SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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KIMBERLY HURRELL-HARRING, *et al.*, on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs

-against-

THE STATE OF NEW YORK, *et al.*,

Defendants.

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INDEX No. 8866-07
(Connolly, J.)

STATEMENT OF INTEREST OF THE UNITED STATES

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STATEMENT OF INTEREST OF THE UNITED STATES

As the Supreme Court recognized in *Powell v. Alabama*, the constitutional right to counsel is more than a formality: It would be "vain" to give the defendant a lawyer "without giving the latter any opportunity to acquaint himself with the facts or law of the case." 287 U.S. 45, 59 (1932) (*quoting Com. v. O'Keefe*, 148 A. 73, 74 (Pa. 1929)). Without taking a stance on the merits of the case, the United States files this Statement of Interest to assist the Court in assessing whether the State of New York has "constructively" denied counsel to indigent defendants during criminal proceedings. Plaintiffs allege that their nominal representation amounted to no representation at all, such that the State failed to meet its *foundational* obligations to provide legal representation to indigent defendants. *Gideon v. Wainwright*, 372 U.S. 335 (1963). It is the position of the United States that constructive denial of counsel may occur in two, often linked circumstances:

(1) When, on a systemic basis, lawyers for indigent defendants operate under substantial structural limitations, such as a severe lack of resources, unreasonably high workloads, or critical understaffing of public defender offices; and/or

(2) When the traditional markers of representation—such as timely and confidential consultation with clients, appropriate investigation, and meaningful adversarial testing of the prosecution's case—are absent or significantly compromised on a system-wide basis.

Under either or both of these circumstances, a court may find that the appointment of counsel is superficial and, in effect, a form of non-representation that violates the Sixth Amendment guarantee of counsel.

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INTEREST OF THE UNITED STATES

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C. § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in a state court. The United States has an interest in ensuring that all jurisdictions—federal, state, and local—are fulfilling their obligation under the Constitution to provide effective assistance of counsel to individuals facing criminal charges who cannot afford an attorney, as required by *Gideon*. The United States can enforce the right to counsel in juvenile delinquency proceedings pursuant to the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (Section 14141). The United States is currently enforcing Section 14141's juvenile justice provision through a comprehensive settlement with Shelby County, Tennessee.[1] An essential component of the agreement, which is subject to independent monitoring, is the establishment of a juvenile public defender system with "reasonable workloads" and "sufficient resources to provide independent, ethical, and zealous representation to Children in delinquency matters." *Id.* at 15.

As the Attorney General stated, "It's time to reclaim *Gideon*'s petition—and resolve to confront the obstacles facing indigent defense providers."[2] In March 2010, the Attorney General launched the Access to Justice Initiative to address the crisis in indigent defense services, and the Initiative provides a centralized vehicle for carrying out the Department of Justice's (Department) commitment to improving indigent defense.[3] The Department has also sought to

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[1] Mem. of Agreement Regarding the Juvenile Court of Memphis and Shelby Counties, Tennessee (2012), *available at* http://www.justice.gov/crt/about/spl/findsettle.php.

[2] Attorney General Eric Holder Speaks at the Justice Department's 50th Anniversary Celebration of the U.S. Supreme Court Decision in *Gideon v. Wainwright* (March 15, 2013), *available at* http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-1303151.html.

[3] The Initiative works with federal agencies and state, local, and tribal justice system stakeholders to increase access to counsel, highlight best practices, and improve the justice delivery systems that serve people who are unable to afford lawyers. More information is available at http://www.justice.gov/atj/.

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address this crisis through a number of grant programs, as well as through support for state policy reform, and has identified indigent defense as a priority area for Byrne-JAG funds, the leading source of federal justice funding to state and local jurisdictions.[4] In 2013, the Department's Office of Justice Programs announced a collection of grants totaling $6.7 million to improve legal defense service for the poor.[5] These grants were preceded by a 2012 $1.2 million grant program, *Answering Gideon's Call: Strengthening Indigent Defense Through Implementing the ABA Ten Principles of a Public Defense Delivery System*, administered by the Bureau of Justice Assistance.[6]

In addition, it is always in the interest of the United States to safeguard and improve the administration of criminal justice consistent with the prosecutor's professional duty as outlined in the American Bar Association (ABA) Criminal Justice Standards: "It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action." ABA CRIMINAL JUSTICE STANDARDS, STANDARD 3-1.2(D), PROSECUTION AND DEFENSE FUNCTION (1993).[7]

Thus, in light of the United States' interest in ensuring that any constitutional deficiencies the Court may find are adequately remedied, the United States files this Statement of Interest to address the factors considered in a constructive denial of counsel claim.

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[4] *See* U.S. Gov't Accountability Office, *Indigent Defense: DOJ Could Increase Awareness of Eligible Funding and Better Determine the Extent to Which Funds Help Support this Purpose* 11-14 (May 2012), *available at* http://www.justice.gov/atj/idp/.

[5] As noted by Associate Attorney General Tony West in the announcement, "These awards, in conjunction with other efforts we're making to strengthen indigent defense, will fortify our public defender system and help us to meet our constitutional and moral obligation to administer a justice system that matches its demands for accountability with a commitment to fair, due process for poor defendants." Attorney General Holder Announces $6.7 Million to Improve Legal Defense Services for the Poor (Oct. 30, 2013), *available at* http://www.justice.gov/opa/pr/2013/October/13-ag-1156.html.

