STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

CHRISTOPHER LEE DUNCAN, BILLY JOE BURR, Jr., STEVEN CONNOR, ANTONIO TAYLOR, JOSE DAVILA, JENNIFER O'SULLIVAN, CHRISTOPHER MANIES, and BRIAN SECREST, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

STATE OF MICHIGAN and JENNIFER M. GRANHOLM, Governor of the State of Michigan, sued in her official capacity,

Defendants. /

Case No.

Hon.

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COMPLAINT

There is no other pending or resolved civil action arising out of the same transaction or occurrence as alleged in this Complaint.

Introduction

1. This is a civil rights class action brought pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 17 and 20 of the Michigan Constitution, on behalf of all indigent adults who have been charged or will be charged with felonies in the District and Circuit Courts of Berrien, Genesee, and Muskegon Counties[1] and who rely or will rely on the State to provide them with counsel for their defense. Plaintiffs seek declaratory and injunctive relief against Defendants the State of Michigan and Jennifer M. Granholm, Governor of the State of Michigan, to prevent violations of Plaintiffs' legal rights and to remedy Defendants' continuing failure to ensure that Plaintiffs receive constitutionally adequate legal representation.

2. The Sixth Amendment to the United States Constitution guarantees that in all criminal prosecutions the accused shall have "the Assistance of Counsel for his defense." In the landmark case of *Gideon v Wainwright*, 372 US 335 (1963), the Supreme Court established that the Sixth and Fourteenth Amendments require states to provide counsel for all those who have been charged with criminal wrongdoing by the state and are unable to afford private counsel. The Michigan Constitution similarly guarantees each criminal defendant the right to "have the assistance of counsel for his or her defense." Const 1963, art 1, § 20.

3. The right to assistance of counsel is the right to *effective* assistance of *competent* counsel. As the United States Supreme Court has repeatedly made clear, "inadequate assistance does not satisfy the Sixth Amendment right to counsel made applicable to the States through the

[1] Berrien County encompasses the Second Circuit and Fifth District Courts, Genesee County encompasses the Seventh Circuit and Sixty-Seventh and Sixty-Eight District Courts, and Muskegon County encompasses the Fourteenth Circuit and Sixtieth District Courts. The three Counties and the Courts that operate within them are collectively referred to in this Complaint as the "Counties".

Fourteenth Amendment." *Cuyler v Sullivan*, 446 US 335, 344 (1980); see also *McMann v Richardson*, 397 US 759 (1970). Constitutionally adequate counsel is counsel that is capable of putting the prosecution's case to the crucible of meaningful adversarial testing. *United States v Cronic*, 466 US 648, 656 (1984). Where, as is the case in Michigan, defense counsel for indigent persons do not have the tools to engage actively and meaningfully in the adversarial process, courts cannot ensure that their decisions, judgments, and punishments are rendered fairly and accurately.

4. This constitutional obligation to provide indigent defendants with adequate counsel rests with the State. *Gideon v Wainwright*, 372 US 335 (1963). Michigan has abdicated its obligation under the United States and Michigan Constitutions by continuing a centuries-old practice of delegating to each of Michigan's 83 counties the responsibility for funding and administering trial-level indigent defense services within their borders, with little or no funding or fiscal or administrative oversight from the State.

5. Defendants do nothing to ensure that any county has the funding or the policies, programs, guidelines, and other essential resources in place to enable the attorneys it hires to provide constitutionally adequate legal representation. Without any oversight from Defendants, most county indigent defense services are seriously under-funded, poorly administered, and do not ensure that indigent defense providers have the tools necessary to do their jobs.

6. The indigent defense services in Berrien, Muskegon and Genesee Counties have the following deficiencies, among others:

a. No written client eligibility standards;

b. No merit-based attorney hiring and retention programs;

c. No written attorney performance standards or meaningful systems of attorney supervision and monitoring;

d. No guidelines on how to identify conflicts of interest;

e. No attorney workload standards;

f. No adequate attorney training; and

g. No independence from the judiciary or the prosecutorial function.

7. As a result of these deficiencies, many indigent defense providers in Berrien, Muskegon and Genesee Counties have too many cases; have insufficient support staff; have either no or insufficient resources to hire outside investigators and experts; and lack the skills and experience to handle the cases assigned to them.

8. The absence of manageable caseloads, necessary support, appropriate training, supervision and monitoring, and written standards and guidelines creates severe obstacles to the ability of indigent defense counsel to put the prosecution's case to the crucible of meaningful adversarial testing. As a result of these systemic deficiencies, indigent defense counsel do not meet with clients prior to critical stages in their criminal proceedings; investigate adequately the charges against their clients or hire investigators who can assist with case preparation and testify at trial; file necessary pre-trial motions; prepare properly for court appearances; provide meaningful representation at sentencings; or employ and consult with experts when necessary. In addition, the systemic deficiencies provide no method for ensuring that attorneys are representing clients free from conflicts of interest.

9. The inability of indigent defense counsel to put the case against their clients to the crucible of meaningful adversarial testing causes members of the Plaintiff Class to suffer numerous harms, including but not limited to:

a. Wrongful denial of representation;

b. Wrongful conviction of crimes;

c. Unnecessary or prolonged pre-trial detention;

d. Guilty pleas to inappropriate charges and denial of the right to trial when meritorious defenses are available; and

e. Harsher sentences than the facts of the case warrant and few alternatives to incarceration.

10. Defendants' failure to take any steps to ensure that the indigent defense services in the Counties are adequately funded and administered, and that as a result, indigent defense providers have the resources and tools necessary to do their jobs, is an abdication of Defendants' constitutional obligations, and the result is the denial of constitutionally adequate defense to indigent criminal defendants.

11. This Complaint focuses on how the Defendants' failures to provide funding and fiscal and administrative oversight have created a broken indigent defense system in Berrien, Genesee, and Muskegon Counties; but the failings in those counties, and the types of harms suffered by these Plaintiffs, are by no means limited or unique to the three Counties. Defendants' failure to provide funding or oversight to any of the State's counties have caused similar problems throughout the State.

12. Pursuant to 42 USC 1983; the Sixth and Fourteenth Amendments to the United States Constitution; Article 1, §§ 17 and 20 of the Michigan Constitution; and MCR 2.605 and 3.310, Plaintiffs seek declaratory and injunctive relief to remedy the present and future constitutional deficiencies in indigent defense services provided to adults charged with felonies at the trial court level in Berrien, Genesee, and Muskegon Counties.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction over this action for declaratory and injunctive relief pursuant to MCL 600.605, MCR 2.605, and MCR 3.310.

14. This court has personal jurisdiction over Defendants because Defendant Granholm is a public official of the State of Michigan who is sued in her official capacity in order to enforce the performance of her official duties, MCR 2.201, and the State has consented to be sued for violations of its own Constitution.

15. Venue is proper in this Court because some of the wrongs giving rise to this action occurred in Ingham County and each Defendant is located in Ingham County.

PARTIES

A. Plaintiffs

1. Christopher Lee Duncan (Berrien County)

16. Plaintiff CHRISTOPHER LEE DUNCAN is and at all times pertinent herein has been a resident of Benton Harbor, Michigan. Mr. Duncan has a pending criminal case in the Second Circuit Court in Berrien County. Mr. Duncan is represented by an attorney who has contracted with Berrien County to provide indigent defense services in that county.

17. Mr. Duncan was arrested on January 10, 2007, and charged with breaking and entering with intent to commit larceny, a felony. The maximum sentence he faces is 10 years in prison. Mr. Duncan met his indigent defense counsel for the first time on January 19, 2007, the date scheduled for his preliminary examination. Mr. Duncan spoke with his attorney for less than five minutes in a holding cell below the courtroom, in the full hearing of numerous other inmates.

18. At that meeting, Mr. Duncan's attorney advised him to waive his preliminary examination and plead guilty as charged, having entered into plea negotiations without first discussing with his client whether his client wished him to pursue a plea.

19. Mr. Duncan is illiterate, and was neither provided with a copy of the police report nor informed of the contents of that report. Mr. Duncan's lawyer did not discuss with Mr. Duncan the police report, the accuracy or the charge against Mr. Duncan or possible defenses to that charge. Had he done so, the attorney may have recognized that Mr. Duncan had a valid defense that required investigation.

20. Without any further meaningful conversations with his attorney and without fully understanding the nature of his plea agreement, Mr. Duncan waived his preliminary examination and pleaded guilty to the charged offense of breaking and entering with intent, which is a more serious charge than the facts of his case warranted. At the hearing, Mr. Duncan's attorney urged Mr. Duncan to admit to facts that Mr. Duncan at first refused to plead to, in order to support the plea of guilty that the attorney recommended.

21. Mr. Duncan's sentencing is scheduled for March 12, 2007. Mr. Duncan's attorney has yet to prepare Mr. Duncan for the sentencing hearing or to discuss with Mr. Duncan strategies to minimize his sentence.

