IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT

OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

TRACY TUCKER, *et al.*, Plaintiffs, vs. STATE OF IDAHO, *et al.*, Defendants.	Case No. CV-OC-2015-10240 MEMORANDUM DECISION AND ORDER GRANTING MOTION TO DISMISS

THIS MATTER comes before the Court on Defendants' Motion to Dismiss, filed July 8, 2015. A hearing was held on December 10, 2015, wherein the Court took the matter under advisement. For the reasons stated herein, Defendants' Motion is GRANTED.

BACKGROUND

The central claim in this case is that the named Plaintiffs, and other indigent criminal defendants similarly situated in the State of Idaho, are continuously being deprived of their state and federal constitutional rights to counsel and Due Process of law, by the named Defendants, who are the State of Idaho, Governor C.L. "Butch" Otter, and the Idaho Public Defense Commission. Plaintiffs seek class action certification[1] and remedial measures by this Court.

[1] Plaintiffs filed a Motion for Class Certification on June 17, 2015, which the parties agreed need not be decided until Defendants' present Motion to Dismiss was resolved.

Plaintiffs' Complaint alleges that Tracy Tucker, Jason Sharp, Naomi Morley, and Jeremy Payne (collectively, "Plaintiffs") were arrested and prosecuted, respectively, in Bonner, Shoshone, Ada, and Payette Counties. Plaintiffs were represented by public defenders in their individual cases. They allege facts to support claims of ineffective assistance of counsel for lack of representation at initial appearances, and attorneys' failure to communicate with them at times, or to file certain motions on their behalf, or to properly investigate their cases.

Plaintiffs contend that their individual experiences are representative of "thousands of indigent defendants across the State, who have been denied their right to effective counsel."[2] Plaintiffs further claim that the "current, patchwork public-defense arrangement in Idaho remains riddled with constitutional deficiencies and fails, at all stages of the prosecution and adjudication processes, to ensure adequate representation for indigent defendants in both criminal and juvenile proceedings in Idaho."[3]

Plaintiffs claim that the defects in the public defender system can be summarized as follows: (1) lack of representation at initial appearances, (2) extended and unnecessary pretrial detention, (3) excessive caseloads, (4) lack of sufficient investigation and expert analysis, (5) lack of sufficient access to or communication with the public defenders assigned to their cases, (6) continued use of fixed-fee contracts by some Idaho counties, (7) lack of public defender independence, and (8) lack of sufficient training, oversight, supervision, and evaluation.[4]

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[2] Pls.' Class Action Complaint for Injunctive and Declaratory Relief (hereafter, "Complaint"), ¶ 8.
[3] *Id.* ¶ 9.
[4] *Id.* ¶¶ 97-161.

In Idaho, the legislature has delegated its constitutional duty to provide public defense to the individual counties. The counties must administer and fund the public defender services. Idaho Code § 19-859 states "[t]he board of county commissioners of each county shall provide for the representation of indigent persons and other individuals who are entitled to be represented by an attorney at public expense." Counties are responsible for maintaining an office of public defender, joining with another county (or counties) to provide a joint office of public defender, contracting with an existing office of public defender, or contracting with a private defense attorney for public defender services.[5] Counties are required to "annually appropriate enough money to administer" its public defender program.[6] Some would call this an unfunded mandate.

The natural result is forty-four different systems with different standards and resources, managing thousands of cases with varying quality of services. In 2010, the National Legal Aid and Defender Association ("NLADA") issued a report after studying trial level indigent services offered in seven Idaho counties, which identified a number of specific areas of concern.[7] The report stated that "[b]y delegating to each county the responsibility to provide counsel at the trial level without any state funding or oversight, Idaho has sewn a patchwork quilt of underfunded, inconsistent systems that vary greatly in defining who qualifies for services and in the level of competency of the services rendered."[8]

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[5] I.C. § 19-859.
[6] I.C. § 19-862.
[7] "These include the widespread use of fixed-fee contracts; extraordinarily high attorney caseloads and workloads; lack of consistent, effective, and confidential communication with indigent clients; inadequate, and often nonexistent, investigation of cases; lack of structural safeguards to protect the independence of defenders; lack of adequate representation of children in juvenile and criminal court; lack of sufficient supervision; lack of performance-based standards; lack of ongoing training and professional development; and lack of any meaningful funding from the State." Complaint ¶ 1.
[8] Complaint ¶ 36 (citing National Legal Aid and Defender Association, The Guarantee of Counsel: Advocacy & Due Process in Idaho's Trial Courts: Evaluation of Trial-Level Indigent Defense Systems in Idaho at 2 (2010)).

After the NLADA report, the legislature created the Idaho Public Defense Commission ("PDC").[9] It is a self-governing executive agency with four members appointed by the Governor, two from the legislature and one from the Supreme Court. It is tasked with promulgating rules for training and education for defense attorneys and to create uniform data reporting requirements that include caseload, workload, and expenditures.[10] The PDC is also charged with making recommendations to the Idaho legislature by January 20th of each year (beginning January 20, 2015) regarding requirements for contracts between counties and private attorneys, qualifications and experience standards, enforcement mechanisms, and funding issues.[11] The PDC failed to make any recommendations as of January 20, 2015.[12]

Plaintiffs argue the PDC is too little, too late, and then it did not even do what it was supposed to do. Pointing to past public pronouncements by both the Governor and the Chief Justice, Plaintiffs claim:

