STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER LEE DUNCAN, BILLY JOE BURR, JR., STEVEN CONNOR, ANTONIO TAYLOR, JOSE DAVILA, JENNIFER O'SULLIVAN, CHRISTOPHER MANIES, and BRIAN SECREST,

Plaintiffs-Appellees,

v

STATE OF MICHIGAN and GOVERNOR OF MICHIGAN,

Defendants-Appellants.

FOR PUBLICATION
June 11, 2009
9:00 a.m.

No. 278652
Ingham Circuit Court
LC No. 07-000242-CZ

CHRISTOPHER LEE DUNCAN, BILLY JOE BURR, JR., STEVEN CONNOR, ANTONIO TAYLOR, JOSE DAVILA, JENNIFER O'SULLIVAN, CHRISTOPHER MANIES, and BRIAN SECREST,

Plaintiffs-Appellees,

v

STATE OF MICHIGAN and GOVERNOR OF MICHIGAN,

Defendants-Appellants.

No. 278858
Ingham Circuit Court
LC No. 07-000242-CZ

CHRISTOPHER LEE DUNCAN, BILLY JOE BURR, JR., STEVEN CONNOR, ANTONIO TAYLOR, JOSE DAVILA, JENNIFER O'SULLIVAN, CHRISTOPHER MANIES, and BRIAN SECREST,

Plaintiffs-Appellees,

v

STATE OF MICHIGAN and GOVERNOR OF MICHIGAN,

Defendants-Appellants.

No. 278860
Ingham Circuit Court
LC No. 07-000242-CZ

Advance Sheets Version

Before: Murphy, P.J., and Sawyer and Whitbeck, JJ.

MURPHY, P. J.

At its core, this case involves a claim that the named plaintiffs, along with members of the certified class, i.e., present and future indigent defendants subject to felony prosecutions in the trial courts of Berrien, Genesee, and Muskegon counties, have been, are being, and will be denied their state and federal constitutional rights to counsel and the effective assistance of counsel, Const 1963, art 1, § 20, and US Const, Am VI, directly as a result of the court-appointed, indigent defense systems currently being employed by those counties. According to plaintiffs, even though the counties and the circuit court chief judges have been statutorily delegated the duties associated with providing representation for indigent criminal defendants, the state of Michigan and the Governor, defendants in this suit, ultimately remain legally responsible for securing and protecting the constitutional rights at issue. And plaintiffs assert that the constitutionally deficient county systems were born out of and created by defendants' inadequate funding and lack of fiscal and administrative oversight. They further allege that the systemic constitutional deficiencies in regard to indigent representation continue to infect the judicial process and are directly attributable to defendants' constitutional failures, which can and must be redressed by court action.

In Docket No. 278652, defendants appeal as of right the trial court's order denying under MCR 2.116(C)(7) their motion for summary disposition based on governmental immunity. In Docket No. 278858, defendants appeal by leave granted the trial court's order denying their motion for summary disposition on numerous theories, including various justiciability doctrines. Finally, in Docket No. 278860, defendants appeal by leave granted the trial court's order granting class certification. The appeals were consolidated.

We affirm, holding that defendants are not shielded by governmental immunity, that defendants are proper parties, that the trial court, not the Court of Claims, has jurisdiction, and that the trial court has jurisdiction and authority to order declaratory relief, prohibitory injunctive relief, and some level of mandatory injunctive relief, the full extent of which we need not presently define. We further hold that, on the basis of the pleadings and at this juncture in the lawsuit, plaintiffs have sufficiently alleged facts that, if true, establish standing, establish that the case is ripe for adjudication, and state claims upon which declaratory and injunctive relief can be awarded. Finally, we hold that the trial court properly granted the motion for class certification.

We preface our opinion by observing that the role of the judiciary in our tripartite system of government entails, in part, interpreting constitutional language, applying constitutional requirements to the given facts in a case, safeguarding constitutional rights, and halting

unconstitutional conduct. For state and federal constitutional provisions to have any meaning, we may and must engage in this role even where litigation encompasses conduct by the executive and legislative branches. We cannot accept the proposition that the constitutional rights of our citizens, even those accused of crimes and too poor to afford counsel, are not deserving and worthy of any protection by the judiciary in a situation where the executive and legislative branches fail to comply with constitutional mandates and abdicate their constitutional responsibilities, either intentionally or neglectfully. If not by the courts, then by whom? We are not ruling that a constitutional failure has in fact occurred here, but it has been alleged and needs to be judicially addressed. This, however, does not mean that we may set public policy, make political judgments, or demand that more efficient or desirable means be utilized by the political branches in carrying out their constitutional obligations. But if a chosen path taken by the executive and legislative branches in an effort to satisfy their constitutional obligations allegedly fails to meet minimum constitutional requirements, the judiciary must examine the allegations and adjudicate the dispute. The judiciary by so intervening is not acting with a lack of judicial modesty or in violation of the separation of powers; it is acting in accordance with its constitutional obligations, duties, and oaths of office. See *Boumediene v Bush*, 553 US __, __; 128 S Ct 2229, 2259; 171 L Ed 2d 41, 77 (2008); *Marbury v Madison*, 5 US (1 Cranch) 137, 177-180; 2 L Ed 60 (1803). Failing to do so results in the political branches' effectively deciding "what the law is," *Boumediene* and *Marbury*, *supra*, impinging on the judiciary's role in violation of the separation of powers. Judicial modesty does not equate to ignoring constitutional obligations. Constitutional compliance is our only concern; matters regarding the method and the manner by which the executive and legislative branches effectuate constitutional demands are not our concern, nor can they be, as long as the branches abide by the state and federal constitutions. In that same vein, and with respect to the particular issues raised in this action, concerns about costs and fiscal impact, concerns regarding which governmental entity or entities should bear the costs, and concerns about which governmental body or bodies should operate an indigent defense system cannot be allowed to prevail over constitutional compliance, despite any visceral reaction to the contrary. We take no position on the validity of plaintiffs' allegations and claims, nor are the underlying motivations of any party relevant. We simply and merely hold that plaintiffs have alleged facts sufficient to survive a motion for summary disposition.

I. The Complaint

In a highly detailed complaint, plaintiffs allege that the indigent defense systems now in place in Berrien, Genesee, and Muskegon counties are underfunded, poorly administered, and do not ensure that the participating defense attorneys have the necessary tools, time, and qualifications to adequately represent indigent defendants and to put the cases presented by prosecutors to the crucible of meaningful adversarial testing. Plaintiffs assert that the county systems are wholly lacking with respect to the following: client eligibility standards; attorney hiring, training, and retention programs; written performance and workload standards; the monitoring and supervision of appointed counsel; conflict of interest guidelines; and independence from the judiciary and prosecutorial offices. Plaintiffs claim harm in the form of improperly denied representation, wrongful convictions, unnecessary or prolonged pretrial detentions, factually unwarranted guilty pleas, lengthy pretrial delays, and the introduction of inadmissible evidence that could have been excluded had pretrial motions been filed. Plaintiffs claim further harm in the form of representation by counsel who have conflicts of interest,

sentences that are harsher than warranted or legally unsound, and hearing and trial failures due to unprepared counsel and the lack of inquiry, investigation, investigatory tools, and access to expert witnesses. The complaint provides numerous examples in support of these contentions.

The complaint proceeds to provide specific instances of alleged deficient and inadequate performances by various court-appointed attorneys with respect to the eight named indigent plaintiffs. As an overview, these alleged instances include: counsel speaking with plaintiffs, for the first time, in holding cells for mere minutes before scheduled preliminary examinations while in full hearing range of other inmates; counsel advising plaintiffs to waive preliminary examinations without meaningful discussions of case-relevant matters; counsel failing to provide plaintiffs with police reports; and counsel generally neglecting throughout the entire course of criminal proceedings to discuss with plaintiffs the accuracy and nature of the charges, the circumstances of the purported crimes, and any potential defenses. Further alleged instances include: counsel entering into plea negotiations without client input or approval; counsel perfunctorily advising plaintiffs to plead guilty as charged absent meaningful investigation and inquiry; counsel improperly urging plaintiffs to admit facts when pleas were taken; and counsel neither preparing for hearings and trials nor engaging in any communications with plaintiffs concerning trials. The complaint alleges that other indigent defendants being prosecuted or who will be prosecuted in the future face the same prospects of receiving inadequate and ineffective assistance of counsel as that received by the named plaintiffs.

With respect to all the named plaintiffs, as well as all those persons fitting within the class, the complaint alleges that the inadequacies and ineffectiveness of counsel in handling indigent cases ultimately result from failures by the state and the Governor to adequately provide funding and fiscal and administrative oversight. According to plaintiffs, it is the failures by the state and the Governor that have caused, are causing, and will continue to cause a denial of constitutionally adequate legal representation within the systems employed by the counties. Count I of the complaint, which pertains only to the Governor, alleges a Sixth Amendment violation of the right to effective or adequate representation and seeks declaratory and injunctive relief for the constitutional violation under 42 USC 1983. Count II of the complaint, which also pertains only to the Governor, alleges a Fourteenth Amendment violation of the right to due process and seeks declaratory and injunctive relief for the constitutional violation under 42 USC 1983. Count III of the complaint, which pertains to the Governor and the state, alleges a violation of the right to the effective assistance of counsel under Const 1963, art 1, § 20, and seeks declaratory and injunctive relief. Count IV of the complaint, which also pertains to the state and the Governor, alleges a violation of due process under Const 1963, art 1, § 17, and seeks declaratory and injunctive relief.

In the prayer for relief, plaintiffs seek a court declaration that defendants' conduct, failure to act, and practices are unconstitutional and unlawful, consistent with the four alleged counts, and plaintiffs seek to enjoin defendants from subjecting class members to continuing unconstitutional practices. Plaintiffs also request an order requiring defendants "to provide indigent defense programs and representation consistent with the requirements of the United States and Michigan Constitutions."

II. Class Certification and Summary Disposition

Pursuant to MCR 3.501(B), plaintiffs moved for class certification, contending that the class was sufficiently numerous to the extent that joinder would be impractical, that factual and legal issues raised by the named plaintiffs were common to, and typical of, prospective class members, that the named plaintiffs and prospective class members share or will share similar harms and constitutional deprivations, and that the named plaintiffs would fairly and adequately protect the interests of the class through maintenance of a class action, which would be superior to any other method of adjudication.

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(4), (7), and (8). Defendants maintained that plaintiffs lacked standing, the case was not ripe for adjudication, the trial court lacked jurisdiction on a variety of grounds, there was a failure to state a claim upon which declaratory and injunctive relief could be granted, the wrong parties were sued, and governmental immunity shielded defendants from liability. The nature of each particular argument will be discussed below in our analysis, given that defendants' arguments were renewed on appeal.

At a hearing in which the trial court addressed plaintiffs' motion for class certification as well as defendants' motion for summary disposition, the court granted class certification and rejected all the grounds raised by defendants in support of the summary disposition motion. We shall discuss the court's reasoning when we examine each of the appellate issues raised by defendants.

III. Analysis

A. Standards of Review

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v Fischer*, 471 Mich 109, 129; 683 NW2d 611 (2004). Also reviewed de novo are issues of constitutional law, *Wayne Co v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004), statutory interpretation, *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006), governmental immunity, *Bennett v Detroit Police Chief*, 274 Mich App 307, 310-311; 732 NW2d 164 (2007), jurisdiction, *Atchison v Atchison*, 256 Mich App 531, 534; 664 NW2d 249 (2003), and matters concerning justiciability, *Michigan Chiropractic Council v Comm'r of the Office of Financial & Ins Services*, 475 Mich 363, 369; 716 NW2d 561 (2006).

"A trial court's ruling regarding certification of a class is reviewed for clear error, meaning that the ruling will be found clearly erroneous only where there is no evidence to support it or there is evidence but this Court is nevertheless 'left with a definite and firm conviction that a mistake has been made.'" *Hill v City of Warren*, 276 Mich App 299, 310; 740 NW2d 706 (2007), quoting *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384 (1999).

B. Underlying Constitutional Principles

1. The Right to Counsel Generally

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." US Const, Am VI. The right to counsel under the Sixth Amendment is made applicable to the states pursuant to the Due Process Clause of the Fourteenth Amendment. *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004), citing *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963). Under the Michigan Constitution, "[i]n every criminal prosecution, the accused shall have the right to . . . have the assistance of counsel for his or her defense[.]" Const 1963, art 1, § 20. *Gideon* made clear that the indigent are constitutionally entitled to be represented by counsel when prosecuted for a crime by the state, even though they lack the financial means to hire an attorney, and that the state has an obligation to provide them counsel. *Gideon, supra* at 344. We wholeheartedly agree with the following wise sentiments articulated by the United States Supreme Court in *Gideon*:

> The assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not . . . be done.
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> . . . [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. [*Id.* at 343-344 (parenthesis, citations, and quotation marks omitted; second ellipsis added).]

