

**IN THE SUPREME COURT OF PENNSYLVANIA**

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NO. 57 MAP 2015

NO. 58 MAP 2015

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ADAM KUREN and STEVEN ALLABAUGH,  
On behalf of themselves and all others similarly situated,

Appellants,

v.

LUZERNE COUNTY of the Commonwealth of Pennsylvania and  
ROBERT C. LAWTON, County Manager, in his official capacity,

Appellees.

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**BRIEF FOR AMICI CURIAE  
THE INNOCENCE NETWORK AND  
THE PENNSYLVANIA INNOCENCE PROJECT  
IN SUPPORT OF APPELLANTS**

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On Appeal from the October 14, 2014 Order of the Commonwealth Court at Nos.  
2072 C.D. 2013 and 2207 C.D. 2013 (consolidated), Reargument Denied,  
December 2, 2014, Affirming the October 22, 2013 Judgment of the Court of  
Common Pleas of Luzerne County, No. 04517, April Term, 2012

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## TABLE OF CONTENTS

INTEREST OF AMICI CURIAE .....	1
STATEMENT OF THE CASE.....	3
STATEMENT OF QUESTIONS PRESENTED .....	3
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	5
A. Failure To Adequately Fund Indigent Defense Counsel Deprives Defendants Of Constitutionally Effective Representation .....	5
B. <i>Strickland</i> Is Neither Intended Nor Able To Address Claims Of Systemic Ineffective Assistance Of Counsel.....	12
C. The Pennsylvania PCRA Imposes Additional Hurdles To Review Of Ineffectiveness Claims .....	15
CONCLUSION .....	19

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>FEDERAL CASES</b>	
<u>Coleman v. Alabama</u> , 399 U.S. 1 (1970) .....	14
<u>Gideon v. Wainwright</u> , 372 U.S. 335 (1963) .....	3
<u>Hamilton v. Alabama</u> , 368 U.S. 52 (1961) .....	14
<u>Herring v. New York</u> , 422 U.S. 853 (1975) .....	5
<u>Luckey, III v. Harris</u> , 860 F.2d 1012 (7th Cir. 1988) .....	13
<u>Marshall v. Rodgers</u> , 133 S.Ct. 1446 (2013) .....	11
<u>McMann v. Richardson</u> , 397 U.S. 759 (1970) .....	14
<u>Padilla v. Kentucky</u> , 559 U.S. 356 (2010) .....	14
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984) .....	4, 11, 12, 13, 14
<b>OTHER CASES</b>	
<u>Commonwealth v. Turner</u> , 80 A.3d 754, 761 (Pa. 2013) .....	16, 17, 18
<b>OTHER STATUTES</b>	
42 Pa. Cons. Stat. § 9543 .....	16

## OTHER AUTHORITIES

Liebman, J.S., Fagan, J., West, V., & Lloyd, J. (2000), <i>Capital Attrition: Error Rates In Capital Cases, 1973-1995</i> , 78 Tex. L. Rev. 1839 .....	7
Blume, John H. & Helm, Rebecca, K, <i>The Unexonerated: Factually Innocent Defendants Who Plead Guilty</i> , Cornell Faculty Working Papers (2014) .....	11
Cases, Innocence Project – Eddie Joe Lloyd, available at <a href="http://www.innocenceproject.org/cases-false-imprisonment/eddie-joe-lloyd">http://www.innocenceproject.org/cases-false-imprisonment/eddie-joe-lloyd</a> .....	8, 9
Farole, Jr., Donald J., and Langton, Lynn, <i>County-Based and Local Public Defender Offices</i> .....	9
Gershowitz, Adam, <i>Raise the Proof: A Default Rule for Indigent Defense</i> , 40 Conn. L. Rev. 85, 98 (2007) .....	7
<i>Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice</i> , American Bar Association (2004).....	7
Innocence Project, <i>Making Up for Lost time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation</i> .....	14, 16, 17, 18
Lefstein, Norman, <i>In Search of Gideon’s Promise: Lessons From England and the Need for Federal Help</i> , 55 Hastings L.J. 835, 860 (2004) .....	7
State Government Indigent Defense Expenditures, FY 2008-2012, available at <a href="http://www.bjs.gov/content/pub/pdf/sgide0812.pdf">http://www.bjs.gov/content/pub/pdf/sgide0812.pdf</a> . .....	9
Taylor, Kate, <i>System Overload: The Costs of Under-Resourcing Public Defense</i> (2011) .....	10

