N.Y.1988); and *Marisol A. v. Giuliani*, 929 F.Supp. 660 (S.D.N.Y.1996). As plaintiffs point out, legislators are generally immune from civil lawsuits seeking injunctive relief. In litigation seeking systemic or institutional reform, public officials are often the only appropriate defendants given their significant positions of public trust and responsibility.

The Public Defender Services Commission is also charged, by statute, with significant responsibility for overseeing the public defender system. See General Statutes Section 51-289, referenced in the endnotes, including but not limited to Section 51-289(g), which states that the commission "shall appoint ... as many assistant public defenders and deputy assistant public defenders for the superior court as the criminal or delinquency business of the court may require." See also General Statutes Section 51-293, which states that the commission "shall appoint ... as many assistant public defenders and deputy assistant public defenders for the super-

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ior court as the criminal or delinquency business of the court may require.”

*4 The fact that a court-ordered remedy could eventually require the expenditure of funds does not render the case nonjusticiable. *Gaines v. Manson*, 194 Conn. 510, 529 n. 18 (1984); *Pellegrino v. O'Neill*, 193 Conn. 670, 675-76 (1984); *Tondro v. Ward*, 565 F.2d 48, 54 n. 8 (2d Cir.1977). If that were the case, then, as a practical matter, lawsuits such as the instant one raising important systemic concerns of constitutional magnitude could seldom if ever be brought.

2. The Claim that the Separation of Powers Prevents the Court from Ordering the Injunctive Relief Requested.

Defendants also claim that pursuant to the separation of powers doctrine, the court is prevented from ordering the relief requested.^{FN5} The defendants' position is essentially that this case is nonjusticiable because it presents political questions the resolution of which will place the courts in conflict with coequal branches. This is because, defendants argue, any meaningful remedy will require an order requiring the expenditure of more money on the public defender system. This properly lies within the province of the other branches of government, not the judiciary, contend the defendants. In support of this argument, the state relies on numerous cases, including *Baker v. Carr*, *Pellegrino v. O'Neill*, *Nielsen v. Kezer* and other authorities. This argument is unpersuasive and calls for an unduly expansive application of the separation of powers doctrine in light of controlling precedents.

FN5. Article Second of the **Connecticut** Constitution provides in relevant part:

The powers of government shall be divided into three distinct departments, and each of them confined to a separate magistracy—to wit—those which are legislative, to one; those which are executive,

to another; and those which are judicial, to another.

It is of course essential to the functioning of our government that each coordinate branch have the utmost respect for the prerogatives of the others and not unduly encroach on these prerogatives. But the caselaw makes it clear that the separation of powers doctrine does not require judicial forbearance unless what is at issue is clearly delegated to a coordinate branch, as was the case, for example, in *Pellegrino*.

In *Nielsen v. Kezer*, Justice Palmer provided a cogent discussion of the question of when a court should appropriately decline jurisdiction because a case raises political questions the resolution of which is beyond the court's authority in light of important and sensitive separation of powers concerns. Citing *Baker v. Carr*, he noted that a case-by-case analysis was required, and that “Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment to a coordinate political department,” among other things. *Nielsen v. Kezer*, 232 Conn. at 75. In the recent case of *Sheff v. O'Neill*, 238 Conn. 1 (1996), in response to the State's claim that the issues in the case were nonjusticiable, Chief Justice Peters observed that: “In the absence of a textual reservation, however, it is the role and the duty of the judiciary to determine whether the legislature has fulfilled its affirmative obligations within constitutional principles.” In this case, notwithstanding defendants' claims, there is no “textually demonstrable commitment” of the disputed issues to a coordinate branch of government. Moreover, the important claims being made in this case, relating to the quality of representation being provided to indigent defendants in our state, make this a matter of peculiar concern to the judicial branch.

3. The Claim that the case Must be Dismissed Because The Complaint Fails to Adequately Allege “Injury-In-Fact” or “Actual Harm.”

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*5 Defendants argue that the complaint must be dismissed because plaintiffs have failed sufficiently to allege "injury-in-fact" or "actual harm," relying on numerous cases, including *Lewis v. Casey*, 64 U.S.L.W. 4587 (June 24, 1996), and *Washington v. Meachum*, 238 Conn. 692 (1996). This argument is unconvincing.

As plaintiffs note, because a party must have standing to invoke the subject matter jurisdiction of the court, it is appropriate for a court to evaluate whether a party has made a "colorable claim" of injury when a motion to dismiss pursuant to Practice Book Section 143 is made. *Sadloski v. Manchester*, 228 Conn. 79, 83-84 (1984). As our Supreme Court stated in *Maloney v. Pac*, 183 Conn. 313, 321 (1981):

Standing is not a technical rule intended to keep aggrieved parties out of court. Rather, it is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate nonjusticiable interests and that judicial decisions which may affect the rights of others are forged in hot controversy, with each view fairly and vigorously represented.

This limited inquiry into standing should not become an inquiry into the merits in the early stages of a case. The pleading requirements for injury necessary to establish standing sufficient to survive a motion to dismiss are not onerous. *Gay and Lesbian Law Students Assn. v. Board of Trustees*, 236 Conn. 453, 463-64 (1996); *Maloney v. Pac*, 183 Conn. at 321. "The requirements of justiciability and controversy are ordinarily held to have been met when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer, in an individual or representative capacity." *Gay and Lesbian Law Students Assn. v. Board of Trustees*, 236 Conn. 453, 463-64. See also *Lujan v. Defenders of Wildlife*, cited in *Lewis v. Casey*.

To establish standing in a case for injunctive relief, plaintiffs do not necessarily need to allege that they have already suffered harm as they would be re-

quired to do in other types of cases, but rather that they are at imminent risk of harm if the court does not grant the relief requested. *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir.1988), *cert denied*, 493 U.S. 957 (1990); *Riley v. Jeffes*, 777 F.2d 143, 147 (3d Cir.1985). In cases involving alleged deprivations of constitutional rights, such as the instant one, the element of injury may be established by alleging the deprivation of the right itself. *Windham Taxpayers Assn. v. Board of Selectmen*, 234 Conn. 513, 526 (1995); *Reitzer v. Board of Trustees*, 2 Conn.App. 196, 201 (1984).

Moreover, Rules 108 and 109 of the Practice Book do not require that every fact be specifically pleaded. Rather, the requirement is that each pleading "contain a plain and concise statement of the material facts on which the pleader relies" so as to "fairly ... apprise the adverse party of the state of the facts" which plaintiff intends to prove. As already noted, our Supreme Court has repeatedly cautioned that allegations of harm should be viewed "broadly and realistically," not through the narrow lens of archaic and abstract pleading rules. *Normand Josef Enterprises, Inc. v. Connecticut National Bank*, 230 Conn. 486, 496 (1994). The complaint must be read in its entirety in such a way as to "give effect to the pleading with reference to the general theory upon which it proceeded, and do substantial justice between the parties." *Dornfried v. October Twenty-Four, Inc.*, 230 Conn. 622, 629 (1994). As long as a complaint sufficiently alleges facts to state a cause of action and avoid surprise or unfairness, it will generally be considered sufficiently well-pled.

*6 In this case, considering the nature of the allegations in light of Connecticut's pleading requirements, I conclude that defendants' argument lacks merit. Specifically, Paragraphs 61 through 74 of the complaint read as follows:

F. HARMS TO PLAINTIFF CLASSES

61. The effects of these extreme caseloads and in-

Not Reported in A.2d, 1996 WL 636475 (Conn.Super.), 18 Conn. L. Rptr. 117
(Cite as: 1996 WL 636475 (Conn.Super.))

adequate resources on the quality of legal representation are pervasive, and harm plaintiffs and members of their class at every stage of their criminal case. Public defenders are not able to spend adequate time interviewing their clients, counselling their clients, or even explaining the basic information to their clients about the upcoming court proceedings. Forced excessive caseloads and inadequate resources prevent public defenders from spending adequate time reviewing each client's file, conducting necessary legal research, conducting necessary fact investigation and witness preparation, pursuing motions for speedy trials, preparing for trial, filing certain pretrial motions and exploring pretrial alternatives to incarceration as well as sentencing options.

62. Indigent criminal defense services function without regard for, and in violation of accepted minimum standards for training, workload, and resources including those promulgated by the American Bar Association, the National Study Commission on Defense Services, the National Legal Aid and Defender Association, and the National Advisory Commission on Criminal Justice Standards and Goals.

63. Excessive caseloads and inadequate resources have caused high stress, low staff morale, and burnout. Because the numbers of attorneys are insufficient, there are no mechanisms for relief when staff is overburdened.

64. Excessive caseloads have also caused mistrust among plaintiffs and members of their class regarding the adequacy of their public defenders. In part, because weeks or months go by without contact from their attorneys, many indigent criminal defendants develop an understandable lack of confidence in the public defender's office.

65. According to the 1993 Annual Report of the Chief Public Defender, "the increasing difficulty public defenders are having in keeping up with the constantly excessive and serious caseloads," has caused a "slowdown in the public defender's ability

to resolve cases expeditiously leading to increased court delays and exacerbating the prison overcrowding problem by prolonging the pretrial incarceration of accused persons who cannot make bail." (p. 7)

66. Overwhelming caseloads substantially contribute to the fact that virtually all cases "plead out." In the G.A.'s there were only 0.1% or 64 out of 55,767 of all cases disposed in FY 1992-93 in which a jury trial was initiated. For a similar period in the J.D. offices, in only 89 of 1,894 or 4.5% of all cases disposed was a jury trial initiated. In 1993-94, 0.1% or 59 out of 50,483 cases in the G.A. courts and 3.9% or 76 out of 1,903 cases in the J.D. courts began in jury trial.

*7 67. Indigent criminal defendants in the state court system are not afforded criminal process and representation substantially similar to that afforded criminal defendants of means.

For the above reasons, I conclude that the complaint sufficiently alleges "injury-in-fact" or "actual harm" for purposes of withstanding the pending motion to dismiss. Whether these allegations will be proven at trial is a question for another day.

Summary and Conclusion

The defendants have raised important concerns in their motion to dismiss. However, given controlling precedents and the issues raised in the complaint, I have concluded that this case ought not to be dismissed at this early stage. Without in any way reaching the merits of plaintiffs' claims, for the reasons stated above, defendants' motion to dismiss is denied.

Conn.Super.,1996.

Rivera v. Rowland

Not Reported in A.2d, 1996 WL 636475
(Conn.Super.), 18 Conn. L. Rptr. 117

END OF DOCUMENT

CARLOS RIVERA, et al.
Plaintiffs

v.

JOHN ROWLAND, et al.
Defendants

SUPERIOR COURT
JUDICIAL DISTRICT OF
HARTFORD/NEW BRITAIN
AT HARTFORD

NOTICE OF SETTLEMENT

Notice is hereby given to members of the plaintiff class in *Rivera v. Rowland*, No. CV-95-0545629S, and other interested individuals, that the parties to the litigation have agreed to a resolution of the case. The lawsuit, brought on behalf of clients of the Connecticut public defender system, alleged deficiencies in the staffing and operation of that system. During the pendency of this action, defendants have made a number of significant improvements to the public defender system. Among other things, additional funding has been appropriated for the system which ultimately will be used to hire approximately 80 new attorney and support staff. In addition, for the first time since 1983, defendants have increased the rates of compensation paid to special public defenders. They have also adopted attorney caseload goals; developed and implemented a more comprehensive attorney training program; enhanced existing practice guidelines; substantially revised the manner in which they supervise and evaluate attorney performance; and announced their intention to appoint a Director of Special Public Defenders, who will be responsible for the administration and operation of the special public defender program.

