STATE OF INDIANA) IN THE SHLEBY SUPERIOR COURT NO. 1
) SS
COUNTY OF SHELBY) CASE NO.73D01-1601-PL-000003

KENNETH ALFORD, TERRY HASKET,)
RICHARD DANIELS, RICHARD BUNTON,)
ANTHONY OWENS, KEITH NYE, and)
WARDELL STRONG, on behalf of themselves)
and all others similarly situated,)
Plaintiffs,)
-vs-) Hon. Robert W. Freese, Special Judge
)
JOHNSON COUNTY COMMISSIONERS,)
in their official capacities,)
THE HONORABLE MARK LOYD,)
in his official and individual capacities,)
THE HONORABLE KEVIN BARTON,)
in his official and individual capacities,)
THE HONORABLE LANCE HAMNER,)
in his official and individual capacities,)
THE HONORABLE CYNTHIA EMKES,)
In her official and individual capacities,)
JOHN P. WILSON, ESQ.,)
MICHAEL BOHN, ESQ.)
ANDREW EGGERS, ESQ.)
JOHN NORRIS, ESQ.)
DANIEL VANDIVIER, ESQ.)
J. ANDREW WOODS, and)
MATTHEW SOLOMON,)
Defendants.)

ORDER AND ENTRY OF JUDGMENT ON DEFENDANTS' MOTION TO DISMISS

The Defendants, Johnson County Commissioners (the "Johnson County Commissioners"), and John P. Wilson, Esq., Michael Bohn, Esq., Andrew Eggers, Esq., John Norris, Esq., Daniel Vandivier, Esq., J. Andrew Woods, Esq., and Matthew Solomon, Esq. (collectively the "Public Defenders"), having filed a Motion to Dismiss For Failure to State a Claim Upon Which Relief May Be Granted Under Ind. Trial Rule 12(B)(6) with supporting Memorandum of Law (the "Motion to Dismiss");

The Plaintiffs, Kenneth Alford, Terry Hasket, Richard Daniels, Richard Bunton, Anthony Owens, Keith Nye, and Wardell Strong[1] (collectively the "Plaintiffs"), having filed Plaintiffs' Response to Defendants' Motion to Dismiss and Plaintiffs' Pre-Hearing Brief (respectively the "Plaintiffs' Response Brief" and "Plaintiffs' Pre-Hearing Brief");

The Johnson County Commissioners and Public Defenders, having filed a Reply to Response of Plaintiffs to Motion to Dismiss Class Action Complaint (the "Reply Brief");

The Court, having reviewed the Motion to Dismiss, Plaintiffs' Response Brief, the Reply Brief, the Plaintiffs' Pre-Hearing Brief, and conducted and completed a hearing on the Motion to Dismiss on January 20, 2017, took matters under advisement; and

Now, being duly advised, the Court now finds and orders as follows:

I. Procedural History

1. These proceedings were initiated by the filing of Plaintiffs' Class Action Complaint for Declaratory and Injunctive Relief on October 8, 2015 in the Marion County Superior Court No. 2 under Cause No. 49D01-1510-PL-033447[2]. (the "Plaintiffs' Complaint").

2. In Plaintiffs' Complaint, Plaintiffs assert they are indigent criminal defendants in the Circuit and Superior Courts of Johnson County, Indiana, and that the Johnson County Commissioners[3], Public Defenders, and the judges of the foregoing described courts (the "Judicial

[1] The Plaintiffs' Complaint includes a request for class certification but at this time the class certification issue has yet to be adjudicated. Therefore, at this stage of the proceedings, only the rights and interests of the named Plaintiffs have been considered for purposes of this entry.

[2] By agreement of the parties, a change of venue to this Court occurred on or about January 26, 2016.

[3] In Plaintiffs' Complaint, the Plaintiff identified the Johnson County Commissioners as Brian Baird, Kevin Walls, Ron West, Kathleen Hash, Barbara Davis, and Amy Briggs. (Plaintiffs' Complaint, ¶¶ 16). On January 26, 2017, Plaintiffs filed a Voluntary Motion to Dismiss for the purposes of dismissing from the action Kathleen Hash, Barbary (sic) Davis, and Amy Briggs for

Defendants")[4] have failed to provide Plaintiffs with the assistance of counsel pursuant to certain alleged constitutional and contractual rights. (Plaintiffs' Complaint, ¶¶ 88-180).

