I.

Introduction

Plaintiffs brought this action on their own behalf and on behalf of all present and future indigent persons facing criminal prosecution in Lake County Superior Court-Criminal Division, Lake County Superior Court-Juvenile Division, and Lake County Superior Court-County Division (hereinafter collectively "Lake County Courts"). The relief sought is that the Defendants be ordered to provide adequate preconviction assistance of counsel. Plaintiffs requested all other proper relief.

Although the Defendants have known of the constitutional defects of the Lake County Public Defender system for nearly a quarter of a century, they have failed to remedy it. This undisputed history of neglect makes it reasonable for a neutral observer to conclude that the Defendants will continue to fail to provide effective preconviction assistance of counsel. The Defendants' failings have resulted and, unless there is judicial intervention, will continue to result in inadequate preconviction assistance of counsel and have jeopardized the rights that effective assistance of counsel would protect. The General Assembly, the local legislature and local executive departments have known of these failings for twenty-five years and have done nothing. When representative democracy has disintegrated to the extent that it proves itself incapable, over long periods, to provide the minimal constitutional protections required by the

Bill of Rights, the Courts are left with no choice but to provide the governance mandated by the Constitution.

The Defendants have not made even the slightest attempt at remedial action. There is no evidence that the deficient conditions complained of have not **always** existed in Lake County.

II.

Procedural History

This litigation was filed 31 July 1995 on behalf of Straley M. Thorpe ("Thorpe"), who is a duly licensed attorney in Indiana. Thorpe is a public defender in Lake Superior Court-County Division Room III. He brought this suit on his own behalf and on behalf of his public defender clients. Plaintiffs Derrick L. Davis ("Davis"); Larry Peterson ("Peterson"); Mustafa N. Shabazz ("Shabazz"); Eugene Eddie ("Eddie"); Hobart Kendrick ("Kendrick"); Lawrence Mourfield ("Mourfield"); and Lamart Carter ("Carter") are all indigent persons charged with having committed criminal offenses in Lake County, Indiana.

The Defendants are the State of Indiana ("Indiana") and Governor Evan Bayh ("Governor") as the chief executive branch officer of Indiana; Lake County; the Lake County Council, and its members, Frances DuPey, Troy Montgomery, Morris Carter, Lance Ryskamp, John Aguilera, Robert Crossk, and Larry Blanchard; the Lake County Board of County Commissioners and its members,

Rudolph Clay, Ernest Niemeyer, and Peter Katic; and the Superior Court of Lake County, Indiana, and its Criminal Division, the Hon. James Clement as a Judge and its chief executive officer, the Hons. Richard Conroy, James Letsinger, and Richard Maroc as judges; the Superior Court of Lake County-Juvenile Division with Mary Beth Bonaventura as its Judge; and the Superior Court of Lake County-County Court with the Hons. Nicholas J. Schiralli, Sheila M. Moss, and Anthony P. Trapane as its judges.

On 31 October 1995, the State Defendants moved to dismiss the complaint and submitted a 23-page brief. On 10 November 1995, the Lake County Council moved to dismiss the complaint and submitted an 8-page brief. On 20 November 1995, Defendant Letsinger moved to dismiss the complaint and submitted a 5-page brief.

III.

The Undisputed Facts

1. Ineffective preconviction assistance of counsel and the Plaintiffs:

The uncontroverted facts concerning the representation provided to Plaintiffs Derrick L. Davis, Larry Peterson, Mustafa N. Shabazz, Eugene Eddie, Hobart Kendrick, Lawrence Morefield, and Lamart Carter appear at ¶¶ 57-101 of the Plaintiffs' Amended Complaint. (hereinafter "PAC").

At the time of the filing of the complaint, Thorpe had been a public defender in Lake Superior Court-County Division Room III since 1985. He brings this suit on his behalf and on behalf of

his clients.

Davis was an indigent person charged with having committed criminal offenses in Lake County, Indiana. Davis has been in custody since 17 June 1994, when he surrendered to law enforcement authorities. On or about 12 July 1994, Davis had his initial hearing. On or about 19 July 1994, a Public Defender was appointed to represent Davis. Since that date, his public defender had personally met with Davis only twice. Each meeting lasted less than a half hour. Since that date, his public defender has spoken with Davis over the telephone three times. Each telephone call lasted for less than a half hour. Since that date, Davis has written to his public defender three times regarding his case, but has yet to receive a written response. (PAC ¶57-66)

Peterson is an indigent person charged with having committed criminal offenses in Lake County, Indiana, and has been in custody since approximately 6 January 1995. Since that date, his trial public defender has personally met with him only three times. No meeting lasted more than ten minutes. Peterson has written his public defender approximately thirty times seeking more information on his case. His public defender has only responded to three of the letters. Peterson is "OR'ed" on the case in Lake County, but remains in custody on a hold from Kentucky. Peterson has requested assistance in being promptly returned to the State of Kentucky, but his public defender has provided no assistance in that matter. As a result of the Public

Defender not assisting Peterson in making the proper demand for transportation to be tried in the Kentucky. Peterson has been and will continue to be held in custody unnecessarily. A competent public defender would have provided assistance of counsel in this matter which would have resulted in his being transported for trial on the Kentucky charges. Peterson has spoken with his attorney less than five times because the Lake County Jail has a telephone policy which only permits inmates to use the phones on Wednesday and Friday. The phones are turned on at 8:30 a.m. (when the attorneys are usually in court) and turned off at 12:00 noon (when the attorneys are usually not in court). Peterson's attorney refuses to accept collect phone calls at her private office. (PAC ¶¶67-73)

Plaintiff Shabazz was arrested on or about 17 January 1995, for possession of a firearm without a permit and escape. Shabazz's initial hearing was on or about 1 February 1995. On or about 7 February 1995, a Public Defender was appointed to represent Shabazz. Since that date, his trial public defender has personally met with him less than five (5) times. During these meetings Shabazz was led to believe, based upon statements of his public defender, that his public defender had been in ***ex parte*** communications with the trial court judge regarding what sentence would be imposed should a conviction result. Each meeting between Shabazz and his public defender lasted less than a half hour. Since 7 February 1995, his public defender has spoken with Shabazz over the telephone twice. Each telephone call lasted less

than fifteen minutes. Since 7 February 1995, Shabazz has written to his trial public defender ten times but has never received a written response. Shabazz was convicted at trial. It was the first trial setting, and Shabazz, because his defense had not been prepared, moved to continue the trial. The motion was denied. After the conviction and sentencing, a Lake County Appellate Defender was appointed to represent Shabazz on his appeal. Since that date, his appellate public defender has never met with Shabazz to discuss his case. Since that date, his appellate public defender has never spoken with Shabazz over the telephone. Since that date, Shabazz has written to his trial public defender five times but has never received a written response. (PAC ¶¶74-87)

Plaintiff Eddie is an indigent person charged with having committed crimes in Lake County. Eddie has been in custody since 12 February 1995. Since that date, his public defender has personally only met with Eddie three times. Each meeting lasted less than fifteen minutes and consisted, almost exclusively, of the public defender lobbying Eddie to accept a plea bargain. Since that date, his public defender has never spoken with Eddie on the telephone. (PAC ¶¶88-91)

Plaintiff Kendrick is an indigent person charged with having committed crimes in Lake County whose experience with the Public Defender system is similar to Davis', Peterson's, and Eddie's. (PAC ¶92)

Plaintiff Mourfield is an indigent person charged with

having committed crimes in Lake County. Mourfield's experience with the Public Defender system is similar to Davis', Peterson's, and Eddie's. (PAC ¶93)

Plaintiff Carter is an indigent person charged with having committed crimes in Lake County. Carter has been incarcerated 14 months. His first public defender did not visit him for the first six months that Carter was in custody. Carter's public defender was suspended from the practice of law for misconduct, and another public defender was appointed to represent Carter. Carter's second public defender visited him one time in jail. In February 1995, Carter's second public defender withdrew from the case and a third public defender was appointed. Carter's third public defender visited Carter twice, but only to pass on plea offers from the State, and did not discuss preparing a defense. Carter's third public defender did not investigate Carter's case. (PAC ¶¶94-101)

2. The historic failure to provide effective preconviction assistance of counsel in Lake County:

The uncontroverted facts concerning the history of the Defendants' failure, or refusal, to provide effective preconviction assistance of counsel to indigents in Lake County appear at ¶¶156-230 of the Plaintiffs' Amended Complaint.

a. 1972 Report: A Program for the Improved Administration of Justice in Lake County:

In 1972, a report titled A Program for the Improved Administration of Justice in Lake County was prepared by the Institute of Court Management. Plaintiffs' counsel has been

unable to obtain a copy of this report. However, portions of it are quoted in subsequent reports. It was paraphrased in a report prepared by the Criminal Courts Technical Assistance Project of the Institute for Advanced Studies in Justice of the American University Law School, Washington, D.C.. (See Exhibit 1, "The Structure and Funding for Criminal Defense of Indigents in Indiana, hereinafter "Structure and Funding"). The Institute of Court Management had never before encountered such widespread dissatisfaction coupled paradoxically with feelings of resignation, apathy and impotence. Structure and Funding at 14.

No subsequent report has ever contradicted this finding or concluded that the conditions found to exist have improved.

b. 1973 Report: Criminal Court Calendar Management in Lake County (1973):

In 1973, a report titled Criminal Court Calendar Management in Lake County was prepared by the American Judicature Society. Plaintiffs' counsel has been unable to obtain a copy of this report. Portions of it are quoted in Structure and Funding. The American Judicature Society noted that there was severe delay in criminal cases in Lake County, and cases become lost while defendants remain in jail. Presumably this includes public defender clients. Structure and Funding" at 13-14.

No subsequent report has ever contradicted this finding or concluded that the conditions found to exist have improved.

c. 1974 Report: The Structure and Funding for Criminal Defense of Indigents in Indiana (1974):

Structure and Funding was prepared by the Criminal Courts

Technical Assistance Project of the Institute for Advanced Studies in Justice of the American University Law School, Washington, D.C. It was part of a program of the Law Enforcement Assistance Administration of the U.S. Department of Justice.

The study was a "statewide survey of indigent defense services in Indiana." Structure and Funding at 1. Lake County was included, and Judge James J. Richards, Chief Judge, Superior Court of Lake County, was one of the individuals interviewed. Id. at 5.

The Report agreed with observations which had been made two years earlier in a report on Lake County prepared by the Institute for Court Management titled A Program for the Improved Administration of Justice in Lake County. The Report noted that it had "never before encountered such widespread dissatisfaction coupled paradoxically with feelings of resignation, apathy and impotence" surrounding a court system. Id. at 14. It noted that as much as a week might pass between an arrest and initial hearing. Id. at 14. The Report noted that, in the area of providing effective assistance of counsel to juveniles in Lake County, "the overall picture . . . is of deficient defense services." Id. at 19.

The Report concurred in an earlier report that "all those involved should be free from political influence" and the "existing practice of the Criminal Court judges appointing public defenders should be discontinued." Id. at 24.

The Report noted that a:

> public defender in Lake County (was) being prosecuted federally for alleged kickbacks or extortion from indigent appointments . . . [and] that suits [were] pending concerning aspects of defender services . . . and [other] suits [were] being seriously contemplated concerning defender services, particularly with respect to misdemeanor representation (or non-representation). Id. at 28-29.

Lake County, at that time, had 1,676 felonies, 11,200 misdemeanors and 1,026 juvenile matters annually and it was estimated that 60% were indigent. Id. at 45 and Appendix A.

No subsequent report has ever contradicted this finding or concluded that the conditions found to exist have improved.

d. 1974 Report Review of the Structure, Scope and Adequacy of the Public Defender System in Lake County, Indiana:

In 1974, a report titled Review of the Structure, Scope and Adequacy of the Public Defender System in Lake County, Indiana was prepared in conjunction with the Criminal Courts Technical Assistance Project of the American University Law School, Washington, D.C. and done under a contract with the Law Enforcement Assistance Administration of the U.S. Department of Justice. (See Exhibit 2, "Review of the Structure, Scope and Adequacy of the Public Defender System in Lake County, Indiana, hereinafter referred to as "Structure, Scope and Adequacy.")

The Report was requested by Judge James J. Richards. Structure, Scope and Adequacy at 6. The purpose of the Report was to present "an evaluation of the system, with suggestions for improvement." Id. at 2.

The Report's first recommendation is that:

> indigent defense service be divorced from the judiciary and be given autonomous status, so as to protect the office from political, economic or other influences which might inhibit the professional independence of the public defender in providing full, competent and zealous representation of the accused. Id. at 4.

The Report recommends that "an adequate budget be made available." Id. at 4. The Chief Judge of Lake Superior Court, James J. Richards, requested that the study be undertaken because "federal litigation was currently challenging the constitutional adequacy of the present public defender system, and the need for technical assistance was urgent." Id. at 6. Apparently, there was some "political" turf infighting among the Superior Court Judges about even doing the study. The Report notes that Judge Andrew V. Giorgi objected contending that the study would "not be advisable at this time." Id. at 8. Due to these "internal problems," the study was delayed. Id. at 8.

The Report noted that a far higher percentage of public defender clients remained in jail (99%) than private clients (57%) during the time of the study. Id. at 22. The average number of days was "significantly longer for indigent defendants." Id. at 23. The Report noted that "in 82% of the disposed pauper cases, the client was never released, while in only 22% of the disposed retainer cases was the client never released." Id. at 23. This raised "the question of whether poor clients are forced to plead guilty to a charge simply in order to get released." Id. at 23.

The public defender's "limited scope and effectiveness of

the service" was noted in the fact that no public defender was provided at preliminary hearings. Id. at 23. In a description which fits the ***current*** public defender office, the Report notes that the "offices in the Center next door to the chief judge have almost no books or files. . . [and]. the two secretaries and the two investigators are selected by the chief judge." Id. at 24.

