

**In the Supreme Court of Pennsylvania**

**MIDDLE DISTRICT**

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**No. 57 MAP 2015 and No. 58 MAP 2015  
(consolidated)**

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**ADAM KUREN AND STEVEN ALLABAUGH,  
ON BEHALF OF THEMSELVES AND ALL OTHERS  
SIMILARLY SITUATED**

*Plaintiffs-Appellants,*

**v.**

**LUZERNE COUNTY OF THE COMMONWEALTH OF PENNSYLVANIA AND  
ROBERT C. LAWTON, COUNTY MANAGER, IN HIS  
OFFICIAL CAPACITY,**

*Defendants-Appellees.*

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

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**BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION  
OF CRIMINAL DEFENSE LAWYERS AND THE  
PENNSYLVANIA ASSOCIATION OF CRIMINAL DEFENSE  
LAWYERS IN SUPPORT OF APPELLANTS**

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## INTERESTS OF *AMICI CURIAE*

*Amici* share a heritage of advancing their missions to ensure the fair administration of justice and to advocate for the constitutionally guaranteed right to counsel for indigent persons charged with crimes. These missions recognize that the right to counsel at each critical stage of the adversary process, not just at trial, is fundamental to the administration of justice and fairness in the Commonwealth. For these reasons, and to secure the integrity of the criminal justice system, *amici* urge this Court to reverse the Commonwealth Court's ruling barring Appellants Kuren's and Allabaugh's claims for prospective relief.

Indeed, it is the fundamental professional duty of all attorneys to ensure that the right to counsel is fully protected:

A lawyer is . . . ***an officer of the legal system and a public citizen having special responsibility for the quality of justice*** . . . . A lawyer should be mindful of the deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives . . . .

Model Rules of Professional Conduct Preamble: A Lawyer's Responsibilities (emphasis added).<sup>1</sup> *Amici* provide further information about each of their organizations' missions below.

### **NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS**

The National Association of Criminal Defense Lawyers (“NACDL”) is a not-for-profit professional organization that represents the nation’s criminal defense attorneys. NACDL is the preeminent organization advancing the institutional mission of the nation’s criminal defense bar to ensure to proper and fair administration of justice, and justice and due process for all persons accused of crime. Founded in 1958, NACDL has a membership of thousands of direct members (including nearly 350 in Pennsylvania) and an additional 40,000 affiliate members in all fifty states and twenty-eight nations. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and accords it representation in the House of Delegates.

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<sup>1</sup> *See also* ABA Criminal Justice Section Standards: Defense Section, Standard 4-1-2(d) (“Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel’s attention, he or she should stimulate efforts for remedial action.”).

In furtherance of its mission to safeguard the rights of the accused and to champion fundamental constitutional rights, NACDL frequently appears as *amicus curiae* before the United States Supreme Court, the federal courts of appeal, and the highest courts of numerous states. In recent years, NACDL's briefs have been cited on numerous occasions by the Supreme Court in some of its most important criminal law decisions. *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Rothgery v. Gillespie Cnty.*, 554 U.S. 191 (2008); *Blakely v. Washington*, 542 U.S. 296 (2004). NACDL also filed amicus briefs in landmark state cases involving indigent defense issues, including in New York in *Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y. 2010), and in Maryland in *DeWolfe v. Richmond*, 76 A.3d 962 (Md. 2012). NACDL has a specific and demonstrated interest in ensuring that accused persons have access to qualified counsel at every stage of a criminal proceeding. NACDL recently supported this principle in *Rothgery v. Gillespie County*, where NACDL successfully urged the Supreme Court to find that the right to counsel unequivocally attaches at arraignment, the first formal proceeding at which an individual is accused.

NACDL, informed by the experience of its membership, is uniquely well positioned to inform this Court of the consequences that are visited upon criminal defendants when they are subjected to representation by overburdened and under-resourced counsel, and to explain why post-conviction remedies are inadequate to redress this deficiency.

Furthermore, NACDL commits significant resources to ensuring that indigent accused persons have access to meaningful and effective representation. NACDL maintains a full-time Indigent Defense Counsel whose sole responsibility is to support indigent defense reform efforts throughout the country. Pursuant to a grant from the Justice Department's Bureau of Justice Assistance ("BJA"), NACDL along with the American Bar Association Standing Committee on Legal Aid and Indigent Defendants ("SCLAID"), serving as a consultant, is currently involved in two workload studies with the goal of improving excessive workloads through the use of evidence-based data to make public defender organizations more efficient, reliable, and most importantly, capable of providing effective assistance of counsel.