3. Plaintiffs' cause of action, consisting of three counts, can be summarized as follows:

(a) Alleged violations of their Sixth Amendment right to effective representation of counsel and Fourteenth Amendment right to Due Process, pursuant to 42 U.S.C. § 1983 (Plaintiffs' Complaint, Count One);

(b) Alleged violations of the right to assistance of counsel pursuant to Article I, § 13(a) of the Indiana Constitution (*Id.*, Count Two); and,

(c) Alleged third party beneficiary status claims for breach of certain public defender contracts between the Judicial Defendants and the Public Defenders. (*Id.*, Count Three).

4. The Plaintiffs' Complaint alleges in relevant part that the Johnson County Commissioners and Judicial Defendants are "constitutionally required to operate a public defense system that provides effective assistance of counsel to indigent persons charged with crimes" and "responsible for establishing, implementing, and maintaining their public defense system." (*Id.*, ¶ 3-4).

5. Plaintiffs' Complaint further alleges a violation of the constitutional rights of Plaintiffs "by operating a public defense system that regularly and systematically deprives indigent persons of the right to assistance of counsel." (*Id.*, ¶ 5). The allegations include the assertion that the Johnson County Commissioners and Judicial Defendants have "failed to impose reasonable caseload

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the reason Brian Baird, Kevin Walls, and Ron West constitute the three-member Board of Commissioners of Johnson County, Indiana.

[4] The named Judicial Defendants consist of the Honorable Mark Loyd, the Honorable Kevin Barton, the Honorable Lance Hamner, and the Honorable Cynthia Emkes. The Judicial Defendants filed a separate motion to dismiss Plaintiffs' Complaint and the Court has ruled on it by separate entry.

limits on public defenders . . . failed to monitor and oversee the public defense system . . . failed to provide adequate funds for public defense . . . implemented a system where public defenders enter into contractual agreements with judges, thus compromising the independence of the public defenders . . . failed to provide representation at all critical stages of prosecution". (*Id.*, ¶ 6).

6. In particular, Plaintiffs complain of the quality of representation by their respective criminal defense counsel and claim that, as a result of these alleged deficiencies, defendants have denied Plaintiffs the right to the assistance of counsel[5]. (*Id.*).

7. Plaintiffs' Complaint requests the following relief:

(a) For a declaration that all defendants are depriving Plaintiffs of their state and federal rights to assistance of counsel. (*Id.*, Section VII, B.);

(b) For the issuance of preliminary and permanent injunctions enjoining the Johnson County Commissioners from violating the Sixth and Fourteenth Amendments to the United States Constitution in the provision of indigent criminal defense services (*Id.*, at Section VII, C.);

(c) For the issuance of preliminary and permanent injunctions enjoining the Johnson County Commissioners and the Judicial Defendants from violating Article I, § 13(a) of the Indiana Constitution in the provision of indigent criminal defense services (*Id.*, at Section VII, D.);

[5] Defendants, J. Andrew Woods and Andrew Eggers, are included as the Public Defenders. (Plaintiffs' Complaint, ¶¶ 44-45). The firm, Eggers Woods, is also identified in Plaintiffs' Complaint. (Plaintiffs' Complaint, ¶¶ 42-43, 46). However, Plaintiffs' Complaint reveals no allegation that these defendants or their firm ever represented any of the Plaintiffs or that they took, or failed to take, any action with respect to the Plaintiffs. Dismissal under T.R. 12(B)(6) is therefore appropriate as to Defendants Woods and Eggers and their law firm. On January 26, 2017, the Plaintiffs filed a Voluntary Motion to Dismiss, identifying Andrew Eggers, J. Andrew Woods, and Eggers Woods as parties to be dismissed from the action, yet the proposed order tendered to the Court in connection with such motion did not include such parties. By and through this judgment entry, such parties shall be dismissed from the action.