The Report notes that one of the:

> first changes which should be made (and one which is not a budgetary item) relates to the professional independence of the chief public defender and the other lawyers on his staff. They should not be selected by the chief judge of the Criminal Division. (. . . this characteristic of the Lake County plan was sharply criticized by several individuals, including prominent members of the legal profession, and by former and present officers of local bar associations.) The term "patronage" was frequently used to characterize the present arrangement.[1] (Footnote in original. *One pauper attorney stated that he had worked in Judge Gorgi's political campaign prior to his appointment by the Judge. One had been associated with Judge Gorgi's brother in private practice. One investigator had previously been a worker in the Democratic organization.*) Id. at 33.

Nearly thirty years ago, it was widely recognized that having judges employ defenders "will cripple seriously any system providing defender services." Structure, Scope and Adequacy at 34. The "least desirable method is to leave the [hiring] choice with the Criminal trial judge." Structure, Scope and Adequacy at 34. Subsequent events confirmed this observation. In 1985, Judge Orval W. Anderson of Lake Superior Court County Division was convicted. See United States v. Anderson, 798 F.2d 919 (7th Cir. 1986). James J. Krajewski was appointed in his stead. Krajewski

fired assistant public defenders because they were Democrats. Krajewski was a Republican. A federal court ordered their reinstatement. Krajewski violated the federal court's order and was held in contempt. See Fisher v. Krajewski, 873 F.2d 1057 (7th Cir. 1989); Kurowski v. Krajewski, 848 F.2d 767 (7th Cir. 1988).

The Report noted that the Chief Public Defender "will be handicapped in fulfilling his responsibility . . . if he does not have the authority to select his assistants." Id. at 35. The Report recommended that "in order to attract an experienced, competent person [to be a defender] the salary should be comparable to that paid to the prosecutor." Id. at 39. The Report noted the deficient nature of the Public Defender infrastructure because the office needed "private offices for the defenders so that confidentiality and privacy of interviews will be assured. A small working library . . . should be readily available within the defender unit." An increased defender staff was recommended also. Id. at 49. The Report noted that there was not even an "office manual of procedure". Id. at 56. None exists today either.

A fair summary is that the Lake County Public Defender Office in 1995 is not significantly different from the Lake County Public Defender Office in 1975. No subsequent report has ever contradicted this finding or concluded that the conditions found to exist have improved.

e. 1986 Spangenberg Report:

The 1986 Report was a state-wide study prepared for the

Indiana Public Defender Council, a state agency, and the Criminal Justice Section of the Indiana State Bar Association. Funding was provided by the American Bar Association's Bar Information Project. The study by Robert Spangenberg, a nationally recognized expert in the area of public defender systems and the adequate assistance of counsel, examined public defense in Indiana and Lake County. (See Exhibit 3, "Evaluation of Partial State Funding for Public Defender Services in Indiana", hereinafter "1986 Report.")

Spangenberg's conclusions were, unsurprisingly, that public defense in Indiana and Lake County had been studied many times with no measurable improvement in services. The studies "consistently pointed out a number of deficiencies in the indigent defense system." (1986 Report at 27)

The study concluded that the following deficiencies were endemic in Indiana:

- Lack of public defender independence from the judiciary;
- Lack of early entry into cases;
- Low compensation possibly discouraging the participation of experienced criminal practitioners in the system;
- Lack of support services and money for investigation and experts;
- Extensive reliance on part-time defense attorneys and the increased possibility of conflicts of interest with their private practices;
- Expansion of contract programs without standards or necessary monitoring and supervision or emphasizing only cost factors

in the negotiation and award of contracts; and,

- Lack of controls on the caseloads of individuals. (Id. at 43)

Lake County was not noted as an exception to these conclusions. No subsequent report has ever contradicted this finding or concluded that the conditions found to exist have improved.

3. The current and continuing failure to provide effective preconviction assistance of counsel to indigents in Lake County:

The uncontroverted facts concerning the Defendants' current failure, or refusal, to provide effective preconviction assistance of counsel to indigents in Lake County appear at ¶¶ 102-55 of the Plaintiffs' Amended Complaint.

As of 1986, an objective observer would have been left with the clear impression that little of significance had changed in the Lake County Public Defender "system" since the Reports described above. Those Reports placed the Defendants, and each of them, on notice of the constitutional failings inherent in the Lake County Public Defender "system." This has not changed. It also provides a factual basis upon which to conclude that the inadequacies will persist.

Each year, approximately seventy percent (70%) of all persons charged with crimes in Lake County Courts (Superior, Juvenile and County Division) qualify for public defenders. (See Exhibit 4, "Comments of the Indiana Public Defender Council", hereinafter "Council Comments," Appendix F at 5.) Not all Lake

Courts provided information for the Council's study. More than 60% of the persons charged with crimes who end up being represented by Public Defenders are African-American or Hispanic.

The amount spent to prosecute indigent defendants is far more than double the amount spent to defend poor persons charged with crimes. By all accepted standards, the Defendants have failed to allocate constitutionally adequate funds or to create a constitutionally adequate system to deliver indigent defense services. (PAC ¶¶102-20)

Each Court contracts with attorneys to provide legal representation for indigent defendants. Public Defenders are not subject to any apparent non-judicial supervision or quality control. The decision on whether to hire a particular attorney is based upon that attorney's personal, and/or partisan, relationship with the particular judge who hires the public defender. This relationship creates an inherent conflict of interest in that Public Defenders must vigorously represent their clients (a circumstance that inevitably, upon occasion, involves angering a judge) in front of the same person who can fire them from their positions as Public Defenders. Thus, there is a direct and immediate disincentive for Public Defenders to do anything to displease the Judge. (PAC ¶¶121-131)

Public Defenders receive clients on a rotating basis. There is no upper limit on the number of cases a Public Defender may have assigned to him or her. Systems in which compensation does not vary with the number of cases assigned, or amount of time or

effort expended by the lawyer on a particular case are called "fixed price" systems and have been criticized by the Courts and professional legal organizations. Council Comments at 9.

Public Defenders are considered part-time at-will employees, and most have private civil and criminal law practices which compete for their time and attention. These Defenders do not have adequately funded staff investigators, staff secretaries, or staff paralegals. There is a Public Defender Office; however it is probably **not** a coincidence that Jerry T. Jarrett, the administrator of the Public Defender Office, is an individual who is presently, or recently has been, suspended from the practice of law by the Indiana Supreme Court for neglecting client affairs, and who was hired by the Presiding Judge for reasons not associated with this individual's competence. (PAC ¶¶132-37) (See Exhibit 5, "Memorandum Opinion In the Matter of Jerry T. Jarrett.") This employment decision by the Judges looks like pure personal patronage to "help" a friend in a "jam" by giving him a public sector job, in other words, the hiring of a friend who has hit a bump in the employment road.

The Council and Commissioners have intentionally underfunded this portion of the Courts' budgets to such an extent that the funds appropriated are insufficient to provide adequate indigent defense services. The Courts and Judges have intentionally failed to mandate funds for this underfunded portion of the Courts' budgets to such an extent that the funds appropriated are insufficient to provide adequate indigent defense services. The

fees paid to Public Defenders are seriously inadequate, and along with the lack of any funds for defense services, hamper their ability to provide effective assistance of counsel to indigent defendants. (PAC ¶¶138-45)

Indigent criminal defendants are denied a fair trial and effective assistance of counsel because the "system" provides inadequate resources and services. Defenders are rendered ineffective as the adversarial process is undermined and unreasonably, and unjustly, skewed to favor the prosecution. The cumulative effect of these inadequacies is that the "system" fails to satisfy minimum constitutional standards. The gross disparity between the resources expended for the prosecution, as compared to the defense of criminal indigent defendants reflects a fundamental unevenness in the adversary process that precludes a fair trial. (PAC ¶¶146-54)

The Public Defender "system" for providing legal representation to poor people charged with crimes does not allow sufficient time and resources to permit adequate defense services, including:

- interviewing;
- investigation;
- research;
- motion practice;
- trial preparation;
- client advice; and
- overall attention to the case, given forced excessive caseloads. (PAC ¶155)

The past, and ***present***, constitutional deficiencies of the Lake County Public Defender "system" were recently catalogued in a report prepared for the State Public Defender Office by the

Spangenberg Group. (See Exhibit 6, "A Study of the Lake County, Indiana Superior Court Trial and Appellate Public Defender Systems, 1982-1992," hereinafter "Spangenberg"; PAC ¶¶156-62)

Spangenberg, a nationally recognized expert in institutional indigent defense, came to several professional expert opinions regarding the Lake County "system" of public defense. The Spangenberg Report expressed the opinion that:

> due to numerous systemic deficiencies, the Lake County Public Defender "system" in operation in the Lake County Superior Court during the period 1982 to 1992 was unable to assure the effective preconviction assistance of counsel for indigent defendants that they are entitled to under the United States Constitution, the Indiana Constitution and Indiana law. (Spangenberg at 4).

Spangenberg was of the opinion that:

> the system in question during this time period could not guarantee reasonably effective [preconviction] assistance of counsel as required under the Sixth Amendment. (Id. at 4-5).

In judging the Lake County Public Defender System, the Spangenberg Report used nationally recognized standards for delivery of defense services set forth in the *American Bar Association's Standards for Criminal Justice, Providing Defense Services* in effect for the period 1982-1992. (Id. at 5). The ABA Criminal Justice Standards are recognized as the most significant model for criminal justice systems. (Id. at 6). The Spangenberg Report used other standards. (Id.) According to reports available as far back as 1972, the Lake County Public Defender "system" was unconstitutionally defective because it failed to

provide constitutionally adequate assistance of counsel. Constitutional litigation has previously been brought against the Lake County Public Defender "system." (Id. at 8) (PAC ¶¶163-70)

Since at least 1972, the Lake County Public Defender "system" has:

- been denied adequate resources to provide constitutionally adequate assistance of counsel to the Plaintiff class (Id. at 11);
- failed to provide constitutionally adequate assistance of counsel to indigents charged with criminal offenses (Id. at 11);
- forced Public Defenders to operate within a system which makes it impossible to provide constitutionally adequate assistance of counsel (Id. at 11) (PAC ¶173)
- failed to comply with relevant provisions of the ABA Criminal Justice Standards and other standards (Id. at 12);
- failed to provide constitutionally adequate assistance of counsel sufficient to comply with the Sixth Amendment (Id. at 12);
- had a structure which requires Lake County Public Defenders to "serve two masters" (the judge and their private practice) a situation that has created conflicts and disincentives to devote sufficient time to their public defender clients" (Id. at 12);
- lacked a program to effectively address conflicts and overload of public defenders. (Id. at 12) (PAC ¶¶171-77)

The Judges handpick Public Defenders who worked in their courtrooms. (Id. at 13) (PAC ¶178)

Since at least 1972, the Lake County Public Defender "system" has:

- failed to provide Lake County Public Defenders with adequate support services,

including investigators, experts and secretaries (Id. at 13);

- failed to provide adequate training to new, as well as experienced, public defenders (Id. at 13);

- had an inadequate physical facility including insufficient office space, insufficient office equipment and an inadequate law library (Id. at 13);

- failed to provide any adequate outlet for overflow cases (Id. at 13);

- failed to provide counsel to indigent defendants at their initial hearing (Id. at 13);

- failed to adequately address the provision of counsel in execution cases until compelled to by other governmental entities (Id. at 13);

- failed to attempt to equalize the extreme disparity in resources between public defenders and prosecutors (Id. at 13);

- employed Public Defenders on terms where they were unable to devote their full and undivided attention to their indigent clients (Id. at 14);

- encouraged, condoned, and continued to employ public defenders who fail to visit clients, fail to file motions (other than bond reduction motions), fail to use experts and investigators and who willingly go to trial whether or not they are prepared (Id. at 14);

- created disincentives for public defenders to adequately represent indigent persons charged with criminal acts (Id. at 15);

- caused part-time public defenders to have caseloads which far exceed caseload standards of the NLADA and NAC (Id. at 15);

- caused part-time public defenders to have caseloads which far exceed caseload standards promulgated by the Indiana Public Defender Commission (Id. at 15);

- created disincentives for public defenders to learn enough about their clients, or the facts of their clients' cases, in order to effectively represent them (Id. at 16) (PAC ¶¶179-91)

Since at least 1972, the Lake County Public Defender "system" has:

- created disincentives for Lake County appellate public defenders to visit their clients, to file illogical and poorly-prepared briefs, to fail to file reply briefs, to fail to file petitions for rehearing, and to fail to file petitions for transfer, by not adequately paying appellate public defenders (Id. at 16);

- lacked an assigned counsel program to address problems of conflicts and attorney overload (Id. at 16-17);

- lacked an independent chief public defender to supervise attorneys, provide administrative services or act as public defender in situations of overload (Id. at 19);

- tolerated "politics" and judicial interference and influence to pervert the provision of constitutionally adequate assistance of counsel. (Id. at 19);

- failed to terminate public defenders for shoddy work. (Id. at 19);

- permitted familiarity with a judge, or other county official, rather than skill or experience, to be the basis for hiring. (Id. at 20);

- failed to protect the professional relationship between attorney and client and failed to provide public defenders with the same freedom of action as private counsel. (Id. at 20-21);

- had a hiring process which effectively thwarts public defender independence. (Id. at 22);

- allowed issues of race, and politics, to pervade and taint the hiring process, in which political --in the sense of narrow partisan and/or patronage-- concerns overshadow professional competence and dedication to the rights of indigent defendants. (Id. at 25-26);

- had a hiring process that has been driven by considerations of politics and race. (Id. at 26);

- failed to compensate personnel in a manner comparable to the prosecutor's office. (Id. at 26) (PAC ¶¶192-02)

Since at least 1972, the Lake County Public Defender "system" has:

