

resources for the Public Defender. Plaintiff has reason to believe that this legal action will subject him to retaliatory termination by the County.

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1343(3) and (4). This Court has supplemental jurisdiction over the state tort claims pursuant to 28 U.S.C. § 1367. Declaratory relief is authorized by 28 U.S.C. § 2201 and Federal Rule of Civil Procedure 57. Injunctive relief is authorized by Federal Rule of Civil Procedure 65.

2. This Court has personal jurisdiction over the defendants, who are located in the Middle District of Pennsylvania.

3. Venue is proper in the Middle District of Pennsylvania pursuant to 28 U.S.C. § 1391(a) in that the defendants are subject to personal jurisdiction within the Middle District of Pennsylvania and the events that give rise to this action occurred within the Middle District of Pennsylvania.

PARTIES

4. Plaintiff Al Flora, Jr. has been the Chief Public Defender in the Office of the Public Defender (“OPD”) of Luzerne County, Pennsylvania since May 2010. As Chief Public Defender, Plaintiff Flora is responsible for managing the OPD, which includes overseeing its lawyers and employees, establishing its policies,

managing its budget, and ensuring its compliance with constitutional, statutory, and professional/ethical guidelines.

5. Defendant Luzerne County is a county of the Third Class located in northeastern Pennsylvania. Effective January 2, 2012, the County transitioned to Home Rule under the governance of the present Council. Prior to January 2012, the County had an elected Board of County Commissioners (“the Commissioners”).

6. Defendant Robert C. Lawton is the County Manager of Luzerne County, Pennsylvania. The County Manager maintains an office at 200 North River Street, Wilkes-Barre, PA 18711. Defendant Lawton assumed this position on February 29, 2012. He is sued in his official capacity. At all times hereinafter mentioned, these defendants were acting within the scope of their official duties and under color of state law.

FACTUAL BACKGROUND

7. The Pennsylvania Public Defender Act (“Act”) requires each County to appoint a public defender, who is directed to provide legal representation to, *inter alia*, indigent criminal defendants, juveniles charged with delinquency and people subject to involuntary commitment. 16 P.S. §§ 9960.3, 9960.6.

8. The right to counsel anchors our criminal justice system: “Without counsel, the right to a trial itself would be ‘of little avail’. . . . ‘Of all the rights that

an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.” *United States v. Cronin*, 466 U.S. 648, 653-54 (1984) (citing *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

9. Plaintiff Flora is the Chief Public Defender in Luzerne County, Pennsylvania. He has been with the OPD as an attorney since 1980. He became the First Assistant Public Defender in 1990 and the acting Chief Public Defender in March 2010. In May 2010, he was appointed the Chief Public Defender by the Luzerne County Board of Commissioners.

10. The OPD is divided into two units: the Adult Unit and the Juvenile Unit. Plaintiff Flora oversees both units.

11. The OPD is charged with providing representation to indigent criminal defendants in seventeen magisterial districts, the Luzerne County Court of Common Pleas, and the state appellate courts (as needed). The OPD is also responsible for providing representation in state parole, county probation/parole revocation, juvenile delinquency, and mental health civil commitment proceedings.

Plaintiff Flora's Efforts to Improve the OPD

12. When Plaintiff Flora became Chief Public Defender in May 2010, the OPD was already plagued with problems due to years of insufficient funding. Plaintiff Flora's predecessor, Basil Russin, had tried in vain since 2007 to secure

additional funding for the OPD from the County. From 2007 to 2010, Mr. Russin submitted weekly reports to the Luzerne County Board of Commissioners detailing the excessive OPD caseloads and staffing deficiencies, which stemmed from insufficient funding. The reports also discussed the County's failure to fill vacancies in a timely fashion.

13. Plaintiff Flora's highest priority when he became Chief Public Defender was improving juvenile representation in the wake of the so-called "kids for cash" scandal, in which two judges of the Luzerne County Court of Common Pleas were convicted or pled guilty to charges that they improperly accepted money from two private, for-profit juvenile detention facilities.

14. State records reveal that between 2003 and 2008, the time period during which the "kids for cash" scandal occurred, approximately 50 percent of juveniles appeared in Luzerne County Juvenile Court without the benefit of counsel—nearly ten times the state average. Virtually all of the unrepresented juveniles were adjudicated delinquent. According to the December 2011 report by Joint State Government Commission's Task Force and Advisory Committee on Services to Indigent Criminal Defendants, the OPD was unable to provide effective representation to juveniles during this time because of inadequate resources.