In light of these changes, plaintiffs have agreed to withdraw the lawsuit, subject to the Court's approval. By its terms, however, this withdrawal shall have no effect on any claims that may be made by any member of the plaintiff class in direct review of any criminal conviction or adjudication by way of appeal or writ of error, in any sentence review proceeding, in any juvenile delinquency proceeding, or in any habeas corpus proceeding arising out of a criminal or juvenile delinquency conviction or adjudication.

The parties' joint motion to withdraw the lawsuit which describes in further detail the changes and improvements to the public defender system is on file for public inspection at the Office of the Clerk of the Superior Court, Judicial District of Hartford, under the above docket number. In addition, copies of the motion may be obtained by writing to Robin Dahlberg, American Civil Liberties Union, 125 Broad Street, New York, NY 10004.

Any member of the plaintiff class who wishes to oppose approval of the resolution of the lawsuit may submit written objections to the attention of Judge Douglas Lavine in care of the Clerk of the Court, Superior Court, Judicial District of Hartford, 95 Washington Street, Hartford, CT 06106, on or before Wednesday, July 29, 1999.

A court hearing in connection with this matter will be held at 2:00 p.m. on Tuesday, August 3, 1999 in Courtroom 312 of the Superior Court, 95 Washington Street, Hartford, CT.

A class member is an individual who (a) was the subject of a pending criminal or juvenile delinquency proceeding in Superior Court or a pending petition for a writ of habeas corpus on July 2, 1999, and (b) was represented in that proceeding or in connection with that petition by a public defender or a special public defender.

Any individual represented by a public defender or special public defender for purposes of appeal only is not a member of the class. A person previously represented but not represented on July 2, 1999 by a public defender or special public defender is not a member of the class. Those filing written objections must demonstrate that they are a member of the class by including with their objections the docket number of the pending case(s) or petition(s) and the court(s) in which the case(s) or petition(s) are pending.

**THIS NOTICE SHALL REMAIN POSTED IN THIS LOCATION
FOR A PERIOD OF NOT LESS THAN TWO (2) WEEKS.**

NO. CV95 - 545629

CARLOS RIVERA

: SUPERIOR COURT

v.

: JUDICIAL DISTRICT OF HARTFORD

JOHN ROWLAND, GOVERNOR, et al

: JULY 2, 1999

JOINT MOTION FOR APPROVAL OF WITHDRAWAL OF ACTION

Plaintiffs, acting on behalf of themselves and the plaintiff class, by and through the undersigned counsel, hereby move for permission to withdraw this action, as required by Conn. Prac. Bk. § 9-9. A proposed withdrawal of action is attached as Exhibit 1.

In this class action lawsuit, plaintiffs alleged that severe understaffing, excessive caseloads, inadequate policies and procedures, and other systemic deficiencies in the Connecticut public defender system made it unlikely that the system's clients would receive constitutionally and statutorily adequate representation in criminal and juvenile delinquency proceedings. Plaintiffs further alleged that unless fundamental changes were made in the system, significant numbers of indigent persons represented by the system were threatened with the deprivation of their rights under the Sixth and Fourteenth Amendments to the United States Constitution, the Connecticut Constitution and various state statutes.

Defendants strongly disagreed with plaintiffs' position. In response to the plaintiffs' claims, defendants asserted that the Connecticut public defender system has continued to provide effective representation to clients in all matters in which public defender representation is provided. Defendants also raised or asserted several legal and jurisdictional defenses. In addition, since this lawsuit was filed, defendants have made a number of changes to the Connecticut public defender system. These include the following:

1. The budget approved by the General Assembly for the fiscal year ending June 30, 1998 included additional funding for the Public Defender Services Commission in the amount of \$1,350,000. This funding was used to increase the staffing of the public defender system by 20 new attorney and support positions, to increase the funds available for outside services, such as expert witnesses, by \$170,000, and to increase the funds available for non-contractual special public defenders by \$345,000.

2. During August 1997 the Habeas Corpus Unit was moved to new space in the Office of the Chief Public Defender in Hartford. The permanent staffing of the unit has increased from 3 full-time attorneys to 4 full-time attorneys and one full-time investigator has been employed.

3. The budget approved by the General Assembly for the fiscal year ending June 30, 1999 included 4 new positions for staffing a new Judicial District office and 2 new positions for a new Juvenile office, both in New Britain.

4. The budget approved by the General Assembly for the July 1999 through June 2001 biennium included increased funding in the amount of \$4,556,370 for FY 2000 and an additional increase of \$2,184,992 for FY 2001. This total includes funding for 29 new permanent positions in FY 2000, including a new Executive Assistant Public Defender position to serve as Director of Special Public Defenders, and funding for an additional 25 new permanent positions in FY 2001. The total also includes an increase in the appropriation for training, and funds for associated expenses, for the purchase of 161 new computers and other equipment, and for an increase in the rates of compensation for special public defenders.

5. The Public Defender Services Commission adopted the following new or revised policies on June 15, 1999: Caseload Goals for Public Defenders; Duties and Responsibilities of Director of Special Public Defenders; Special Public Defender Supervision and Evaluation; Special Public Defender Qualifications and Training; Special Public Defender Compensation Rates; Annual Performance Evaluation of Attorneys; Amendment to Guideline 2.1 of the Public Defender Services Commission's "Guidelines on Indigent Defense" concerning training; and, other changes to the "Guidelines on Indigent Defense". Copies of said policies are appended to this motion as Exhibits 2 through 9.

6. According to the Annual Reports prepared by the Office of the Chief Public Defender between January 1995 and January 1999 the average caseload per attorney in the Judicial District offices has declined from 113 cases per year to 61 cases per year, the average caseload per attorney in the Geographical Area offices has declined from 1045 cases per year to 618 cases per year, and the average caseload per attorney in the Juvenile Matters offices has declined from 716 cases per year to 544 cases per year. In addition, according to the Annual Reports, an attorney has been added to the staff of the Training Department, and additional computers and legal research software have been acquired.

The plaintiffs understand that the proposed withdrawal does not create any legal obligations on the part of any defendant. Nevertheless, in light of the many positive changes in Connecticut's public defender system that have occurred during the pendency of this litigation it

is no longer necessary to proceed with the litigation. Accordingly, subject to appropriate notice to the class, if required by the court, plaintiffs acting on behalf of themselves and plaintiff class move for permission to withdraw this action, in accordance with Conn. Prac. Bk. § 9-9. The defendants join in this motion.

BY:

 /s/
Robin Dahlberg
Reginald Shuford
American Civil Liberties Union
125 Broad Street
New York, NY 10004-2400
(212) 549-2500

 /s/
Ann Parrent
Philip D. Tegeler
Connecticut Civil Liberties Union Foundation
32 Grand Street
Hartford, CT 06106
(860) 247-9823

Attorneys for the Named Plaintiffs
Individually and as Class Representatives

DEFENDANTS

BY: RICHARD BLUMENTHAL
ATTORNEY GENERAL

 /s/
Robert B. Teitelman
Assistant Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
(860) 808-5355

NO. CV95 - 545629

CARLOS RIVERA : SUPERIOR COURT

v. : JUDICIAL DISTRICT OF HARTFORD

JOHN ROWLAND, GOVERNOR, et al : AUGUST 3, 1999

WITHDRAWAL OF ACTION

The parties to this action, acting through their counsel, hereby stipulate and agree that this action be withdrawn, as set forth below:

1. This action is withdrawn.
2. The named plaintiffs and members of the plaintiff class are precluded from reasserting the causes of action for the relief sought in the Second Amended Complaint with respect to the period of time up to and including the effective date of this withdrawal.
3. This withdrawal shall have no effect on any claims that may be made by any of the plaintiffs or any member of the plaintiff class in direct review of any criminal conviction or adjudication by way of appeal or writ of error, in any sentence review proceeding, in any juvenile delinquency proceeding, or in any habeas corpus proceeding arising out of a criminal or juvenile delinquency conviction or adjudication.
4. Defendants will pay to counsel for the plaintiffs costs and attorneys' fees in the total amount of \$400,000 on or before August 17, 1999. Payment of this sum shall fully resolve any and all claims for costs and attorneys' fees of any sort in connection with this action. Other than this payment, both parties shall bear their own fees and costs.

PLAINTIFFS
(individually and as class representatives)

BY: THEIR ATTORNEYS

Robin Dahlberg
Reginald Shuford
American Civil Liberties Union
125 Broad Street
New York, NY 10004-2400
(212) 549-2500

Ann Parrent
Philip D. Tegeler
Connecticut Civil Liberties Union Foundation
32 Grand Street
Hartford, CT 06106
(860) 247-9823

DEFENDANTS

BY: RICHARD BLUMENTHAL
ATTORNEY GENERAL

Robert B. Teitelman
Assistant Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
(860) 808-5355

ORDER

The court, having considered this Withdrawal of Action, and having determined that it is in the interests of justice to permit the withdrawal of this action on the specified terms, hereby ORDERS: The withdrawal of this action is approved and this action is hereby withdrawn, on the terms specified in the accompanying Withdrawal of Action.

Dated at Hartford, Connecticut, this the 3rd day of August, 1999.

By the Court (Lavine, J.)

Judge/

Assistant Clerk

CERTIFICATION

I hereby certify that a copy hereof was hand-delivered this date to all counsel and pro/se parties of record, in accordance with Conn. Prac. Bk. § 10-12, to: Robert B. Teitelman, Assistant Attorney General, 55 Elm Street, P.O. Box 120, Hartford, CT 06141-0120.

/s/

Ann Parrent

PUBLIC DEFENDER SERVICES COMMISSION

CASELOAD GOALS FOR PUBLIC DEFENDERS

In order to insure that attorneys within the Division of Public Defender Services are able to render quality representation to all clients and avoid unnecessary delay in the disposition of cases, the Public Defender Services Commission establishes caseload goals for individual attorneys as set forth below. It is the intention of the Commission that said goals be used for purposes of requesting and maintaining adequate resources for the Division through the budgeting process, for allocating resources equitably within the Division, and for assignment of cases in individual offices. Said goals reflect the Commission's view of what is desirable under current circumstances and shall not constitute a limit on the actual number of cases that may be assigned to an individual attorney.

For purposes of these goals, "caseload" shall be defined as the average number of new cases assigned per attorney per fiscal year per individual public defender office or unit. For combined JD/GA offices, an individual attorney shall be counted once for purposes of calculating the average JD and GA caseload per attorney for that office.

Caseload goals for the various types of representation provided shall be as follows:

1. *Judicial Districts. Not to exceed 75 cases.* For purposes of calculating the number of new cases assigned, murder cases and non-death penalty capital felony cases shall be counted as 2 cases, capital felony cases in which the State seeks the death penalty shall be counted as 10 cases, and minor felony, misdemeanor and motor vehicle cases accompanying major felony cases shall be excluded.
2. *Geographical Areas. Not to exceed 450-500 cases, except for GA's 2, 6, & 14, where the goal shall be not to exceed 525-575 cases.* For purposes of calculating the number of new cases assigned, cases that are nolleed or dismissed on the date of appointment and bail only appointments shall be excluded.
3. *Juvenile Matters. Not to exceed 300-400 cases.* For purposes of calculating the number of new cases assigned, cases in which the Juvenile is charged with Violation of a Court Order in a pending case shall be excluded.
4. *Habeas Corpus. Not to exceed 20-25 cases.*

Adopted June 15, 1999

PUBLIC DEFENDER SERVICES COMMISSION

DUTIES & RESPONSIBILITIES OF DIRECTOR OF SPECIAL PUBLIC DEFENDERS

There is established within the Office of Chief Public Defender the position of Director of Special Public Defenders, which position shall be classified at the level of Executive Assistant Public Defender. The Director of Special Public Defenders shall report directly to the Chief Public Defender, and shall have duties and responsibilities including, but not limited to, the following:

1. Administration and management of all Special Public Defender operations and functions within the Division of Public Defender Services.
2. Evaluation of the qualifications of attorneys to serve as Special Public Defenders in accordance with the minimum qualifications established by the Public Defender Services Commission for GA, JD, Juvenile, Habeas Corpus, Appeals and Capital Felony representation.
3. Maintaining a current list of attorneys approved by the Chief Public Defender to serve as Special Public Defenders in accordance with §51-291(11), C.G.S.
4. Actively recruiting qualified criminal defense practitioners to serve as Special Public Defenders on a contractual or individual case basis.
5. Conducting a biennial review of Special Public Defender compensation rates, and recommending appropriate adjustments in said rates to the Chief Public Defender for inclusion in the Commission's biennial budget request.
6. Implementing and conducting a training program for Special Public Defenders in coordination with the Director of Training.
7. Acting as liaison to and as a member of the Standing Committee on Special Public Defenders, responsible for the approval of applicants for Special Public Defender Contracts and the monitoring of Special Public Defender performance under said contracts.
8. Implementation and administration of all Special Public Defender contracts approved by the Public Defender Services Commission.