- failed to provide resource equity, in terms of lawyers, compensation for lawyers, secretaries, law clerks and investigators and expert witnesses between the prosecutor's office and public defenders. (Id. at 26);

- has failed to insulate public defenders from judicial interference and meddling, by making public defenders at-will employees of the judges in whose courts they practice. (Id. at 29);

- tolerated unequal judicial treatment of public defenders compared to private counsel. (Id. at 30);

- allowed judges to treat public defenders differently from, and less favorably in comparison to, private counsel. (Id. at 30);

- support services for Public Defenders that were constitutionally inadequate, investigators were unreliable, secretaries untrained in legal work, and experts rarely available. (Id. at 33);

- had judges hiring investigators for public defenders. (Id. at 33);

- required investigators for public defenders to also be investigators for the probation office. (Id. at 34);

- failed to have an adequate number of adequately trained secretaries for public defenders. (Id. at 35);

- failed to provide adequate expert witnesses for public defenders. (Id. at 35);

- provided no training for new public defenders. (Id. at 36);

- placed its most inexperienced public defenders into the most complex cases without adequate training, supervision or support services. (Id. at 37);

- resulted in constitutionally inadequate representation, in that trial public defenders in execution cases have not conducted adequate legal research on their clients' cases and did not conduct constitutionally adequate crime and life history investigations on the clients in preparation for trial. (Id. at 38);

- demanded that public defenders carry caseloads far in excess of the number of cases an attorney can carry and provide effective [preconviction] assistance of counsel. (Id. at 41);

- caused public defenders to fail to: visit clients in jail; conduct factual investigations; do legal research; have criminal investigations when it was in the client's best interests; provide any representation in matters involving sentencing; prepare for trial; advise clients to plead guilty when it was the client's best interest to proceed to trial; tender jury instructions; and, preserve error in trial (Id. at 43) (PAC ¶¶203-16)

Since at least 1972, the Lake County Public Defender "system" has had public defenders who were ignorant of the law, overloaded with cases, interfered with by trial judges, placed private clients' interests ahead of public defender clients' interests, lacked training and supervision, and/or lacked

necessary support services. The Lake County Public Defender "system" has failed to provide constitutionally adequate assistance of counsel by assigning execution cases to public defenders who were unqualified. The Lake County Public Defender "system" has failed to provide constitutionally adequate assistance of counsel by being a system that has overloaded appellate public defenders. (Spangenberg at 43-45) (PAC ¶¶217-20)

The "system" has failed to provide resources that would make it possible for public defenders to:

- appear at the prefiling stage of criminal proceedings;
- appear at preliminary and/or initial hearings;
- promptly meet with clients;
- promptly conduct factual investigations;
- do legal research;
- have criminal investigations done when it has been in the client's best interests to have a criminal investigation conducted;
- conduct discovery;
- file appropriate motions;
- adequately prepare for trial;
- provide any adequate representation in matters involving sentencing, such as raising mitigating factors;
- advise clients to proceed to trial, rather than plead guilty, when it was in the client's best interest to proceed to trial;
- tender jury instructions; and,
- preserve error in trial (Id. at 46-47) (PAC ¶¶221-26)

The Lake County Public Defender "system" has failed to provide constitutionally adequate assistance of counsel by being a system that has remained unconstitutional for all the reasons alleged above for more than twenty (20) years. This system will not be changed without judicial intervention. The public defender system in operation in Lake County, as documented in the Spangenberg Report for the period 1982 to 1992, has not materially changed as of the date of the filing of this complaint --except perhaps to deteriorate further-- with regard to assuring effective preconviction assistance of counsel for plaintiff class members to which they are entitled under the United States Constitution, the Indiana Constitution and Indiana law.

All Defendants have been aware for nearly a quarter-century of the systemic failures and inadequacies of the Lake County Public Defender "system." The Reports noted above were done about the system, oftentimes at the Defendants' request. The Reports demonstrate that the Defendants have intentionally failed to act in any responsible way to remedy the constitutional failings detailed in this complaint. The Lake County indigent defense system was, and remains, inherently incapable of providing constitutionally adequate services and has inherent conflicts of interest that makes the entire "system" --if it could be called one --constitutionally deficient. Indigent criminal defense services in Lake County, Indiana, operate without regard for, and in violation of, accepted minimum standards of training, workload and resources standards for indigent defense services which have

been promulgated by the American Bar Association, the National Study Commission on Defense Services, the National Legal Aid and Defender Association, the National Advisory Commission on Criminal Justice Standards and Goals, and the Indiana Public Defender Council guidelines. The State of Indiana has made funds available to counties which comply with the Indiana Public Defender Council guidelines. See I.C. 33-9-15-1 et seq. (PAC ¶¶228-33). The Defendants' unanimous "non-response" to this crisis in public defense amounts to the cynical policy which could be described as: "If you ignore them, they will go away -- they will go away to prison."

None of the facts as alleged in the amended complaint are in dispute -- only the legal meaning of the facts. The sources for these facts and opinions, except those affecting the plaintiffs, are unimpeachably unbiased.

IV.

Arguments

Summary of the Arguments

Plaintiffs' Position:

Plaintiffs state a cause of action for a deprivation of a federal right (the right to preconviction effective assistance of counsel) under color of state law (the State of Indiana's failure to provide it). There is no serious question that the Constitution creates an enforceable right to receive effective assistance of counsel. The question raised by the Defendants is whether the right is enforceable ***prior*** to being convicted or

after being convicted. This question is the legal question of the existence of a right. The evidentiary question regarding whether the Defendants' past and present failure to provide effective assistance of counsel prior to conviction establishes that the Defendants are either unable, or unwilling, to provide effective preconviction assistance of counsel, is a distinct question. The Defendants do not contest the existence of the right but rather claim it is only enforceable in post conviction relief proceedings or on direct appeal. The Defendants' argument conflate being not guilty with being provided a fair trial. Under their theory, only innocent persons are entitled to effective assistance of counsel.

Poor people are entitled to both objective justice (not being wrongfully convicted) and subjective justice (the appearance of not being wrongfully convicted). The undisputed history of Lake County's actual provision of counsel leaves a dispassionate observer with the firm conviction that the performance of the public defender system in Lake County is so deficient that it undermines the basic faith in the fairness of the criminal justice system. It compels the relief requested in order to justify the public's even minimal faith in the basic fairness of the system.

The Plaintiffs are entitled to ***prevent*** a deficient preconviction performance of counsel -- the first prong of the Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 685, 104 S.Ct. 2052 (1988) -- because after trial the harm becomes (for

all practical purposes) irreparable. A helpful analogy would be to consider what an airline passenger is "entitled" to. An airline passenger is "entitled" to competent ***pre-crash*** assistance of air traffic controllers because ***post-crash*** only remedial medical care is available. The other equitable notion to consider is that the State of Indiana, by bringing suit against the Plaintiffs, is estopped from asserting any "technical" non-substantive defense to a claim that it is failing to provide effective preconviction assistance of counsel. The relationship between the State of Indiana and indigent defendants, such as the Plaintiffs herein, is illuminated by the following analogy.

Assume there is a car race with two cars. The State owns both cars. The "Prosecution Car" is tuned up and ready to go. It has a driver and a garage full of mechanics, a tank full of gas, and money to buy any equipment the State needs. The "Public Defender Car" has been out of tune for twenty-five years, has only one driver (who doubles as the mechanic), the tank has been on empty for twenty-five years, and the tires are bald.

The "Public Defender Car" driver must petition race officials, after the race has begun, for permission to buy anything needed to try to be competitive in the race. The State's arguments are that only after the race is over, and the Public Defender car has predictably lost, may a challenge to the fairness of the race be brought. This is like saying that only after you have lost your bet can you complain that the fix was in. Such a public defender system is nothing more than a "misty

mirror" defender system that cannot be tolerated.

The State argues for continuing a criminal justice system which gambles about appearances of justice and does not mind losing. This is not a gamble the judicial system should recognize as legitimate.

The State should be estopped from arguing that the Defense must await the conclusion of the race before alleging a foul. The Plaintiffs have a right to prevent an unfair race rather than participate in one and try to reverse the results afterwards. The State, by underfunding the Accused's efforts, is estopped from arguing it is going to be a "fair" race.

State Defendants' Position:

The State Defendants' positions are that:

- the Plaintiffs have "an adequate remedy at law" and ***must*** suffer a wrongful conviction in order to state a cause of action. (State Defendants' Memorandum in Support of Motion to Dismiss, hereinafter "State's Memorandum") § B, p. 5-12); **or,**

- the Plaintiffs are "in the wrong court" and must litigate ineffective assistance of counsel prior to conviction (State's Memorandum § C, p. 12-15); **or**,

- at least the State Defendants should be dismissed because they cannot do anything about Lake County's failure to provide effective preconviction assistance of counsel (State's Memorandum § D, p. 16-18); **and**,

- Judges are immune from damages (State's Memorandum, § D [sic], p. 18-20); **and**,

- Thorpe lacks standing (State's Memorandum § E, p. 20-21).

The State Defendants' position is that poor people charged

with crimes are not entitled to effective ***preconviction*** assistance of counsel prior to conviction but rather are only entitled to have their convictions reversed if their public defenders' performances were so abysmal that a court of appeals or post-conviction court will overturn it. The Defendants' position is, in effect, "So what? Too bad. Don't worry; it will all be sorted out ***after*** conviction."

The choice this Court must make is whether poor people represented by Public Defenders are entitled to some form of relief which will prevent highly probable, indeed almost guaranteed, ineffective preconviction assistance of counsel **or** whether the Plaintiffs' only recourse is a futile appeal.

County Council Defendants' Position:

The County Council argues it has no "statutory" authority to provide criminal defense because the General Assembly has "vested" that authority with the Courts. They next urge that the Plaintiffs fail to sufficiently allege an equal protection claim by arguing, incorrectly, that the Plaintiffs must allege and prove that a racially discriminatory purpose "must be **the** motivating factor." (County Brief at 7.)

Defendant Letsinger's Position:

Letsinger claims judicial immunity from damages. The Plaintiffs concede that the precedents regarding judges acting in their capacity as "judges deciding cases" may apply; however, Letsinger fails to acknowledge that, in the instant situation,

the judges are acting in their capacity as "employers" and "administrators of a system," **not** as judges deciding legal issues. Letsinger does not acknowledge that as administrators and employers they have no more immunity than a sheriff operating a jail unconstitutionally. Relief is not being sought against Letsinger in his "judge" capacity, but rather in his "administrative" capacity.

Standards for Motions to Dismiss and Summary Judgment

The Defendants state the proper standard for rulings on Motions to Dismiss. Plaintiffs move for summary judgment pursuant to Indiana Rules of Trial Procedure Rule 56 on their claims that indigent criminal defendants are not provided constitutionally adequate legal representation when judged by the standards of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution; and Article 1, § 13; Article 1, § 12; Article 1, § 16; and, Article 1, § 17 of the Indiana Constitution.

"Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, affidavits, if any, and admissions on file show that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." Vukadinovich v. Board of School Trustees, 978 F.2d 403, 408 (7th Cir. 1992).

The facts presented above are not disputed. The facts of the past, and present, systemic failure are contained in the independently-prepared reports listed. The Defendants will be

unable to dispute the facts. Rather they will only be able to dispute the meaning of the facts. The affidavits and the additional reports accurately and truthfully describe the historical and current state of the Lake County Public Defender "system."

The Plaintiffs, and all neutral observers, are persuaded, as the Court should be, that there is, in fact, a "Lake County Public Defender System" and that this "system" can be judged for compliance with the Indiana and United States Constitutions just as any other governmental system that is required by the constitutions. A "jail" system would be one example.

The pertinent questions are: "What is the system `supposed' to do?" and "What does it `actually' do?" Plaintiffs contend the system falls short of all the constitutional standards described above. There are no other facts material to this court's determination of the legal question as to whether the public defender "system" in Lake County violates:

the Sixth Amendment;
the Fifth Amendment;
the Eighth Amendment;
the Fourteenth Amendment;
Article 1, § 13;
Article 1, § 12;
Article 1, § 16; and/or
Article 1, § 17.

Summary judgment is proper where there is no real conflict regarding facts dispositive of the litigation. Johnson v. Patterson (1991), Ind. App., 570 N.E.2d 93.

"There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a . . . verdict for

that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Bostic v. City of Chicago, 981 F.2d 965, 969 (7th Cir. 1992), (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511 (1986)).

A grant of summary judgment is proper if the trial court need not weigh conflicting evidence in order to reach a decision, and summary judgment is appropriate when there is no dispute or conflict regarding facts that are dispositive of the litigation. Fortmeyer v. Summit Bank (1991), Ind. App., 565 N.E.2d 1118.

Since the pleadings, affidavits and neutral reports show there is no genuine issue as to any material fact, summary judgment is appropriate. The Plaintiffs have demonstrated they are entitled to judgment as a matter of law.

1. The "system" has failed, and will continue to fail to meet requirements of the Sixth Amendment:

The United States Constitution Sixth Amendment guarantees every individual charged with a crime the right to competent preconviction assistance of counsel regardless of ability to pay. The Sixth Amendment provides, in its pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to. . . have the assistance of counsel for his defense.

The core federal constitutional claim in this litigation is the Sixth Amendment right to effective preconviction assistance of counsel. This section of the argument will discuss all other federal rights involved in this litigation in the context of this

right.

The right to counsel is "one of the safeguards deemed necessary to insure fundamental rights of life and liberty." Johnson v. Zerbst, 304 U.S. 458, 462, 58 S.Ct. 1019, 82 L.Ed. 1461 (1937). It is the right to effective counsel. Mann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). Effective preconviction assistance of counsel requires an active and diligent advocate. Anders v. California, 386 U.S. 738, 18 L.Ed.2d 493, 87 S.Ct. 1396 (1967), reh. den., 388 U.S. 924, 18 L.Ed.2d 1377, 87 S.Ct. 2094.