22. Mr. Duncan has not been provided with the legal representation to which he is constitutionally entitled, insofar as he had no opportunity to discuss with his attorney the factual basis for the charge against him before pleading guilty, to participate in building a defense to that charge, to make an informed decision about whether to plead guilty to the charge, and to discuss with his lawyer mitigating factors that could reduce his sentence. On information and belief, Mr. Duncan's attorney will fail to prepare for Mr. Duncan's sentencing and will fail to advocate meaningfully for a reduced sentence for Mr. Duncan.

2. Billy Joe Burr, Jr. (Berrien County)

23. Plaintiff BILLY JOE BURR, JR. is and at all times pertinent herein has been a resident of Niles, Michigan. Mr. Burr has a pending criminal case in the Second Circuit Court in Berrien County and is incarcerated at the Berrien County Jail. Mr. Burr is represented by an attorney who has contracted with Berrien County to provide indigent defense services in that county.

24. Mr. Burr was arrested on January 15, 2007, and charged with unlawfully driving away in an automobile, a felony. Mr. Burr was charged as a second habitual offender, and the maximum sentence Mr. Burr faced for this charge was 3 years in prison. Mr. Burr met his indigent defense counsel for the first time at his pre-examination conference. Mr. Burr spoke with his attorney for approximately five minutes.

25. At that meeting, Mr. Burr's attorney presented him with a plea offer, having entered into plea negotiations without first discussing with his client whether his client wished him to pursue a plea. That plea offer required Mr. Burr to plead guilty as charged, despite the fact that the attorney had not conducted any investigation into the charge against Mr. Burr and had not discussed with Mr. Burr the accuracy of the charge or possible defenses to that charge. Had he done either, or held the preliminary examination, the attorney may have recognized that Mr. Burr had a valid defense that required investigation. Mr. Burr's attorney terminated the meeting when Mr. Burr refused to plead guilty to a felony.

26. On January 23, 2007, the date scheduled for Mr. Burr's preliminary examination, Mr. Burr's attorney again presented Mr. Burr with the same plea offer. Only on Mr. Burr's insistence did his attorney speak with the prosecutor, who then offered to reduce the charge. Mr.

Burr then waived his preliminary examination and pleaded guilty to unlawful use of an automobile, a two-year misdemeanor.

27. Mr. Burr's sentencing is scheduled for March 5, 2007. Mr. Burr's attorney has yet to prepare Mr. Burr for the sentencing hearing or to discuss with Mr. Burr strategies to minimize his sentence.

28. As a result of Defendants' failures, Mr. Burr's attorney is unable to put the prosecution's case to the crucible of meaningful adversarial testing. Mr. Burr had no opportunity to discuss with his attorney the factual basis for the charge against him, to participate in building a defense to that charge, to make an informed decision about whether to plead guilty to the charge, and to discuss with his lawyer mitigating factors that could reduce his sentence. On information and belief, Mr. Burr's attorney will fail to prepare for Mr. Burr's sentencing and will fail to advocate meaningfully for a reduced sentence for Mr. Burr.

3. Steven Connor (Berrien County)

29. Plaintiff STEVEN CONNOR is and at all times pertinent herein has been a resident of Benton Harbor, Michigan. Mr. Connor has a pending criminal case in the Second Circuit Court in Berrien County and is incarcerated at the Berrien County Jail. Mr. Connor is represented by an attorney who has contracted with Berrien County to provide indigent defense services in that county.

30. Mr. Connor was arrested on January 20, 2007, and charged with manufacturing methamphetamines and manufacturing methamphetamines within 500 feet of a residence, felonies which subject him to a potential maximum sentence of 20 years in prison.

31. Mr. Connor's arrest occurred after police officers entered his hotel room. Upon entry, the officers conducted a warrantless search of the hotel room, discovering drug paraphernalia that was not in plain view.

32. Mr. Connor met his indigent defense counsel for the first time at his pre-examination conference. Mr. Connor spoke with his attorney in a holding cell below the courtroom, in the full hearing of numerous other inmates, including one of Mr. Connor's co-defendants. Mr. Connor was not comfortable discussing the details of his case in the presence of that co-defendant.

33. At that meeting, Mr. Connor's attorney advised him that he faced a minimum of 51 to 73 months in prison and a maximum of 40 years. Mr. Connor asked his attorney whether he had received a copy of the police report, and his attorney informed him that he had not. Mr. Connor's lawyer did not attempt to discuss with Mr. Connor the circumstances of his arrest, the accuracy of the charges against Mr. Connor or possible defenses to those charges. Had he done so, the attorney may have recognized that Mr. Connor had a valid defense that required investigation.

34. Mr. Connor's trial is scheduled for March 22 and 23, 2007. Mr. Connor's attorney has failed to file a motion to suppress evidence of the alleged offense. Mr. Connor's attorney has not met with him to discuss preparation for trial and potential defenses or to inform him about developments in his case. Notwithstanding the fact that one of Mr. Connor's co-defendants received a plea offer from the prosecutor, Mr. Connor's attorney has failed to negotiate a plea offer. On information and belief Mr. Connor's attorney has done nothing to prepare for Mr. Connor's trial.

35. As a result of Defendants' failures, Mr. Connor's attorney is unable to put the prosecution's case to the crucible of meaningful adversarial testing. Mr. Connor has had insufficient opportunity to discuss with his attorney the circumstances of his arrest and the factual basis for the charges against him and to participate in building a defense to those charges. Mr. Connor has also been deprived of the ability to negotiate a favorable plea.

4. Antonio Taylor (Berrien County)

36. Plaintiff ANTONIO TAYLOR is and at all times pertinent herein has been a resident of Benton Harbor, Michigan. Mr. Taylor has a pending criminal case in the Second Circuit Court in Berrien County and is incarcerated at the Berrien County Jail. Mr. Taylor is represented by an attorney who has contracted with Berrien County to provide indigent defense services in that county.

37. Mr. Taylor was arrested on December 16, 2006, and charged with carrying a concealed weapon in an automobile, a felony. Mr. Taylor was also charged with two related misdemeanors: reckless use of a firearm and failure to present a pistol for inspection. Mr. Taylor was charged as a third habitual offender, and faces a maximum penalty of 10 years in prison.

38. At the time of his arrest, there were five others in the car with Mr. Taylor and the gun was on the floor of the car under a passenger seat. Mr. Taylor was the only occupant of the car known to the arresting officer, and the only occupant arrested.

39. Mr. Taylor met his indigent defense counsel on December 27, 2007, and spoke with him for approximately five minutes in a holding cell below the courthouse, in the full hearing of numerous other inmates.

40. At that meeting, Mr. Taylor's attorney advised him to waive his preliminary examination and plead to the original felony charge, having entered into plea negotiations without first discussing with his client whether his client wished him to pursue a plea. Mr. Taylor's attorney had not conducted any investigation into the charges against Mr. Taylor and had not discussed with Mr. Taylor the accuracy of the charges or possible defenses to those charges. Had he done either, the attorney might have recognized that Mr. Taylor had a valid defense that required investigation, and that the case involved forensic evidence that required scientific testing, as well as numerous witness statements that also required investigation.

41. On December 28, 2007, Mr. Taylor's preliminary examination was held. At the conclusion of his preliminary examination, Mr. Taylor was bound over to the circuit court on the charged offenses.

42. Since his preliminary examination Mr. Taylor's attorney has met with him once, on January 12, 2007, in a holding cell in full hearing of other inmates, to convey a plea offer that would involve Mr. Taylor pleading to a reduced charge of attempted carrying and concealing a weapon in an automobile in exchange for dropping the two misdemeanor charges. Mr. Taylor rejected the plea offer.

43. Mr. Taylor's case is scheduled for trial on March 2, 2007. Mr. Taylor's attorney has not met with him to discuss preparation for trial and potential defenses or to inform him about developments in his case. On information and belief, Mr. Taylor's attorney has failed to file motions to suppress evidence of the alleged offense and for necessary discovery, and has failed to demand independent scientific examination of the prosecution's evidence. On information and belief Mr. Taylor's attorney has not conducted any investigation into the

prosecutor's allegations underlying the charges and has done nothing to prepare for Mr. Taylor's trial.

44. As a result of Defendants' failures, Mr. Taylor's attorney is unable to put the prosecution's case to the crucible of meaningful adversarial testing. Mr. Taylor has had insufficient opportunity to discuss with his attorney the factual basis for the charges against him and to participate in building a defense to those charges, and has been deprived of investigative and expert assistance that may contribute to his exoneration of the charged offenses.

5. Jose Davila (Genesee County)

45. Plaintiff JOSE DAVILA is and at all times pertinent herein has been a resident of Flint, Michigan. Mr. Davila has a pending criminal case in the Seventh Circuit Court in Genesee County and is incarcerated at the Genesee County Jail. Mr. Davila is represented by a member of the private bar who has been appointed by the Defender Administrator for the Seventh Circuit Court to provide indigent defense representation to Mr. Davila.