> "Despite the State's acknowledgement that significant reform is necessary in this arena – by, among other things, the creation of various virtually powerless committees, including the establishment in 2010 of a public-defense subcommittee of the Criminal Justice Commission, the establishment in 2013 of a special committee of the legislature to recommend legislative reforms to the public-defense system, and the 2014 statutory amendments and formation of the PDC – the State has done little to meaningfully address the myriad problems plaguing Idaho's indigent-defense system."[13]

Plaintiffs emphasize that the State does not provide any funding or supervision to any of the counties, the public defender commission failed to promulgate any rules as of January 20, 2015,

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[9] I.C. § 19-849
[10] I.C. §§ 19-849, 19-850.
[11] I.C. § 19-850.
[12] Complaint ¶ 49.
[13] Complaint ¶ 45.

and the State has failed to sufficiently address the many state and federal constitutional issues raised by the NLADA report.[14]

Unquestionably, the State is ultimately responsible for ensuring constitutionally-sound public defense. Each branch of government has its responsibility. Each branch also has its limits, due to the separation of powers. Plaintiffs allege the State has failed to provide a constitutionally-sound system of public defense, despite being on notice for over a decade of the deficiencies in the public defender system, because it provides no training, supervision, oversight, statewide standards, or funding.[15]

COURSE OF PROCEEDINGS

On June 17, 2015, Plaintiffs filed this Class Action Complaint for Injunctive and Declaratory Relief against the State of Idaho, Governor C.L. "Butch" Otter, and seven members of the PDC (collectively, "Defendants"). Plaintiffs seek declaratory and injunctive relief to remedy the Defendants' failure "to provide effective legal representation to indigent criminal defendants across the State of Idaho, in violation of the Sixth and Fourteenth Amendments to the United States Constitution, of Article 1, Section 13, of the Idaho Constitution, and Idaho statutes and regulations."[16]

Plaintiffs allege the following claims for relief: (1) violation of the Sixth Amendment of the United States Constitution and 42 U.S.C. § 1983 (right to counsel), (2) violation of Article 1,

[14] *Id.* ¶¶ 46-48, 52.
[15] *Id.* ¶¶ 162-169.
[16] Complaint ¶ 3.

Section 13 of the Idaho Constitution (right to counsel), (3) violation of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983 (Due Process), and (4) violation of Article 1, Section 13 (Due Process), by the Defendants' failure to ensure that all indigent criminal defendants receive meaningful and effective legal representation at all critical stages of their cases.[17]

The relief requested by Plaintiff in this case includes, in relevant part, the following:

A) Certify this case as a class action pursuant to Rule 23 of the Idaho Rules of Civil Procedure;
B) Declare that the State of Idaho is obligated to provide constitutionally adequate representation to indigent criminal defendants, including at their initial appearances;
C) Declare that the constitutional rights of Idaho's indigent criminal defendants are being violated by the State on an ongoing basis, and provide a deadline for the State to move this Court for approval of specific modifications to the structure and operation of the State's indigent-defense system;
D) Enjoin the State from continuing to violate the rights of indigent defendants by providing constitutionally deficient representation;
E) Enter an injunction requiring the State to propose, for this Court's approval and monitoring, a plan to develop and implement a statewide system of public defense that is consistent with the U.S. Constitution and the Constitution and laws of the State of Idaho;
F) Enter an injunction that requires the State to propose, for this Court's approval and monitoring, uniform workload, performance, and training standards for attorneys representing indigent criminal defendants in the State of Idaho in order to ensure accountability and to monitor effectiveness;
G) Enter an injunction barring the use of fixed-fee contracts in the delivery of indigent-defense services in the State of Idaho; . . . .[18]

On July 8, 2015, Defendants filed a Motion to Dismiss along with a Memorandum in Support. On November 23, 2015, Plaintiffs filed a Response to the Motion to Dismiss, along with an

[17] *Id.* ¶¶ 170-183.
[18] Complaint, p. 53.

Affidavit of Ian Thompson and Second Affidavit of Richard Eppink.[19] On December 4, 2015, Defendants filed a Reply Memorandum in Support of the Motion to Dismiss, along with an Objection and Motion to Strike. Plaintiffs filed a Response to Defendants' Objection and Motion to Strike on December 9, 2015.

Defendants assert that the Complaint should be dismissed because the named Defendants are not proper parties (i.e. the State of Idaho is not a "person" subject to suit under 42 U.S.C. § 1983; Governor Otter and members of the Public Defense Commission cannot be sued under § 1983 or for alleged violations of constitutional rights as they have no legal authority to make the sweeping changes to Idaho's public defense system; and the Complaint fails to state a claim for relief because the Court lacks authority to enjoin the State and there is no justiciable controversy between the State and Plaintiffs).

Plaintiffs assert that the named Defendants are the proper parties because (1) the State bears the ultimate responsibility for ensuring that the constitutional rights of Idahoans are protected (the United States Supreme Court has repeatedly indicated that indigent defense is the State's responsibility, the State has an affirmative duty to ensure Sixth Amendment compliance, the State's delegation of duties to the counties does not abdicate the State's responsibility); (2) the Governor and the PDC members are proper defendants because they are the only State officials who give effect to Idaho's statewide indigent defense system; (3) resolving systematic reform litigation is a central responsibility of the judiciary; and (4) Plaintiffs' suit complies with Idaho Rules of Civil Procedure 3(b) and 65(d).

[19] On November 24, 2015, Plaintiffs filed an "Errata" regarding certain errors in their Response, along with a Corrected Response.