(d) For the issuance of preliminary and permanent injunctions to compel the creation of public defender services, which are not under the Courts' supervision or financial control, which are adequately funded, and which conform to the caseload standards set by the American Bar Association and the Indiana Public Defender Commission (*Id.*, at Section VII, E.);

(e) For an award of damages to Plaintiffs so as to reasonably compensate them for damages that they have suffered as a result of the breach of contract by the defendants (*Id.*, at Section VII, F.); and

(f) For an award of Plaintiffs' costs and attorneys' fees (*Id.*, at Section VII, G.).

8. A hearing as to the Motion to Dismiss was previously conducted on June 1, 2016, by the Honorable R. Kent Apsley, Judge of the Shelby County Superior Court No. 1. While the Motion to Dismiss was under advisement before Judge Apsley, an order was entered by the Executive Director of the Indiana Supreme Court appointing Special Judge, Robert W. Freese, pursuant to Indiana Trial Rule 53.1(E).

9. A hearing on the Motion to Dismiss was conducted on January 20, 2017, before Special Judge, Robert W. Freese, at the Hendricks County Superior Court No. 1. Counsel for all of the parties appeared and presented oral arguments with respect to the Motion to Dismiss.

10. The parties were granted the opportunity to present proposed orders to the Court for review and consideration as to the Motion to Dismiss. Proposed orders were submitted by all counsel and reviewed by the Court while the Motion to Dismiss remained under advisement.

II.
Standard of Review

1. The standard for a motion to dismiss under T.R. 12(B)(6) is well-settled:

> The grant or denial of a motion to dismiss turns on the legal sufficiency of the claim and does not require determinations of fact. Therefore, a motion to dismiss under Rule 12(B)(6) tests the legal sufficiency of a

> complaint: that is, whether the allegations in the complaint establish any set of circumstances under which a plaintiff would be entitled to relief. Thus, while we do not test the sufficiency of the facts alleged with regard to their adequacy to provide recovery, we do test their sufficiency with regards to whether or not they have stated some factual scenario in which a legally actionable injury has occurred. In determining whether any facts will support the claim, we look only to the complaint and may not resort to any other evidence in the record.
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> Thus, a court should accept as true the facts alleged in the complaint and should not only consider the pleadings in the light most favorable to the plaintiff, but also draw every reasonable inference in favor of the non-moving party. However, a court need not accept as true allegations that are contradicted by other allegations or exhibits attached to or incorporated in the pleading.

Arflack v. Town of Chandler, 27 N.E.3d 297, 302 (Ind. Ct. App. 2015) (citations omitted).

2. The Court "need not accept as true conclusory, nonfactual assertions or legal conclusions." *McCalment v. Eli Lilly & Co.*, 860 N.E.2d 884, 890 (Ind. Ct. App. 2007).

III.
Overview of Indigent Criminal Defense in Indiana

A. Constitutional Rights; Provision of Counsel

1. Indigent defense at public expense is a federal and state constitutional right. *Gideon v. Wainwright,* 372 U.S. 335, 339–45, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Knox County Council v. State ex rel. McCormick,* 217 Ind. 493, 29 N.E.2d 405 (1940). Specifically, the federal Sixth Amendment right is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Gideon,* 372 U.S. at 341-42. Correspondingly, Article I, § 13, of the Indiana Constitution provides that in "all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel." Ind. Const. art. 1, § 13(a).

2. The method of indigent defense has been left to the States "to implement." *Ake v. Oklahoma,* 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

3. Historically, Indiana trial judges appointed indigent criminal defense counsel and mandated compensation to such counsel out of their respective county treasuries. *Johnson v. State*, 948 N.E. 2d 331, 336 (Ind. 2011).