46. Mr. Davila was arrested on December 10, 2006, when he attempted to enter his niece's home and was attacked by a group of people from a neighboring house, one of whom was wielding a baseball bat. As a result of this incident, Mr. Davila was charged with first-degree home invasion, a felony, and assault and battery, a misdemeanor.

47. Mr. Davila met his indigent defense counsel for the first time five minutes before his arraignment. While Mr. Davila requested an opportunity to confer with his attorney at that time, his attorney left immediately after the arraignment without speaking with Mr. Davila.

48. On December 22, 2006, Mr. Davila's preliminary examination was held and he was bound over to the circuit court on a charge of third-degree home invasion, a felony, and

three related misdemeanors: malicious destruction of a building, trespassing, and jostling. These charges expose Mr. Davila to a maximum of 5 years in prison. Mr. Davila's attorney failed to prepare for the preliminary investigation, made no arguments to the court as the charges against Mr. Davila were revised, and failed to explain to Mr. Davila the significance of those revisions. Mr. Davila's attorney also informed the court that he had discussed the charges with Mr. Davila, although he had not. The court proceeded to read to Mr. Davila the contents of the felony information. Mr. Davila's attorney again left court without speaking with his client.

49. Another court hearing was held in Mr. Davila's case on February 5. Again, Mr. Davila was afforded no opportunity to speak with his attorney in advance. At that hearing, the court ordered Mr. Davila's attorney to meet with Mr. Davila to discuss the charges. On information and belief, Mr. Davila's attorney has still not met with him.

50. Mr. Davila's case is scheduled for trial on March 16. Mr. Davila's attorney has not spoken with Mr. Davila about the accuracy of the charges against him or possible defenses to those charges, and on information and belief has failed to perform any factual investigation of Mr. Davila's case or interview numerous witnesses to the alleged offense. Had he done any of these things, the attorney might have recognized that Mr. Davila has a valid defense that required investigation.

51. As a result of Defendants' failures, Mr. Davila's attorney is unable to put the prosecution's case to the crucible of meaningful adversarial testing. Mr. Davila has had no opportunity to discuss with his attorney the factual basis for the charges against him and to participate in building a defense to those charges and has been deprived of investigative assistance that may contribute to his exoneration of the charged offenses. On information and belief, Mr. Davila's attorney will fail to prepare for Mr. Davila's trial.

6. Jennifer O'Sullivan (Genesee County)

52. Plaintiff JENNIFER O'SULLIVAN is and at all times pertinent herein has been a resident of Flint, Michigan. Mrs. O'Sullivan has a pending criminal case in the Sixty-Seventh District Court in Genesee County and is incarcerated at the Genesee County Jail. Mrs. O'Sullivan is represented by a member of the private bar who has been appointed by the Defender Administrator for the Seventh Circuit Court to provide indigent defense representation to Mrs. O'Sullivan.

53. Mrs. O'Sullivan was arrested on August 15, 2006, and charged with two counts of solicitation of murder and two counts of conspiracy to commit murder, all of which are felonies that carry a maximum sentence of life in prison. Mrs. O'Sullivan has no prior criminal record—these charges stem from threats made against her and her young daughter by a neighbor's boyfriend. She met her indigent defense counsel for the first time on August 24, 2006, the day before her pre-trial hearing. They spoke for approximately ten minutes. Mrs. O'Sullivan's attorney asked her no questions about the facts of her case, potential witnesses, or potential avenues of investigation or defense.

54. Mrs. O'Sullivan saw her attorney again on September 5, when he requested that she waive her right to have a preliminary examination within fourteen days of arraignment, even though twenty-one days had already passed since her arraignment. Mrs. O'Sullivan subsequently signed the waiver form.

55. Mrs. O'Sullivan met with her attorney again on September 8. Mrs. O'Sullivan has not spoken to or heard from her attorney since September 8. She has not yet had a preliminary examination and has not been bound over to the circuit court. Mrs. O'Sullivan's family members have repeatedly sought to contact her attorney on her behalf, but he has not

returned any of their calls. Mrs. O'Sullivan wishes to replace her attorney but is unable to because she cannot afford to retain an attorney.

56. As a result of Defendants' failures, Mrs. O'Sullivan's attorney is unable to put the prosecution's case to the crucible of meaningful adversarial testing. Mrs. O'Sullivan has not heard from her attorney in over five months, has had insufficient opportunity to discuss with her attorney the factual basis for the charges against her, has had no opportunity to participate in building a defense to those charges, and does not understand where her case stands or the status of the charges against her.

7. Christopher Manies (Muskegon County)

57. Plaintiff CHRISTOPHER MANIES is and at all times pertinent herein has been a resident of Muskegon, Michigan. Mr. Manies has a pending criminal case in the Fourteenth Circuit Court in Muskegon County. Mr. Manies is represented by an attorney who has contracted with Muskegon County to provide indigent defense services in that county.

58. Mr. Manies was arrested on January 10, 2007, and charged with second-degree home invasion, attempting to disarm a peace officer, and resisting and obstructing and assaulting a police officer, all of which are felonies. Mr. Manies was charged as a second habitual offender, and is subject to a potential maximum sentence of 22 1/2 years in prison.

59. The charges against Mr. Manies stem from allegations that Mr. Manies shoved a police officer who had drawn a gun on him during an alleged home invasion, and that Mr. Manies then led the police officer on a chase that allegedly ended in Mr. Manies successfully fleeing. Mr. Manies was arrested the following day when he learned the police were looking for him and voluntarily turned himself in.

60. Mr. Manies met his indigent defense counsel for the first time at a pre-preliminary examination conference. Mr. Manies spoke with his attorney for approximately two minutes. Mr. Manies' lawyer did not attempt to discuss with Mr. Manies the facts of his case, the accuracy of the charges against Mr. Manies or possible defenses to those charges. Had he done so, the attorney may have recognized that Mr. Manies had a valid defense that required investigation.

61. On January 25, 2007, the date scheduled for Mr. Manies' preliminary examination, he met his lawyer for the second time, for approximately five minutes. Again, Mr. Manies lawyer made no effort to discuss the case or possible defenses, despite Mr. Manies' eagerness to do so. Mr. Manies subsequently waived his preliminary examination and was bound over to the circuit court on the charged offenses.

62. Mr. Manies has not heard from his lawyer since January 25, despite having written to him several times. Mr. Manies has learned that he has been assigned new counsel, but has not heard from that attorney. Mr. Manies' attorney has not met with him to discuss preparation for trial and potential defenses or to inform him about developments in his case, including when he is next scheduled to appear in court and whether his case is scheduled for trial. On information and belief Mr. Manies' attorney has not conducted any investigation into the prosecutor's allegations underlying the charges and has done nothing to prepare for Mr. Manies' trial.

63. As a result of Defendants' failures, Mr. Manies' attorney is unable to put the prosecution's case to the crucible of meaningful adversarial testing. Mr. Manies has had insufficient opportunity to discuss with his attorney the factual basis for the charges against him and to participate in building a defense to those charges. Mr. Manies also does not understand where his case stands or the status of the charges against him.

8. Brian Secrest (Muskegon County)

64. Plaintiff BRIAN SECREST is and at all times pertinent herein has been a resident of Wyoming, Michigan. Mr. Secrest has a pending criminal case in the Fourteenth Circuit Court in Muskegon County and is incarcerated at the Muskegon County Jail. Mr. Secrest is represented by an attorney hired pursuant to a contract with Muskegon County to provide indigent defense services in that county.

65. Mr. Secrest was arrested on November 28, 2006, and charged with armed robbery as a second habitual offender, which exposes him to a maximum sentence of life in prison. Mr. Secrest met his indigent defense counsel for the first time on the date scheduled for his preliminary examination, and spoke with him for approximately two minutes. Mr. Secrest's attorney did not discuss with Mr. Secrest the accuracy of the charges or possible defenses to those charges.

66. Mr. Secrest waived his preliminary examination on December 21, 2006. Mr. Secrest had a pretrial conference scheduled for January 23, 2007, but did not see his lawyer on that date, or at any time since. Mr. Secrest subsequently wrote to his lawyer asking for information about his case, and has received no response.

67. As a result of Defendants' failures, Mr. Secrest's attorney is unable to put the prosecution's case to the crucible of meaningful adversarial testing. Mr. Secrest has had insufficient opportunity to discuss with his attorney the factual basis for the charges against him and has had no opportunity to participate in building a defense to those charges.

B. Defendants

68. Defendant STATE OF MICHIGAN is sued for violations of the State Constitution. See MCR 2.201(C)(5); see also *Gaertner v State*, 24 Mich App 503, *aff'd* 385

Mich 49 (1971); and *Burdette v State*, 166 Mich App 406 (1988). The State Capitol and center of State government is in Ingham County.