In Gideon v. Wainwright, 372 U.S. 335 at 344, 83 S.Ct 792, 9 L.Ed.2d 799 (1963), the Court noted that governments "both state and federal, . . . spend vast amounts to try Defendants accused of crime." Fairness and justice are reasonably assured if the amount spent on prosecution is reasonably balanced with the amount spent on defense because the Constitution's guarantee of assistance of counsel cannot be satisfied by a mere formal appointment. Avery v. Alabama, 308 U.S. 444, 446, 84 L.Ed.2d 377, 60 S.Ct. 321 (1940). This principle was reaffirmed in Kimmelman v. Morrison, 477 U.S. 365, 91 L.Ed.2d 305, 106 S.Ct. 2574 (1986). "The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary system." Id. at 374. The "right to counsel is the right to effective [preconviction] assistance of counsel." Id. at 377. "Where a state obtains a criminal conviction in a trial in which the accused is deprived of the effective assistance of

counsel the State unconstitutionally deprives the defendant of his liberty." Id. at 383. The "right to effective assistance of counsel is personal to the defendant, and is explicitly tied to a fundamentally fair trial - a trial in which the determination of guilt or innocence is "just" and "reliable." Id. (J. Powell, concurring) at 392-93.

Effective preconviction assistance of counsel encompasses the right to have one's counsel adequately prepare and investigate the case. Wade v. Armentrout, 798 F.2d 304 (8th Cir. 1986). Investigation "is an essential component of the adversary process." Crisp v. Duckworth, 743 F.2d 580 (7th Cir. 1984). Effective "representation hinges on adequate investigation and pre-trial preparation." Goodwin v. Balkom, 684 F.2d 794, 805 (11th Cir. 1982). Proper investigation, by effective counsel, enables cross-examination of crucial prosecution witnesses in a manner that impacts on the witnesses' credibility and demeanor in ways a reviewing court could never ascertain. Inadequate investigation in seeking out and interviewing defense witnesses may well be the reason that a record does not disclose the prejudice.

Only if there is a balance in funding is the defense adequate to meet the prosecution. Courts have long recognized adequate funds **must** be provided for investigative assistance to indigent defendants in order to assure the constitutional guarantee of adequate defense. Smith v. Enomoto, 615 F.2d 1251 (9th Cir. 1980); Mason v. Arizona, 504 F.2d 1345 (9th Cir. 1974),

cert. den., 420 U.S. 936 (1975). The Defendants may argue that they "have no money." This "no money" argument was advanced by the State of Oklahoma in Ake v. Oklahoma, 470 U.S. 68, 84 L.Ed.2d 53, 105 S.Ct. 1087 (1989), for not having to provide a psychiatrist. Oklahoma argued "that to provide Ake with psychiatric assistance . . . would result in a staggering burden to the State." Id. at 78.

The United States Supreme Court directly and unambiguously rejected the argument, stating that "the governmental interest in denying Ake the assistance of a psychologist is not substantial." Id. at 79. Not only do the Plaintiffs have an interest in a fair trial with adequate representation of counsel, the "State, too, has a profound interest in assuring that its ultimate sanction is not erroneously imposed and we do not see why monetary considerations should be . . . persuasive." Id. at 83.

Spending money is not irreparable harm. The Plaintiffs are not required to be subjected to the risk of illegal conviction if they raise systemic failure to provide adequate preconviction assistance of counsel which may result in such conviction. The principle of "innocent until proven guilty" upon which the entire criminal justice system is based requires that no indigent defendant be declared guilty unless the government, opposed by constitutionally adequate and competent counsel, proves guilt beyond a reasonable doubt.

The Plaintiffs are requesting adequate representation by a system clean of conflicts of interests. If this is not provided,

the injuries suffered by the Plaintiffs are, among other things,

- an unfair trial;
- an unwarranted conviction; and/or
- a wrongful imprisonment;

Under the Defendants' argument an accused has standing to enforce a right to effective pretrial assistance of counsel only after these events have occurred. The Defendants do not identify the preconviction vehicle available to an accused to prevent a wrongful conviction or a constitutionally flawed defense. The Defendants' arguments are more correctly aimed at reversing a wrongful conviction in a criminal appeal than at preventing a violation by way of a civil action. The difference is the difference between prevention and cure. The Defendants' irrational argument is: let the harm occur; it can be fixed. The Plaintiffs' far more rational argument is: when harm appears extremely likely to occur, particularly when the harm is irremediable, such as wrongful imprisonment and loss of liberty; there is a right to prevent the harm. An analogy to the Defendants' argument would be that only ***after*** a car wreck should a driver be concerned about whether the brakes are defective -- even though mechanics were saying for years that the brakes were defective.

The right to effective preconviction assistance of counsel is more pervasive than any of the Plaintiffs' rights because a defense attorney's performance directly affects a criminal defendant's ability to assert and protect all his, or her, other rights, such as their Fifth Amendment right to due process; the

Eighth Amendment right to bail; the Fourteenth Amendment right to due process of law; the Fourteenth Amendment right to equal protection of the law; and the Fourteenth Amendment right to racial equality.

The right to effective preconviction assistance of counsel is a linchpin right that has been made applicable to many preconviction steps in criminal proceedings not explicitly addressed in the Sixth Amendment, e.g. custodial interrogations, Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966); preliminary examinations, Coleman v. Alabama, 399 U.S. 1, 26 L.Ed.2d 387, 90 S.Ct. 1999 (1970); pre-indictment lineups, Kirby v. Illinois, 406 U.S. 682, 32 L.Ed.2d 411, 92 S.Ct. 187 (1972); arraignment, Hamilton v. Alabama, 368 U.S. 52, 7 L.Ed.2d 114, 82 S.Ct. 157 (1961); post-indictment lineup, U.S. v. Wade, 388 U.S. 227, 18 L.Ed.2d 1149, 87 S.Ct. 1926 (1968); sentencing, Townsend v. Burke, 334 U.S. 736, 95 L.Ed.2d 661, 71 S.Ct. 286 (1948); first appeal of right, Douglas v. California, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814 (1963); collateral attacks on conviction, Johnson v. Avery, 393 U.S. 483, 21 L.Ed.2d 718, 89 S.Ct. 747 (1969); and probation and parole hearings, Gagnon v. Scarpelli, 411 U.S. 778, 36 L.Ed.2d 656, 93 S.Ct. 1756 (1972).

When effective preconviction assistance of counsel is not provided, the entire adversary system itself suffers. McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974). Inadequate representation is "not a product of an adversary [process], but a flaw in the adversary process." Id. at 218-19. Systemic resource deprivation

cannot be countenanced because it conceals its own existence. This deprivation can be objectively measured. See Note: How to Thread the Needle: Toward A Checklist Based Standard for Evaluating Ineffective Assistance of Counsel Claims, 77 Georgetown L.J. 413, 415 (1988). By the criteria contained in both the case law and the literature, it can be reasonably concluded that underfunding, combined with no limits on caseloads, forces individual public defenders to accept ever-increasing caseloads and that ineffective assistance of counsel will occur. Overburdening public defenders conceals the nature and extent of the damage done to defendants' rights. State v. Smith, 140 Ariz. 355, 362, 681 P.2d 1374, 1381 (1984).

The Sixth Amendment also protects rights that do not necessarily affect the outcome of the trial. The right to effective preconviction assistance of counsel for defense includes defense provided prior to trial. Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988), cert. den. 495 U.S. 957, 110 S.Ct. 2562 (1990). In the post-trial context, certain errors may be deemed harmless because they did not "affect" the outcome of the trial. These errors could be prevented with effective preconviction assistance of counsel.

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 whether it can be protected prospectively. Prospective relief is designed

to avoid future harm. Prospective relief is appropriate to protect constitutional rights even if the violation of these rights would not affect the outcome of the trial.

Only when effective preconviction assistance of counsel is rendered before judgment can the adversary system truly test the guilt or innocence of the accused. "An accused is entitled to be assisted by an attorney . . . who plays the role necessary to ensure that the trial is fair." Strickland, supra at 685, held that in "certain Sixth Amendment contexts, prejudice is presumed [by the] denial of the assistance of counsel." A public defender can only play the necessary role if able. Lack of caseload limits, the inability to adequately investigate, and inadequate support staff disable.

Appellate review is not an adequate remedy for defendants who have been "assisted" by counsel made ineffective by the lack of resources. Such a wrongful loss of liberty is too great to be tolerated or fostered. See Gaines v. Manson, 194 Conn. 510, 481 A.2d 1084, 1093 (1984). The Lake County "system" does both. There is an obvious loss of freedom while in custody, either pre- or post-conviction, or on probation. Setting aside a conviction does not afford a complete remedy. Besides, if investigation and preparation are inadequate, it follows that any record relied upon to show the extent of prejudice would, of necessity, be incomplete. U.S. v. Tucker, 716 F.2d 576 (9th Cir. 1983). Thus, the harm of inadequate representation conceals itself from the reviewing court. The question is: "What would an investigation,

which was not done, reveal?"

It is difficult, nearly impossible, to obtain a reversal of a conviction based upon incompetent counsel. The current standard to determine, after a conviction, whether there was constitutionally deficient ineffective preconviction assistance of counsel is the Strickland test. A causal connection must be proven between the shortcomings of counsel and the outcome. Because Strickland creates an almost insurmountable hurdle for Defendants claiming ineffective preconviction assistance of counsel, prevention becomes even more important to the criminal defendant because he or she is jailed.

The instant litigation specifically addresses this point because inadequate investigation and burdensome caseloads are **not** trial strategy. These symptoms indicate systemic failure.

Before reversing a conviction, an appellate court must be convinced of two things: 1) a deficient performance by counsel; and 2) a sufficiently great prejudice to the defendant. Strickland, supra at 694. The Strickland Court, in discussing the first prong, held that there was a strong presumption that trial counsel was adequate, that any errors were conscious ones, and that the trial counsel's conduct was constitutionally adequate. Strickland, supra at 690-91. "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance. . . .[a] defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound

trial strategy." Id. at 689. Citations omitted. Strickland creates, by way of a "factual presumption," an almost insurmountable hurdle for defendants to overcome in order to obtain a reversal of a conviction.

The "system" undermines the reliability of this "factual presumption" by starving the defense of resources. Thus, what Strickland does "in law," the Lake County "system" undoes "in fact." Preventing ineffective assistance of counsel becomes even more important to the criminal defendant because he, or she, loses their liberty by being jailed during the pendency of the appeal of the wrongful conviction. Plaintiffs' litigation specifically addresses this point because inadequate investigation and burdensome caseloads are **not** trial strategy. These symptoms indicate systemic failure.

The Sixth Amendment protects rights that do not affect the outcome of the trial. Luckey v. Harris, supra. In the post-trial context, certain 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 relating to the relief granted (whether the defendant is entitled to have his or her conviction overturned) rather than to the question of whether such a right exists in the first place and can be protected prospectively. Prospective relief is designed to avoid future harm. Prospective relief is appropriate to protect constitutional rights even if the violation of these rights would not affect the outcome of the trial. Luckey v. Harris, supra.

Thus, the Plaintiffs are entitled to prevent a deficient performance of counsel --the first prong of the Strickland test-- from occurring prior to trial, because after trial the harm becomes, for all practical purposes, irreparable. This is because appellate review holds little likelihood of success due to the presumptions in play that uphold guilty verdicts.

The Indiana Supreme Court has recognized that serious and systemic problems in public defense systems do exist. See Smith v. State (1987), 511 N.E.2d 1042:

> errors and omissions made by trial counsel lead to the unerring conclusion that appellant was denied his right to effective assistance of counsel . . . We note that the record reflects counsel had only become a public defender a few weeks prior to appellant's trial and resigned shortly thereafter due to an overbearing caseload. The reversal of this conviction may not have come about so much from an individual performance as from a flaw in the system maintained to provide legal counsel to those unable to meet the expense on their own.

In addition to the investigations and studies performed above, the Indiana Supreme Court has initiated a "rulemaking" process as a result of Appellant Jihad Muhammad's October 14, 1992 "Petition for Rule Making or Other Intervention" with the Indiana Supreme Court. (See Exhibit 7, "Petition for Rule Making or Other Intervention", hereinafter "Petition for Rule Making.") In response to this request, the Supreme Court issued an order requesting public comment in Request for Rule Making Concerning the Marion County Public Defender System, Cause Number 49500-9210-MS-822. (See Exhibit 8, "Order Seeking Comment on Petition

for Rule Making", hereinafter "Request for Rule Making.")

The Indiana Public Defender Commission, a public agency, prepared and filed its "Comments" which contained the pertinent American Bar Association's Standards for Criminal Justice." (See Exhibit 9, "Comments of the Indiana Public Defender Commission", hereinafter "Commission Comments," and Council Comments.)

The IPDC focused its findings and recommendations on three areas: 1) the need for independent public defender boards; 2) increased funding and compensation; and 3) meaningful caseload and workload limits. IPDC noted that there "are serious problems with the quality of representation provided to indigent persons in nearly all counties in Indiana." Council Comments at 1. The Council noted that "indigent defense services are grossly underfunded in Indiana." Council Comments at 2.

Statewide, including Lake County, public defender systems had a lack of independence for public defenders; excessive caseloads; inadequate compensation; lack of support staff and lack of funds for investigation and expert assistance. Council Comments at 1.