9. Establishing and maintaining a system for implementing the Commission's policy for Supervision and Evaluation of Special Public Defenders.
10. Investigating all formal complaints against Special Public Defenders, and reporting the results to the Chief Public Defender.
11. Addressing and responding to issues raised by clients concerning Special Public Defenders.
12. Providing support to attorneys in their capacity as Special Public Defenders.
13. Acting upon and approving requests for authorization to incur expenses of defense in individual special public defender cases, in accordance with financial limits established by the Commission.
14. Processing of all invoices for special public defender services, including contractual and non-contractual payments.
15. Monitoring the assigned workload of Special Public Defenders to insure that the number of assigned cases is not excessive and allows for effective representation.
16. Advising the Chief Public Defender on all matters involving or related to Special Public Defenders.

Adopted June 15, 1999

PUBLIC DEFENDER SERVICES COMMISSION

SPECIAL PUBLIC DEFENDER SUPERVISION & EVALUATION

In order to insure that individual Special Public Defenders are providing adequate and quality representation to indigent clients, the Director of Special Public Defenders shall monitor the performance of Special Public Defenders on an ongoing basis by the following methods:

1. Conduct periodic visits to the various courts for purposes of observing attorneys in court in the performance of their responsibilities as Special Public Defenders.
2. Annually survey the supervising attorneys of all public defender offices as to the performance and reliability of individual contract and non-contract Special Public Defenders.
3. Periodically inquire of judges in the various courts as to the quality of the representation and advocacy provided by individual Special Public Defenders, and their reliability in performing their responsibilities on behalf of their clients.
4. Evaluate the trial skills of individual Special Public Defenders on an on-going basis through personal observation, review of transcripts and/or discussions with trial judges.
5. In consultation with the Chief of Legal Services, evaluate the representation provided by Special Public Defenders handling appeals, including the quality of briefs filed and oral arguments in individual cases.
6. In consultation with the Chief of Habeas Corpus Services, evaluate the representation provided by Special Public Defenders handling habeas corpus matters, including pleadings, case preparation and trial advocacy.
7. In consultation with the Chief of Capital Defense & Trial Services, evaluate the representation provided by Special Public Defenders in capital cases, including the raising of legal issues appropriate to a capital case, case preparation, and advocacy at trial and penalty phase.

8. Review all complaints and habeas corpus petitions filed against Special Public Defenders for indications of any problems or patterns of poor performance on the part of an individual Special Public Defender.
9. Review all grievances filed against a Special Public Defender in which probable cause has been found.
10. Make recommendations to the Standing Committee on Special Public Defenders for the removal of attorneys from the list of approved SPD contractors as a result of unsatisfactory performance.
11. Make recommendations to the Chief Public Defender for removal of attorneys from the list of attorneys available to accept appointments pursuant to §51-291(11), C.G.S. as a result of unsatisfactory performance.

Adopted June 15, 1999

PUBLIC DEFENDER SERVICES COMMISSION

SPECIAL PUBLIC DEFENDER QUALIFICATIONS & TRAINING

The following qualifications and training requirements are established for attorneys serving as Special Public Defenders:

1. Attorneys approved by the Chief Public Defender or the Standing Committee on Special Public Defenders to receive appointments as Special Public Defenders on a contractual or non-contractual basis in the various courts shall meet the minimum qualifications established by the Commission for representation in Geographical Area courts, Judicial District courts, juvenile delinquency matters, appeals, habeas corpus matters, and capital felony cases, as set forth in the attached Appendices.
2. Prior to receiving appointments, a Special Public Defender shall be required to participate in an SPD Basic Orientation course, which will familiarize the attorney with the duties and responsibilities of a Special Public Defender, address basic criminal practice and procedure issues, and review the Commission's *Guidelines on Indigent Defense*. Participation in said course may be waived by the Chief Public Defender or the Director of Special Public Defenders on the basis of prior experience as a Special Public Defender.
3. The Commission shall make ongoing professional education and training programs available to Special Public Defenders, including but not limited to the following:
 - a) Regularly scheduled professional education and training programs presented by the Training Unit of the Office of Chief Public Defender on various topics of criminal law and procedure, as well as other topics relevant to the representation of clients in criminal cases.
 - b) A trial advocacy training program for special public defenders conducted annually by the Director of Special Public Defenders.
 - c) A mentor program, through which experienced criminal defense attorneys are made available on a voluntary basis to provide advice and assistance to special public defenders upon request.

4. All Special Public Defender Contracts shall contain a provision requiring Special Public Defenders to certify annually that they have completed six hours of professional education and training, including public defender, bar and professional association, regional, or national training events and seminars, and taped or multimedia programs.
5. All Special Public Defender contracts shall contain a provision requiring Special Public Defenders to be familiar with the Public Defender Services Commission's *Guidelines On Indigent Defense*, and to observe said guidelines in accordance with their "Purpose", as set forth at p. 1.

Adopted June 15, 1999

PUBLIC DEFENDER SERVICES COMMISSION

**Standards For The Appointment Of Special Public Defenders
In Geographical Area Courts**

Attorneys who are appointed as a special public defender in a criminal matter in Geographical Area (GA) courts should be attorneys who satisfy the following criteria:

1. Are experienced in the field of criminal defense and/or possess sufficient education and training to enable them to adequately represent clients in criminal cases; and,
2. Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to the representation of misdemeanor and felony cases;
3. Are familiar with diversionary programs and alternatives to incarceration that are available; and,
4. For Class B felony cases, meet the criteria set forth in the Standards For The Appointment Of Special Public Defenders In Judicial District Courts.

The Chief Public Defender may consider any other comparable relevant experience or qualifications that demonstrate an ability to adequately represent clients in criminal cases. Such qualifications or experience may be substituted in lieu of any of the criteria set forth above.

Adopted June 15, 1999

PUBLIC DEFENDER SERVICES COMMISSION

**Standards For The Appointment Of Special Public Defenders
In Judicial District Courts**

Attorneys who are appointed as a special public defender in a criminal matter in the Judicial District (JD) courts should be attorneys who satisfy the following criteria:

1. Are experienced and active trial practitioners with at least two years litigation experience in the field of criminal defense; and,
2. Have prior experience as lead or sole counsel in no fewer than two criminal jury or court trials of class D or greater felony cases or four criminal jury or court trials of misdemeanor cases, which cases were tried to verdict or a hung jury, or at least one jury or court trial of class D or greater felony cases and two criminal jury or court trials of misdemeanor cases which were tried to verdict or a hung jury; and,
3. Are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and,
4. Have specialized training in jury trials or have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to serious felony cases.

The Chief Public Defender may consider any other comparable relevant experience or qualifications that demonstrate an ability to adequately represent clients in serious felony cases. Such qualifications or experience may be substituted in lieu of any of the criteria set forth above.

Adopted June 15, 1999

PUBLIC DEFENDER SERVICES COMMISSION

**Standards For The Appointment of Special Public Defenders
In Juvenile Matters**

Attorneys who are appointed as a special public defender in a delinquency proceeding at the Superior Court for Juvenile Matters should be attorneys who satisfy the following criteria:

1. Are experienced and active practitioners with experience in the field of criminal defense; and,
2. Are familiar with programs available at the juvenile court level for residential and community based treatment including but not limited to psychiatric and/or substance abuse treatment;
3. Have specialized training in the representation of juveniles or have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to juvenile cases; and,
4. For Serious Juvenile Offenses (SJO), have prior experience as lead or sole counsel in no fewer than two trials of juvenile matters, which cases were tried to judgement, or meet the criteria set forth in Paragraph 2 of the Standards For The Appointment Of Special Public Defenders In Judicial District Courts.

The Chief Public Defender may consider any other comparable relevant experience or qualifications that demonstrate an ability to adequately represent clients in juvenile courts. Such qualifications or experience may be substituted in lieu of any of the criteria set forth above.

Adopted June 15, 1999

PUBLIC DEFENDER SERVICES COMMISSION

**Standards For The Appointment Of Special Public Defenders
For Appeals**

Attorneys who are appointed as a special public defender in a criminal appellate matter should be attorneys who satisfy the following criteria:

1. Are experienced and active practitioners with litigation or appellate experience in the field of criminal defense;
2. Possess extensive research and writing skills and the ability to identify appellate issues including, but not limited to, state and federal constitutional issues, criminal procedural issues and evidentiary issues; and,
3. Have specialized training in appellate brief writing, agree to read and study appellate training materials provided by the Legal Services Unit of the Office of Chief Public Defender, or have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to appeal cases.

The Chief Public Defender may consider any other comparable relevant experience or qualifications that demonstrate an ability to adequately represent clients on appeal. Such qualifications or experience may be substituted in lieu of any of the criteria set forth above.

Adopted June 15, 1999

PUBLIC DEFENDER SERVICES COMMISSION

**Standards For The Appointment Of Special Public Defenders
In Habeas Corpus Cases**

Attorneys who are appointed as a special public defender in a habeas corpus matter should be attorneys who satisfy the following criteria:

1. Are experienced and active practitioners with at least two years trial or appellate experience in the field of criminal defense;
2. Have prior experience in the representation of habeas petitioners or prior experience as lead or sole counsel in no fewer than two jury or court trials or two appeals;
3. Are familiar with the civil rules of procedure which govern habeas corpus and the applicable standard for the effective assistance of counsel in criminal matters;
4. Are familiar with and experienced in the utilization of expert witnesses and evidence; and,
5. Have specialized training in the representation of clients in habeas corpus matters, agree to read and study training materials provided by the Habeas Corpus Unit of the Office of Chief Public Defender, or have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to habeas corpus cases.

The Chief Public Defender may consider any other comparable relevant experience or qualifications that demonstrate an ability to adequately represent clients in habeas corpus matters. Such qualifications or experience may be substituted in lieu of any of the criteria set forth above.