2. The Right to the Effective Assistance of Counsel

The constitutional right to counsel encompasses the right to the *effective assistance* of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). In *United States v Cronic*, 466 US 648, 654-656; 104 S Ct 2039; 80 L Ed 2d 657 (1984), the United States Supreme Court explained:

> The special value of the right to the assistance of counsel explains why "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." The text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of counsel to the accused, but "Assistance," which is to be "for his defence." Thus, "the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." If no actual "Assistance" "for" the accused's "defence" is provided, then the constitutional guarantee has been violated. To hold otherwise "could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."
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> The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. "[T]ruth," Lord Eldon said, "is best discovered by powerful statements on both sides of the question." This dictum describes the unique strength of our system of criminal justice. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." It is that "very premise" that underlies and gives meaning to the Sixth Amendment. It "is meant to assure fairness in the adversary criminal process." Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself." [Citations omitted.]

3. The Right to Counsel at Critical Stages of the Proceedings, Including Pretrial Stages

"The Sixth Amendment safeguards the right to counsel at all critical stages of the criminal process for an accused who faces incarceration." *Williams*, *supra* at 641. A critical stage of the proceedings is any stage where the absence of counsel may harm a defendant's right to a fair trial and "applies to preliminary proceedings where rights may be sacrificed or defenses lost." *People v Green*, 260 Mich App 392, 399; 677 NW2d 363 (2004), overruled on other grounds *People v Anstey*, 476 Mich 436, 447 n 9 (2006). Critical stages include, in part, the preliminary examination, *Coleman v Alabama*, 399 US 1, 9; 90 S Ct 1999; 26 L Ed 2d 387 (1970), a pretrial lineup, *People v Frazier*, 478 Mich 231, 249 n 20; 733 NW2d 713 (2007), and the entry of a plea, *People v Pubrat*, 451 Mich 589, 593-594; 548 NW2d 595 (1996). In *Maine v Moulton*, 474 US 159, 170; 106 S Ct 477; 88 L Ed 2d 481 (1985), the United States Supreme Court observed:

> [T]he Court has . . . recognized that the assistance of counsel cannot be limited to participation in a trial; *to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.* Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier,

> "critical" stages in the criminal justice process "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." And, "[w]hatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . . ." This is because, after the initiation of adversary criminal proceedings, "'the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" [Citations omitted; emphasis and initial ellipsis added.]

When read together, the authorities cited above make abundantly clear that representation by counsel, and thus effective representation by counsel, is crucial in serving to protect Sixth Amendment rights not only at trial but also during pretrial proceedings.

4. Ineffective Assistance of Counsel Claims in Criminal Appellate Proceedings

In the context of criminal cases and appeals, our Supreme Court in *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), enunciated the basic and well-established principles involving a claim of ineffective assistance of counsel:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Counsel's performance is deemed deficient or ineffective when the "representation [falls] below an objective standard of reasonableness." *Strickland*, *supra* at 688; *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The two-part *Strickland* test, cited in *Carbin*, takes center stage in addressing the justiciability claims, where defendants vigorously argue for its application in this civil suit seeking declaratory and prospective injunctive relief. In our justiciability analysis, we will also explore the circumstances in which the prejudice prong of the *Strickland* test is inapplicable.

C. Discussion

1. Governmental Immunity

Defendants argue that governmental immunity bars plaintiffs' "tort" claims against the state because they do not come within an exception to the broad grant of immunity afforded by MCL 691.1407(1). Defendants also contend that absolute immunity bars plaintiffs' claims against the Governor under MCL 691.1407(5). The trial court ruled that governmental immunity is not available in a state court action alleging constitutional violations.

Under MCR 2.116(C)(7), summary disposition in favor of a defendant is proper when the plaintiff's claim is "barred because of . . . immunity granted by law . . . ." See *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008). The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Id.* The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Id.*

a. The State

The governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, provides a broad grant of immunity from "tort liability" to governmental agencies, absent the applicability of a statutory exception,[1] when they are engaged in the discharge or exercise of a governmental function. MCL 691.1407(1); *Maskery v Univ of Michigan Bd of Regents*, 468 Mich 609, 613; 664 NW2d 165 (2003); *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567, 595; 363 NW2d 641 (1984). The state of Michigan is a "governmental agency" entitled to immunity as granted under the GTLA. MCL 691.1401(c) and (d). An activity that is expressly or impliedly authorized or mandated by constitution, statute, local charter, ordinance, or other law constitutes a governmental function for purposes of the GTLA. *Maskery*, *supra* at 613-614, quoting MCL 691.1401(f). This Court gives the term "governmental function" a broad interpretation, but the statutory exceptions must be narrowly construed. *Maskery*, *supra* at 614. The "immunity protects the state not only from liability, but also from the great public expense of having to contest a trial." *Odom*, *supra* at 478. The party that seeks to impose liability on a governmental entity has the burden of pleading in avoidance of governmental immunity. *Mack v Detroit*, 467 Mich 186, 198; 649 NW2d 47 (2002).

Here, there can be no reasonable dispute that the state was engaged in a governmental function when it delegated the representation of indigent defendants to the various counties.[2]

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[1] The statutory exceptions to governmental immunity consist of the highway exception, MCL 691.1402, the proprietary-function exception, MCL 691.1413, the governmental-hospital exception, MCL 691.1407(4), the motor-vehicle exception, MCL 691.1405, the public-building exception, MCL 691.1406, and the sewage-disposal-system-event exception, MCL 691.1417(2). *Odom, supra* at 478 n 62.

[2] MCL 775.16 provides:

(continued…)

Moreover, it is the state that is ultimately mandated to ensure that indigent defendants are provided their constitutional right to counsel. *Gideon*, *supra*; *Williams*, *supra* at 641.

Our Supreme Court has "observed that nontort causes of action are not barred by immunity *if* a plaintiff successfully pleads and establishes such a cause of action." *Borg-Warner Acceptance Corp v Dep't of State*, 433 Mich 16, 19; 444 NW2d 786 (1989) (emphasis in original). Further, in *Smith v Dep't of Pub Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), aff'd sub nom *Will v Michigan Dep't of State Police*, 491 US 58; (1989), the Michigan Supreme Court held:

> [] Where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action.
>
> [] A claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases.

See also *Jones v Powell*, 462 Mich 329, 336; 612 NW2d 423 (2000).

State policies are at the forefront of this litigation. "'Governmental immunity is not available in a state court action where it is alleged that the state has violated a right conferred by the Michigan Constitution.'" *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 546-547; 688 NW2d 550 (2004), quoting *Burdette v Michigan*, 166 Mich App 406, 408; 421 NW2d 185 (1988). An action that establishes unconstitutional conduct "may not be limited except as provided by the Constitution because of the preeminence of the Constitution." *Hinojosa*, *supra* at 546, citing *Smith*, *supra* at 641 (opinion by Boyle, J.). In *Smith*, *id.*, Justice Boyle observed in her opinion concurring in part and dissenting in part:

> MCL 691.1407; MSA 3.996(107) does not, by its terms, declare immunity for unconstitutional acts by the state. The idea that our Legislature would indirectly seek to "approve" acts by the state which violate the state constitution

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(…continued)

> When a person charged with having committed a felony appears before a magistrate without counsel, and who has not waived examination on the charge upon which the person appears, the person shall be advised of his or her right to have counsel appointed for the examination. If the person states that he or she is unable to procure counsel, the magistrate shall notify the chief judge of the circuit court in the judicial district in which the offense is alleged to have occurred, or the chief judge of the recorder's court of the city of Detroit if the offense is alleged to have occurred in the city of Detroit. Upon proper showing, the chief judge shall appoint or direct the magistrate to appoint an attorney to conduct the accused's examination and to conduct the accused's defense. The attorney appointed by the court shall be entitled to receive from the county treasurer, on the certificate of the chief judge that the services have been rendered, the amount which the chief judge considers to be reasonable compensation for the services performed.

> by cloaking such behavior with statutory immunity is too far-fetched to infer from the language of MCL 691.1407; MSA 3.996(107). We would not ascribe such a result to our Legislature.

The *Burdette* panel reiterated those sentiments from *Smith* in addressing a due process challenge, further reasoning:

> Plaintiffs' claim alleged that defendant violated plaintiffs' due process rights under Const 1963, art 1, § 17. Plaintiffs have stated a prima facie claim. . . . [D]efendant cannot claim immunity where the plaintiff alleges that defendant has violated its own constitution. Constitutional rights serve to restrict government conduct. These rights would never serve this purpose if the state could use governmental immunity to avoid constitutional restrictions. [*Burdette*, *supra* at 408-409.]

The instant claims against the state are based solely on alleged violations of the Michigan Constitution and concern custom and policy matters with respect to the representation of indigent defendants. Moreover, plaintiffs' lawsuit against the state is not a "tort liability" action. Accordingly, the state is not shielded by immunity granted by law in this suit seeking declaratory and injunctive relief for constitutional violations. The state, however, characterizes plaintiffs' claims as "constitutional tort" claims for money damages and thus claims that governmental immunity bars the action. The state argues that plaintiffs are actually seeking appropriations or money from the state treasury, making plaintiffs' action one for money damages or monetary relief. A cause of action seeking money damages for a violation of state constitutional rights has been coined a "state constitutional tort action." See *Jones v Sherman*, 243 Mich App 611, 612; 625 NW2d 391 (2000). Typically, a constitutional tort claim arises when a governmental employee, exercising discretionary powers, violates constitutional rights personal to a plaintiff. *Reid v Michigan*, 239 Mich App 621, 629; 609 NW2d 215 (2000).

We initially note that, as indicated above, "[a] claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases." *Smith*, *supra* at 544; see also *Powell*, *supra* at 336. Nevertheless, defendants inaccurately characterize plaintiffs' claims, where the gravamen of the lawsuit concerns the adequacy of representation for indigent defendants and prays for equitable relief; *this is not a tort liability action for money damages, nor do plaintiffs request an appropriation of state funds*. Plaintiffs seek a court declaration that defendants' practices are unconstitutional, seek to enjoin continuing unconstitutional practices, and seek to compel the state and the Governor to provide indigent defendants representation consistent with the state and federal constitutions. Assuming that the state would incur an unfavorable fiscal impact as the ultimate result of the proceedings, it does not magically transform the case, for purposes of the GTLA, from an equitable action into a tort liability action seeking a money judgment or monetary relief. See, e.g., *Edelman v Jordan*, 415 US 651, 666-668; 94 S Ct 1347; 39 L Ed 2d 662 (1974) (a fiscal consequence to state treasuries resulting from compliance with equitable decrees, which by their terms are prospective in nature, is an ancillary effect and does not mean that a money judgment had been entered). The state has cited no convincing or even relevant authority making the GTLA applicable in this equitable action. Accordingly, the trial court properly concluded that governmental immunity is not available to the state.

b. The Governor

With respect to the Governor, MCL 691.1407(5) provides:

> A judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from *tort liability* for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority. [Emphasis added.]

"The executive power is vested in the governor[,]" Const 1963, art 5, § 1; therefore, there can be no dispute that the Governor is the highest executive official in state government. Additionally, this lawsuit necessarily relates to duties within the scope of the Governor's executive authority, given that "[t]he governor shall take care that the laws be faithfully executed[,]" Const 1963, art 5, § 8. Further, in regard to the scope of executive authority, this suit *potentially* affects issues of state funding, and Const 1963, art 5, § 18, provides that "[t]he governor shall submit to the legislature at a time fixed by law, a budget for the ensuing fiscal period setting forth in detail, for all operating funds, the proposed expenditures and estimated revenue of the state." However, for the reasons stated earlier in this opinion with respect to the state, this is not a tort liability action seeking money damages. Accordingly, MCL 691.1407(5) provides no immunity for the Governor.

2. Jurisdiction and Authority to Order Various Forms of Injunctive Relief

a. Mandamus and the Governor

Defendants argue, in cursory fashion, that the trial court lacks jurisdiction to order injunctive relief with respect to the Governor. On this issue, the trial court ruled that Michigan law cannot immunize the Governor from federal claims under preemption principles and that the Governor is not immune from state law claims because the suit does not entail tort liability. As is evident, the trial court somewhat treaded on governmental immunity principles discussed earlier in this opinion.