69. Defendant JENNIFER M. GRANHOLM ("Defendant Governor") is Governor of Michigan and is sued in her official capacity as to all claims. Pursuant to Article V, § 1 of the Constitution of Michigan of 1963, the executive power of the State is vested in the Governor. The Michigan Constitution further provides that the Governor shall take care that applicable federal and state laws are faithfully executed. Const 1963, art 5, § 8. The Michigan Constitution also provides that the Governor shall submit to the legislature a budget that sets forth proposed State expenditures for each fiscal period. Const 1963, art 5, § 18. Governor Granholm maintains her principal office at the Office of the Governor, 111 S. Capitol Avenue, George W. Romney Building, Lansing, Michigan 48933, which is in Ingham County.

CLASS ACTION ALLEGATIONS

70. This action is properly brought as a class action pursuant to MCR 3.501.

71. The Class is defined as all indigent adult persons who have been charged with or will be charged with felonies in the District and Circuit Courts of Berrien, Genesee, and Muskegon Counties and who rely or will rely on the Counties to provide them with defense services. The Class includes all indigent adults against whom felony criminal charges will be brought in Berrien, Genesee, and Muskegon Counties during the pendency of this action.

72. The Class is sufficiently numerous to make joinder impractical. At any point in time, hundreds of indigent adults with criminal cases pending in each of the three Counties rely on appointed indigent defense counsel for legal representation.

73. The questions of law and fact raised by the named Plaintiffs' claims are common to, and typical of, those raised by the Class they seek to represent. Each Plaintiff relies on the

State for legal representation during the course of his or her felony proceedings, and is harmed by the Defendants' failure to provide funding and fiscal and administrative oversight to Michigan's indigent criminal defense system.

74. Questions of fact common to the Class include:

a. whether Defendants have failed to take the steps necessary to ensure that the three Counties provide the attorneys they hire to represent indigent adults accused of felony wrongdoing with the tools necessary to enable those attorneys to put the prosecution's case to the crucible of meaningful adversarial testing;

b. whether Defendants' failure to take such steps has resulted in the inability of indigent defense counsel in the three Counties to provide constitutionally adequate legal representation to members of the Plaintiff Class; and

c. whether, as a result of such failures by Defendants, members of the Plaintiff Class are harmed by the inability of indigent defense counsel to provide them with constitutionally adequate legal representation.

75. Questions of law common to the Class include:

a. whether Michigan is violating its obligation under the Sixth and Fourteenth Amendments to the United States Constitution to ensure that indigent defense providers have the tools necessary to provide indigent adults accused of felonies in state court proceedings in the three Counties with constitutionally adequate representation; and

b. whether Michigan is violating its obligation under the Michigan Constitution to ensure that indigent defense providers have the tools necessary to provide indigent adults accused of felonies in state court proceedings in the three Counties with constitutionally adequate legal representation.

76. The violations of law and resulting harms alleged by the named Plaintiffs are typical of the legal violations and harms suffered by all Class members.

77. Plaintiff Class representatives will fairly and adequately protect the interests of the Plaintiffs. Plaintiffs' counsel know of no conflicts of interest between the class representatives and absent class members with respect to the matters at issue in this litigation; the

class representatives will vigorously prosecute the suit on behalf of the Class; and the class representatives are represented by experienced counsel. Plaintiffs are represented by attorneys employed by the American Civil Liberties Union ("ACLU") and the ACLU of Michigan, nonprofit legal organizations whose attorneys have substantial experience and expertise in indigent criminal defense matters; and Frank D. Eaman PLLC, a private law firm with extensive experience in criminal litigation. Plaintiffs will also be represented by Cravath, Swaine & Moore LLP, a law firm with extensive complex civil litigation experience, if *pro hac vice* motions are granted. Plaintiffs' attorneys have identified and thoroughly investigated all claims in this action, and have committed sufficient resources to represent the Class.

78. The maintenance of the action as a class action will be superior to other available methods of adjudication and will promote the convenient administration of justice. Moreover, the prosecution of separate actions by individual members of the Class could result in inconsistent or varying adjudications with respect to individual members of the Class and/or one or more of the Defendants.

79. Defendants have acted or failed to act on grounds generally applicable to all Plaintiffs, necessitating declaratory and injunctive relief for the Class.

FACTUAL ALLEGATIONS REGARDING SYSTEMIC DEFICIENCIES IN THE CRIMINAL INDIGENT DEFENSE SYSTEM THAT HARM PLAINTIFFS

I. National and Michigan-Based Legal Organizations Have Long Recognized the Prerequisites for Constitutionally Adequate Indigent Defense Services.

80. There is a national consensus on both the requirements of adequate indigent defense delivery systems and the task indigent defense providers must undertake to provide constitutionally adequate legal representation.

81. In the 1970s, the American Bar Association ("ABA") and the National Legal Aid and Defender Association ("NLADA") promulgated performance standards for indigent defense counsel. Those standards, which are periodically updated, require, among other things, that indigent defense counsel: (a) have adequate knowledge of the relevant areas of the law; (b) act with reasonable diligence and promptness, avoiding unnecessary delay in the disposition of cases; (c) provide representation 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; and (e) consult with their clients in order to elicit relevant information about the case, to inform clients of their rights, and to enable clients to make informed decisions about the direction of their cases.

82. In 2002, the House of Delegates of the American Bar Association ("ABA") approved the *Ten Principles of a Public Defense Delivery System* (the "Ten Principles"), establishing the fundamental criteria necessary for an indigent defense system to provide effective, efficient, ethical, and conflict-free legal representation to its clients. Based upon the work of the Director of the Michigan State Appellate Defender Office and earlier standards pertaining to the administration of indigent defense programs promulgated by the ABA and the NLADA, the Ten Principles reflect a national consensus regarding the prerequisites for constitutionally adequate indigent defense, reached by representatives from each of the fifty states, the civil bar, and all segments of the criminal justice system—including judges, prosecutors, private defense counsel, public defenders, court personnel, and academics active in criminal justice.

83. Among other things, the Ten Principles state that: (a) defense counsel should be an equal partner in the justice system, with the same resources as prosecuting attorneys; (b) only qualified counsel should represent indigent defendants; (c) clients should be appropriately screened for eligibility for public defense services; (d) defense counsel should receive the training necessary to perform competently; (e) there should be attorney performance standards and adequate supervision and oversight to ensure compliance with those standards; (f) workloads should be monitored; and (g) indigent defense systems should be independent from undue political influence, to ensure that counsel are free to make the decisions necessary to advocate meaningfully for their clients.

84. In 2002, the State Bar of Michigan adopted the *Eleven Principles of a Public Defense Delivery System* (the "Eleven Principles"). The Eleven Principles, which were modeled on the ABA's Ten Principles, add as an Eleventh Principle that one of the functions of indigent defense should be to explore and advocate for programs that improve the indigent defense system and reduce recidivism.

II. Defendants Have Long Known of the Urgent Need for Systemic Reform of Michigan's Indigent Defense System.

85. Although the constitutional obligation to provide indigent persons with effective assistance of competent counsel rests with the State, Defendants have repeatedly abdicated that responsibility. Report after report has called attention to the fact that Michigan's delegation of its constitutional obligation to its Counties without appropriate funding or fiscal and administrative oversight has resulted in serious deficiencies.

86. In 1978, 1986, 1992, 2002 and again in 2003, various statewide and local committees and task forces—including a task force appointed by the Defendant Governor

herself—have condemned the same deficiencies in Michigan's indigent defense system as those upon which Plaintiffs base this Complaint. Each has recommended the adoption of statewide standards and/or the creation of a statewide indigent defense commission. National and state-level studies and news reports have similarly decried the state of the system in Michigan. Defendants have disregarded each report and set of recommendations. For example:

a. In 1986, Michigan State Bar President George T. Roumell, Jr., established Michigan's Special State Bar Task Force on Assigned Counsel Standards. The recommendations of the 1986 Task Force were published in the *Michigan Bar Journal* in September 1986, under the title "Minimum Standards for Court-Appointed Criminal Trial Counsel." These minimum standards were subsequently approved by the Michigan State Bar's Board of Commissioners and representative Assembly. The Task Force noted the lack of statewide standards in contrast to other states throughout the country and recommended specific standards, including ones governing caseloads, conflicts of interest, the preservation of attorney-client privilege, practice standards, access to experts and investigators, the attorney client working relationship, pretrial motions, plea negotiations, and sentencing. The Task Force also recommended state funding for indigent defense services.

b. The *Michigan Bar Journal* dedicated its February 1992 issue to the state of indigent defense services in Michigan. The first article, by Thomas E. Daniels, a former prosecuting attorney, was entitled "Gideon's Hollow Promise—How Appointed Counsel Are Prevented From Fulfilling Their Role in the Criminal Justice System," and observed, among other things, that "the methods we use to appoint, pay, train and supervise appointed counsel virtually guarantee that many will not perform their role effectively, to the detriment of their clients and the criminal justice system itself."

c. In December 2004, the American Bar Association Committee on Legal Aid and Indigent Defendants published *Gideon's Broken Promise: America's Quest for Equal Justice*. This report singled out Michigan as the only state for which funding information could not be gathered.

d. On February 28, 2005, *Michigan Lawyers Weekly* published an article titled "Indigent Criminal Services Strained by 'Underfunding.'" The article noted that prosecutors, judges, criminal defense practitioners, legislators and citizens acknowledge that the underfunding of indigent criminal defense services in Michigan is a serious and growing problem.