The Association is currently pursuing training and reform initiatives in at least half a dozen states. In addition, NACDL devotes considerable resources to providing back-up support to both public defenders and private counsel who handle assigned cases, and funds a full time Resource Counsel to perform that function. NACDL also sponsors scholarships to provide access to training programs for those engaged in public defense. The Association recognizes that a system of criminal justice that provides inferior justice to those whose poverty prevents them from hiring private counsel is inconsistent with fundamental American values, including, most significantly, the right to counsel as guaranteed by the Sixth and Fourteenth Amendments and the constitutions of the states.

NACDL has long conducted and sponsored pioneering investigations, research, and reporting on indigent defense issues. In recent years, NACDL has published groundbreaking reports chronicling the deficiencies in indigent defense, including: *Three Minute Justice: Haste and Waste in Florida’s Misdemeanor Courts*; *Minor Crimes, Massive Waste: The Terrible Toll of America’s Broken Misdemeanor Courts*; *Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparities in the Criminal Justice System*; *National Indigent Defense Reform: The Solution Is Multifaceted*; *Gideon at 50 Part I – Rationing Justice: The Underfunding of Assigned Counsel Systems*; and *Gideon at 50 Part II – Redefining Indigence: Financial Eligibility Guidelines for Assigned Counsel*.<sup>2</sup>

Accordingly, NACDL brings a perspective that can inform the Court’s consideration of the issues in this case and has a direct interest in seeing that the indigent accused have a vehicle to redress systemically deficient representation.

**PENNSYLVANIA ASSOCIATION OF  
CRIMINAL DEFENSE LAWYERS**

The Pennsylvania Association of Criminal Defense Lawyers (“PACDL”) is a professional association of attorneys admitted to practice before the Supreme Court of Pennsylvania and who are actively engaged in providing criminal defense representation. Founded in 1988, PACDL is the recognized affiliate of NACDL in

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<sup>2</sup> For copies of these and other NACDL reports, visit [www.nacdl.org/reports](http://www.nacdl.org/reports).

Pennsylvania. As *amicus curiae*, PACDL presents the perspective of experienced criminal defense attorneys who aim to protect and ensure by rule of law those individual rights guaranteed by the Pennsylvania and United States Constitutions, and who work to achieve justice and dignity for defendants. PACDL's membership includes more than 850 private criminal defense practitioners and public defenders throughout the Commonwealth.

PACDL members have a direct interest in the outcome of this appeal because of their concerns for ensuring that criminal defendants' constitutional rights are not abridged and that established precedent protecting those rights is given all due consideration. PACDL cooperates closely with the Pennsylvania Public Defender Association, including coordination of the two associations' annual meetings and educational programs. Like the members of NACDL, the members of PACDL have significant experience representing those accused of serious crimes and are aware of the consequences to criminal defendants who are represented by overburdened and under-resourced counsel. Accordingly, PACDL is in a position to inform the Court's consideration of the issues in this case, including why post-conviction remedies and case-by-case adjudication are inadequate to redress the systemic problems affecting those accused of serious crimes in Luzerne County.

## INCORPORATION OF OPENING SECTIONS OF BRIEF

The NACDL and PACDL (collectively, the “*amici*”) incorporate Appellants Kuren’s and Allabaugh’s Statement of Jurisdiction, Order in Question, Statement of Scope and Standard of Review, Statement of Questions Involved, and Statement of the Case.

## SUMMARY OF ARGUMENT

The Commonwealth Court’s decision should be reversed. The decision incorrectly holds—against the weight of developing authority—that only post-conviction remedies are available to address the systematic denial of fundamental constitutional rights to those accused of serious crimes. This Court should reverse the Commonwealth’s Court’s erroneous ruling because the post-conviction legal remedy available to enforce *Strickland v. Washington*, 466 U.S. 668 (1984), is wholly inadequate to redress harms suffered by those accused of crimes—both serious and less so—who cannot obtain effective assistance of counsel prior to conviction, let alone prior to trial. The occasional failings of particular lawyers in particular cases do not define the crisis in indigent defense more than fifty years after *Gideon*. The problems are systemic and demand systemic solutions. Where a public defender’s office cannot provide even minimally effective representation in most of its cases because of onerously excessive caseloads and a crippling lack of resources—the precise situation in Luzerne County alleged in the Amended Complaint—prospective

relief is the only way to prevent the accused, as a class and not merely as individuals, from suffering irreparable harm at critical stages of the adversary criminal justice process prior to trial.