[6] Grants have been awarded to agencies in Texas, Delaware, Massachusetts, Mississippi, Tennessee, Utah and Michigan.

[7] *Available at* http://www.americanbar.org/groups/criminal_justice/standards.html.

BACKGROUND

Fifty years ago, the Supreme Court held that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon*, 372 U.S. at 344. Four years later, the Supreme Court held that the right to counsel extended to juveniles in delinquency proceedings. *In re Gault*, 387 U.S. 1, 36 (1967). And yet, as the Attorney General recently noted, "America's indigent defense systems continue to exist in a state of crisis, and the promise of *Gideon* is not being met."[8] Recently, the federal district court in *Wilbur v. City of Mount Vernon* echoed this concern, stating, "The notes of freedom and liberty that emerged from Gideon's trumpet a half a century ago cannot survive if that trumpet is muted and dented by harsh fiscal measures that reduce the promise to a hollow shell of a hallowed right." 989 F.Supp.2d 1122, 1137 (W.D. Wash. 2013).

Our national struggle to meet the obligations recognized in *Gideon* and *Gault* is well documented.[9] *See*, *e.g.*, Am. Bar Ass'n, Standing Comm. on Legal Aid and Indigent Defendants Report, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* (2004); National Juvenile Defender Center (NJDC) State Assessments[10] (outlining obstacles to provision of juvenile defense services in numerous states). Despite long recognition that "the proper performance of the defense function is . . . as vital to the health of the system as the performance of the prosecuting and adjudicatory functions," Attorney General's Committee on Poverty and

[8] Attorney General Eric Holder Delivers Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), *available at* http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html.
[9] In March 2013, the Yale Law Journal held a symposium on the challenges of meeting *Gideon*'s promise and published the discussions. *See* 122 Yale L.J. 8 (June 2013).
[10] Assessments available at http://www.njdc.info/assessments.php.

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the Administration of Federal Criminal Justice, *Final Report* 11 (1963), public defense agencies nationwide are continually funded at dramatically lower levels than prosecutorial agencies.[11]

Due to this lack of resources, states and localities across the country face a crisis in indigent defense.[12] In many states, remedying the crisis in indigent defense has required court intervention. *See e.g.*, *Pub. Defender v. State,* 115 So. 3d 261, 278-79 (Fla. 2013) (holding that courts must intervene when public defenders' excessive caseloads and lack of funding result in "nonrepresentation and therefore a denial of the actual assistance of counsel guaranteed by *Gideon* and the Sixth Amendment"); *Missouri Pub. Defender Comm'n v. Waters*, 370 S.W.3d 592, 607 (Mo. 2012) (ruling that the trial court erred when it appointed counsel to indigent defendants when, due to excessive caseloads and insufficient funding, that counsel could not provide adequate assistance, noting that "a judge may not appoint counsel when the judge is aware that, for whatever reason, counsel is unable to provide effective representation to a defendant"); *Duncan v. State*, 832 N.W.2d 761, 771 (Mich. Ct. App. 2012) (holding that, absent court intervention, "indigent persons who are accused of crimes in Michigan will continue to be subject to inadequate legal representation without remedy unless the representation adversely affects the outcome"); *State v. Citizen*, 898 So.2d 325, 338-39 (La. 2005) (holding that courts are obliged to halt prosecutions if adequate funding is not available to lawyers representing indigent defendants).

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[11] *Compare* Steven W. Perry & Duren Banks, U.S. Bureau of Justice Statistics, *Prosecutors in State Courts, 2007 Statistical Table*s 1 (2012) (noting that prosecution offices nationwide receive a budget of approximately $5.8 billion), *with* Lynn Langton & Donald J. Farole, Jr., U.S. Bureau of Justice Statistics, *Public Defender Offices, 2007 Statistical Tables* 1(2010) (noting that public defender offices nationwide had a budget of approximately $2.3 billion). *See also* Nat'l Right to Counsel Comm., *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* 61-64 (2009) (collecting examples of funding disparities).

[12] John P. Gross, *Gideon at 50: A Three-Part Examination of Indigent Defense in America*, Nat'l Ass'n of Criminal Def. Lawyers (2013) (describing astonishingly low rates of compensation for assigned counsel across the nation); Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. Rev. L. & Soc. Change 427 (2009) (describing crises nationwide).

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The United States is taking an active role to provide expertise on this pressing national issue. Last year, the United States filed a Statement of Interest in *Wilbur v. City of Mount Vernon*, a case in which indigent defendants challenged the constitutional adequacy of the public defense systems provided by the cities of Mount Vernon and Burlington in the Western District of Washington.[13] As in this case, the United States took no position on the merits of the plaintiffs' claims in *Wilbur*, but instead recommended to the court that, if it found for the plaintiffs, the court should ensure that counsel for indigent defendants have realistic workloads, sufficient resources, and are carrying out the hallmarks of minimally effective representation, "such as visiting clients, conducting investigations, performing legal research, and pursuing discovery." Ex. 1 at 5-10. The court in *Wilbur* ultimately ruled for the plaintiffs, finding "that indigent criminal defendants in Mount Vernon and Burlington are systematically deprived of the assistance of counsel at critical stages of the prosecution and that municipal policymakers have made deliberate choices regarding the funding, contracting, and monitoring of the public defense system that directly and predictably caused that deprivation." *Wilbur*, 989 F.Supp.2d at 1124. To remedy this systematic deprivation of counsel, the court ordered increased resources for indigent defense services, controls to be established for defenders' workloads, and monitoring of defenders' actual representation to ensure that they carry out the traditional markers of representation. *Id.* at 1134-37.