IPDC noted that the "level of pay per case should raise grave concerns about the quality of services provided in Indiana . . . with the impact of inadequate compensation on the quality of representation [being] of even greater concern when the services are provided by part-time, salaried and contractual public defenders with unlimited caseloads." Council Comments at 25. This is the situation in Lake County. "In Lake County, some

of the part-time public defenders in the Superior Court--Criminal Division, reported that they received over 100 new felony cases in 1992." Council Comments at 28. This an amount far beyond any standards recommended by any recognized group. Standards for indigent defense services have been promulgated by the American Bar Association, the National Study Commission on Defense Services. (See Exhibit 10, Standards of 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). As if anticipating the Defendants' arguments, the Council noted that in "Indiana there is currently no effective remedy for a defendant to prevent the harm [ineffective assistance of council] before it occurs." Council Comments at 31.

The Plaintiffs would add that the legislative branch also has failed to provide either the structure, or the resources, to defend the "rights of those [it wishes] to throw to the wolves." State v. Peart, 621 So.2d 780, 791 (La. 1993). The Defendants do not contest the proposition that the Lake County "system" falls well "below an objective standard of reasonableness under prevailing professional norms." Williams v. State (1987), Ind. 508 N.E. 1264.

The Supreme Court's action on the Request for Rule Making described in Defendants' Motion also indicates an awareness similar to that evidenced in the State v. Peart, supra. Justice Sullivan, in his concurring opinion in Dubinion v. State (1992),

Ind. App., 600 N.E.2d 136, wrote that the "case vividly demonstrates the need for a dramatic and substantial revision of the Marion County Municipal Court system, including most prominently the Municipal Court Public Defender system." Dubinion at 138. This observation also applies to Lake County.

Other State's courts facing challenges to the adequacy of defender systems have ordered systemic changes like those requested in the instant case. See State v. Peart, supra. State ex rel. Stephan v. Smith, 242 Kan. 336, 747 P.2d 816 (1987) (charged dropped against indigent defendants due to inadequate public defender compensation); State v. Robinson, 123 N.H. 665, 465 A.2d 1214 (1983) (cap on public defender fees lifted); Arnold v. Kemp, 306 Ark. 294, 813 S.W.2d 770 (1991) (cap on fees lifted; preconviction injunctive relief provided); and Arkansas v. Post, 311 Ark. 510, 845 S.W.2d 487 (1993) (State, having delegated the responsibility for providing indigent defense, has the ultimate responsibility for the payment of public defender fees).

The Kemp Court noted that it had:

> perpetuated throughout the years, a system of appointment without just compensation . . . that is long past due for correction. The only proper and permissible course for us to follow is simply to give effect to the plain language of our constitution (citations omitted) . . . Arkansas has delayed in confronting the realities of contemporary criminal defense practice, particularly in the area of capital litigation, even as the concept of what constitutes due process has changed.

No limit is placed upon public defender caseloads. Just as placing a maximum limit of fees on public defenders'

representation is unconstitutional, Makemson v. Martin County, 491 So.2d 1109 (1986), so too is the inverse of a limitless number of cases. None of the courts have caseload maximums for their public defenders. Individual public defenders may attempt to do their professional best to vigorously represent public defender clients, but without caseload limits, researchers, paralegals, investigators, adequate funding for depositions and experts, these efforts are thwarted, and constitutionally adequate assistance of counsel is not provided. The studies show that throughout the years, a public defender system without just compensation that is long past due for correction has existed in Lake County. The Plaintiffs contend that the only proper and permissible course to follow is simply to give effect to the plain language of the state and federal constitutions. Lake County in particular has delayed in confronting the realities of contemporary criminal defense practice.

The present lack of funding, overwhelming caseloads, and lack of defense support services places an unconscionable burden upon public defenders in Lake County. Due to the number and types of cases, and the number of indigent defendants, more funding for the defense of the poor is required because defense "of the poor (is) an imperative duty . . . [devolving] upon the public or some portion of it." Blythe v. State (1854), 6 Ind. 13.

Plaintiffs are entitled to a process that is constitutional, lawful, and just, and appears constitutional, lawful and just. The Plaintiffs are also entitled to a result that is

constitutional, lawful, and just and appears constitutional, lawful, and just. Justice, and the appearance of justice, are central to American law. "We the People of the United States, in order to form a more perfect union, establish justice . . ." United States Constitution Preamble. "To the end, that justice be established, public order maintained, and liberty perpetuated." Indiana Constitution Preamble. Effective preconviction assistance of counsel is a prerequisite to establish justice for criminal defendants.

The methods "employed in the enforcement of our criminal laws [are] the measures by which the quality of our civilization may be judged." Coppedge v. U.S., 369 U.S. 438, 449, 8 L.Ed.2d 21, 82 S.Ct. 917 (1962). As former Chief Justice Burger has stressed, surely "an effective system of justice is as important to the social, economic and political health of the country as an adequate system of medical care is to our physical health." C.J. Warren Burger, Has the Time Come?, 55 F.R.D. 119, 123 (1972).

"The evil--it bears repeating--the evil is in what the advocate finds himself compelled to refrain from doing; not only at trial, but also as to possible pretrial plea negotiations and in the sentencing process." Holloway v. Arkansas, 435 U.S. 475, 490, 98 S.Ct. 1173, 1182, 55 L.Ed.2d 426 (1978). Public defenders, if restrained from being effective and vigorous advocates, are nothing more than warm bodies with law degrees sitting next to the Plaintiffs in the courtroom. The "assistance of counsel is among those `constitutional rights so basic to a

fair trial that their infraction can never be treated as harmless error.'" Id. at 489 (citing Chapman v. California, 386 U.S. 18, 23, 87 S.Ct 824, 827,28, 17 L.Ed.2d 705 (1967).

Inadequate funding perverts the process from the beginning when the immediate task is to investigate because no one can "say what a prompt and thorough going investigation (might) disclose as to the facts." Powell v. Alabama, 287 U.S. 45, 58, 77 L.Ed. 158, 53 S.Ct 55 (1932).

The Indiana and Lake County system for providing legal representation to poor people charged with crimes allows insufficient time and resources to permit adequate defense services, including:

- interviewing;
- investigation;
- research;
- motion practice;
- trial preparation;
- client advice; and,
- overall attention to the case, given forced excessive caseloads.

The Rules of Professional Conduct provide that a "lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client." (Rule 1.7(b))

Underfunding and understaffing increase the likelihood of public defender malpractice because cases are not thoroughly investigated. Public defenders then may become personally liable for the malpractice and violations of defendants' civil rights. Polk County v. Dodson, 454 U.S. 312, 70 L.Ed.2d 509, 102 S.Ct. 445 (1991).

Contrary to Defendants' contentions, appearing in their Motions to Dismiss, appellate review is not the answer for criminal defendants who have been "assisted" by counsel made ineffective by the lack of resources. Only when effective assistance of counsel is rendered ***before*** judgment can the adversary system truly test the guilt or innocence of the accused. "An accused is entitled to be assisted by an attorney . . . who plays the role necessary to ensure that the trial is fair." Strickland, supra, at 685 (emphasis added). A public defender can only play the necessary role if able. Lack of caseload limits, the inability to adequately investigate, and inadequate support staff disable.

This Court should deny the Defendants' Motions to Dismiss and grant Plaintiffs' Motion for Summary Judgment because Lake County's Public defender "system" is unconstitutionally inadequate.

2. The "system" fails to meet the requirements of the Fifth Amendment:

The United States Constitution Fifth Amendment, taken singly or together with the Sixth Amendment, the Eighth Amendment and Fourteenth Amendments, provides that persons accused of crimes who are too poor to afford counsel are entitled to pre-conviction adequate assistance of counsel, due process of law, and equal protection of the laws. Luckey v. Harris, supra.

The right to due process of law is based on the Fifth Amendment to the United States Constitution, which states:

> No person shall be . . . deprived of life, liberty, or property, without due process of law;

Plaintiffs incorporate their prior argument on ineffective preconviction assistance of counsel.

3. The "system" fails to meet the requirements of the Eighth Amendment:

Effective preconviction assistance of counsel is needed in order to assure that excessive bail will not be required nor that excessive fines and/or cruel and unusual punishments be inflicted in violation of the United States Constitution Eighth Amendment. The right to bail and the right to be free from cruel and unusual punishments is based on the Eighth Amendment which states, in its pertinent part that, "excessive bail shall not be required, . . . nor cruel and unusual punishments inflicted."

Delays in appointment of counsel, and the caseloads imposed upon counsel appointed, for pretrial detainees in jail effectively deny the Plaintiffs their right to bail. This is so because if caseload levels and inadequate resources prevent their attorney from preparing a defense, then ***a fortiorari*** any issues of bail will never be adequately investigated and/or presented.

The uncontradicted past history and uncontroverted present state of the Lake County Public Defender "system" demonstrates that the "system" fails to provide adequate assistance of counsel and thus violates the Sixth Amendment. It is clear that the Defendants have abandoned their obligations and that their efforts are mere "tokens" intended to keep up appearances by

providing counsel without, in reality, providing effective, as opposed to **token**, assistance of counsel. See Benner, Tokenism and the American Indigent: Some Perspectives on Defense Services, 12 American Criminal Law Review 667 (1975). It is apparent that Plaintiffs state a claim upon which relief can be based.

4. The "system" fails to meet the requirements of the Fourteenth Amendment:

a. Fourteenth Amendment Right to Due Process of Law:

For all practical purposes, the right to due process of law, found in the United States Constitution Fourteenth Amendment, is identical to Fifth Amendment due process of law. The systemic and funding deficiencies of the public defender system result in ineffective preconviction assistance of counsel and deprivations of due process. Counsel cannot fully and adequately protect those interests due to inadequate funding and caseloads.

b. Fourteenth Amendment right against income discrimination

The right to equal protection of the law and against wealth based discrimination is based on the Fourteenth Amendment which states:

> No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Criminal defendants with the financial means to obtain adequate defense services are afforded a different quality of justice in Lake County. The failure of the Indiana criminal defense system denies the Plaintiffs their rights to equal protection of the law guaranteed by the Fourteenth Amendment.

c. Fourteenth Amendment right against race discrimination

The right to be free from racially discriminatory governmental practices is based on the Fourteenth Amendment, which states:

> No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.

The evidence of intentional neglect and underfunding of public defense is so overwhelming that it is reasonable to conclude that the Defendants ***intend*** that poor people, generally, and African-Americans, in particular, who are charged with crimes, receive inadequate assistance of counsel. Palmer v. Thompson, 403 U.S. 217, 29 L.Ed.2d 438, 91 S.Ct. 1940, (1971). See also Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, 1971 Supreme Court Review 95 at 119-20. "An invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." Washington v. Davis, 426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct. 2040 (1976). Equally sinister would be the conclusion that there is a willful disregard and lack of concern that they receive effective preconviction assistance of counsel.

It is undisputed that at least sixty percent (60%) of the persons represented by public defenders are African-Americans even though only 25% of the population of Lake County is African-American. Since "normally the actor is presumed to have intended the natural consequences of his deeds" Washington (J. Stevens,

concur.), at 253, it can be reasonably inferred that the Defendants intended for African-Americans to receive ineffective preconviction assistance of counsel. It certainly has been adequately alleged to state a cause of action.

Plaintiffs need not obtain the proverbial "smoking gun," i.e., an explicit statement of racially discriminatory intent. It is rare in criminal cases to find a direct statement of intent; yet convictions under the much heavier "beyond a reasonable doubt" standard of proof are reached. Likewise, a direct statement of intent to prove intent to commit a racist act is not required to make a finding of intentional racial discrimination. A fact finder may infer from the surrounding circumstances the intent of the actors at the time.

As the Supreme Court noted more than a century ago:

> The motives of the legislators, considered as to the purposes they had in view, will always be presumed to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile. Soon Hing v. Crowley, 113 U.S. 703, 710-11, 5 S.Ct. 730, 28 L.Ed. 1145 (1885).

The Defendants are presumed to have intended the consequences of their acts. Thus, if the result is to keep poor people, who are disproportionately African-Americans, inadequately represented, such a result is presumed to be intended. Just as very few murderers verbally announce their

intent to kill and very few robbers declare their intent to rob, or shoplifters their intent to shoplift, no modern politician or officeholder will intentionally make a racist statement in public. It would be intellectually dishonest to require such as the ***only*** satisfactory proof of racially discriminatory intent.

Plaintiffs have alleged that it is known and understood by the white majority on the Council that persons represented by public defenders in Lake County are African-American. Plaintiffs have also alleged that part of the motive of the white majority party on the Council for neglecting and underfunding public defense (and thus failing to assure that adequate legal counsel is provided to poor persons charged with crimes in Lake County) is a racial animus towards African-Americans, or a lack of concern about how African-Americans are treated by the criminal justice system. Plaintiffs have alleged that the systemic and funding deficiencies of the Indiana and Lake County criminal defense scheme for indigents violate the Plaintiffs' rights guaranteed them by the Fourteenth Amendment right to be free from governmental policies that have a known racially discriminatory effect.

History shows that the "system" in Lake County does not provide constitutionally adequate effective preconviction assistance of counsel. The "system", in itself, constitutes a systemic failure to satisfy minimum constitutional standards, and an injunction or other equitable relief would be a proper remedy.

Circumstantial evidence is given the same weight as direct

evidence. "The law makes no distinction between the weight to be given either direct or circumstantial evidence." U.S. v. Clark, 506 F.2d 416, 418 (5th Cir. 1975). In United States v. Container Corp., 393 U.S. 333, 337 (1969) at 436 fn. 13, the Court held:

> The law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain, and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result.

Id. at 430.

Once Plaintiffs demonstrate the possibility that an improper consideration, e.g. discrimination against African-Americans, is a motivating factor, it is unnecessary to allege that it was dominant or primary.

The Plaintiffs have, with their allegations, and evidence, clearly stated a claim upon which relief can be granted.

