Nos. 57 MAP 2015, 58 MAP 2015

IN THE SUPREME COURT OF PENNSYLVANIA

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

ON APPEAL FROM THE ORDER OF THE COMMONWEALTH COURT AT NO. 2072 CD 2013, DATED OCTOBER 14, 2014, AFFIRMING THE ORDER OF LUZERNE COUNTY COURT OF COMMON PLEAS, CIVIL DIVISION, AT NO. 04517, DATED OCTOBER 22, 2013

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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INTRODUCTION

More than fifty years ago, the United States Supreme Court held in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), that the Sixth Amendment guarantees access to counsel in state court for all those charged with a felony.[1] This Court will become the second state court of last resort to consider whether indigent defendants who are assigned counsel in name only may vindicate that Sixth Amendment right through a constructive denial-of-counsel claim for prospective injunctive relief, or whether their only remedy is to seek post-conviction relief under *Strickland* v. *Washington*, 466 U.S. 668 (1984). The New York Court of Appeals was the first state court of last resort to consider this question, and in *Hurrell-Harring* v. *State*, 930 N.E.2d 217 (N.Y. 2010), it upheld the right of indigent defendants to seek relief in a civil action asserting a constructive denial of the right to counsel, as guaranteed by *Gideon*. That ruling was correct. The availability of civil actions for constructive denial of counsel is critical to protecting the constitutional right to counsel that *Gideon* recognized.

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[1] The Court later made clear that the guarantee of access to counsel extends to all criminal defendants faced with incarceration, including those charged with misdemeanors. See *Alabama* v. *Shelton*, 535 U.S. 654, 661-662 (2002). For simplicity's sake, this brief sometimes uses "*Gideon*" as shorthand for the Court's recognition of the right to counsel in both felony and misdemeanor contexts.

The Commonwealth Court has deprived indigent defendants in Pennsylvania of this essential tool, well grounded in the law, for enforcing their constitutional right to counsel. This Court should correct that error.

STATEMENT OF THE QUESTION INVOLVED

The United States will address:

Whether a civil claim for prospective, injunctive relief based on constructive denial of counsel under the Sixth Amendment to the United States Constitution is cognizable.[2]

INTEREST OF THE UNITED STATES

The United States has a strong interest in ensuring that all jurisdictions – federal, state, and local – are fulfilling their constitutional obligation to provide counsel to criminal defendants facing incarceration who cannot afford an attorney, as required by *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). In March 2010, the Attorney General launched the Office for Access to Justice to address the crisis in indigent defense services. The Office coordinates the Department of Justice's commitment to improving indigent defense. See *Office for Access to Justice*, http://www.justice.gov/atj (last visited Sept. 8, 2015).

[2] The United States takes no position on the merits of this particular case. The United States also takes no position on the state-law mandamus issue or on any issue particular to the claim based on the Pennsylvania Constitution.

The Department of Justice enforces the right to counsel in juvenile delinquency proceedings under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14141. For example, the Department entered into a comprehensive memorandum of agreement with Shelby County, Tennessee, that requires the County, among other things, to appoint counsel before children appear before a magistrate judge, and to establish a juvenile defender unit within the public defender's office.[3]

The Department of Justice has filed statements of interest (SOIs) in cases involving constructive denial-of-counsel claims under the Sixth and Fourteenth Amendments. See U.S. SOI, *Hurrell-Harring* v. *State*, No. 8866-07 (N.Y. Sup. Ct. Sept. 25, 2014)[4]; U.S. SOI, *Wilbur* v. *City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013) (No. 2:11-cv-1100)[5]; see also U.S. SOI, *N.P.* v. *Georgia*, No. 2014-cv-241025 (Fulton Cnty. Ga. Super. Ct.) (addressing juveniles' right to

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[3] Office of Public Affairs, *Department of Justice Enters into Agreement to Reform the Juvenile Court of Memphis and Shelby County, Tennessee* (Dec. 18, 2012), available at http://www.justice.gov/opa/pr/department-justice-enters-agreement-reform-juvenile-court-memphis-and-shelby-county-tennessee.

