No. 10-0671

IN THE SUPREME COURT OF TEXAS

KERRY HECKMAN, MONICA MAISENBACHER, SYLVIA PETERSON, TAMMY NEWBERRY, ELVEDA VIEIRA, AND JESSICA STEMPKO, ON BEHALF OF THEMSELVES AND ALL OTHER PERSONS SIMILARLY SITUATED,
Petitioners,

v.

WILLIAMSON COUNTY, HONORABLE DAN A. GATTIS, HONORABLE SUZANNE BROOKS, HONORABLE TIM WRIGHT, HONORABLE DOUG ARNOLD, AND HONORABLE WILLIAM THOMAS EASTES,
Respondents.

On Petition For Review from the Third Court of Appeals
No. 03-06-00600-CV

BRIEF OF AMICUS CURIAE TEXAS APPLESEED IN SUPPORT OF PETITIONERS

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[1] Kelsey Stempko, a plaintiff in the trial court was non-suited in October 2007. Elveda Vieira, a plaintiff in the trial court and an appellee in the court of appeals, passed away in June 2010.

[2] Respondent the Honorable Dan A. Gattis was substituted for his predecessor in office and a defendant in the trial court, the Honorable John Christian Doerfler. *See* TEX. R. APP. PROC. 7.2(a).

[3] Respondent the Honorable Doug Arnold was substituted for his predecessor in office and a defendant in the trial court, the Honorable Donald Higginbotham. *See id.*

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TO THE HONORABLE SUPREME COURT OF TEXAS:

Texas Appleseed respectfully submits this brief of *amicus curiae* in support of petitioners Kerry Heckman, Monica Maisenbacher, Sylvia Peterson, Tammy Newberry, Elveda Vieira and Jessica Stempko, on behalf of themselves and all other persons similarly situated.

STATEMENT OF IDENTITY OF *AMICUS CURIAE*

Texas Appleseed is a non-profit, public interest law organization that promotes social and economic justice for all Texans by leveraging the skills and resources of

volunteer lawyers and other professionals to identify practical solutions to difficult systemic problems. The Texas Appleseed board comprises distinguished legal practitioners from various sectors of the Texas Bar who are committed to pursuit of these goals. Texas Appleseed has been a leader in the effort to ensure that all citizens are given adequate representation and a fair trial before a jury of their peers. Texas Appleseed played a key role in passage of the Texas Fair Defense Act in 2001 and continues to advocate for effective representation for individuals who are too poor to hire a lawyer. No fee has been paid or will be paid for preparation of this brief. DLA Piper LLP (US) represents Texas Appleseed *pro bono* in this proceeding.

SUMMARY OF ARGUMENT

Nearly thirty years ago, in *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972), the United States Supreme Court held that the Sixth Amendment right to appointed counsel extends to indigent defendants facing misdemeanor charges in state court. Despite the court's clear ruling, Texas courts did not consistently provide counsel to indigent defendants, including indigent misdemeanor defendants. Because of a lack of consistency and standards in providing counsel for these defendants, the Texas legislature enacted the Texas Fair Defense Act (FDA) in 2001.[1] The FDA provided historic and far-reaching changes both to the allocation of responsibility for indigent defense systems and to the delivery of indigent defense services.[2] Despite enactment of the FDA, indigent

[1] Texas Fair Defense Act, Act of May 24, 2001, 77th Leg., R.S. ch. 906, 2001 Tex. Gen. Laws 1697.

[2] Terry Brooks & Shubhangi Deoras, *Texas Enacts Landmark Reforms*, 16 CRIMINAL JUSTICE 56 (Fall 2001).

misdemeanor defendants continue to be denied their rights to appointed counsel in some Texas counties. To remedy these deficiencies in the Williamson County county courts at law, Petitioners filed suit alleging the denial of misdemeanor indigent defendants' rights, including the right to counsel under the Sixth and Fourteenth Amendments, the right to a public trial under the First, Sixth and Fourteenth Amendments, and corresponding violations of the Texas Constitution and violations of the FDA. Following a well-developed body of case law, Petitioners' prospective class action suit under 42 U.S.C. § 1983 is an appropriate vehicle for challenging Respondents' systemic violation of misdemeanor defendants' pretrial rights because such violations cause irreparable harm and no other adequate remedy at law exists.

Texas Appleseed submits this brief of *amicus curiae* to provide information about the FDA, reasons for its enactment, and a rationale for allowing a prospective class action lawsuit to remedy these systemic deficiencies. This case raises critical issues for ensuring that a fair and effective indigent defense system exists in Texas under the FDA.

ARGUMENT

A. With enactment of the FDA, the Texas Legislature endeavored to fix a system in crisis.

When the FDA was passed in 2001, Texas' indigent criminal defense system was among the worst in the country. With no state guidelines or oversight, procedures for appointment of attorneys, compensation for representing indigent defendants, and the quality of representation afforded to indigent defendants varied widely from county to

county and, in some cases, from courtroom to courtroom.[3] At the time, there was no state funding for indigent defense; counties bore the financial burden of providing indigent defense services on their own.[4]

In September 2000, the State Bar of Texas' Committee on Legal Services to the Poor in Criminal Matters published the results of its six-year, three-part study of the delivery of indigent defense services, *Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas*.[5] The report concluded that "large portions of Texas . . . fall short of meeting each of the [reporters'] criteria for meaningful systems of indigent defense."[6] A few months later, Texas Appleseed released the results of its year-long study of indigent criminal representation. The study, *Fair Defense Report: Analysis of Indigent Defense Practices in Texas*, catalogued information on indigent defense practices across the state, focusing on a representative sample of 23 counties, containing 61% of the population of Texas.[7]

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[3] Rodney Ellis & Hanna Liebman Dershowitz, *Gideon's Promise: The Texas Story*, 27 THE CHAMPION 61 (Apr. 2003).

[4] *See id.*; Texas Appleseed Fair Defense Project, *The Fair Defense Report: Analysis of Indigent Defense Practices in Texas* (Dec. 2000) 12-14, *available at* http://www.texasappleseed.net/pdf/projects_fairDefense_fairref.pdf (hereinafter as "*Fair Defense Report*"); "Week in Review: Senators Announce Bill to Overhaul Indigent Criminal Defense System", THE TEXAS STATE SENATE WEEK IN REVIEW (Feb. 16, 2001), *available at* http://www.senate.state.tx.us/75r/Senate/Archives/Arch01/p021601w.htm.

[5] *See* State Bar of Texas Committee on Legal Services to the Poor in Criminal Matters, *Muting Gideon's Trumpet: The Crisis in Indigent Criminal Defense in Texas* (Sept. 22, 2000), *available at* http://www.uta.edu/pols/moore/indigent/last.pdf (hereinafter "*Muting Gideon's Trumpet*").

[6] *Muting Gideon's Trumpet* at [2].

[7] *Fair Defense Report*, at 4.

Both *The Fair Defense Report* and *Muting Gideon's Trumpet* identified troubling inconsistencies. The various systems of providing indigent defense evidenced a "[l]ack of consistency and accountability result[ing] in wide and unjustifiable disparities in the treatment received by indigent defendants and their defense counsel . . . ."[8] The vast majority of Texas courts used *ad hoc* appointed counsel systems for indigent defendants, without oversight or guidelines.[9] Indeed, the Senate committee Bill Analysis cited such inconsistency as the impetus for the FDA stating, "Currently, throughout the many criminal courts of Texas' 254 counties the variety of indigent defense systems result in a lack of uniformity in standards and quality of representation among those many indigent defense systems."[10]

Further reducing the efficacy of the counsel provided to indigent defendants was the length of time that passed before attorneys were appointed. Some courts did not appoint attorneys until months after an arrest, at times leaving the defendant languishing in jail with no access to counsel. In other cases, particularly misdemeanor cases, courts encouraged defendants to attempt to arrange plea agreements with prosecutors without the benefit of counsel.[11] In short, the Texas indigent defense system lacked consistency

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[8] *Fair Defense Report*, at 43.

[9] *See id.* at 12; House Research Organization, Bill Analysis, S.B. 7, 77th Leg., R.S. (2001) ("Each court runs its own program and, except for a certain type of appeal in death penalty cases, no statewide oversight or guidelines exist beyond those in the statutes."); House Committee on Criminal Jurisprudence, Bill Analysis, S.B. 7, 77th Leg., R.S. (2001) ("In most Texas counties, judges appoint attorneys for indigent defendants . . . . Because there are no uniform statewide indigent defense standards, it is not uncommon for abuse of the system to occur . . . .").

[10] Senate Comm. on Criminal Justice, Bill Analysis, Tex. S.B. 7, 77th Leg., R.S. (2001).

[11] *See Fair Defense Report*, at 28-30.

or standards, resulting "in defendants faring differently from county to county, courtroom to courtroom, depending on where they were arrested."[12]

B. FDA provisions provide consistency and accountability in indigent defense; however, deficiencies persist in appointment of counsel for misdemeanor defendants in some counties.

Through enactment of the FDA in 2001, the Texas Legislature sought to provide consistency and accountability in indigent defense systems and improve the quality of representation provided to indigent defendants.[13] Accordingly, the Legislature substantially amended Code of Criminal Procedure provisions that govern procedures for appointment of counsel, requiring countywide procedures that would apply to every court and every defendant in a county. TEX. CODE CRIM. PROC. art. 26.04(a)-(c). The Legislature also amended the Government Code to add provisions that created an administrative structure for state support of county indigent defense systems. TEX GOV'T CODE §§ 71.051-71.063. However, despite the enactment of the FDA, deficiencies in the appointment of counsel for misdemeanor defendants persist.

1. The FDA establishes a framework for appointment of counsel for indigent defendants and requires adoption of countywide indigent defense procedures.

As amended by the FDA, the Code of Criminal Procedure establishes a detailed framework for appointment of counsel for indigent defendants. Under Article 26.04 of the Code, the "judges of the county courts, statutory county courts, and district courts trying criminal cases in each county" are required to "adopt and publish written

[12] *Gideon's Promise*, at 61.

[13] Senate Comm. on Criminal Justice, Bill Analysis, Tex. S.B. 7, 77th Leg., R.S. (2001).

countywide procedures for timely and fairly appointing counsel for an indigent defendant" arrested for or charged with a misdemeanor punishable by confinement or a felony. TEX. CODE CRIM. PROC. art. 26.04(a). In addition, the judges in each county are required to publish an appointed attorney fee schedule that adopts reasonable rates "taking into consideration reasonable and necessary overhead costs and the availability of qualified attorneys willing to accept the stated rates . . . ." *Id.* at art. 26.05(b), (c). The procedures are adopted and applied on a countywide basis and not according to judicial district lines. *Id.* at art. 26.04(a).

Article 26.04 sets out several requirements for the countywide procedures that the judges must adopt. The countywide procedures must (1) authorize only the judges of the county courts, statutory county courts, and district courts trying criminal cases, or the judges' designee, to appoint counsel for indigent defendants; (2) apply to each appointment of counsel; and (3) ensure that each indigent defendant who is charged with a misdemeanor punishable by confinement and who appears in court without counsel has an opportunity to confer with appointed counsel before the commencement of judicial proceedings. *Id.* at art. 26.04(b)(1)-(3).

Under the FDA, the countywide procedures also must "include procedures and financial standards for determining whether a defendant is indigent." *Id.* at art. 26.04(*l*). These procedures and standards must "apply to each defendant in the county equally, regardless of whether the defendant is in custody or has been released on bail." *Id.* By adding requirements for standards to determine indigency, the FDA sought to overcome

highly subjective determinations of indigency by courts and court coordinators, including routine denial of counsel to defendants able to make bond.[14]

The judges of the Williamson County courts adopted procedures for appointment of indigent defense counsel under Article 26.04(a)—the Joint Felony and Misdemeanor Court Rules—with an effective date of January 1, 2002.[15] These rules were in effect at the time Petitioners' filed their Original Petition. The Williamson County rules address magistrate procedures, indigency standards, and appointment of counsel for indigent defendants in misdemeanor cases.[16] The procedures control each appointment of counsel made in Williamson County, including appointments by visiting judges.[17]

Additionally, the FDA established a statewide agency, the Task Force on Indigent Defense, to develop policies and standards for indigent defense, to develop a plan for statewide reporting requirements for counties relating to reporting indigent defense information, and to administer state grants. TEX. GOV'T CODE §§ 71.051, 71.060–71.062(a). The Task Force has a mandate to provide technical support to "assist counties in improving their indigent defense systems" and to "promote compliance by the counties with the requirements of state law relating to indigent defense . . . ." *Id.* at § 71.062(a)(1)(A), (B). The FDA also created a reporting system for collection of local

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[14] *See* The Equal Justice Center & Texas Appleseed, *Texas Fair Defense Act Implementation—Report No. 1—Quality of Initial County Plans Governing Indigent Defense in Adult Criminal Cases* 13 (Mar. 2002), *available at* http://www.texasappleseed.net/pdf/projects_fairDefense_2002imp.pdf.