LEGAL STANDARD

"A court may grant a motion to dismiss for failure to state a claim under Rule 12(b)(6) only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief." *Harper v. Harper*, 122 Idaho 535, 536, 835 P.2d 1346, 1347 (Ct. App. 1992). In ruling on a motion to dismiss, the issue "is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims." *Losser v. Bradstreet*, 145 Idaho 670, 673, 183 P.3d 758, 761 (2008). "A motion to dismiss must be resolved solely from the pleadings and all facts and inferences from the record are viewed in favor of the non-moving party." *Taylor v. McNichols*, 149 Idaho 826, 832-33, 243 P.3d 642, 648-49 (2010).

To state a claim for relief and survive a Rule 12(b)(6) motion, the pleading "does not need detailed factual allegations," however, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545, 127 S. Ct. 1955, 1959 (2007). Mere "labels and conclusions" or a "formulaic recitation of a cause of action's elements will not do." *Id.* There must be "enough facts to state a claim to relief that is plausible on its face." *Id.* at 547, 127 S. Ct. at 1960. Stated differently, "[the] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949 (2009). "As a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which the plaintiff includes allegations showing on the face of the complaint that there is some insurmountable bar to relief." *Harper*, 122 Idaho at 536, 835 P.2d at 1347.

ANALYSIS

(1) Defendants' Objection and Motion to Strike

Along with their Response to Defendants' Motion to Dismiss, Plaintiffs filed an Affidavit of Ian Thomson and an Affidavit of Richard Eppink. Defendants contend that the Affidavits should be stricken or disregarded, because this is purely a Rule 12(b)(6) Motion and the Court has no right to consider outside material.

Plaintiffs contend that the evidence may properly be considered without converting the Motion to Dismiss into a Motion for Summary Judgment, because Defendants' Motion is really a Rule 12(b)(1) Motion challenging the Court's subject matter jurisdiction.

The Court may consider outside evidence on a Rule 12(b)(6) Motion so long as the Court converts the Motion into one for Summary Judgment. However, it is within the Court's discretion to exclude such evidence and treat the Motion as purely a Motion to Dismiss. *See Orthman v. Idaho Power Company*, 126 Idaho 960, 895 P.2d 561 (1995).

Here, the Motion to Dismiss asserts that Plaintiffs have failed to state a claim upon which relief can be granted under federal law (42 U.S.C. 1983) and under state law (Idaho Rules of Civil Procedure 3(b) and 65(d), and the Idaho Constitution). This Motion is subject to Rule 12(b)(6) and can be decided without considering outside evidence. Therefore, in exercising the Court's discretion, Defendants' Motion to Strike is GRANTED and the Affidavits filed by Plaintiffs will not be considered.

(2) Defendants' Motion to Dismiss

Plaintiffs have alleged that indigent criminal defendants in Idaho are systematically being deprived of their constitutional rights to counsel and Due Process of law, due to the Defendants' failure to provide an adequate public defense system in the State of Idaho.

Defendants assert that the entire action should be dismissed because the State of Idaho, the Governor and the PDC are entitled to governmental immunity, and the Court lacks authority and jurisdiction to order relief.

Before addressing the competing arguments on the Motion to Dismiss, underlying constitutional principles must first be addressed.

One of the founding principles of our system of justice is that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. The landmark 1963 case, *Gideon v. Wainwright*, made clear that an indigent criminal defendant is entitled to be represented by counsel even though they lack the financial means to hire one. The Court reasoned that the state has the obligation to provide indigent defendants with counsel:

> [R]eason and reflection require us to recognize that in our adversary system of criminal justice, 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. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and

> present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Gideon v. Wainwright, 372 U.S. 335, 344, 83 S. Ct. 792, 796-97 (1963). The Sixth Amendment right to counsel is applicable to the states under the Due Process Clause of the Fourteenth Amendment. *Id.* The Idaho Constitution also guarantees the right to counsel: "[i]n all criminal prosecutions, the party accused shall have the right to . . . appear and defend in person and with counsel." Idaho Const. art. I, § 13.

The United States Supreme Court also held that the constitutional right to counsel includes the right to *effective assistance* of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland*, 466 U.S. at 685, 104 S. Ct. at 2063. As explained in *United States v. Cronic*:

> The special value of the right to the assistance of counsel explains why "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." The text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of counsel to the accused, but "Assistance," which is to be "for his defence." Thus, "the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." If no actual "Assistance" "for" the accused's "defence" is provided, then the constitutional guarantee has been violated. To hold otherwise "could convert the appointment of counsel into a sham and nothing more than a formal

> compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."
> . . .
>
> The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. "[T]ruth," Lord Eldon said, "is best discovered by powerful statements on both sides of the question." This dictum describes the unique strength of our system of criminal justice. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." It is that "very premise" that underlies and gives meaning to the Sixth Amendment. It "is meant to assure fairness in the adversary criminal process." Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself."

United States v. Cronic, 466 U.S. 648, 654-56, 104 S. Ct. 2039, 2044-45 (1984) (footnotes omitted, citations omitted).