[4] available at http://www.justice.gov/sites/default/files/crt/legacy/2014/09/25/hurrell_soi_9-25-14.pdf.

[5] available at http://www.justice.gov/sites/default/files/crt/legacy/2013/08/15/wilbursoi8-14-13.pdf.

counsel).[6] These SOIs have addressed the scope of the right to counsel, the appropriate remedy for systemic deprivations of that right, or both.

The Department of Justice also has sought to address the crisis in indigent defense services through a number of grant programs, as well as through support for state policy reform. The Department, for example, has identified indigent defense as a priority area for Byrne-JAG funds, the leading source of federal justice funding to state and local jurisdictions.[7] In 2013, at a government-wide event hosted by the Department, the Department's Office of Justice Programs announced a collection of grants totaling $6.7 million to improve legal defense services for the poor.[8] These grants were preceded in 2012 by a $1.2 million grant program, *Answering Gideon's Call: Strengthening Indigent Defense Through Implementing the ABA Ten Principles of a Public Defense Delivery System*,

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[6] available at http://www.justice.gov/sites/default/files/crt/legacy/2015/03/13/np_soi_3-13-15.pdf.

[7] See Government Accountability Office, *Indigent Defense: DOJ Could Increase Awareness of Eligible Funding and Better Determine the Extent to Which Funds Help Support this Purpose*, 11-14 (May 2012), http://www.gao.gov/assets/600/590736.pdf.

[8] Office of Public Affairs, *Attorney General Holder Announces $6.7 Million to Improve Legal Defense Services for the Poor* (Oct. 30, 2013), available at http://www.justice.gov/opa/pr/2013/october/13-ag-1156.html. See also Office for Access to Justice, *Fifty Years Later: The Legacy of Gideon v. Wainwright* (Oct. 21, 2014), available at http://www.justice.gov/atj/fifty-years-later-legacy-gideon-v-wainwright.

administered by the Bureau of Justice Assistance. The Department of Justice's efforts to address the crisis in indigent defense with grants and other initiatives remain ongoing.[9]

STATEMENT OF THE CASE

Plaintiffs Adam Kuren and Steven Allabaugh are individuals facing criminal charges in Luzerne County who are represented by the Luzerne County Office of the Public Defender (OPD). They seek certification of a class comprised of "all indigent adults in Luzerne County who are or will be represented by the Office of the Public Defender from this point until the Office of the Public Defender has the funding and resources necessary to enable it to meet ethical, legal, and constitutional standards of representation." (R. 852a).

1. Plaintiffs' claim under 42 U.S.C. 1983 asserts a violation of their Sixth Amendment right to counsel, as articulated in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). (R. 882a-883a). Plaintiffs ask the court to compel the County to provide the necessary funding to allow OPD to provide constitutional representation to

[9] See Office for Access to Justice, *Accomplishments* (July 21, 2015), available at http://www.justice.gov/atj/accomplishments.

indigent defendants. (R. 861a). Among other allegations,[10] the complaint sets out the following:

• "Without significantly more lawyers and support staff, [OPD attorneys] will continue to endure overwhelming caseloads that effectively preclude constitutionally adequate representation." (R. 864a).

• "[G]iven the OPD's current volume of work, [OPD] * * * lawyers are unable to engage in many of the basic functions of representation, including conferring with clients in a meaningful way prior to critical stages of their legal proceedings, reviewing client files, conducting discovery, motion practice, and factual investigation, as well as devoting necessary time to prepare for hearings, trials, and appeals." (R. 864a).

• OPD attorneys "simply do not have the time and resources to provide constitutionally adequate and professionally required representation for the majority of Public Defender clients." (R. 864a).

• "[H]eavy caseloads regularly lead to scheduling conflicts, causing OPD attorneys to request continuances of critical proceedings. These continuances can lead to clients remaining in pre-trial detention for longer periods than necessary." (R. 867a).

• "The heavy caseloads also frequently result in the OPD attorneys' inability to consult with their clients prior to each stage of their case. Consequently, OPD attorneys participate in many stages of their clients' criminal proceedings without a full understanding of the facts and potential strategies for the case." (R. 867a).