DISCUSSION

In this matter, Plaintiffs allege that indigent defendants within five New York counties have been constructively denied counsel in their criminal proceedings. That is, as a result of inadequate funding, indigent defendants face systemic risks of constructive denial of counsel

[13] Attached as Exhibit 1.

including: "the system-wide failure to investigate clients' charges and defenses; the complete failure to use expert witnesses to test the prosecution's case and support possible defenses; complete breakdowns in attorney-client communication; and a lack of any meaningful advocacy on behalf of clients." Plaintiffs' Mem. of Law in Opposition to the State Defendant's Motion for Summary Judgment at 41. An analysis of *Gideon* cases informs the United States' position that constructive denial of counsel may occur when: (1) on a systemic basis, counsel for indigent defendants face severe structural limitations, such as a lack of resources, high workloads, and understaffing of public defender offices; ***and/or*** (2) indigent defenders are unable or are significantly compromised in their ability to provide the traditional markers of representation for their clients, such as timely and confidential consultation, appropriate investigation, and meaningful adversarial testing of the prosecution's case. *Wilbur,* 989 F.Supp.2d 1122; *Pub. Defender v. State,* 115 So. 3d 261; *Missouri Pub. Defender Comm'n*, 370 S.W.3d 592; *Duncan*, 832 N.W.2d 761; *State v. Young*, 172 P.3d 138 (N.M. 2007); *Citizen*, 898 So.2d 325; *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004); *New York Cnty. Lawyers' Ass'n v. State*, 196 Misc. 2d. 761 (N.Y. Sup. Ct. 2003); *State v. Peart*, 621 So.2d 780, 789 (La. 1993).

Constructive denial may occur even in public defender systems that are not systematically underfunded if the attorneys providing defender services are unable to fulfill their basic obligations to their clients. The Supreme Court has recognized that, in some circumstances, "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."

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United States v. Cronic, 466 U.S. 648, 659-60 (1984). This may occur when, for example, the defense attorney is not provided sufficient time to prepare. *Powell*, 287 U.S. at 53-58. Thus, whether there are severe structural limitations, the absence of traditional markers of representation, or both, the appointment of counsel is superficial and, in effect, a form of non-representation that may violate the guarantees of the Sixth Amendment.[14]

I. The Court May Consider Structural Limitations and Defenders' Failure to Carry Out Traditional Markers of Representation in its Assessment of Plaintiffs' Claim of Constructive Denial of Counsel.

It is a core guarantee of the Sixth Amendment that every criminal defendant, regardless of economic status, has the right to counsel when facing incarceration. *Gideon*, 372 U.S. at 340-44 (1963) (holding that the right to counsel is "fundamental and essential to a fair trial"). This right is so fundamental to the operation of the criminal justice system that its diminishment erodes the principles of liberty and justice that underpin all of our civil rights in criminal proceedings. *Gideon,* 372 U.S. at 340-341, 344; *Powell,* 287 U.S. at 67-69 ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel . . . . [A Defendant] requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."); *see also Alabama v. Shelton*, 535 U.S. 654 (2002).

[14] If the Plaintiffs prevail, the court may appoint a monitor as part of its authority to grant injunctive relief. Monitors, or their equivalent, have been utilized in similar cases. In *Wilbur*, pursuant to an order for injunctive relief, the court required the hiring of a "Public Defense Supervisor" to supervise the work of the public defenders. The supervision and monitoring includes extensive file review, caseload assessments, data collection, and reports to the court to ensure there is "actual" and appropriate representation for indigent criminal defendants in the cities of Mount Vernon and Burlington. *See Wilbur*, No. C11-1100RSL at 19. Similarly, in Grant County, Washington, an independent monitor was essential to implementing the court's injunction in a right-to-counsel case. *Best v. Grant Cnty.*, No. 04-2-00189-0 (Kittitas Cty. Sup. Ct. Dec. 21, 2004).

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As the New York Court of Appeals held in this matter, claims of systemic constructive denial of counsel are reviewed under the principles enumerated in *Gideon* and the Sixth Amendment, not the *Strickland*[15] ineffective assistance standard which provides only retrospective, individual relief. *Hurrell-Harring v. State*, 930 N.E.2d 217, 224 (N.Y. 2010) (holding that these "allegations state a claim, not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*."); *see also Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988) (holding that the Sixth Amendment protects rights that do not affect the outcome of a trial, and deficiencies that do not meet the "ineffectiveness" standard may still violate a defendant's rights under the Sixth Amendment); *Missouri Pub. Defenders Comm'n,* 370 S.W.3d at 607 (holding Sixth Amendment right to counsel requires more than just a "pro forma" appointment whereby the defendant has counsel in name only); *Powell*, 287 U.S. at 58-61 (holding that counsel's "appearance was rather pro forma than zealous and active [and] defendants were not accorded the right of counsel in any substantial sense"). Courts have consistently defined "constructive" denial of counsel as a situation where an individual has an attorney who is *pro forma* or "in name only."