Adopted June 15, 1999

PUBLIC DEFENDER SERVICES COMMISSION

QUALIFICATIONS OF ATTORNEYS TO BE APPOINTED AS SPECIAL PUBLIC DEFENDERS IN CAPITAL FELONY CASES

Qualifications

Attorneys who are appointed as lead counsel in capital cases should be attorneys who satisfy the following criteria:

1. Are experienced and active trial practitioners with at least seven years litigation experience in the field of criminal defense; and
2. Have prior experience as lead or sole counsel in no fewer than nine criminal jury trials of serious and complex cases which were tried to verdict or hung jury. If the attorney has experience as lead or co-counsel in a capital case that was tried through the sentencing phase then seven, not nine, prior jury trials are required. Of the nine jury trials which were tried to completion, the attorney should have been lead or sole counsel in at least three cases in which the charge was murder or felony murder; or alternatively, of the nine jury trials, at least one was a murder or felony murder trial and an additional five were felony jury trials of C degree felonies or greater; for attorneys with prior capital felony trial experience one additional felony trial of the seven felony trials was for murder or felony murder, or six were felony jury and court trials of C degree felonies or greater; and
3. Are familiar with and experienced in the utilization of expert witnesses and evidence, including, but not limited to, psychiatric and forensic evidence; and
4. Have completed a certified training program in the litigation of capital felony defense; or agree to read and study capital felony defense trial training and mitigation preparation and presentation materials compiled by and provided by the Trial Services Unit of the Office of the Chief Public Defender.
5. Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

Attorneys who are appointed as co-counsel in capital cases should be attorneys who qualify as lead counsel or meet the following criteria:

1. Are experienced and active trial practitioners with at least four years litigation experience in the field of criminal defense; and
2. Have prior experience as lead counsel or co-counsel in no fewer than four criminal jury trials of class C or greater felony cases which were tried to verdict or hung jury, including at least one trial in which the charge was murder or felony murder; or have participated as lead or co-counsel in one prior capital felony jury trial tried to completion through the sentencing phase; and
3. Have completed a certified training program in the litigation of capital felony defense; or agree to read and study capital felony defense trial training and mitigation preparation and presentation materials compiled by and provided by the Trial Services Unit of the Office of the Chief Public Defender.
4. Have demonstrated the necessary proficiency and commitment which exemplify the quality of representation appropriate to capital cases.

An attorney who does not meet these requirements may be appointed or co-counsel if the attorney demonstrated to the Commission that he or she can provide competent representation. The Commission may consider the following:

- a. Experience in the trial of criminal cases;
- b. Specialized post-graduate training in jury trials;
- c. Specialized training in the defense of persons accused of capital crimes;
- d. Any other relevant considerations.

PUBLIC DEFENDER SERVICES COMMISSION

*SPECIAL PUBLIC DEFENDER
COMPENSATION RATES*

Effective July 1, 1999, compensation for attorneys appointed to serve as Special Public Defenders pursuant to §51-293, C.G.S. is established in accordance with §51-291(12), C.G.S., as follows:

Non-Contractual Hourly Rates

Misdemeanor Cases:

In Court	\$35 per hour
Out of Court	\$25 per hour

Felony Cases, Habeas
& Appeals:

In Court	\$60 per hour
Out of Court	\$40 per hour

Death Penalty Cases:
(Trial, Appeal & Habeas)

All Services	\$60 per hour
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Juvenile Delinquency:

Same hourly rates as for misdemeanor or felony cases,
based upon underlying charge.

Contract Rates

JD Cases	\$500 per case
GA Cases (Excluding Class B felonies)	\$250 per case
Juvenile Cases (Excluding Serious Juvenile Offenses)	\$250 per case
Habeas (Guilty Plea cases only)	\$750 per case

Contract Cases To Trial

Same compensation rates upon commencement of trial as above non-contractual hourly rates.

Said compensation rates shall be reviewed by the Chief Public Defender and the Director of Special Public Defenders at least biennially to consider any adjustment in the rates necessary to insure the adequacy of the rates of compensation paid to Special Public Defenders. In assessing the adequacy of the compensation rates, the Chief Public Defender and the Director of Special Public Defenders shall take into consideration the rates of compensation paid by the Federal District Court for the District of Connecticut to attorneys serving on the CJA Panel of assigned counsel, as well as rates paid within the jurisdiction for other court appointed legal services. Prior to submission of the Commission's biennial budget request, the Chief Public Defender shall report any recommendation for adjustment of the rates to the Public Defender Services Commission to allow for inclusion of a request for increased funding in the Commission's proposed budget.

Adopted June 15, 1999

PUBLIC DEFENDER SERVICES COMMISSION

ANNUAL PERFORMANCE EVALUATION OF ATTORNEYS

All Public Defenders, Supervisory Assistant Public Defenders, Assistant Public Defenders and Deputy Assistant Public Defenders shall be evaluated annually as to their performance in accordance with the following requirements:

1. Supervisory attorneys shall complete a written evaluation of each attorney under their supervision in accordance with criteria established by the Chief Public Defender. Supervisory attorneys shall meet with each attorney to discuss the attorney's performance and review the written report. Said written report shall then be forwarded to the Director of Personnel in accordance with a schedule established by the Chief Public Defender.
2. The Director of Personnel shall develop forms and procedures for conducting attorney performance evaluations.
3. Annual performance evaluation of attorneys shall include assessment of the following:
 - a) Effectiveness in the representation of clients.
 - b) Professionalism in relationships with clients.
 - c) Familiarity with the Public Defender Services Commission's *Guidelines On Indigent Defense* and observance of said guidelines in accordance with their "Purpose", as set forth at p. 1.
 - d) Professionalism in working relationships with colleagues and office support staff.
 - e) Effectiveness in management of time and workload.
 - f) Use of office resources effectively and appropriately.
 - g) Adherence to Commission Policy regarding work hours for attorneys.
 - h) Professional development and achievements.
 - i) Participation in a minimum of twelve hours of professional education and training annually, including public defender, bar and professional association, regional, or national training events and seminars, and taped or multimedia programs..
 - j) Professionalism in working relationships with judges and other court personnel.
 - k) Maintaining positive public image for Office of Public Defender.
 - l) Such other criteria as the Chief Public Defender may determine.

4. In order to conduct annual performance evaluation of attorneys fairly and effectively, supervisors should observe the attorney's courtroom performance and interaction with clients and court personnel during the year, and may review case files to evaluate the attorney's approach to individual cases.
5. Supervisory attorneys shall be evaluated annually by the Chief Public Defender or Deputy Chief Public Defender, or their designee in accordance with the same procedures as set forth in paragraph 1. Annual performance evaluation of supervisory attorneys shall include assessment of the supervisor's management skills, performance of administrative duties, adherence to Commission policies, compliance with directives of the Chief and Deputy Chief Public Defender, and effectiveness in supervising their office.

Adopted June 15, 1999

PUBLIC DEFENDER SERVICES COMMISSION
*AMENDMENT TO GUIDELINE 2.1 OF THE
PUBLIC DEFENDER SERVICES COMMISSION'S
"GUIDELINES ON INDIGENT DEFENSE"*

PART II. TRAINING

Guideline 2.1 Training.

- (a) Counsel should be familiar with substantive criminal law, criminal procedural law, the Connecticut Rules of Practice and the prevailing customs or practices of the court in which he/she practices.
- (b) Counsel has a continuing obligation to stay abreast of changes and developments in criminal law and criminal procedure.
- (c) Counsel has a continuing obligation to continue his/her legal training, professional development and education through the weekly review of the Connecticut Law Journal and other legal periodicals. Counsel should also participate in public defender, bar and professional association, regional, or national training events and seminars, and taped or multimedia programs. Public defenders, assistant public defenders, and deputy assistant public defenders employed by the Commission should complete a minimum of twelve hours of such training annually. Special public defenders should complete a minimum of six hours of such training annually.
- (d) Newly appointed attorneys shall be required to participate in the following training activities during their first year as employees of the Division of Public Defender Services:
 - (1) *A New Attorney Training Program* conducted by the Training Department covering the duties and responsibilities of a public defender, ethics of defense practice, basic criminal practice and procedure, and a review of the Connecticut Public Defender Services Commission *Guidelines on Indigent Defense*. Said Training Program shall be conducted over a twelve-month period in accordance with a curriculum developed by the Training Department.
 - (2) *A Trial Advocacy Program* conducted by the Training Department covering the development of basic trial skills for criminal defense.

- (3) A *Mentor Program* through which newly appointed attorneys will be paired with an experienced attorney for the first six months of employment. The mentor will be available to meet periodically with the new attorney and to provide advice and assistance as necessary to support the new attorney during this transition period.
 - (4) The Chief Public Defender may vary any of the requirements of this section based on the prior experience of the newly appointed attorney.
- (e) Supervisory attorneys shall be provided with management training on a regular periodic basis.

Adopted June 15, 1999

GUIDELINES ON INDIGENT DEFENSE
Connecticut Public Defender Services Commission

PURPOSE:

These guidelines are intended to encourage public defenders and special public defenders contracted by the Division of Public Defender Services to perform to a high standard of representation and to promote professionalism in the representation of clients. These guidelines are intended to be used as a guide for the representation of clients. *However, the obligations due a client are not limited by the guidelines articulated here; attorneys are also expected to use their individual professional judgment in representing clients. If that judgment mandates a departure from the guidelines, the attorney should be aware of and be able to articulate the reasons that a departure from the guidelines is in the client's best interests.*

These guidelines should be used by attorneys in evaluating and improving their own performance and by supervising attorneys in evaluating staff performance. However, these guidelines are not intended to be used as criteria for the judicial evaluation of performance or alleged misconduct of defense counsel to determine the validity of a conviction.

PART I. GENERAL GUIDELINES

GUIDELINE 1.1. Role of Defense Counsel.

(a) Counsel should zealously represent and advocate for each client and render effective assistance of counsel.

(b) To ensure the preservation, protection and promotion of the client's rights and interests, counsel should:

- (1) be proficient in the applicable substantive and procedural law;*
- (2) acquire and maintain appropriate experience, skills and training;*
- (3) devote adequate time and resources to the case;*
- (4) engage in the preparation necessary for quality representation;*
- (5) endeavor to establish and maintain a relationship of trust and open communication with the client;*
- (6) keep the client informed and seek the lawful objectives of the client; and*
- (7) make accommodations where necessary due to a client's special circumstances, such as youth, mental or physical disability, or foreign language barrier.*

(c) Counsel should adhere to the Rules of Professional Conduct and other guidelines of professional conduct stated in statutes, rules, court decisions, codes or canons.

(d) Counsel should act with reasonable diligence and promptness in representing clients.

(e) All counsel should abide by the policies adopted by the Connecticut Public Defender Services Commission and the Chief Public Defender in regard to the representation of a client.

GUIDELINE 1.2. Role of Defense Counsel in Juvenile Matters.

(a) Counsel should abide by the guidelines enumerated in Guideline 1.1.

(b) *The duty to keep the client informed may extend, in the case of a juvenile client, to a parent or guardian whose interests are not adverse to the juvenile's, subject to the requirements of client confidentiality.*

(c) Counsel in juvenile matters often has occasion to counsel the client and, in some cases, the client's family with respect to related non-legal matters (e.g. education, family, therapy, etc.), which should be discharged to the best of counsel's training and ability or with appropriate assistance of other professions by referral.

(d) *Whenever the nature and circumstances of the case permit, counsel should explore the possibility of an early diversion from the formal juvenile court process through other community resources. Participation in non-judicial stages of the juvenile court process may well be critical to such diversion, as well as to protection of the client's rights.*

(e) Counsel should be prepared to assist in securing appropriate legal or other services for the client in matters arising from or related to the juvenile proceedings.

(f) Counsel should be familiar with dispositional alternatives and services, should investigate the client's social educational and psychological history, and should advocate a plan approved by the client generally proposing the least restrictive alternative.