• "[B]ecause of scheduling conflicts, OPD lawyers must frequently substitute for one another and thus attend proceedings for cases of which they have no prior knowledge." (R. 867a).

• "OPD attorneys are often unable to conduct reasonable factual investigation prior to the pre-trial hearing or even prior to negotiating a plea agreement." (R. 867a).

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[10] The United States takes no position on whether plaintiffs' allegations are true or will be proved.

• "When discovery is obtained, the attorneys are frequently unable to review the information. If discovery responses are inadequate or incomplete, attorneys rarely have time to follow up to obtain complete information." (R. 867a).

• "OPD attorneys also rarely have time to conduct the necessary fact inquiry and investigation prior to preliminary hearings." (R. 867a).

• "Generally, OPD attorneys are limited to a few minutes' introduction immediately prior to the hearings in a non-secure area of a district magistrate's office, or a similarly brief meeting at the County prison. These brief meetings are not sufficient to gather information about a case to provide constitutionally adequate representation." (R. 869a).

• OPD attorneys are often unable to contact their clients at any point during the three-month period between the preliminary hearing and the status conference, or in the one-month period between the status conference and the pre-trial hearing. (R. 870a).

• "OPD attorneys are often unable to conduct meaningful and comprehensive interviews with clients until the eve of trial, if the case proceeds that far." (R. 870a).

• "Overall, OPD attorneys are unable to maintain regular contact with their clients and to follow up on client attempts to communicate with them." (R. 871a).

• OPD attorneys handle massive caseloads that far exceed the maximum caseloads recommended by the American Bar Association and must fulfill other time-consuming responsibilities as well. (R. 872a-874a).

• OPD attorneys are often scheduled to appear in two different courtrooms at the same time. (R. 874a).

• "[M]any [OPD] attorneys still do not have their own desks, workspaces, or dedicated phone lines, which makes it difficult, if not impossible, to receive and return calls from clients." (R. 874a-875a).

2. The trial court granted the County's motion to dismiss, concluding that plaintiffs lacked standing[11] and did not state a valid claim. *Flora* v. *Luzerne Cnty.*, 103 A.3d 125, 130 (Pa. Commw. Ct. 2014), reargument denied (Dec. 2, 2014). Plaintiffs appealed, and the Pennsylvania Commonwealth Court affirmed. *Id.* at 140.

The Commonwealth Court held that a civil claim for constructive denial of counsel is not a cognizable claim. *Flora*, 103 A.3d at 136. The court explained its holding by stating (1) that it "accept[ed] the analyses of the dissenting judges in *Hurrell–Harring* and *Duncan* [v. *State*, 774 N.W.2d 89 (Mich. Ct. App. 2009)] and reject[ed] as not persuasive the majority opinions in those cases," and (2) that "there is no precedent from the United States Supreme Court acknowledging that a constructive denial-of-counsel claim may be brought in a civil case that seeks prospective relief in the form of more funding and resources to an entire office, as

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[11] There were two separate standing issues in this case. The first was whether one of the original plaintiffs, former Chief Public Defender Al Flora, continued to have a cognizable injury after he stopped working at OPD. The trial court concluded that he did not, and the Commonwealth Court agreed. *Flora* v. *Luzerne Cnty.*, 103 A.3d 125, 130 (Pa. Commw. Ct. 2014), reargument denied (Dec. 2, 2014). The plaintiffs petitioned this Court on that standing issue, but this Court declined to review it. *Flora* v. *Luzerne Cnty.*, No. 951 MAL 2014, 2015 WL 3996993 (Pa. June 30, 2015) (granting the petition in part). Thus, the Commonwealth Court's ruling that Flora lacks standing is final. The second standing issue, whether the indigent clients of OPD have standing, "merges with the question of whether the amended complaint states a claim upon which relief can be granted." *Flora*, 103 A.3d at 133.

opposed to relief to individual indigent criminal defendants." *Ibid.* The court also indicated agreement with the *Duncan* dissent's conclusion that recognition of such a cause of action would violate separation-of-powers principles. *Ibid.*