A. Considering the Role of Structural Limitations

The provision of defense services is a multifaceted and complicated task. To guide the defense function, the ABA and NJDC have promulgated national standards to ensure that defenders are able to establish meaningful attorney-client relationships and provide the constitutionally required services of counsel. *See* ABA, STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION AND DEFENSE FUNCTION; Am. Bar Ass'n, Standing Comm. on Legal Aid and Indigent Defendants, *ABA Eight Guidelines of Public Defense Related to Excessive Workloads*

[15] *Strickland v. Washington*, 466 U.S. 668 (1984).

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(2009); Am. Bar Ass'n, Standing Comm. on Legal Aid and Indigent Defendants, *ABA Ten Principles of a Public Defense Delivery System* (2002); NAT'L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS (2012). These standards emphasize the structural supports required to ensure that defenders can perform their duties. They include an independent defense function, early appointment, adequate staffing, funding for necessary services (e.g., investigation, retention of experts, and administrative staff), workload controls, training, legal research resources, and oversight connected to practice standards.

In assessing *Gideon* claims for systemic indigent defense failures, courts have considered the absence of these structural supports as reflected in insufficient funding, agency-wide lack of training and performance standards, understaffing, excessive workloads, delayed appointments, lack of independence for the defense function from the judicial or political function, and insufficient agency-wide expert resources.[16] In *Wilbur,* for example, the court noted the structural limitations—insufficient staffing, excessive caseloads, and almost non-existent supervision—that resulted in a system "broken to such an extent that confidential attorney/client communications are rare, the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned." *Wilbur*, 989 F.Supp.2d at 1127. The court continued,

> The Court does not presume to establish fixed numerical standards or a checklist by which the constitutional adequacy of counsel's representation can be judged. The experts, public defenders, and prosecutors who testified at trial made clear that there are myriad factors that must be considered when determining whether a system of public defense provides indigent criminal

[16] We note that, in alleging that there has been a constructive denial of counsel based on systemic indigent defense failures, plaintiffs are not seeking to reverse criminal convictions but are seeking only prospective injunctive relief. The Court may enter prospective relief upon a finding of a substantial risk of a constitutional violation. *See Brown v. Plata*, 131 S. Ct. 1910, 1941 (2011). In the context of a challenge to a criminal conviction, the defendant must also show that the denial of counsel caused actual prejudice to secure a reversal. *Strickland*, 466 U.S. 668. *Cronic,* 466 U.S. 648, creates a narrow exception to the need to show prejudice where the denial of counsel contaminates the entire criminal proceeding.

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> defendants the assistance required by the Sixth Amendment. Factors such as the mix and complexity of cases, counsel's experience, and the prosecutorial and judicial resources available were mentioned throughout trial.

Wilbur, 989 F.Supp.2d at 1126.

Similarly, the court in *Pub. Defender v. State,* 115 So. 3d at 279, held that the public defender's office could withdraw from representation of indigent defendants because of structural limitations. Insufficient funds and the resultant understaffing created a situation where indigent defendants did not receive assistance of counsel as required by the Sixth Amendment. Courts have also held in indigent defense funding cases that budget exigencies cannot serve as an excuse for the oppressive and abusive extension of attorneys' professional responsibilities, and courts have the power to take corrective measures to ensure that indigent defendants' constitutional and statutory rights are protected. *See Citizen*, 898 So.2d at 336. Similarly, in *Lavallee*, 812 N.E.2d at 904, the court held that proactive steps may be necessary when an indigent defense compensation scheme "raises serious concerns about whether [the defendants] will ultimately receive the effective assistance of trial counsel." *See also New York Cnty. Lawyers' Ass'n*, 196 Misc. 2d. 761 (holding statutory rates for assigned counsel unconstitutional as they resulted in denial of counsel and excessive caseloads, among other issues); *Young,* 172 P.3d 138 (holding that inadequate compensation of defense attorneys deprived capital defendants of counsel). In all of these cases, the courts granted relief based on evidence that indigent defense services were subject to such substantial structural limitations that actual representation would simply not be possible.

Substantial structural limitations force even otherwise competent and well-intentioned public defenders into a position where they are, in effect, a lawyer in name only. Such limitations essentially require counsel to represent clients without being able to fulfill their basic

obligations to prepare a defense, including investigating the facts of the case, interviewing witnesses, securing discovery, engaging in motions practice, identifying experts when necessary, and subjecting the evidence to adversarial testing. Under these conditions, the issue is not effective assistance of counsel, but, as the Court of Appeals noted, "nonrepresentation." *Hurrell-Harring,* 930 N.E.2d at 224. Other courts have emphatically made this same point. As the Supreme Court of Louisiana stated, "We know from experience that no attorney can prepare for one felony trial per day, especially if he has little or no investigative, paralegal, or clerical assistance." *Peart,* 621 So.2d at 789. The court agreed with the trial court's characterization that "[n]ot even a lawyer with an S on his chest could effectively handle this docket." *Id.* The court concluded that "[m]any indigent defendants in Section E are provided with counsel who can perform only pro forma, especially at early stages of the proceedings. They are often subsequently provided with counsel who are so overburdened as to be effectively unqualified." *Id.*

B. Considering the Traditional Markers of Representation

In addition to the presence of structural limitations, courts considering systemic denial of counsel challenges have also examined the extent, or absence of, traditional markers of representation. The traditional markers of representation include meaningful attorney-client contact allowing the attorney to communicate and advise the client, the attorney's ability to investigate the allegations and the client's circumstances that may inform strategy, and the attorney's ability to advocate for the client either through plea negotiation, trial, or post-trial. These factors ensure that defense counsel provide the services that protect their client's due process rights.