87. As Michigan State Bar President Thomas W. Cranmer noted in a 2006 *Michigan Bar Journal* article, despite the State's highly publicized deficiencies and the above-mentioned recommendations, "little has changed . . . . Currently Michigan has no statewide standards or funding structure to assure adequate representation. In recent national reviews of indigent defense systems, *Michigan has ranked among the lowest in terms of providing adequate support and structure to its defense system*."

III. Defendants Provide Inadequate Funding and No Fiscal Oversight to Michigan's Indigent Defense System.

88. Michigan provides no funding specifically for the provision of indigent defense services in felony criminal actions at the trial stage in the three Counties or any other county in the State. To the extent that state funding is used by the Counties to pay for indigent defense services, Defendants do not ensure that such funding is spent appropriately. And to the extent that the Counties provide funding of their own, Defendants do not provide the Counties with any oversight or guidance to ensure that such funding produces an indigent defense system capable of providing constitutionally adequate indigent defense services.

89. On an annual basis, Michigan allocates monies to a Court Equity Fund, administered by the State Court Administrative Office ("SCAO"), to help the Counties, and the other counties in Michigan, pay for trial court operations expenses (which include indigent defense expenses). The amount allocated is grossly insufficient. For example, the monies allocated to Muskegon County in 2006 and to Berrien County in 2004 barely covered one-seventh of the Counties' actual expenses.

90. Counties are permitted to allocate those funds within their court systems any way they choose. Defendants do not ensure that any of those funds are spent on indigent defense and do not maintain records as to whether in fact any of those funds are spent on indigent defense.

91. In direct contrast to its fiscal approach to indigent criminal defense, Michigan designates funding and provides fiscal oversight for the prosecutorial function at the trial level. Michigan has provided the Prosecuting Attorneys Coordinating Council with millions of dollars over the last ten years (and $2.2 million in 2007 alone) to help ensure that prosecutors competently perform their prosecutorial function. For example, funding has been provided and designated for professional training of all prosecutors' staff; to publish newsletters to keep prosecutors informed of the most recent legislative, judicial, and technical changes affecting their duties; to provide legal research assistance for prosecutors; and to install and upgrade automated work management systems in prosecutors' offices to help manage tasks such as issuing subpoenas, keeping track of court schedules, and running statistics and managerial reports. No such state resources or state funding for such resources exist for indigent defense counsel.

92. Michigan also provides $28 million per year to the Michigan State Police Forensic Science Division, which provides free investigative and expert witness services to prosecutors. The Division, which has seventeen offices across the State, provides crime scene investigations, drug analysis, document examination, polygraph testing, latent print examination, DNA analysis, toxicology analyses, blood/alcohol analyses, firearms and tool mark examination, arson evidence analyses, serology, and trace evidence analyses. The Division employs over 200 workers who also serve as experts for the prosecution in court cases. In 2005, the Division processed over 100,000 cases and offered expert testimony in nearly 1,000 court cases on behalf of the prosecution. Indigent defense counsel have no access to the Forensic Sciences Division,

and there are no comparable state resources or state funding for such resources for indigent defense counsel.

IV. Defendants Exercise No Administrative Oversight Over Michigan's Indigent Defense System.

93. There is effectively no state supervision over the provision of indigent defense services in felony criminal actions at the trial level in any of the three Counties or anywhere else in Michigan.

94. Defendants do not require that the manner in which indigent defense services are provided in the three Counties complies with the Ten Principles or the Eleven Principles. Nor do Defendants require that indigent defense counsel providing representation at the trial level in the three Counties comply with any of the nationally recognized performance standards. There are no statewide standards regarding eligibility for indigent defense counsel, and few if any resources provided for attorney training. There is no statewide supervision, attorney performance evaluation, workload limitations, or access to resources for the defense function. The result is a broken system that does not meet the constitutional standard for providing adequate legal representation to Plaintiffs in the three Counties.

95. While Michigan has promulgated court rules through which, in theory, Defendants could exercise some oversight over the indigent defense system, Defendants neither enforce the rules nor make effective use of the information provided to them pursuant to those rules. Michigan Court Rule 8.123(B) requires that each trial court submit to the SCAO for approval an "administrative order that describes the court's procedures for selecting, appointing, and compensating counsel who represent indigent parties in that court." Michigan Court Rule 8.123(C) requires the SCAO to approve only those orders whose "provisions will protect the

integrity of the judiciary." The SCAO has routinely approved the administrative orders sent by each of the three Counties, even when they provide for procedures that deprive indigent defendants—including Plaintiffs—of constitutionally adequate legal representation. The SCAO thus fails to protect the integrity of the judiciary, and Defendants do nothing to ensure that the SCAO fulfills this duty.

96. Michigan Court Rule 8.123(D) requires that each trial court submit to the SCAO an electronic report of the total public funds paid to each attorney and/or contracting entity providing legal services to indigent persons. The Fourteenth Circuit Court in Muskegon County has never provided this information and Defendants have never taken steps to compel its production. The data produced by the other two Counties is not used to analyze or evaluate indigent defense services or to ensure their adequacy.

97. Pursuant to Article VI of the Michigan State Constitution, the SCAO is authorized to issue best practices guidelines for courts within its jurisdiction. The SCAO has issued guidelines on such topics as jail overcrowding and conservatorship, but never on the provision of competent criminal defense services to indigent defendants. Defendants have taken no steps to require the SCAO to issue best practices guidelines concerning indigent defense services.

98. In contrast, Michigan engages in administrative oversight of prosecuting attorneys. MCL 14.30 directs the Attorney General to "supervise the work of, consult and advise the prosecuting attorneys, in all matters pertaining to the duties of their offices" and to make biennial reports to the Legislature. Prosecuting Attorneys in the three Counties must also submit annual reports to the Attorney General. MCL 14.32. The state-created and funded Prosecuting Attorneys Coordinating Council provides state-wide direction as to the "system of conduct" to be

followed by all prosecuting attorneys. 1972 PA 203; MCL 49.109. On information and belief, these statutory provisions are followed.

V. Because of Defendants' Failures To Fund and To Exercise Oversight, the Counties Deny Indigent Defense Counsel Fiscal and Administrative Support Necessary To Provide Constitutionally Adequate Legal Representation.

99. As a direct result of Defendants' failure to ensure that indigent defense providers have the tools necessary to provide constitutionally adequate indigent defense in the three Counties, indigent defense services in the Counties, and elsewhere in the State, are operated at the lowest cost possible and without regard to the constitutional adequacy of the services provided. The result is that the indigent defense provided in each of the three Counties does not meet—and does not attempt to meet—the ABA's Ten Principles, Michigan's Eleven Principles, or commensurate safeguards; and does not meet or even attempt to meet the constitutional minimums required by the United States and Michigan Constitutions.

100. Berrien and Muskegon Counties, as is the case with approximately 39 other Michigan counties, enter into contracts with a law firm or group of lawyers pursuant to which the county pays the attorneys a flat fee or flat rate to staff all trial-level felony indigent defense cases for a set period of time. Berrien County has entered into contracts with roughly 12 local attorneys to provide defender services to indigent adults in criminal courts located in the cities of St. Joseph and Niles, and in the drug court in St. Joseph. The contracts provide the attorneys with a fixed amount per year to cover all cases arising during the contract period. Because the fixed amount is intended to cover training, legal research tools, and investigative work, there is a financial disincentive for indigent defense counsel to allocate funds to these necessary items. Attorneys must also pay for conflict counsel from the flat rate, providing a financial disincentive for identifying conflicts.

101. Muskegon County contracts with a single law firm to handle all adult felony cases at the trial level. That firm, in turn, sub-contracts with other attorneys with no supervision by or involvement from the County. As in Berrien County, the contract provides the law firm with a fixed amount to cover all cases arising during the contract period. Also as in Berrien County, the contract provides no additional funds for training, legal research tools, experts, investigators, or office overhead, and therefore provides the same disincentives to the provision of constitutionally adequate indigent defense as exist in Berrien County.