[15] Report of Williamson County, Texas Concerning Indigent Defense Joint Felony and Misdemeanor Court Rules (Jan. 1, 2002), *available at* http://tfid.tamu.edu/CountyDocuments/Williamson/2002%20Williamson%20Plan.pdf.

[16] *Id.*

[17] *Id.*

county data on indigent defense practices and spending. The Task Force must "use the information reported by a county to monitor the effectiveness of the county's indigent defense policies, standards, and procedures, and to ensure compliance by the county with the requirements of state law relating to indigent defense." *Id.* at § 71.061(a). Under the FDA, the state contributes to the funding of indigent defense at the county level through a Task Force-administered state grant program. The Task Force is required to "direct the comptroller to distribute [grant] funds . . . based on the county's compliance with standards developed by the task force and the county's demonstrated commitment to compliance with the requirements of state law relating to indigent defense." *Id.* at § 71.062(b). In Fiscal Year 2010, the Task Force awarded $28 million in grants to counties, offsetting approximately 14.4% of statewide indigent defense expenditures totaling $194.5 million.[18]

2. Indigent misdemeanor defendants continue to be denied their right to appointment of counsel in some Texas counties.

A recent survey of indigent defense in misdemeanor courts throughout the United States revealed that many courts "are incapable" of providing accused individuals with the due process guaranteed by the Constitution.[19] "Whether because of a desire to move cases through the court system, a desire to keep indigent defense costs down, or

[18] Texas Task Force on Indigent Defense, *2010 Annual and Expenditure Report* 32 (2010), *available at* http://www.courts.state.tx.us/tfid/pdf/FY10AnnualReportTFID.pdf.

[19] National Ass'n of Criminal Defense Lawyers, *Minor Crimes, Massive Waste The Terrible Toll of America's Broken Misdemeanor Crimes* 7 (Apr. 2009), *available at* http://www.nacdl.org.public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf (hereinafter "*Minor Crimes, Massive Waste*").

ignorance, pervasive and serious problems exist in misdemeanor courts across the country because counsel is oftentimes either not provided, or provided late, to those who are lawfully eligible to be represented."[20] As to Texas, the survey notes, "'Three quarters of Texas counties appoint counsel in fewer than 20 percent of jailable misdemeanor cases . . . . The vast majority of jailable misdemeanor cases in Texas are resolved by uncounseled guilty pleas.'"[21] In one example from a Texas county,

> [C]ourt staff directed misdemeanor defendants to confer with the prosecutor about a possible plea before the defendants had a meaningful opportunity to request the appointment of counsel. . . . [Prosecutors] called a defendant's name and then negotiated a plea directly with the defendant. . . . Only in some of the cases where the plea involved a jail sentence did the prosecutor inform the defendant that he or she must sign up for a court-appointed lawyer.[22]

Practices in the Williamson County county courts at law evidence similar and continuing difficulties and deficiencies with appointment of counsel to indigent defendants charged with misdemeanors. Petitioners filed their lawsuit to remedy systemic deficiencies in practices in Williamson County courts and seek relief from procedures that violate their rights under the United States and Texas Constitutions, and the FDA.

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[20] The Constitution Project, *Justice Denied America's Continuing Neglect of Our Constitutional Right to Counsel, Report of the National Right to Counsel Committee* 85 (Apr. 2009), *available at* http://www.nlada.org/DMS/Documents/1239831988.5/Justice%20Denied_%20Right%20to%20Counsel%20Report.pdf.

[21] *Minor Crimes, Massive Waste*, at 15 (quoting Fair Defense Campaign, http://www.fairdefense.org/about.php (last visited Mar. 16, 2009)).

[22] *Id.* at 16.

C. A prospective class action suit in Texas state court, under 42 U.S.C. § 1983, is appropriate to challenge systemic deficiencies.

A cause of action under 42 U.S.C. § 1983 provides a remedy for plaintiffs seeking relief for violations of their federal constitutional rights against defendants acting under color of state law.[23] Section 1983 does not create substantive rights, but rather serves as a means for plaintiffs to assert their constitutional rights.[24] Although § 1983 suits involve questions of federal law, state courts serve as proper forums for such suits.[25] In fact, because, under the *Younger* abstention doctrine, federal courts often decline to exercise their jurisdiction in § 1983 cases involving violations of the pretrial rights of criminal defendants, state courts have become the preferable forum for such cases.[26]

Accordingly, Petitioners' claim for prospective equitable relief from Williamson County's systemic deprivation of their Sixth Amendment rights is appropriately brought as a § 1983 class action. Indeed, courts in numerous other jurisdictions have recognized the viability of similar § 1983 claims. Other remedies are inadequate because they would cause Petitioners, and others in their proposed class, irreparable harm.

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[23] 42 U.S.C. § 1983; *see* 1 STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS § 1:1 (2010).

[24] *Id.*

[25] *See generally* 1 STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE Courts § 1:1 (2010).

[26] In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court provided the foundation for what became known as the *Younger* abstention doctrine. Generally, under the doctrine, a federal court refrains from hearing constitutional challenges to state action when doing so would intrude on the state's right to enforce its own laws in its own courts. 17B CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 4251 (2007). The doctrine addresses federalism concerns to "prevent federal courts from presuming that state courts are unable or unwilling to perform their duty." 1 STEVEN H. STEINGLASS, SECTION 1983 LITIGATION IN STATE COURTS § 6:11 (2010). No federalism concerns exist in this case because Petitioners have sued in state court.

1. Courts in other jurisdictions have upheld prospective § 1983 actions for systemic Sixth Amendment violations.

Federal and state courts across the country have concluded that plaintiffs asserting Sixth Amendment violations, individually or on behalf of a class of pre-conviction criminal defendants, have stated a cognizable claim for prospective injunctive and declaratory relief under § 1983. Federal courts within the Second,[27] Sixth,[28] Ninth[29] and Eleventh[30] Circuits have considered this issue and concluded that a § 1983 claim may address systemic failures of the indigent defense system. For example, in *Luckey v. Harris*, a class of indigent persons who were charged with criminal offenses asserted Sixth Amendment claims under § 1983 seeking reforms in the indigent defense system in Fulton County, Georgia.[31] The Eleventh Circuit concluded that plaintiffs' allegations, including systematic delays in appointment of counsel, stated a claim under § 1983 upon which prospective equitable relief could be granted.[32] Although the case was ultimately dismissed under the *Younger* abstention doctrine,[33] the Eleventh Circuit's holding that plaintiffs stated a valid claim remains undisturbed by the abstention analysis and serves

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[27] *Wallace v. Kern*, 392 F. Supp. 834, 835, 848-50 (E.D.N.Y 1973) *rev'd on abstention grounds*, 481 F.2d 621 (2d Cir. 1973).

[28] *Johnson v. Zurz*, 596 F. Supp. 39, 46 (N.D. Ohio 1984).

[29] *Trombley v. Cnty. of Cascade*, No. CV-87-114-AF, 1989 WL 79848, at *1 (9th Cir. July 12, 1989).

[30] *Luckey v. Harris*, 860 F.2d 1012, 1018 (11th Cir. 1988); *Tucker v. City of Montgomery Bd. of Comm'rs*, 410 F. Supp. 494, 505 (M.D. Ala. 1976).

[31] *Luckey*, 860 F.2d at 1013.

[32] *Id.* at 1018.

[33] *Luckey v. Miller*, 976 F.2d 673, 679 (11th Cir. 1992).

as a guide to state courts faced with the same issue. Similarly, in *Tucker v. City of Montgomery Board of Commissioners*, plaintiffs representing a class of indigent defendants against whom state criminal charges were pending sought prospective relief under § 1983 to enjoin a state-court judge from following practices that violated the defendants' right to counsel.[34] The federal district court granted the injunction, holding that the defendants' Sixth Amendment rights had been violated.[35]

State courts in Arizona,[36] Connecticut,[37] Massachusetts,[38] Mississippi,[39] Montana,[40] New York,[41] Pennsylvania[42] and Washington[43] have similarly held that a suit seeking prospective equitable relief to remedy systemic Sixth Amendment violations states a cognizable claim. Moreover, these cases also include class actions in which state

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[34] *Tucker*, 410 F. Supp. at 499, 505.

[35] *Id.* at 505.

[36] *Zarabia v. Bradshaw*, 912 P.2d 5, 8-9 (Ariz. 1996).

[37] *Rivera v. Rowland*, No. CV 650545629S, 1996 WL 636475, at *7 (Conn. Super. Ct. Oct. 23, 1996).

[38] *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895, 907 (Mass. 2004).

[39] *Mississippi v. Quitman Cnty.*, 807 So.2d 401, 410 (Miss. 2001).

[40] *White v. Martz*, CDV-2002-133, at 8 (Montana First Judicial District Court, July 24, 2002). (Appendix Tab A).

[41] *Hurrell-Harring v. State*, 930 N.E.2d 217, 227-28 (N.Y. 2010); *N.Y. Cnty. Lawyers' Ass'n v.Pataki*, 727 N.Y.S. 2d 851, 860 (N.Y. App. Term 2001).

[42] *Doyle v. Allegheny Cnty. Salary Bd.*, No. GD96-13606 (Pa. Ct. Common Pleas Mar. 19, 1998), *available at* University of Michigan Law School, The Civil Rights Litigation Clearinghouse, http://www.clearinghouse.net/chDocs/public/PD-PA-0001-0007.pdf; *Doyle v. Allegheny Salary Bd.*, No. GD96-1306 (Pa. Ct. Common Pleas Nov. 21, 1997). (Appendix Tab B).

[43] *Best v. Grant Cnty.*, No. 042-001890, at 9 (Wash. Sup. Ct. Aug. 26, 2004), *available at* University of Michigan Law School, The Civil Rights Litigation Clearinghouse, http://www.clearinghouse.net/chDocs/public/PD-WA-0001-0002.pdf. (Appendix Tab C).

courts have denied defendants' motions to dismiss or for summary judgment, and consequently certified the putative class seeking prospective equitable relief pursuant to a § 1983 action.[44] Most recently, the New York Court of Appeals reversed the dismissal of a class action complaint brought on behalf of indigent criminal defendants who alleged systemic Sixth Amendment violations, including "allegations that in numerous cases representational denials are premised on subjective and highly variable notions of indigency . . . ."[45] As these state-court decisions demonstrate, courts across the country allow plaintiffs to maintain § 1983 actions in pursuit of prospective equitable relief to remedy the unconstitutional denial of counsel.

These authorities speak directly to the case at hand. According to the above line of cases, prospective systemic relief is appropriate as the unconstitutional denial of counsel presents a "likelihood of substantial and immediate irreparable injury" and no other remedies are adequate.[46] Based on the foregoing, Petitioners must be able to pursue a § 1983 class action to prospectively rectify a systemic denial of the right to counsel in Williamson County.

2. Other remedies seeking to protect indigent criminal defendants' rights to counsel are inadequate because the defendants will suffer irreparable harm.

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[44] *See id.* at 12 (certifying a class of plaintiffs asserting claims for prospective relief from Sixth Amendment violations in Washington state court); *Rivera*, 1996 WL 636475, at *7 (Conn. Super. Ct. 1996)(holding that class plaintiffs' Sixth Amendment claims for systemic equitable relief pursuant to § 1983 were sufficient to survive defendants' motion to dismiss).

[45] *Hurrell-Harring*, 930 N.E.2d at 224.

[46] *Luckey*, 860 F.2d at 1017 (citing *O'Shea v. Littleton,* 414 U.S. 488, 502 (1974)); *see also Lavallee*, 812 N.E.2d at 903–05.

Petitioners' § 1983 action for prospective relief is appropriate because the denial of counsel precipitates irreparable harm and remedies at law other than a claim seeking prospective relief are inadequate. Indigent criminal defendants are irreparably harmed when judges deny the defendants' requests for counsel and force them to navigate the criminal justice system without legal advice.[47] As one court recently stated, the harm that a class of criminal defendants who are denied the right to counsel suffer "cannot be remedied in the normal course of trial and appeal because an essential component of the 'normal course,' the assistance of counsel, is precisely what is missing here."[48] Accordingly, post-conviction relief, such as an appeal, cannot provide adequate and appropriate relief. A prospective claim under § 1983 can.

Indeed, all stages of criminal proceedings are fraught with traps for the involuntary *pro se* defendant who may unwittingly injure his or her chances in court. Unless preempted by prospective relief, the *pro se* defendant's only hope is to successfully navigate the appeals process to vindicate his or her right to counsel. However, "[n]avigating the appellate process without a lawyer's assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals . . . who have

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[47] *See Best*, No. 042-001890, at 7-8 (stating that plaintiff's allegation "that he is facing criminal prosecution without an effective lawyer at his side certainly raises the prospect of serious and immediate injury or threatened injury. . . . Harm is not limited to locking innocent people up. The accused is prejudiced if he or she is forced to plead guilty rather than run the risk of going to trial without competent counsel. . . or when the accused must evaluate the pros and cons of a plea offer without competent counsel to explain the plea and its consequences . . . .").