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The New York Court of Appeals recognized the importance of these traditional markers, stating, "Actual representation assumes a certain basic representational relationship." *Hurrell-Harring*, 930 N.E.2d at 224. Other courts have adopted this reasoning. For example, in *Wilbur*, 989 F.Supp.2d at 1128, clients met their attorneys for the first time in court and immediately accepted a plea bargain, without discussing their cases in a confidential setting. The court found that these services "amounted to little more than a 'meet and plead' system," and that the resulting lack of representational relationship violated the Sixth Amendment. *Id.* at 1124. Similarly, in *Pub. Defender v. State*, 115 So. 3d at 278, the court reasoned that denial of counsel was present where attorneys engaged in routine meeting and pleading practices, did not communicate with clients, were unable to investigate the allegations, and were unprepared for trial.

The absence of these traditional markers of representation has led courts to find non-representation in violation of the Sixth Amendment. *Wilbur*, 989 F.Supp.2d at 1131 (noting that in such cases "the appointment of counsel may be little more than a sham and an adverse effect on the reliability of the trial process will be presumed") (citing *Cronic*, 466 U.S. at 658-60, and *Avery v. Alabama*, 308 U.S. 444, 446 (1940)); *see also Pub. Defender,* 115 So. 3d at 278; *Citizen*, 898 So.2d 325; *Peart,* 621 So. 2d at 789. The traditional markers require the "opportunity for appointed counsel to confer with the accused to prepare a defense," engage in investigation, and advocate for the client. *Wilbur*, 989 F.Supp.2d at 1131; *Public Defender v. State,* 115 So. 3d at 278; *Peart,* 621 So.2d at 789; *see also Missouri v. Frye*, 132 S. Ct. 1399, 1408 (2012) ("[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the

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accused."); *Powell*, 287 U.S. at 59-60 (finding that when "no attempt was made to investigate" the defendants lacked "the aid of counsel *in any real sense*") (emphasis added).

The New York Court of Appeals, along with many other courts, has taken note of the vital importance of these traditional markers of representation. These markers may be considered in conjunction with the structural limitations placed on counsel to determine whether the counties "constructively" denied counsel to indigent defendants during criminal proceedings. When assessing the merits of the case, this Court may use this framework to assess whether a systemic "constructive" denial of counsel in violation of *Gideon* and the Sixth Amendment occurred from either factor, standing alone or in conjunction.

CONCLUSION

The Court can consider structural limitations and defenders' failure to carry out traditional markers of representation in its assessment of Plaintiffs' claim of constructive denial of counsel.

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INDEX No. 8866-07
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EXHIBIT 1 TO U.S. STATEMENT OF INTEREST

Judge Robert S. Lasnik

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

----------x

JOSEPH JEROME WILBUR, *et al.*,

Plaintiffs

v.

CITY OF MOUNT VERNON, *et al.*,

Defendants.

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No. C11-1100RSL

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STATEMENT OF INTEREST OF THE UNITED STATES

The United States files this Statement of Interest to assist the Court in answering the question of what remedies are appropriate and within the Court's powers should it find that the Cities of Mount Vernon and Burlington violate misdemeanor defendants' right to counsel. The United States did not participate in the trial in this case and takes no position on whether Plaintiffs should prevail on the merits. The United States files this SOI to provide expertise and a perspective that it may uniquely possess. If the Plaintiffs prevail, it is the position of the United States that the Court has discretion to enter injunctive relief aimed at the specific factors that have caused public defender services to fall short of Sixth Amendment guarantees, including the appointment of an independent monitor to assist the Court. The United States has found monitoring arrangements to be critically important in enforcing complex remedies to address systemic constitutional harms.

In discussing the remedies available to the Court in this Statement, the United States will address questions (1) and (3) of the Court's Order for Further Briefing, with particular focus on the role of an independent monitor. (Dkt. # 319.) To answer the Court's first question, the United States is unaware of any federal court appointing a monitor to oversee reforms of a public defense agency, but the Ninth Circuit has recognized a federal court's authority in this area under 42 U.S.C. § 1983. *Miranda v. Clark County, NV*, 319 F.3d 465 (9th Cir. 2003). The United States is aware of one case in which a federal court, through a Consent Order instituting reforms of a County public defender agency, received reports from the county regarding the progress of those reforms. *Stinson v. Fulton Cnty. Bd. of Comm'rs*, No. 1:94-CV-240-GET (N.D. Ga. May 21, 1999). However, the Court did not have the benefit of an independent monitor to assist it in assessing the implementation of the reforms.