## **ARGUMENT**

In affirming the trial court’s dismissal of the Amended Complaint, the Commonwealth Court refused to recognize a constructive denial of counsel claim, ruling that the only remedy available to those who receive deficient representation is a post-conviction claim under *Strickland v. Washington*, 466 U.S. 668 (1984). (See Oct. 14, 2014 Opinion (“Op.”) at 18.) In doing so, the Commonwealth Court went against the weight of developing authority on a matter of first impression implicating substantial public interests in the fair administration of justice. Worse, the effect of the Commonwealth Court’s ruling denies any avenue of prospective relief to those whose constitutional right to counsel—guaranteed by the Sixth Amendment to the United States Constitution and Article 1, Section 9 of the Constitution of the Commonwealth of Pennsylvania—is directly threatened as a consequence of the government’s systemic shortcomings in funding and staffing a public defender’s office. Because case-by-case post-conviction relief is wholly inadequate to redress the various injuries that an accused may suffer from the systematic denial of adequate indigent defense services throughout our Commonwealth (and, indeed, our nation), the Court should recognize the necessity of permitting litigants to invoke the courts’

equitable powers to issue prospective relief where nearly *all* of the poor who are accused of crimes have access to legal assistance only through a system that is *structurally* incapable of ensuring their constitutional rights.

**I. APPELLANTS HAVE STATED A CLAIM FOR CONSTRUCTIVE DENIAL OF COUNSEL BECAUSE THE ALLEGATIONS OF THE AMENDED COMPLAINT DEMONSTRATE THAT THERE ARE SYSTEMIC DEFICIENCIES IN THE LUZERNE COUNTY OFFICE OF THE PUBLIC DEFENDER THAT CREATE AN IMMINENT AND UNACCEPTABLE RISK THAT APPELLANTS' RIGHT TO COUNSEL WILL BE VIOLATED IN WAYS THAT CANNOT BE CURED BY POST-CONVICTION REVIEW**

The deficiencies in the Luzerne County Office of the Public Defender (“OPD”) described in the Amended Complaint constitute violations of Appellants Kuren’s and Allabaugh’s right to counsel under the United States and Pennsylvania constitutions. The injuries with which they are imminently threatened cannot be remedied by post-conviction review pursuant to *Strickland*. In light of the imminent threat and the irreparable nature of the constitutional injuries they and others may suffer as a consequence of the systemic problems at the OPD, Kuren and Allabaugh should be permitted to proceed with a claim for prospective relief to protect their right to counsel.

**A. The Amended Complaint Describes Systemic Violations of Kuren’s and Allabaugh’s Right to Counsel Under the United States and Pennsylvania Constitutions**

The Amended Complaint alleges that the OPD is subject to routine underfunding from Luzerne County that prevents it from fulfilling the government’s

obligation to provide constitutionally adequate representation to all of its clients. (Am. Compl. ¶¶ 23, 28.) Among other things, the lack of funding causes the OPD to suffer from caseloads for its attorneys that far exceed national maximum caseload standards, a lack of adequate clerical staff, a lack of adequate computers and information technology, and inadequate physical facilities that are overcrowded and not suitable for client conferences or maintaining client confidentiality. (*See id.* ¶ 29.)

These deficiencies have significant deleterious effects on the OPD, which is unable to engage in many of the most basic functions of representation in any meaningful way. (Am. Compl. ¶ 45.) For example, the seriously overburdened attorneys in the OPD are prevented from meeting and conferring with clients in any meaningful way prior to critical stages in their legal proceedings, prevented from conducting reviews of client files, prevented from conducting discovery or engaging in motion practice, prevented from conducting factual investigations, and prevented from conducting necessary preparation for hearings, trials, and appeals. (*See id.*) Thus, because of the systemic deficiencies affecting it, the OPD is incapable of providing even minimally adequate representation to the majority of its indigent defendant clients.

This inability on the part of the OPD to meet the state's obligations to provide effective assistance of counsel is not merely speculative. The OPD is incapable of meeting the fundamental requirements of adequate legal representation as defined by

national standards, the Rules of Professional Responsibility, and as required by the Sixth Amendment and Article I, Section 9 of the Pennsylvania Constitution. The systemic problems affecting the OPD prevent its attorneys from satisfying basic standards such as having knowledge of the relevant areas of the law, being present at every critical stage of their clients' proceedings, conducting reasonable factual and legal investigations into the charges against their clients, and consulting with their clients to discover relevant information about the case to permit them to inform clients of their rights and enable their clients to make informed decisions about their defense. (Am. Compl. ¶¶ 48-70.)

The Amended Complaint further establishes that OPD attorneys are tasked with workloads that far exceed the maximum caseload standards established by the American Bar Association. (Am. Compl. ¶¶ 75-84.) And beyond that, the OPD lacks support staff, having no social workers, paralegals, or trial assistants to help attorneys prepare cases or manage workload. (*See id.* ¶ 85.) These crippling effects of these institutional deficiencies and excessive caseloads are clear and prevent OPD from meeting recognized standards for adequate representation, such as those set forth in the National Legal Aid & Defender Association Performance Guidelines. (*See id.* ¶¶ 92, 93.)