15. As part of his efforts to improve the quality of juvenile representation, Plaintiff Flora was able to obtain grant funding from the Pennsylvania Commission

on Crime and Delinquency and the Luzerne-Wyoming Counties Mental Health/Mental Retardation Program. These grants allowed Plaintiff Flora to create a separate Juvenile Unit by hiring one attorney, two social workers, one secretary, and one investigator to exclusively handle juvenile cases.

16. Even with this grant funding, Plaintiff Flora was forced also to transfer a senior attorney from the Adult Unit to meet the staffing needs in the Juvenile Unit. Defendants have refused to authorize Plaintiff Flora to replace this attorney in the Adult Unit, despite the fact that funding for the position exists in the current budget.

17. With a full complement of staff in the Juvenile Unit, Plaintiff Flora has been able to implement a comprehensive process for handling juvenile cases and determining juvenile eligibility for OPD representation. The Juvenile Unit is now a model unit that has earned accolades from across the state and has been recognized by the Pennsylvania Commission on Crime and Delinquency as a “Model” Juvenile Defender Unit for the state. The senior attorney in the Juvenile Unit is a member of the Board of Directors of the Juvenile Defenders Association of Pennsylvania (“JDAP”). The Juvenile Unit adheres to JDAP’s Performance Guidelines for Quality and Effective Juvenile Delinquency Representation. With the resources provided by outside grant funding and the County, the OPD has been able to intervene in juvenile cases at an early stage, thereby diverting these cases

from court and preserving the resources of the Juvenile Unit, the County, and the judiciary.

18. Despite the success of the Juvenile Unit, the County has refused to provide Plaintiff Flora with the resources necessary to make similar and badly needed improvements to the Adult Unit.

19. In June 2010, Plaintiff Flora provided Defendant County and its Commissioners with a report describing the significant resource shortfall at the OPD and its consequent inability to provide the representation required by the Public Defender Act and the U.S. and Pennsylvania Constitutions. The OPD's listed deficiencies included:

- a. Caseloads for OPD attorneys that far exceed national maximum caseload standards;
- b. An insufficient number of clerical staff;
- c. The County's failure to fill staff vacancies;
- d. The lack of any appellate counsel, resulting in staff lawyers, many of whom are not versed or trained in appellate practice, doing their own appeals;
- e. Physical facilities that are undersized, overcrowded, poorly maintained and not suitable for client conferences or maintaining client confidentiality; and
- f. Severely inadequate information technology.

20. At the conclusion of his report, Plaintiff Flora stated, "[a]bsent appropriate staff increases, the Office will begin declining applications for

representation within 60 days.” Plaintiff Flora’s June 2010 report is attached to this Complaint as Exhibit A.

21. Plaintiff Flora discussed his June 2010 report at a meeting with the County Commissioners soon thereafter. The Commissioners were unhappy with Mr. Flora’s report, several of them calling it “demeaning.”

22. In July 2010, at the request of the Commissioners, Plaintiff Flora provided Defendant County and its Commissioners with a short-term plan to correct the OPD’s staffing deficiencies and the resulting problems. Recommendations included the creation of a Juvenile Unit, hiring appellate and additional trial attorneys, and active caseload monitoring. Plaintiff Flora’s July 2010 plan is attached to this Complaint as Exhibit B.

23. In his 2011 budget proposal, Plaintiff Flora recommended hiring two attorneys to handle appeals because the trial attorneys, who had (and still have) little to no appellate experience, were responsible for their own appeals. He also requested an additional investigator and a secretary “to help alleviate staffing/caseload problems and provide better ratio of lawyers to support staff to insure effective assistance of counsel.” The County denied his requests.

24. Plaintiff Flora’s 2012 budget again requested two appellate lawyers, along with two secretaries, to start rectifying the severe staffing shortage in the Office.

Currently office has no appellate lawyers creating significant ethical issues for supervisory counsel. Two appellate lawyers would bring office into compliance with ABA standards on Public Defense Delivery Systems as relating to appeals. Office still understaffed on adult side re: trial lawyers and does not meet ABA standards. Two additional secretaries seriously needed on adult side given large volume of cases. Currently, office has 4 clerk steno's on adult side with each steno handling over 1,000 cases per year. Adequate support staff essential to allow counsel to [sic] perform duties effectively.

Defendants once more denied Plaintiff Flora's requests. .

25. Because of Defendants' refusal to provide minimum funding and resources to the OPD, Plaintiff Flora was forced to take action to limit caseloads in order to provide constitutionally adequate criminal defense to at least some indigent defendants in Luzerne County.