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Also, an independent monitor is currently monitoring systemic reform of a juvenile public defender system through an agreement between the United States and the Shelby County (TN) Juvenile Court ("Shelby County").

Finally, it is worth noting that but for removal to federal court by the Cities here, this matter would have proceeded in state court, and state court litigation over the crisis in indigent defense is not at all unusual. Those cases bear out the practicality—and, at times, the necessity—of court oversight in this area.

In answer to the Court's third question, a number of states have imposed "hard" caseload standards,[1] but the United States believes that, should any remedies be warranted, defense counsel's *workload* should be controlled to ensure quality representation. "Workload," as defined by the *ABA Ten Principles of a Public Defense Delivery System,* takes into account not only a defender's numerical caseload, but also factors like the complexity of defenders' cases, their skills and experience, and the resources available to them. Workload controls may require flexibility to accommodate local conditions. Due to this complexity, an independent monitor would provide the Court with indispensible support in ensuring that the remedial purpose of workload controls is achieved.

The Washington State Bar's Standards for Indigent Defense, incorporated by its Supreme Court in its criminal rules, considers the importance of workloads in evaluating the efficacy of defender services. Washington's move to implement workload controls is a welcome recognition of its obligation under *Gideon*. The United States recognizes that these standards are the result of work commenced at least since 2003 by the Washington State Bar Association's Blue Ribbon Commission on Criminal Defense and supported by the State Legislature, the

[1] For example, Arizona, Georgia, and New Hampshire have specific caseload limitations. A number of states have "soft" caseload caps by using a weighted system. See attached Exhibit 1 for a description of select jurisdictions.

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Washington Defender Association, and the Washington Association of Prosecuting Attorneys, among others. These workload controls are scheduled to go into effect October 2013.[2]

INTEREST OF THE UNITED STATES

The United States has authority to file this Statement of Interest pursuant to 28 U.S.C. § 517, which permits the Attorney General to attend to the interests of the United States in any case pending in federal court. The United States has an interest in ensuring that all jurisdictions—federal, state, and local—are fulfilling their obligation under the Constitution to provide effective assistance of counsel to individuals facing criminal charges who cannot afford an attorney, as required by *Gideon v. Wainwright*, 372 U.S. 335 (1963). The United States can enforce the right to counsel in juvenile delinquency proceedings pursuant the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 (Section 14141). As noted above, the United States is currently enforcing Section 14141's juvenile justice provision through a comprehensive out-of-court settlement with Shelby County.[3] An essential piece of the agreement, which is subject to independent monitoring, is the establishment of a juvenile public defender system with "reasonable workloads" and "sufficient resources to provide independent, ethical, and zealous representation to Children in delinquency matters." *Id.* at 14-15.

As the Attorney General recently proclaimed, "It's time to reclaim Gideon's petition – and resolve to confront the obstacles facing indigent defense providers."[4] In March 2010, the Attorney General launched the Access to Justice Initiative to address the access-to-justice crisis. Indigent defense reform is a critical piece of the office's work, and the Initiative provides a

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[2] The United States does not by this mean to endorse or detract from the efforts of these entities.

[3] Mem. of Agreement Regarding the Juvenile Court of Memphis and Shelby Counties, Tennessee (2012), *available at* http://www.justice.gov/crt/about/spl/findsettle.php.

[4] Attorney General Eric Holder Speaks at the Justice Department's 50th Anniversary Celebration of the U.S. Supreme Court Decision in *Gideon v. Wainwright*, March 15, 2013, *available at* http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-1303151.html.

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centralized focus for carrying out the Department's commitment to improving indigent defense.[5] The Department has also sought to address this crisis through a number of grant programs.[6] The most recent is a 2012 $1.2 million grant program, *Answering Gideon's Call: Strengthening Indigent Defense Through Implementing the ABA Ten Principles of a Public Defense Delivery System* administered by the Bureau of Justice Assistance.[7] In light of the United States' interest in ensuring that any constitutional deficiencies the Court may find are adequately remedied, the United States files this Statement of Interest on the availability of injunctive relief.

BACKGROUND

The Plaintiffs' claims of deprivations of the right to counsel, if meritorious, are part of a crisis impacting public defender services nationwide. Fifty years ago, the Supreme Court held that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon*, 372 U.S. at 344. And yet, as the Attorney General recently noted, "despite the undeniable progress our nation has witnessed over the last half-century—America's indigent defense systems continue to exist in a state of crisis," and "in some places—do little more than process people in and out of our courts."[8]

Our national difficulty to meet the obligations recognized in *Gideon* is well documented.[9] *See, e.g.* ABA Standing Committee on Legal Aid and Indigent Defendants Report, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, (December 2004). Despite

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[5] The office works with federal agencies, and state, local, and tribal justice system stakeholders to increase access to counsel, highlight best practices, and improve the justice delivery systems that serve people who are unable to afford lawyers. More information is available at http://www.justice.gov/atj/.

[6] *See* Government Accountability Office, *Indigent Defense: DOJ Could Increase Awareness of Eligible Funding* 11-14 (May 2012), *available at* http://www.justice.gov/atj/idp/.

[7] Grants have been awarded to agencies in Texas, Delaware, Massachusetts, and Michigan.