102. Genesee County and approximately 36 other Michigan counties, use assigned counsel systems, in which a court administrator or judges appoints individual lawyers to represent indigent clients on a case-by-case basis. Genesee County uses an "attorney for the day" program, in which one or two attorneys handle all cases on a given day and are compensated based on an event-based fee schedule. As of July 2006, there were approximately 100 attorneys accepting appointments. The assigned counsel program is administered by a single Defender Administrator, who also serves as Circuit Court Administrator. The Defender Administrator is supposed to oversee the assigned counsel list and is responsible for processing attorney vouchers and reviewing all eligibility determinations. The event-based fee schedule and method of attorney reimbursement used in Genesee County undercompensates attorneys for their work and provides financial disincentives to the provision of constitutionally adequate indigent defense.

103. As described in greater detail below, as a result of Defendants' failure to provide funding and to exercise fiscal and administrative oversight, the provision of indigent defense services at the trial court level in the three Counties is inadequately funded, fails to provide counsel to all eligible indigent defendants, fails to ensure that defense counsel are qualified, fails

to protect the independence of the defense function, fails to train attorneys adequately, fails to monitor attorney workloads, fails to monitor and supervise attorney performance, and fails to identify and handle conflicts of interest properly.

A. Indigent Defense Services in the Counties Are Inadequately Funded.

104. Because of Defendants' failure to ensure that indigent defense providers have the tools necessary to provide constitutionally adequate indigent defense, defense services in each of the three Counties are not adequately financed. Contrary to the ABA Ten Principles and Michigan's Eleven Principles, indigent defense efforts in the Counties are not equal partners in the criminal justice system.

105. In Berrien and Genesee Counties, the budget of the prosecuting attorney's office is nearly three and a half times greater than each County's indigent defense budget. In Muskegon County, the prosecuting attorney's budget is nearly double the County's indigent defense budget.

106. In 1999, a survey by the U.S. Department of Justice of 100 largest counties in the country found that $1.205 billion was spent on defending some 4.2 million criminal cases; or some $287 per case. See http://www.ojp.gov/bjs/pub/ascii/idslc99.txt. Recently, the Muskegon County finance director issued a letter to the county commissioners stating that the average cost per case should be kept to $130 to $140. In 2004, some Berrien County contract holders received an average of $94 per case.

107. Although assigned counsel in Genesee County appear to receive more money per case than indigent defense counsel in Berrien and Muskegon, they do so pursuant to a fee schedule that provides incentives to attorneys to encourage indigent defendants to plead guilty early and to high charges. The fee schedule also bears no relation to the amount of time attorneys actually spend working on assigned cases. It provides a flat base fee for each assigned

felony case and "extra" fees for additional specific services. For example, attorneys receiving five felony cases on the day they are scheduled for assignments receive a base rate of $400 for all five cases, while attorneys receiving two felony cases are paid $175 total. Attorneys can receive an additional $200 for pre-trial preparation of non-capital felonies; $400 for pre-trial preparation of capital felonies; $30 for visiting a client in jail prior to the preliminary examination (additional visits prior to disposition are not compensated); $200 if the client pleads guilty in Circuit Court before the first day of trial; and only $50 if the client pleads guilty on the day of trial. Although the fee schedule provides that attorneys can petition for extraordinary expenses, few do, and those who do typically receive only a fraction of what they request.

108. Because of Defendants' failings, as set forth above, the Counties take extraordinary measures that defy constitutional requirements in order to keep costs low. For example, they limit access to experts and investigators. In all three Counties, indigent defense counsel must petition judges and/or trial court administrators for permission to retain experts and investigators. Most requests are either denied or not granted in full. As a result, many indigent defense counsel simply do not bother to make such motions. In 2004, the trial court administrator in Berrien County did not receive a single request for an expert or an investigator.

B. Indigent Defense Services in the Counties Fail To Provide Counsel To All Eligible Indigent Defendants.

109. Because of Defendants' failure to ensure that indigent defense providers have the tools necessary to provide constitutionally adequate indigent defense, none of the Counties has written guidelines defining which defendants qualify for indigent defense counsel. In most cases, the judges make the decision, but not all judges consider the same factors. As a result, eligibility requirements vary widely from county to county and from case to case, and indigent defendants who are constitutionally eligible for state-appointed counsel are denied counsel.

110. One Berrien County judge, for example, routinely refuses to appoint counsel to defendants who have made bail, while other Berrien County judges do not view having made bail as determinative.

111. Indigent defense counsel in Muskegon and Genesee Counties frequently second-guess judicial eligibility determinations, and resist being appointed to represent individuals they view as ineligible. The Muskegon law firm holding the indigent defense contract advises its lawyers to move to be discharged from representing clients who have full-time jobs, regardless of how little those jobs pay.

112. One attorney in Genesee County refuses to represent indigent defendants assigned to him if he considers them to be financially ineligible. Instead, he offers to represent them as a private attorney, at a discount from his normal rate.

C. Indigent Defense Services in the Counties Fail To Ensure That Indigent Defense Counsel Are Qualified.

113. Because of Defendants' failure to ensure that indigent defense providers have the tools necessary to provide constitutionally adequate indigent defense, none of the Counties takes steps to ensure that only qualified counsel represent indigent persons charged with criminal offenses. Neither the Berrien nor Muskegon County programs have written job descriptions or qualifications. Although the administrative order promulgated by Muskegon County pursuant to MCR 8.123 requires attorneys to "have the requisite skill and experience to provide constitutionally satisfactory representation," it does not define "requisite skill or experience." In practice, indigent defense counsel need no more than bar admission and residence in the County to be appointed.

114. The Genesee County Defender Administrator never has rejected an application to join the assignment list for anything other than failure to pass the bar examination or lack of

residency. In fact, when the Administrator adds attorneys to the list, she prefers recent law school graduates. She has stated that she is suspicious of more experienced attorneys who wish to join, because the rate of compensation is so low.

115. Neither Berrien nor Muskegon Counties have written guidelines establishing the degree of experience an attorney must have to handle complex felonies or capital cases. Attorneys right out of law school with no background in criminal practice are permitted to handle serious felony cases. In Berrien County, at least one contractor routinely subcontracts his work to younger and inexperienced associates with no training. Attorneys are rehired year after year despite the fact that they lack the skills and knowledge necessary to provide constitutionally adequate services.

116. Genesee County maintains "A" and "B" lists of attorneys, with A-list attorneys supposedly having the experience necessary to handle more complex cases than B-list attorneys. However, there are no guidelines as to what type of experience is needed to get on the "A list."

117. In contrast, the Berrien and Genesee County prosecutor's offices have written job descriptions that list minimum job qualifications and years of experience; required knowledge, skill and abilities; and tasks to be performed by prosecuting attorneys.

D. Indigent Defense Services in the Counties Fail To Protect the Independence of the Defense Function.

118. Because of Defendants' failure to ensure that indigent defense providers have the tools necessary to provide constitutionally adequate indigent defense, none of the Counties' programs ensures the independence of the defense function. Although contracting and hiring decisions are supposed to be made by County Commissioners or, in the case of Genesee County, the Defender Administrator, judges routinely involve themselves in the solicitation of contract bids and the selection and retention of indigent defense counsel.

119. For example, approximately 10 years ago the Chief Judge of Berrien County attempted to lower the indigent defense counsel contract rates and to eliminate some specific people from the group then holding the contract by encouraging junior attorneys to bid for the contracts. The lower bids from more junior attorneys reduced the bids from the more experienced attorneys, some of whom ultimately kept the contracts, but for much less money.

E. Indigent Defense Services in the Counties Fail To Train Indigent Defense Counsel Adequately.

120. Because of Defendants' failure to ensure that indigent defense providers have the tools necessary to provide constitutionally adequate indigent defense, indigent defendants in the Counties are represented by counsel who have not received adequate training. The Berrien and Muskegon County programs provide no continuing legal education and training requirements, and the Genesee County program does not provide continuing legal education and training adequate to ensure that new attorneys learn how to perform their jobs competently and that more experienced attorneys keep their skills up to date. Michigan does not have a continuing legal education requirement.

121. As a result, many indigent defense counsel are unable adequately to advise their clients because they are unaware of key aspects of criminal law and procedure, such as the notice requirement for the use of an alibi defense or appropriate objections.

122. By comparison, the prosecutor's office in Berrien County sets aside funds for regular training, the prosecutor's office in Muskegon County holds week-long training sessions, and prosecutors in Genesee County attend quarterly state training conferences and receive on-the-job training.