4. Now, the methods to provide indigent criminal defense counsel are provided by statute. Specifically, Indiana has implemented its method of indigent defense by enacting a comprehensive statutory structure—consisting of Article 40 of Title 33 of the Indiana Code—running 55 separate sections dedicated to the provision of indigent defense. In short, Indigent criminal defense services in Indiana are statutorily provided through one of the following statutorily recognized delivery methods:

(a) There is the State Public Defender, appointed by the Indiana Supreme Court, whose office represents incarcerated indigent persons in post-conviction proceedings and provides trial counsel to indigent defendants on request of a trial court judge when certain circumstances exist. *See* Ind. Code §§ 33-40-1-1 through 33-40-1-6;

(b) There is the legislative grant of discretion to County Boards of Commissioners to establish County Public Defender Boards for the provision of indigent defense in the county. *See* Ind. Code §§ 33-40-7-1 through 33-40-7-12; and

(c) There is the express grant of statutory authority for trial courts to engage public defenders on their own authority, either upon a contractual term basis or case-by-case appointments. *See* Ind. Code §§ 33-40-8-2 through 33-40-8-5.

B. Sixth Amendment Test for Effectiveness of Counsel

5. While the United States Supreme Court's decision in *Gideon* established that the Sixth Amendment's right to counsel applied to the states through the Fourteenth Amendment,

Gideon did not establish the standard for the performance of counsel as guaranteed by the Sixth Amendment.

6. The standard for judging the effectiveness of counsel under the Sixth Amendment was established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), wherein the United States Supreme Court held that ineffective assistance of counsel is found where counsel performed deficiently and the deficiency resulted in prejudice to the defendant. To establish prejudice, the defendant must show that but for the errors of counsel, the result of the criminal proceeding would have been different. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

7. The Indiana Supreme Court has applied the *Strickland* test to both Sixth Amendment and Article 1, § 13 state constitutional claims. *See Benefield v. State*, 945 N.E.2d 791, 797 (Ind. Ct. App. 2011); *Bellmore v. State*, 602 N.E.2d 111, 123 (Ind. 1992), *reh. denied*; *Resnover v. State*, 507 N.E.2d 1382, 1385 (Ind. 1987), *cert. denied*, 484 U.S. 1036, 108 S.Ct. 762, 98 L.Ed.2d 779 (1988).

8. As articulated by *United States v. Cronic*, 466 U.S. 648, 658, 104 S.Ct. 2039, 2046, 80 L.Ed.2d 657 (1984), the Sixth Amendment's right to effective assistance of counsel "is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." Thus, "[a]bsent some effect of [the] challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated." *Id.* For these reasons, any potential violation of the Sixth Amendment must be viewed in the context of the entire case proceedings, as "the determination of the effectiveness of counsel is whether the defendant had the assistance necessary to justify reliance on the outcome of the proceeding." *Strickland*, 466 U.S. at 692, 104 S.Ct. at 2067.

C. Construction of State Court System and County Governance

9. In Indiana, judges of Circuit and Superior Courts are judicial officers of the state judicial system and are not county officials. Circuit and Superior Courts in Indiana are state entities that are exclusively units of the judicial branch of the state's constitutional system. Ind. Const., art. 3, § 1 and art. 7, § 1; *Woods v. Michigan City, Ind.*, 940 F.2d 275, 279 (7th Cir. 1991); *Allen County Council v. Allen Circuit Court, 38th Judicial Dist.*, 549 N.E.2d 364, 365 (Ind. 1990); *Juvenile Court v. Swanson*, 671 N.E.2d 429, 435 (Ind. Ct. App. 1996).

10. At the county level in Indiana, the executive branch authority and function is governed by three-person Boards of Commissioners. Ind. Code § 36-2-2-2. The express powers and duties of these Boards are set forth under Ind. Code § 36-2-3.5-4 and do not include the supervision of the Circuit and Superior Courts and its judges. *See Waldrip v. Waldrip*, 976 N.E.2d 102, 118 (Ind. Ct. App. 2012) (stating that the supervision of the county courts, as state entities, is not within the purview of the Board of Commissioners).

11. The Board of Commissioners "is the corporate entity representing the county through which it acts, and is in legal contemplation the county." *Owen County Council v. State*, 175 Ind. 610, 619, 95 N.E. 253, 256 (1911).

D. Johnson County Indigent Criminal Defense Services

12. In Johnson County, indigent criminal defense is provided by public defender contracts through the individual courts. (Plaintiffs' Complaint, Exhibits "A"-"E"). As outlined hereunder, public defender contracts are a statutorily authorized method of providing indigent criminal defense counsel pursuant to Ind. Code § 33-40-8-1.