[48] *Lavallee*, 812 N.E.2d at 907.

little education, learning disabilities, and mental impairments."[49] The "perilous endeavor" of post-conviction appeal is not an adequate remedy for the systemic deficiencies that Petitioners allege.

In sum, prospective equitable relief should be utilized to remedy a systemic denial of counsel. Because other remedies do not prevent this violation of the right to counsel, they are inadequate.

CONCLUSION

Accordingly, Texas Appleseed urges the Court to grant the Petitioners' Petition for Review and allow their claims to proceed in Williamson County district court.

Respectfully submitted,

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[49] *Halbert v. Michigan*, 545 U.S. 605, 621 (2005).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 28, 2011, a true and correct copy of the foregoing Brief of *Amicus Curiae* Texas Appleseed in Support of Petitioners was served on the following counsel of record by USPS, first class mail:

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/s/ Jessie A. Amos
Jessie A. Amos

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APPENDIX

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A

White v. Martz
CDV-2002-133
(Montana First Judicial District Court, July 24, 2002)

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MONTANA FIRST JUDICIAL DISTRICT COURT

COUNTY OF LEWIS AND CLARK

LARRY WHITE, CANDACE BERGMAN, DAVID CHASE, MICHAEL SHIELDS, KENNETH SELLARS, CAROL HOMEGUN, MICKEY McDONOUGH, KENNETH INGRAHAM, WINCHESTER WISEMAN, MICHELLE FORD, ROBERT ARMSTRONG, GARY ACKERMANN, DANIEL FINLEY, CHRIS KOWITZ, and JUSTIN CLONINGER, Plaintiffs, vs. 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;	Cause No. CDV-2002-133 **MEMORANDUM AND ORDER ON MOTIONS TO DISMISS**

MISSOULA COUNTY COMMISSIONERS BARBARA EVANS, BILL CAREY, and JEAN CURTISS;

GLACIER COUNTY COMMISSIONERS ALLAN LOWRY, WILLIAM ICENOGGLE, and RAYMOND SALOIS;

TETON COUNTY COMMSSIONERS 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.

* * * * * * * * * * * * * * * * * * *

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 46-8-101 (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 costs.

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*** **Buttrell 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 contrast, 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 **Luckey** 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, ____ P.3d ____, ¶ 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.3rd 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. Lehrirondale**, 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

Plaintiffs have "'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues'". Olson v. Dep't of Revenue, 223 Mont. 464, 469, 726 P.2d 1162, 1166 (1986) (quoting Baker v. Carr, 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7 L. Ed. 2d 663, 678 (1962)). The Court concludes that Plaintiffs' complaint satisfies this requirement and, therefore, Plaintiffs have standing to assert violations of Sections 46-8-201 and -202, MCA.

V.

Missoula County's Motion to Dismiss

The above analysis is equally applicable to Count IV of the complaint regarding the Missoula County public defenders' office. As a result, the motion should be denied.

NOW, THEREFORE IT IS ORDERED:

1. Defendants' motions to dismiss ARE DENIED.

2. Defendants SHALL HAVE 20 days within which to file their answers.

3. A scheduling conference WILL BE HELD on Friday, the 30th day of August, 2002, at 1:30 p.m.

DATED this 24th day of July, 2002.

Thomas C. Honzel
District Court Judge

pc: Ronald F. Waterman
Mike McGrath/Brian M. Morris
Molly Maffei
Fred Van Valkenburg/Mike Sehnstedt
Larry D. Epstein
Joe Cobla
Thomas J. Esch/Jonathan B. Smith
Robert J. Long
George H. Corn

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Doyle v. Allegheny Cnty. Salary Bd.,
No. GD-96-13606
(Pa. Ct. Common Pleas Mar. 19, 1998)

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

Thomas Doyle, R. W., S. K., David Holmes, Jake Wesley and Eugene Charles,

Plaintiffs,

vs.

Allegheny County Salary Board, County Commissioners Lawrence Dunn, Bob Cranmer, and Michael Dawida and Chief Public Defender Kevin Sasinoski and Allegheny County,

Defendants.

Civil Division
Class Action

GD96-13606

ORDER OF COURT

AND NOW, this 19th day of March, 1998, upon consideration of Defendants' Motion for Summary Judgment, the briefs submitted by the parties and argument thereon, it is hereby ORDERED, ADJUDGED and DECREED that Defendants' Motion for Summary Judgment is denied.

BY THE COURT:

Robert C. Gigan

FILE COPY

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

THOMAS DOYLE, R.W., S. K., DAVID HOLMES, JAKE WESLEY, and EUGENE CHARLES,

Plaintiffs,

v.

ALLEGHENY COUNTY SALARY BOARD, COUNTY COMMISSIONERS LAWRENCE DUNN, BOB CRANMER, and MICHAEL DAWIDA, CHIEF PUBLIC DEFENDER KEVIN SASINOSKI, and ALLEGHENY COUNTY,

Defendants.

Civil Division
Case No. GD-96-13606
Code No. 011

THIRD AMENDED CLASS ACTION COMPLAINT

I. INTRODUCTION

1. This civil rights class action is to remedy profound defects in the Allegheny County Public Defender program that undermine rights guaranteed to indigent criminal defendants and those who are the subject of involuntary civil commitment proceedings by the Sixth and Fourteenth Amendments to the United States Constitution and other provisions of federal and state law. As detailed in this Complaint, overwhelming caseloads, severe understaffing, inadequate resources, defective policies and procedures, inferior physical facilities and other long-standing systemic problems prevent persons who are entitled to representation by

the Public Defender's Office from receiving constitutionally and statutorily adequate assistance of counsel, or, at the very least, place them at serious and imminent risk of such a deprivations. Because of the above deficiencies, Allegheny County's public defenders, despite their dedication and commitment, frequently are unable to engage in even the most basic functions of representation, such as conferring with clients in a meaningful manner prior to critical stages of their criminal or mental health proceedings, reviewing client files; assisting in the securing of witnesses, conducting pre-trial investigations and preparing for hearings and trials.

2. Pursuant to 42 U.S.C. §1983, the Pennsylvania Constitution, the Commonwealth's Public Defender Act and various other provisions of state statutory law, plaintiffs, on behalf of themselves and all those similarly situated, seek injunctive and declaratory relief to correct the historic deficiencies that have deprived members of the plaintiff class of their right to legal representation - deficiencies that were only exacerbated when, in February 1996, Defendants cut the budget of the Public Defender program by 27.5%.

II. PARTIES

A. Named Plaintiffs

Thomas Doyle

3. Plaintiff Thomas Doyle is a client of the Allegheny County Public Defender system. In one matter, he was charged with forgery, theft, receiving stolen property and criminal conspiracy and, in another matter, escape from house arrest. Since June 12, 1996, he has been incarcerated at the Allegheny County Jail. Because of a general lack of resources, including attorney staff and investigators, the Public Defender's Office is not providing him with effective

assistance of counsel, in violation of his constitutional and statutory rights. Although almost four months have passed since his arrest, the Office has yet to initiate an investigation into any of the charges against him. In addition, his public defenders are not conferring with him in a meaningful manner.

4. Mr. Doyle was represented by three different public defenders in connection with his theft charge. He met with each attorney once, immediately prior to a court appearance, and talked to each for no longer than a few minutes. This matter is listed for trial on November 11, 1996. The co-defendant, whose confession to the police was responsible for Mr. Doyle's prosecution, has already plead guilty and received three years probation. The co-defendant has also been consistently represented by the Public Defender. Despite a clear conflict of interest between the two co-defendants, there has been no effort to obtain other counsel for Mr. Doyle because there exists no system by which the Public Defenders are informed in a timely manner and/or given the resources with which to investigate whether a conflict exists between co-defendants in order to withdraw their representation appropriately.

5. Although he was informed in July that he had been appointed yet another public defender for the escape charge and that it is scheduled for trial in November, Mr. Doyle has yet to meet this attorney.

R.W.

6. Plaintiff R.W. has been a client of the Allegheny County Public Defender system several times during the last twelve years. He suffers from a mental illness and is homeless. To protect his privacy, Mr. W. appears in this litigation under a pseudonym.

7. Since 1984, Mr. W. has been involuntarily committed to state psychiatric institutions at least six times. On each occasion, he was represented by a public defender. On each occasion, systemic deficiencies prevented the Public Defender system from providing him with the legal representation to which he was constitutionally and statutorily entitled. Attorneys did not meet and confer with him in a meaningful manner, investigate the charges against him, utilize expert witnesses or advocate zealously on his behalf.

8. Mr. W. was most recently committed to a psychiatric institution in April 1996. In connection with this commitment, he had three hearings and was represented at each hearing by a different public defender. He met each attorney for the first time a few minutes prior to the hearings and told each one that he did not want to be committed. None of the public defenders, however, had him evaluated by an independent psychiatrist. On information and belief, none of the public defenders advocated aggressively on Mr. W.'s behalf, and each hearing lasted between five and ten minutes. Mr. W.'s current psychiatrist confirms that Mr. W. should not have been committed and, instead, should been referred to a community placement.

9. Because of the recurring nature of Mr. W.'s mental illness and his homelessness, Mr. W. is likely to be the subject of involuntarily commitment proceedings in the future and again will have to rely on the Public Defender system for legal representation. Because of the long-standing nature of the Public Defender program's lack of resources and systemic deficiencies, he will again be deprived of effective assistance of counsel or subject to the real and immediate threat of such an injury.

S.K.

10. Plaintiff S.K. is currently a client of the Allegheny County Public Defender system. Because she was under the age of 18 when she was arrested, she appears in this litigation with a pseudonym to protect her privacy. Due to a lack of resources and personnel, the Public Defender's Office is not providing her with the effective legal representation to which she is constitutionally and statutorily entitled. Although she has had several court appearances, her public defenders have not met and conferred with her in a meaningful manner. On information and belief, they have not initiated an appropriate investigation into her case and they have been unable to utilize necessary and appropriate expert witness assistance.

11. On July 5, 1996, Ms. K., a high school senior with a part-time job, was arrested, charged with disorderly conduct, possession of an illegal substance and possession with intent to deliver, and detained although she was statutorily entitled to a delinquency hearing within 10 days of her arrest, she was not provided and one and no one form the Public Defender's Office objected.

12. She remained in detention until at which time she was released on electronic home monitoring. She has had four court appearances since her arrest and three different public defenders. She met each public defender for the first time immediately prior to an appearance and spoke with him or her for only a few minutes each.

13. At the second court appearance, the prosecution declared that it would seek to prosecute Ms. K. as an adult with respect to the drug charges and obtained permission to have Ms. K. evaluated by a psychiatrist to prove that Ms. K. was incapable of being rehabilitated by the juvenile justice system. At the third court appearance, Ms. K.'s then-public defender let it be

known that the Public Defender's Office did not have the funds to hire its own independent expert to counter the prosecution's expert witness.

14. Ms. K. has yet to explain fully to any public defender her version of the events that led to her arrest, why she is innocent of the drug charges against her, and why she should be permitted to complete high school and continue to work at her part-time job.

David Holmes

15. Plaintiff David Holmes is a client of the Allegheny County Public Defender's Office. Because of a general lack of resources, including attorney staff and investigators, and deficient office practices and policies, the Public Defender's Office is not providing him with effective assistance of counsel, in violation of his constitutional and statutory rights. As a result of the Public Defender's negligence and other deficiencies, Mr. Holmes was unnecessarily incarcerated for more than two months in the Allegheny County Jail.

16. On January 18, 1996, Mr. Holmes was charged with driving while under the influence of alcohol ("DUI") and another motor vehicle code violation. On January 19, he was released after posting bail. At a February 21 preliminary hearing, Mr. Holmes was represented by an attorney from the Public Defender's Office, an attorney he met only immediately prior to the hearing and with whom he spoke for just a few minutes. At the hearing, the motor vehicle code violation was withdrawn, and the DUI charge was held for court with a recommendation that Mr. Holmes be allowed to enter a pre-trial diversionary program. A formal arraignment was scheduled for April 3, 1996.

17. On March 22, Mr. Holmes, who had subsequently returned to his home in eastern Ohio, suffered an injury that made it impossible for him to appear at the April 3 hearing in

Allegheny County. To determine whether the hearing could be postponed, Mr. Holmes called the Public Defender's Office and advised the individual who answered his call of his medical condition. She asked him some further questions and then assured him that the Office would obtain a postponement of the hearing.

18. At the end of April, Mr. Holmes called the Public Defender's Office to find out whether he had a new hearing date. He was told that a new date had not yet been selected but that the Public Defender's Office would contact him once the hearing had been rescheduled. He was further asked to send copies of his medical records to the Public Defender's Office, which he subsequently did by registered mail. During the next several months, Mr. Holmes called the Public Defender's Office several times and was repeatedly told that the court had yet to reschedule his hearing.