(g) *In any case in which a judicial detention hearing will be held regarding a juvenile client, counsel should be prepared to present facts and arguments relating to the jurisdictional sufficiency of the allegations, the appropriateness of the place of and criteria used for detention, and any noncompliance with procedures for referral to court or placement in detention. Counsel should also be prepared to present evidence with regard to the necessity for detention and, to the extent possible, a plan for pretrial release of the juvenile client.*

(h) *In the dispositional phase of a delinquency proceeding, counsel should take appropriate steps to evaluate and augment the recommendations of the state so that the ultimate disposition is tailored to the client's individual needs.*

(i) *Counsel should explain the nature of the disposition hearing, the issues involved, and the alternatives available to the court. Counsel should also explain fully and candidly the nature, obligations, and consequences of any proposed dispositional plan, including the meaning of conditions of probation, the characteristics of any institution to which commitment is possible, and the probable duration of the client's responsibilities under the proposed dispositional plan. Counsel should not*

make or agree to a specific dispositional recommendation without a client's consent.

(j) Counsel should exercise discretion in revealing or discussing the contents of psychiatric, psychological, medical and social reports, tests or evaluations bearing on the client's history or condition or the history or condition of the client's parents. In general, counsel should not disclose information or conclusions contained in such reports to the extent that, in counsel's judgment based on knowledge of the client and the client's family, revelation would be likely to affect adversely the client's well-being or relationships within the family and disclosure is not necessary to protect the client's interests in the proceeding.

(k) When a dispositional decision has been reached by the court, it is counsel's duty to explain the nature, obligations, and consequences of the disposition to the client and his or her family, and to urge upon the client the need for accepting and cooperating with the dispositional order.

GUIDELINE 1.3. Representation after Disposition.

(a) Counsel's responsibility to the client does not necessarily end with dismissal of the charges or entry of a final dispositional order. Counsel should be prepared to counsel and render or assist in securing appropriate legal services for the client in matters arising from the original proceeding.

PART II. TRAINING

GUIDELINE 2.1. Training and Experience.

(a) Counsel should be familiar with substantive criminal law, criminal procedural law, the Connecticut Rules of Practice and the prevailing customs or practices of the court in which he/she practices.

(b) Counsel has a continuing obligation to stay abreast of changes and developments in criminal law and criminal procedure.

(c) Counsel has a continuing obligation to continue his/her legal training, professional development and education through the weekly review of the Connecticut Law Journal and other legal periodicals. Counsel should participate in public defender, bar and professional association, regional, or national training events and seminars, [as well as training] and taped or multimedia programs. Public defenders, assistant public defenders, and deputy assistant public defenders employed by the Commission should complete a minimum of twelve hours of such training annually. Special public defenders should complete a minimum of six hours of such training annually.

(d) Newly appointed attorneys shall be required to participate in the following training activities during their first year as employees of the Division of Public Defender Services:

- (1) A New Attorney Training Program conducted by the Training Department covering the duties and responsibilities of a public defender, ethics of defense practice, basic criminal practice and procedure, and a review of*

the Connecticut Public Defender Services Commission *Guidelines on Indigent Defense*. Said Training Program shall be conducted over a twelve-month period in accordance with a curriculum developed by the Training Department.

- (2) A *Trial Advocacy Program* conducted by the Training Department covering the development of basic trial skills for criminal defense.
- (3) A *Mentor Program* through which newly appointed attorneys will be paired with an experienced attorney for the first six months of employment. The mentor will be available to meet periodically with the new attorney and to provide advice and assistance as necessary to support the new attorney during this transition period.
- (4) The Chief Public Defender may vary any of the requirements of this section based on the prior experience of the newly appointed attorney.

(e) Supervisory attorneys shall be provided with management training on a regular periodic basis.

(f) *Prior to undertaking the defense of one accused of a crime, counsel should have sufficient training or experience to provide competent representation for that case. Where appropriate, counsel should consult with more experienced attorneys to acquire knowledge and familiarity with all facets of criminal representation.*

PART III. LAWYER-CLIENT RELATIONSHIP

GUIDELINE 3.1. Establishment of Relationship.

(a) Counsel should seek to establish a relationship of trust and confidence with the client.

(b) *As soon as practicable after being appointed, counsel or counsel's representative should contact the client and conduct an initial client interview.*

(c) Counsel should schedule confidential legal visits with the incarcerated client when necessary to provide effective representation and maintain effective communication with the client by mail or telephone.

(d) *Counsel should preserve client confidences and should not knowingly disclose confidential information obtained during the course of representation, unless authorized to do so by the client or the court or as otherwise permitted by law or the Rules of Professional Responsibility.*

(e) *Counsel should ensure that barriers to communication with the clients, such as differences in language or literacy, are overcome. Counsel should make accommodations where necessary due to a client's special circumstances, such as youth, mental or physical disability, or foreign language barrier.*

GUIDELINE 3.2. Duty to Keep Client Informed.

(a) Counsel should keep the client informed of any developments in the case and the progress of the preparation of the defense, and provide sufficient information to permit intelligent participation in decision making by the client.

(b) Counsel should comply with reasonable requests for information from the client and reply to client correspondence and telephone calls.

(c) Counsel should inform and explain to the client that he/she has the constitutional right to plead not guilty; to be tried by a judge or a jury; to the assistance of counsel; to confront and cross-examine witnesses against him/her; to testify and, to not be compelled to incriminate him/herself.

(d) Counsel should explain to the client the court procedures.

(e) Counsel should explain the attorney-client privilege to the client and explain to the client that he/she is not required to speak to anyone regarding the case without counsel present.

GUIDELINE 3.3. Protecting Confidentiality.

Counsel should ensure that confidential communications between defense counsel and the client are conducted in privacy, including reasonable efforts to compel court and other officials to make necessary accommodations for private discussions between counsel and clients in courthouses, lock-ups, jails, prisons, detention centers, and other places where clients must confer with counsel.

GUIDELINE 3.4. Initial Client Interviews

(a) Counsel should conduct a client interview as soon as practicable after being appointed by the court, in order to obtain information necessary to provide quality representation at the early stages of the case and to provide the client with information concerning counsel's representation and the case proceedings. Counsel should conduct the initial interview with the client sufficiently before any court proceeding so as to be prepared for that proceeding.

(b) To the extent possible, counsel should prepare for an initial interview with the client by reviewing petitions and/or charging documents, police and other investigative agency reports, and the reports of pretrial detention agencies, where applicable.

(c) To the extent possible, counsel should obtain the following types of information from the client at the initial interview:

- (1) the facts surrounding the allegations against or affecting the client;*
- (2) any possible witnesses who should be located;*

- (3) *any evidence of improper conduct by police or other investigative agencies; juvenile or mental health departments or the prosecution which may affect the client's rights;*
- (4) *any evidence that should be preserved; and*
- (5) *evidence of the client's competence to stand trial and/or mental state at the time of the offense.*

(d) As applicable, counsel should convey the following types of information to the client:

- (1) *the nature of the allegations, what the state must prove, and maximum potential sentence;*
- (2) *an explanation of the attorney-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the attorney;*
- (3) *a general procedural overview of the likely progression of the case;*
- (4) *the procedures that will be followed in setting the conditions of pretrial release, if applicable to the type of proceeding and the particular client;*
- (5) *an explanation of the type of information that will likely be requested in any interview that may be conducted by pretrial release, family services personnel, or others what information the client should and should not provide;*
- (6) *the importance of maintaining contact with counsel and the need to notify counsel of any change of address;*
- (7) *the names and contact information regarding counsel and staff assisting with the case;*
- (8) *when counsel will see the client next;*
- (9) *realistic answers, where possible, to the client's questions; and*
- (10) *any arrangements that will be made or attempted for the satisfaction of the client's needs, including medical or mental health attention and contact with family or employers.*

GUIDELINE 3.5. Control and Direction of the Case.

(a) Counsel should advise the client of those decisions that are ultimately for the *client*, which are:

- (1) what pleas to enter;

- (2) whether to accept a plea agreement;
- (3) whether to waive a jury trial;
- (4) whether to testify in his/her own behalf;
- (5) whether to appeal;
- (6) whether to apply for sentence review.

(b) Counsel should also advise the client of the client's right to assert certain defenses that include extreme emotional disturbance or insanity, when applicable.

(c) Counsel should advise the client of the existence of any lesser-included offense.

(d) Counsel should advise the client that strategic and tactical decisions will be made by counsel.

(e) Counsel should discuss a client's decision whether to testify at trial.

(f) *Counsel should fully advise the client of the advantages and disadvantages of either a court trial or a jury trial.*

PART IV. CONFLICTS OF INTEREST

GUIDELINE 4.1. Conflicts.

(a) Counsel should adhere to the Rules of Professional Conduct regarding conflicts of interest.

(b) Counsel should be cognizant of the existence of any potential and actual conflicts of interest which would impair counsel's ability to represent a client, such as if the representation of one client's interests are materially adverse to those of a current or former client.

(c) Except for preliminary matters such as arraignment or an initial hearing; counsel should not represent a client when a conflict of interest exists between co-defendants or multiple defendants such that the representation of one client *will be directly adverse* to the other client.

(d) Counsel should not represent a client if the representation of that client *may be materially limited* by the lawyer's responsibilities to another current or former client or to a third person, or by the lawyer's own interests, unless:

- (1) The lawyer reasonably believes the representation will not be adversely affected; and
- (2) The client consents after consultation, which consent should be documented by

counsel in counsel's file. When the representation of multiple clients in a single matter is undertaken, the consultation should include explanation of the implications of the common representation and the advantages and risks involved.

(e) Counsel who has formerly represented a client should not thereafter use information relating to the former representation to the disadvantage of a former client unless the information has become generally known or the ethical obligation of confidentiality otherwise does not apply.

(f) Counsel should not withdraw solely on the basis of a personality conflict with the client or a difference of opinion as to how to proceed in the case, unless required by the Rules of Professional Conduct.

(g) The filing or existence of a habeas corpus petition or grievance against counsel in regard to his/her quality of representation shall not create a conflict of interest *per se*. Withdrawal by counsel from the representation of a client under such circumstances should occur if ordered by the court upon motion by the client or if counsel is of the opinion that the filing or existence of the habeas corpus petition or grievance will interfere with counsel's ability to adequately represent the client.

(h) Counsel should withdraw upon the filing of a civil lawsuit against counsel by a client alleging malpractice, a finding of probable cause in connection with a grievance complaint, or if counsel has been scheduled to testify at a habeas corpus trial in which (1) counsel is the subject of the claim of ineffective assistance of counsel which has been raised in the petition; and (2) the pleadings have been closed.

PART V. PRETRIAL RELEASE

GUIDELINE 5.1. Pretrial Release.

(a) *When a client is in custody, counsel should explore with the client the pretrial release of the client under the conditions most favorable to the client and attempt to secure that release.*

(b) *Counsel should obtain information regarding the client, including family and community ties, immigration status, school or employment history, physical and mental health, participation in community programs, past criminal and delinquency record, the ability of the client, relatives or third parties to meet any financial conditions of release, and the names of individuals or other sources that counsel can contact to verify the information provided by the client.*

(c) *Where appropriate, counsel should make a proposal concerning conditions of release that are least restrictive with regard to the client. Counsel should assist the client in contacting parents, spouse, relatives or other persons who may assist the client or provide third party surety.*

(d) *If the court sets conditions of release, counsel should explain to the client the conditions of release and potential consequences of violating such conditions. If the court sets as a condition of release that security be posted, counsel should explain to the client the available options and procedures for posting security.*

(e) Where the client is not able to obtain release under the conditions set by the court or where new information becomes available, counsel should consider pursuing modification of the conditions of release under available procedures. When appropriate, counsel should also pursue the client's right to review under applicable law.

(f) Where the client is unable to obtain pretrial release, counsel should inform the court and the jail or juvenile detention facility personnel about any medical, psychiatric, or security needs of the client.

PART VI. PRETRIAL PREPARATION

Guideline 6.1. Preliminary Preparation.

(a) Counsel should examine and seek copies of all pertinent and available court documents.