IV.
<u>Analysis of Motion to Dismiss Arguments as to All Counts</u>

A. Justiciability of Plaintiffs' Claims

<u>*Separation of Powers Requirement*</u>

1. As outlined above, Indiana trial judges historically appointed indigent criminal defense counsel. *Johnson v. State*, 948 N.E. 2d at 336. Under Indiana's statutory structure for the provision of indigent defense services, Indiana Code 33-40, that option continues to exist for the judges of the circuit and superior courts.

2. The issue of whether this Court may declare the Johnson County Courts' indigent criminal defense system constitutionally inadequate raises a non-justiciable question.

3. Specifically, Plaintiffs' Complaint seeks an order of this Court that essentially rewrites the statutory scheme and orders the adoption of one authorized method of indigent criminal services (*i.e.*, the creation of a public defender board) and rules another (*i.e.*, public defender contracts through the Johnson County Courts) unconstitutional. (Plaintiffs' Complaint, Section VII.).

4. Yet, the establishment of county public defender boards is discretionary, as Ind. Code § 33-40-7-3(a) states "[a] county may executive *may* adopt an ordinance establishing a county public defender board consisting of three (3) members." (emphasis added). Had the legislature intended to mandate the creation of a public defender board, it would have used the mandatory term "shall" as opposed to the permissive term "may" in the statute. *Tongate v. State,* 954 N.E.2d 494, 496 (Ind. Ct. App. 2011), *trans. denied* (*citing Romine v. Gagle,* 782 N.E.2d 369, 380 (Ind. Ct. App. 2003), *trans denied*); *see also United Rural Elec. Membership Corp. v. Indiana & Michigan Elec. Co.,* 549 N.E.2d 1019, 1022 (Ind. 1990) (stating that the word "shall" is construed as mandatory rather than directory unless the context or the purpose of the statute clearly

intended a different meaning). The statute does not contain the term "shall" and therefore implies a permissive grant of discretion on the part of county government.

5. So too did the legislature expressly authorize the provision of indigent criminal defense services upon a contract basis under Ind. Code 33-40-8; such contracts not mandated but intended as but one statutorily authorized method to provide indigent defense.

6. Consequently, as the method of indigent defense has been left to the states "to implement", *see Ake v. Oklahoma,* 470 U.S. at 83, Indiana's comprehensive indigent criminal defense statutes reflect a policy decision on the part of the legislature to grant the Board of Commissioners the discretion to decide whether to create a public defender board, or alternatively, defer to the courts to contract for public defender services. The Commissioners do not need the approval of the Courts to create a public defender board should they choose to adopt one.

7. For this Court to favor one statutorily authorized method over another would violate Indiana's separation of powers requirement, as the policy decisions of providing indigent criminal defense are not justiciable. Indeed, the Court is mindful that the Indiana Supreme Court recently reaffirmed the separation of powers doctrine in *Citizens Action Coal. of Indiana v. Koch,* 51 N.E. 3d 236 (Ind. 2016), *reh'g denied* (July 12, 2016), stating:

> The Indiana Constitution explicitly provides for the separation of powers: "The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; and no person, charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided." Article 3, § 1. "[A]lthough the courts have jurisdiction to review [a] case in the first instance, justiciability concerns stemming from Article 3, Section 1, caution courts to intervene only where doing so would not upset the balance of the separation of powers." *Berry,* 990 N.E.2d at 418. In other words, although this Court may have subject matter jurisdiction, it may, "for prudential reasons," ultimately conclude that the issue presented is non-justiciable. *Id.* "[W]here a particular function has been expressly delegated to the legislature by our Constitution