## **INTEREST OF AMICI CURIAE**

The Innocence Network (the “Network”) is an association of organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The 70 current members of the Network represent hundreds of prisoners with innocence claims in all 50 states and the District of Columbia, as well as Australia, Canada, France, Ireland, Italy, the Netherlands, New Zealand and Taiwan. The Network and its members are dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on lessons learned from cases in which the system convicted innocent persons, the Network advocates reforms designed to enhance the truth-seeking functions of the criminal justice system and thereby prevent wrongful convictions.

The underfunding of indigent defense precludes indigent defendants from receiving adequate representation throughout criminal proceedings, undermining the adversarial system and, ultimately, preventing indigent criminal defendants from receiving the effective assistance of counsel guaranteed by the United States and Pennsylvania Constitutions. In this case, the Network seeks to present a broad legal and factual perspective on how post-conviction proceedings, which rely on after-the-fact adjudication of individual defendants’ claims of ineffective assistance of counsel, fail to properly address the issue of systemic

ineffectiveness of counsel caused by inadequate defense funding. Only by evaluating systemic ineffectiveness claims prospectively may the Court ensure that indigent defendants receive constitutionally adequate representation.

The Pennsylvania Innocence Project is a nonprofit legal clinic and resource center founded in 2008, housed at Temple University's Beasley School of Law, and a member of the Network. Its board of directors and advisory committee include practicing lawyers, law professors, former United States Attorneys, former state court prosecutors, and the deans of the law schools of Temple University, Drexel University, the University of Pennsylvania, and Rutgers-Camden. The Project provides pro bono investigative and legal services to indigent prisoners throughout the Commonwealth of Pennsylvania whose claims of actual innocence are supported by the results of DNA testing or other, powerfully exculpatory evidence or whose claims, after a preliminary investigation, evince a substantial potential for the discovery of such evidence. In addition, the Project works to remedy the underlying causes of wrongful convictions to ensure that no one will be convicted and imprisoned for a crime they did not commit and to lessen the risk that a wrongdoer will escape justice because an innocent person was convicted in their stead. Adequate representation is the most basic necessity for ensuring the innocent are not convicted in error.

## **STATEMENT OF THE CASE**

Amici curiae adopt and incorporate the Statement of the Cases as presented by Appellants in their Brief to this Court.

## **STATEMENT OF QUESTIONS PRESENTED**

Amici curiae adopt and incorporate the Statement of Question Presented as presented by Appellants in their Brief to this Court.

## **SUMMARY OF ARGUMENT**

It is, according to the United States Supreme Court, an “obvious truth” that lawyers are “necessities, not luxuries” in our adversarial system of justice. Gideon v. Wainwright, 372 U.S. 335, 344 (1963). Yet, throughout the United States, including, according to the Amended Complaint, in Luzerne County, Pennsylvania, the fair and just functioning of our criminal defense system is undermined by the failure of local, county, and state governments to provide indigent defense funding sufficient for defense lawyers to meet even the most basic standards of effective defense counsel. That is, the indigent defense system is so poorly resourced that public defenders who rely on local, county, or state funding are unable to provide Constitutionally effective representation to indigent criminal defendants because of the lack of that funding. Thus, indigent criminal defendants proceed through the criminal process – and face each consequent harm, including excessive bail, unnecessary pre-trial incarceration, and erroneous convictions –

without the aid of the counsel promised by the United States and Pennsylvania Constitutions.