In support of their contention that injunctive relief cannot issue against the Governor, defendants cite only *Straus v Governor*, 459 Mich 526, 532-533; 592 NW2d 53 (1999), in which the Supreme Court, quoting and adopting this Court's opinion in the case, stated:

> "We would also note that, because a court at all times is required to question sua sponte its own jurisdiction (whether over a person, the subject matter of an action, or the limits on the relief it may afford), we have some doubt with respect to the propriety of injunctive relief against the Governor. It is clear that separation of powers principles, Const 1963, art 3, § 2, preclude mandatory injunctive relief, mandamus, against the Governor. Whether similar reasoning also puts prohibitory injunctive relief beyond the competence of the judiciary appears to be an open question that need not be resolved in this case. We do note that the Supreme Court has recently recognized that declaratory relief normally will suffice to induce the legislative and executive branches, the principal members of which have taken oaths of fealty to the constitution identical to that taken by the judiciary, Const 1963, art 11, § 1, to conform their actions to

> constitutional requirements or confine them within constitutional limits. Only when declaratory relief has failed should the courts even begin to consider additional forms of relief in these situations. The need for utmost delicacy on the part of the judiciary, and respect for the unique office of Governor, [has been] recognized [by this Court.]" [Citations omitted.]

In part, plaintiffs seek declaratory relief, and the quoted passage from *Straus* makes clear that the courts have the authority to issue a declaratory judgment against the Governor, which should be the first course of action before even contemplating injunctive relief. Plaintiffs also seek to enjoin continuing unconstitutional practices or, stated otherwise, prohibitory injunctive relief. Such a remedy could potentially entail a cessation of criminal prosecutions against indigent defendants absent constitutional compliance with the right to counsel. *Straus* indicates that the Court was not resolving the question whether the judiciary is constrained from ordering prohibitory injunctive relief against the Governor and, given that defendants do not present any additional arguments on the issue, we decline to find that the trial court lacks authority or jurisdiction to enjoin the Governor from continuing unconstitutional practices. In regard to the issue of mandatory injunctive relief (mandamus), plaintiffs do seek to compel the Governor to provide indigent defendants with representation that is consistent with the state and federal constitutions. As will be discussed later in this opinion, we believe that there may exist a basis to subject the Governor to a mandamus order under Michigan law in regard to state constitutional violations if this case reflects the existence of impediments to the ability of the judiciary to carry out its duties in compliance with constitutional principles relative to indigent defendants being prosecuted in state courtrooms. However, we need not specifically answer the question because the Governor is also being sued for alleged federal constitutional violations under 42 USC 1983, which allows for mandatory injunctive relief.[3] A review of *Straus* reveals that it did not involve a claim brought under 42 USC 1983 alleging a violation of a federal constitutional right. 42 USC 1983 provides, in relevant part:

> Every *person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, *suit in equity*, or other proper proceeding for redress, except that in any action brought against a *judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted* unless a

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[3] "[T]he Michigan Constitution does not afford greater protection than federal precedent with regard to a defendant's right to counsel when it involves a claim of ineffective assistance of counsel." *Pickens*, *supra* at 302. Plaintiffs' request for mandamus-type relief encompasses, without distinction, both the alleged state and the alleged federal constitutional deprivations; therefore, considering that the federal constitutional rights parallel those under the Michigan Constitution, if there is a state violation, there would be a federal violation, implicating relief under 42 USC 1983.

declaratory decree was violated or declaratory relief was unavailable. [Emphasis added.]

Even though a state official is a "person" in the literal sense, "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office[, and,] [a]s such, it is no different from a suit against the State itself." *Will v Michigan Dep't of State Police*, 491 US 58, 71; 109 S Ct 2304; 105 L Ed 2d 45 (1989) (citations omitted). However, "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Will*, *supra* at 71 n 10, quoting *Kentucky v Graham*, 473 US 159, 167 n 14; 105 S Ct 3099; 87 L Ed 2d 114 (1985), and citing *Ex parte Young*, 209 US 123, 159-160; 28 S Ct 441; 52 L Ed 714 (1908); see also *Hafer v Melo*, 502 US 21, 27; 112 S Ct 358; 116 L Ed 2d 301 (1991). The suit against the Governor qualifies as an official-capacity suit, *id.* at 24, 27, and the action seeks equitable relief in the form of a declaratory judgment and an injunction, thereby providing prospective relief. The Governor can thus be sued for injunctive relief under 42 USC 1983, which makes clear that equitable relief is available for a federal constitutional violation and that, if there is any limitation on granting injunctive relief, the limitation pertains only to judicial officers. See *Van Orden v Perry*, 545 US 677; 125 S Ct 2854; 162 L Ed 2d 607 (2005) (Texas resident commenced § 1983 action against the governor and other state officials, seeking declaratory relief and an injunction that would require the removal of the Ten Commandments from the capitol on the basis of an Establishment Clause violation). There is no language in 42 USC 1983 suggesting that equitable relief in the form of a mandatory injunction or mandamus is not available against the Governor, or that there is a distinction to be made between prohibitory injunctive relief and mandatory injunctive relief.

In *Felder v Casey*, 487 US 131, 139; 108 S Ct 2302; 101 L Ed 2d 123 (1988), the United States Supreme Court made clear the broad reach of a § 1983 action, stating:

> Section 1983 creates a species of liability in favor of persons deprived of their federal civil rights by those wielding state authority. As we have repeatedly emphasized, "the central objective of the Reconstruction-Era civil rights statutes . . . is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief." Thus, § 1983 provides "a uniquely federal remedy against incursions . . . upon rights secured by the Constitution and laws of the Nation," and is to be accorded "a sweep as broad as its language."
>
> Any assessment of the applicability of a state law to federal civil rights litigation, therefore, must be made in light of the purpose and nature of the federal right. This is so whether the question of state-law applicability arises in § 1983 litigation brought in state courts, which possess concurrent jurisdiction over such actions, or in federal-court litigation, where, because the federal civil rights laws fail to provide certain rules of decision thought essential to the orderly adjudication of rights, courts are occasionally called upon to borrow state law. Accordingly, we have held that a state law that immunizes government conduct otherwise subject to suit under § 1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state

> immunity law would thwart the congressional remedy, which of course already provides certain immunities for state officials. [Citations omitted; ellipses in original.]

Accordingly, any state law (statutory, constitutional, or common law) that can be read to exclude the Governor from being compelled to act, or otherwise subjected to any type of injunction, is preempted when a suit for equitable relief is brought against the Governor pursuant to 42 USC 1983 for violation of the federal constitution, regardless of the fact that the suit is litigated in a state court.

b. Appropriations from the State Treasury

Defendants also argue that only the Legislature, as opposed to the trial court or any court, has the authority or jurisdiction to appropriate funds from the state treasury. In support of their position, defendants rely on *Musselman v Governor*, 448 Mich 503; 533 NW2d 237 (1995). In *Musselman*, the plaintiffs, current and retired public school employees who were members of the Michigan Public School Employees Retirement System, alleged that the state had failed to fund retirement health care benefits being earned by employees, thereby violating Const 1963, art 9, § 24. The plaintiffs sought a "writ of mandamus ordering the appropriate official to transfer funds from the school aid fund to the reserve for health benefits." *Musselman*, *supra* at 521. Our Supreme Court held that the state was constitutionally "obligated to prefund health care benefits under art 9, § 24." *Musselman*, *supra* at 524. The Court, however, denied mandamus, ruling that it had "no authority to order the Governor or the Legislature to appropriate funds[.]" *Id.* The *Musselman* Court reasoned:

> Given that the plaintiffs have failed to show that there is a pool of funds available to be transferred to the reserve for health benefits, the requested relief necessarily involves funds from the state treasury. The only defendant with authority to appropriate funds from the treasury is the Legislature. "No money shall be paid out of the state treasury except in pursuance of appropriations made by law." Const 1963, art 9, § 17.
>
> In this context, this Court lacks the power to require the Legislature to appropriate funds. This was the understanding of the drafters of art 9, § 24, who likewise did not contemplate that the prefunding requirement could be enforced by a court. They expected that the decision to comply rested ultimately with the Legislature, whom the people would have to trust[.] [*Musselman*, *supra* at 522.][4]

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[4] The Supreme Court subsequently granted rehearing and issued *Musselman v Governor (On Rehearing)*, 450 Mich 574, 576-577; 545 NW2d 346 (1996), wherein the former majority of four in the case lost Chief Justice Brickley who decided that it was unnecessary to construe Const 1963, art 9, § 24, because mandamus could not ultimately issue to order the appropriation or transfer of funds. Thus, while there was no longer a majority regarding interpretation of Const 1963, art 9, § 24, there still remained a majority rejecting a mandamus remedy. See *Studier v*

(continued…)

It appears to us that equally problematic would be a court order directing the enactment of legislation or administrative rules, or the issuance of executive or administrative orders, in order to correct any constitutional deficiencies in the court-appointed, indigent defense systems. See Const 1963, art 4, § 1 ("The legislative power of the State of Michigan is vested in a senate and a house of representatives."); Const 1963, art 5, § 17 ("The governor shall communicate by message to the legislature at the beginning of each session and may at other times present to the legislature information as to the affairs of the state and recommend measures he considers necessary or desirable.).[5]

Here, again, plaintiffs seek a court declaration that defendants' practices are unconstitutional, seek to enjoin continuing unconstitutional practices, and seek to compel defendants to provide indigent defendants representation consistent with the state and federal constitutions. In the prayer for relief, plaintiffs are not expressly seeking an appropriation or transfer of state funds, nor expressly demanding the enactment of legislation. We acknowledge that plaintiffs allege that the systemic constitutional deficiencies have been caused by inadequate state funding and the lack of fiscal and administrative oversight. We further recognize that, should plaintiffs prevail, funding and legislation would seemingly appear to be the measures needed to be taken to correct constitutional violations. However, we are not prepared to rule on the issue whether the trial court has the authority to order appropriations, legislation, or comparable steps. It is unnecessary to do so at this juncture in the proceedings.

There is no dispute that declaratory relief is an available remedy falling within the trial court's jurisdiction and authority. As indicated in *Straus*, *supra* at 532, "'[o]nly when declaratory relief has failed should the courts even begin to consider additional forms of relief[.]'" (Citation omitted.) With respect to the state constitutional claims, which are the only claims brought against the state, should plaintiffs prevail, declaratory relief alone needs to be initially contemplated. And if the state takes corrective action without further need for intervention by the trial court, injunctive relief and the authority to issue constitutionally questionable forms of such relief would no longer be at issue. Additionally, while 42 USC 1983 does not place a limit on a court to first attempt resolution through a declaratory judgment alone, it is possible that upon entry of a declaratory judgment, the Governor would take corrective measures to comply with constitutional requirements.[6] Accordingly, the issue of injunctive relief may never come to fruition.

Furthermore, defendants do not argue that the trial court lacks authority or jurisdiction to enjoin them from continuing unconstitutional practices; therefore, there is the potential that

(…continued)

Michigan Pub School Employees' Retirement Bd, 472 Mich 642, 650-659; 698 NW2d 350 (2005) (discussing the *Musselman* cases and resolving the open issue regarding construction of Const 1963, art 9, § 24).

[5] "While strong arguments can be made that state funding would be a more desirable system of court financing, it is for the Legislature to determine whether to adopt such a system." *Grand Traverse Co v Michigan*, 450 Mich 457, 472; 538 NW2d 1 (1995).

[6] The trial court would necessarily enter a declaratory judgment before, or contemporaneous with, the entry of an order granting injunctive relief.

constitutional compliance could occur through issuance of prohibitory injunctive relief, without reaching questions concerning mandatory injunctive relief or mandamus or compelling defendants to act by way of appropriations or legislation.

Additionally, other than defendants' argument that injunctive relief can never issue against the Governor, which argument we rejected earlier in this opinion, defendants do not contend that the judiciary lacks the authority or jurisdiction to enter an order compelling, in broad and general terms, compliance with constitutional mandates. Defendants' argument merely decries court intervention in the appropriation of funds from the state treasury. However, the entry of an order simply compelling the state and the Governor to provide indigent defendants representation consistent with the state and federal constitutions does not necessarily mean that the state is being required by the court to appropriate funds to come into compliance. Theoretically, there may be creative alternatives available to satisfy constitutional mandates concerning the right to counsel.

We can only speculate at this time regarding the measures ultimately needed to be taken in order to come into compliance with the state and federal constitutions, assuming plaintiffs establish their case.[7] Only when all other possibilities are exhausted and explored, as already discussed, does there arise issues regarding appropriations and legislation, the separation of powers, and the full extent of court jurisdiction and authority. Therefore, we find no need at this time for this Court to conclusively addressed the questions posed. That being said, we wish to make clear that nothing in this opinion should be read as foreclosing entry of an order granting the type of relief so vigorously challenged by defendants. We take that stand for two reasons. First, unlike in *Musselman*, federal constitutional violations are alleged here and brought pursuant to 42 USC 1983. In the context of federal law, and keeping in mind the broad reach of a § 1983 action, we note the following passage from the United States Supreme Court's decision in *Edelman, supra* at 667-668:

> As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night. The injunction issued in *Ex parte Young* was not totally without effect on the State's revenues, since the state law which the Attorney General was enjoined from enforcing provided substantial monetary penalties against railroads which did not conform to its provisions.