> without any express constitutional limitation or qualification, disputes arising in the exercise of such functions are inappropriate for judicial resolution." *Id.* at 421.
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> To maintain the separation of powers, this Court "should not intermeddle with the internal functions of either the Executive or Legislative branches of Government." *Masariu,* 621 N.E.2d at 1098. This Court has previously found a separation of powers issue where legislation appears to empower the judicial branch to "inquire into and interfere with the internal operations of the Indiana House of Representatives." *Id.* We determine that a similar type of inquiry and interference with the internal operations of the legislative branch is being requested in the present case.
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> This Court provided in *Berry* that the purpose of Article 3, Section 1, was to "rid each separate department of government from any influence or control by the other department." 990 N.E.2d at 415 (citations omitted). In order to achieve this constitutional aim, this Court "should be very careful not to invade the authority of the legislature. Nor should anxiety to maintain the constitution ... lessen [its] caution in that particular." *Id.*

Citizens Action Coal. of Indiana v. Koch, 51 N.E.3d at 241-242.

8. Beyond that, Plaintiffs have presented no factual allegations in Plaintiffs' Complaint or legal authority to support the proposition that the provisions of Ind. Code 33-40-8 may be rendered unconstitutional by this Court. To the contrary, Plaintiffs' citation to *Johnson v. State, supra,* in Plaintiffs' Response Brief is wholly misplaced, as the decision reflects the Indiana Supreme Court's rejection of a Sixth Amendment claim for ineffective assistance of counsel and did not address the federal or state constitutionality of any aspect of the public defender system in Indiana. (Plaintiffs' Response Brief, pp. 1-2; 10-13; 15).

9. The legislature having made the policy decision to leave to the discretion of the Johnson County Commissioners and Judicial Defendants the decision of whether to utilize a public defender board or public defender contracts through the courts, the claims of Plaintiffs' Complaint present a non-justiciable question requiring dismissal under T.R. 12(B)(6).

Ripeness of Plaintiffs' Complaint

10. Based upon the factual allegations of the Plaintiffs' Complaint, each of the named Plaintiffs except for Plaintiff, Anthony Owens, is an existing pretrial criminal defendant with respect to active criminal proceedings in the Johnson County Courts. (*Plaintiffs' Complaint*, ¶¶ 88-176). Plaintiff Owens' criminal proceeding was resolved by plea agreement prior to trial and therefore he waived his right to trial. *See e.g., Creech v. State*, 887 N.E.2d 73, 74-75 (Ind. 2008).

11. Under these alleged circumstances, the Plaintiffs' Sixth Amendment claims are not ripe until the outcome of the proceedings in order to determine the adequacy and any prejudice that may be associated with the representation of the Plaintiffs. *See Platt v. State*, 664 N.E.2d 357, 363 (Ind. Ct. App. 1996), *trans. denied, cert. denied*, 520 U.S. 1187, 117 S. Ct. 1470, 137 L. Ed 2d 683 (1997) (holding Sixth Amendment claims were not ripe for judicial review under the two-part *Strickland* test until conclusion of the underlying criminal case).

12. The *Platt* decision is the controlling legal precedent in the State of Indiana concerning the 6th Amendment claims made the subject of this cause and Plaintiffs have failed to present any authority to bar its application to Plaintiffs' Complaint. Indeed, in their briefs, Plaintiffs presented case law authority from Michigan[6], New York[7], Pennsylvania[8], the 11th Circuit Court of Appeals[9], and the United States District for the Western District of Washington[10], but all such authorities are inapposite to the case at bar. With respect to the Michigan, New York, and Pennsylvania state court decisions, and the Washington District Court decision, each of those jurisdictions had statutory or municipal code systems that made the respective counties or, in the

[6] *Duncan v. State*, 774 N.W. 2d 89 (Mich. Ct. App. 2009).
[7] *Hurrell-Harring v. State*, 15 N.Y. 3d 8, 904 N.Y.S. 2d 296, 930 N.E. 2d 217 (2010).
[8] *Kuren v. Luzerne County*, 146 A. 3d 715 (Pa. 2016).
[9] *Luckey v. Harris*, 860 F. 2d 1012 (11th Cir. 1988).
[10] *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash 2013).

case of Washington the cities, responsible for indigent defense. (Plaintiffs' Pre-Hearing Brief, pages 2-4; Plaintiffs' Response Brief, pages 18-19). Indiana's system, as noted, gives the board of county commissioners the discretion, not the duty, with respect to whether to establish a county public defender board, and therefore the cited decisions from other states do not apply to the allegations and claims of Plaintiffs' Complaint. Likewise, the 11th Circuit case did not address the merits of the cause of action but rather concerned whether the 11th Amendment barred the claim.