The Public Defender's Office Has Been Forced To Decline Cases In Order To Comply With Ethical Rules And Professional Standards

26. On December 12, 2011, Plaintiff Flora sent a letter to the President Judge of the Luzerne County Court of Common Pleas stating that he would begin declining certain cases on December 19, 2011, because of a lack of OPD resources.

27. Beginning on December 19th, the OPD started declining cases, advising defendants in writing that although they were eligible for counsel, the OPD could not accommodate their request due to a lack of resources. The OPD currently approves new applications for representation only from indigent adult defendants with homicide or felony sex offense charges, or individuals who are

incarcerated or subject to extradition. The OPD also continues to provide representation to individuals in mental health, state parole, county probation/parole revocation, and juvenile cases. The OPD has continued representation in all cases that the OPD was handling before December 19, 2011.

28. To date, the Office has declined representation to over three hundred (300) eligible criminal defendants.

29. To date, conflict counsel have not been appointed to represent defendants whom the OPD has declined to represent as a result of the December 19, 2011 policy. Upon information and belief, the Court of Common Pleas does not have sufficient resources to provide conflict counsel for so many defendants.

30. Plaintiff Flora's policy to limit new cases to address excessive workloads is necessary in light of the ethical and constitutional rules under which Plaintiff Flora and the OPD operate. His policy is required by the Pennsylvania Rules of Professional Conduct and the ethical guidance provided to public defenders by the American Bar Association and the National Legal Aid and Defender Association.¹

31. Pennsylvania Rule of Professional Conduct 1.1 states that "[a] lawyer shall provide competent representation to a client. Competent representation

¹ The American Bar Association's *Ten Principles of a Public Defense Delivery System* is attached to this Complaint as Exhibit C. The NLADA Guidelines are attached to this Complaint as Exhibit D.

requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Plaintiff Flora’s policy is necessary to ensure that OPD attorneys’ caseloads are not so overwhelming that they preclude the attorneys from providing clients with representation involving sufficient preparation and thoroughness to satisfy the requirements of Rule 1.1.

32. Pennsylvania Rule of Professional Conduct 5.1 states that “[a] lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.” Plaintiff Flora’s policy is necessary to ensure that the OPD attorneys over whom Plaintiff Flora has supervisory authority comply with Rule 1.1.

33. American Bar Association Ethics Opinion 06-441² states that the Rules of Professional Conduct relating to competency “provide no exception for lawyers who represent indigent persons charged with crimes.” American Bar Association Ethics Opinion 06-441 also provides that “[a] lawyer’s primary ethical duty is owed to existing clients. Therefore, a lawyer must decline to accept new cases, rather than withdraw from existing cases, if the acceptance of a new case will result in her workload becoming excessive.”

34. American Bar Association Ethics Opinion 06-441 further states that “[i]f any subordinate lawyer’s workload is found to be excessive, the supervisor

² The American Bar Association’s Ethics Opinion 06-441 is attached hereto as Exhibit E.

should take whatever additional steps are necessary to ensure that the subordinate lawyer is able to meet her ethical obligations in regard to the representation of her clients.”

35. On February 28, 2012, Plaintiff Flora sent a letter to the President Judge of the Luzerne County Court of Common Pleas requesting “the court’s immediate assistance . . . to assign outside or conflict counsel to provide representation in [mental health] cases.” The part-time attorney who handled mental health cases resigned on February 20, 2012, and another attorney, largely untrained in mental health law, has been temporarily assigned to these cases. This is one of the four funded vacancies that Plaintiff Flora is seeking to fill.

36. On March 16, 2012, one of the OPD’s part-time attorneys advised Plaintiff Flora that he would no longer accept cases that had been reassigned due to current or upcoming vacancies. The attorney stated that he could not provide ethical representation to indigent defendants if he added more cases to his already heavy workload. Even with the December 19, 2011, policy in effect for three months, this part-time attorney had approximately 115 open cases as of March 16, 2012.

The County Has Further Decreased Funding For The Public Defender’s
Office Since That Office Began Declining Cases

37. In January 2012, Luzerne County reopened its budget pursuant to its transition to Home Rule. The Interim County Manager gave all county offices a

bottom-line figure within which to allocate their funding. The OPD was given \$2.36 million, a nearly twelve percent (12%) *decrease* from its \$2.68 million 2011 budget. The loss in funds would have required the OPD to cut four positions, jeopardizing the adequate staffing in the Juvenile Unit as some of its employees would have had to be shifted to the Adult Unit.