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[7] The dissent indicates that this litigation will inevitably superimpose a statewide and state-funded system for the representation of indigent criminal defendants. There is, however, no certainty that this will occur, even if it may be a goal of plaintiffs. The dissent jumps ahead to an envisioned remedy, where plaintiffs have not proven, nor even tried their case yet, where legislative or congressional action on the issue, which has received much attention as of late, could conceivably occur before and regardless of this litigation, and where other avenues of constitutional compliance have not been explored, given the stage of the proceedings. Ultimately, and again assuming plaintiffs are successful, constitutional compliance could come in any variety or combination of forms. Our overriding concern is constitutionality, not the chosen path by which constitutional compliance is achieved.

> Later cases from this Court have authorized equitable relief which has probably had greater impact on state treasuries than did that awarded in *Ex parte Young*. In *Graham* v. *Richardson*, 403 U.S. 365 [29 L Ed 2d 534; 91 S Ct 1848] (1971), Arizona and Pennsylvania welfare officials were prohibited from denying welfare benefits to otherwise qualified recipients who were aliens. In *Goldberg* v. *Kelly*, 397 U.S. 254 [90 S Ct 1011; 25 L Ed 2d 287] (1970), New York City welfare officials were enjoined from following New York State procedures which authorized the termination of benefits paid to welfare recipients without prior hearing. *But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature*. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*, *supra*. [Emphasis added.]

Our second reason for not accepting outright defendants' arguments is the Michigan Supreme Court's decision in *46th Circuit Trial Court v Crawford Co*, 476 Mich 131; 719 NW2d 553 (2006). The case involved "a conflict between the legislative branch's exercise of the 'legislative power' to appropriate and to tax, and the judicial branch's inherent power to compel sufficient appropriations to allow the judiciary to carry out its essential judicial functions." *Id.* at 134. The plaintiff trial court sought to compel "counties to appropriate funding for the enhanced pension and retiree health care plans it deem[ed] necessary to recruit and retain adequate staff to allow it to carry out its essential judicial functions." *Id.*

The Supreme Court indicated that the judiciary has the extraordinary and inherent power to compel funding, which power is derived from the separation of powers set forth in articles 4 through 6 and article 3, § 2, of the 1963 Michigan Constitution. *46th Circuit Trial Court* at 140-141. The Court explained:

> [J]ust as it is implicit in the separation of powers that each branch of government is empowered to carry out the entirety of its constitutional powers, and only these powers, it is also implicit that each branch must be allowed adequate resources to carry out its powers. Although the allocation of resources through the appropriations and taxing authorities lies at the heart of the *legislative* power, and thus belongs to the legislative branch, *in those rare instances in which the legislature's allocation of resources impacts the ability of the judicial branch to carry out its constitutional responsibilities, what is otherwise exclusively a part of the legislative power becomes, to that extent, a part of the judicial power*. . . .
>
> In order for the judicial branch to carry out its constitutional responsibilities as envisioned by Const 1963, art 3, § 2, the judiciary cannot be totally beholden to legislative determinations regarding its budgets. While the people of this state have the right to appropriations and taxing decisions being made by their elected representatives in the legislative branch, *they also have the*

> *right to a judiciary that is funded sufficiently to carry out its constitutional responsibilities.*
>
> Thus, the judiciary's "inherent power" to compel appropriations *sufficient to enable it to carry out its constitutional responsibilities* is a function of the separation of powers provided for in the Michigan Constitution. The "inherent power" does not constitute an exception to the separation of powers; rather, it is integral to the separation of powers itself. What *is* exceptional about the judiciary's "inherent power" is its distinctiveness from more traditional exercises of the judicial power, involving as it does determinations that directly implicate the appropriations power.
>
> However, in order to accommodate this distinctive, and extraordinary, judicial power with the normal primacy of the legislative branch in determining levels of appropriations, the "inherent power" has always been sharply circumscribed. The "inherent power" contemplates only the power, when an impasse has arisen between the legislative and judicial branches, to determine levels of appropriation that are "*reasonable and necessary" to enable the judiciary to carry out its constitutional responsibilities.* However, levels of appropriation that are *optimally* required for the judiciary remain always determinations within the legislative power. [*46th Circuit Trial Court* at 142-144 (emphasis added and in original).]

If indeed there exist systemic constitutional deficiencies in regard to the right to counsel and the right to the effective assistance of counsel, it is certainly arguable that *46th Circuit Trial Court* lends authority for a court to order defendants to provide funding at a level that is constitutionally satisfactory. The state of Michigan has an obligation under *Gideon* to provide indigent defendants with court-appointed counsel, and the "state" is comprised of three branches, including the judiciary. Const 1963, art 3, § 2. Ultimately, it is the judiciary, on a daily basis, that is integrally involved with ensuring that, before prosecutions go forward, indigent defendants are provided counsel, without which the court could not carry out its constitutional responsibilities. *Musselman* did not entail the constitutional implications that arise here, which include the ability of the judicial branch to carry out its functions in a constitutionally sound manner.

In sum, we reiterate that we decline at this time to define the full extent of the trial court's equitable authority and jurisdiction beyond that recognized and accepted earlier in this opinion.[8]

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[8] We have ruled that declaratory relief is available and we have ruled that prohibitory injunctive relief is available, assuming establishment of plaintiffs' case, both remedies being requested by plaintiffs. It is true that we have not set boundaries with respect to mandatory injunctive relief; however, as already indicated, *Straus* dictates that restraint be exercised if and until declaratory relief fails to accomplish constitutional compliance. Moreover, our decision not to set the parameters relative to mandatory injunctive relief cannot serve as a basis to dismiss the action,
(continued…)

3. Jurisdiction: Court of Claims versus the Circuit Court

Defendants contend that the Court of Claims has exclusive jurisdiction over this case. The trial court determined that defendants had relied on cases involving tort claims for money damages in making this jurisdictional argument and, because plaintiffs are seeking prospective relief that is purely equitable, the case did not belong in the Court of Claims.

MCL 600.6419 provides in pertinent part:

> (1) Except as provided in [MCL 600.6419a] and [MCL 600.6440], the jurisdiction of the court of claims, as conferred upon it by this chapter, shall be exclusive. . . . The court has power and jurisdiction:
>
> (a) To hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies.
>
> * * *
>
> (4) This chapter shall not deprive the circuit court of this state of jurisdiction over . . . proceedings for declaratory or equitable relief, or any other actions against state agencies based upon the statutes of this state in such case made and provided, which expressly confer jurisdiction thereof upon the circuit court . . . .

To interpret MCL 600.6419 correctly, it must be read in conjunction with MCL 600.6419a, which provides, in full:

> In addition to the powers and jurisdiction conferred upon the court of claims by section 6419, the court of claims has concurrent jurisdiction of any demand for equitable relief and any demand for a declaratory judgment when ancillary to a claim filed pursuant to section 6419. The jurisdiction conferred by this section is not intended to be exclusive of the jurisdiction of the circuit court over demands for declaratory and equitable relief conferred by [MCL 600.605].

In *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763, 775; 664 NW2d 185 (2003), our Supreme Court construed these provisions and held:

> Today we hold that pursuant to the plain language of § 6419(1)(a), the Court of Claims has exclusive jurisdiction over complaints based on contract or tort that seek solely declaratory relief against the state or any state agency. We disavow any contrary statements found in our prior case law that have seemingly interpreted § 6419(1)(a) as granting the Court of Claims jurisdiction over claims for money damages only.

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given that other relief is available.

Consistent with our discussion earlier in this opinion, plaintiffs' complaint is not based on tort, and it is indisputable that it is not based on contract. The *Parkwood* Court interpreted MCL 600.6419(4) "as maintaining the jurisdiction of the circuit court over those declaratory claims against the state *that do not involve contract or tort*." *Parkwood*, *supra* at 774 (emphasis added). The Court further stated:

> This jurisdiction of the circuit court is concurrent with the jurisdiction of the Court of Claims over such claims in the circumstances set out in § 6419a, see n 7. That is, when such a declaratory action is ancillary to another claim within the Court of Claims exclusive jurisdiction under § 6419, the circuit court and the Court of Claims have concurrent jurisdiction over the declaratory action. [*Parkwood*, *supra* at 774 n 10.]

Footnote 7 in *Parkwood*, *supra* at 772, referenced in the preceding quotation, provides:

> We construe the enactment of § 6419a as having *added to* this jurisdiction by clarifying that the Court of Claims also has jurisdiction over *other* declaratory and equitable claims, specifically, those that relate neither to contract nor tort—over which the circuit court would otherwise have exclusive jurisdiction—when those claims are ancillary to a claim within the court's exclusive jurisdiction under § 6419. [Emphasis in original.]

Thus, the Court of Claims, while having exclusive jurisdiction over complaints based on contract or tort that seek solely declaratory relief against the state, also has concurrent jurisdiction over complaints seeking declaratory and equitable relief not based on tort or contract if ancillary to a contract or tort claim. Because there is no contract or tort claim whatsoever here, the Court of Claims has neither exclusive nor concurrent jurisdiction. The trial court did not err by ruling that the instant case does not belong in the Court of Claims.

4. Proper Parties to the Litigation

Defendants argue that the action should have been filed against the judiciary and the counties that administer the indigent criminal defense systems. The trial court found that even though defendants have essentially delegated their constitutional duties to the counties, it does not ultimately relieve defendants of their constitutional responsibilities.

Under MCL 775.16, a circuit court's chief judge is responsible for procuring representation for indigent defendants and county treasurers are obligated to pay reasonable compensation to appointed attorneys. *In re Recorder's Court Bar Ass'n v Wayne Circuit Court*, 443 Mich 110, 122; 503 NW2d 885 (1993). However, it would be erroneous to assume "that the statutory purpose underlying assigned counsels' right to reasonable compensation was to assure that indigent criminal defendants received effective assistance of counsel." *Id.* at 123. "Appointed counsel had a statutory right to reasonable compensation for services provided to criminal indigent defendants long before indigent criminal defendants had a right, statutory or otherwise, to appointed counsel." *Id.* at 123-124.

In *Frederick v Presque Isle Co Circuit Judge*, 439 Mich 1, 15; 476 NW2d 142 (1991), our Supreme Court stated that all courts are part of Michigan's one court of justice under Const

1963, art 6, § 1; however, "the Legislature retains power over the county and may delegate to the local governments certain powers," which it did by enacting a statute that directs certain actions of chief judges and county treasurers, MCL 775.16. Thus, the counties do not have any independent constitutional obligation, apart from the state, to pay for the representation of indigent defendants. Rather, their obligations arise solely out of state statute and, as indicated in *In re Recorder's Court, supra* at 123-124, the purpose of the statute was not to secure the constitutional right to counsel. The counties could be sued for failure to comply with MCL 775.16; however, that is not the basis or thrust of the instant suit, nor do defendants cite any joinder rules or law requiring plaintiffs to include the counties as parties. Indeed, defendants themselves have not sought to join the counties as parties to the suit under the court rules, MCR 2.204 to 2.206. Regardless, we agree with the trial court's assessment that, even though the counties have been given responsibility for the operation and funding of trial courts through the Legislature's delegation powers, including payment of court-appointed counsel for indigent defendants, it does not relieve defendants of their constitutional duties under *Gideon*. Even were we to assume that the counties are necessary parties, it does not form a basis to dismiss the suit against defendants.

With respect to the judiciary, a circuit court's chief judge plays the main role in obtaining legal services for indigent defendants as reflected in MCL 775.16. Additionally, MCR 8.123(B), which applies to all trial courts,[9] provides that the courts "must adopt a local administrative order that describes the court's procedures for selecting, appointing, and compensating counsel who represent indigent parties in that court." An order must be submitted to the State Court Administrator for review, and the State Court Administrator must approve the plan "if its provisions will protect the integrity of the judiciary." MCR 8.123(C). Moreover, the judiciary is of course a branch of state government. See *Grand Traverse Co v Michigan*, 450 Mich 457, 473; 538 NW2d 1 (1995) ("courts have always been regarded as part of state government" despite county funding). Accordingly, the judiciary or the courts in the three counties could have been named as defendants in this action. However, again, defendants cite no joinder rules or laws that required plaintiffs to include the courts in the suit; it was a matter of choice for plaintiffs. And, once again, defendants are not somehow relieved of their constitutional duties and entitled to dismissal even if the courts were or should have been sued.