The problems facing the OPD fall within a larger pattern of problems facing representation of indigent defendants in this Commonwealth and throughout our

nation. Numerous studies have shown that overworked and under-resourced public defenders are powerless to overcome the structural problems that impair defense attorneys' ability to render effective assistance to their indigent clients. By way of example, the Pennsylvania Task Force and Advisory Committee on Services to Indigent Criminal Defendants<sup>3</sup> issued a report in 2011 that noted that many public defender offices "across Pennsylvania have caseloads high enough that even experienced defense lawyers would have difficulty in providing an adequate and ethically compliant defense for all clients. . . . These staggering caseloads create numerous difficulties for counsel, which can lead to inadequate representation of some clients." *A Constitutional Default: Services to Indigent Criminal Defendants in Pennsylvania* (December 2011) (the "Task Force Report")<sup>4</sup> at 74. Among the problems that excessive caseloads cause, the report identified poor attorney-client contact, with attorneys unable "to meet personally with their clients to receive and communicate vital information." *Id.* In addition, the report observed that excessive caseloads lead to "[i]nadequate preparation, as attorneys . . . fail to conduct interviews or investigations, file no motions or file the same boilerplate motions in every case, fail to act in a timely manner on important information, fail to pursue issues, or 'cut

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<sup>3</sup> The Task Force operated under the Pennsylvania General Assembly's Joint State Government Commission.

<sup>4</sup> A copy of the Task Force Report is available on the Internet at <http://jsg.legis.state.pa.us/resources/documents/ftp/publications/2011-265-Indigent%20Defense.pdf> (last visited September 8, 2015).

corners' in their work.” *Id.* The report identified Luzerne County as one in which the number of public defense attorneys was insufficient to provide adequate representation. *See id.* at 75-76.

The Task Force’s observations are not a statement about the quality of the lawyers providing services to indigent defendants:

The problem is not the public defenders (PDs) themselves, but the system in which they work. Most PDs are hard-working, committed, and competent professionals. The problem is that they must work against daunting obstacles: inadequate training and oversight, severely limited resources, and unmanageable caseloads. ***In many of Pennsylvania’s counties, the most brilliant and accomplished lawyer could not provide adequate representation because he or she simply would not have the time and resources needed to mount a constitutionally adequate defense.***

*Id.* at 3 (emphasis added).

Because their assigned counsel labor under these untenable conditions, Appellants Kuren and Allabaugh have stated a claim that they (like thousands of others in similar circumstances) have suffered—and that they are at imminent risk of continuing to suffer—a violation of their right to counsel under the United States and Pennsylvania constitutions. Indeed, as Appellants Kuren and Allabaugh detail in their merits brief, the right to counsel under the United States and Pennsylvania constitutions promises meaningful and effective assistance of counsel ***at all critical stages of a criminal prosecution.*** This right secures the accused not only against

wrongful convictions resulting from ineffective assistance of counsel at trial but also against other injuries they may suffer whether or not ultimately convicted or even tried, such as by the wrongful denial of bail, excessive sentencing, or the failure to negotiate a proper and favorable plea agreement.

The Commonwealth Court ignored the fact that serious constitutional injuries can and do occur prior to trial as a consequence of the government's failure to meet its obligation to provide indigent defendants with adequate assistance of legal counsel at all critical stages of a criminal prosecution. Instead, the Commonwealth Court focused solely on one purpose of the Sixth Amendment: the purpose to "ensure that criminal defendants receive a fair trial." (Op. at 17 (citing *Strickland*, 466 U.S. at 689)). In focusing on this pronouncement in *Strickland*, the Commonwealth Court ignored significant developments in Sixth Amendment jurisprudence, including the Supreme Court's affirmation that the Sixth Amendment's requirement of counsel applies not only at trial but at all critical stages of the adversarial process. See *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 208-09 (2008) (rejecting government's argument that "prejudice to a defendant's pretrial liberty" is not a cognizable harm under the Sixth Amendment).

Contrary to the Commonwealth Court's conclusion that any prejudice must be established via a post-conviction *Strickland* claim, the Supreme Court has recognized ineffective assistance claims where there never was a trial. In *Rothgery*, for example,

the Court considered a claim brought based on a defendant's pre-trial incarceration in a matter in which the charges were eventually dismissed. 554 U.S. at 196-97. There is abundant Supreme Court authority holding that the right to effective assistance of counsel is critical well before trial. *See Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (plurality); *see also, e.g., Estelle v. Smith*, 451 U.S. 454, 470-71 (1981); *United States v. Wade*, 388 U.S. 218, 236-37 (1967); *White v. Maryland*, 373 U.S. 59, 60 (1963).