The court then ruled that, even if a civil constructive denial-of-counsel claim exists, it was not adequately pleaded here. *Flora*, 103 A.3d at 136-137. The court characterized the complaint as alleging that Luzerne County OPD attorneys "meet only briefly with indigent clients, rarely contact clients between court appearances, do not conduct significant investigation or discovery, do not engage in sufficient trial preparation, and cannot properly litigate appeals due to lack of experience." *Id.* at 137. It concluded that "[t]hese allegations do not create circumstances that are 'so likely [to create prejudice] that case-by-case inquiry into prejudice is not worth the cost.'" *Ibid.* (alteration in original) (quoting *Strickland* v. *Washington*, 466 U.S. 668 (1984)). The court concluded that, because prejudice could not properly be inferred under the circumstances alleged in the complaint, plaintiffs' only recourse is to bring a post-conviction *Strickland* claim.

Finally, the court concluded that plaintiffs did not state a claim for actual denial of counsel. *Flora*, 103 A.3d at 139-140. The court recognized that plaintiffs' complaint alleges nonrepresentation at preliminary arraignments. *Id.* at 139. But the court concluded that, though the right to counsel attaches at the

preliminary arraignment, "the defendant does not have a right to counsel to represent him *at* the preliminary arraignment." *Ibid.*

Plaintiffs filed a petition for allowance to appeal with this Court, which this Court granted in part.

ARGUMENT

A CIVIL CLAIM FOR CONSTRUCTIVE DENIAL OF COUNSEL UNDER THE SIXTH AMENDMENT IS COGNIZABLE

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall * * * have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. In *Gideon* v. *Wainwright*, the U.S. Supreme Court held that the Sixth Amendment right to counsel requires state courts to appoint attorneys for defendants who are charged with felonies and cannot afford to retain counsel, because "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." 372 U.S. 335, 344 (1963). The Court explained that "lawyers in criminal courts are necessities, not luxuries." *Ibid.* This Court also has explained that "the right to counsel has been recognized as a fundamental right, one that is essential to the goal of ensuring that every criminal defendant receives a fair trial before an impartial tribunal." *Commonwealth* v. *Chmiel*, 738 A.2d 406, 422 (Pa. 1999) (citing *Gideon*, 372 U.S. at 344-345).

The Sixth Amendment right to counsel requires more than the mere appointment of a member of the bar. The right of indigent criminal defendants to be provided an attorney may be violated by the government's *actual* denial of counsel, or by a *constructive* denial of counsel.[12] A civil claim for systemic prospective relief based on constructive denial of counsel is viable: (1) when, on a system-wide basis, the traditional markers of representation – such as timely and confidential consultation with clients, appropriate investigation, and meaningful adversarial testing of the prosecution's case – are absent or significantly compromised; and (2) when substantial structural limitations – such as a severe lack of resources, unreasonably high workloads, or critical understaffing of public defender offices – cause that absence or limitation on representation. In these circumstances, the appointment of counsel is merely cosmetic, effectively resulting in a lawyer in name only. And when that is the case – that is, when the totality of the circumstances indicate that structural limitations are causing such a system-wide problem of nonrepresentation – indigent criminal defendants may seek

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[12] *Strickland* claims and *Gideon* claims are doctrinally distinct. An ineffective assistance-of-counsel claim under *Strickland* contends that counsel (whether appointed or selected and paid for by the defendant) failed to represent his or her client effectively, and that that failure prejudiced the client. A constructive denial-of-counsel claim under *Gideon* asserts a form of nonrepresentation – that appointed counsel is counsel in name only – and seeks prospective relief. In a constructive denial-of-counsel claim no individualized showing of prejudice is required.

prospective, systemic relief in a civil suit to protect the full Sixth Amendment rights of the class that they represent.