"The Sixth Amendment guarantees a criminal defendant the right to counsel during all 'critical stages' of the adversarial proceedings against him." *Estrada v. State*, 143 Idaho 558, 562, 149 P.3d 833, 837 (2006); *United States v. Wade*, 388 U.S. 218, 224, 87 S. Ct. 1926, 1931 (1967). "The commencement of the criminal prosecution, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment, marks the 'critical stage' of the prosecution to which the guarantees of the Sixth Amendment are applicable." *State v. Shelton*, 129 Idaho 877, 880-81, 934 P.2d 943, 946-47 (Ct. App. 1997). "Thus, under criminal procedures followed in Idaho, a defendant's Sixth Amendment right to counsel is triggered by the filing of a criminal complaint or an indictment." *State v. Tapp*, 136 Idaho 354, 363, 33 P.3d 828, 837 (Ct. App. 2001). A critical stage of the proceedings is any stage "where certain rights may be sacrificed or lost." *Coleman v. Alabama*, 399 U.S. 1, 7, 90 S. Ct. 1999, 2002 (1970). Critical stages include, for example, the preliminary hearing, *Coleman*, 399 U.S. at 9, 90 S. Ct. at 2003, the pretrial

lineup, *id.*, the arraignment, *Murillo v. State*, 144 Idaho 449, 454, 163 P.3d 238, 243 (Ct. App. 2007); *Bell v. Cone*, 535 U.S. 685, 696, 122 S. Ct. 1843, 1851 (2002), and the entry of a plea, *State v. Creech*, 109 Idaho 592, 602, 710 P.2d 502, 512 (1985).

As explained by the United States Supreme Court in *Maine v. Moulton*:

> [T]he Court has also recognized that the assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, "critical" stages in the criminal justice process "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." And, "[w]hatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . . ." This is because, after the initiation of adversary criminal proceedings, "'the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'"

Maine v. Moulton, 474 U.S. 159, 170, 106 S. Ct. 477, 484, 88 L. Ed. 2d 481 (1985) (citations omitted).

It is abundantly clear in the authorities cited above that the fundamental right to counsel, and the right to *effective* assistance of counsel, is critical not only at a defendant's trial, but also in the pretrial proceedings.

A. GOVERNMENTAL IMMUNITY UNDER § 1983

Defendants argue that they are not the proper parties to be sued in this suit, because they are not "persons" subject to suit under 42 U.S.C. § 1983 and they cannot provide redress for the claims made by Plaintiffs. Defendants argue that there is no authority requiring a state or one of its officers "to be responsible for ensuring that there are constitutionally adequate public defender services throughout the State."[20] Defendants also contend they are not proper parties because Idaho statutes place responsibility for the public defender system on county officials, not on the Governor or the PDC.

Plaintiffs have conceded in their Response brief[21] and at oral argument that the State of Idaho is not a "person" for purposes of injunctive relief under 42 U.S.C. § 1983. Plaintiffs conceded that the federal law claims against the State should be dismissed.[22] Therefore, Counts 1 and 3 must be dismissed against the State of Idaho. Accordingly, the Court will address only whether the Governor and the PDC members are "persons" subject to suit under § 1983.

42 U.S.C. § 1983 is a remedial statute which provides an avenue of redress to persons injured by the actions of government which violated federal constitutional rights. The statue provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an

[20] Defs.' Reply Mem. in Supp. of Defs.' Mot. to Dismiss, p. 4.
[21] *See* Pls.' Response to Defs.' Mot. to Dismiss, p. 3, FN 2
[22] *See* Hearing held on December 16, 2015.

> action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. . . .[23]

In *Will v. Michigan Department of State Police*, the United States Supreme Court specifically addressed the issue of whether a State, or an official acting in his or her official capacity, is a person within the meaning of § 1983. The Court held that "States or governmental entities that are considered 'arms of the State' for Eleventh Amendment purposes" are not 'persons' under § 1983." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70, 109 S. Ct. 2304, 2312 (1989). *Will* also held that state officials acting in their official capacities are not "persons" within the meaning of § 1983. *Will*, 491 U.S. at 71, 109 S. Ct. at 2312.

However, there is an exception that "[w]hen sued for *prospective injunctive relief*, a state official in his official capacity is considered a "person" for § 1983 purposes. In what has become known as part of the *Ex parte Young* doctrine, a suit for prospective injunctive relief provides a narrow, but well-established, exception to Eleventh Amendment immunity." *Doe*, 131 F.3d at 839 (emphasis in original, citation omitted). "The rule of *Ex parte Young* gives life to the Supremacy Clause by providing a pathway to relief from continuing violations of federal law by a state or its officers." *Los Angeles Cty. Bar Ass'n*, 979 F.2d at 704.

Under *Ex parte Young*, the state officer sued must have some connection with the enforcement of the allegedly unconstitutional act. *Ex parte Young*, 209 U.S. 123, 157, 28 S. Ct. 441, 453 (1908). "That connection must be fairly direct; a generalized duty to enforce state law or general

[23] Claims under § 1983 are limited by the scope of the Eleventh Amendment, *Doe v. Lawrence Livermore Nat. Lab.*, 131 F.3d 836, 839 (9th Cir. 1997), however, the Eleventh Amendment does not apply in state courts, *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63-64, 109 S. Ct. 2304, 2308 (1989).

supervisory power over the persons responsible for enforcing the challenged provision will not subject an official to suit." *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013) (citations omitted).

Defendants claim the Governor and PDC only have a "generalized duty" to supervise or enforce a constitutionally sound public defense system, but no direct or specific authority or responsibility. Defendants emphasize that the legislature has delegated that duty to the counties, as well as the duty to collect taxes in support thereof. Defendants assert that the Governor and the PDC members "do not directly control, regulate, administer, or otherwise bear responsibility for provision of public defender services, and they have no ability to provide the requested relief."[24]

Defendants point to *Association des Eleveurs de Canards et d'Oies du Quebec*, a case where producers and sellers of foie gras brought an action against the State of California, the governor, and the attorney general, to enjoin the enforcement of a statute that "bans the sale of products that are the result of force feeding birds to enlarge their livers beyond normal size." *Ass'n des Eleveurs de Canards et d'Oies du Quebec*, 729 F.3d at 942. The Ninth Circuit Court of Appeals found that the California Governor was entitled to Eleventh Amendment immunity because his only connection to the statute was a general duty to enforce state law. *Id.* at 943. However, the attorney general was not entitled to immunity, because the statute specifically authorized enforcement by district and city attorneys and the attorney general has direct supervision and the same powers as district attorneys. *Id.*

[24] Defs.' Mem. in Supp. of Mot. to Dismiss, p. 11.