19. On July 25, Mr. Holmes was arrested by the police in Akron, Ohio, on the basis of a warrant issued by the Allegheny County Court of Common Pleas for failure to appear at the April 3 hearing. He was released on his own recognizance to attend to medical problems and asked to return to the Ohio court on September 4, 1996, by which time the Ohio court hoped to be able to inform him of how Allegheny County wished to proceed. When Mr. Holmes appeared in the Ohio court on September 4, he was told that Allegheny County had not yet contacted the court and was asked to return on October 4. When he returned on October 4, he was taken into custody and on October 15, was transferred to the Allegheny County Jail where he remained incarcerated until December 24, 1996.

20. Between October 16 and December 24, no one from the Public Defender's Office visited Mr. Holmes to learn about his predicament. The Office was unresponsive to written and

telephonic entreaties for help from both Mr. Holmes and his wife. Mr. Holmes and his wife advised whomever they could contact at the Public Defender's Office that Mr. Holmes' incarceration was the result of an error by the Public Defender's Office, but no action was taken. At a November 22 pre-trial hearing, no one from the Public Defender's Office spoke to Mr. Holmes about his case. Finally, on December 24, 1996, Mr. Holmes' family was able to pay bail and he was released from custody.

21. Mr. Holmes is scheduled for trial on or about February 4, 1997. To this date, no one from the Public Defender's Office has contacted Mr. Holmes about his case.

Jake Wesley

22. Plaintiff Jake Wesley is a client of the Allegheny County Public Defender system. Because of a general lack of resources, including attorney staff and investigators, and deficient office practices and policies, the Public Defender's Office is not providing him with effective assistance of counsel, in violation of his constitutional and statutory rights. Mr. Wesley is currently on Death Row and although he is represented by the Public Defender's Office for purposes of his direct appeal, he has yet to met with a public defender to discuss his appeal.

23. In early 1995, Mr. Wesley was found guilty of first degree murder and sentenced to death. At trial and during the sentencing phase of his proceeding, he was represented by the Public Defender's Office. His trial public defender met with him briefly on only three occasions. Despite the serious and complex nature of the charges against Mr. Wesley, this attorney permitted nearly eight months to lapse between his first and second meetings with Mr. Wesley. On information and belief, this same attorney failed to contact any of Mr. Wesley's alibi.

witnesses, to investigate adequately the charges against Mr. Wesley, and to procure the services of the experts needed to mount an adequate defense.

24. During the sentencing phase, Mr. Wesley was represented by a different attorney from the Public Defender's Office. On information and belief, this attorney was assigned to Mr. Wesley's case one week before the sentencing hearing, was unable to prepare properly, and was not provided with the resources necessary to engage appropriate mitigation expert witnesses. Moreover, she had no prior experience in death penalty litigation.

25. For purposes of his appeal and pursuant to the Capital Unitary Review Act, 42 Pa. Cons. Stat. §9571, Mr. Wesley is currently represented by two separate attorneys. A court-appointed attorney is representing Mr. Wesley on his collateral appeal and the Public Defender's Office is representing him on his direct appeal. On information and belief, Mr. Wesley has had no contact with any public defender since his trial.

Eugene Charles

26. Plaintiff Eugene Charles is a client of the Allegheny County Public Defender's Office. Although only 17 years old when arrested, Mr. Charles is now being prosecuted as an adult. Because of a general lack of resources, including attorney staff, and deficient office practices and policies, the Public Defender's Office is not providing him with effective assistance of counsel, in violation of his constitutional and statutory rights. His public defenders are not conferring with him in a meaningful manner prior to critical phases of his criminal proceeding or investigating the charges brought against him.

27. In mid-October 1996, Mr. Charles was arrested in connection with the robbery of a beer distributor and charged with robbery, possession of instruments of a crime and criminal conspiracy. He has been detained at the Allegheny County Jail since his arrest.

28. Mr. Charles' first contact with the Public Defender's Office was on October 23, 1996, the date of his preliminary hearing. Immediately prior to that hearing, the public defender who was to represent him entered the holding room in which Mr. Charles and at least three other juveniles were waiting for their court appearances. Although the public defender spoke to one of the juveniles for a few minutes, he did not speak with Mr. Charles other than to ask him whether he wished to be prosecuted as a juvenile or an adult.

29. Mr. Charles' next contact with the Public Defender's Office was on December 12, 1996, at a hearing held to determine whether he should be prosecuted as an adult. At that hearing, Mr. Charles was represented by a second public defender who not only failed to met with Mr. Charles prior to the hearing, but neglected to introduce himself to Mr. Charles at the hearing. On information and belief, Mr. Charles' public defender did not investigate the charges

against Mr. Charles, had little or no contact with witnesses or family members who could have testified on Mr. Charles' behalf and did not seek the assistance of experts. The Judge ultimately decided to permit Mr. Charles to be prosecuted as an adult.

30. Although Mr. Charles is currently scheduled to go to trial on April 8, 1997, he has had no contact with the Public Defender's Office since his December 12 hearing.

B. Defendants

31. Pursuant to 16 Pa. Cons. Stat. §§1620 and 1622-23, defendant Allegheny County Salary Board is the county entity responsible for determining the number and compensation of attorneys and support personnel working for Allegheny County's Public Defender program. By statute, it is composed of the three County Commissioners, the County Controller and the Chief Public Defender. Its current members are County Commissioners Lawrence Dunn, Bob Cranmer and Michael Dawida, County Controller Frank Lucchino, and Chief Public Defender Kevin Sasinoski. Although the Board has long known of the Public Defender program's systemic deficiencies and inability comply with its constitutional and statutory mandates, it has failed and refused to provide the Public Defender program with the number and type of employees it needs to fulfill its duties.

32. Defendants Lawrence Dunn, Bob Cranmer and Michael Dawida are Allegheny County Commissioners, and as stated above, members of the Salary Board. As members of the Salary Board, they are responsible for the number and compensation of employees working for the Public Defender system. Pursuant to the Commonwealth's Public Defender Act, 16 Pa. Cons. Stat. §§9960.1-13, they are responsible for the appointment of Allegheny County's Public

Defender and the implementation of the Public Defender Act within Allegheny County. Pursuant to 42 Pa. Cons. Stat. §3721, they are also responsible for the maintenance of offices, supporting facilities and services for public defenders at the county courthouse. They and their predecessors-in-office have known of the Public Defender program's inability to provide adequate representation to its clients and have failed and refused to rectify the systemic deficiencies responsible for this inability. Most recently, they cut the program's budget by 27.5%, exacerbating existing problems. They are sued in their official capacities.

33. Defendant Kevin Sasinoski is the Chief Public Defender. As a member of the Salary Board and pursuant to the Commonwealth's Public Defender Act, 16 Pa. Cons. Stat. §§9960.1-13, he is responsible for ensuring, among other things, that a sufficient number of attorneys and support personnel are employed by the Public Defender program to enable him to carry out the duties of his office. Pursuant to the Public Defender Act, he is also responsible for ensuring that persons who are eligible for public defender services receive the legal representation to which they are constitutionally and statutorily entitled. He and his predecessors-in-office have known of the Office's inability to provide effective assistance of counsel to its clients. Because of, among other things, the actions and inactions of the other Defendants in this action, he and his predecessors-in-office have failed to remedy the systemic defects responsible for this inability. He is sued in his official capacity.

34. Pursuant to 16 Pa. Cons. Stat. §9960.3, defendant Allegheny County is required to establish and maintain a public defender system within its boarders. Pursuant to the Sixth Amendment to the United States Constitution and other provisions of federal and state law, that system is required to provide its clients with adequate legal representation in connection with

their criminal, delinquency and involuntary mental health commitment proceedings. Although the County, through its officers, administrators, commissioners, agents and employees, has long known of the Public Defender program's systemic deficiencies, the County has failed and refused to take those steps necessary to ensure that the program complies with its constitutional and statutory mandates.

35. Hereinafter, the County Salary Board, the three County Commissioners, the Chief Public Defender and Allegheny County shall be referred to collectively as "Defendants."

III. CLASS ACTION ALLEGATIONS

36. Pursuant to 42 Pa. Cons. Stat. §§1701-16, the Named Plaintiffs bring this suit on behalf of themselves and all others similarly situated who are or will in the future be adversely affected by the unlawful and unconstitutional practices of the Public Defender's Office in Allegheny County and who seek equitable relief from Defendants' failure to ensure that the Allegheny County Public Defender system provides constitutionally adequate assistance of counsel to all those individuals eligible for and entitled to its services.

37. The class that the Named Plaintiffs seek to represent is composed of all persons who are or will be entitled to public defender services, including those who have been or will be refused public defender services because of the unlawful manner in which the Allegheny County Public Defender system determines eligibility for such services.

38. The prerequisites for class certification are satisfied in this case.

a. The class is so numerous that joinder of all members is impracticable. It is a fluid class that includes thousands of current and future Public Defender clients and persons who are or will be eligible for public defender services.

b. There are questions of law and fact common to the members of the plaintiff class, including, but not limited to, whether Allegheny County's Public Defender program has been and continues to be plagued by excessive caseloads, severe understaffing, inadequate resources, defective policies and procedures, and inferior physical facilities; whether these systemic deficiencies prevent the Public Defender program from providing effective assistance of counsel to its clients; and whether the failure to provide effective assistance of counsel violates rights secured to plaintiffs and members of the plaintiff class by the Sixth and Fourteenth Amendments to the United States Constitution, and state constitutional and statutory law.

c. The claims of the Named Plaintiffs are typical of the claims of the class in that the constitutional and statutory deprivations caused by Defendants and claimed by the class representatives are the same for all other members of the class and predominate over individual claims.

d. The Named Plaintiffs will fairly and adequately protect the interests of the class. They have no interests antagonistic to the class and are represented by attorneys experienced in complex civil rights litigation.

e. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual

members of the class which would establish incompatible standards of conduct for the parties opposing the class.

f. Because Defendants have consistently acted and refused to act on grounds generally applicable to the class, final declaratory and injunctive relief with respect to the class as a whole will be appropriate.

IV. FACTUAL ALLEGATIONS REGARDING THE SYSTEMIC DEFICIENCIES IN THE ALLEGHENY COUNTY'S PUBLIC DEFENDER SYSTEM

A. Allegheny County's Indigent Defense Scheme

39. In the wake of Gideon v. Wainwright, 372 U.S. 335 (1963), holding that indigent criminal defendants are constitutionally entitled to legal representation, a Public Defender's Office was established in Allegheny County. While the Office originally represented adults, the Commonwealth of Pennsylvania subsequently expanded its jurisdiction to include juveniles charged with delinquency and persons named as respondents in involuntary mental health commitment proceedings.

40. In accordance with its constitutional and statutory obligations, the Allegheny County Public Defender's Office has had broad responsibilities, representing clients at various stages in their criminal and mental health proceedings. More specifically, public defenders represent adult clients accused of criminal wrongdoing at preliminary hearings, pre-trial conferences, trials, post-conviction proceedings, and probation and parole revocation proceedings. Although such clients must also appear at preliminary and formal arraignments, they are not represented by counsel at these hearings.

41. The Public Defender's Office represents juvenile clients charged with delinquency at detention hearings, hearings adjudicating whether the juvenile should be tried as an adult pursuant to 42 Pa. Cons. Stat. §6322, trials and post-conviction proceedings. And, it represents mentally-ill adults and children who are the subject of involuntary commitment proceedings at hearings held in connection with such proceedings.

42. Pursuant to long-standing practice, the Office's attorneys were and continue to be designated and paid as part-time employees.

43. Prior to 1996, they were assigned to one or more of the following divisions with the Public Defender's Office: Preliminary Hearing, Pre-Trial, Trial, Homicide, Appeals and Post-Conviction Relief, Parole and Probation, Juvenile, and Mental Health.

44. Attorneys assigned to the Preliminary Hearing, Pre-Trial, Trial, Appeals and Post-Conviction and Parole and Probation Divisions represented the same adult criminal clients at different points in their proceedings. Under this horizontal system, Preliminary Hearing attorneys represented them at preliminary hearings. Attorneys in the Pre-Trial Division represented them after the preliminary hearings but prior to the pre-trial conferences for purposes of discovery and pre-trial motion practice. Attorneys in the Trial Division represented them from pre-trial conference to disposition. Attorneys in Appeals and Post-Conviction Division represented them in post-conviction proceedings, and those charged with parole and probation revocation violations were represented by attorneys in the Parole and Probation Division.

45. Pursuant to the same system, attorneys in the Homicide Division represented adults charged with homicide and capital crimes. Juveniles charged with delinquency were represented by public defenders in the Juvenile Division through disposition and by public

defenders in the Appeals and Post-Conviction Division in post-conviction proceedings. Attorneys assigned to the Mental Health Division represented adults and juveniles facing involuntary commitment to mental health facilities.