However, post-conviction proceedings are incapable of remedying the systemic deprivations of counsel occurring because of chronic inadequate funding for indigent defense. First, post-conviction review pursuant to Strickland v. Washington, 466 U.S. 668 (1984) is neither intended nor able to provide a remedy for harms suffered from inadequate representation during pre-trial and pre-conviction proceedings, such as wrongful denial of bail or unnecessary pre-trial incarceration, as Strickland focuses solely on whether ineffective assistance of counsel resulted in an unreliable conviction or erroneous sentence. Moreover, under the Pennsylvania Post Conviction Relief Act, a defendant loses the right to raise an ineffective assistance claim once released from custody, thus, wrongfully convicted defendants facing shorter sentences have no recourse whatsoever to vindicate their Constitutional right to counsel.

Second, and more fundamentally, review under Strickland is entirely retrospective and narrowly circumscribed, with the sole question before a reviewing court whether a specific defendant was wrongfully convicted due to the ineffectiveness of his attorney and the sole remedy available being a new trial for that defendant. Such review does not reach the systemic failure to provide indigent defendants as a class with effective counsel and does nothing whatsoever to ensure



indigent defendants receive adequate representation from the outset of a criminal prosecution. The prospective relief sought in the Amended Complaint is the only way to address the continued and system-wide Constitutional injuries sustained by indigent criminal defendants.

## ARGUMENT

### A. **Failure To Adequately Fund Indigent Defense Counsel Deprives Defendants Of Constitutionally Effective Representation**

The most fundamental principle of the American criminal justice system is that truth is best achieved (and innocents thereby protected) through an adversarial process – partisan advocates exploring and testing facts and evidence before a neutral arbiter – and the concomitant right to counsel is enshrined in the Sixth Amendment of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution. Indeed, the United States Supreme Court has explained that “[t]he 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.” Herring v. New York, 422 U.S. 853, 862 (1975).

However, the goal of truth in our adversarial system is thwarted by the simple fact that adequate legal representation cannot be rendered unless indigent defense systems are adequately funded. For instance, the ABA has also set forth its Ten Principles of a Public Defense Delivery System, which include: (1)

independence of the defense function; (2) a caseload management system; (3) prompt screening for and assignment to indigent defense counsel; (4) adequate time and space for counsel to meet with defendants; (5) workload controls to ensure adequate representation; (6) training and experience requirements for attorneys; (7) continuous representation throughout a defendant's case; (8) resource parity between the defense and prosecution functions; (9) continuing legal education for defense counsel; and (10) supervision and review of defense counsel's performance. (See Standing Comm. on Legal Aid & Indigent Defendants, ABA, The Ten Principles of a Public Defense Delivery System.)<sup>1</sup> But, the ability of indigent defense systems to meet these standards is dependent on state, county, and local governments providing indigent defenders proper resources. Without adequate funding, the indigent defense system is left unable to meet any of the standards set forth for adequate public defense, and is instead marked by severely excessive caseloads; inexperienced lawyers; lack of attorney

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<sup>1</sup> Appellants allege conditions at the Luzerne County Office of the Public Defender ("OPD") that would fail to meet each of these standards. According to the Amended Complaint, "[t]he OPD has an insufficient amount of clerical staff," (Am. Compl. ¶ 96), "[t]he OPD lacks appropriate scheduling software to keep track of important case deadlines and provide reminders," (Am. Compl. ¶ 97); "[t]he OPD lacks an appropriate computerized data or case management system to track cases and provide meaningful breakdowns of attorney caseloads," (Am. Compl. ¶ 98); "[m]any attorneys do not have their own desks or workspaces," (Am. Compl. § 99); the OPD is "unable to provide consistent, ongoing supervision of the attorneys," (Am. Compl. ¶ 101); "[t]he Adult Unit does not have any performance standards or guidelines for its attorneys," (Am. Compl. ¶ 102). If true, these allegations would establish that the OPD is incapable to providing representation that meets applicable professional standards.

contact with defendants; lack of investigation; and lack of zealous advocacy. See generally *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, American Bar Association (2004).