5. Justiciability and Statement of a Claim for Declaratory and Injunctive Relief

Defendants argue that plaintiffs lack standing and that their claims are not ripe for adjudication because the preconviction ineffectiveness claims are too remote, speculative, and abstract to warrant the issuance of declaratory and injunctive relief. Defendants also contend that plaintiffs failed to state a claim on which relief may be granted, considering that they have an adequate remedy at law in the form of individual criminal appeals. Defendants rely chiefly on *Strickland* and its two-part test relative to claims of ineffective assistance of counsel. Defendants posit that the need to show injury or harm, relative to justiciability, necessarily equates to establishing deficient performance of counsel *and* satisfying the prejudice prong of an ineffective

[9] MCR 8.123(A).

assistance claim typically applicable in criminal appeals, which prejudice, and therefore justiciable harm, can *only* be based on the rendering of an unreliable verdict, compromising the right to a fair trial. Preconviction ineffectiveness, standing alone, is simply insufficient to establish a case. Stated differently, defendants assert that a Sixth Amendment violation does not occur until there is a deficient performance by counsel *and* prejudice arising out of an unfair trial. Therefore, in the context of this civil suit claiming a Sixth Amendment infringement, the injury or harm needed to make the case justiciable requires satisfaction of the same two elements and that has not been shown.

The trial court found that plaintiffs had standing and that their claims were ripe for adjudication, rejecting the argument that convictions or the complete denial of counsel were necessary to litigate the case. With respect to *Strickland*, the court indicated that it was unsure whether *Strickland* had any application to plaintiffs' pretrial claims of inadequate representation; however, the court was of the opinion that it would not have to delve into the circumstances of each particular criminal case. Thus, the trial court concluded that plaintiffs had stated a claim on which relief could be granted.

a. Justiciability Generally

Both the state and federal constitutions confer only "judicial power" on the courts, US Const, art III, § 1, and Const 1963, art 3, § 2, and the United States Constitution expressly provides that judicial power is limited to cases and controversies, US Const, art III, § 2. *Michigan Chiropractic*, *supra* at 369. In order to prevent the judiciary from usurping the power of coordinate branches of government, our Supreme Court and the federal courts have developed justiciability doctrines to ensure that lawsuits filed in the courts are appropriate for judicial action, and these "include the doctrines of standing, ripeness, and mootness." *Id.* at 370-371. Federal courts have held that standing and mootness are constitutionally derived doctrines and jurisdictional in nature, given that failure to satisfy the elements of these doctrines implicates the constitutional authority of the courts to only exercise judicial power and to solely adjudicate actual cases or controversies. *Id.* at 371. Michigan caselaw has similarly viewed the justiciability doctrines as affecting judicial power, "the absence of which renders the judiciary constitutionally powerless to adjudicate [a] claim." *Id.* at 372.

In *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 614-615; 684 NW2d 800 (2004), our Supreme Court explained the concept of "judicial power," stating:

> The "judicial power" has traditionally been defined by a combination of considerations: the existence of a real dispute, or case or controversy; the avoidance of deciding hypothetical questions; the plaintiff who has suffered real harm; the existence of genuinely adverse parties; the sufficient ripeness or maturity of a case; the eschewing of cases that are moot at any stage of their litigation; the ability to issue proper forms of effective relief to a party; the avoidance of political questions or other non-justiciable controversies; the avoidance of unnecessary constitutional issues; and the emphasis upon proscriptive as opposed to prescriptive decision making.

With respect to the proper exercise of the "judicial power," the most critical element is the mandate that there exist a genuine case or controversy between the parties, meaning that the dispute between the parties is real, not hypothetical. *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 479 Mich 280, 293; 737 NW2d 447 (2007).

b. Standing Principles

On the doctrine of standing, the Supreme Court in *Michigan Citizens*, *supra* at 294-295, quoting *Nat'l Wildlife*, *supra* at 628-629, quoting *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001), quoting *Lujan v Defenders of Wildlife*, 504 US 555, 560-561; 112 S Ct 2130; 119 L Ed 2d 351 (1992), stated that the following three elements must be proven:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. [Quotation marks and ellipses omitted.]

c. Ripeness Principles

With regard to the doctrine of ripeness, it precludes the adjudication of hypothetical or contingent claims before an actual injury has been sustained, and an action is not ripe if it rests on contingent future events that may not occur as anticipated or may not occur at all. *Michigan Chiropractic*, *supra* at 371 n 14. Although standing and ripeness are both justiciability doctrines that assess pending claims to discern whether an actual or imminent injury in fact is present, they address different underlying concerns. *Id.* at 378-379. The standing doctrine "is designed to determine whether a particular party may properly litigate the asserted claim for relief." *Id.* at 379. On the other hand, the ripeness doctrine "does not focus on the suitability of the party; rather, ripeness focuses on the *timing* of the action." *Id.* (emphasis in original).

d. Declaratory Relief

With respect to declaratory judgment actions, MCR 2.605(A)(1), (C), and (F) respectively provide as follows:

> In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.
>
> * * *
>
> The existence of another adequate remedy does not preclude a judgment for declaratory relief in an appropriate case.

* * *

> Further necessary or proper relief based on a declaratory judgment may be granted, after reasonable notice and hearing, against a party whose rights have been determined by the declaratory judgment.

The "actual controversy" requirement found in MCR 2.605(A)(1) has been described as "'a summary of justiciability as the necessary condition for judicial relief.'" *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 125; 693 NW2d 374 (2005), quoting *Allstate Ins Co v Hayes*, 442 Mich 56, 66; 499 NW2d 743 (1993). A court cannot declare the obligations and rights of parties regarding an issue if the issue is not justiciable, meaning that it does not entail a genuine, live controversy between interested persons who are asserting adverse claims, which, if decided, can affect existing legal relations. *Associated Builders*, *supra* at 125, quoting *Allstate Ins*, *supra* at 66.

e. Injunctive Relief

Finally, in regard to injunctive relief, an injunction constitutes an extraordinary remedy that may be issued only when justice requires it, there is an absence of an adequate remedy at law, and there exists the danger of irreparable injury that is real and imminent. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008).

f. Justiciability Framework

In constructing the broad analytical framework for addressing the justiciability issues in connection with the particular allegations made by plaintiffs, we find guidance in *Lewis v Casey*, 518 US 343; 116 S Ct 2174; 135 L Ed 2d 606 (1996). In *Lewis*, the respondents were 22 inmates imprisoned in various facilities operated by the Arizona Department of Corrections (ADOC), and they filed a class action on behalf of all adult prisoners who were currently or will be incarcerated by the ADOC, alleging deprivations of their fundamental constitutional right of access to the courts. *Id.* at 346. The action was brought in reliance on *Bounds v Smith*, 430 US 817, 828; 97 S Ct 1491; 52 L Ed 2d 72 (1977), in which it was held that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." See *Lewis*, *supra* at 346. Following a three-month bench trial in *Lewis*, the federal district court ruled in favor of the respondents, concluding that the respondents had a constitutional right of access to the courts that is meaningful, adequate, and effective, and that the ADOC's system failed to comply with these constitutional standards. The district court tailored an injunctive remedy that was sweeping in scope, ensuring that the ADOC would provide meaningful court access. The United States Court of Appeals for the Ninth Circuit affirmed, with minor exceptions related to the terms of the injunction. *Id.* at 346-348.

On certiorari granted, the petitioners argued that, in order to establish a *Bounds* violation, an inmate needed to show that any alleged inadequacy of a prison's law library facilities or legal assistance programs caused an actual injury, or in other words, "'actual prejudice with respect to contemplated or existing litigation, such as the inability to meet a filing deadline or to present a

claim.'" *Id.* at 348. The petitioners further argued that the district court failed to find sufficient instances of actual injury that would warrant systemwide relief. *Id.* The Supreme Court held:

> We agree that the success of respondents' systemic challenge was dependent on their ability to show widespread actual injury, and that the court's failure to identify anything more than isolated instances of actual injury renders its finding of a systemic *Bounds* violation invalid. [*Id.* at 349.]

The United States Supreme Court then proceeded to provide the underlying rationale and reasoning for its holding:

> The requirement that an inmate alleging a violation of *Bounds* must show actual injury derives ultimately from the doctrine of standing, a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches. It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution. In the context of the present case: It is for the courts to remedy past or imminent official interference with individual inmates' presentation of claims to the courts; it is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the presentation of claims will not occur. Of course, the two roles briefly and partially coincide when a court, in granting relief against actual harm that has been suffered, or that will imminently be suffered, by a particular individual or class of individuals, orders the alteration of an institutional organization or procedure that causes the harm. But the distinction between the two roles would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but merely the status of being subject to a governmental institution that was not organized or managed properly. If—to take another example from prison life—a healthy inmate who had suffered no deprivation of needed medical treatment were able to claim violation of his constitutional right to medical care simply on the ground that the prison medical facilities were inadequate, the essential distinction between judge and executive would have disappeared: it would have become the function of the courts to assure adequate medical care in prisons. [*Id.* at 349-350 (citations omitted).]

We derive much from this passage. It indicates that inmates do not sustain harm, for purposes of justiciability analysis and the constitutional right of access to the courts, simply because of their status as inmates in the prison system and their exposure to the possibility of being denied meaningful court access because of the institution's lack of proper management and organization. There needs to be interference with the presentation of a claim to the court, just as inmates must first be ill and in need of prison medical treatment before being able to claim deprivation of a constitutional right to medical care. By analogy, here criminal defendants do not sustain harm, for purposes of justiciability analysis and the constitutional right to the effective assistance of counsel, simply because of their status as indigent defendants with court-appointed counsel subject to prosecutorial proceedings in a system with presumed existing

deficiencies. There needs to be an instance of deficient performance or inadequate representation, i.e., "representation [falling] below an objective standard of reasonableness." *Strickland, supra* at 688; *Toma, supra* at 302. *Lewis* does not indicate that the harm must include, besides interference with the right of access to the courts, a showing that the inmate would have been successful in court had access been made available. This proposition is further reflected in the *Lewis* Court's subsequent observations with respect to actual harm:

> Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense. That would be the precise analog of the healthy inmate claiming constitutional violation because of the inadequacy of the prison infirmary. Insofar as the right vindicated by *Bounds* is concerned, "meaningful access to the courts is the touchstone," and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim. He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint. [*Lewis, supra* at 351 (citation omitted).]

There is no suggestion in the two examples that the hypothetical inmate had to show that the dismissed or unfiled complaint would likely have resulted in a favorable court outcome following litigation; interference, by itself, with a person's attempt to access the court, if access is not sought frivolously, suffices to establish harm. See *id.* at 353.[10]

The *Lewis* Court went on to find that the district court had identified only two instances of actual injury, and the Court then turned to the issue whether those two injuries justified the remedy ordered by the district court. *Id.* at 357. The Court noted that the remedy has to be "limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Id.* The Court further explained that this principle is just as applicable with respect to class actions. *Id.* According to *Lewis*, standing is necessary in class actions and named plaintiffs representing the class must allege and show personal injury. *Id.* The *Lewis* Court concluded that there was a failure to show that the constitutional violations were systemwide; therefore, granting a remedy beyond what was necessary to provide relief to the two injured inmates was improper. *Id.* at 360. Nevertheless, the message that flows from *Lewis* is that in cases where systemwide constitutional

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[10] While we examine *Lewis* to provide a general framework, we are examining a different constitutional right and one that is expressly provided for in the state and federal constitutions. Our harm analysis later in this opinion is additionally shaped by caselaw directly addressing the same constitutional right at stake here.

violations are proven, prospective equitable relief to prevent further violations is a proper remedy.

The absence of widespread and systemic harm in *Lewis* was the downfall of the case presented by the inmate respondents. Here, if plaintiffs are to succeed, they must prove widespread and systemic constitutional violations that are actual or imminent, constituting the harm necessary to establish justiciability. In addressing this appeal and the justiciability issues, we find that, on the basis of the posture of the lower court proceedings, our attention needs to be directed solely at the allegations in plaintiffs' complaint. In *Lewis*, *supra* at 357-358, the Supreme Court, quoting *Lujan*, *supra* at 561, made the following observations:

> The general allegations of the complaint in the present case may well have sufficed to claim injury by named plaintiffs, and hence standing to demand remediation, with respect to various alleged inadequacies in the prison system, including failure to provide adequate legal assistance to non-English-speaking inmates and lockdown prisoners. That point is irrelevant now, however, for we are beyond the pleading stage.
>
> "Since they are not mere pleading requirements, but rather an indispensable part of the plaintiff's case, each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial." [Alteration in original; citation and internal quotation marks omitted.]

Here, the justiciability and *Strickland* issues were raised under both MCR 2.116(C)(4) (summary disposition for lack of subject-matter jurisdiction) and MCR 2.116(C)(8) (summary disposition for failure to state a claim). "In reviewing a motion under MCR 2.116(C)(4), it is proper to consider the pleadings and any affidavits or other documentary evidence submitted by the parties to determine if there is a genuine issue of material fact." *Toaz v Dep't of Treasury*, 280 Mich App 457, 459; 760 NW2d 325 (2008); see also *Cork v Applebee's of Michigan, Inc*, 239 Mich App 311, 315; 608 NW2d 62 (2000) (Under MCR 2.116[C][4], "this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact."). MCR 2.116(C)(8) provides for summary disposition where "[t]he opposing party has failed to state a claim on which relief can be granted." A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a complaint. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The trial court may only consider the pleadings in rendering its decision. *Id.* All factual allegations in the pleadings must be accepted

as true. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997).