Plaintiffs assert that the Governor and the PDC members have a sufficient connection to public defense in Idaho. Plaintiffs further contend that the Governor is responsible for indigent defense and has power to effectuate necessary changes to improve the public defense system. Plaintiffs assert the Governor appoints the majority of the PDC members, is deeply and directly involved in its work, and has been in regular communication with the PDC on systemic public defense issues. Plaintiffs argue that the Governor has legal appointment authority over the PDC, the State Appellate Public Defender, and boards of county commissioners as well.[25] The PDC has statutory duties to establish rules governing public defenders throughout the State, I.C. § 19-850(1)(a), and is mandated to make recommendations for system-wide reform, I.C. § 19-850(1)(b).[26]

Plaintiffs cite *Los Angeles County Bar Association*, where the Ninth Circuit Court of Appeals found that the governor was not entitled to Eleventh Amendment immunity where the bar association was challenging the constitutionality of a statute that prescribed the number of judges on the Superior Court of Los Angeles County. *Los Angeles Cty. Bar Ass'n*, 979 F.2d at 704. There, the Court found that the governor had a specific connection to the challenged statute, because the governor had the duty to appoint judges to any new positions. *Id.*

Defendants urge the Court to find that the Governor and the PDC have no responsibility for public defense in Idaho. The Court disagrees. Contrary to the alleged animal abuse issue presented in *Association des Eleveurs de Canards et d'Oies du Quebec*, the central issue in this case concerns the continuous and systematic violation of fundamental constitutional human

[25] Pls.' Response to Defs.' Mot. to Dismiss, p. 11.
[26] *Id.*

rights. Plaintiffs pose serious allegations of widespread systemic violations of constitutional rights to counsel, to effective assistance of counsel, and to fair judicial proceedings for indigent criminal defendants across the State of Idaho.

The Defendants would have the Court believe that the plain language set forth in United States Supreme Court cases mandating that it is the State's responsibility to provide counsel to indigent criminal defendants does not in fact place any responsibility on the Defendants in this case.

Under the *Ex parte Young* doctrine, the Court finds that the Governor and the PDC members have a more than sufficiently close connection or nexus to the enforcement of public defense in Idaho. The Governor has a duty to ensure that the Constitution and laws are enforced in Idaho. The Governor also has direct supervisory authority over those responsible to establish standards for a constitutionally sound public defense system. The PDC was specifically saddled with the responsibility of creating rules regarding training and education of defense attorneys and making recommendations to the legislature for improving public defense in Idaho. The fact that the legislature has delegated public defender services to individual counties does not abdicate the Defendants' responsibility to indigent criminal defendants in the State of Idaho. (Neither does it abdicate further legislative responsibility, nor excuse legislative inaction.)

Accordingly, the Court finds that the Governor and the PDC members are subject to suit under 42 U.S.C. § 1983.

B. JUSTICIABLE CONTROVERSY

In this case, Plaintiffs seek various forms of declaratory and injunctive relief. "A prerequisite to a declaratory judgment action is an actual or justiciable controversy." *Miles v. Idaho Power Co.*, 116 Idaho 635, 639, 778 P.2d 757, 761 (1989). The elements of a justiciable controversy include the following:

> A "controversy" in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. The controversy must be definite and concrete, touching the legal relations of the parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Wylie v. State, Idaho Transp. Bd., 151 Idaho 26, 31, 253 P.3d 700, 705 (2011) (citation omitted). "Justiciability is generally divided into subcategories—advisory opinions, feigned and collusive cases, standing, ripeness, mootness, political questions, and administrative questions." *Miles*, 116 Idaho at 639, 778 P.2d at 761.

In this case, the issues of standing, ripeness, and separation of powers are implicated.[27] Each issue will be discussed in turn.

[27] In *Miles v. Idaho Power Company*, the Court discussed separation of powers as an element of justiciability. *Miles*, 116 Idaho at 639, 778 P.2d at 761 (1989). Accordingly, separation of powers will be addressed as a sub-issue of the justiciability doctrine.

1) **Standing**

Plaintiffs must first establish standing to bring a case. "The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated." *Miles*, 116 Idaho at 641, 778 P.2d at 763. The major aspect of the standing inquiry has been explained as follows:

> The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." As refined by subsequent reformulation, this requirement of a "personal stake" has come to be understood to require not only a "distinct and palpable injury," to the plaintiff, but also a "fairly traceable" causal connection between the claimed injury and the challenged conduct.

Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 72, 98 S. Ct. 2620, 2630 (1978) (citations omitted). Thus, in order to have standing to bring suit, a plaintiff must have (1) suffered an injury in fact, (2) causally connected to the conduct complained of, and (3) it is likely as opposed to merely speculative that the injury will be redressed by a favorable decision. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992).

"[T]o satisfy the case or controversy requirement of standing, litigants generally must allege or demonstrate an injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury." *Miles*, 116 Idaho at 641, 778 P.2d at 763. "In some cases even though a plaintiff has shown or alleged an 'injury in fact,' standing is denied because of other factors. For example, the United States Supreme Court has held that 'when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of

citizens, that harm alone normally does not warrant exercise of jurisdiction.'" *Id.* (citation omitted).