(b) Counsel should research and review the relevant statutes and caselaw to identify:

- (1) the elements of the charged offense(s);*
- (2) any defects in the charging instrument, such as statute of limitations or double jeopardy; and*
- (3) the available defenses, ordinary and affirmative, and whether notice of any defense is required and any specific timelines for giving such notice.*

(c) Counsel should take advantage of any opportunity for the earliest possible discovery, including review of the files of the State's Attorney and police reports or other documents in their possession.

(d) Counsel should seek preservation and/or discovery of any evidence likely to become unavailable unless special measures are taken.

GUIDELINE 6.2. Investigation.

(a) Counsel should conduct a thorough investigation prior to trial, including investigation of potential witnesses, physical evidence and the scene of the crime.

(b) Where appropriate, counsel should obtain the assistance of experts and other professionals to provide consultation and testimony regarding issues in the case, evaluations of clients and others, and testing of physical evidence.

(c) During investigation and trial preparation, counsel should develop and continually reassess a defense theory of the case

Guideline 6.3. Formal Discovery.

(a) Counsel has a duty to pursue as soon as practicable discovery procedures provided by applicable law. In considering discovery requests, counsel should take into account that such requests may trigger reciprocal discovery obligations.

(b) Counsel should consider seeking discovery of the following items:

- (1) potential exculpatory information;
- (2) the names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;
- (3) all oral and/or written statements by the *client* and details of the circumstances under which the statements were made;
- (4) the prior criminal *and/or delinquency* record of the client and any evidence of other misconduct that the prosecutor may intend to use against the client;
- (5) all *physical evidence, including* books, papers, documents, photographs, tangible objects, buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case;
- (6) all results or reports of *and underlying data regarding* relevant physical or mental examinations, scientific tests, experiments *and comparisons*.
- (7) statements of co-defendants;
- (8) *reports or notes of searches or seizures and the circumstances of any such searches or seizures.*

GUIDELINE 6.4. Pretrial Motions.

(a) Counsel should file pre-trial motions and memoranda and briefs in a timely fashion, as necessary to protect the client's rights after consideration of the statutes, caselaw and constitutional provisions.

(b) *Before filing a pretrial motion, counsel should consider any potential adverse effects that might result from the filing of the motion.*

(c) Counsel should file a motion for a bill of particulars prior to trial, except when tactical reasons exist for not doing so.

PART VII. PLEA NEGOTIATIONS.

GUIDELINE 7.1. Discussions with the Client Concerning Plea Negotiations.

(a) *After interviewing the client and developing a thorough knowledge of the law and facts of the case, counsel should discuss with the client all alternatives, including the possible resolution of the case through a negotiated plea of guilty. Counsel should make it clear to the client that the ultimate decision to enter a plea of guilty has to be made by the client.*

(b) Counsel should advise the client with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome.

(c) Counsel should caution the client to avoid communication about the case with witnesses or other individuals, except with the approval of counsel.

(d) Counsel should explain to the client the evidence that the state has and elicit from the client all relevant information in regard to the aspects of the case, including but not limited to, background information concerning the defendant, his/her prior convictions and the events surrounding the offenses charged.

(e) Counsel should discuss with the client any ongoing plea negotiations and convey all offers to the client.

(f) Counsel should discuss with the client the advantages and disadvantages of accepting a plea agreement.

(g) Counsel should discuss with the client any rights that are waived by acceptance of a plea agreement.

(h) Counsel should discuss with the client the nature of the charge to which he/she would be entering a plea, the possible maximum and/or mandatory sentences which the client is exposed to as a result of the plea and any other questions that the court may raise during the plea canvass.

GUIDELINE 7.2. Conduct of Plea Negotiations.

(a) Counsel should not accept or reject any plea agreement without the authorization of the client.

(b) Counsel should not intentionally understate or overstate the risks, hazards, or prospects of the case to exert undue influence on the client's decision as to his/her plea.

GUIDELINE 7.3. Prerequisites for Guilty Pleas.

(a) *Before counsel advises the client to plead guilty, counsel should be satisfied as to the following:*

- (1) *That the client admits guilt, or believes that there is a substantial likelihood of conviction at trial, and believes that it is in his/her best interests to plead guilty under the plea agreement rather than risk the consequences of conviction after trial (North Carolina v. Alford);*
- (2) *That the client understands all aspects of the plea agreement, and understands all consequences of a plea of guilty under the agreement;*
- (3) *That the state would be able to prove the charge(s) against the client at trial;*
- (4) *That a plea of guilty by the client is voluntary, and intelligent, with full understanding of the nature of the charge and the consequences of the plea;*
- (5) *That the client understands the rights he/she is waiving, including the right to trial by jury, the right to assistance of counsel at trial, the right to compulsory process, the right to confrontation of witnesses, the right to testify and privilege against self-incrimination, and the state's burden of proof beyond a reasonable doubt;*
- (6) *That the client understands the terms of the plea agreement and the consequences of conviction, including the maximum possible sentence faced by the client, any mandatory minimum sentence faced by the client.*

(b) In addition, if applicable and to the extent possible, counsel should advise the client of:

- (1) *the potential liability faced by the client for enhanced punishment after a subsequent conviction, the client's probation and parole eligibility, and the likelihood of potential civil liabilities arising out of conviction for this particular offense;*
- (2) *collateral consequences of conviction, e.g. deportation and civil disabilities.*

PART VIII. TRIAL

GUIDELINE 8.1. TRIAL PREPARATION

(a) Counsel should conduct a thorough independent investigation prior to trial, including investigation of potential witnesses, physical evidence and the scene of the alleged crime.

(b) To the extent possible, counsel should obtain expert reports, witness statements, police and law enforcement reports and any other potential information relating to the offense.

(c) Counsel has a duty to pursue as soon as practicable discovery procedures provided by the rules of the jurisdiction and to pursue such information through discovery methods as may be available to supplement the factual investigation of the case. In considering discovery requests, counsel should take into account that such requests may trigger reciprocal discovery obligations.

(d) Counsel should consider seeking discovery of the following items:

(i) potential exculpatory information;

(ii) the names and addresses of all prosecution witnesses, their prior statements, and criminal record, if any;

(iii) all oral and/or written statements by the accused, and the details of the circumstances under which the statements were made;

(iv) the prior criminal record of the accused and any evidence of other misconduct that the government may intend to use against the accused;

(v) all books, papers, documents, photographs, tangible objects, buildings or places, or copies, descriptions, or other representations, or portions thereof, relevant to the case;

(vi) all results or reports of relevant physical or mental examinations, and of scientific tests or experiments, or copies thereof;

(vii) statements of co-defendants.

(e) Counsel should obtain the assistance of experts where necessary.

(f) During investigation and trial preparation, counsel should develop and continually reassess a defense theory of the case.

(g) Counsel should file appropriate pre-trial motions and memoranda or briefs in a timely fashion, as necessary to protect the defendant's rights after consideration of the statutes, caselaw and constitutional provisions. Counsel should file a motion for a bill of particulars prior to trial, except when tactical reasons exist for not doing so.

(h) Counsel should request a continuance if he/she determines that he/she is not prepared for trial.

(i) Counsel should develop an overall defense strategy. In deciding on defense strategy, counsel should consider whether the client's interests are best served by not putting on a defense case and instead relying on the prosecution's failure to meet its constitutional burden.

(j) Counsel should be familiar with and prepared to address legal and evidentiary issues that can reasonably be anticipated to arise in the trial.

GUIDELINE 8.2. VOIR DIRE.

(a) Counsel should be familiar with the voir dire process and the exercise of both challenges for cause and peremptory challenges and should conduct a thorough voir dire. *Counsel should tailor voir dire questions to the issues of the case.*

(b) *Counsel should be alert to any irregularities in the composition or selection of the venire and be prepared to raise proper challenges to those irregularities. Counsel should be alert to prosecutorial misuse of peremptory challenges and, where appropriate, should seek remedial measures from the court for such misuse.*

GUIDELINE 8.3. OPENING STATEMENT.

(a) *If the court allows an opening statement, it should be confined to a statement of the issues in the case and the evidence counsel believes in good faith will be available and admissible at trial. Other objectives may include providing an overview of the defense theory of the case, identifying weaknesses in the prosecution case, and emphasizing the prosecution's burden of proof.*

GUIDELINE 8.4. EVIDENCE.

(a) *Counsel should be prepared to cross-examine prospective witnesses for the State, be familiar with the applicable law and procedures concerning impeachment, and be alert to issues relating to witness credibility, including bias and motive for testifying.*

(b) *Counsel should prepare all defense witnesses for direct and possible cross-examination.*

(c) *Counsel should consider the advantages and disadvantages before entering into stipulations concerning the prosecution's case.*

(d) *Counsel should discuss with the client all of the considerations relevant to the client's decision to testify, and prepare the client for direct and cross-examination if he/she chooses to testify.*

(e) *Counsel should advise the client of the client's right to assert certain defenses, if applicable, including extreme emotional disturbance or insanity, and should know the burden of proof or the burden of production the defense must bear.*

GUIDELINE 8.5. CLOSING ARGUMENT

(a) *Counsel should present closing argument and object to any improper argument by opposing counsel. Whenever the prosecution exceeds the scope of permissible argument, counsel should request a mistrial, or seek cautionary instructions unless tactical considerations suggest otherwise.*

GUIDELINE 8.6 REQUESTS TO CHARGE/PRESERVATION FOR APPEAL.

(a) *Counsel should submit requests to charge to the court and take appropriate steps to preserve the record when necessary. During delivery of the charge, counsel should be alert to any deviations from the judge's planned instructions and, if necessary, request additional or curative instructions. If the court proposes giving supplemental instructions to the jury, counsel should request that the judge state the proposed instructions to counsel before they are delivered to the jury.*

(b) *Counsel should endeavor throughout the trial process to establish a proper record for appellate review and should request that all trial proceedings be recorded. Where appropriate, counsel should make an offer of proof as to evidence deemed by the trial court to be inadmissible. Counsel*

should request precise rulings from the court on all objections and make every effort to obtain for the record the reasons for the court's rulings.

PART IX. SENTENCING

GUIDELINE 9.1. Sentencing.

(a) Prior to sentencing, counsel should discuss with the client the maximum sentence that may be imposed which may include any period of probation, any special conditions of probation which may include treatment or restitution, and any fine which may be imposed.

(b) Counsel should inform the client of the nature of the presentence investigation process and the client's right to waive the presentence investigation if appropriate.

(c) For the purposes set forth in Connecticut Practice Book Section 912, counsel or counsel's representative should be present during the Office of Probation's interview of the client in the presentence investigation process when requested by the client, or when, in counsel's opinion, counsel's presence is required to protect the interests of the client, or when otherwise appropriate.

(d) With the client's consent, counsel should provide information and documents to the probation officer preparing the presentence report.

(e) Counsel should review the presentence investigation report with the client and request that any necessary corrections be made to the presentence investigation report in writing and in accordance with Connecticut Practice Book Section 919(1).

(f) Counsel should request a copy of the corrected report for his/her file and for the parole board.

(g) Counsel should advocate the best possible disposition for sentencing on behalf of the client. *In advocating his/her position, counsel should take whatever steps are necessary, including, where appropriate, the presentation of witnesses and other evidence.*

(h) *Where appropriate, counsel should carefully prepare the client and/or witnesses to address the court.*

(i) *Counsel should verify that the client understands the sentence, including any conditions of probation. Counsel should advise the client as to what is required in order to comply with the obligations that are imposed.*

PART X. POST-CONVICTION

GUIDELINE 10.1. Sentence Review.

(a) At sentencing, counsel should insure that the court informs counsel's client of his/her right

to sentence review.