[8] Attorney General Eric Holder Speaks at the American Film Institute's Screening of *Gideon's Army*, June 21, 2013, *available at* http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130621.html.

[9] In March 2013, the Yale Law Journal held a symposium on the challenges of meeting Gideon's promise and published resulting articles in its most recent issue. *See* 122 Yale L.J. __ (June 2013).

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long recognition that "the proper performance of the defense function is . . . as vital to the health of the system as the performance of the prosecuting and adjudicatory functions," Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, *Final Report* 11 (1963), public defense agencies nationwide remain at a staggering disadvantage when it comes to resources. Steven W. Perry & Duren Banks, U.S. Bureau of Justice Statistics, *Prosecutors in State Courts, 2007 Statistical Table*s 1 (2012) (noting that prosecution offices nationwide receive about 2.5 times the funding that defense offices receive); National Right to Counsel Committee, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* 61-64 (2009) (collecting examples of funding disparities).

Due to this lack of resources, states and localities across the country face a crisis in indigent defense. Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. Rev. L. & Soc. Change 427 (2009) (describing crises nationwide). In many states, remedying the crisis in indigent defense has required court intervention. *E.g.*, *State v. Citizen*, 898 So.2d 325 (La. 2005); *Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y. 2010); *Missouri Public Defender Comm'n v. Waters*, 370 S.W.3d 592 (Mo. 2012). The crisis in indigent defense extends to misdemeanor cases where many waive their right to counsel and end up unnecessarily imprisoned. NACDL, *Minor Crimes, Massive Waste* 21 (2009).[10]

DISCUSSION

It is the position of the United States that it would be lawful and appropriate for the Court to enter injunctive relief if this litigation reveals systemic constitutional deficiencies in the Defendants' provision of public defender services. Indeed, the concept of federal oversight to address the crisis in defender services has gained momentum in recent years. *See, e.g,. Gideon's*

[10] The report is available at http://www.opensocietyfoundations.org/reports/minor-crimes-massivewaste.

Broken Promise, *supra*, at 41-42 (recommending federal funding); Drinan, *The Third Generation of Indigent Defense Litigation*, *supra* (arguing federal judges are well suited to address systemic Sixth Amendment claims); Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 Harv. L. Rev. 2062 (2000) (advocating systemic litigation). (Again, the United States takes no position on the merits of the underlying suit.)

I. The Court Has Broad Authority to Enter Injunctive Relief, Including the Appointment of an Independent Monitor, if It Finds a Deprivation of the Right to Counsel.

If Plaintiffs prevail on the merits of their claims, or as part of a consent decree, this Court has broad authority to order injunctive relief that is adequate to remedy any identified constitutional violations within the Cities' defender systems. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *see also Thomas v. County of Los Angeles*, 978 F.2d 504, 509 (9th Cir. 1992) (noting that courts have power to issue "broad injunctive relief" where there exist specific findings of a "persistent pattern of [police] misconduct"). When crafting injunctive relief that requires state officials to alter the manner in which they execute their core functions, a court must be mindful of federalism concerns and avoid unnecessarily intrusive remedies. *Labor/Community Strategy Center v. Los Angeles County*, 263 F.3d 1041, 1050 (9th Cir. 2001). Courts have long recognized—across a wide range of institutional settings—that equity often requires the implementation of injunctive relief to correct unconstitutional conduct, even where that relief relates to a state's administrative practices. *See, e.g.*, *Brown v. Plata*, 131 S. Ct. 1910 (2011) (upholding injunctive relief affecting State's administration of prisons); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955) (upholding injunctive relief affecting State's administration of schools). Indeed, while courts "must be sensitive to the State's interest[s]," courts "nevertheless

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must not shrink from their obligation to 'enforce the constitutional rights of all persons.'" *Plata*, 131 S. Ct. at 1928 (quoting *Cruz v. Beto,* 405 U.S. 319, 321 (1972)).

In crafting injunctive relief, the authority of the Court to appoint a monitor is well established. *Eldridge v. Carpenters 46*, 94 F.3d 1366 (9th Cir. 1996) (holding that district court's failure to appoint a monitor was an abuse of discretion where defendant insisted on retaining a hiring practice already held to be unlawfully discriminatory); *Nat'l Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 543 (9th Cir. 1987); *Madrid v. Gomez*, 889 F. Supp. 1146, 1282 (N.D. Cal. 1995) (holding that the "assistance of a Special Master is clearly appropriate" because "[d]eveloping a comprehensive remedy in this case will be a complex undertaking involving issues of a technical and highly charged nature").

II. Appointment of an Independent Monitor Is Critical to Implementing Complex Remedies to Address Systemic Constitutional Violations.

In the experience of the United States, appointing a monitor can provide substantial assistance to courts and parties and can reduce unnecessary delays and litigation over disputes regarding compliance. This is especially true when institutional reform can be expected to take a number of years. A monitor provides the independence and expertise necessary to conduct the objective, credible analysis upon which a court can rely to determine whether its order is being implemented, and that gives the parties and the community confidence in the reform process. A monitor will also save the Court's time.