Predictably, the failure to receive adequate representation is the biggest contributing factor to erroneous convictions. See, e.g., Liebman, J.S., Fagan, J., West, V., & Lloyd, J. (2000), *Capital Attrition: Error Rates In Capital Cases, 1973-1995*, 78 Tex. L. Rev. 1839. Amicus Innocence Network members have collectively represented hundreds of innocent clients convicted of crimes they did not commit where inadequate trial counsel was a contributing factor to the wrongful conviction. For example, in 2007, DNA evidence exonerated Jimmy Rae Bromgard who, by that point, had served over fifteen years in prison for child rape. See Gershowitz, Adam, *Raise the Proof: A Default Rule for Indigent Defense*, 40 Conn. L. Rev. 85, 98 (2007). At trial, his appointed counsel had performed no investigation, made no pre-trial motions, gave no opening statement, made no attempt to exclude an equivocal eyewitness identification, presented no expert testimony, gave no closing statement and filed no appeal. Id. Bromgard's attorney failed to provide any defense whatsoever because he was performing under a flat-fee contract with the state that paid him the same amount regardless of the number of hours he worked on the case. See Lefstein, Norman, *In Search of Gideon's*

*Promise: Lessons From England and the Need for Federal Help*, 55 Hastings L.J. 835, 860 (2004).

Similarly, Eddie Joe Lloyd served 17 years in Michigan prison for murder and rape before being exonerated of both crimes through DNA evidence in 2002. Lloyd was initially charged with the offenses when, while hospitalized for his mental illness, he had written to police with “tips” for solving various outstanding murders. (See Cases, Innocence Project – Eddie Joe Lloyd, available at <http://www.innocenceproject.org/cases-false-imprisonment/eddie-joe-lloyd>.) Police interrogated Lloyd in the hospital, leading him to believe that if he confessed and allowed himself to be arrested, he would help police “smoke out” the real perpetrator. Id. Lloyd was originally represented by a court appointed attorney who received \$150.00 for pre-trial preparation and investigation and who, in turn, gave \$50 dollars to a convicted felon who conducted no investigation into Lloyd’s mental illness or coerced confession. Id. Lloyd’s counsel withdrew eight days prior to trial and replaced with a second court appointed lawyer who did not meet with prior counsel, did not question the details of the investigation, did not cross-examine the involved police officers, called no defense witnesses and gave a five minute closing statement. Id. A separate attorney appointed to file Lloyd’s direct appeal did not visit Lloyd in prison at all or raise an ineffective assistance of counsel claim. Id. Instead, after Lloyd wrote to the court saying his appellate

assistance was lacking, his appointed counsel responded that Lloyd “was guilty and should die.” Id.

Critically, though, erroneous convictions are not the lone consequence facing an inadequately represented criminal defendant. Lack of adequate funding for indigent defense programs precludes those programs from hiring a sufficient number of attorneys to meet the demand on them. Consequently, each public defender bears excessively high caseloads. While national standards recommend that public defenders handle no more than 150 felony, 400 misdemeanor, 200 juvenile, 200 mental health, or 25 appeals per year, a recent census of public defense offices conducted by the Department of Justice found that 73 percent of county-based public defenders lacked enough attorneys to meet these caseload standards, and 23 percent of responding offices had less than half of the necessary attorneys to meet caseload standards.<sup>2</sup> Farole, Jr., Donald J., and Langton, Lynn, *County-Based and Local Public Defender Offices*, 2007.<sup>3</sup> This excessive caseload has severe pretrial consequences for indigent defendants. Public defenders lack the

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<sup>2</sup> The Amended Complaint contains allegations that, if proven true, would grossly exceed nationwide standards. According to the Amended Complaint, an attorney with the OPD receives 331 new cases each year. (Am. Compl. ¶ 89.) In addition to cases carrying over from a prior year, each attorney handles, on average, 436 cases per year. (Id.)