The concept of a constructive denial-of-counsel claim is both legitimate and rooted in U.S. Supreme Court case law. In *United States* v. *Cronic*, 466 U.S. 648 (1984), the U.S. Supreme Court recognized that some infringements of the right to counsel are so significant that no showing of prejudice is necessary. No showing of prejudice is required where there is a complete denial of counsel at a critical stage; where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; or where "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." *Id.* at 659-660. In *Powell* v. *Alabama*, 287 U.S. 45 (1932), for example, the Court ruled that it would be "vain" to give the defendant a lawyer "without giving the latter any opportunity to acquaint himself with the facts or law of the case." *Id.* at 59 (quoting *Commonwealth* v. *O'Keefe*, 148 A. 73, 74 (Pa. 1929)). Similarly, in *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940), the Court explained that "mere formal appointment" of counsel does not satisfy the right to counsel. Specifically, the Court ruled that "the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment

of counsel into a sham." *Ibid.* Thus, the Court has repeatedly indicated that the absence of traditional markers of representation can result in a constructive denial of counsel.[13]

A. Courts That Have Considered The Issue Have Recognized That A Civil Claim For Constructive Denial Of Counsel Is Cognizable

Hurrell-Harring is the leading case recognizing a civil constructive denial-of-counsel claim and, in the United States' view, is correctly reasoned. The court in that case recognized a constructive denial-of-counsel claim under *Gideon* that is distinct from an ineffective-assistance claim under *Strickland*. The court determined that, "[g]iven the simplicity and autonomy of a claim for nonrepresentation, as opposed to one truly involving the adequacy of an attorney's performance, there is no reason * * * why such a claim cannot or should not be brought without the context of a completed prosecution." *Hurrell-Harring* v.

[13] To be sure, the Supreme Court did not ultimately conclude that the right to counsel was violated in *Cronic* or *Avery*. In both cases, the Court concluded that, in the particular circumstances presented, late appointment of counsel did not justify a presumption of ineffectiveness. See *Cronic*, 466 U.S. at 665; *Avery*, 308 U.S. at 450-453. The appointed counsel in those cases, the Court determined, were not merely formal appointments who were unable to subject the government's theory to adversarial testing. But in a systemic constructive denial-of-counsel claim, plaintiffs allege that the counsel assigned to indigent defendants are counsel in name only and thus are not subjecting the government's theory to meaningful adversarial testing, or providing other traditional markers of representation because of severe structural limitations that make these failures of representation inevitable. That situation is different from the facts underlying the individual claims at issue in *Cronic* and *Avery*.

State, 930 N.E.2d 217, 225-226 (N.Y. 2010). The court recognized that to conclude that this type of claim is only cognizable in an action for post-conviction relief would be to prevent courts from effectively remedying systemic violations of *Gideon*. The court concluded that "the fairly minimal risks involved in sustaining the closely defined claim of nonrepresentation we have recognized must be weighed against the very serious dangers that the alleged denial of counsel entails." *Id.* at 226. The court also determined that "enforcement of a clear constitutional or statutory mandate is the proper work of the courts," and the mere fact "that a remedy in this action would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities" was not reason enough to shrink from that obligation. *Id.* at 227.

The court in *Wilbur* v. *City of Mount Vernon* followed a similar analysis. Like *Hurrell-Harring*, it recognized that plaintiffs' suit was not alleging ineffective assistance of counsel under *Strickland*, but rather was asserting a systemic deprivation of the right to counsel promised in *Gideon*. No. 2:11-cv-1100, 2012 WL 600727, at *2 (W.D. Wash. Feb. 23, 2012). The *Wilbur* court concluded that plaintiffs had asserted facts that could support a finding "that the assignment of public defenders is little more than a sham," and that a civil action seeking a systemic remedy was appropriate: "Where official government policies trample rights guaranteed by the Constitution, the courts have not hesitated to use their

equitable powers to correct the underlying policies or systems." *Id.* at *2-3. See also *Duncan* v. *State*, 774 N.W.2d 89, 127 (Mich. Ct. App. 2009) (concluding that plaintiffs state a valid civil claim where they allege an actual denial of counsel, a constructive denial of counsel, or conflicted counsel)[14]; *Luckey* v. *Harris*, 860 F.2d 1012, 1018 (11th Cir. 1988) (concluding that a civil Sixth Amendment claim was cognizable where plaintiffs asserted, among other things, "systemic delays in the appointment of counsel," that their attorneys are denied the resources necessary to investigate their cases, and that attorneys are pressured to hurry cases to trial and to enter guilty pleas).[15]