As opposed to the circumstances in *Lewis*, we are addressing matters of justiciability at a very early stage in the proceedings and not in the context of completed trial proceedings or a summary disposition motion involving the submission of documentary evidence. The lower court record reveals that defendants' justiciability-related arguments were set forth without reliance on documentary evidence. And the argument that plaintiffs failed to state a claim for declaratory and injunctive relief, which only implicated MCR 2.116(C)(8), couched defendants' entire *Strickland* analysis. Defendants did not engage in an effort to show an absence of a genuine factual dispute with respect to whether plaintiffs' claims were justiciable; their argument was purely legal in nature and attacked the alleged inadequacy of the pleadings. Even though defendants could have taken a "documentary evidence" approach for purposes of MCR 2.116(C)(4), as indicated in *Toaz* and *Cork*, they chose not to do so, attempting instead to dispose of the case in quick fashion without being buried in the discovery process. Accordingly, the focus in addressing the justiciability issues under the principles articulated earlier in this opinion must be on the allegations in plaintiffs' highly detailed complaint.[11]

g. Defining Justiciable Harm for Purposes of this Suit

Plaintiffs seek a declaratory judgment and prohibitory and mandatory injunctions, which remedies are prospective in nature, in an effort to stop alleged ongoing constitutional violations and to prevent future violations. As we view it, plaintiffs would be entitled to declaratory relief, in the context of this case and assuming establishment of causation, if they can show widespread and systemic instances of actual harm. The right to any prospective injunctive relief tends to concern the question whether the harm sought to be avoided in the future is *imminent*, and we conclude that harm is imminent if plaintiffs can show widespread and systemic instances of actual harm that have occurred in the past under the current indigent defense systems being employed by the counties. Accordingly, regardless of whether the focus is on declaratory relief or on injunctive relief, the proofs will require a showing of widespread and systemic instances of

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[11] In *Nat'l Wildlife*, *supra* at 631, our Supreme Court stated:

> [A] plaintiff must include in the pleadings "general factual allegations" that injury will result from the defendant's conduct. If the defendant brings a motion for summary disposition, the plaintiff must further support the allegations of injury with documentation, just as he has to support the other allegations that make up his claim. Finally, when the matter comes to trial, the plaintiff must sufficiently support his claim, including allegations of injury, to meet his burden of proof.

While here there was a motion for summary disposition, it was confined by the parties to the pleadings and the allegations, and it was entertained by the trial court shortly after the filing of the complaint. The case was truly at a pleading-assessment level.

actual harm, thereby making the action justiciable.[12] The next step, therefore, is for us to define "harm" for purposes of this action.

We hold that, in the context of this class action civil suit seeking prospective relief for alleged widespread constitutional violations, injury or harm is shown when court-appointed counsel's representation falls below an objective standard of reasonableness (deficient performance) and results in an unreliable verdict or unfair trial, when a criminal defendant is actually or constructively denied the assistance of counsel altogether at a critical stage in the proceedings, or when counsel's performance is deficient under circumstances in which prejudice would be presumed in a typical criminal case. We further hold that injury or harm is shown when court-appointed counsel's performance or representation is deficient relative to a critical stage in the proceedings and, absent a showing that it affected the reliability of a verdict, the deficient performance results in a detriment to a criminal defendant that is relevant and meaningful in some fashion, e.g., unwarranted pretrial detention. Finally, we hold that, when it is shown that court-appointed counsel's representation falls below an objective standard of reasonableness with respect to a critical stage in the proceedings, there has been an invasion of a legally protected interest and harm occurs. Plaintiffs must additionally show that instances of deficient performance and denial of counsel are widespread and systemic and that they are caused by weaknesses and problems in the court-appointed, indigent defense systems employed by the three counties, which are attributable to and ultimately caused by defendants' constitutional failures.[13] If the aggregate of harm reaches such a level as to be pervasive and persistent (widespread and systemic), the case is justiciable and declaratory relief is appropriate, as well as injunctive relief to preclude future harm and constitutional violations that can reasonably be deemed imminent in light of the existing aggregate of harm. See *Milliken v Bradley*, 433 US 267, 282; 97 S Ct 2749; 53 L Ed 2d 745 (1977) (remedies ordered by court, while usually not the province of the judiciary, were proper where designed to counter pervasive and persistent constitutional violations within the school system).

Plaintiffs will no doubt have a heavy burden to prove and establish their case, but for now we are only concerned with whether plaintiffs have sufficiently alleged supportive facts. While

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[12] Of course, plaintiffs are not precluded from introducing other evidence that has a tendency to show that future harm is imminent.

[13] In its discussion of class action certification, the dissent states, "Unlike the majority, I am unwilling to presume that every alleged deficiency in every indigent criminal defendant's case is the result of the alleged deficiencies in the county indigent defense systems." *Post* at 34. We agree with the dissent that no presumption should exist, but are at a loss in regard to why the dissent concludes that we are making such a presumption. Throughout this opinion, we indicate that plaintiffs will have to establish a causal connection between the deficient performance and the indigent defense systems being employed. There will likely be occasions in which counsel for an indigent defendant acted below an objective standard of reasonableness, yet the deficient performance cannot be attributed to problems in an indigent defense system; some attorneys may be lacking in skills, and no amount of money, time, and resources will make a difference. Again, proving their case will be a monumental undertaking for plaintiffs.

we leave it to the trial court to determine the parameters of what constitutes "widespread," "systemic," or "pervasive" constitutional violations or harm, the court must take into consideration the level or degree of any shown harm, giving more weight to instances of deficient performance that resulted in unreliable verdicts and instances where the right to counsel was denied, with less weight being given where there is mere deficient performance. We find that the allegations in plaintiffs' complaint are sufficient to establish the existence of a genuine case or controversy between the parties, reflecting a dispute that is real, not hypothetical.

To summarize the approach to be taken on remand, plaintiffs must show the existence of widespread and systemic instances of actual or constructive denial of counsel and instances of deficient performance by counsel, which instances may have varied and relevant levels of egregiousness, all causally connected to defendants' conduct. Furthermore, because the proofs could be so wide ranging, it would reflect poor judgment on our part to set a numerical threshold with respect to the court's determination of whether the instances of harm, if shown, are sufficiently "widespread and systemic" so as to justify relief. The trial court is in a better position to first address this issue, subject of course to appellate review.

We glean from the dissenting opinion that our colleague is of the position that the only avenue, judiciary-wise, to address problems in the indigent defense systems employed by the three counties is through a standard criminal appeal as reflected in *Strickland.* The dissent also contends that a claim of ineffective assistance of counsel requires a conviction and deprival of a fair trial as reflected in an unreliable verdict, even in this civil class action suit, given the holding in *Strickland*. Because of the dissent's position, it is concluding that we are necessarily making a finding of prejudice per se, and thereby a finding of justiciability per se, relative to the claims of preconviction ineffectiveness. Stated differently, the dissent finds that we are assuming that the individual plaintiffs and class members will be convicted, that defendants' actions caused the convictions, that the courts addressing the criminal cases will not correct any constitutional deficiencies, and that this action will redress their injuries. We are not making any such assumptions, and we respectfully conclude that the dissent simply fails to appreciate the nature and character of this civil action brought by a fluid class of plaintiffs that seeks a declaration of unconstitutionality and prospective, system-wide relief to prevent ongoing and future constitutional violations.

It is our view that *Strickland* and its many progeny, which demand deficient performance by counsel and, generally speaking, prejudice in order to entitle a criminal defendant to relief under the Sixth Amendment, have to be understood and viewed in context. The fundamental flaw in defendants' and the dissent's position on the justiciability issues is that the argument is grounded on principles intended to be applied in the context of postconviction criminal appeals that is not workable or appropriate to apply when addressing standing, ripeness, and related justiciability principles in this type of civil rights lawsuit. We cannot properly foist the framework of the criminal appellate process upon the justiciability analysis that governs this civil case simply because state and federal constitutional rights related to the right to counsel are implicated. We reject the argument that the need to show that this case is justiciable necessarily and solely equates to showing widespread instances of deficient performance accompanied by resulting prejudice in the form of an unreliable verdict that compromises the right to a fair trial.

It is entirely logical to generally place the decisive emphasis in a court opinion on the fairness of a trial and the reliability of a verdict when addressing a criminal appeal alleging ineffective assistance *because the appellant is seeking a remedy that vacates the verdict and remands the case for a new trial*. Indeed, it can instantly be gleaned from the opening paragraph in *Strickland* that it has little relevance here:

> This case requires us to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective. [*Strickland, supra* at 671.]

In the case sub judice seeking prospective relief to prevent future harm, we are not judging whether a conviction or sentence should be set aside because of the ineffective assistance of counsel. Applying the two-part test from *Strickland* here as an absolute requirement defies logic, where the allegations concern widespread, systemic instances of constitutionally inadequate representation, and where the requested remedy in the form of prospective relief seeks to curb and halt continuing acts of deficient performance. What is essentially harmless-error analysis[14] is being confused with justiciability analysis in a case involving an altogether different remedy. The right to counsel must mean more than just the right to an outcome.

A simple hypothetical illustrates the inappropriateness of applying, solely, the two-part *Strickland* test and in taking a position that the only avenue of relief is a criminal appeal. Imagine that, in 100 percent of indigent criminal cases being handled by court-appointed counsel, it could be proven that the proceedings were continuously infected with instances of deficient performance by counsel, yet the trial verdicts were all deemed reliable, assuming all cases went to trial. As is often the case, appellate courts affirm guilty verdicts despite inadequate representation and deficient performance because there existed strong and untainted evidence of guilt. In our scenario, under defendants' and the dissent's reasoning, court intervention in a class action suit such as the one filed here would not be permitted on justiciability grounds despite the constitutionally egregious circumstances. This is akin to taking a position that indigent defendants who are ostensibly guilty are unworthy or not deserving of counsel who will perform at or above an objective standard of reasonableness. The holding set forth in *Gideon* becomes empty and meaningless under such a rationale. Widespread and systemic instances of deficient performance caused by a poorly equipped appointed-counsel system will not cease and be cured with a case-by-case examination of individual criminal appeals, given that prejudice is generally required and often not established. Even though a criminal appeal may occasionally result in a new trial, it has no bearing on eradication of continuing systemic constitutional deficiencies.

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[14] Harmless-error analysis mirrors the analysis governing review of the prejudice prong of an ineffective assistance claim and also implicates a new trial remedy. See MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Thus, contrary to defendants' argument and the dissent's position, there is no adequate legal remedy for the harm that plaintiffs are attempting to prevent.[15]

Contrary to the dissent's contention, we are not engaging in any findings of prejudice, standing, or justiciability per se. Rather, we are merely indicating that *if it is proven*, as alleged, that there have been widespread and systemic instances of deficient performance and denial of counsel, along with proof of the requisite causation, unconstitutionality can be declared and harm in ongoing and future criminal prosecutions of indigent defendants can be deemed imminent, thereby giving rise to a right to an equitable remedy. Concluding that an invasion of a legally protected interest is imminent will always carry with it some modicum of speculation; however, there is no caselaw of which we are aware that suggests that a showing of imminent harm is insufficient to permit judicial intervention. Indeed, the caselaw is to the contrary. See, e.g., *Michigan Citizens*, *supra* at 294-295. The dissent also fails to acknowledge that plaintiffs have alleged wrongful convictions.

We additionally find that defendants' and the dissent's position ignores the reality that harm can take many shapes and forms. Consistently with the concept of prejudice as employed in criminal appeals, we would agree that justiciable injury or harm is certainly indicated by a showing that there existed a reasonable probability that, but for an error by counsel, the result of a criminal proceeding would have been different. See *Carbin*, *supra* at 599-600. But injury or harm also occurs when there are instances of deficient performance by counsel at critical stages in the criminal proceedings that are detrimental to an indigent defendant in some relevant and meaningful fashion, even without neatly wrapping the justiciable harm around a verdict and trial. Such harm arises, for example, when there is an unnecessarily prolonged pretrial detention, a failure to file a dispositive motion, entry of a factually unwarranted guilty plea, or a legally unacceptable pretrial delay.[16] And as indicated earlier in this opinion, simply being deprived of

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[15] We are assuming, for purposes of this issue and in contemplation of the elements necessary to merit injunctive relief, that a criminal appeal constitutes a "legal remedy." Generally, "[a]ctual damages is a legal, rather than an equitable, remedy[.]" *Anzaldua v Band*, 457 Mich 530, 541; 578 NW2d 306 (1998).