38. After the Council approved a two-percent tax increase, Plaintiff Flora was able rearrange his new allotment of \$2.5 million (a 6.7% decrease from 2011) to maintain current staffing levels. Preserving existing positions in the OPD required Plaintiff Flora to reduce his expert witness budget from \$100,000 to \$72,000. (The OPD spent approximately \$170,000 on expert witnesses in 2011.) This budget reduction will have a substantial impact on the OPD's ability to retain experts in capital and juvenile cases, both of which frequently require expert testimony. The OPD will likely have to petition the Court to direct the County to pay expert fees once the OPD has exceeded its budget for this expense.

39. Plaintiff Flora submitted his new budget under protest, declaring

Current staffing levels and existing caseloads, prevent this office from providing level of representation required by ethical standards and by Federal and State Constitutions. As such, office is ethically required to withdraw from existing cases or refuse new cases. Letter of January 3, 2012 from American Council of Chief Defenders to County Council supports position. Budget submitted in protest for reasons as already stated in previous memos and reports to County and Court. Cannot reduce staffing any further.

40. In February 2012, the Interim Manager permitted Plaintiff Flora to advertise the three funded attorney vacancies in the Adult Unit.³ As the County had instituted a hiring freeze in February 2012, the Interim Manager did not allow Plaintiff Flora to fill these vacancies.

41. Defendant Lawton, the new County Manager, has also not permitted Plaintiff Flora to fill these vacancies.

Current State of the Luzerne County Public Defender's Office

42. National standards and Rules of Professional Responsibility define proper legal representation to indigent criminal defendants at all critical stages of the proceedings against them as requiring, among other things, that defense counsel: (a) have adequate knowledge of the relevant areas of the law; (b) be assigned to their clients as early in the criminal, delinquency, or mental health proceeding as possible; (c) be present at every critical stage of their clients' proceedings; (d) conduct reasonable factual and legal pre-trial investigations into the charges against their clients, pursue available formal and informal discovery procedures, and use appropriate and necessary experts; (e) consult with their clients to elicit relevant information about the case, to inform clients of their rights,

³ There are currently four funded vacancies due to the March 27, 2012 resignation of a full-time attorney in the Adult Unit.

and to enable clients to make informed decisions about the direction of their cases;
and (f) perform their work with reasonable diligence and promptness.

43. The NLADA Performance Guidelines require criminal defense attorneys, in part:

- a. To have “sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. . . . [and] to keep the client informed of the progress of the case” Guideline 1.3.
- b. To engage in an initial interview with their clients. During this interview, the attorney is expected to “be familiar with the elements of the offense and the potential punishment, where the charges against the client are already known” and to have obtained all available relevant documents. Guideline 2.2.
- c. To appear at the arraignment. Guideline 3.1.
- d. To be familiar with the facts of the case prior to appearing at the preliminary hearing. Guideline 3.2.
- e. To promptly conduct an independent investigation of the facts of the case, including interviewing witnesses and retaining experts, when necessary. Guideline 4.1.
- f. To pursue formal and informal discovery as soon as practicable. Guideline 4.2.
- g. To file a variety of pretrial motions, when appropriate. Guidelines 5.1-5.3.
- h. To engage in comprehensive trial preparation. Guideline 7.1.

44. OPD attorneys are currently unable to meet the NLADA Performance Guidelines due to the excessive workloads they face. Indeed, the December 2011 report of the Joint State Government Commission’s Task Force and Advisory

Committee on Services to Indigent Criminal Defendants indicated that the OPD is operating under excessive workloads and would require an additional 8.5 full-time attorneys to meet nationally recognized standards.⁴ This number does not include the four current, budgeted vacancies that Plaintiff Flora has not been authorized to fill.

45. Because Defendants have refused to provide the necessary funding and resources, the OPD cannot provide representation that satisfies the above standards and therefore cannot provide legal representation to indigent criminal defendants at all critical stages of the proceedings against them in accordance with its constitutional, statutory, and professional obligations. In particular:

- a. OPD lawyers are frequently unable to interview or meet with their clients prior to a preliminary hearing and have no contact whatsoever with their clients between court appearances;
- b. OPD lawyers are often able to conduct no discovery or only minimal discovery;
- c. OPD lawyers are often able to engage in no motion practice or only minimal motion practice;
- d. OPD lawyers are unable to muster adequate information to engage in effective plea negotiations;
- e. OPD lawyers are able to engage in only minimal trial preparation; and

⁴ A Constitutional Default: Services To Indigent Criminal Defendants In Pennsylvania, Report Of The Task Force And Advisory Committee On Services To Indigent Criminal Defendants December 2011, is attached hereto as Exhibit F.