F. Indigent Defense Services in the Counties Fail To Monitor Attorney Workloads.

123. Because of Defendants' failure to ensure that indigent defense providers have the tools necessary to provide constitutionally adequate indigent defense, the Counties' indigent defense programs do not have workload limits, do not monitor workloads, and tolerate excessive workloads. The National Advisory Commission on Criminal Justice Standards and Goals, established to advise the federal Law Enforcement Assistance Administration, states that a single full-time indigent defense counsel can reasonably be expected to handle no more than: (a) 150 felonies per year; or (b) 400 misdemeanors per year; or (c) 200 juvenile delinquency cases per year. The ABA Standing Committee on Ethics and Professional Responsibility recently issued a formal opinion describing the ethical obligation of indigent defense counsel to refuse appointments and/or withdraw from representation when excessive caseloads interfere with competent and diligent representation. ABA Formal Opinion 06-441.

124. Many indigent defense counsel in the Counties have excessive caseloads. For example, in Berrien County, 6 of the 12 contract holders in 2004 received a collective total of 4,479 felony and misdemeanor cases, for an average of over 746 cases per attorney. One attorney doing contract work regularly had a caseload of 1,000 cases a year (700 misdemeanors and 300 felonies) in addition to 200 private cases. One attorney in Muskegon County handled over 700 felony cases per year; another routinely handled 15 felonies per week.

G. Indigent Defense Services in the Counties Fail to Provide Meaningful Monitoring and Supervision of Attorney Performance.

125. Because of Defendants' failure to ensure that indigent defense providers have the tools necessary to provide constitutionally adequate indigent defense, there are no written performance standards and no formal system of monitoring and supervision to guide indigent defense counsel in their representation of indigent defendants in the three Counties. Neither the

contracts in Berrien and Muskegon nor the Administrative Order promulgated by Genesee County pursuant to MCR 8.123 contains performance standards. There is no structured or meaningful feedback on attorney representation. In contrast, prosecutors in Berrien and Genesee, for example, are regularly evaluated on their work.

H. Indigent Defense Services in the Counties Fail To Identify and Handle Conflicts Properly.

126. Because of Defendants' failure to ensure that indigent defense providers have the tools necessary to provide constitutionally adequate indigent defense, the Counties' programs do not have written standards that define conflicts of interest. As a result, attorneys routinely represent clients in situations in which conflicts of interest exist.

127. Many indigent defense counsel also serve as prosecutors, often in the same courtrooms before the same judges. Some are assigned to defend individuals they previously prosecuted.

128. For example, a Berrien County attorney does both felony defense work and abuse and neglect work. He has no system for screening conflicts despite the possibility of defending a parent under the felony contract who is also the subject of an abuse and neglect proceeding under the other contract.

129. To the extent conflicts are identified, they are identified late in the judicial process, depriving indigent defendants of their constitutional right to conflict-free representation.

VI. Defendants' Failures To Fund and To Exercise Necessary Oversight Prevent Indigent Defense Counsel from Putting the Prosecution's Case To the Crucible of Meaningful Adversarial Testing.

130. Plaintiffs are entitled to constitutionally adequate legal representation, that is, representation that puts the prosecution's case to the crucible of meaningful adversarial testing.

By failing to provide sufficient funding and fiscal and administrative oversight, Defendants have failed to ensure that indigent defense counsel possess the tools necessary to provide constitutionally adequate legal representation, and have thus deprived Plaintiff Class members of their constitutional rights. To the extent that the ABA and NLADA performance standards set forth tasks that defense counsel should undertake to provide such representation, indigent defense counsel in the Counties are prevented from performing them. As a result, the Plaintiff Class is constructively denied, or threatened with the constructive denial of counsel. Following are some examples of the deficiencies in representation caused by Defendants' abdication of Michigan's obligation to provide indigent defendants with constitutionally adequate legal defense:

131. Indigent defense counsel do not confer with their clients prior to critical stages in their criminal proceedings. Pursuant to Michigan state law, all persons accused of criminal wrongdoing must be arraigned before a magistrate within 72 hours of their arrest. At arraignment, the magistrate informs the individual of the charges against him or her and appoints counsel if the person is indigent. Within 14 days of arraignment, the defendant is entitled to a probable cause hearing (also known as a preliminary examination) at which a magistrate or judge decides whether there is sufficient evidence to proceed with the case.

132. Most indigent defense counsel do not speak with their clients before they arrive at the courthouse for the probable cause hearing. Attorneys in the Counties routinely enter into plea negotiations without clients' permission and before initial client interviews. One Genesee County attorney has stated that he only meets with incarcerated clients prior to a preliminary examination if they are charged with felonies punishable by more than five to ten years of imprisonment.

133. When the initial interviews finally take place, these privileged and confidential discussions between the attorney and client are often held in public, damaging the attorney client relationship, preventing open and candid discussion, and making it possible for parties with adverse interests (such as victims, prosecutors and co-defendants) to overhear conversations. Although courthouses are equipped with private rooms, few defenders use them. In Genesee County, interviews often take place via a video link to the jail that is neither secure nor confidential, and is often unavailable because it is in use by judges conducting video arraignments or by other attorneys.

134. Defendants do not ensure, or even encourage, communications between Plaintiffs and their defense counsel. All three Counties have collect-call-only policies in the county detention facilities. Because the Counties do not reimburse indigent defense counsel for these calls, the attorneys have a strong financial disincentive to accept them. At least one attorney in Berrien County actually asked a client to stop attempting to communicate with him.

135. Indigent defense counsel are unable adequately to investigate the charges against their clients or to hire investigators who can assist with case preparation and testify at trial. Many Plaintiffs are represented at each new court hearing by a different attorney, none of whom has had the time to become familiar with their cases, to review any prior work carried out by any of the previous attorneys, or to discuss their defense to the charges. The attorneys generally do not meet with or subpoena witnesses, follow up on potential alibis, visit the scenes of the crimes, examine evidence, or use independent investigative resources. To the extent clients provide lists of witnesses and avenues of investigation, counsel rarely pursue them.

136. The ability of clients to participate in the development of their defense to the charges is further hampered by the fact that some attorneys refuse to provide their clients with copies of court files and police records.

137. Counsel are unable to file necessary motions for pre-trial suppression, discovery, speedy trial, motions to quash circuit court bind-over, or motions *in limine*. They often fail to challenge illegal identifications, illegal searches and seizures, or illegally obtained confessions.

138. Counsel cannot prepare adequately for court hearings and trial. Many do not call witnesses to testify on their clients' behalf, do not call experts to challenge the prosecution, and do not perform meaningful cross-examinations. Others do not make opening or closing statements at trial. In fact, many do not put on any meaningful defense case at all.

139. Counsel also often fail to provide meaningful representation at sentencings. Some attorneys offer information during sentencing proceedings that is detrimental to their clients' cases. Others often fail to catch sentencing errors and do not read the pre-sentencing reports prior to the sentencing hearings.

140. Attorneys in Berrien County frequently sit at counsel's table before a court proceeding is over, leaving Plaintiffs to be sentenced without any counsel standing by their side, much less advocating on their behalf. Other attorneys actively engage in discussions with other clients or with the prosecutor while their clients are speaking to the judge. Those attorneys who remain standing do not introduce information outside of the pre-sentence report.

VII. As a Result Of the Failures and Deficiencies Described Herein, Members of the Plaintiff Class Are Harmed.

141. Plaintiffs suffer irreparable harm or are at imminent and serious risk of suffering such harm because of Defendants' failure to adequately fund and oversee the Michigan's indigent defense system.

142. Some members of the Plaintiff Class must represent themselves because they are wrongfully denied defender services.

143. Other Class members are detained unnecessarily or for prolonged periods of time before trial. Contract defenders in Berrien and Muskegon Counties, for example, rarely seek reductions in bail, even for clients whose charges have been reduced by the prosecutor, or for clients who pose no flight risk. Many indigent defense counsel fail to appear at court proceedings, resulting in frequent rescheduling and postponements. One client in Muskegon County, for example, was forced to sit in the county jail for months because an attorney he never met missed several consecutive court dates, including three scheduled circuit court hearings.

144. Many Class members are compelled to take inappropriate pleas, often to the highest charge, even when they have meritorious defenses. Indigent defense counsel routinely encourage their clients to plead guilty without a proper factual basis for guilt, without even a cursory investigation into potentially meritorious defenses, in the absence of any physical evidence, and without the presence of a complaining witness. On advice of counsel, some Plaintiffs take "open" pleas, *i.e.*, pleas that are taken without promise of a particular sentence, that often result in punishment that is disproportionate to the facts of the case.

145. An attorney in Berrien County advised a client who claimed to have acted in self-defense to plead guilty to a domestic violence charge. An attorney in Genesee County permitted a client to plead guilty to failure to pay restitution to his ex-wife even though he had already paid

her the money owed. Other attorneys in Berrien County routinely fail to ensure that non-English-speaking clients understand what rights they waive by pleading guilty.

146. Fearful that their attorneys will not adequately prepare for trial, Plaintiffs forgo their right to trial, pleading guilty to crimes they did not commit or to charges more severe than the facts of their cases warrant.