<sup>3</sup> It’s important to note that this survey was conducted prior to the recession, which began in 2008. More recent analysis by the Department of Justice has shown that state funding for indigent defense programs has decreased since 2008. *See* State Government Indigent Defense Expenditures, FY 2008-2012, available at <http://www.bjs.gov/content/pub/pdf/sgide0812.pdf>.

time to meet with their clients or conduct timely bail hearings. See Taylor, Kate, *System Overload: The Costs of Under-Resourcing Public Defense* (2011). For example, a study conducted in Louisiana found that public defenders who represented 85 percent of the inmates in a particular parish made 31 pretrial jailhouse visits, while private attorneys who represented 15 percent of the inmates made 236 pretrial jailhouse visits during the same period. See Gershowitz, *supra*, at 94. Accordingly, indigent defendants can be subject to excessive pretrial incarceration – and the attendant social consequences, including job loss, loss of residence, and family and community destabilization – for the simple reason that their appointed attorney does not have the time to see to their release. See Farole, et al., *supra*.

Moreover, over-burdened defense attorneys are heavily incentivized to negotiate guilty pleas quickly, and without the benefit of having conducted any investigation into their clients' innocence, in order to reduce their caseloads. At the same time, indigent defendants who are receiving little to no pretrial representation are themselves motivated to plead guilty to crimes they did not commit fearing that refusing to do so could result in greater delays in reaching trial – and therefore lengthier pretrial incarceration – and harsher sentences upon conviction, which, as noted, is substantially more probable notwithstanding a defendant's innocence because of the ineffectiveness of their appointed defense

attorney during the pretrial investigatory phase and at trial. See Taylor, *supra*, at 20. Indeed, as a practical matter, plea bargaining is little more than a cost-benefit analysis for an innocent defendant – plead guilty to a lesser charge that may lead to release from prison or seek trial to prove their innocence at risk of facing maximum sentencing for a crime they did not commit. And, this practical reality is easily leveraged by prosecutors who will offer the greater incentives to plead guilty where the evidence of the defendant’s guilt – presumably lacking in the case of an innocent defendant – is weakest. See Blume, John H. & Helm, Rebecca, K, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty*, Cornell Faculty Working Papers, 17 (2014).

The Supreme Court has stated that “[i]t is beyond dispute that “[t]he Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal process,” Marshall v. Rodgers, 133 S.Ct. 1446, 1449 (2013) (quoting Iowa v. Tovar, 541 U.S. 77, 80-81 (2004)), and that the counsel to which all criminal defendants are entitled must be effective to be Constitutionally adequate, Strickland v. Washington, 466 U.S. 668, 687-88 (1984). However, it is equally beyond dispute that the indigent defense system, without additional funding, cannot meet these standards. Thus, system-wide, indigent criminal defendants are deprived of their Constitutional right to effective counsel.

B. **Strickland Is Neither Intended Nor Able To Address Claims Of Systemic Ineffective Assistance Of Counsel**

The Court in Strickland explicitly declined to set forth or endorse minimum standards for representation adequate to satisfy the Sixth Amendment. Instead, the sole question Strickland decided was considering - “the standards by which to judge a contention that the Constitution requires that a criminal judgment be overturned because of the actual ineffective assistance of counsel.” 466 U.S. at 684. The Court thus held that, in order to overturn a conviction based on the ineffective assistance of counsel, a prisoner must show (1) that the performance of his counsel was deficient, i.e., that he “made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment” and (2) that the deficient performance by his counsel prejudiced his defense, i.e., “that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Id. at 687.