13. Similarly, the claim against the Public Defenders in Count Three requires resolution of the underlying criminal cases before becoming ripe to proceed. Without an outcome, there can be no way to assess the Public Defenders' performance and whether the Plaintiffs were damaged thereby. Moreover, the Court notes that in none of the decisions cited by the Plaintiffs are any individual public defenders named parties to the proceedings.

14. This Court finds unpersuasive Plaintiffs' reliance upon *Cronic*, where the United States Supreme Court recognized that in limited circumstances of extreme magnitude, "a presumption of ineffectiveness" may be justified and that such circumstances are, in and of themselves, "sufficient [to establish a claim of ineffective assistance] without inquiry into counsel's actual performance at trial." *Cronic,* 466 U.S. at 662, 104 S.Ct. at 2048, 80 L.Ed.2d at 670. Such circumstances would allow a defendant to dispense with having to fulfill the individualized requirements of *Strickland* for establishing a Sixth Amendment ineffective assistance of counsel claim, but *Cronic* did not find such circumstances to exist in that case. Moreover, *Cronic* said nothing about creating a civil action for pre-trial ineffective assistance of counsel claims. Rather, it merely added a possible layer of analysis to a *Strickland* claim brought *after* conviction and sentencing. *Id.* at 659 n. 26, 104 S.Ct. at 2047 n. 26, 80 L.Ed.2d at 668 n. 26.

15. Because Plaintiffs' claims are not yet ripe, dismissal is warranted under T.R. 12(B)(6).

B. Claims for Injunctive Relief

16. As to the Plaintiffs' claims requesting injunctive relief, the Court finds the *Platt* decision by the Indiana Court of Appeals to be instructive, wherein Platt's petition for equitable relief was found to be inappropriate because there were several adequate remedies available at law, including a direct appeal, post-conviction relief, and a petition for a writ of habeas corpus relief. *Platt*, 664 N.E.2d at 363-64.

17. Likewise, each of the Plaintiffs has adequate remedies at law, making equitable relief inappropriate in this action.

18. For these reasons, the Plaintiffs' claims for injunctive relief are hereby dismissed.

V.
Analysis of Motion to Dismiss as to Specific Counts

A. Counts One (42 U.S.C. § 1983 action) and Two (Violation of Article 1, § 13(a) of the Indiana Constitution) as applied to Johnson County Commissioners

1. The gravamen of Plaintiffs' § 1983 action against the Johnson County Commissioners is that the indigent criminal defense system in Johnson County has violated Plaintiffs' constitutionally guaranteed rights to the assistance of counsel under the Sixth and Fourteenth Amendments of the United States Constitution. (Plaintiffs' Complaint, ¶ 183).

2. In order to state a claim upon which relief may be granted under § 1983, a plaintiff must show that the defendant caused the constitutional deprivation through operation of a policy or custom. *Love v. Rehfus*, 946 N.E.2d 1, 20 (Ind. 2011) (discussing *Monell v. Department of Social Servs.*, 436 U.S. 658, 694 (1978)); *see also Woods v. Michigan City*, 940 F. 2d 275, 277 (7th Cir. 1991). A cognizable claim under § 1983 against the municipality may not be premised on

vicarious liability under the doctrine of *respondeat superior. Id.* Rather, the municipality's policy or custom must be the proximate cause of the plaintiff's injury. *Strauss v. City of Chicago*, 760 F.2d 765, 767 (7th Cir. 1985).

3. Specifically, an unconstitutional policy or custom may be established as follows: (a) an express policy that, when enforced, causes a constitutional deprivation; (b) a widespread practice that, although not authorized by written law or express municipal policy, is so permanent and well settled to constitute a "custom or usage" with the force of law; or (c) an allegation that the constitutional injury was caused by a person with final policy-making authority. *Palmer v. Marion County*, 327 F.3d 588, 594-595 (7th Cir. 2003).