The Lake County Council County **materially** misstates the law in this respect by willfully misrepresenting Minority Police Officers Association of South Bend v. City of South Bend, 617 F. Supp 133, affirmed 801 F.2d 964 (7th Cir. 1986) (Council Brief at 7-8). The County argues that the Plaintiffs must allege and prove that a racially discriminatory purpose "must be **the** motivating factor." Council Brief at 7. The correct statement of law is that a Plaintiff need only allege that race "was a motivating factor." Id. at 1348. Minority Police Officers holds that impact "is a starting point and if stark and unexplainable on other grounds, may provide evidence of discriminatory intent or purpose." Id. at

1348. Material misquotation is unacceptable. See Anderson v. Holmes, 16 F.3d 219 (7th Cir. 1994).

5. The "system" fails to comply with Article 1, § 13:

The core Indiana constitutional claim in this litigation revolves around the right to pretrial and preconviction effective assistance of counsel. This section of the brief, in a manner similar to the discussion infra of the federal right to effective preconviction assistance of counsel, will discuss all other state constitutional rights in the context of the right to effective preconviction assistance of counsel.

The Indiana right to effective preconviction assistance of counsel is based on Indiana Constitution Article 1, § 13, which states:

> In all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel;

Plaintiffs incorporate their prior argument on the federal right to adequate assistance of counsel prior to conviction except to add that the Indiana right to effective pre-conviction assistance of counsel is older and broader than the federal right. Webb v. Baird (1854) 6 Ind. 13; Batchelor v. State, (1920) 189 Ind. 69, 125 N.E. 773. To paraphrase Justice Lairy in the Batchelor opinion "the privilege of the presence of counsel upon the trial would be a poor concession to the accused if the right to effective representation prior to the trial was denied." Id. at 776.

The right to effective preconviction assistance of counsel

is more pervasive than any of the Plaintiffs' rights. This is because a defense attorney's performance directly affects a criminal defendant's ability to assert and protect all these other state-created rights, such as, the right to due course of law pursuant to Indiana Constitution Article 1, § 12, the right to reasonable bail pursuant to Indiana Constitution Article 1, § 16, the right to bail pursuant to Indiana Constitution Article 1, § 17, the right to reformative, rather than vindictive, justice pursuant to Indiana Constitution Article 1, § 18, and the right to equal privileges and immunities pursuant to Indiana Constitution Article 1, § 23; Indiana has, in addition, held that there can be no conviction without adequate counsel. Winn v. State (1953), 232 Ind. 70, 111 N.E.2d 653.

The right to counsel of all persons at all critical stages of a criminal proceeding is fundamental, and denial of this right is denial of fundamental due process. Clark v. State (1991), Ind. App., 577 N.E.2d 620. It attaches when adversarial proceedings commence. Wright v. State (1992), 593 N.E.2d 1192, cert. den. ___ U.S. ___, 113 S.Ct. 605, 121 L.Ed.2d 540.

The right to effective preconviction assistance of counsel applies at the following: identification proceedings, Clark v. State, supra; lineups, Page v. State (1991), Ind. App., 582 N.E.2d 438; and post-conviction, Ferrier v. State (1979), 270 Ind. 279, 385 N.E.2d 422, appeal after remand, 274 Ind. 585, 413 N.E.2d 260.

It is beyond reasonable dispute that the Indiana

Constitution protects the right to effective preconviction assistance of counsel for paupers, which is co-extensive with the right to counsel of non-paupers. State ex re. Brown v. Thompson (1948), 251 Ind. 546, 242 N.E.2d 919.

Effective preconviction assistance of counsel, prior to conviction, is critical. This is because after conviction, a series of state law presumptions exist that are analogous to the Strickland presumptions. The presumptions make reversing the conviction nearly, or effectively, impossible. There is a strong presumption that effective preconviction assistance has been provided. Terry v. State (1984), Ind., 465 N.E.2d 1085; Metcalf v. State (1983), Ind., 451 N.E.2d 321; Davis v. State (1983), Ind., 446 N.E.2d 1317; Miller v. State (1980), 273 Ind. 493, 405 N.E.2d 909. This is a "rebuttable" presumption. Kappos v. State (1991), Ind, App., 577 N.E.2d 974, trans. den. The law makes "factual" assumptions that serve as the foundation for a legal "presumption."

To overcome these presumptions regarding effective preconviction assistance of counsel, the Defendant must present "strong and compelling" evidence. Babs v. State (1993), Ind. App., 621 N.E.2d 326, trans. den.; Fugate v. State (1993), Ind, 608 N.E.2d 1370 (1993). The conviction will only be set aside if there has been a "breakdown in the adversarial process which renders the result unreliable." Young v. State (1986), Ind., 482 N.E.2d 246; Roberts v. State (1992), Ind., 599 N.E.2d 595; Adams v. State (1991), Ind., 575 N.E.2d 625.

This unreliability can be proved by a showing that the performance fell below an "objective standard of reasonableness" which deprived the Defendants of a fair trial. Bellmore v. State (1992), Ind., 602 N.E.2d 111; Cuppett v. Duckworth, 8 F.3d 1132 (7th Cir. 1993).

What better "strong and compelling" evidence is there that the Lake County Public Defender system's performance has fallen below an objective standard of reasonableness than the five reports spanning more than 20 years, all of which are uniformly critical of the delivery of public defender services to poor citizens charged criminally in Lake County?

The Defendants, through systematic underfunding and neglect, have systematically destroyed any factual foundation to underpin the Strickland presumption. Thus, Plaintiffs have alleged, and demonstrated, not only the lack of a fair trial, but also the lack of a fair "pretrial."

The Plaintiffs have adequately alleged this compelling lack of adequate assistance of counsel to state a claim upon which relief may be based. Furthermore the evidence is sufficiently uncontested to grant the Plaintiffs' summary judgment on this issue.

6. The "system" closes the courts and denies due course of law in violation of Article 1, § 12:

The Indiana constitutional right to due course of law and open courts is based on Article 1, § 12, which states:

> All courts shall be open; and every man, . . . shall have remedy by due course of law.

The systemic and funding deficiencies of the Indiana and Lake County criminal defense scheme for indigents has two effects. First, the Plaintiffs are denied due course of law prior to trial through ineffective preconviction assistance of counsel. Second, the courts are effectively "closed" to the Plaintiffs because there is no effective lawyer to keep them "open."

These allegations are sufficient to state a claim upon which relief can be granted under Article 1, § 12 of the Indiana Constitution, and the facts are sufficiently uncontested to grant judgment.

7. The "system" allows excessive bail to be required in violation of Article 1, § 16:

The Indiana right to reasonable bail is based upon Article 1, § 16, which states: "Excessive bail shall not be required."

Plaintiffs incorporate by reference their Eighth Amendment arguments. It should be noted Article 1, § 16 jurisprudence is not well developed. The Plaintiffs have found only eight (8) cases interpreting it. Several provide guidance on the role of effective preconviction assistance of counsel in asserting bail rights. For example, in Sherelis v. State (1983), Ind. App., 452 N.E.2d 411, it was held that bail "is excessive where the amount set represents a figure higher than that calculated to assure the accused party's presence at trial." Id. at 413. In reviewing I.C. 35-33-8-4, the Court noted the very detailed and fact sensitive nature of the bail inquiry.

Failing to provide adequate resources to perform the

detailed investigation means that poor people are denied an individualized bail determination after a careful investigation and assessment of the facts by their public defenders. This is because their lawyers do not have the resources to prepare a thoroughly developed factual basis. In addition, unnecessary jail costs are accrued when persons who would otherwise be out are imprisoned.

If there were adequate resources, an adequate presentation relating to bail could be done, and unlawful pretrial detention, which is a form of pre-conviction punishment, would be avoided. Thus, ineffective assistance of counsel results in inadequate bail hearings and results in pre-conviction punishment. See also, Mott v. State (1986), Ind. App., 490 N.E.2d 1125, for an example of a carefully individualized assessment of the facts related to bail. The "object of bail very definitely is not to effect punishment in advance of conviction." Hobbs v. Lindsay (1959), 240 Ind. 74, 162 N.E.2d 85, 88. The "right to freedom by bail pending trial is an adjunct to that revered Anglo-Saxon aphorism which holds an accused to be innocent until his guilt is proven beyond a reasonable doubt." Id. at 88.

Thus, failure to provide adequate assistance of counsel for purposes of defending the right to bail and the right to reasonable bail amounts to nothing other than punishment prior to conviction. This is perfectly demonstrated by Plaintiff Carter's situation. He has been incarcerated 14 months. His first public defender did not visit him for the first six months of that

custody. Carter's second public defender visited him one time in jail. In February 1995, Carter's second public defender withdrew from Carter's case and a third public defender was appointed. Carter's third public defender visited Carter twice, but only to pass on plea offers from the state. He did not discuss preparing a defense. (PAC ¶¶94-101)

Thus, Carter was "punished" by the length of his preconviction incarceration --a period of time, fifteen months, which compares unfavorably with Third World Countries, or the former Soviet Union, for their length of pretrial detention without trial. Here, the political crime appears to be a financial inability to afford a private lawyer.

This pre-conviction punishment results in "time-served" pleas. See also Green v. Petil (1944), 222 Ind. 467, 54 N.E.2d 281, 282. Furthermore, as noted in Hobbs, supra, at 88, the "right to freedom by bail is of ***especial*** significance to the accused who must prepare his defense in the interim." (Emphasis added.)

Thus, ineffective assistance of counsel in the bail proceedings results in two substantive evils, pre-conviction punishment and further aggravation of the problem of inadequate preparation. See, generally, Holland v. Hargar (1980), Ind., 409 N.E.2d 604; Pollard v. State (1969), 252 Ind. 513, 250 N.E.2d 748; State v. Ryan (1986), Ind., 490 N.E.2d 1113; and Brown v. State (1975), 262 Ind. 629, 322 N.E.2d 708.

8. The "system" denies the right to bail in violation of Article 1, § 17:

The Indiana right to bail is based upon Article 1, § 17, which states:

> Offenses, other than murder or treason, shall be bailable by sufficient sureties.

The Plaintiffs incorporate the argument related to Article 1, § 16.

9. The State, by initiating legal action against the Plaintiffs, is equitably estopped from asserting any non-substantive defenses to the Plaintiffs' claim that ineffective preconviction assistance of counsel is being provided:

The Defendants rely on Will v. Michigan Dept. of State Police, 491 U.S. 58, 105 L.Ed.2d 45, 109 S.Ct. 2304 (1989), as authority for the proposition that sovereign states are not persons within the meaning of 42 U.S.C. 1983, and that therefore a state Court has no jurisdiction to adjudicate alleged federal constitutional violations against Defendant State of Indiana.

The Defendants do not contend that this Court does not have jurisdiction under the State Constitution. Thus, this point is waived. Plaintiffs contend that even Will is inapplicable due to the unique nature of the case. The issue in Will was whether the Michigan Department of State Police could be sued for damages under 42 U.S.C. 1983. In the instant case, the Plaintiffs are suing for injunctive relief to prevent the State of Indiana, which is prosecuting them, from failing to provide adequate assistance of counsel. This is a material difference because the State of Indiana has placed the Plaintiffs in a position of peril

constituting a loss of freedom.

In Will, Michigan had not brought any legal action against the Plaintiffs. The Plaintiffs were seeking compensation from the state treasury for wrongs done to them. Here, the Plaintiffs are seeking to ***prevent*** the wrong from being done them by a litigant in another case. The only recourse available to the plaintiffs is to bring litigation against the entity or person which is prosecuting them. As the Will Court noted, states can be "persons" -- at least under 15 U.S.C. 13 [a] and [c]-- **if**, as here, the relief sought is injunctive.

The Supreme Court's primary concern was to not subject sovereign states treasuries to possible damage liability. Will, supra, at 68. The Court held that "although in other respects the impact on state sovereignty was much talked about, no one suggested that Section 1 would subject the State's themselves to a damages suit under federal law." This leaves a clear exception for suits seeking injunctive relief.

The State, by bringing suit against the Plaintiffs in their criminal proceedings, has waived any 11th Amendment immunity because it has acted as a "person" for purposes of 42 U.S.C. 1983. Those legal actions are brought in the State's name and the State is the only "person" who can remedy the systematic deprivation of adequate assistance of counsel.

Additionally, the Defendants are equitably estopped because the relief requested is the ability to fairly contest a lawsuit. The State of Indiana has sued the Plaintiffs for criminal relief.

The Plaintiffs have sued the State, and its operatives, for civil injunctive relief to permit the Plaintiffs to fairly contest the criminal action. The State Defendants, in effect, want to require the Plaintiffs to be convicted before they can assert a claim for ineffective preconviction assistance of counsel. The State Defendants would force the Plaintiffs to be harmed, thus triggering potential civil damages liability, rather than to seek to prevent such damages. The entire point of an injunction is to prevent harm, thus obviating the necessity of remedying the harm.

The Plaintiffs, by seeking injunctive relief, are trying to avoid having the potential harm become actual harm. The States' misunderstanding is evident by the "results" only standard it argues. Sometimes, factually guilty Defendants are not convicted even though they have had inadequate assistance of counsel. Plaintiffs are entitled to both a process that is constitutional and a result that is constitutional. Stated quaintly, an ounce of prevention (assuring adequate counsel prior to verdict) is worth more than a pound of cure (attempting to set aside a verdict due to ineffective assistance of counsel).

V.

Defense Arguments

State Defendants' Position:

The State Defendants' positions are:

> 1. the Plaintiffs have "an adequate remedy at law" in setting aside a "wrongful" conviction (State Defendants' Motion to Dismiss § B, p. 5-12); **or,**

2. the Plaintiffs are "in the wrong court" (State Defendants' Motion to Dismiss § C, p. 12-15) because the trial courts will guarantee the Plaintiffs' preconviction right to counsel; **or**,

3. the State Defendants should be dismissed because they cannot do anything about it (State Defendants' Motion to Dismiss § D, p. 16-18); **and**,

4. Judges are immune from damages (State Defendants' Motion to Dismiss (second) § D, p. 18-20); **and**,

5. Thorpe lacks standing to represent the Plaintiffs in this legal action (State Defendants' Motion to Dismiss § E, p. 20-21).