"At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan*, 504 U.S. at 561, 112 S. Ct. at 2137 (citation omitted).

a. Injury in Fact

This is an issue of first impression in Idaho, as neither the United States Supreme Court nor the Idaho Supreme Court has addressed a Sixth Amendment right to the effective assistance of counsel claim for declaratory and prospective injunctive relief concerning claimed pre-conviction systemic injuries resulting from the representation that indigent criminal defendants are receiving from their publically appointed attorneys.

In this case, Plaintiffs' alleged injury is the violation of their right to effective assistance of counsel. As alleged, the injury is specialized and peculiar to each of the named Plaintiffs. However, Plaintiffs also allege that *all* indigent criminal defendants are suffering alike from the current public defender system in Idaho.

Here, it is important to note the procedural posture of the Plaintiffs' underlying criminal lawsuits in this matter. As of the date the lawsuit was filed, none of the Plaintiffs were convicted or

sentenced in any of their pending criminal cases. On the record presented, it is troubling to the Court that the Plaintiffs have not yet been convicted of any crime in their underlying cases, nor pursued or exhausted any appeal rights, nor any post-conviction relief. Accordingly, the Court fails to see how the Plaintiffs have suffered an injury at the time the Complaint was filed in this matter. At this point, Plaintiffs have alleged various forms of ineffective assistance of counsel; however, there is not yet any ascertainable injury – i.e. none of the Plaintiffs have either been convicted or sentenced. Accordingly, the Court finds the Plaintiffs have not properly alleged an actual injury.

b. Causal Connection

The second element of standing requires the Plaintiffs to properly allege that the injury suffered is causally connected to the conduct complained of. In other words, the injury must be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560, 112 S. Ct. at 2136.

Plaintiffs allege that the State, the Governor, and the PDC are ultimately on the hook for public defender services in Idaho. However, the legislature has currently delegated the responsibility for public defender services to individual counties, none of which are parties to this suit. The Complaint alleges, and it is commonly accepted in official pronouncements by the highest officials in all three branches of government that there are widespread systemic problems with the public defense system. Defendants concede this point. However, it is not clear (or even properly alleged) that systemic constitutional violations are occurring in every county. Plaintiffs

allege there is a problem with public defense in the entire State of Idaho, but only provides examples from a sampling of counties that are not even party to this lawsuit.

Plaintiffs challenge the inaction of the Defendants, but do not acknowledge the legislature and the county commissioners – the principal bodies with the power to affect the policy (political) and systemic changes Plaintiffs seek. The connection of the claimed injury to the Governor and the PDC are too remote to be fairly traceable. Neither has the power and authority to act alone to redress Plaintiffs' grievances. Certainly, both have moral, political, and public power to pressure the legislature or the counties to act, but neither have the ability to require it. Accordingly, there is no fairly traceable causal connection between the claimed injury and the challenged inaction.

c. Redressability

Finally, Plaintiffs must show that it is likely as opposed to merely speculative that the injury will be redressed by a favorable decision. *See Lujan*, 504 U.S. at 561, 112 S. Ct. at 2136. In order to have standing, the Court must be able to redress the problems not merely in an advisory, hypothetical or speculative way, but concretely.

Here, Plaintiffs seek relief in their individual cases as well as in all other indigent criminal cases in Idaho. However, there is no basis for the Court to award such relief where the Plaintiffs themselves have not even been convicted of a crime, nor appealed, nor sought post-conviction or other relief.

Instead, Plaintiffs invite the Court to make a variety of largely speculative assumptions: (1) that the Plaintiffs (and the class members they would represent) will in fact be convicted of a crime, (2) that the actions or inactions of the Defendants will have caused those convictions (i.e. that the actions or inactions of Defendants will have been so prejudicial that the Plaintiffs will have been denied their constitutional right to a fair trial), (3) that the trial courts in each case will be unable or unwilling to correct such results (e.g., new trial, dismissal, etc.), (4) that the Plaintiffs will be granted the relief they seek in this case, and that any such remedy would or could truly redress the problem.

The issue of ineffective assistance of counsel is frequently raised in petitions for post-conviction relief and addressed on a case-by-case basis. In every case, before or after exhausting appeal rights, every convicted criminal defendant has the right to seek judicial review of the public defense services provided. The topic has been addressed by the United States Supreme Court and by the Idaho Supreme Court on a number of occasions.

In *Strickland v. Washington*, the United States Supreme Court laid down a two-part test to analyze claims alleging ineffective assistance of counsel. Under this test, the petitioner must demonstrate (1) that counsel's performance was deficient and (2) that the petitioner was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064-65 (1984). To establish deficient performance, the applicant must prove that counsel's representation fell below an objective standard of reasonableness. *Id.*

In a post-conviction setting, a criminal defendant has the right to challenge the adequacy of his or her representation, and those cases are decided on a case-by-case basis, with the Court finding the individual facts of the case based on evidence and testimony, then applying the law to the facts, which is the traditional exercise of judicial authority.[28] *Strickland* requires proof of actual prejudice, and here, there is no showing that any prejudice has been suffered in the Plaintiffs' underlying criminal cases. Rather, the prejudice suffered by Plaintiffs is merely hypothetical at this point. Moreover, even if prejudice were actually shown, any relief by this Court would be advisory or hypothetical since the underlying criminal cases are not before this Court.