46. Each year, thousands of indigent persons have relied on the Public Defender's Office to represent them in criminal, juvenile delinquency and mental health proceedings. Despite the important consequences of such proceedings on the lives and liberties of these individuals, Allegheny County's Public Defender Office is, and historically has been, ill-equipped to deliver the legal representation to which its clients are constitutionally and statutorily entitled.

47. Inadequate facilities and resources, excessive caseloads, defective policies and procedures and other systemic problems engendered by years of Defendants' deliberate indifference have produced a program that functions without regard for, and in violation of, constitutional and statutory mandates, Pennsylvania's Rules of Professional Responsibility and accepted national standards for effective assistance of counsel, attorney workload, attorney training, and office resources. Such standards have been either promulgated or endorsed by, among other organizations, 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.

48. Despite the fact that many attorneys employed by the Public Defender's Office are conscientious, dedicated lawyers, systemic deficiencies within the Office have prevented these part-time lawyers from undertaking the following tasks in a meaningful and adequate manner: meeting and conferring with their clients prior to critical stages of their proceedings; reviewing

client files; conducting pre-trial investigations; researching relevant legal issues; appearing at pre-trial proceedings; pursuing pre-trial motions; obtaining transcripts of preliminary hearings; employing necessary and appropriate expert witnesses; seeking bond reductions; exploring pre-trial alternatives to incarceration; evaluating sentencing options; preparing for trial; prosecuting appeals and motions for post-conviction relief in the manner mandated by law; representing clients at probation and parole revocation hearings; and opposing involuntary mental health commitments.

49. In November 1995, The Spangenberg Group, a private consulting group specializing in the assessment of civil and criminal justice systems, conducted a study of Allegheny County's Public Defender system and prepared a Report that identified many of the deficiencies alleged in this Complaint. The Group found that the Office had fewer resources than virtually all comparable public defender offices elsewhere in the nation and that "the overall conditions of the office create a major impediment to providing quality representation to indigent defendants."

50. The Report made numerous recommendations for change. It suggested, among other things, that the expert budget of the Public Defender program be increased, public defender positions be made full-time, attorneys be provided with continuing legal education, office space be increased and written policies and procedures be promulgated.

51. Although Defendants received a copy of the Spangenberg Report, they failed to implement these recommendations and in February 1996, slashed the budget of the Public Defender's Office by 27.5%. Almost overnight, funding for the Public Defender system went from approximately $3.9 million to roughly $2.9 million.

52. The County Commissioners then brought in an Assistant County Solicitor to oversee the restructuring of the Office necessitated by the budget cuts. Because the County Solicitor's Office appears in opposition to the Public Defender's Office in some juvenile and all mental health proceedings, its involvement in the administration of the Public Defender's Office raised serious ethical questions.

53. The effects of the February 1996 budget cuts and the subsequent reorganization have been devastating. As of December 1995, the Allegheny County Public Defender system handled approximately 15,000 cases per year with a staff of 10 administrators and/or supervisors, 49 part-time public defenders and 27 support staff. The budget cuts resulted in the immediate dismissal of 15 of the attorneys, approximately 20% of the clerical staff, the complete social work staff, and the complete investigative staff. It also led to the dismantling of the Pre-Trial Division. During the ensuing months, Defendants encouraged additional public defender staff to leave under a program designed to reduce the local government payroll. Although some attorneys and support personnel were eventually rehired, as of June 1996, the Public Defender's Office had seven administrators and/or supervisors, 38 part-time attorneys and 20 full-time support staff.

54. As alleged in more detail below, each of the wrongs identified in paragraph 31 above now occurs with greater frequency, depriving even more members of the plaintiff class of their constitutional and statutory right to effective representation of counsel or placing them at even greater risk of such deprivation. Not only has the system had to operate with less staff and fewer resources, many public defenders have increased responsibilities as a result of the passage of recent legislation, including Act 33 (42 Pa. Cons. Stat. §6322), a bill which requires that

juveniles accused of certain types of crimes be tried as adults unless their legal representatives can convince the juvenile court otherwise.

B. Caseloads

55. For several years, national standards have recommended that public defender organizations be staffed with full-time attorneys to avoid conflicts between paying and non-paying clients, and to ensure that public defenders do not work full-time for part-time pay. They further recommend that full-time, non-supervisory public defenders should not be assigned more than 150 felonies per attorney per year; 400 misdemeanors per attorney per year; 200 juvenile cases per attorney per year, or 25 appeals per attorney per year. In fact, these standards, as well as the Rules of Professional Responsibility, advise defender organizations to refuse or take steps to reduce caseloads that are so excessive that they erode the attorneys' ability to provide adequate representation.

56. The caseloads of the part-time public defenders exceeded national minimums for full-time public defenders long before the February 1996 budget cuts. These caseloads so overwhelmed defenders that they had neither the time nor the resources to practice law in a manner consistent with constitutional and statutory mandates, the Rules of Professional Responsibility and national practice standards.

57. During the first six months of 1995, each of the part-time attorneys assigned to the Preliminary Hearing Division handled approximately 1,100 preliminary felony and misdemeanor hearings. The Trial Division conducted 3,498 felony or misdemeanor hearings. The four-person Homicide Division conducted 26 homicide trials, for an annualized rate of more than 13 trials per attorney. Attorneys in the Appeals and Post-Conviction Unit filed 192 appellate briefs, petitions

and other documents for an annualized rate of 64 per attorneys, and lawyers in the Juvenile Division conducted 2,964 hearings for an annualized rate of 1,186 hearings per attorney.

58. With the recent budget cuts, the resulting staff reductions and the elimination of the Pre-Trial Division, attorney caseloads, particularly in the Trial Division, have increased as lawyers have assumed the job responsibilities of their former colleagues. As lawyers have been transferred or laid off, many attorneys with already heavy caseloads have been asked to represent an additional 50 to 60 new clients.

59. As of April 1996, many attorneys in the Trial Division had between 75 and 100 open cases proceeding towards trial at any one point in time and were receiving 20 to 30 new cases every two weeks. On information and belief, some attorneys had a total of 40 jury trials, non-jury trials and pleas scheduled each month.

60. In June 1996, each Juvenile public defender had between 40 and 50 open matters proceeding towards trial at any one point in time. On information and belief, each attorney in the Post-Conviction and Appeals Division is currently expected to handle between 40 and 60 appeals and/or post-conviction relief cases per year. On information and belief, the six part-time attorneys assigned to the Mental Health Division are involved in approximately 7200 involuntary commitment proceedings per year.

61. Although many attorneys are aware that the size of their caseloads is preventing them from providing effective assistance of counsel to their clients, the Trial Division attorneys have been instructed that they cannot petition the court to withdraw from a case without receiving prior approval from senior administrators. Because permission is rarely granted, many attorneys have simply stopped asking.

C. Lack of Resources

62. State statutes, including 42 Pa. Cons. Stat. 3721, mandate and national standards recommend that Defendants provide indigent defender systems with adequate office space, furniture, equipment and the supplies and resources required for constitutionally and statutorily adequate representation, including a law library, funding for experts, clerical support staff and investigators. Defendants have long failed to make such resources available to Allegheny County's Public Defender system.

63. Office space has been and continues to be inadequate. The space cannot accommodate the number of attorneys who need to use the office and often affords no privacy for confidential interviews of clients and witnesses.

64. Library and legal research facilities are lacking. Public defenders in the Juvenile Division never have had access to a law library at their courthouse offices and can not research cases. Although attorneys in the Trial Division have had access to a library located over a mile from the courthouse, that library has no digests, case reporters or Shepard's Citations for lower federal courts. As a result, these attorneys have had no efficient means of locating relevant case law or of ensuring that case law has not been overturned. Although attorneys in the Post-Conviction and Appeals Division had access to a total of three hours of WESTLAW each month, the Office discontinued the service after the February 1996 budget cuts and did not reinstate it until July.

65. For many years, there have not been enough investigators to assist public defenders in investigating their cases so that they may properly prepare a defense. Prior to the February 1996 budget cuts, there were eight full-time "investigators," whose only responsibilities

were to interview clients in their office or at jail. Pursuant to the policy of the then-investigative chief, they were not to leave the office to seek out witnesses, serve subpoenas or visit crime scenes except in extraordinary circumstances. In February 1996, the entire full-time investigative staff was fired and, as of July 15, 1996, one investigator and five "interviewers" (one of whom is technically referred to as an investigator) had been hired in its place. The investigator only works on certain capital cases, egregious homicides and an occasional mental health case. On information and belief, he is not available to work on any other type of public defender case, including juvenile and post-conviction cases. The interviewers' primary responsibility is to determine whether those seeking public defender services are eligible for such services. Without investigators, public defenders frequently cannot conduct the type of factual investigation necessary to permit them to advocate effectively on their clients' behalf.

66. For many years, there have not been enough social workers to assist public defenders in exploring, preparing and proposing alternatives to incarceration or institutionalization on behalf of adult and juvenile clients. An effective social worker can help locate alternative placements for mentally-ill clients who do not require institutionalization. In addition, he or she may be able to help juvenile clients find needed social services programs or more appropriate placements. Although it typically costs law enforcement programs less to refer someone to a rehabilitation program than to incarcerate him, the only social worker employed by the agency was terminated in February 1996.

67. For many years, there have been no paralegals in the Public Defender's Office to assist public defenders in conducting legal research, marshaling the facts, drafting pleadings,

preparing for trial, or other essential functions. As of June 8, 1996, there was one legal assistant for the entire office.

68. For many years, there have not been enough clerical personnel to prepare motions and other documents for public defenders in a timely manner, or to transcribe the tape recordings of the preliminary hearings. As of June 1996, the 18 attorneys in the Trial Division shared one secretary, as did the four attorneys in the Juvenile Division.

69. For many years, Defendants have failed to provide the Public Defender program with the funds necessary to engage expert witnesses or to procure psychiatric evaluations and scientific tests that are needed to represent clients adequately. Despite the enormous size of the agency's client base and the extensive need for such services, during fiscal year 1996 Defendants made only $36,000 available for such purposes. At some point in 1996, public defenders in the Mental Health Division were told by their superiors that there were no funds available for independent psychiatric evaluations of clients who were the subject of involuntary commitment proceedings.

70. For many years, there have been no written policies and procedures regarding a public defender's ethical obligations to his or her clients, or defining the minimum job responsibilities of the attorneys within the respective divisions of the Public Defender Office. There is no uniform procedure governing the use of expert witnesses. There are no written policies or procedures discussing the representation of clients charged with capital crimes. There are no limitations on the number of private clients a public defender may accept and no written rules regarding conflicts of interests between a part-time public defender's private clients and his public defender clients. There has been no system of quality control and no internal monitoring

to ensure that the quality of public defender representation meets constitutional and statutory mandates.

71. For many years, there have been no training programs for newly hired public defenders to teach them court procedures, the relevant criminal law and the Rules of Professional Responsibility as they pertain to indigent defense representation. In addition, there are no training programs for more experienced public defenders to apprise them of changes in law and procedures.

72. For example, public defenders in the Juvenile Division received no training on recent legislation mandating that every child charged with certain serious offenses be tried as an adult unless, at a decertification hearing, his or her public defender could convince a judge otherwise. Specifically, they were not instructed on how to prepare for or prevail at a decertification hearing. As a result, representation at these hearings has been chaotic.

73. For many years, the Public Defender program has had no information systems designed to keep track of caseloads and case assignments. On information and belief, this has resulted in the uneven distribution of cases and the allocation of excessive numbers of cases to some public defenders.

74. Defendants' indifference to the legal needs of public defender clients is further reflected in the large disparity between the amount of money that Allegheny County spends on its Public Defender program and the amount spent by comparably sized counties elsewhere in the country for public defender services. According to the 1990 national census, Bronx County, New York, Broward County, Florida, Middlesex County, Massachusetts, Hennipen County, Minnesota, and Suffolk County, New York, each has a population similar to Allegheny County's

-- between 1.2 and 1.3 million. In sharp contrast to Allegheny County's $2.9 million public defender budget, the 1994 budget for public defender services in Bronx, Broward and Middlesex counties was approximately $14 million. In Hennipen it was $11 million and in Suffolk it was $5.3 million.

75. Defendants' indifference is also illustrated by the substantial difference in funding between Allegheny County's prosecutorial and public defender services. The District Attorney's 1996 budget was approximately three times larger than the Public Defender's 1996 budget of $2.8 million. While Defendants cut the Public Defender budget by 27.5% in February 1996, they cut the District Attorney's budget by only 2.2%.

D. Harm to Plaintiffs

76. National standards and Professional Rules of Responsibility define adequate assistance of counsel as requiring, among other things, that defense counsel: (a) have adequate knowledge of the relevant areas of the law; (b) be assigned to their clients as early in the criminal, delinquency or mental health proceeding as possible; (c) be present at every critical stage of their clients' proceedings; (d) conduct reasonable factual and legal pre-trial investigations into the charges against their clients, pursue available formal and informal discovery procedures, and use appropriate and necessary experts; (e) consult with their clients to elicit relevant information about the case, to inform clients of their rights, and to enable clients to make informed decisions about the direction of their cases; and (f) perform their work with reasonable diligence and promptness.