The State Defendants' position is that poor people who have no choice but to be represented by public defenders are not entitled to prevent ineffective ***preconviction*** assistance of counsel and are only entitled to have a conviction reversed if their public defender's performance was so abysmal that an appellate court cannot in good conscience let it stand. The airplane crash analogy described above should be recalled. The Defendants' theory of post-crash relief suffers from the triple flaw of being tolerant of systemic constitutional violations, impractical and the most roundabout remedy conceivable. Additionally, it favors cure over prevention.

The Defendants' contention is that, in order to be entitled to relief, the Plaintiffs must show:

1. there was a deficient performance by counsel;
2. which caused a sufficiently great prejudice to the defendant to cause an innocent person to be convicted.

The Defendants' response to ineffective assistance of

counsel is, in essence, "So what, too bad, don't worry, let the appellate courts sort it out ***after*** a conviction." Since it is the State which seeks a conviction in the first place, this argument of conviction first, relief later is consistent with the State's interests and desires.

The choice the Courts, as an institution, must make is whether the Plaintiffs are entitled to relief designed to prevent highly probable ineffective preconviction assistance of counsel or whether the Plaintiffs' only recourse is in setting aside a wrongfully obtained conviction.

Under the Defendants' theory of the case, the Plaintiffs have **no** civil rights remedy but rather only has a remedy available in the criminal proceeding.

This Court should reject the notion that it is powerless to prevent civil rights violations from occurring. Assume that the Plaintiff has no right to effective preconviction assistance of counsel but that this Court mistakenly orders the relief sought by the Plaintiff. Who would be harmed by taking the steps requested to assure compliance with national guidelines for effective assistance of counsel? No one. It is no different from asking who is harmed by boiling the water when the public water supply is at risk. The Plaintiffs have the right to prevent ineffective assistance of counsel.

There are several instances where judicial intervention of an equitable and/or injunctive nature has provided systemic relief to prevent systemic ineffective assistance of counsel. See

State v. Smith, supra; Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So.2d 1130 (Fla. 1990) (systemic equitable relief ordered to address "tremendous backlog of appeals"); Rose v. Palm Beach County, 361 So.2d 135 (Fla. 1978) (Courts have the power to do all things reasonably necessary for the administration of justice, including compelling the expenditure of funds from other branches of government. The doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights.) Escambia County v. Behr, 384 So.2d 147 (Fla. 1980) (systemic relief ordered against the counties who were the only real parties in interest); Hatten v. State, 561 So.2d 562 (Fla. 1990) (mandate compelling case to be reviewed and briefs filed); Jewell v. Maynard, 383 S.E.2d 536 (W.Va. 1989) (writ of prohibition issued against judge forbidding him from appointing an attorney to represent additional indigent defendants after a special master concluded that the state was at a "flash point" in providing indigents with adequate representation).

The State argues that the "trial court" will assure effective preconviction assistance counsel to each plaintiff. The history of the "system" described in the reports puts the lie to this argument. However, the State can point to **no** instance where a Lake Superior Trial Court has refused to permit a trial to proceed due to ineffective preconviction assistance of counsel. The State will not be able to show a single instance where any of the Defendant Judges have reversed a conviction, or prevented one

from occurring by aborting a trial on its own motion, for ineffective assistance of counsel. History shows that either ineffective assistance of counsel conceals itself from Trial Courts, or that Trial Courts do not recognize it when it is present, or that they tolerate it.

There is a large real world difference between a Court having the "theoretical" authority to do something and actually doing it. The Courts "can" prevent ineffective preconviction assistance of counsel but the Defendant Courts have not. Indeed, the Defendant Court's have hired a lawyer suspended from the practice of law for neglecting clients to administer the Public Defender system. Certain undisputed facts lead to the inference that the Courts are more concerned about patronage matters (see Fisher v. Krajewski, supra, and Kurowski v. Krajewski, supra; and Jarrett's hiring) than minimal standards of public defense. There is no record of any Judge disciplining or discharging a public defender for ineffective assistance of counsel --only for not being of the correct political persuasion.

This State's argument further suggests that the trial judge's role, in effect, is to be an indigent defendant's second "quality control" lawyer whose task it is to constantly oversee and monitor the adequacy of the performance of his "lead" lawyer and to remove him if inadequate assistance is being provided. Placing this duty on trial judges to "second guess" defense counsel would also raise the specter of judges becoming adversaries to the prosecution and raises serious problems with

the appearance of conflict or favoritism. The State will be unable to provide any instance of this trial court "safety net" in operation, thus making this an argument with no real world basis.

The Defendants raise an "exhaustion of remedies" argument urging that courts of appeal, in the direct appeal of the Plaintiff's wrongful conviction, should determine, on a case-by-case basis, whether an individual defendant's rights were violated. Defendants note that each plaintiff has a pending action to litigate the question of the constitutional adequacy of his or her counsel in the criminal court where the charge is pending. See Richards v. State (1985), Ind. 476 N.E.2d 497. This "exhaustion of remedies" argument does not apply because of the nature of the wrong being committed. The wrong being committed is systemic ineffective assistance of counsel, which only lends itself to prevention rather than cure.

The West Virginia Supreme Court's analysis in Jewell, supra, is a sufficient rejoinder to this argument:

> the current system does not consistently ensure experienced, competent, capable counsel to all indigent defendants and others entitled to appointed counsel. Id. at 542.

The Jewel Court further noted:

> We now must answer the question: What is to be done? This Court must measure the current system against generally accepted constitutional standards to determine whether the system meets those standards. Id. at 545.

The Jewell Court found the ***entire*** West Virginia system deficient based upon a single petition brought by a single

lawyer. The West Virginia system was deficient when measured against "generally accepted constitutional standards" and ordered extraordinary relief. The Plaintiffs have shown that the Lake County system has been, is, and will continue to be "deficient when measured against generally accepted constitutional standards." That the procedural vehicle used happened to be a mandate in West Virginia, rather than a request for injunctive relief, is a difference without a distinction. The relief obtained was equitable in nature. Id. at 547.

The Oklahoma Supreme Court in State v. Lynch, 796 P.2d 1150 (Okla. 1990), granted interim extraordinary systemic relief which was to stay in place until the legislature acted. In State ex rel. Stephan v. Smith, supra, a mandamus action allowed preconviction systemic relief in the nature of extraordinary relief similar to that requested by the Plaintiffs in this action. In Wilson v. State, 574 So.2d 1338 (Miss. 1990), the Supreme Court of Mississippi held, in discussing the discretionary authority of the legislature to allocate funds, that the:

> discretionary authority of the Legislature is wide indeed, but it does not cover quite all the spectrum. If it [the Legislature] fails to fulfill a constitutional obligation to enable the judicial branch to operate independently and effectively, then it has violated its Constitutional mandate, and the judicial branch has the authority as well as the duty to see that courts do not atrophy.

Wilson at 1339-40.

See also Pruett v. State, 574 So.2d 1342 (Miss. 1990).

The Arizona Supreme Court in State v. Smith, supra, which was a "systemic" case, found that it was:

> obvious that the caseload of the defendant's attorney was excessive, if not crushing. In making this determination [the court did] not base [its] opinion on the standards alone, but also on [its] own experience that the defendant was inadequately represented. The fact that one felony defendant out of 149 was given minimum adequate representation does not mean that others were properly represented. The insidiousness of overburdening defense counsel is that it can result in concealing from the courts, and particularly the appellate courts, the nature and extent of damage that is done to defendants by their attorneys' caseloads. We do not believe the Mohave County system is in conformance with these standards.

Id. at 1381.

The State v. Smith Court further noted that:

> We believe the procedure followed by Mohave County violates the right of a defendant to due process and right to counsel as guaranteed by the Arizona and United States Constitutions. We reach this conclusion based upon the reasoning stated above, that an attorney so overburdened cannot adequately represent all his clients properly and be reasonably effective. Some defendants must receive inadequate representation in relation to those who do, in fact, receive adequate representation.

Id. at 1381.

The Court continued:

> Because this decision mandates new procedures not heretofore contemplated, we order that this opinion shall be prospectively applied after the mandate issues in this matter. In matters tried prior to the issuance of the mandate, the defendant will still be required to show that he was, in fact, denied adequate assistance of counsel. As to trial commenced after the issuance of the mandate, if the

> same procedure for selection and compensation of counsel is followed as was followed in this case, there will be an inference that the procedure resulted in ineffective preconviction assistance of counsel, which inference the state will have the burden of rebutting.

Id. at 1384.

See State v. Robinson, supra (cap on public defender fees lifted systemwide); Arkansas v. Post, supra, (State held to be ultimately responsible for the payment of public defender fees).

In any event, the issue of what relief the Plaintiffs are entitled to is something more appropriately addressed at the ***remedy*** stage, not the "***pleading***" stage, of the litigation.

State Counsel for the Defendants erroneously asserts that the Platt Plaintiffs sought "statewide" relief. More During oral argument on the Motions to Dismiss the Second Amended Complaint, the Trial Court, the Hon. Christopher Burnham, inquired on the precise point of statewide relief. The undersigned attorney orally clarified that the word "state" was a clerical error and that only "countywide" relief was being sought. Countywide relief in Platt was consistent with the class definition, which was a countywide class.

The Defendants are unable to distinguish Luckey v. Harris, supra. Even should the Court be persuaded that it cannot enter orders preventing the violation of the civil right to effective preconviction assistance of counsel under the U.S. Constitution, the Indiana Constitution provides an independent and adequate basis for a cause of action and injunctive relief.

County Council Defendants' Position:

The County Council argues it has no "statutory" authority over criminal defense because the General Assembly has "vested" the authority with the Courts. It next argues that the Plaintiffs fail to sufficiently allege an equal protection claim.

As the legislature for the County, however, the Council is not without the ability to require, as a condition of funding, that certain minimal standards be in place. The Council's suggestion that the Plaintiffs are seeking any "specific" level of funding or structure is both irrelevant and incorrect. The Plaintiffs, as a class, are in imminent danger of being provided ineffective pretrial assistance of counsel because the Defendants permit preconviction inadequate assistance of counsel to occur. This consideration seems more appropriate at the remedy stage.

The Council's argument that ineffective pretrial assistance of counsel "must" be approached on a "case-by-case" basis is about as persuasive as urging that plague be treated on a "case-by-case" basis. An example would be urging that cholera (a waterborne disease caused by deficient sanitation measures) should be treated on a "case-by-case" basis rather than installing proper water and sewage treatment. It is an unscientific argument at best and a primitive one at worst.

The Council attempts to miscast the nature of the Plaintiffs' claims by arguing that this is a case about "differences" in quality. Council Memorandum at 5. The Plaintiffs allege, and the facts prove the allegations to be true, that this

is a claim about structurally endemic inadequate pretrial assistance of counsel caused by all responsible departments of government --judicial, legislative and executive. Not surprisingly, the Council Defendants "point the finger" over there. But their argument, curiously, is that Plaintiffs should address their request for relief to the legislative, not the judicial, branch of government. The Council **is** the local legislative branch of government.

The Plaintiffs are not required to cite a particular "case" which establishes what the "constitution requires as adequate" compensation. Council Memorandum at 5. Spangenburg's expert opinion establishes this fact of inadequate pretrial assistance of counsel.

The Council's argument regarding the provision of experts, or any investigation for that matter, places the Court in the role of "senior fiscal" officer and directly in conflict with the ability to render a vigorous defense. The absurdity of the "case-by-case" scenario urged by the Council is made clear by having Judges be "senior bean counters" for the defense but not for the prosecution. This argument by the Council proves the conflict that exists when judges hire the individual public defenders and proceed to control how they litigate the case.

The Council's attempt to liken private counsel representation (a relationship freely entered into between the client and the lawyer) with public defender representation (an involuntary relationship between the client and the public

defender, which as the Council agrees is subjected to intrusive judicial oversight of defense strategy and tactics) illuminates the Council's lack of knowledge regarding how the system "works." It is clear from their arguments that the Council is unfamiliar with the numerous reports which prove the constitutional decrepitude of the Lake County Public Defender system. Two examples of the "quality" of judicial oversight of public defenders in Lake County are sufficient to dispose of this argument. In In the Matter of McGrath (1987), Ind., 506 N.E.2d 1083, the Supreme Court, in its per curiam opinion, stated:

> Upon review of the matters now before the Court, we find that the Respondent, who is an attorney admitted to the Bar of Indiana on October 21, 1975, was, at all times relevant herein, employed as a part-time salaried Appellate Public Defender by the Criminal Division of the Lake County Superior Court. During a period between February, 1984, and February, 1986, forty-six criminal cases were assigned to the Respondent for which he was to perfect an appeal. The Respondent proceeded in a timely fashion in only seven of the assigned cases. In three of the cases assigned to him, the Respondent filed a record but did not complete the appeals; six other appeals were dismissed because of his failure to complete the work; in twenty-three assigned cases, he failed to file a record resulting in belated appeals; and in seven cases, he failed to file the record or to complete the appeal. It is clear from the foregoing findings that the Respondent engaged in misconduct.

The Council's argument does not simply ignore the facts of how the Lake County system works, but the Council County **materially** misleads the court on the law by quoting, out of its proper context, Minority Police Officers. Council Memorandum at

page 7-8. The County argues that the Plaintiffs must allege and prove that a racially discriminatory purpose "must be **the** motivating factor." Council Memorandum at 7. The correct statement of law is that a Plaintiff need only allege that race "was a motivating factor." Minority Police Officers at 1348. Minority Police Officers holds that impact "is a starting point and if stark and unexplainable on other grounds, may provide evidence of discriminatory intent or purpose." Id. at 1348. Willful misstatements of the law are subject to sanction. Selch v. Letts, 5 F.3d 1040 (7th Cir. 1993).