Plaintiffs do not contend that the post-conviction procedure is faulty or is systematically failing criminal defendants in Idaho. Instead, Plaintiffs ask this Court to basically intervene and supersede in every single case, and in every court and county and to then make a blanket determination that every indigent criminal defendant's rights are being violated. This is a giant step from the case-by-case analysis of ineffective assistance of counsel claims. Plaintiffs generally request sweeping relief for counties and cases where there might not be any deficiency in public defense services.

Without a doubt, the Court believes that there are serious problems with public defense in Idaho that need to be addressed. However, this Court cannot and should not usurp the duties of the PDC. Essentially, the Plaintiffs request the Court to assume control of public defense in Idaho, on the basis that a few defendants might have their rights violated. Such relief is too speculative and fundamentally violates the notion that courts are to decide specific cases and controversies before them. Accordingly, the Court finds Plaintiffs lack standing.

[28] Extended even further, there is also the Writ of Habeas Corpus remedy available.

2) **Ripeness**

Another subcategory of justiciability is ripeness, which "asks whether there is any need for court action at the present time." *Miles*, 116 Idaho at 642, 778 P.2d at 764. A case is not justiciable if it is not ripe. *Noh v. Cenarrusa*, 137 Idaho 798, 801, 53 P.3d 1217, 1220 (2002). "The traditional ripeness doctrine requires a petitioner or plaintiff to prove 1) that the case presents definite and concrete issues, 2) that a real and substantial controversy exists, and 3) that there is a present need for adjudication." *Noh*, 137 Idaho at 801, 53 P.3d at 1220. A declaratory judgment action must raise issues that are definite and concrete, and must involve a real and substantial controversy as opposed to an advisory opinion based upon hypothetical facts. *Harris v. Cassia County*, 106 Idaho 513, 516, 681 P.2d 988, 991 (1984). The purpose of the ripeness requirement is to prevent courts from entangling themselves in purely abstract disagreements. *Abbot Labs. v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515 (1967).

In this case, even with the facts in the Complaint construed as true, Plaintiffs have not made sufficient allegations to sustain a Motion to Dismiss on the first two elements of ripeness, namely, that there are definite, concrete issues and a real, substantial controversy exists. The Complaint invites the Court to make speculative assumptions regarding Plaintiffs' conclusions. For example, although an arraignment is a critical proceeding requiring counsel, there is no allegation (and the Court would find it hard to believe) that every single indigent defendant is lacking counsel in every single county and at every single arraignment. As set forth above, Plaintiffs have not even pursued any appeal or post-conviction relief in their individual cases. While it seems Plaintiffs make allegations of present violations of right to counsel, the ultimate

results in their cases have not yet been determined. Our appeals process determines whether a defendant received due process on a case-by-case basis. At this time, Plaintiffs' arguments are based on assumptions that they will be convicted and that their convictions will be due to their systemic public defense inadequacies.

This case is ultimately not ripe for adjudication. As previously set forth, none of the Plaintiffs' criminal cases have concluded, no appeals have taken place, and no post-conviction relief has been sought. In each of their individual cases, Plaintiffs can assert and litigate the claim of lack of effective assistance of counsel and lack of a fair trial. If it is decided that their constitutional rights have been violated, then those courts can order a specific remedy, for example, a new trial or dismissal of the case. Thus, the nature and extent of any real or permanent injury cannot be determined at this time. Accordingly, the Court finds the case is not ripe for adjudication.

3) Separation of Powers[29]

As much as anything, this case involves the constitutional doctrine of separation of powers. The doctrine permeated the discussion above, and will be discussed further below.

Defendants contend that only the legislature can make the changes requested by Plaintiffs, and the legislature would not be bound by any injunction entered by the district court in this case.

[29] Defendants originally contended in their Memorandum in Support of Motion to Dismiss that although the case presented a serious separation of powers issue, the issue need not be addressed because under Idaho Rules of Civil Procedure 3(b) and 65(d) the Court does not have authority to issue an injunction in this case. However, in their Reply Memorandum and at the hearing held on December 16, 2015, Defendants did not argue for dismissal on the basis of the Idaho Rules of Civil Procedure, but on the separation of powers doctrine. The Court does not find Defendants' argument for dismissal on the basis of the Rules 3(b) and 65(d) persuasive.

Defendants further assert that neither the Governor nor the PDC members have statutory or constitutional authority to tell county officers how to operate the public defense system.

Article 2, § 1 of the Idaho Constitution provides for the separation of powers among the three branches of Idaho's government. Article 3, § 1 provides that the power to pass bills is vested in the legislature. Article 3, § 15, provides that "[n]o law shall be passed except by bill[.]" "Read together, these three constitutional provisions stand for the proposition that, of Idaho's three branches of government, only the legislature has the power to make 'law.'" *Mead v. Arnell*, 117 Idaho 660, 664, 791 P.2d 410, 414 (1990).

The separation of powers doctrine asks "whether this Court, by entertaining review of a particular matter, would be substituting its judgment for that of another coordinate branch of government, when the matter was one properly entrusted to that other branch." *Miles*, 116 Idaho at 639, 778 P.2d at 761.

In *Idaho Schools for Equal Opportunity v. State*, 123 Idaho 573, 850 P.2d 724 (1993) (*ISEEO I*), the Supreme Court determined that the plaintiffs had standing to sue the defendants (including the State and the Governor) and it also rejected the State's argument that the court was invading the legislature's authority by declaring that the present level and method of funding for Idaho's public schools is unconstitutional. The Supreme Court stated:

> [W]e decline to accept the respondents' argument that the other branches of government be allowed to interpret the constitution for us. That would be an abject abdication of our role in the American system of government.