77. For years, the effects of extreme caseloads, inadequate resources as described above, and poor policies and procedures have had a pervasive negative impact on the quality of

indigent legal representation in Allegheny County. As described earlier in this Complaint, these systemic defects have acted to deprive the named plaintiffs of their constitutional and statutory right to effective assistance of counsel or have placed them at serious and imminent risk of such a deprivation. As will be described in more detail below, members of the plaintiff class are being harmed or threatened with harm in much the same manner. Even the most diligent and knowledgeable public defenders cannot surmount the agency's systemic deficiencies and harm to members of the class is inevitable.

General Allegations of Harm

78. Because of the ever-changing nature of the Office and the lack of oversight, training, and written policies, procedures and guidelines, many Allegheny County public defenders do not have the knowledge or experience necessary to advocate effectively on behalf of their clients. With the recent staffing shortages, lawyers are routinely transferred from one Division to another without preparation, training or supervision. Attorneys with no experience in the mental health area have been asked to defend suicidal clients who are the subject of involuntary commitment proceedings. Trial attorneys with no experience in capital defense have been required to represent capital defendants at the sentencing stage.

79. Upon information and belief, public defenders have represented and continue to represent clients who have conflicting interests without informing the clients of the conflict or seeking a waiver from them.

Adult Criminal Clients

80. Adult criminal clients are not being provided with legal representation at preliminary arraignments. Pursuant to Pennsylvania law, an individual's constitutional right to

counsel attaches at this stage in his or her proceedings. See Commonwealth v. Moose, 602 A.2d 1265 (1992). Yet, the Public Defender's Office does not provide representation to its clients at this critical stage.

81. Because of the Office's systemic deficiencies, public defenders in the Preliminary Hearing and Trial Division do not meet and confer with their clients in a meaningful manner prior to, and in between, critical stages of their criminal proceedings. Public defenders in the Preliminary Hearing Division generally meet their clients on the day of the preliminary hearing, minutes before the hearing. Because it is not unusual for such an attorney to have 30 preliminary hearings scheduled on a single day, he or she may have to meet and confer with 30 clients immediately prior to the hearings. Trial attorneys frequently meet their clients for the first time minutes before their pre-trial conferences and often do not talk to them again until the next court hearing.

82. Because there is no unified central system for preparing and disseminating certified transcripts of preliminary hearings, Trial attorneys frequently cannot not obtain such transcripts. Should the prosecution's description of a client's alleged criminal conduct change as a case proceeds, a competent defense lawyer may use testimony from the preliminary hearing at later proceedings to impeach or weaken the prosecution's case. Without a copy of the transcript, however, a public defender can do no such thing.

83. Hampered by the lack of investigators and excessive caseloads, public defenders have been and continue to be unable to investigate the cases to which they are assigned. With only one investigator who can actually go out into the field, attorneys in the Trial Division must conduct their own investigations if any investigation is to occur. Because of their excessive

caseloads, however, they rarely initiate investigations prior to trial. They do not have time to meet with or subpoena witnesses, to visit the scene of the crime or to examine evidence.

84. Trial attorneys historically have had great difficulty obtaining expert assistance. On information and belief, they can not utilize experts without permission from senior management, and such permission usually is not granted.

85. Public defenders often do not have the time to make prepare and present pre-trial motions or conduct appropriate discovery. With the demise of the Pre-Trial Division in February 1996, this situation has worsened. The responsibility for pre-trial motions and discovery has shifted to the overextended Trial Division, which lacks the time or sufficient information to perform these functions adequately.

86. Overwhelmed by their excessive caseloads, many public defenders ask for repeated continuances, forcing some clients to remain incarcerated for protracted periods prior to the disposition of their cases and others to waive their right to a speedy trial. Although sentencing alternatives exist, public defenders have neither the time nor the ability to explore them.

87. The inability of public defenders to meet and confer with their clients in a meaningful manner, obtain preliminary hearing transcripts, conduct pre-trial investigations, utilize expert witnesses, make necessary pre-trial motions and obtain relevant discovery has far-reaching consequences. Public defenders do not obtain important information about their cases, including the names of valuable witnesses, possible alibis, defenses or mitigating circumstances, and the availability of relevant evidence. Without such information, they cannot advocate effectively against detention or the imposition of bail, participate effectively in plea negotiations,

prepare for trial or make informed decisions about whether clients should testify at hearings and trials. In addition, they cannot explain to their clients the nature and importance of their proceedings, and they jeopardize the clients' ability to make informed decisions, including decisions relating to the advisability of pleading guilty or proceeding to trial.

88. Due to Defendants' failure to cure the Public Defender program's systemic deficiencies, plaintiffs and members of the plaintiff class do not receive fair trials and are denied due process or persuaded to waive due process protections without a sufficient understanding of the protections they are waiving. Clients who have meritorious defenses are persuaded to plead guilty. Others receive harsher sentences than the facts of their case may warrant.

89. Public defender clients charged with capital crimes are particularly poorly served by the Public Defender system. Prior to the February 1996 budget cuts, all capital cases were handled by attorneys in the Homicide Division. After the budget cuts, the Homicide Division was reconfigured and capital cases are being assigned, often on the eve of trial, to attorneys in the Trial Division with no prior experience in death penalty litigation. Because of their caseloads, these attorneys have little time to prepare or to meet and confer with their clients. Experienced lawyers do not second chair the trials. There are no mitigation experts on staff or under contract to assist in the sentencing phase and no funds to hire such experts. There are no attorneys in the Post-Conviction and Appeals Division with death penalty trial or appellate experience to handle appeals.

Juvenile Clients

90. Like their colleagues in the Preliminary Hearing and Trial Divisions, public defenders in the Juvenile Division are unable to meet and confer with their clients in a

meaningful manner. Since the February 1996 budget cuts, many Juvenile Division attorneys have begun to represent children at juvenile detention hearings without ever having met them. Although studies indicate that children who are detained pending their delinquency hearings generally receive harsher sentences than those who are not detained, the public defenders do not play an active role at the detention hearings and most hearings are usually concluded in a matter of minutes.

91. With the passage of Act 33 (42 Pa. Cons. Stat. 6322), juveniles charged with certain types of crimes must be tried as adults unless their public defenders can convince a court, at a decertification hearing, that the child is capable of rehabilitation and would be better served by the juvenile system. Because of the onerous nature of their caseloads, the lack of training and guidelines, and their existing job responsibilities, Juvenile Division attorneys have neither the time nor ability to prepare for these hearings adequately. Although expert testimony is often necessary to establish that clients are capable of rehabilitation by the juvenile justice system, attorneys in the Juvenile Division are not given the funds to hire such experts.

92. Juvenile Division attorneys generally receive the files of clients who are not the subject of decertification hearings the afternoon before their delinquency hearings and meet with the children, their parents and/or their probation officers for the first time the day of the hearings. They often do not have the time to conduct any type of pre-hearing investigation into the charges against their clients and cannot advocate effectively on behalf of their clients at the hearings. They only meet with witnesses if the clients' families are knowledgeable enough to bring them to the hearings. On information and belief, several public defenders have placed witnesses on the stand without having interviewed them or prepared them to testify, and in some cases, the

testimony of those witnesses has actually been harmful to the clients. Although probation officers routinely make recommendations at these hearings as to how the court should dispose of the cases, many public defenders do not interview the probation officers prior to the hearings and do not know what the probation officers will say until they testify.

93. On information and belief, those juvenile clients who are convicted are often not informed of their right to appeal. On further information and belief, without the assistance of social workers, little, if any, work is done on sentencing alternatives or social service referrals.

94. As in the adult criminal context, the inability of public defenders to meet and confer with their juvenile clients in a meaningful manner, conduct pre-trial investigations, utilize expert witnesses and explore sentencing alternatives has profound consequences. Public defenders cannot effectively advocate against detention or certification, effectively represent their clients at delinquency hearings or participate in plea negotiations. Children with meritorious defenses or mitigating circumstances are needlessly detained or receive harsher sentences than they might otherwise with an adequately prepared advocate. Without adequate legal representation, public defender clients do not receive a fair trial and are, therefore, denied due process. In some instances, they are persuaded to waive due process protections without a sufficient understanding of the protections they are waiving.

Mental Health Clients

95. Like the attorneys in the Preliminary Hearing, Trial and Juvenile Divisions, Mental Health attorneys do not meet and confer with their clients in a meaningful manner, investigate the charges against their clients, utilize necessary expert witness assistance, or seriously explore alternatives to institutionalization. Most attorneys in the Mental Health

Division meet their clients for the first time minutes before their involuntary commitment proceedings.

96. They generally do not meet with the clients' families or friends, and if they review relevant mental health records, it is immediately before the hearings. Although expert testimony is often the only meaningful way to oppose an involuntary mental health commitment proceeding, Mental Health public defenders rarely obtain independent psychiatric evaluations of their clients or utilize mental health experts to oppose commitment.

97. Mental Health attorneys who do seek psychiatric expert assistance almost always use doctors or clinicians from one of the two local hospitals that admit involuntarily committed patients. Which doctors or practitioners are utilized depends on which hospital has agreed to accept the client as a patient. If the state is attempting to commit the client to one hospital, the attorney will ask the other to review the client's commitment papers. That the two hospitals that stand to gain financially from involuntarily commitments act as each other's evaluators raises an apparent conflict and casts doubt on the impartiality of the evaluation. On information and belief, however, these attorneys have no other options. As stated earlier, there has been no funding to pay for any other type of mental health evaluation since January 1996.

98. As a result of their inability to prepare adequately for the hearings, clients who do not want to be committed and for whom other alternatives exist are needlessly institutionalized.

E. Exclusion of Indigents from Public Defender Representation

99. While many members of the plaintiff class are denied or at imminent risk of being denied adequate assistance of counsel, others who are eligible for public defender services receive no legal representation at all.

100. A number of years ago, the Allegheny County Court of Common Pleas promulgated Rule 317.4 establishing eligibility criteria. Rule 317.4 requires that an eligibility determination "must include an assessment of both assets and liabilities. The sum used to determine eligibility must be the amount which remains after the liabilities are deducted from the prospective client's assets" (emphasis in original). The eligibility determinations conducted by the Allegheny County Public Defender's Office, however, have routinely failed to include an assessment of the liabilities of potential agency clients. As a result, indigent persons entitled to and in need of legal representation by the Public Defender system do not receive it.

F. Defendants' Long-Standing Knowledge of Inadequate Representation and Lack of Adequate Remedy at Law

101. The systemic deficiencies alleged herein constitute a pattern and practice. Defendants and their predecessors-in-office have long been aware of these inadequacies and have failed to remedy them. Their failure to remedy them constitutes deliberate indifference to the constitutional and statutory rights of the plaintiffs and members of the class.

102. Plaintiffs and members of the plaintiff class have suffered irreparable harm or are at imminent and serious risk of suffering such harm because of Defendants' failure to remedy the system's deficiencies. There is no adequate remedy at law to address these matter deficiencies or the system-wide deprivation of counsel.

V. LEGAL CLAIMS

A. First Count: United States Constitution, Sixth and Fourteenth Amendments and 42 U.S.C. §1983

103. Paragraphs one through 102 are incorporated herein by reference the same as though pleaded in full.

104. Defendants' failure to provide plaintiffs and members of the plaintiff class with adequate legal representation violates plaintiffs' rights under the Sixth and Fourteenth Amendments to the United States Constitution, including, but not limited to, their rights to effective assistance of counsel and due process.

B. Second Count: Pennsylvania Constitution, Art. I, §9

105. Paragraphs one through 104 are incorporated herein by reference the same as though pleaded in full.

106. Defendants' failure to provide plaintiffs and members of the plaintiff class with adequate legal representation violates plaintiffs' rights under Art. I, §9 of the Pennsylvania Constitution, which, among other things, guarantees to all criminally accused the right to be heard through a legal representative.

C. Third Count: Pennsylvania's Public Defender Act, 16 Pa. Cons. Stat. §§9960.1-13

107. Paragraphs one through 106 are incorporated herein by reference the same as though pleaded in full.

108. By failing to provide plaintiffs and each of the class members with effective assistance of legal counsel, Defendants have violated plaintiffs' rights and the rights of the plaintiff class under the Pennsylvania Public Defender Act, 16 Pa. Cons. Stat. §§9960.1-13, which requires Defendants to provide counsel and legal services to indigent criminal defendants and those who are the subject of involuntary mental health proceedings.