[16] It is not difficult to conceive of scenarios in which a criminal defendant suffers a detriment or "harm" as a result of an attorney's deficient performance, absent consideration of any trial. Effective assistance of counsel at a preliminary examination potentially can result in a dismissal of the prosecutor's case, as opposed to the case's being bound over to the circuit court if counsel's performance was instead deficient. Effective assistance of counsel at a pretrial hearing potentially can result in the exclusion of a confession or an identification, leading to a *nolle prosequi* or dismissal, whereas a deficient performance by counsel, including a failure to even file a motion challenging the confession or identification, could leave the prosecution's case intact and strong. Effective assistance of counsel in plea negotiations potentially can produce a guilty plea on a warranted charge much less serious than the one initially brought by the prosecution that was factually unwarranted, but an ineffective attorney in comparable circumstances might have his or her client plead guilty of the more serious and overcharged offense. Effective assistance of counsel at a bail hearing might result in a defendant's being able to be released on bond before trial, whereas ineffective assistance at the same hearing could

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the constitutional right to effective representation at a critical stage in the proceedings, in and of itself, gives rise to harm.

Further, even in criminal appeals there are situations in which the prejudice prong need not be satisfied. In *Strickland*, *supra* at 692, the United States Supreme Court stated that "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." The Court similarly observed in *Cronic* that constitutional error exists without a showing of prejudice when counsel is "prevented from assisting the accused during a critical stage of the proceeding." *Cronic*, *supra* at 659 n 25. The concept of constructive denial of counsel was explored in *Cronic*, wherein the Court stated that "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Id.* at 659. The *Strickland* Court made clear that where there is actual or constructive denial of counsel "[p]rejudice . . . is so likely that case-by-case inquiry into prejudice is not worth the cost." *Strickland*, *supra* at 692. *Strickland* also provided "that prejudice is presumed when counsel is burdened by an actual conflict of interest." *Id.* Taking into consideration this precedent for the purpose of analyzing justiciability, it is reasonable to conclude that justiciable harm or injury exists when there is an actual denial of counsel, there is an overwhelmingly deficient performance by counsel equating to constructive denial of counsel, or when counsel with conflicting interests represents an indigent defendant. As will be detailed later in this opinion, plaintiffs' complaint contains allegations that fit within the categories of actual and constructive denial of counsel, as well as allegations that encompass other situations in which prejudice is presumed.

Our conclusion that the two-part test in *Strickland* should not control this litigation is generally consistent with caselaw from other jurisdictions addressing comparable suits.[17]

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leave the defendant sitting in a jail cell pending trial. An effective attorney may win a dismissal of a prosecutor's case for failure by the state to provide a speedy trial to a defendant, as opposed to a situation involving ineffective representation, where the lawyer fails to recognize a speedy trial issue. These are but a few examples in which the effective assistance of counsel would either end the case before trial and conviction or otherwise benefit a defendant in some favorable fashion; deficient performance, on the other hand, results in a detriment to the defendant. Under a scenario in which an unfiled pretrial motion would have precluded a trial from taking place, a criminal defendant still suffers some level of harm or injury by having his or her life unnecessarily put on hold by the trial process even in a situation where the defendant proceeds to trial and is acquitted. Plaintiffs' complaint encompasses performance deficiencies during the pretrial stages mentioned in this footnote.

[17] In summarizing our position regarding the applicability and relevance of *Strickland*, we note the following points. We reject the conclusion that *Strickland* only allows for judicial intervention by way of a criminal appeal, and not the type of action pursued here, to address issues concerning the right to counsel and the effective assistance of counsel. We reject the conclusion that *Strickland* requires us to find that justiciability, for purposes of this action, can only be established by showing deficient performances, coupled with convictions that are unreliable or resulting from unfair trials. However, with respect to general underlying principles espoused in *Strickland*, and repeated in hundreds if not thousands of cases across the country,

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A case heavily cited on the topic at hand is *Luckey v Harris*, 860 F2d 1012 (CA 11, 1988). *Luckey* was an action commenced "on behalf of a bilateral class consisting of all indigent persons presently charged or who will be charged in the future with criminal offenses in the courts of Georgia and of all attorneys who represent or will represent indigent defendants in the Georgia courts[.]" *Id.* at 1013. The plaintiffs alleged systemic deficiencies with respect to the appointment of counsel for indigent defendants that resulted in deprivations of various constitutional rights, including the Sixth Amendment right to counsel. The alleged deficiencies included delays in the appointment of counsel, pressure on attorneys to enter guilty pleas or to hurry cases to trial, and inadequate resources. Relying on *Strickland*, the federal district court dismissed the action for, in part, failure to state a claim. *Id.* at 1013, 1016. The United States Court of Appeals for the Eleventh Circuit reversed, ruling:

> [The *Strickland*] standard is inappropriate for a civil suit seeking prospective relief. The [S]ixth [A]mendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the "ineffectiveness" standard may nonetheless violate a defendant's rights under the [S]ixth [A]mendment. In the post-trial context, such errors may be deemed harmless because they did not affect the outcome of the trial. Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief—whether the defendant is entitled to have his or her conviction overturned—rather than to the question of whether such a right exists and can be protected prospectively. . . .
>
> Where a party seeks to overturn his or her conviction, powerful considerations warrant granting this relief only where that defendant has been prejudiced. The *Strickland* [C]ourt noted the following factors in favor of deferential scrutiny of a counsel's performance in the post-trial context: concerns for finality, concern that extensive post-trial burdens would discourage counsel from accepting cases, and concern for the independence of counsel. These considerations do not apply when only prospective relief is sought.
>
> Prospective relief is designed to avoid future harm. Therefore, it can protect constitutional rights, even if the violation of these rights would not affect the outcome of a trial. [*Id.* at 1017 (citations omitted).]

We fully agree with the statements and observations made in this passage, and they mirror our thoughts voiced earlier in this opinion. Petitions for rehearing and suggestions of rehearing en banc were denied. *Luckey v Harris*, 896 F2d 479 (CA 11, 1989), cert den 495 US 957 (1990). Eventually, the plaintiffs' case was dismissed on unrelated abstention grounds. *Luckey v Miller*, 976 F2d 673 (CA 11, 1992).[18] Defendants and the dissent here favor the

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e.g., deficient performance equates to representation falling below an objective standard of reasonableness, we have no qualms.

[18] The court, citing *Younger v Harris*, 401 US 37; 91 S Ct 746; 27 L Ed 2d 669 (1971), stated that "abstention from interference in state criminal proceedings served the vital consideration of comity between the state and national governments." *Luckey*, 976 F2d at 676. "Comity" is defined as "[c]ourtesy among political entities (as nations, states, or courts of different

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approach twice rejected in the *Luckey* cases. We choose not to give weight to a dissenting judge's analysis that failed to convince a majority of judges on the Eleventh Circuit of its correctness.

In *Platt v State*, 664 NE2d 357, 362 (Ind App, 1996), a civil suit was brought seeking injunctive relief premised on the contention "that the system for providing legal counsel for indigents in Marion County lacks sufficient funds for pretrial investigation and preparation which inherently causes ineffective assistance of counsel at trial." The plaintiffs alleged that the public defender system violated the fundamental right to effective pretrial assistance of counsel under the Sixth Amendment. *Id.* The appellate court first cited principles from *Strickland* and *Cronic* and then ruled:

> Here, Platt seeks to enjoin the Marion County public defender system because it effectively denies indigents the effective assistance of counsel. However, a violation of a Sixth Amendment right will arise only after a defendant has shown he was prejudiced by an unfair trial. This prejudice is essential to a viable Sixth Amendment claim and will exhibit itself only upon a showing that the outcome of the proceeding was unreliable. Accordingly, the claims presented here are not reviewable under the Sixth Amendment as we have no proceeding and outcome from which to base our analysis. [*Id*. at 363 (citation omitted).]

This cursory analysis is flawed for all the reasons that we expressed earlier in this opinion. Moreover, the opinion is essentially silent with respect to any particular allegations of deficient performance and harm, and it indicates that the court was not presented with any criminal proceedings and outcomes. In the instant case, plaintiffs allege wrongful trial convictions, instances wherein prejudice would be presumed, and situations in which counsel was actually or constructively denied. We find *Platt* wholly unpersuasive.

There is also the case of *Kennedy v Carlson*, 544 NW2d 1 (Minn, 1996), in which a chief public defender brought suit. The Minnesota Supreme Court noted that the public defender claimed "that his clients have been exposed to the *possibility* of substandard legal representation[.]" *Id*. at 6 (emphasis added). The court, without any reference whatsoever to *Strickland* and its two-part test, stated:

> We note that appellants cite a number of decisions by other courts addressing the issue of public defense funding. In those cases where courts have found a constitutional violation due to systemic underfunding, the plaintiffs showed substantial evidence of serious problems throughout the indigent defense

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(…continued)

jurisdictions), involving esp. mutual recognition of legislative, executive, and judicial acts." Black's Law Dictionary (7th ed). The *Luckey* Court invoked abstention because of concerns regarding the possibility that, if relief were granted to the plaintiffs, the federal court would have to force the state to promulgate uniform standards related to prosecutions and that the federal court would have to review and interrupt ongoing state proceedings. *Luckey*, 976 F2d at 678-679. Thus, it was the potential of a federal court's intermeddling in state prosecution practices that served as the basis of the abstention ruling. Here, abstention issues have no relevance.

> system. By comparison, Kennedy has shown no evidence that his clients actually have been prejudiced due to ineffective assistance of counsel. To the contrary, the evidence establishes that Kennedy's office is well-respected by trial judges, it is well-funded when compared to other public defender offices, and its attorneys have faced no claims of professional misconduct or malpractice. [*Id.* at 6-7.]

The Minnesota court then proceeded to cite several cases in which courts from other jurisdictions have adjudicated matters related to systemic constitutional deficiencies arising out of the right to effective counsel. *Id.* at 7-8. The court then ruled:

> The majority of the cases discussed above cite evidence of substandard representation by court appointed defense counsel, generally supplied by a particular defendant, as contributing to the court's decision to intervene. Kennedy, however, has not shown that his attorneys provide substandard assistance of counsel to their clients. . . .
>
> In short, Kennedy's claims of constitutional violations are too speculative and hypothetical to support jurisdiction in this court. The district court did not find that Kennedy's staff had provided ineffective assistance to any particular client, nor did it find that Kennedy faced professional liability as a result of his office's substandard services. Nor do any of Kennedy's clients join him in attacking the statutory funding scheme at issue here by presenting evidence of inadequate assistance in particular cases. In light of Kennedy's failure to provide more substantial evidence of an "injury in fact" to himself or his clients, we hold that the district court erred in granting Kennedy's summary judgment motion. [*Id.* at 8.]

Here, we have a class of plaintiffs who have been, are being, or will be subjected to the court-appointed, indigent defense systems employed in Berrien, Muskegon, and Genesee counties. Further, we have extensive allegations of substandard representation and ineffective assistance of counsel. Thus, given the distinctions between *Kennedy* and the instant action, the ultimate holding in *Kennedy* is simply inapposite and its underlying discussion tends to support our ruling.

In *New York Co Lawyers' Ass'n v State*, 192 Misc 2d 424, 430-431; 745 NYS2d 376 (2002), the New York court rejected a *Strickland* approach, reasoning:

> Prejudice, as an aspect of the *Strickland* test, is examined more generally under the State Constitution in the context of whether defendant received meaningful representation. (*See, People v. Hobot*, 84 N.Y.2d 1021, 1022, 646 N.E.2d 1102, 1103, 622 N.Y.S.2d 675, 676 (1995) (the test is whether counsel's errors seriously compromise a defendant's right to a fair trial). . . . The purpose is to ensure that a defendant has the assistance necessary to justify society's reliance on the outcome of the proceedings. Notably, New York is concerned as much with the integrity of the judicial process as with the issue of guilt or innocence, and therefore this court finds the more taxing two-prong *Strickland* standard used to vacate criminal convictions inappropriate in a civil action that seeks

> prospective relief premised on evidence that the statutory monetary cap provisions and compensation rates currently subject children and indigent adults to a severe and unacceptable risk of ineffective assistance of counsel. This court further finds *Strickland*'s reliance on post-conviction review provides no guarantee that the indigent will receive adequate assistance of counsel under the New York Constitution in the context of this action. Accordingly, because the right to effective assistance of counsel in New York is much more than just the right to an outcome, threatened injury is enough to satisfy the prejudice element and obtain prospective injunctive relief to prevent further harm. (Citation omitted.)