To suggest that the Sixth Amendment cannot be enforced except where deficient representation led to a wrongful conviction both contravenes this established body of precedent and demonstrates a misconception of the role of defense counsel in the adversarial criminal justice system. It also underestimates the power of the courts to ensure that rights are not systematically violated in addition to their important role in affording individualized remedies after a violation has occurred. Those charged with serious crimes rely on the effective assistance of counsel to protect their rights and interest in various ways at every stage of criminal proceedings and to permit them to make informed decisions about their defense. While the constitutional guarantees of assistance of counsel do not guarantee the services of the very best counsel or perfect outcomes in every case, there is an indisputable requirement that appointed counsel have the ability, at the very minimum, to be effective and available to defendants at every critical stage of the process.

Concluding that criminal defendants' rights are violated only if ineffective counsel ultimately contributes to a wrongful conviction misses the point of assistance of counsel at every critical stage of the adversary criminal process. An approach such as that countenanced by the Commonwealth Court eliminates judicial review of a great deal of the critical role that lawyers play in ensuring that defendants are fairly treated in criminal proceedings and leaves no avenue for indigent defendants to protect their rights prior to conviction.

**B. Violations of the Right to Effective Assistance of Counsel at Critical Stages of the Adversarial Process Prior to Trial Cannot Be Remedied by Post-Conviction Review, Making Prospective Injunctive Relief Appropriate**

The Commonwealth Court has incorrectly concluded that that the massive institutional workload and resources crisis at the OPD, which prevents OPD staff from rendering services that meet even the minimal requirements of effective assistance to the majority of OPD clients, does not impair staff to the extent that all of its clients are in imminent jeopardy of having their rights irremediably violated.

The post-conviction review contemplated by the Commonwealth Court as the sole avenue of addressing ineffective assistance of counsel claims cannot remedy the injuries that Appellants Kuren and Allabaugh contend they have suffered and will continue to suffer based on Luzerne County's inadequate funding of OPD and the resulting caseload and resources crisis at OPD, and which innumerable others in similar circumstances have suffered and will continue to suffer throughout this

Commonwealth and in much of our nation. *See* NACDL, *Gideon at 50 Part I – Rationing Justice: The Underfunding of Assigned Counsel Systems* (2013).<sup>5</sup> Among those harms are that the OPD is unable to provide adequate assistance of counsel, including inability of counsel to confer with clients in any adequate or meaningful way prior to hearings, or for counsel to gather information, conduct investigation, or pursue discovery necessary to prepare for or to have adequate plea negotiations. (Am. Compl. ¶¶ 96, 106.)

Among the potential harms post-conviction review cannot remedy are prolonged pre-trial delay or pre-trial detention, the denial of bail or bail review, and the conduct of ineffective plea negotiations by counsel not aware of the details of the case. Indeed, it has been observed that a lawyer’s effective advocacy is a critical factor in determining whether arrestees are released shortly after their arrest or whether they spend substantial amounts of time in pretrial incarceration. *See* Douglas L. Colbert, *et al.*, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 *CARDOZO L. REV.* 1719, 1763 (2002). In fact, researchers studying Baltimore’s criminal justice system found that indigent arrestees represented by counsel were more than two-and-a-half times as likely to be released on their own recognizance, spending less time in jail. *See id.* at 1755. Such injuries are especially

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<sup>5</sup> A copy of the report is available on the Internet at <https://www.nacdl.org/reports/gideonat50/rationingjustice/> (last visited September 8, 2015).

pronounced for defendants who ultimately are acquitted or whose cases are dismissed but who nevertheless lose licenses, jobs, homes, education, freedom, time, opportunity, or income as a result of the lack of prompt, effective assistance of counsel. These injuries are not side effects of every criminal prosecution; rather, they stem directly from the kinds of deficient representation alleged in the complaint: counsel who are incapable of conducting adequate legal and factual investigation into their clients' cases, unable to communicate promptly with their clients or to meet with them prior to critical events in the process, and otherwise frustrated by crushing caseloads and inadequate support resources in their attempt to render effective representation.

Likewise, an indigent accused may suffer harm if an unprepared and overworked attorney fails to negotiate a plea agreement and the accused is subsequently convicted and sentenced more harshly than he or she would have been under a negotiated plea.

Other potential harms include the potential loss of witnesses or evidence that are not identified and secured through prompt and comprehensive discussions with accused indigent clients. The loss of such potentially exculpatory evidence cannot be remedied in post-conviction proceedings: it is impossible to establish that the outcome of the proceeding would have been different where the evidence necessary to demonstrate prejudice has permanently vanished, as it is likely to do in many

transient, indigent communities. For these reasons, the ABA has recognized that one of counsel's most important duties is to establish early and regular contact with a criminally accused client so that vital evidence is not lost. *See ABA Defense Attorneys Function Standard 4-3.2: Interviewing the Client* ("As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused.").