The Commonwealth Court is the first court we are aware of to have ruled that a claim for constructive denial of counsel is not cognizable at all. The court's primary justification for that ruling was that "there is no precedent from the United States Supreme Court acknowledging that a constructive denial-of-counsel claim may be brought in a civil case that seeks prospective relief." *Flora* v. *Luzerne Cnty.*, 103 A.3d 125, 136 (Pa Commw. Ct. 2014), reargument denied (Dec. 2,

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[14] As the Commonwealth Court in this case explained, the procedural history of *Duncan* is complex, but ultimately the Court of Appeals affirmed that plaintiffs had stated a claim in that case. See *Flora* v. *Luzerne Cnty.*, 103 A.3d 125, 135 n.7 (Pa Commw. Ct. 2014), reargument denied (Dec. 2, 2014).

[15] This case was dismissed on remand based on abstention grounds under *Younger* v. *Harris*, 401 U.S. 37 (1971). See *Luckey* v. *Miller*, 976 F.2d 673, 675 (11th Cir. 1992). But the Eleventh Circuit's initial opinion remains good law.

2014). Specifically, the court noted that *Strickland*, *Cronic*, and *Gideon* were cases in which a defendant sought post-conviction relief, not civil actions. But none of those cases suggest, let alone hold, that the Sixth Amendment right to counsel cannot be vindicated through a civil action. The Commonwealth Court failed to articulate any affirmative reason for its conclusion that a civil constructive denial-of-counsel claim is not cognizable.

Rather, the court simply stated that it accepted the analyses of the dissenting judges in *Hurrell-Harring* and *Duncan*. *Flora*, 103 A.3d at 136. But the dissent in *Hurrell-Harring* expressly avoided espousing an absolute rule that a civil claim for constructive denial of counsel is never cognizable. It concluded instead that "the various claims asserted by plaintiffs [in that case] do not rise to that level." *Hurrell-Harring*, 930 N.E.2d at 230 (Pigott, J., dissenting). The dissent in *Duncan*, meanwhile, lends no relevant authority here as both the majority and dissent in that case viewed the claim through a *Strickland* lens alone. Thus, the *Duncan* dissent should be interpreted as concluding (correctly) that a *Strickland* ineffectiveness-of-counsel claim cannot be brought in a civil action. See *Duncan*, 774 N.W.2d at 158-166 (Whitbeck, J., dissenting).

And though the *Duncan* dissent also found that the systemic relief the plaintiffs sought in that case would violate separation-of-powers principles, courts are *not* powerless to compel action by other branches of government in order to

remedy a constitutional violation. To the contrary, courts have long recognized the necessity of systemic equitable relief to correct unconstitutional conduct. See, *e.g.*, *Brown* v. *Plata*, 563 U.S. 493 (2011); see also *Hurrell-Harring*, 930 N.E. 2d at 227 ("It is, of course, possible that a remedy in this action would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities. But this does not amount to an argument upon which a court might be relieved of its essential obligation to provide a remedy for violation of a fundamental constitutional right.").

This Court should reach the same conclusion that the courts in *Hurrell-Harring* and *Wilbur* reached. It should rule that a constructive denial-of-counsel claim based on *Gideon* is cognizable, and that such a claim is pled adequately where the allegations, if true, support a conclusion that assigned attorneys are attorneys in name only.

B. Factors Relevant To A Constructive Denial-Of-Counsel Claim

Courts should consider two related questions in assessing a claim for systemic constructive denial of counsel: (1) whether traditional markers of representation are frequently absent or significantly compromised in plaintiffs' relationships with their assigned counsel; and (2) whether the absence of traditional markers of representation is caused by assigned attorneys operating under systemic

structural limitations that prevent the attorneys from offering bona fide assistance of counsel.