147. Those who insist on their right to trial may be subjected to punitive charges or lengthy pre-trial delays. For example, an individual defendant in Muskegon County sat in jail for ten months awaiting trial before he finally pled no contest to, among other charges, attempted larceny. His indigent defense counsel refused to enforce his right to a speedy trial and instead told the client that if he did not plead, the prosecutor would drop the charges against him before the speedy trial time period ran and re-arraign him on the same charges. There was no evidence connecting the client to the crime and the client had three alibi witnesses who would have testified that he was nowhere near the crime scene.

148. Many Class members who plead guilty or are found guilty at trial face harsher sentences than the facts of their cases warrant. A client in Berrien County received a sentence of 12 to 24 months even though the plea agreement had recommended no incarceration. When the sentence was imposed, her attorney said nothing. Instead, it was the prosecutor who reminded the court of its obligation to allow the client to withdraw her plea if the court did not intend to follow the plea agreement.

149. An attorney in Genesee County told a client trying to decide whether to plead guilty to tampering with a parking meter that if he were convicted at trial, he would face a sentence of 15 years. According to Michigan's sentencing guidelines, however, the sentencing range for the crime with which the client was charged was 0 to 34 months.

150. A client in Berrien County was sentenced to 37 days for contempt even though the maximum sentence permitted under state law was 30 days. Again, when the sentence was imposed, defense counsel said nothing. The court clerk noticed the error.

151. Plaintiffs—including those who receive public assistance—are assessed fees in the hundreds of dollars that they cannot possibly pay without substantial hardship, including charges for attorneys who have provided little advocacy. Attorneys in Berrien and Muskegon Counties, for example, do not advocate for Plaintiffs at proceedings to assess fees and attorney charges despite clear Supreme Court case law condemning automatic fee assessments and prohibiting the assessment of counsel costs that do not involve a determination of the client's ability to pay. Clients in Berrien County are not advised of the costs they will be charged, such as for probationary supervision, before they plead guilty. Clients in Muskegon County are routinely assessed fees of $120 without regard for their ability to pay.

152. Plaintiffs do not have access to alternatives to incarceration. Plaintiffs who should be enrolled in drug treatment programs, for example, are instead sentenced to lengthy prison terms that cannot address underlying issues. Medical records that can indicate effective solutions are rarely, if ever, requested. Clients who wish to have alternative sentencing must explore the alternatives and request them themselves.

153. Plaintiffs have no adequate remedy at law.

COUNT I

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND 42 USC §1983

(Against Defendant Granholm)
(Asserted by All Named Plaintiffs and the Plaintiff Class)

154. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations of paragraphs 1 through 153.

155. Michigan is obligated to provide tools to indigent defense counsel that will enable counsel to provide constitutionally adequate defense services to Plaintiff Class members.

156. As set forth herein, Defendant Granholm fails to provide funding and oversight to the County programs, and therefore does nothing to ensure that the State provides the necessary tools to indigent defense counsel in the Counties.

157. As a result of Defendant's failures to provide funding and exercise guidance, Michigan's indigent defense system is under funded, poorly administered, and does not provide mandated constitutional protections.

158. As a result of Michigan's deficient indigent defense system, indigent defense counsel in the Counties are unable to provide constitutionally adequate legal representation.

159. As a result of the inability of indigent defense counsel to provide constitutionally adequate legal representation, Plaintiffs are harmed.

160. Defendant's failure to provide the funding and to exercise the oversight necessary for constitutionally adequate indigent defense during trial court felony criminal proceedings violates Plaintiffs' rights under the Sixth Amendment to the United States Constitution, including, but not limited to, their right to effective assistance of counsel. This, in turn, provides Plaintiffs with the right to obtain declaratory and injunctive relief and attorney fees, pursuant to 42 USC 1983.

COUNT II

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND 42 USC §1983

(Against Defendant Granholm)
(Asserted by All Named Plaintiffs and the Plaintiff Class)

161. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations of paragraphs 1 through 153.

162. Michigan is obligated to provide tools to indigent defense counsel that will enable counsel to provide constitutionally adequate defense services to Plaintiff Class members.

163. As set forth herein, Defendant Granholm fails to provide funding and oversight to the County programs, and therefore does nothing to ensure that the State provides the necessary tools to indigent defense counsel in the Counties.

164. As a result of Defendant's failures to provide funding and exercise guidance, Michigan's indigent defense system is under funded, poorly administered, and does not provide mandated constitutional protections.

165. As a result of Michigan's deficient indigent defense system, indigent defense counsel in the Counties are unable to provide constitutionally adequate legal representation.

166. As a result of the inability of indigent defense counsel to provide constitutionally adequate legal representation, Plaintiffs are harmed.

167. Defendant's failure to provide the funding and to exercise the oversight necessary for constitutionally adequate indigent defense during trial court felony criminal proceedings violates Plaintiffs' rights under the Fourteenth Amendment to the United States Constitution, including, but not limited to, their right to due process of law. This, in turn, provides Plaintiffs with the right to obtain declaratory and injunctive relief and attorney fees, pursuant to 42 USC 1983.

COUNT III

ART 1 § 20 OF THE MICHIGAN CONSTITUTION

(Against All Defendants)

(Asserted by All Named Plaintiffs and the Plaintiff Class)

168. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations of paragraphs 1 through 153.

169. Michigan is obligated, under the Michigan Constitution, to provide tools to indigent defense counsel that will enable counsel to provide constitutionally adequate defense services to Plaintiff Class members.

170. Defendants fail to provide funding and to exercise oversight, and therefore fail to ensure that such tools are provided in the Counties.

171. As a result of Defendants' failure to provide funding and exercise oversight, Michigan's indigent defense system is under-funded, poorly administered, and does not provide mandated constitutional protections.

172. As a result of Michigan's deficient indigent defense system, indigent defense counsel in the Counties are unable to provide constitutionally adequate legal representation.

173. As a result of the inability of indigent defense counsel to provide constitutionally adequate legal representation, Plaintiffs are harmed.

174. Defendants' failure to provide the funding and oversight necessary for constitutionally adequate indigent defense during trial court felony criminal proceedings violates Plaintiffs' rights under the Michigan Constitution, including, but not limited to, their right to effective assistance of counsel. Const 1963, art 1, § 20. This, in turn, provides Plaintiffs with the right to obtain declaratory and injunctive relief.

COUNT IV

ART 1 § 17 OF THE MICHIGAN CONSTITUTION

(Against All Defendants)

(Asserted by All Named Plaintiffs and the Plaintiff Class)

175. Plaintiffs reallege and incorporate by reference as if fully set forth herein the allegations of paragraphs 1 through 153.

176. Michigan is obligated, under the Michigan Constitution, to provide tools to indigent defense counsel that will enable counsel to provide constitutionally adequate defense services to Plaintiff Class members.

177. Defendants fail to provide funding and to exercise oversight, and therefore fail to ensure that such tools are provided in the Counties.

178. As a result of Defendants' failure to provide funding and exercise oversight, Michigan's indigent defense system is under-funded, poorly administered, and does not provide mandated constitutional protections.

179. As a result of Michigan's deficient indigent defense system, indigent defense counsel in the Counties are unable to provide constitutionally adequate legal representation.

180. As a result of the inability of indigent defense counsel to provide constitutionally adequate legal representation, Plaintiffs are harmed.

181. Defendants' failure to provide the funding and oversight necessary for constitutionally adequate indigent defense during trial court felony criminal proceedings violates Plaintiffs' rights under the Michigan Constitution, including, but not limited to, their right to due process of law. Const 1963, art 1, § 17. This, in turn, provides Plaintiffs with the right to obtain declaratory and injunctive relief.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Court:

A. Assert jurisdiction over this action;

B. Order that Plaintiffs may maintain this action as a class action pursuant to Rule 3.501 of the Michigan Court Rules;

C. Declare unconstitutional and unlawful:

i. Defendant Granholm's violation of Plaintiffs' rights, including their rights to effective assistance of counsel, under the Sixth and Fourteenth Amendments to the United States Constitution and 42 USC §1983;

ii. Defendant Granholm's violation of Plaintiffs' rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution;

iii. Defendants' violation of Plaintiffs' rights, including their rights to effective assistance of counsel, under Article 1, § 20 of the Michigan Constitution of 1963; and

iv. Defendants' violation of Plaintiffs' rights under the Due Process Clause of Article 1, § 17 of the Michigan Constitution.

D. Permanently enjoin Defendants from subjecting Plaintiffs to practices that violate their rights;

E. Order appropriate relief requiring Defendants to provide indigent defense programs and representation consistent with the requirements of the United States and Michigan Constitutions;

F. Award to Plaintiffs the reasonable costs and expenses incurred in the prosecution of this action, including reasonable attorneys' fees; and

G. Grant such other and further declaratory and equitable relief as the Court deems appropriate, just and proper to protect Plaintiffs from further harm by Defendants.

Respectfully submitted,

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