Post-conviction claims pursuant to *Strickland* are simply not designed to correct all of the deprivations of rights that defendants suffer when they are denied effective assistance of counsel at all critical stages of criminal proceedings. To be sure, *Strickland* announced a non-exclusive post-conviction process to ensure "confidence in the outcome" of criminal proceedings. 466 U.S. at 694. *Strickland* did not create a remedy for the numerous injuries and prejudices, and especially pre-trial injuries, that indigent defendants suffer as a result of the denial of effective counsel. Even more important, nothing in *Strickland* bars courts from addressing systemic problems in the context of civil litigation concerning the routine denial of constitutional rights that ineluctably results from the inadequacy of a government's overall manner of fulfilling one of its many social responsibilities.

A case-by-case analysis, as is required by post-conviction review, is an inappropriate standard to apply to a class claim implicating a wholesale failure of government to provide effective assistance of counsel to indigent defendants. This standard simply cannot apply to a case seeking prospective relief to cease and prevent

widespread, imminent future harm caused by denial of effective counsel at every critical stage of adversary criminal proceedings. Pre-trial and pre-conviction systemic deficiencies such as those alleged in the Amended Complaint cannot be redressed through a “wait and see” but-for analysis that hinges on whether a conviction results from prejudice in an individual case. As one court has explained, “[w]idespread and systemic instances of deficient performance caused by a poorly equipped appointed-counsel system will not cease and be cured with a case-by-case examination of individual criminal appeals, given that prejudice is generally required and often not established.” *Duncan v. Michigan*, 774 N.W.2d 89, 126 (Mich. Ct. App. 2009), *aff’d on other grounds*, 780 N.W.2d 843 (Mich. 2010).

Instead, the question in this matter of first impression before this Court is whether the right to counsel can be protected prospectively. Numerous courts throughout the United States have already held that it can and should be. *See Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988); *Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y. 2010) (allowing claim for constructive denial of effective assistance of counsel and noting that systemic deficiencies among public defender offices due to inadequate funding created a situation that could not be remedied by *Strickland* review); *Duncan*, 774 N.W.2d at 124-32 (rejecting argument that post-conviction relief contemplated by *Strickland* provided the sole and proper remedy for ineffective assistance of counsel).

*Strickland* review addresses post-conviction harm in individual cases where counsels' failures are so extreme that the appropriate remedy is reversal of a conviction. But that does not mean that in cases in which the lack of effective assistance of counsel falls short of the demanding *Strickland* standard that the right to effective assistance of counsel is not being violated systematically. And it certainly does not mean that the right cannot be prospectively safeguarded. The *Strickland* standard is properly limited to a narrow subset of cases in which ineffective assistance demonstrably resulted in a conviction and is based on considerations of finality of judgments, preservation of judicial resources, and reluctance to second-guess strategic decisions of counsel that are not at issue in pretrial proceedings and not a bar to address ongoing system-wide harm.

Moreover, the Supreme Court explained in a decision announced the same day as *Strickland* that there may be circumstances “present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate ***without inquiry into the actual conduct of the trial.***” *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (emphasis added). Although also a post-conviction case, *Cronin* acknowledged that there are times when the *Strickland* standard and its assessment of claimed ineffectiveness on the ultimate outcome of a case is unjustified to address the violation of the right to effective

assistance of counsel. Indeed, *Strickland* itself recognized that there are some circumstances in which prejudice will be presumed, such as where the defendant is constructively denied effective assistance of counsel. *Strickland*, 466 U.S. at 696. In such cases, the Court explained that prejudice is “so likely that case-by-case inquiry into prejudice is not worth the cost.” *Id.* at 696. In those situations, the deprivations of the right to counsel are “easy to identify and . . . easy for the government to prevent.” *Id.*

As described above, the Amended Complaint demonstrates the existence of a crisis affecting OPD’s workload and resources that results in a number of specific and material deficiencies in the indigent defense system in Luzerne County. These deficiencies are so glaring and pervasive that case-by-case inquiry into possible prejudice is not worth the cost. The ways in which the OPD is impaired in its ability to meet the minimum requirements of effective representation occur on such a scale that the Amended Complaint states a colorable claim for the constructive denial of counsel that should be permitted to proceed. Moreover, the Amended Complaint reflects an ongoing deficiency in how the Commonwealth attempts to satisfy its obligation to provide effective assistance of counsel to indigent defendants through local county governments that, in the case of Luzerne County, fail to meet the government’s constitutional obligations to its citizens. Not only do these deficiencies affect the determination of guilt or innocence for the accused, but they also cause

severe and irreparable collateral harms, such as incarceration, loss of employment, and loss of homes among others.