Courts assessing a constructive denial-of-counsel claim should consider whether traditional markers of representation are present for clients of the public defender's office. These include the attorney's availability to engage in meaningful attorney-client contact to learn from and advise the client, the attorney's ability to investigate the allegations and the client's circumstances that may inform strategy, and the attorney's ability to advocate for the client either through plea negotiation, trial, or post-trial. When these markers of representation are absent, there is a serious question whether the assigned counsel is merely a lawyer in name only. Indeed, "[*a*]*ctual* representation assumes a certain basic representational relationship." *Hurrell-Harring*, 930 N.E.2d at 224 (emphasis added); see also *Wilbur* v. *City of Mount Vernon*, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013) (finding that, where clients met their attorneys for the first time in court and immediately accepted a plea bargain, without discussing their cases in a confidential setting, the system "amounted to little more than a 'meet and plead' system," and that the resulting lack of representational relationship violated the Sixth Amendment); *Public Defender, Eleventh Jud. Cir. of Fla.* v. *State*, 115 So. 3d 261, 278 (Fla. 2013) (finding denial of counsel where attorneys were "mere

conduits for plea offers," did not communicate with clients, were unable to investigate the allegations, and were unprepared for trial).

Concerning systemic structural limitations, courts should consider factors such as insufficient funding, insufficient staffing, excessive workloads, lack of training and supervision, and lack of resources. In *Wilbur*, for example, the court noted the structural limitations – insufficient staffing, excessive caseloads, and almost nonexistent supervision – that resulted in a system "broken to such an extent that confidential attorney/client communications are rare, the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned." *Wilbur*, 989 F. Supp. 2d at 1127. Similarly, the court in *Public Defender*, 115 So. 3d at 279, held that the public defender's office could withdraw from representation of indigent defendants because of structural limitations. Insufficient funds and the resultant understaffing and excessive caseloads created a situation where indigent defendants did not receive assistance of counsel as required by the Sixth Amendment. *Ibid*. Other courts have also concluded that severe structural limitations result in a denial of Sixth Amendment rights. See, *e.g.*, *New York Cnty. Lawyers' Ass'n* v. *State*, 196 Misc. 2d 761, 790 (N.Y. Sup. Ct. 2003) (holding statutory rates for assigned counsel unconstitutional as they resulted in denial of counsel and excessive caseloads, among other issues);

State v. *Young*, 172 P.3d 138, 144 (N.M. 2007) (holding that inadequate compensation of defense attorneys deprived capital defendants of their Sixth Amendment right to counsel).

Structural limitations can lead to a situation where even a well-intentioned and competent lawyer is a merely nominal counsel because the lawyer is unable to fulfill the basic obligation of preparing a defense, including conferring with the defendant, investigating the facts of the case, interviewing witnesses, securing discovery, engaging in motions practice, identifying experts when necessary, and subjecting the evidence to adversarial testing. As the Supreme Court of Louisiana stated, "[w]e know from experience that no attorney can prepare for one felony trial per day, especially if he has little or no investigative, paralegal, or clerical assistance." *State* v. *Peart*, 621 So. 2d 780, 789 (La. 1993).

C. Civil Constructive Denial-Of-Counsel Claims Provide An Important Tool For Remedying Serious Violations Of The Constitutional Right To Counsel

A civil constructive denial-of-counsel claim is an effective way for litigants to seek to effectuate the promise of *Gideon*. Post-conviction claims cannot provide systemic structural relief that will help fix the problem of under-funded and under-resourced public defenders. The constructive denial-of-counsel claim recognized in *Hurrell-Harring* and *Wilbur* provides indigent defendants deprived of their constitutional right to counsel with a meaningful tool for pursuing systemic relief. The Commonwealth Court's opinion in this case is the only decision the United

States is aware of that concludes that a *Gideon*-based civil action for constructive denial of counsel is not viable at all. It erects a roadblock that will impede indigent defendants' ability to vindicate their Sixth Amendment right to counsel. This Court should remove that roadblock and rule that constructive denial-of-counsel claims are actionable.

CONCLUSION

The judgment of the Commonwealth Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS complies with Pennsylvania Rule of Appellant Procedure 2135 because it contains 4805 words, excluding the parts of the brief exempted.

s/ Nathaniel S. Pollock
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Dated: September 10, 2015

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2015, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS with the Deputy Prothonotary for the Pennsylvania Supreme Court using the PACFile system.

I further certify that I served two copies of the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS on the following counsel by first class mail, which service satisfies the requirements of Pennsylvania Rule of Appellant Procedure 121.

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