4. The core of Plaintiffs' Complaint against the Johnson County Commissioners is contained Paragraphs 3-6 and 9-10, none of which present any factual allegations but merely recite conclusory, nonfactual assertions and legal conclusions. As a whole, Plaintiffs' Complaint is devoid of any reference to a policy or custom of the Johnson County Commissioners that proximately caused the alleged constitutional deprivations. Upon these reasons, alone, Plaintiffs' Complaint is deficient for pleading purposes under T.R. 12(B)(6).

5. Yet, in any event, under these circumstances Plaintiffs' claims may not properly be advanced against the Johnson County Commissioners, as the supervision of the county courts as state entities is not within the purview of the Board of Commissioners. *Waldrip v. Waldrip*, 976 N.E.2d 102, 119 (Ind. Ct. App. 2012). Stated another way, the Judicial Defendants, and by extension the Johnson County Courts, are not county units and therefore cannot be policy-making officials for purposes of attaching § 1983 liability to the county. It is a false premise that the Johnson County Commissioners are responsible for the provision of indigent criminal defense

services in the Johnson County Courts and consequently the claim must be dismissed under T.R. 12(B)(6).

6. Likewise, as to Count Two and the Indiana Constitutional claim, because the Johnson County Commissioners lack the legal obligation, statutory or otherwise, to provide indigent criminal defense services under the Sixth and Fourteenth Amendment to the United States Constitution, the Johnson County Commissioners cannot be liable under the state constitutional claims, either. *See Platt*, 664 N.E. 2d at 367 n. 4 (utilizing the same analysis in the disposition of the state and federal claims). Count Two should therefore be dismissed under T.R. 12(B)(6) as to the Johnson County Commissioners.

B. Count Three – Breach of Contract (Third Party Beneficiary) as applied to Public Defenders

7. The analysis under *Strickland* and *Platt* requiring an outcome prior to the accrual of a claim for constitutional deprivation is mirrored in the Plaintiffs' state law claims against the Public Defenders.

8. Unless and until there is an outcome with respect to the Plaintiffs' pre-trial proceedings, a claim for breach of the indigent criminal defense contracts is premature and has yet to accrue. *See Anderson v. Anderson*, 399 N.E. 2d 391 (Ind.App. 1979) (holding that malpractice action arising from a property settlement pursuant to a divorce was premature as the court had not entered a dissolution decree disposing of the marital property and resulting in the unfavorable property settlement).

9. For these reasons, the Plaintiffs' claim under Count Three shall be dismissed.

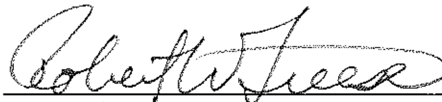
VI.

Judgment Entry

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that based upon the foregoing entry, the Motion to Dismiss filed by Defendants, Johnson County Commissioners, John P. Wilson, Esq., Michael Bohn, Esq., Andrew Eggers, Esq., John Norris, Esq., Daniel Vandivier, Esq., J. Andrew Woods, Esq., and Matthew Solomon, Esq., as to Plaintiffs' Complaint is hereby GRANTED and judgment of DISMISSAL pursuant to T.R. 12(B)(6) is hereby entered in favor of Defendants, Johnson County Commissioners, John P. Wilson, Esq., Michael Bohn, Esq., Andrew Eggers, Esq., John Norris, Esq., Daniel Vandivier, Esq., J. Andrew Woods, Esq., Matthew Solomon, Esq., and Eggers Woods, and against Plaintiffs, as to all claims and counts made a part of Plaintiffs' Complaint.

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to T.R. 12(B), the Plaintiffs shall have ten (10) days after service of notice of this order to amend once as a matter of right pursuant to T.R. 15(A). In the event the Plaintiffs fail to amend the Complaint with respect to claims and counts dismissed hereunder, the judgment entered herein shall be considered a final and appealable judgment under T.R. 54(B) as there is otherwise no just reason to delay entry of final judgment.

SO ORDERED this 30th day of January, 2017.



Honorable Robert W. Freese, Special Judge
Shelby Superior Court No. 1

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