> Passing on the constitutionality of statutory enactments, even enactment with political overtones, is a fundamental responsibility of the judiciary, and has been so since *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1813).

Id. at 583, 850 P.2d at 734. There is no question that the judiciary has the power to "say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177, 2 L. Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Accordingly, a court is "not precluded from reviewing the constitutionality of a proposed course of action merely because both the executive and legislative branches happen to concur in supporting it." *Miles*, 116 Idaho at 640, 778 P.2d at 762. "Constitutional rights, as well as this Court's duty to faithfully interpret our constitution and the federal constitution, do not wane before united efforts of the legislature and the governor." *Id.*

Here, the Idaho legislature has delegated the duty to provide indigent criminal defense to the counties. *See* I.C. § 19-859. Plaintiffs ask the Court to override this system and reshape the system of indigent criminal defense in Idaho. The Court finds that it would invade the province of the legislature to do so.

Plaintiffs do not argue that the statute delegating the duty to provide public defense is unconstitutional. They simply argue that the county commissioners in some or all of the counties, and the various systems of public defense, have failed to protect their constitutional rights to counsel and a fair trial. Instead of filing suit against those counties where they believe their constitutional rights have been violated, they brought this action against the State, the Governor, and the PDC. Plaintiffs also do not argue that the statute establishing the PDC is unconstitutional. They argue, instead, that the PDC is an ineffective and inadequate response by

the legislature to redress the problem of inadequate or ineffective assistance of public defense counsel. Instead of seeking to have an act declared unconstitutional, they ask this Court to declare the inaction to be unconstitutional. Plaintiffs ask this Court to declare the whole system (or lack of system) to be unconstitutional and to then establish standards or guidelines, based on previous holdings of other courts, that the Governor, the PDC, the legislature, and all counties (whom they have not sued at this time), must follow. Plaintiffs ask this Court to mandate that the Governor and the PDC (and the legislature and counties) must enact as legislation, ordinances, or rules to meet those standards, and to provide adequate funding therefore. This Court does not have the power or jurisdiction to do so under the established principles of separation of powers imbedded in the federal and state constitutions.

To be sure, the Governor, as the "supreme executive power of the state" has the duty to ensure that the constitution and laws are enforced. Idaho Const. art. IV, § 5. The Governor also has the ability to make recommendations to the legislature concerning the public defense system in Idaho. In addition, the Governor can veto budgets that do not appropriate any funding toward improving the public defender system in Idaho. Thus, even without the "power of the purse" or the power to legislate, the Governor has a constitutional duty to ensure a constitutionally sound public defense system, to the maximum extent of his authority within the limitations of power of the office. Moreover, the PDC has direct statutory duties and responsibilities, some of which were not met more than a year ago.

Under the long-held principles of *Marbury v. Madison*, this Court has jurisdiction to pass on the constitutionality of statutory enactments, even enactments with political overtones. This is a

fundamental responsibility of the judiciary. However, it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution. Accordingly, the Court finds the case violates the separation of powers doctrine.

This case presents troubling allegations regarding problems with the public defender system in Idaho. The Court is sympathetic with Plaintiffs' plight. However, the case invites the Court to make speculative assumptions regarding the outcomes of individual cases (that are before other courts and in other counties), presume that all indigent criminal defendants in all counties are receiving the same ineffective assistance of counsel, and then issue blanket orders halting all criminal prosecutions until the issues are resolved. The Court declines to do so as such action would essentially mandate the Court legislating standards that must be met in every county and in every case. Courts can, and do, find, and redress violations of constitutional rights in individual cases. But, it is not the proper role of the Court to legislate specific standards, nor can the Court provide funding to enact those standards. Accordingly, the Court finds that this case is not a proper case or controversy for judicial action.

CONCLUSION

For all the reasons set forth herein, Defendants' Motion to Dismiss is GRANTED.

IT IS SO ORDERED this 20th day of January, 2016.

SAMUEL A. HOAGLAND
District Judge

CERTIFICATE OF MAILING

I hereby certify that on this 21 day of January, 2016, I mailed (served) a true and correct copy of the within instrument to:

Richard Eppink
American Civil Liberties Union of Idaho Foundation
P.O. Box 1897
Boise, ID 83701

Jason D. Williamson
American Civil Liberties Union Foundation
125 Broad St.
New York, NY 10004

Andrew C. Lillie
Hogan Lovells US LLP
One Tabor Center, Suite 1500
1200 Seventeenth Street
Denver, CO 80202

Kathryn M. Ali
Hogan Lovells US LLP
555 Thirteenth St. NW
Washington, DC 20004

Bret H. Ladine
Hogan Lovells US LLP
3 Embarcadero Center #1500
San Francisco, CA 94111

Jenny Q. Shen
Hogan Lovells US LLP
4085 Campbell Ave., Ste. 100
Menlo Park, CA 94025

Steven L. Olsen
Michael S. Gilmore
Shasta Kilminster-Hadley
Scott Zanzig
Civil Litigation Division
Office of the Attorney General
954 West Jefferson Street, 2nd Floor
Boise, Idaho 83702

Cally A. Younger
Counsel to the Governor
Office of the Governor
Idaho State Capitol Building
700 West Jefferson Street
Boise, Idaho 83702

Daniel J. Skinner
Cantrill, Skinner, Lewis, Casey & Sorensen, LLP
P.O. Box 359
Boise, Idaho 83701

Christopher Rich
Clerk of the District Court

By Stephanie Hardy
Deputy Court Clerk