(b) Counsel should take all necessary steps to preserve the client's right to sentence review.

(c) Counsel should represent the client before the Sentence Review Division unless waived by the client or excused by the Sentence Review Division for exceptional reasons in accordance with Practice Book Section 937. The fact that the client's appeal has been transferred to another public defender or a special public defender does not relieve counsel of the duty to represent the client before the Sentence Review Division.

GUIDELINE 10.2. Appeal.

(a) Counsel should inform the client of his/her right to appeal.

(b) Counsel should take all necessary steps to preserve the client's appellate rights:

(c) In any case involving conviction after trial and imposition of a sentence of incarceration or a suspended sentence of incarceration, there shall be a presumption that an appeal should be filed on behalf of a client. If it is the opinion of the attorney that all potential issues in the appeal would be wholly frivolous, those issues should normally be addressed in accordance with the procedures set forth in Practice Book Section 949 through 956. Under Section 953, after the appeal has been filed, counsel should submit an *Anders* brief identifying anything in the record that might arguably support the appeal following a review of the trial transcript. Under circumstances when a defendant deems it in his/her best interests not to appeal a conviction, the final decision not to appeal must be made by a defendant knowingly, intelligently, and after full consultation with counsel. In any case in which an accused wishes to waive his/her right to appeal, a waiver should be made before the court on the record or in a writing signed by the defendant in which he/she affirmatively states his/her desire not to appeal so as to ensure that the decision is voluntary.

(d) Counsel should cooperate in providing information to appellate counsel in regard to the trial proceedings in accordance with the requirements of the Division's policy regarding the handling of appeals.

(e) Counsel should not withdraw his/her appearance from the trial court file, even though the appeal has been transferred to the appellate office or another public defender or special public defender.

GUIDELINE 10.3. HABEAS CORPUS

(a) Counsel should abide by the Connecticut Practice Books rules in regard to Habeas Corpus Sec. 23-21 et seq.

(b) Counsel should conduct the initial interview of the client, obtain and review all relevant documents and transcripts and conduct relevant investigation in a timely manner.

- (c) Counsel should file any appropriate motions and memoranda with the court, when necessary, in accordance with the Practice Book rules or in accordance with the court's scheduling orders.
- (d) Counsel should file the Amended Petition as soon as is practicable.
- (e) Counsel should be diligent in protecting the client's rights to have the Amended Petition heard in a timely manner.
- (f) Counsel should take all necessary steps to preserve the client's appellate rights.
- (g) Counsel shall be responsible for the filing of any appeal from the dismissal of a habeas corpus matter unless the client has expressly waived said appeal.

Adopted June 15, 1999

C

District Court of **Montana**.

Lewis And Clark County

Larry WHITE, Candace Bergman, David Chase, Michael Shields, Kenneth Sellars, Carol Homegun, Mickey McDonough, Kenneth Ingraham, Winchester Wiseman, Michelle Ford, Robert Armstrong, Gary Ackermann, Justin Cloninger, Plaintiffs,

v.

Governor Judy MARTZ; Supreme Court Administrator Rick Lewis; Appellate Defender Commissioners Todd Hillier, Dorothy McCarter, Beverly Kolar, Michael Sherwood, and Randi Hood; the Boards of Commissioners of Missoula, Glacier, Teton, Flathead, Lake, and Ravalli Counties; Butte-Silver Bow County Chief Executive Judy Jacobson; Missoula County Commissioners Barbara Evans, Bill Carey, and Jean Curtiss; Glacier County Commissioners Allan Lowry, William Icenoggle, and Raymond Salois; Teton County Commissioners R. F. Sam Carlson, Mary Sexton, and Arnie Gettel; District Court Judge Marc Buyske; Flathead County Commissioners Dale Williams, Howard Gipe, and Robert Watne; Lake County Commissioners Mike Hutchin, Barry Baker, and Dave Stipe; and Ravalli County Commissioners Jack Atthowe, Alan Thompson, and Betty Lund, Defendants.

No. CDV-2002-133.

July 25, 2002.

Memorandum and Order on Motions to Dismiss

Thomas C. Honzel, Judge.

Before the Court are Defendants' motions to dismiss. The motions were heard May 24, 2002, and are ready for decision.

BACKGROUND

The Plaintiff class is comprised of indigent Defendants involved in current criminal proceedings in various counties of the state of **Montana**. The Defendants are state and County agencies or public officials charged with the responsibility of funding and overseeing indigent defense programs within the seven counties named in the complaint.

Plaintiffs allege that Defendants are violating or imminently will violate their rights guaranteed by the United States Constitution, Sixth and Fourteenth Amendments, 42 U.S.C. § 1983 (Count I); the **Montana** Constitution, Article II, Sections 4, 17 and 24 (Count II); and the following **Montana** statutes: Section 46-8-1.01 (Count II), Section 46-8-201 (Count III), Section 46-8-202 (Count IV), and Section 2-15-1020 (Count V), MCA. Specifically, Plaintiffs contend that Defendants' failure to design, administer, fund, and supervise indigent defense programs with sufficient resources is depriving or will deprive them of their rights to effective assistance of counsel, due process, equal protection and individual dignity. The amended complaint alleges, among other things, instances of unnecessary pre-trial incarceration; inadequate client/attorney contact; insufficient investigations, discovery and trial preparation; uncorrected conflicts of interests; and excessive attorney workloads.

The State has moved to dismiss Counts I, II and III, and the seven defendant counties joined in the motion. Missoula County, the only Defendant county with a public defenders' office as provided by Section 46-8-202, MCA, has filed a separate motion to dismiss Count IV. Count V is specific to the Appellate Defender Commission and

is not subject to the pending motions.

As remedies for the alleged violations, Plaintiffs seek declaratory judgment, preliminary and permanent injunctions, and an award for attorney fees and cost's.

STANDARD

In reviewing a motion to dismiss pursuant to Rule 12(b)(6), M.R.Civ.P., courts must consider the complaint in the light most favorable to the plaintiff and accept the allegations in the complaint as true. *Goodman Realty, Inc. v. Monson*, 267 Mont. 228, 231, 883 P.2d 121, 123 (1994). A complaint should not be dismissed under Rule 12(b)(6), M.R.Civ.P., Unless it appears that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Wheeler v. Moe*, 163 Mont. 154, 161, 515 P.2d 679, 683 (1973). In other words, dismissal is justified only when the allegations of the complaint itself clearly demonstrate that plaintiff does not have a claim. *Id.* at 161, 515 P.2d at 683. See also *Buttrel v. McBride Land & Livestock Co.*, 170 Mont. 296, 298, 553 P.2d 407, 408 (1976). For these reasons, a trial court rarely grants a motion to dismiss for failure to state a claim upon which relief can be granted.

DISCUSSION

I.

Sixth Amendment

The Defendants' primary contention relates to Plaintiffs' alleged lack of actual injury. Defendants contend that Plaintiffs must allege an actual injury to seek relief under 42 U.S.C. § 1983, citing *Lewis v. Casey*, 518 U.S. 343, 349, 116 S. Ct. 2174 (1996). Defendants argue that in cases involving Sixth Amendment ineffective-assistance-of-counsel claims, an actual injury is demonstrated by an unfair trial. Defendants assert that because the Plaintiff class is composed of pre-trial defendants, it is impossible to prove actual injury since the Plaintiffs' trials have yet to occur. Plaintiffs argue that the actual injury requirement of *Lewis* is inapplicable at the motion to dismiss phase because it was an evidentiary burden placed upon the plaintiffs in that case during a three-month bench trial.

The issue in *Lewis* was not the same as the issues raised here. *Lewis* did not involve the Sixth Amendment claims of pre-trial defendants. Rather, it involved a claim by prison inmates that Arizona prison officials were violating the United States Supreme Court holding in *Bounds v. Smith*, 430 U.S. 817 (1977), that " 'the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.' " *Lewis* at 346.

The Second Circuit Court of Appeals has held that *Lewis* does not apply to the Sixth Amendment claims of pre-trial detainees. *Benjamin v. Fraser*, 264 F.3d 175, 185 (2nd Cir. 2001). The court stated: "[W]here the right at issue is provided directly by the Constitution or federal law, a prisoner has standing to assert that right even if the denial of that right has not produced an 'actual injury'." *Id.*

The court also stated:

The access claims at issue in *Lewis* concerned the ability of convicted prisoners "to attack their sentences, directly or collaterally, and .. to challenge the conditions of their confinement." [*Lewis*], 518 U.S. at 355. By con-

trast, here we are concerned with the Sixth Amendment right of a pretrial detainee, in a case brought against him by the state, to utilize counsel in his defense. It is not clear to us what "actual injury" would even mean as applied to a pretrial detainee's right to counsel.

Benjamin at 186.

For these reasons, the Court concludes that Plaintiffs' alleged lack of an actual injury is not fatal to their cause of action.

Next, Defendants rely on *Riley v. Jeffes*, 777 F.2d 143, 148 (3rd Cir. 1985), for their contention that Plaintiffs' cause of action is barred by the availability of direct appeal or post-conviction relief. However, this is an overly broad analysis of the court's holding and is not persuasive because the court, relying on *Parratt v. Taylor*, 451 U.S. 527, 543, 101 S. Ct. 1908 (1981), overruled by *Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662 (1986), only addressed a cause of action for money damages by an inmate against prison officials for deprivation of property.

Defendants also argue that Plaintiffs cannot satisfy the test for determining when counsel has rendered ineffective assistance established by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). This test requires a showing:

(1) [T]hat the performance of his counsel was deficient, i.e., that he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and; (2) that the deficient performance by his counsel prejudiced his defense, i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988), vacated on abstention grounds, 976 F.2d 673, citing *Strickland* at 687.

With regard to applying the *Strickland* test prospectively, the court in *Luckey* held:

This standard is inappropriate for a civil suit seeking prospective relief. 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 at 1017 (citations omitted). The court concluded:

In a suit for prospective relief the plaintiff's burden is to show "the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law." This is the standard to which appellants, as a class, should have been held.

Id. at 1017-18 (citations omitted).

Defendants dispute the application of *Lucky* to Montana law. They contend that this Court is bound by the standard set forth in *Strickland* because the Montana Supreme Court has adopted it for all ineffective-assistance-of-counsel claims, regardless of when the claim arose during the proceedings. See e.g., *Hans v. State*, 283 Mont. 379, 391, 942 P.2d 674, 681 (1997) (post-conviction petition); *State v. Berg*, 1999 MT 282, ¶ 28, 296 Mont. 546, ¶ 28, 991 P.2d 428, ¶ 28 (direct appeal); *State v. Lawrence*, 2001 MT 299, ¶ 12, 307 Mont. 487, ¶

12. 38 P.3d 809, ¶ 12 (challenge to guilty plea based on ineffective assistance). However, there is no Montana Supreme Court case addressing the appropriate standard in a civil action brought by pre-trial defendants seeking prospective relief for alleged systemic deficiencies in indigent defense programs. The Court also notes that the right to counsel afforded by Article II, Section 24, of the Montana Constitution is broader than the rights afforded by the U.S. Constitution. *State v. Spang*, 2002 MT 120, ¶ 22, 310 Mont. 52, ¶ 22, 48 P.3d 727, ¶ 22.

The Court concludes that the reasoning in *Luckey* is sound and that the *Strickland* standard does not preclude claims of pretrial Defendants seeking prospective relief.

II.

Due Process/Equal Protection

Defendants contend that the Sixth Amendment provides sufficient protection and thus the Court should not entertain any claims based on substantive due process. Defendants reason that the treacherous nature of analyzing substantive due process claims has led courts to restrict such claims to "liberties deeply rooted in this Nation's history and tradition." *Armedariz v. Penman*, 75 F.3d 1311, 1319 (9th Cir. 1996). Regarding procedural due process, Defendants assert that Plaintiffs have been given notice of the charges against them and an opportunity for a hearing, which is all that is required.