Defendant Letsinger's Position:

Letsinger contends judicial immunity from damages. Judges acting in a judicial such as when they are "deciding cases" have immunity. Judges acting in their capacity as employers and administrators of a "system" not deciding issues of law and do not. A different standard applies. See Fisher v. Krajewski, supra, and Kurowski v. Krajewski, supra.

The actions involved here are actions by judges, but are not judicial actions as that term is used in Pierson v. Ray, 386 U.S. 554, 87 S.Ct. 1299, 18 L.Ed.2d 285 (1967). Maintaining a corrupt hiring system merely for the purpose of defending patronage power is hardly an "exercise [of] their functions with independence without fear of consequence." Letsinger Memorandum at 2. Patronage hiring can hardly be defended on the grounds that it is "principled and fearless decision making." This is a standards, practices, and policy litigation, not an erroneous ruling. The

Judge Defendants are being held accountable for their administrative decisions. Forrester v. White, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988). The "extent of immunity depends on the capacity in which the judge acts; judicial decisions are immune absolutely, while administrative decisions must be evaluated under principles of qualified immunity." Kurowski v. Krajewski, supra, at 773. The Defendant Judges, just like Krajewski in firing public defenders, are acting in their administrative roles when hiring and administering public defenders. Just as the Defendant Judges are not entitled to absolute immunity, neither are they entitled to qualified immunity. The contours of the right to effective assistance of counsel are so well known and established that a reasonable person in the Judges' position would have understood that indigents are entitled to effective assistance of counsel prior to conviction. Also, a reasonable person would have understood, in light of all the studies performed on Lake County indigent defense, that effective preconviction assistance of counsel is not provided in Lake County.

This suit is not brought by an unhappy litigant who has lost a case due to an erroneous ruling by a judge "acting maliciously and corruptly." Letsinger Memorandum at 2. Rather, it is brought by persons who are involuntary indigent passengers in a public defender railroad car which the Defendant Judges have put on autopilot and most probably will drive off the tracks. Letsinger compares his situation to Judge Stumpp who ordered, ***sans***

jurisdiction, a tubal ligation on a minor. Stumpp's case was an individual "case" which adjudicated the rights of an individual. Letsinger's situation, and the Plaintiffs' circumstance, is a system of administration involving a policy decision which is in the nature of an employment decision --not a judicial decision.

The broad formulation of Letsinger's argument, when parsed carefully, stands for the proposition that judges may intentionally hire public defenders who will provide ineffective preconviction assistance of counsel.

This litigation is not directed against Letsinger "for his role in [the] convictions," Letsinger Brief at 3, but rather for his role in creating and maintaining a hopelessly conflicted and constitutionally deficient public defender system which does not provide justice prior to verdict.

Letsinger's argument conflates "jurisdiction" with "authority." The General Assembly has "authorized," or empowered, judges to create, administer, and employ public defenders for indigents. This authorization does not, however, "immunize" judges in their administrative and employer capacity from the requirement to provide effective preconviction assistance of counsel.

"Jurisdiction," on the other hand, is a conceptually distinct notion from "authorization." The General Assembly has created the Court that Letsinger occupies and given it "jurisdiction" to hear certain cases.

In a sense, there it is no real difference between the

instant case and cases involving improper discharge, or violations of employees civil rights. A different standard applies.

Letsinger incorporates the State Defendants' Arguments regarding the Plaintiffs' entitlement to injunctive relief, and Plaintiffs likewise incorporate their response.

The Defendants' argument that the trial court will assure effective preconviction assistance counsel to each plaintiff suggests that the trial judge will, in effect, become the indigent defendants second "quality control" lawyer whose task it is to constantly oversee the adequacy of the performance of his "lead" lawyer and remove him if inadequate assistance is being provided. The Plaintiffs specifically reject the implicit "means justifies the ends" argument that if "a plaintiff is acquitted or succeeds in having the charges dropped, his appointed counsel is not, by definition, inadequate." All persons, regardless of their factual innocence or guilt, or whether they are found guilty or not guilty, are entitled to a fair trial, that appears to be a fair trial, while represented by constitutionally adequate counsel.

Under the State's analysis, for example, a person could be held for years in custody. But the State would argue that the accused really had effective preconviction assistance of counsel if the charges were eventually dismissed. The hypocrisy of the State's argument becomes clear because under this theory, only "guilty" people are entitled to "effective" assistance of

counsel. One must be convicted before Strickland would apply.

Under the Defendants' hypothetical, appointed counsel may be inadequate, thus fulfilling the first prong of the Strickland test. But since the inadequacy does not have disastrous effects on the Plaintiffs, as required in Strickland in order to justify a reversal of a conviction, the Plaintiffs therefore should not prevail. The representation was inadequate, but fortunately, it did not harm the Plaintiff.

There is an obvious loss of freedom while in custody or on probation if one is convicted. Setting aside a conviction does not afford a complete remedy. Thus preventing the violation must be even more of a priority. Incarceration while awaiting a reversal would meet the standard described in Haines v. Trueblood (1918), 67 Ind. App. 456, 119 N.E. 383. In Haines, the Court held that in "determining the adequacy of legal remedies and the consequent superiority of equitable remedies, some force is given to the fact, if it exists, that the former are vexatiously inconvenient, or that a denial of the latter results in irritation, annoyance, and embarrassment readily relieved by the application of such remedy." Id. at 386. Surely, the Defendants would concede that imprisonment awaiting a legal remedy is an irritation, annoyance and embarrassment. Haines provides strong arguments for granting the Plaintiffs requested relief because it will "secure repose from perpetual litigation" surrounding effective preconviction assistance of counsel. Id.

The State claims to have found a case, In re Forfeiture

Hearing as to Caplin & Drysdale, 837 F.2d 637 (4th Cir. 1988), which is contrary to Luckey v. Harris, supra. A close reading of this case indicates significant differences between the two.

First, Caplin neither employs Luckey v. Harris methodology nor explains why it does not. Second, the evidentiary setting is significantly different from Luckey v. Harris. In Caplin, the public defender office appointed to represent Reckmeyer did not have a 25-year proven history of constitutionally ineffectiveness. Caplin recognizes the possibility of a per se rule, given a certain factual setting, when it notes that claims "of ineffective preconviction assistance are ***generally*** to be resolved through an inquiry into the fairness of a particular proceeding and not by a per se rulemaking." Id. at 647 (emphasis added). The Fourth Circuit thus reserves the option, in specific and particular instances, to adopt a per se rule. Under Caplin, it depends upon the facts, and the facts in the instant case are significantly different from, and far more deplorable, than the facts in Caplin.

All the Plaintiffs are trying to do is prevent harm from happening when it seems clear, in light of history, that it will. There is no "evidence" that it will not happen and studies of the Lake County "system" allege and prove, without dispute, that systematic ineffective preconviction assistance of counsel has been going on in Lake County for years and will continue unless systemic action is taken. "Piecemeal" actions, as the State and County recommend, have not worked.

The State asserts, without presenting either facts or authority, that the adequacy of representation provided to indigent criminal defendants is an issue present in every criminal proceeding where a criminal defendant is represented by either retained or appointed counsel.

The only issues present in a criminal case prior to conviction are the issues raised by the charging information and any defense asserted against it. The State implies that inadequacy is "automatically" at issue, but fails to inform this court how this issue is raised. Nor does it give any examples of it happening. The fact that it "could" does not prove that it "does." Saying something is so, does not make it so. If preconviction ineffective assistance of counsel were present in every case, then the Defendants should be able to show at least one instance of judicial intervention.

If the State's argument, with its implicit assumptions made explicit, is restated, it is as follows: In every case in Lake County since 1975, the trial judge has been keenly on watch to assure that every indigent (and privately represented) criminal defendant was provided with constitutionally effective counsel. If the defendant was not provided with constitutionally effective counsel, then the trial court, on its own, took all steps necessary to assure that effective counsel was rendered in order to prevent a conviction in violation of the right to effective preconviction assistance of counsel. Strickland, supra, at 694. Strickland's "strong presumption" that trial counsel was

"adequate" and its "highly deferential" scrutiny places the bar very high and are based upon the presumption of a system that generally provides effective preconviction assistance of counsel. As pled, in the instant action, no such presumptions can exist regarding Lake County.

All of the Defendants' arguments are attempts to sidestep the day of reckoning which has been approaching for more than twenty years. This Court should bear in mind the Louisiana Supreme Court's "final warning" to the Louisiana Legislature, when it stated:

> If legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective preconviction assistance of counsel. Peart at 791.

The State contends that the Plaintiffs' "adequate remedy at law" is having a conviction reversed. Obviously, this is not the standard when a system is as constitutionally insufferable as the Lake County system has been over the last quarter of a century.

Injunctive relief requiring a system to operate according to certain universally recognized norms prevents the wrongful conviction, imprisonment, and loss of civil rights such as voting.

VI.

Conclusion

The State of Indiana is ultimately responsible for providing

constitutionally adequate assistance of counsel and cannot shirk its responsibility for these services. Systemic resource deprivation cannot be countenanced because it conceals its own existence. State v. Smith, supra. The Fifth Amendment, taken singly or together with the Sixth and Fourteenth Amendments, provides that persons accused of crimes who are too poor to afford counsel are entitled to pre-conviction adequate assistance of counsel, due process of law, and equal protection of the laws. Luckey v. Harris, supra.

The Fifth, Sixth and Fourteenth Amendments provide not only that representation failing the Strickland standard irreparably taints the lawfulness of the verdict, but also that due process of law requires adequate assistance of counsel even before a verdict is reached in order to avoid such a tainted outcome. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment. Avery v. Alabama, 308 U.S. 444, 446, 84 L.Ed.2d 377, 60 S.Ct. 321 (1940). This was reaffirmed in Kimmelman v. Morrison, 477 U.S. 365, 91 L.Ed.2d 305, 106 S.Ct. 2574 (1986). "The right to counsel is a fundamental right of criminal defendants; it assures the fairness, and thus the legitimacy, of our adversary system." Id. at 374. The "right to counsel is the right to effective preconviction assistance of counsel." Id. at 377. "Where a state obtains a criminal conviction in a trial in which the accused is deprived of the effective preconviction assistance of counsel the State unconstitutionally deprives the defendant of his liberty."

Kimmelman, at 383. "(T)he right to effective preconviction assistance of counsel is personal to the defendant, and is explicitly tied to a fundamentally fair trial -- a trial in which the determination of guilt or innocence is "just" and "reliable." Id. (J. Powell concurring) at 392-93.

The Trial Court "has the ultimate responsibility for the conduct of a fair and lawful trial." Lakeside v. Oregon, 435 U.S. 333, 341-42, 55 L.Ed.2d 319, 98 S.Ct. 1091 (1978). It is properly this Court's responsibility to ensure that public defenders provided by the State are able to act in accordance with professionally accepted standards of competent representation, such as the ABA guidelines.

Indigent criminal defense services in Lake County function without regard for, and in violation of, accepted minimum standards of training, workload and resources. Legal services provided by the County to indigent persons charged with crimes do not satisfy minimum constitutional obligations.

The uncontradicted past history and uncontroverted present state of the Lake County Public Defender "system" demonstrates by a preponderance of the evidence that the "system" fails to provide adequate assistance of counsel and thus violates the Sixth Amendment. It is clear that the State of Indiana has abandoned its obligations, and that Lake County's efforts are mere "tokens" intended to keep up appearances by providing counsel without, in reality, providing effective preconviction assistance of counsel.

Plaintiffs need only prove, by a preponderance of the evidence, present and prospective ineffective preconviction assistance of counsel. They need not wait for the highly probable, indeed almost inevitable, prospective harm to become actual harm. They are entitled to injunctive relief.

The Defendants are required by the Sixth Amendment to the United States Constitution to provide poor people with adequate legal representation. The State of Indiana has attempted to delegate this constitutional duty to Lake County. Lake County has accepted this duty without honoring it.

Discriminatory purpose can be established by showing a decisionmaker "selected or reaffirmed a particular course of action at least in part `because of' not merely `in spite of' its adverse effects upon an identifiable group." Personnel Administration v. Feeney, 442 U.S. 256, 279, 60 L.Ed.2d 870, 99 S.Ct. 2282 (1979). "Proof of discriminatory intent must necessarily usually rely on objective factors." Id. at 279.

Once Plaintiffs prove that an improper consideration, e.g. discrimination against the poor, is a motivating factor, it is unnecessary to demonstrate that it was dominant or primary. The burden of proof switches to the defendants to prove that "the same decision would have resulted even had the impermissible purpose not been considered." Village of Arlington Heights v. Metropolitan Housing Development Corporation, 429 U.S. 252, 265, 270-71 n.21, 50 L.Ed.2d 450, 97 S.Ct. 555 (1977).

The Plaintiffs are merely requesting an adequate defense

provided by an attorney free of conflicts of interests and that its adequacy be determined before the Plaintiff goes to trial. If this is not provided, the injuries suffered by the Plaintiffs are, among other things,

- an attorney with conflicts of interests amounting to divided loyalties;
- unjustifiable pretrial detention;
- an unfair trial;
- an unwarranted conviction; and/or
- a wrongful imprisonment.

WHEREFORE, Plaintiffs request the Court to deny the Defendants' Motions to Dismiss, to grant their Motion for Summary Judgment and for all other just and proper relief.

Respectfully Submitted this Friday 29 December 1995.

LAUDIG & GEORGE

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document has been served, via first class mail, postage prepaid, or by hand-delivery upon:

Ray L. Szarmach
Robert P. Kennedy
Wayne E. Uhl
Linda Garcia-Marmolego
Kathryn D. Schmidt

on this Friday 29 December 1995.

_____
Stephen Laudig