In Grant County, Washington, an independent monitor was essential to implementing the court's injunction in a right-to-counsel case. *Best et al. v. Grant County*, No. 04-2-00189-0 (Kittitas Cty. Sup. Ct., filed Dec. 21, 2004). There, the monitor assisted the court and parties for almost six years by conducting site visits, assessing caseloads, and completing quarterly reports on the County's compliance with court orders. We note that the monitor's term in Grant County

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was limited from the outset to a defined period, and the monitor's final report noted work that still remained to be done.[11] In our experience, it is best to continue monitoring arrangements until the affected parties have demonstrated sustained compliance with the court's orders.

In 2009, the United States entered a Memorandum of Agreement with King County, Washington to reform the King County Correctional Facility. *United States v. King County, Washington*, No. 2:09-cv-00059 (W.D. Wash., filed Jan. 15, 2009). That successful reform process was assisted by an independent monitor. Other significant cases involving monitors include: *United States v. City of Pittsburgh*, No. 97-cv-354 (W.D. Pa., filed Feb. 26, 1997) (police; compliance reached in 1999); *United States v. Dallas County*, No. 3:07-cv-1559-N (N.D. Tex., filed Nov. 6, 2007) (jail); *United States v. Delaware*, No. 1-11-cv-591 (D. Del., filed Jun 6, 2011) (mental health system); *United States v. City of Seattle*, No. 12-cv-1282 (W.D. Wash., filed July 27, 2012)(police). In each of these cases, the independent monitor improved efficiency in implementation, decreased collateral litigation, and provided great assistance to the court.[12]

The selection of a monitor need not be a strictly top-down decision by the Court. The parties may agree on who should fill the role of the monitor, but if they cannot, the Court can order them to nominate monitor candidates for the Court's consideration. In addition, it should be noted that the cost of an independent monitor, however it is paid, should not reduce the funds available for indigent defense.

Finally, it should be noted that the appointment of an independent monitor can ensure public confidence in the reform process. With allegiance only to the Court and a duty to report its findings accurately and objectively, the monitor assures the public that the Cities will move

[11] The monitor's final report and two of its quarterly reports are attached as Exhibit 2.
[12] Summaries of those cases, relevant pleadings, and reports from the monitors can be found at http://www.justice.gov/crt/about/spl/findsettle.php.

forward in implementing the Court's order, and will not escape notice if they do not. Moreover, the Cities' progress towards implementing the Court's order will be more readily accepted by a broader segment of the public if that progress is affirmed by a monitor who is responsible for confirming each claim of compliance asserted by the Cities.

III. If the Court Finds Liability in this Case, its Remedy Should Include Workload Controls, Which Are Well-Suited to Implementation by an Independent Monitor.

Achieving systemic reform to ensure meaningful access to counsel is an important, but complex and time-consuming, undertaking. Any remedy imposed by the Court may require years of assessment to determine whether it is accomplishing its purpose, and the Court and the parties may need independent assistance to resolve concerns about compliance.

One source of complexity will be how the Court and parties assess whether public defenders are overburdened. In its Order for Further Briefing, the Court asked about "hard" caseload standards, which provide valuable, bright-line rules that define the outer boundaries of what may be reasonably expected of public defenders. *ABA Ten Principles*, *supra*. However, caseload limits alone cannot keep public defenders from being overworked into ineffectiveness; two additional protections are required. First, a public defender must have the authority to decline appointments over the caseload limit. Second, caseload limits are no replacement for a careful analysis of a public defender's *workload*, a concept that takes into account all of the factors affecting a public defender's ability to adequately represent clients, such as the complexity of cases on a defender's docket, the defender's skill and experience, the support services available to the defender, and the defender's other duties. *See id.* Making an accurate assessment of a defender's workload requires observation, record collection and analysis, interviews with defenders and their supervisors, and so on, all of which must be performed quarterly or every six months over the course of several years to ensure that the Court's remedies

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are being properly implemented. The monitor can also assess whether, regardless of workload, defenders are carrying out other hallmarks of minimally effective representation, such as visiting clients, conducting investigations, performing legal research, and pursuing discovery. ABA Standing Committee on Legal Aid and Indigent Defendants, *Eight Guidelines of Public Defense Workloads* (August 2009). These kinds of detailed inquiries, carried out over sufficient time to ensure meaningful and long-lasting reform, are critical to assessing whether the Cities are truly honoring misdemeanor defendants' right to counsel, and they can be made most efficiently and reliably by an independent monitor. As shown in Exhibit 2, these are the kinds of inquires made by the independent monitor in the Grant County, Washington case. Also, should non-compliance be identified, early and objective detection by the monitor, as well as the identification of barriers to compliance, allow the parties to undertake corrective action.

An independent monitor may also obviate the need for the Court to dictate specific and rigid caseload requirements. In the Shelby County juvenile justice enforcement matter, for example, the County is required to establish a juvenile defender program that provides defense attorneys with reasonable workloads, appropriate administrative supports, training, and the resources to provide zealous and independent representation to their clients, but the agreement does not specify a numerical caseload limit. *See* Mem. of Agreement at 14-15.

CONCLUSION

Should the Court find for the Plaintiffs, it has broad powers to issue injunctive relief. That power includes the authority to appoint an independent monitor who would assist the Court's efforts to ensure that any remedies ordered are effective, efficiently implemented, and achieve the intended result.

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

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