The Strickland test is necessarily retrospective – evaluating a claim only after a conviction (one, but far from the only, possible consequence of ineffective assistance of counsel) has occurred – and narrowly focused on a single prisoner and his claim. Indeed, the only relief granted in a successful ineffectiveness claim under Strickland is a new trial or new sentencing for the effected prisoner. However, relegating all forms of claims of ineffectiveness to the post-conviction context ignores the myriad ways a defendant’s Sixth Amendment



rights are violated throughout a criminal prosecution. For this reason, Courts have held that Strickland is simply not an appropriate test for evaluating systemic ineffectiveness claims and for achieving prospective relief, *i.e.*, the provision of Constitutionally adequate counsel for indigent defendants. As the Seventh Circuit has stated:

This standard is inappropriate for a civil suit seeking prospective relief. The sixth amendment protects rights that do not affect the outcome of trial. Thus, deficiencies that do not meet the “ineffectiveness” standard may nonetheless violate a defendant’s rights under the sixth amendment. In the post-trial context, such errors may be deemed harmless because they did not affect the outcome of trial. Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief – whether the defendant is entitled to have his or her conviction overturned – rather than to the question of whether such a right exists and can be protected prospectively.

Luckey, III v. Harris, 860 F.2d 1012, 1017 (7th Cir. 1988).

As noted, indigent defendants suffer severe harm from the outset of a criminal prosecution due to their lack of adequate representation that review pursuant to Strickland cannot reach. For instance, post-conviction review provides no remedy for defendants who experienced prolonged pretrial detention due to defense counsel’s excessive caseload. These defendants are deprived a remedy for a Constitutional violation that results in severe and long-lasting personal and societal injuries, notwithstanding the Supreme Court’s acknowledgement of the right to effective assistance of counsel during preliminary hearings, arraignments,

and during plea negotiations. See Hamilton v. Alabama, 368 U.S. 52, 54 (1961); Coleman v. Alabama, 399 U.S. 1, 7 (1970); McMann v. Richardson, 397 U.S. 759, 774 (1970); Padilla v. Kentucky, 559 U.S. 356, 368-69 (2010).

More fundamentally, Strickland does nothing whatsoever to ensure indigent defendants receive the benefit of their Sixth Amendment right to effective counsel. For instance, a successful individual defendant raising a post-conviction ineffectiveness claim nevertheless must experience lengthy incarceration through years of court proceedings and the resulting personal damage, including, but not limited to, loss of family, residence, and employment, just to reach a point where a Court will order the appointment of competent counsel for a new trial. See, e.g., The Innocence Project, *Making Up for Lost time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, 7-11 (discussing the psychological, physical, and financial obstacles that exonerated defendants face). Finally, even if an individual defendant may ultimately overcome the injustices born from inadequate representation, the deficient indigent defense system that led to those injustices is left untouched, exposing all other indigent defendants to the same dire consequences of being denied the right to effective counsel in their criminal proceedings.

Only the prospective relief sought in the Amended Complaint can remedy the many Constitutional violations borne by indigent criminal defendants due to the inadequate funding of the indigent defense system.

C. **The Pennsylvania PCRA Imposes Additional Hurdles To Review Of Ineffectiveness Claims**

It is a fact of the criminal justice system that individuals may be held accountable for crimes they did not commit. See, e.g., the National Registry of Exoneration, Exonerations in 2014 (Jan. 27, 2015) (noting that the National Registry of Exonerations has recorded 125 exonerations in 2014). Whether an innocent person pleads guilty to a lesser offense carrying a lesser sentence to avoid the risk of conviction on greater charges or an individual is erroneously convicted of an offense carrying a shorter sentence, where those results are caused by ineffective representation, a Sixth Amendment violation has occurred. However, notwithstanding clear constitutional violations, in Pennsylvania if an erroneously convicted individual is no longer in custody by the time a post-conviction proceeding has been adjudicated, that person is barred from vindicating their rights under the Pennsylvania Post-Conviction Relief Act (“PCRA”).