Plaintiffs respond with a fundamental fairness argument. Relying on *In re Mental Health of K.G.F.*, 2001 MT 140, ¶ 91, 306 Mont. 1, ¶ 91, 29 P.3d 485, ¶ 91. Plaintiffs assert that due process and fundamental fairness require appointment of competent counsel, a thorough initial investigation, an early and detailed interview and consultation, assistance of counsel in any examination, and vigorous adversarial advocacy.

If Plaintiffs' allegations are proven, Plaintiffs' due process rights may have been violated because "[a]n indigent criminal defendant has a fundamental right to effective assistance of counsel guaranteed by the Sixth Amendment, the due process clause of the Fourteenth Amendment, and the Montana Constitution." *Wilson v. State*, 1999 MT 271, ¶ 12, 296 Mont. 465, ¶ 12, 989 P.2d 813, ¶ 12 (overruled on other grounds by *State v. Gallagher*, 2001 MT 39, ¶ 19, 304 Mont. 215, 19 P.3d 817)

Therefore, Defendants' motion to dismiss the claims based on due process should be denied.

Regarding equal protection, the Montana Supreme Court has held:

There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.

State v. Swan, 199 Mont. 459, 467, 649 P.2d 1297, 1301 (1982) (quoting *Gideon v. Wainwright*, 372 U.S. 335, 357, 83 S. Ct. 792, 816 (1963)). Thus, if Plaintiffs are being deprived of effective assistance of counsel, their right to equal protection may be violated as well as their Sixth Amendment right to counsel. Therefore, the motion to dismiss Plaintiffs' equal protection claim should be denied.

III.

Statutory Claims

Defendants contend that Plaintiffs have not stated a claim for which relief can be granted under Section 46-8-101, MCA. That statute provides indigent defendants charged with felonies the right to assignment of counsel by the court. Defendants assert that the complaint does not allege that any court failed to inform the Plaintiffs of their right to counsel at the initial appearance nor that any court failed to assign counsel to the Plaintiffs.

Plaintiffs respond by asserting that the required assignment of counsel necessarily entails the assignment of reasonably effective counsel. Plaintiffs argue that being provided with ineffective counsel is akin to being provided with no counsel at all, and, therefore, the statute has not been satisfied.

Plaintiffs' argument is persuasive and their claim based on Section 46-8-101, MCA, should not be dismissed.

IV.

Standing

Defendants contend that Plaintiffs lack standing to assert a claim under Section 46-8-201, MCA, which provides for reasonable compensation and reimbursement to indigent defense counsel. They argue that such a claim belongs to Plaintiffs' defense attorneys and that the statute does not provide for third-party standing.

Plaintiffs argue that the statute's purpose is to provide for the defense of Plaintiffs' cases and that they have a direct interest in their attorneys' compensation. As authority, Plaintiffs cite to *State v. Hardaway*, 1998 MT 224, ¶38, 290 Mont. 516, 966 P.2d 125, where the court allowed an indigent defendant to claim his counsel's right of reimbursement for witness fees provided under Section 46-15-116, MCA. In addition, the Plaintiffs rely on the reasoning of the Iowa Supreme Court:

[T]he issues of a defendant's right to effective representation and an attorney's right to fair compensation in cases such as these are "inextricably linked." Therefore the circumstances particular to court-appointed representation warrant this review. To deny standing in cases such as these would put a lawyer in the unfavorable position of having to admit that inadequate representation was provided, thus raising the specter of malpractice and bar sanctions.

Lewis v. Iowa Dist. Court, 555 N.W.2d 216, 219 (Iowa 1996) (citation omitted).

The Montana Supreme Court has stated: "Court appointed counsel should neither be unjustly enriched nor unduly impoverished, but *must* be awarded an amount which will allow the financial survival of his practice. A county *shall* pay a reasonable amount for all professional services which are not donated." *State v. Allies*, 182 Mont. 323, 325, 597 P.2d 64, 65 (1979) (emphasis in original) (citing *State v. Lehrirondede*, 15 Wash. App. 502, 550 P.2d 33 (1976)). See also *State v. Boyken*, 196 Mont. 122, 637 P.2d 1193 (1981)

The Supreme Court of Florida has stated, "(W)e must not lose sight of the fact that it is the defendant's right to effective representation rather than the attorney's right to fair compensation which is our focus. We find the two inextricably interlinked." *Makemson v. Martin County*, 491 So.2d 1109, 1112 (Fla. 1986).

Based on the foregoing, the Court finds that

Note: Pages 14-15 illegible in original document

White v. Martz

2002 WL 34377577 (Mont.Dist.) (Trial Order)

END OF DOCUMENT

1 of 4 DOCUMENTS



Analysis
As of: Dec 14, 2008

LARRY WHITE, CANDACE BERGMAN, DAVID CHASE, MICHAEL SHIELDS, KENNETH INGRAHAM, GARY ACKERMANN, and DANIEL FINLEY, Plaintiffs, vs. GOVERNOR JUDY MARTZ; SUPREME COURT ADMINISTRATOR JAMES OPPEDAHL; APPELLATE DEFENDER COMMISSIONERS TODD HILLIER, DOROTHY McCARTER, BEVERLY KOLAR, MICHAEL SHERWOOD, and RANDI HOOD; DISTRICT COURT COUNCIL MEMBERS CHIEF JUSTICE KARLA GRAY, DISTRICT COURT JUDGE KATHERINE R. CURTIS, DISTRICT COURT JUDGE THOMAS McKITTRICK, DISTRICT COURT JUDGE JOHN McKEON and DISTRICT COURT JUDGE ED McLEAN; THE BOARD OF COMMISSIONERS OF MISSOULA COUNTY; MISSOULA COUNTY COMMISSIONERS BARBARA EVANS, BILL CAREY, and JEAN CURTISS; Defendants.

Docket No. CDV-2002-133

FIRST JUDICIAL DISTRICT COURT OF MONTANA, LEWIS AND CLARK COUNTY

2006 Mont. Dist. LEXIS 136

January 25, 2006, Decided

PRIOR HISTORY: *White v. Martz*, 2005 Mont. Dist. LEXIS 1871 (2005)
White v. Martz, 2004 Mont. Dist. LEXIS 2005 (2004)

JUDGES: [*1] Thomas C. Honzel, District Court Judge.

OPINION BY: Thomas C. Honzel

OPINION

MEMORANDUM AND ORDER ON MOTIONS TO DISMISS

P1. Before the Court are the Plaintiffs' motion for order of dismissal with conditions pursuant to MRCP 41(a)(2); 23(e), and Defendants' Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction on grounds of mootness. The motions were heard January 11, 2006, and are ready for decision. For the reasons stated herein, the Court concludes that the case is moot and, therefore, the Defendants' motion to dismiss should be granted.

Background

P2. Plaintiffs filed this action February 14, 2002, alleging, among other things, that the Defendants in their official capacities had failed to provide the public defender programs in Montana counties with the administrative and financial resources necessary to ensure that lawyers employed by those programs were capable of providing statutorily and constitutionally adequate legal representation to their indigent clients. On May 7, 2004, the parties entered into a Stipulation and Order of Postponement of Trial to allow the 2005 Montana legislature to enact legislation that would adequately address the indigent [*2] defense system.

P3. On April 16, 2005, the Montana legislature passed Senate Bill 146 (SB 146), known as the Montana Public Defender Act. Governor Schweitzer signed it into law on April 28, 2005. The Act significantly changes the manner in which public defender services are delivered to all courts in the state. It establishes a statewide public defender system which, effective July 1, 2006, will completely replace the system the Plaintiffs challenged in this case.

P4. In making their motion Defendants acknowledge that if the action is dismissed as moot, the Court still would have jurisdiction to enforce the May 7, 2004, stipulation, and to award Plaintiffs their attorney fees if applicable.

Discussion

P5. Plaintiffs have conceded that, with the exception of funding, SB 146 addresses the substantive concerns that grounded the complaints about the former public defender system. Plaintiffs' contention that this case will not be rendered "moot" until SB 146 is properly implemented is misplaced.

P6. The Montana Supreme Court has held that "[a] moot question is one which existed once but because of an event or happening, it has ceased to exist and no longer presents an actual [*3] controversy." *Miller v. Murray*, 183 Mont. 499, 503, 600 P.2d 1174, 1176 (1979). More recently, the court cited its holding in *Miller* and went on to state that it normally does not address moot questions but that it "will consider the merits of moot issues when faced with constitutional questions which are capable of repetition yet could avoid review." *Skinner Enterprises, Inc. v. Lewis and Clark County*, 1999 MT 106, P12, 294 Mont. 310, P12, 980 P.2d 1049, P12.

P7. In *Miller*, Miller was the chairperson of the Tax Relief Association, a group organized to expand the state's gambling laws by constitutional initiative. When the secretary of state determined the petition drive fell 2,904 signatures short of the 31,672 necessary, Miller requested a declaratory judgment or writ of mandate on signature certification. The district court denied Miller's request for declaratory relief because "the controversy would become moot before a factual determination could be made and that it is the function of the legislature and not the judiciary to resolve the question of petition signature qualifications." *Miller*, at 502, 600 P.2d at 1176. [*4] In holding the issue was moot, the supreme court noted that the forty-sixth Montana legislature significantly modified the statute on which Miller relied and that "[t]he controversy cannot be repeated because the law has been decisively changed." *Miller*, at 503, 600 P.2d at 1176.

P8. Similarly, Skinner wanted to develop a subdivision in the Helena valley. Skinner asserted there was a discrepancy between the 1993 county wastewater regulations and the state's regulations. The county reviewed its regulations, conducted public hearings and adopted several amendments in 1995. Skinner then filed a petition

alleging constitutional and statutory notice requirement violations. In 1998, the county again amended its wastewater treatment regulations. As a result, "the District Court found that Skinner's objections to the process for the adoption of the 1995 amendments were moot and it dismissed the case." *Skinner*, at P8. In affirming the district court, the court stated: "[t]he adoption of the 1995 amendments which formed the basis for Skinner's claim were superseded by the 1998 amendments, prior to trial. As a result, the legality of the 1995 amendments was no longer of any [*5] practical consequence to the parties . . ." *Skinner*, at P16.

P9. In determining whether the exception to mootness applies, the supreme court has established a two-part test: First, the challenged action must be too short in duration to be fully litigated prior to cessation; and second, there must be a reasonable expectation that the same complaining party would be subject to the same action again.

P10. *Skinner*, at P18 (citing *Heisler v. Hines Motor Co.*, 282 Mont. 270, 275-76, 937 P.2d 45, 48 (1997).

P11. Here, Plaintiffs acknowledge that the framework of SB 146 meets their objections to the old system. In their reply brief they state that "the only disagreement between the parties is the procedural mechanism by which the case should be brought to a close." They also express concern about the adequacy of the funding to implement SB 146.

P12. There is, of course, no way of knowing at this time whether the new system is adequately funded or will be adequately funded in the future. Nevertheless, any challenge to SB 146 would be a completely different lawsuit and there is no reason to believe that a new claim could evade review.

P13. Because the Court has determined [*6] that the case should be dismissed as moot, it is not necessary to address the Plaintiffs' motion to dismiss with conditions.

P14. NOW, THEREFORE, IT IS ORDERED:

P15. 1. Defendants' motion to dismiss IS GRANTED.

P16. 2. Plaintiffs' motion to dismiss with conditions IS DENIED.

DATED this 25th day of January, 2006.

Thomas C. Honzel, District Court Judge