D. Fourth Count: Pennsylvania's Juvenile Act, 42 Pa. Cons. Stat. §6337

109. Paragraphs one through 108 are incorporated herein by reference the same as though pleaded in full.

110. By failing to provide juvenile members of the plaintiff class with effective assistance of legal counsel, Defendants have violated the rights of those plaintiffs under 42 Pa. Cons. Stat. §6337, which states that such plaintiffs are entitled to legal counsel at every stage of any delinquency proceeding.

E. Fifth Count: Pennsylvania's Mental Health Procedures Act, 50 Pa. Stat. Ann. §7304, and 55 Pa. Code §6250.22

111. Paragraphs one through 110 are incorporated herein by reference the same as though pleaded in full.

112. By failing to provide members of the plaintiff class who are the subject of an involuntary mental health commitment proceeding with effective assistance of legal counsel, Defendants have violated the rights of those plaintiffs under 50 Pa. Stat. Ann. §7403 and 55 Pa. Code §6250.22, which state that such plaintiffs are entitled to legal counsel at every stage of any mental health commitment proceeding.

F. Sixth Count: Pennsylvania's Law on Probation and Parole, 37 Pa. Code §§71.2 and 71.4.

113. Paragraphs one through 112 are incorporated herein by reference the same as though pleaded in full.

114. By failing to provide members of the plaintiff class who are the subject of revocation of parole proceedings with effective assistance of legal counsel, Defendants have

violated the rights of those plaintiffs under 37 Pa. Code §§71.2 and 71.4, which state that such plaintiffs are entitled to legal counsel at revocation hearings.

G. Seventh Count: Pennsylvania's Public Defender Act, 16 Pa. Cons. Stat. §§9960.1-13, and 42 Pa. Cons. Stat. §3721

115. Paragraphs one through 114 are incorporated herein by reference the same as though pleaded in full.

116. By failing to provide the public defender system with adequate facilities and resources, Defendants have violated plaintiffs' rights and the rights of the plaintiff class under 16 Pa. Cons. Stat. §9960.9 and 42 Pa. Cons. Stat. §3721, which require Defendants to provide suitable office space, furniture, equipment and supplies for the use of the Public Defender's Office.

H. Eighth Count: Sixth and Fourteenth Amendments to the United States Constitution; Pennsylvania's Public Defender Act, 16 Pa. Cons. Stat. §§9960.1-13; and Rule 317.4 of the Allegheny County Court Rules

117. Paragraphs one through 116 are incorporated herein by reference the same as though pleaded in full.

118. By failing to determine eligibility for public defender services in the manner required by state law, Defendants have violated plaintiffs' rights and the rights of the plaintiff class under the Sixth Amendment to the United States Constitution, Pennsylvania's Public Defender Act, 16 Pa. Cons. Stat. §§9960.1-13, and Rule 317.4 of the Allegheny County Court Rules.

VI. PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request the following relief:

1. A declaration that plaintiffs' rights are being violated.

2. The issuance of preliminary and permanent injunctions requiring Defendants to provide a Public Defender program in Allegheny County that is consistent with the Sixth and Fourteenth Amendments to the United States Constitution; 42 U.S.C. §1983; Art. I, §9 of the Pennsylvania Constitution; 16 Pa. Cons. Stat. §§9960.1-13; 42 Pa. Cons. Stat. §§3721 and 6337; 50 Pa. Cons. Stat. § 7304; 37 Pa. Code §§71.2 and 71.4; 55 Pa. Code §6250.22, and Rule 317.4 of the Allegheny Local Court Rules.

3. The award to plaintiffs of costs and attorneys' fees under 42 U.S.C. §1988.

4. The granting of such other and further relief as this Court deems necessary or proper.

Respectfully submitted,

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Best v. Grant Cnty.,
No. 042-001890 (Wash. Sup. Ct. Aug. 26, 2004)

FILED

AUG 2 6 2004

JOYCE L. JULSRUD, CLERK
KITTITAS COUNTY, WASHINGTON

SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

JEFFREY BEST, DANIEL CAMPOS and GARY DALE HUTT, on behalf of Themselves and all others similarly Situated and GREGG HANSEN,	)	
Plaintiffs,	)	No. 04 2 00189 0
vs.	)	**MEMORANDUM DECISION**
GRANT COUNTY, a Washington County,	)	
Defendant.	)	

PROCEEDINGS

This case is a proposed class action under CR 23 in which the plaintiffs asked the court to issue injunctive and declaratory relief against Grant County concerning its indigent defense services. The three named defendants Best, Campos and Hutt, were all charged with felonies in Grant County Superior Court and assigned attorneys to represent them. Each named defendant contends Grant County, through its Board of County Commissioners, has violated the constitutional rights of indigent persons accused of felonies in Grant County arising from the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Sections 3, 12 and 22 of the Washington State Constitution.

The proposed representative plaintiffs (Best, Campos and Hutt) seek judicial enforcement of their right to effective assistance of counsel, due process and equal protection of the laws. They, together with Grant County taxpayer Gregg Hansen, seek injunctive and declaratory relief

in order to protect the constitutional rights of all present and future indigent criminal defendants. By their request for class certification under CR 23(b)(2) the representative plaintiffs seek to represent a class consisting of all 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.

The defendant opposes the representative plaintiffs' motion for class certification, contending class certification is not appropriate because the plaintiffs cannot establish a justicable controversy, the plaintiffs cannot establish actual harm and/or the imminent threat of future harm, because the plaintiffs cannot establish the necessary requirements under CR 23 and because the plaintiffs fail to state a claim upon which relief may be granted.

Plaintiffs have also moved the court to compel Grant County to produce documents responsive to plaintiffs' first request for production, to produce a witness in response to the plaintiffs' CR 30(b)(6) deposition who will be prepared to testify knowledgeably and completely regarding the matter set forth in the deposition notice, to answer questions concerning the qualifications of new public defenders contracted with the county and to provide the identity and responsibility of all persons who have participated on behalf of Grant County in the decision to seek reassignment of cases from one attorney to another since February 15, 2004.

Oral argument on the motions[1] was heard by the court on Wednesday, August 4, 2004. The court thereafter took the matter under advisement to review the extensive briefings by the parties and to consult the numerous cases cited by each side.[2] The court has now had the opportunity to review the positions of the parties.

DISCUSSION

1. Background. The plaintiffs' complaint contains numerous allegations pertinent to their motion for class certification. Paragraphs 27 through 31 outline Grant County's duty to

[1] The defendant also moved to strike plaintiffs' references to unpublished decisions in their reply in support of plaintiffs' motion for class certification and unauthenticated hearsay documents attached to the declarations of Nancy Talner and Don Scaramastra. While the parties did not argue the motion to strike orally, the court indicated it would consider the motion to strike and the opposition thereto in its decision-making process.

[2] The court also indicated to the parties that it was about to embark on a 10-day vacation which the court did take from August 5 to August 15. The court returned back on August 16 to preside over a 5½ day trial, Northwest Pipeline v. the State of Washington and 29 counties in which Northwest Pipeline protested its tax evaluations in the State of Washington.

provide effective assistance of counsel for indigent persons charged with felony crimes. Paragraphs 32 through 41 provide an overview of Grant County's public defense system. Paragraphs 42 through 49 provide reference to judicial findings of ineffective assistance of counsel and the disbarment recommendations for the public defenders Tom Earl and Guillermo Romero.[3] Paragraphs 50 through 56 outline the chaos created in the Grant County public defense system by suspension of Tom Earl. Paragraphs 57 through 94 outline how Grant County has failed to establish a public defense system that provides effective assistance of counsel to all indigent persons charged with felony crimes in that it has failed to assure that all public defenders meet professional qualifications, that defendant Grant County has failed to impose reasonable case load limits, has failed to monitor or oversee the public defense system, has failed to provide adequate funds for public defense, has failed to provide adequate funds to pay necessary costs of defense, has failed to provide representation at all critical stages of prosecution, and has undermined the independence of public defenders.

In paragraphs 95 through 100 of their complaint the plaintiffs outline how Grant County has failed to provide effective assistance of counsel for the class plaintiffs. Specifically, on January 29, 2004 Jeffrey Gregg Best was charged with burglary in the second degree, theft of anhydrous ammonia, unlawful storage of anhydrous ammonia, and theft in the second degree under cause number 04-1-00101-6. On February 10, 2004 Mr. Best was charged with burglary in the second degree and theft of anhydrous ammonia under cause number 04-1-00142-3. Mr. Best was assigned an attorney to represent him on the charges. Best contends and argues he was deprived of his rights of effective assistance of counsel because he wasn't represented at his initial appearance; he only met with his attorney on three occasions, none of the meetings of which lasted more than 10 minutes and one of which was by happenstance; and that Best did not have sufficient opportunity to discuss the facts relating to the charges against him or dismiss substantive legal issues or important litigation strategy. Moreover, Best asserts he was unable to contact his attorney even though he made several attempts to contact the attorney including filing kites with the jail and writing letters to his attorney. His court appointed counsel acknowledged receiving the kites and letters but did not respond in substance to them. Mr. Best further contends he was not advised of his rights with respect to important pretrial hearings, including suppression hearing under CrR 3.5 and CrR 3.6, nor was he fully advised of his sentencing range

[3] Both of whom have since been in fact disbarred by the Washington State Supreme Court.

if convicted. He asserts his attorney had an excessive case load because it had doubled since Tom Earl was suspended and because the attorney was also assigned a juvenile defendant charged in superior court with first degree murder. In fact, Best's attorney candidly admitted that he had not been able to do the things that should be done with regard to Best's case.

Daniel Campos was charged on August 22, 2003 with two counts of stalking and two counts of driving on suspended license under cause number 03-1-00750-4. On February 9, 2004 Mr. Campos was charged with malicious mischief second degree under cause number 04-1-00134-2. On March 29, 2004 the 2004 information was amended to include a second count of malicious mischief. Mr. Campos was appointed an attorney. Mr. Campos asserts he has been deprived of his rights to effective assistance of counsel because he was not represented by counsel at his initial appearance on the 2003 charge, that during representation of Campos on 2003 charge Campos' attorney only met with him immediately before court dates and that at these meetings Campos had an inadequate opportunity to discuss defending the charges against him. Mr. Campos further asserts that after having been represented by the assigned attorney on the 2003 charge for approximately five months he was given a newly assigned attorney, that when he asked for an explanation Campos was told he was provided a new lawyer because of an unidentified conflict of interest, and that his new attorney assumed responsibility of Campos' defense for both the 2003 and 2004 charges. Campos alleges that at the pretrial hearing regarding the 2003 charge Campos' previous attorney indicated that there were several witnesses that had not been identified or developed by the State and that although his previous attorney had indicated these witnesses would be needed to be interviewed no interviews took place. Campos additionally claims that although he provided his new attorney with contact information for potential exculpatory witnesses regarding the 2003 charge his attorney failed to advise Campos that the witnesses had been interviewed, that prior to receiving the names of potentially exculpatory witnesses from Campos, his attorney had already filed a list of witnesses for the 2003 charge and that the list only reserved the right to call Campos and two witnesses reserved by the State. Campos also contends his new attorney had him sign a stipulation to admissibility of defendant's statements made regarding the 2003 charge without fully advising Campos concerning the contents of those statements, the circumstances under which the statements were made, or the impact of the stipulation on his defense. Finally, Campos asserts his attorney did

not meet with him for a sufficient amount of time to discuss the facts relating to the charges against him, substantive legal issues and important litigation strategy.

Gary Dale Hutt was charged with conspiracy to deliver methamphetamine and attempted introduction of contraband in the second degree under cause number 04-1-00022-2 on January 12, 2004. On February 24, 2004 the information was amended to include charges of possession of methamphetamine with intent to deliver, possession of cocaine with intent to deliver, possession of marijuana with intent to deliver, conspiracy to deliver cocaine, conspiracy to deliver marijuana, and assault in the second degree. Mr. Hutt was assigned an attorney. He alleges his rights to effective assistance of counsel were violated because he wasn't represented by counsel at his initial appearance on the charges set forth above, that while detained during the pendency of the proceeding against him he had the opportunity to meet with his attorney only three times, none of which meetings lasted longer than 15 minutes, and that his attorney did not adequately discuss the facts relating to the charges against him or discuss substantive legal issues or important litigation strategy. He alleges his attorney did not accurately review the discovery with him or interview important witnesses in the case.

Finally, the plaintiffs allege that as a result of Grant County's acts and omissions including policies, practices and procedures maintained in countenance by Grant County, the indigent persons charged with felony crimes in Grant County have suffered or are at imminent and serious risk of suffering harm. The plaintiffs contend among other things that indigent persons are deprived of adequate consultation and communication with attorneys, that they must make decisions about their rights or contest issues without adequate factual or legal investigation by their attorneys, that they are deprived of meaningful opportunities to present defenses, that the rights of indigent persons are waived without proper consultation advice, that indigent persons are deprived of services of investigators and expert witnesses, that indigent persons' cases are not properly prepared for trial and that indigent persons do not receive meaningful benefits in exchange for guilty pleas.