The fundamental and pervasive deficiencies in the OPD alleged by Appellants Kuren and Allabaugh describe a situation in which it is unlikely that “any lawyer, even a fully competent one,” would be able to “provide effective assistance.” *Cronic*, 466 U.S. at 659-60. The deficiencies are so manifest that the injuries they cause—including injuries that occur prior to trial and conviction—can be seen even “without inquiry into the actual conduct of the trial.” *Id.*

Because the post-trial review contemplated by *Strickland* cannot conceivably remedy the numerous deprivations of the right to counsel that Appellants Kuren and Allabaugh and others similarly situated have suffered and are in imminent danger of continuing to suffer, not only in Luzerne County but also throughout Pennsylvania and in much of the rest of the country, the Commonwealth Court’s ruling should be reversed. Appellants’ constructive denial of counsel claim should be permitted to proceed.

## **II. THE PROBLEMS CONFRONTING INDIGENT DEFENSE SERVICES ARE SYSTEMIC AND EXTEND THROUGHOUT THE COMMONWEALTH AND THE NATION**

As noted above, the problems facing the OPD fall within a larger pattern of deep-rooted problems that result from local governments underfunding public defenders throughout Pennsylvania and that routinely cause violations of indigent

defendants' right to effective assistance of counsel. These problems are numerous and pervasive, ranging from excessive caseloads, lack of support staff, and lack of resources to lack of training, inability to implement standards for representation, and inability to supervise staff to ensure quality of representation. Without the ability to pursue prospective relief to avert these problems, innumerable indigent defendants will continue to see their constitutional rights to counsel violated in ways that seriously harm them.

Recent studies have shown that overworked and under-resourced public defender offices create systemic problems that prevent defense attorneys from rendering effective assistance to their indigent clients. The problems facing the public defenders in Pennsylvania go back decades.

In 2011, the Pennsylvania's General Assembly's Joint State Government Commission's Task Force and Advisory Committee on Services to Indigent Criminal Defendants issued a report that highlighted the areas in which indigent defense in Pennsylvania was falling short of the constitutional mandate. The Task Force measured Pennsylvania's indigent defense system against the American Bar Association's "Ten Principles of a Public Defense Delivery System," a set of nationally accepted criteria for indigent defense system reform. With regard to each of the ten principles, Pennsylvania's indigent defense system exhibited serious deficiencies.

For example, the Pennsylvania system requires local county governments to fund indigent defense efforts.<sup>6</sup> This creates a system in which the indigent defense system in many counties is not independent but “subject to interference from the judiciary, the county commissioners, or both.” Task Force Report at 6.

Furthermore, although proper, effective representation requires that a defense attorney be appointed as soon as possible following a defendant’s arrest and meet with the accused prior to a preliminary hearing, there are counties in Pennsylvania where the attorney is not appointed and does not even meet the client until the preliminary hearing. *Id.*

Most significantly, underfunding leads to a shortage of staff, which in turn leads to excessive case workloads for staff attorneys. Consequently, the Task Force Report notes that the majority of counties in Pennsylvania have public defender offices in which “attorney workloads substantially exceed recommended limits.” *Id.* at 7. This is one of the most insidious problems facing the indigent defense system in Pennsylvania because overworked attorneys, no matter how talented, are not capable of rendering the basic minimum services required to provide effective assistance at all

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<sup>6</sup> Pennsylvania is one of two remaining states in the country that does not fund its indigent defense system at the state level to meet its constitutional obligation to provide effective assistance of counsel to indigent defendants. The only other state in this category is Utah.

critical stages of a defendant's journey through the adversary criminal process. *Id.* at 73-78.

These systemic problems are not going away. To the contrary, they are endemic. They do not manifest themselves only in the occasional individual case. Accordingly, they require an institutional solution, not an individualistic one. Many of the deficiencies identified in the findings of the Task Force are nearly identical to those identified almost a decade earlier in the *Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Judicial System* issued in 2003. *See* Task Force Report at 5.

Indeed, many of the problems identified in the Task Force Report were identified decades earlier. In 1995, the Spangenberg Group, on behalf of the ABA Bar Information Program, conducted a study of the Allegheny County Public Defender's Office. *See A Review of the Allegheny County (Pennsylvania) Public Defender Office* (November 1995) (the "Spangenberg Report").<sup>7</sup> After site visits and analysis of budgetary and caseload data, the Spangenberg Group concluded that the caseload was "overwhelming" for the office. Spangenberg Report at 6. The office failed to meet the majority of the ABA standards applicable to proper representation of criminal defendants. *See id.* at 8. Problems identified in the Spangenberg Report

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<sup>7</sup> A copy of the Spangenberg Report is available on the Internet at [http://www.nlada.net/sites/default/files/pa\\_allegheycounty\\_tsgreport\\_111995.pdf](http://www.nlada.net/sites/default/files/pa_allegheycounty_tsgreport_111995.pdf) (last visited September 8, 2015).

included salaries for staff attorneys that were far too low, inadequate office space and resources, conflicts of interest arising because the county commissioners had the power to hire and fire the public defender at will, a lack of staff resources to conduct factual investigations of the clients' cases (as opposed to mere interviews), a lack of written standards, and a great disparity between the support the district attorney's office received from local government and the much lower amount of support the public defender's office received. In short, the Spangenberg Report demonstrates that many of the problems identified in the Task Force Report are systemic problems that have existed for decades.