- f. OPD lawyers are required to conduct their own appeals despite lacking adequate training and resources to do so effectively, resulting in missed deadlines and dismissed appeals.

These deficiencies have only gotten worse as the OPD's resources have been reduced by defendants. And, of course, since the OPD has begun declining new cases, there are hundreds of indigent defendants who have no representation at all in their ongoing criminal cases.

Plaintiff Flora's Threats to Sue and The County's Threat to Retaliate

46. In December 2011, Mr. Flora spoke to local newspaper reporters about his decision to decline new cases while the OPD's resources precluded adequate representation of new clients. He stated, among other things, that he would consider suing the County if there were no other way to obtain adequate funding for the OPD. Those comments were reported on December 20, 2011 in a local newspaper, the Times Leader..

47. A few weeks later, on January 8, 2012, Mr. Flora's willingness to sue the County, if necessary, to obtain adequate funding for the office was again reported by the Times Leader.

48. Mr. Flora's comments did not go unnoticed. At a meeting about the proposed budget revision in late January 2012, the County's Interim Manager, Thomas Pribula, in discussing the proposed cuts to all court offices, stated that he believed that Plaintiff Flora would sue the County because the County would not

augment the OPD's budget. He went on to note that the Public Defender is selected by the County Manager with County Council confirmation, and that they could replace Mr. Flora if there was a "lack of cooperation."⁵ Those remarks were reported in the Times Leader on January 27, 2012.

49. Since learning of Mr. Pribula's "lack of cooperation" comment, Mr. Flora has refrained from making public comments regarding his concerns about the OPD's insufficient funding. Prior to Mr. Pribula's statement, Mr. Flora would advocate for the OPD without hesitation at public meetings and in the media, explaining how the County's failure to adequately fund the OPD was compromising the rights of indigent defendants. He is now concerned that such comments would cost him his job. Mr. Flora currently does not speak at public meetings and only provides cautiously worded statements to the media that do not contain his professional opinions about OPD operations.

50. Plaintiff Flora is even more concerned that his lawsuit against the County, seeking greater funding for the OPD, will precipitate his removal from office.

51. The threatened retaliation for speech and for Plaintiff Flora's efforts to fulfill his constitutional, statutory and professional responsibilities creates a

⁵ At the same meeting, Council member Edward Brominski, who had voted for the more austere amended budget with no tax increase, said, "The DA, courts and public defender – they don't intimidate me."

profound chill on expression by Plaintiff Flora and others within the OPD, sending a message that “lack of cooperation” with the County’s budget choices – however they affect the constitutional rights of criminal defendants – will be punished, thereby creating irreparable harm.

52. Moreover, if Plaintiff Flora is removed from office, he no longer will have standing to pursue relief for the OPD and its clients, thus silencing the most powerful voice for the rights of Luzerne County criminal defendants. There is no legal remedy available to obviate this chill on free speech, a matter that has a substantial impact on the public’s interest in having a Public Defender that is independent and willing to advocate for the OPD’s clients. Expeditious injunctive relief, under the circumstances of this case, is both necessary and appropriate.

CLAIMS

53. The threatened termination of Plaintiff Flora would violate his rights under the First and Fourteenth Amendments to the United States Constitution as made actionable against such defendants pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983. Similarly, the threatened termination of Plaintiff Flora would constitute Wrongful Discharge under Pennsylvania’s tort law.

54. Plaintiff Flora is entitled to declaratory and injunctive relief to prevent irreparable harm – the loss of his First Amendment rights – and to protect the public’s interest in knowing the facts about the OPD.

REQUESTED RELIEF

On the basis of the foregoing, Plaintiff Al Flora, Jr. requests the following:

- (a) The issuance of a temporary restraining order to prevent his removal from the position of Chief Public Defender for Luzerne County;
- (b) The issuance of preliminary and permanent injunctions;
- (c) an order awarding the Plaintiff the costs incurred in this litigation, including attorney's fees pursuant to 42 U.S.C. § 1988; and
- (d) such other relief as the Court deems just and proper.

Respectfully submitted,

/s/ Mary Catherine Roper
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VERIFICATION

I swear on penalty of perjury that the statements of fact made in the foregoing Verified Complaint are true and correct to the best of my knowledge.


Al Flora, Plaintiff

4/9/12
Date