On March 5, 2004 the Grant County Board of County Commissioners established a new contract to public defender program pursuant to Chapter 10.101 RCW which is evidently patterned after a similar system in Benton County. Grant County contends the new system comports to recommendations made by the ACLU in its March 2004 report entitled "The Unfulfilled Promise of Gideon-Washington's Flawed System of Defense for the Poor".

On April 20, 2004 Jeffrey Best entered a Statement of Defendant on Plea of Guilty to two counts of burglary in the second degree and theft in the second degree. Mr. Hutt's cases have all been resolved, he has been sentenced and is serving his time in Shelton Correctional Facility. Mr. Campos' cases are pending.

2. Law Regarding Class Action Certification. A primary function of a class action lawsuit is to provide a procedure for vindicating claims which, taken individually, are too small to justify individual legal action but which are of significant size and importance if taken as a group. Smith v. Behr Process Corp., 113 Wn.App. 306, 319 quoting Brown v. Brown, 6 Wn.App. 249, 253 (1971). Washington courts favor a liberal interpretation of CR 23 as the rule avoids multiplicity of litigation, saves members of the class the cost and trouble of filing individual suits, and also frees the defendant from the harassment of identical future litigation. Smith, supra at 318. Interests of justice require that in a doubtful case any error, if there is to be any, should be committed in favor of allowing the class action. Smith, supra at 319 quoting Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968).

In a proposed action such as this one where the plaintiffs seek sweeping injunctive relief, questions relating to the named plaintiffs' standing and entitlement to equitable relief, the propriety of class certification, and the availability of system wide relief will often overlap. Stevens v. Harper, 213 F.R.D. 358, 366 (2002). Standing and entitlement to equitable relief are threshold jurisdictional requirements that must be satisfied prior to class certification. Any analysis of class certification must begin with the issue of standing. Only after the court determines the issue for which the named plaintiffs have standing should it address the question of whether the named plaintiffs have representative capacity. Stevens, supra. On a motion to dismiss for lack of standing, the trial court must accept as true all material allegations of the complaint and construe the complaint in favor of the complaining party. Stevens, supra at 370.

When standing has been determined, plaintiffs moving for class certification bear the burden of demonstrating they meet the requirements of CR 23. Miller v. Farmer Brothers Company, 115 Wn.App. 815, 820 (2003). Where class certification is sought at the early stages of litigation, courts generally assume that the allegations in the pleadings are true and will not attempt to resolve material factual disputes or make any inquiry into the merits of the claim. Miller, supra; Smith, supra at 320. Courts may, however, go beyond the pleadings and examine the parties' evidence to the extent necessary to determine whether the requirements of CR 23

have been met. Miller, supra; Oda v. State, 111 Wn.App. 79, 94, review denied, 147 Wn.2d 1018 (2002). Because class actions are a specialized proceeding available in limited circumstances, the trial court must conduct a " rigorous analysis" of the CR 23 requirements to determine whether a class action is appropriate in a particular case. Miller, supra; Oda, supra at 93.

To certify a class action the court must determine four elements of CR 23(a) are present, that is (1) the class is so numerous that joinder of all members is impractical; (2) that there are questions of law in fact common to the class; (3) that the claims of the representative parties are typical of the claims of the class; and (4) that the representative parties will fairly and adequately protect the interests of the class. In addition to satisfying the four requirements of CR 23(a), the class action suit must fall within one of three categories of actions set forth in CR 23(b). Here, the representative plaintiffs contend CR 23(b)(2) applies because Grant County, it is contended, has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive or a corresponding declaratory relief with respect to the class as a whole. See Sitton v. State Farm Mutual Auto Insurance Company, 116 Wn.App. 245, 251 (2003).

3. Decision.

a. Standing. To establish standing, a plaintiff must allege he has suffered an injury in fact, that the injury was causally connected to the defendant's actions, and that it is likely that the injury will be redressed by a favorable decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed. 2d 351 (1992). Here, each of the three plaintiffs, Best, Campos and Hutt, is or was represented by a public defender. They each allege they were denied effective assistance of counsel because the county failed to provide adequate indigent public defense services to them. Each has alleged specific facts related to the manner in which the county has provided and continues to provide indigent defender services and alleges specific facts which detail the manner in which each of the named plaintiffs has been deprived of those services.

Yet, Grant County contends Campos' claim is not ripe yet because his action is still pending and that Best's and Hutt's claims are moot because their cases have been resolved. Campos' allegation that he is facing criminal prosecution without an effective lawyer at his side certainly raises the prospect of serious and immediate injury or threatened injury. The right to

effective assistance of counsel extends to all persons accused of felonies not just those who are innocent. Harm is not limited to locking up innocent people. The accused is prejudiced if he or she is forced to plead guilty rather than run the risk of going to trial without competent counsel or if counsel doesn't bother to call witnesses who can support the accused, or when the accused must evaluate the pros and cons of a plea offer without competent counsel to explain the plea and its consequences or when counsel doesn't bother to move to suppress inadmissible evidence. Campos' claim is ripe.

The fact Best's and Hutt's claims have been resolved after this case was filed do not render their claims moot. As indicated by the United States Supreme Court in Sosna v. Iowa, 419 U.S. 393, 402 note 11, 95 S.Ct. 553, 42 L.Ed. 2d 532 (1975):

> "There may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion. In such instances, whether the certification can be said to 'relate back' to the filing of the complaint may depend on the circumstances of the particular case and especially the reality of the claim that otherwise the issue would evade review."

Two classes of cases in which certification should "relate back" to the date of filing the complaint, preventing the case from being mooted by subsequent events involve cases where the allegedly illegal acts complained of are "capable of repetition yet evading review"[4] and cases including classes that are "inherently transitory".[5] As pointed out by the plaintiffs, Best's and Hutt's claims survive the mootness argument because their cases fall within both the classes allowing their cases to relate back to the date of filing even though their individual claims might be otherwise moot. See Burman v. State, 50 Wn.App. 433, 439 (1988). It is noted criminal proceedings are short in duration and inevitably terminate before a civil proceeding like this one is fully litigated. For this reason the length of any preadjudication status is unknown and no member of the class is likely to have a live claim throughout the litigation. As such the duration of the challenged action is short enough to evade review. Gerstein, supra. Moreover, that Best and Hutt have led guilty does not mean they may not act as class representatives. Putative class representatives are not required to forego or delay legal opportunities in order to avoid a mootness challenge. Perez-Funex v. District Director, INS, 611 F.Supp. 990, 1000, C.D. Cal.

[4] See Gerstein v. Pugh, 420 U.S. 103, 111, note 11, 95 S.Ct. 854, 483 L.Ed. 2d 54 (1975).
[5] See Wade v. Kirkland, 118 Fed. 3d 667, 670 (9th Cir. 1997).

(1984). Additionally, the changes in the plaintiffs' status do not moot their claims on behalf of the class because the class is inherently transitory. A class is inherently transitory when it consists of a "fluid population", such as pretrial detainees, prisoners or indigent persons, or where there is a constant, though revolving, class of persons suffering from the same deprivation. County of Riverside v. McLaughlin, 500 U.S. 44, 52, 114 L.Ed. 2d 49, 111 S.Ct. 1661 (1991). The class the plaintiffs seek to represent is fluid in that its membership shifts frequently.

Based on the foregoing, the court concludes the plaintiffs Best, Campos and Hutt have standing and that the court should proceed to its analysis under CR 23.

b. CR 23. CR 23(a)(1) requires the class to be so numerous that joinder of all members is impractical. A proposed class of at least 40 members creates a rebuttable presumption that joinder is impracticable. Miller, supra at 821. Here, while the numbers of the proposed class are by no means precise it has been demonstrated to the satisfaction of the court that the class consists of hundreds of persons with felony criminal cases currently pending in the Grant County Superior Court and several hundred if not thousands of whom will have criminal cases in the future.[6] And as has been pointed out above, the membership is inherently transitory so it is in a constant state of flux, making identification and joinder of members especially difficult and therefore impracticable. See Robinson v. Peterson, 87 Wn.2d 665, 667 (1976); see Johnson v. Moore, 80 Wn.2d 531, 533 (1972). These factors and others weigh in favor of certification.

CR 23(a)(2) requires that the proponents of the class demonstrate there are questions of law or fact common to the class. This threshold of "commonality" is low in the sense that it is qualitative rather than quantitative, that is, there need be only a single issue common to all members of the class. Smith v. Behr, supra at 320. Here, the plaintiffs' complaint sets forth in some detail the problems indigent defendants have experienced. They lack response from their attorneys, their attorneys failed to follow up with witnesses, their attorneys failed to assist with case strategy in evaluation of plea offers, their attorneys failed to file key motions and their attorneys failed to even appear on behalf of them in open court. The complaint also links the harmful practices it describes, contending the root causes of those practices are inadequate

[6] See declaration of J. Michael Spencer, paragraph 2, in which records from Grant County Superior Court indicate as of July 19, 2004 455 criminal cases had been filed.

funding of defense services, excessive case loads and prosecutorial interference with defense system. The plaintiffs have satisfied the requirement of commonality.

Next, the plaintiffs must establish under CR 23(a)(3) that the claims or defenses of the representative parties are typical of the claims or defenses of the class. "Typicality" is present if the representative plaintiffs' claims arise "from the same event or course of conduct which gives rise to claims of other class members and is based on the same legal theory." Rodriguez v. Carlson, 166 F.R.D. 465, 472 (1996). The representative plaintiffs' claims need not be identical to those of other class members. Hanlon v. Chrysler Corporation, 150 F.3d 1011, 1019 (9th Cir. 1998). Here, plaintiffs' claims are typical of those of other class members because their claims arise from the same course of conduct that gives rise to the claims of other class members, that is, all claims arise from Grant County's systematic deprivation of the constitutional right of effective assistance of counsel in its public defense system. All the claims are based on the same legal theory. All the claims arise from appointed counsels' failure to form such basic tasks as returning phone calls, appearing in court, giving legal advice, interviewing witnesses, filing motions, and preparing for trial. While the claims may vary in their precise details, they all arise from the same event or course of conduct. Plaintiffs have satisfied the typicality requirement.

Finally, CR 23(a)(4) requires the representative parties of the class to fairly and adequately protect the interests of the class. To be adequate class representatives, plaintiffs must not be involved in a collusive suit and they must not have interests antagonistic to those of the remainder of the class. Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978). The defendant Grant County does not contest this prong of the rule head on. Rather, it insists Best and Hutt are not adequate representatives because their cases are resolved and they do not belong to the class and that Campos' representation is inadequate because his case is not resolved. This court rejects those arguments as outlined above.[7] Here, the representative plaintiffs have the same interest as the class as a whole. They seek effective assistance of legal counsel for themselves and for all other indigent persons accused of felonies in Grant County. Moreover, each of the attorneys representing the plaintiffs is qualified, experienced and able to conduct the proposed litigation. They have the resources and expertise to handle this type of litigation.

[7] Under the discussion of standing, mootness and ripeness.

Based upon the foregoing the court concludes the requirements of CR 23(a) have been met.

Finally, in addition to satisfying the four requirements of CR 23(a), this action must fall into one of the three categories outlined in CR 23(b). The action does fall within the parameters of CR 23(b)(2) which provides that the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or a corresponding declaratory relief with respect to the class a whole. Here, the case arises from Grant County's creation and maintenance of a public defense system that acts or fails to act in ways applicable to all class members. The case satisfied the "grounds generally applicable standard outlined in CR 23(b)(2)." Sitton, supra at 251.

Based on the foregoing, the court concludes from its analysis that the plaintiffs have met their burden under CR 23 and that the court should certify this a class action for declaratory and injunctive relief.

5. Motion to Compel. The court, as indicated above, also heard oral argument on the plaintiff's motion to compel. At oral argument there appeared to be some agreement with respect to two of the four areas of concern. The parties indicated that Grant County had finally complied with the request for production. To the extent that Grant County has not complied, it should be ordered to do so. Secondly, plaintiffs complained the Board of Commissioner Allison was not prepared for his CR 30(b)(6) deposition and they therefore have moved to compel that Grant County prepare the designee to respond to the questions outlined in the deposition notice. Grant County should be ordered to prepare the designee for the 30(b)(6) deposition so he can adequately respond to questions propounded, including responding to questions concerning identity and responsibility of all persons who have participated, on behalf of Grant County, in the decision to seek reassignment of cases from one attorney to another since February 15, 2004.

6. Motion to Strike. After reviewing the defendant's motion to strike references to unpublished opinions, exhibits appended to Nancy Talner's declaration and the newspaper article appended to Don Scaramastra's declaration, the court respectfully should deny Grant County's motion.

CONCLUSION

Based on the foregoing analysis, the court grants the plaintiffs' motion to certify the class, grants the plaintiffs' motion to compel and denies the defendant's motion to strike. Please prepare the appropriate orders and note them for presentation or otherwise present them by agreement.

DATED: August 26, 2004

JUDGE