To be eligible for relief under the PCRA, a defendant:

Must plead and prove by a preponderance of the evidence  
all of the following:

(1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:

(i) currently serving a sentence of imprisonment, probation or parole for the crime . . .

(2) That the conviction or sentence resulted from one or more of the following:

. . .

(ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.

42 Pa. Cons. Stat. § 9543.

In Commonwealth v. Turner, the defendant filed a PCRA petition seeking to overturn her conviction for conspiracy to deliver a controlled substance on the grounds that her trial counsel was ineffective for failing to investigate exculpatory evidence and call character witnesses. 19 Pa. D. & C. 5th 129, 130 (Phila. Ct. Comm. Pl. 2010). During the pendency of her petition, the defendant completed her probation sentence. Id. at 131. Nevertheless, arguing that her Constitutional right to counsel had been denied her, defendant sought an evidentiary hearing to determine whether her counsel was Constitutionally ineffective. Id. at 135. Arguing that defendant's PCRA petition was mooted upon defendant's completion of her probation sentence, the Commonwealth argued for dismissal of the petition. Noting that defendant "has a strong interest in

overturning her felony conviction so that she can cure her civil disabilities, clear her reputation, and restore her ability to work at jobs from which she would be disqualified by a felony conviction” the court held that strictly following the terms of the PCRA would “not comport with fundamental fairness,” noting that “[i]t is illogical to bar defendants serving short sentences from obtaining relief and confer unequal and, ironically, more substantive procedural protection to convicted defendants serving longer sentences.” *Id.* at 140. Accordingly, the court held that defendant was “entitled to relief because she has a Sixth Amendment right to effective assistance of counsel and Pennsylvania is not giving her an opportunity to be heard.” *Id.*

On the Commonwealth’s appeal, this Court reversed the PCRA court’s decision. Though noting that “[t]he Sixth and Fourteenth Amendments to the United States Constitution entitle a defendant to the effective assistance of counsel,” Commonwealth v. Turner, 80 A.3d 754, 761 (Pa. 2013), the Court held that “[because] individuals who are not serving a state sentence have no liberty interest in and therefore no due process right to collateral review of that sentence, the statutory limitation of collateral review to individuals serving a sentence of imprisonment, probation, or parole is consistent with the due process prerequisite of a protected liberty interest.” *Id.* at 766. The Court went on, “[o]f course, the legislature was free to extend a statutory right of collateral review to individuals

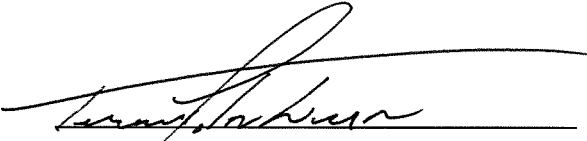
like Petitioner who had completed their sentence and, had they done so, they would be constitutionally obligated to ensure that those rights were impacted only in accord with due process. . . . However, the legislature did not do so.” Id.

Under Turner, inadequately represented innocents who, through plea or trial, are convicted of a crime they did not commit, but who have served their sentences, are procedurally precluded from vindicating their Constitutional rights. However, by asserting an absolute bar to *post-conviction* relief for such defendants, the Turner decision highlights the fundamental need for allowing *prospective* claims of systemic ineffective assistance of counsel to go forward. As the Turner case demonstrates, inadequately represented criminal defendants face dire consequences, even if those consequences do not include lengthy terms of incarceration or probation. But, regardless of the length of a defendants’ sentence, in a case involving ineffective assistance of counsel, it is still the product of a Constitutional violation. Only by permitting appellants’ claim for prospective relief to go forward can this Court ensure that indigent defendants receive constitutionally adequate representation and that no Sixth Amendment violations may evade review.

## CONCLUSION

Accordingly, for the reasons set forth above, Amici request that this Court permit Appellants' cause of action to proceed.

Respectfully Submitted,



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