Although Pennsylvania's method of using local government to fund and provide indigent defense services contributes to these systemic problems, the need for reform extends beyond Pennsylvania. In April 2009, the National Right to Counsel Committee of The Constitution Project issued a report finding that the American justice system as a whole was failing to provide adequate counsel to indigent defendants in criminal and juvenile delinquency cases. *See Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (April 2009) (the "Right to Counsel Report").<sup>8</sup> The Right to Counsel Committee undertook to examine whether indigent defendants received "adequate legal representation, consistent with decisions

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<sup>8</sup> A copy of the Right to Counsel Report is available on the Internet at <http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf> (last visited on September 8, 2015).

of the Supreme Court and rules of the legal profession.” Right to Counsel Report at 3. The report noted that, although there were a few exceptions, “[i]n most of the country, notwithstanding the dedication of lawyers and other committed staff, quality defense work is simply impossible because of inadequate funding, excessive caseloads, a lack of genuine independence, and insufficient availability of other essential resources.” *Id.* at 4.

The Right to Counsel Committee identified inadequate funding as the root cause of many of the systemic problems for indigent defense in the country. Right to Counsel Report at 6-7. The most direct consequence of inadequate funding “is attorneys attempting to provide defense services while carrying astonishingly large caseloads.” *Id.* at 7. The consequences of inadequate funding and overwhelming caseloads the Right to Counsel Report identifies are identical to those identified in the Task Force Report and include the inability to interview clients properly, the inability to comply with professional and ethical standards, the inability to prepare adequately for hearings, the inability to be effective in seeking pretrial release, the inability to engage in proper motion practice or to conduct factual investigations, and the inability to negotiate in any meaningful way with the prosecutor on behalf of the clients. *Id.*

The threat that these systemic problems pose to the rights of the indigent accused are substantial and long-standing. As explained by the Right to Counsel Report, public defenders’ offices have been chronically underfunded. Right to

Counsel Report at 50-52. This underfunding results in staggering caseloads for indigent defense attorneys throughout the country and impairs their ability to deliver effective assistance. *See id.* at 65. At the same time, the problems inadequate representation pose to indigent defendants have become more complex and include more numerous collateral consequences. *See id.* at 72. NACDL issued several carefully-researched reports on the occasion of the 50th Anniversary of *Gideon v. Wainwright*, 372 U.S. 335 (1963), reaching the same conclusions. *See* [www.nacdl.org/reports](http://www.nacdl.org/reports).

Significantly to this case, the Right to Counsel Report identified litigation efforts, including cases similar to this case, as one of the principal avenues to reform this badly broken indigent defense system. *See* Right to Counsel Report at 9, 103-28. Such litigation efforts invoke the courts’ “inherent authority to protect the core functions of the judiciary, their equity jurisdiction, and their powers of general superintendence.” *Id.* at 130.

In the face of these systemic problems, this Court should permit Appellants Kuren and Allabaugh to proceed with their case for prospective relief to protect their constitutional right to effective assistance of counsel at all critical stages of their involvement in the adversary criminal process.

## CONCLUSION

For all the foregoing reasons and those stated in the brief of Appellants Kuren and Allabaugh, the National Association of Criminal Defense Lawyers and Pennsylvania Association of Criminal Defense Lawyers urge that the decision of the Commonwealth Court be reversed.

Respectfully submitted,

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## CERTIFICATIONS

This 10th day of September, 2015, I certify that:

***Electronic filing.*** The electronic version of this brief that is filed through the Court's PACFILE web portal is an accurate and complete representation of the paper version of this document that is being filed by *amici*.

***Word count.*** This brief contains 6,640 words, as counted by the undersigned's Microsoft Word word processing software.

***Service.*** I served true and correct copies of this brief via the Court's PACFile system, which services satisfies Rule 121 of the Pennsylvania Rules of Appellate Procedure. The method of service is reflected on the Certificate of Service generated by the PACFile system.

***Corrected Version.*** I further certify that I submitted and served via the PACFile system a corrected version of this brief on September 11, 2015, to address a typographical error that appeared in Mr. Kuren's name. The method of service is reflected on the Certificate of Service generated by the PACFile system.

/s/ Arleigh P. Helfer III

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