In *Quitman Co v State*, 910 So 2d 1032 (Miss, 2005), the county itself commenced a civil action for declaratory and injunctive relief, alleging that by imposing an obligation on the county to fund the representation of indigent defendants, the state of Mississippi breached its constitutional duties to provide adequate representation for indigent criminal defendants. Consistent with our opinion, the Mississippi Supreme Court stated:

> In [the first appeal], this Court held that the County would be entitled to the prospective statewide relief it seeks *if* it established the cost of an effective system of indigent criminal defense, the county's inability to fund such a system, and the failure of the existing system to provide indigent defendants in Quitman County with the tools of an adequate defense. The circuit judge ruled that the County failed to establish these facts . . . . The County asserts that "[t]he evidence at trial established each of these elements."
>
> The State correctly points out that "[c]ommon sense suggests that if Quitman County claims there is widespread and pervasive ineffectiveness, the most probative evidence to support that claim would be testimony about specific instances when the public defenders' performance fell below 'an objective standard of reasonableness' as measured by the professional norms." [Citing *Strickland.*] The State also asserts that the circuit judge expected to hear such testimony at trial since the County alleged in its complaint that requiring each county to pay for its own public defenders did not satisfy the constitutional requirements for effective assistance of counsel. The record reflects that no such evidence was presented at trial. . . . .
>
> The County did not present any evidence on any one of the central factual allegations in its complaint, and the County did not try to show specific examples of when the public defenders' legal representation fell below the objective standard of professional reasonableness. [*Quitman*, *supra* at 1037 (emphasis in original).]

The Mississippi Supreme Court had allowed the case to go forward on the basis of the allegations in the complaint, *State v Quitman Co*, 807 So 2d 401 (Miss, 2001), which is all that we are doing, and our plaintiffs must ultimately prove their case to obtain relief, which the county in *Quitman* failed to accomplish.

We finally note *Benjamin v Fraser*, 264 F3d 175 (CA 2, 2001), which was a suit that involved the question whether pretrial detainees had demonstrated the existence of current and ongoing constitutional violations and the need for the continuation of prospective relief with respect to impediments to attorney-client jail visitations. The United States Court of Appeals for the Second Circuit stated that "[i]n considering burdens on the Sixth Amendment right to counsel, we have not previously required that an incarcerated plaintiff demonstrate 'actual injury' in order to have standing." *Id.* at 186. The court further asserted that "[i]t is not clear to us what 'actual injury' would even mean as applied to a pretrial detainee's right to counsel." *Id.* Read in context, the *Benjamin* court was simply indicating, consistently with our position, that a *Strickland*-like prejudice requirement, arising out of a trial and conviction, is not applicable if the right to counsel has been violated.

Having set the analytical framework, including the appropriate standard for justiciable harm, we now move on to applying the allegations in plaintiffs' complaint to the framework.

h. Application of Complaint Allegations to Justiciability Principles

(i) Harm and the Named Plaintiffs

Plaintiff Christopher L. Duncan alleges that he pleaded guilty of an overcharged crime that was factually unwarranted because of his attorney's inadequate representation. Plaintiff Billy Joe Burr, Jr., alleges that he had to endure a delay before an acceptable misdemeanor plea was offered to him, which only occurred after counsel advised him to plead guilty of the charged felony and after Burr demanded that counsel speak further to the prosecutor. Plaintiff Steven Connor alleges that there was a basis to suppress a search without a warrant that was ignored by counsel. Plaintiff Antonio Taylor alleges that there existed a valid defense predicated on forensic evidence and witness accounts had counsel bothered conducting an investigation and inquiry. Plaintiff Jose Davila alleges that counsel failed to discuss the charges with Davila, lied to the court about it, and failed to challenge a revision of the charges. Plaintiffs Jennifer O'Sullivan, Christopher Manies, and Brian Secrest allege that counsel had effectively gone missing in action, despite the fact that they faced serious charges and that hearings and trials were pending. A common thread that runs through all the allegations concerning the named plaintiffs is the failure of counsel to converse with plaintiffs in a meaningful manner. The named plaintiffs allegedly experienced conduct that included: counsel speaking with plaintiffs, for the first time, in holding cells for mere minutes before scheduled preliminary examinations while in full hearing range of other inmates; counsel advising plaintiffs to waive preliminary examinations without meaningful discussions on case-relevant matters; counsel failing to provide plaintiffs with police reports; and counsel generally neglecting throughout the entire course of criminal proceedings to discuss with plaintiffs the accuracy and nature of the charges, the circumstances of the purported crimes, and any potential defenses. They further complain of the following: counsel entering into plea negotiations without client input or approval; counsel perfunctorily advising plaintiffs to plead guilty as charged absent meaningful investigation and inquiry; counsel improperly urging plaintiffs to admit facts when pleas were taken; and, counsel

neither preparing for hearings and trials, nor engaging in any communications with plaintiffs concerning trials. In sum, the allegations by the named plaintiffs include instances of representation by counsel that fell below an objective standard of reasonableness in regard to critical stages in the criminal proceedings.[19]

(ii) Harm and Class Members Generally

Plaintiffs devote an entire section of the complaint to allegations of harm suffered by class members. Plaintiffs allege that class members "are detained unnecessarily or for prolonged periods of time before trial." As examples, they refer to contract defenders and counsel for indigents who rarely seek bail reductions, despite circumstances calling for reductions, and who fail to appear at court proceedings, resulting in frequent postponements and rescheduling. Plaintiffs refer to one class member who "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." These allegations include instances of deficient performance, which also resulted in the harm of unwarranted, unnecessary, and prolonged delays and detentions.

Plaintiffs next allege that class members are compelled into taking inappropriate pleas, often to the highest charged crimes, even "when they have meritorious defenses." Plaintiffs assert that counsel routinely encourage guilty pleas "without a proper factual basis for guilt" and absent "even a cursory investigation into potentially meritorious defenses." They further complain of counsel pressuring class members to take "open pleas," which promise no particular sentence, and which "often result in punishment that is disproportionate to the facts of the case." Plaintiffs refer to one case in which counsel permitted a client to plead guilty of failure to pay restitution even though he had already paid restitution. Plaintiffs indicate that class members are so fearful that counsel will not adequately prepare for trial that they forgo their right to trial and plead guilty of factually unwarranted offenses. These allegations regarding pleas include instances of deficient performance that inflicted a detriment to indigent defendants.

Plaintiffs allege that indigent defendants who insist on going to trial are subjected to punitive charges or lengthy pretrial delays. As an example, plaintiffs refer to an indigent defendant who sat in the Muskegon County jail for 10 months before he finally pleaded guilty of various charges. Plaintiffs allege that the indigent defendant's court-appointed 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 period ran and re-arraign

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[19] We recognize that much has transpired in the criminal prosecutions related to the named plaintiffs since the filing of the instant complaint. In class actions, while there must be a case or controversy with respect to a named plaintiff at the time the complaint was filed in a case, the controversy may continue to exist "between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot." *Sosna v Iowa*, 419 US 393, 402; 95 S Ct 553; 42 L Ed 2d 532 (1975). The overall case, however, must still present a case or controversy at the time of court review. *Id.* In our discussion regarding class certification, we return to the issue of mootness and explain why the doctrine compels a conclusion that certification was proper.

him on the same charges." Plaintiffs contend that there had been no evidence connecting the defendant to the crime and that the defendant "had three alibi witnesses who would have testified that he was nowhere near the crime scene." Justiciable harm could be found from these allegations.

Plaintiffs additionally allege that class members face harsher sentences than warranted by the facts. They refer to a case in which a criminal defendant received a sentence of 12 to 24 months' imprisonment despite the fact that the plea agreement recommended no incarceration. Plaintiffs note that "[w]hen the sentence was imposed, [the defendant's] 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." Plaintiffs allege that "[a]n 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." Plaintiffs point to a Berrien County incident where a defendant was sentenced to 37 days in jail for an offense that had a 30-day statutory maximum; counsel said nothing, but the court clerk noticed the error. Plaintiffs also assert that "[c]ounsel . . . often fail to provide meaningful representation at sentencings," with "[s]ome attorneys offer[ing] information during sentencing proceedings that is detrimental to their clients' cases." Other attorneys, according to plaintiffs, "often fail to catch sentencing errors and do not read the pre-sentencing reports prior to the sentencing hearings." Plaintiffs further allege that inadequate representation results in indigent defendants' being improperly assessed fees, which they have no ability to pay, and they assert that failures by counsel to explore otherwise available alternatives to incarceration result in access being denied to alternatives such as drug treatment programs. These allegations include instances of deficient performance detrimental to indigent defendants.

Plaintiffs next maintain that "[c]ounsel are unable to file necessary motions for pre-trial suppression, discovery, [and] speedy trial, motions to quash circuit court bind-over, or motions in limine[, and] [t]hey often fail to challenge illegal identifications, illegal searches and seizures, or illegally obtained confessions." Plaintiffs complain that "some attorneys refuse to provide their clients with copies of court files and police records." These allegations include instances of deficient performance detrimental to indigent defendants.

With respect to trials, plaintiffs allege:

> 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.

Plaintiffs do allege that wrongful convictions have occurred, which suggests satisfaction of the *Strickland* prejudice requirement typically applicable in criminal appeals.

(iii) Presumed Prejudice and Harm

Plaintiffs allege that the three challenged court-appointed, indigent defense systems "fail[] to provide counsel to all eligible indigent defendants." Plaintiffs claim that "[s]ome members . . . must represent themselves because they are wrongfully denied defender services." In that same vein, plaintiffs allege that "indigent defendants who are constitutionally eligible for state-appointed counsel are denied counsel." As an example, plaintiffs contend that "[o]ne Berrien County judge . . . routinely refuses to appoint counsel to defendants who have made bail[.]" On this same topic, plaintiffs maintain that "[t]he 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." And "[o]ne 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." Plaintiffs further contend that, as a result of a failure to abide by national performance standards, class members are "constructively denied, or threatened with the constructive denial of counsel." These allegations concern the actual or constructive denial of counsel, which would ordinarily give rise to a presumption of prejudice in a criminal appeal, and which would constitute justiciable harm. *Strickland*, *supra* at 692; *Cronic*, *supra* at 659.

Plaintiffs also allege that "attorneys routinely represent clients in situations in which conflicts of interest exist." According to plaintiffs, "[m]any 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." As an example, plaintiffs allege that "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." Prejudice is presumed when an attorney is burdened by an actual conflict of interest. *Strickland*, *supra* at 692.

(iv) Widespread Harm, Causation, and Redress of Injury

We first find that the allegations discussed in the preceding sections reflect widespread and systemic instances of violations of the constitutional right to counsel and the effective assistance of counsel.

Plaintiffs allege that an absence of standards, training,[20] programs, supervision, monitoring, guidelines, and independence from the judicial and prosecutorial functions has resulted in indigent counsel having too many cases,[21] insufficient support staff, insufficient or no

[20] According to plaintiffs, "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."

[21] Plaintiffs claim:

(continued…)

resources to hire experts and investigators,[22] and a lack of skills and experience to properly handle assigned cases. Plaintiffs further maintain that these problems have created severe obstacles in putting cases presented by the prosecution to the crucible of meaningful adversarial testing. They additionally contend:

> As a result of the[] systemic deficiencies, indigent defense counsel do not meet with clients prior to critical stages in their criminal proceedings;[23] 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.

We have recited above the numerous harms claimed by plaintiffs and, ultimately, plaintiffs allege a nexus or causal connection between the widespread and systemic deficiencies and defendants, asserting:

> 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 [American Bar Association's] Ten Principles,

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(…continued)

> [I]n 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 700 felony cases per year; another routinely handled 15 felonies per week.

[22] Plaintiffs allege that "[i]ndigent 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." They note that "[i]n 2004, the trial court administrator in Berrien County did not receive *a single request* for an expert or an investigator." (Emphasis added.)

[23] Plaintiffs allege:

> 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.

> 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.[24]

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[24] We note that the complaint contains numerous additional paragraphs alleging the necessary causal connection. The dissent, citing *Ashcroft v Iqbal*, __ US __; 129 S Ct 1937; 173 L Ed 2d 868 (2009), argues that the causation allegations in plaintiffs' complaint fail because they constitute mere legal conclusions and because the allegations implausibly assert causation and are incapable of being proven or disproven. The dissent contends that it is impossible for plaintiffs to prove that the alleged inaction and failures by defendants caused the asserted constitutional violations. To the extent that *Ashcroft*, a case interpreting the Federal Rules of Civil Procedure and cases construing those rules, even has application to the case at bar, which is controlled by the Michigan Court Rules, it does not support summary dismissal of plaintiffs' complaint. With respect to the argument that the allegations of causation are legal conclusions, we first note that any allegation of causation, whatever the context, carries with it some tinge of a legal conclusion. Additionally, the extensive complaint sets forth numerous factual allegations that bear on the issue of causation, including those cited by us in this opinion. We initially reiterate the principle so long ago announced in *Gideon* that it is the state that ultimately has the affirmative constitutional obligation to implement a system that safeguards the right to counsel for indigent defendants, which right, under *Strickland* and *Cronic*, includes the right to the effective assistance of counsel. If a county system is constitutionally inadequate under the standards we have set today, i.e., a finding of widespread and systemic instances of deprivation of counsel and deficient performance resulting from a flawed county system of providing indigent representation, but the county is in full compliance with existing state law and mandates, the cause of the constitutional deficiencies will necessarily flow from failures by the state. The complaint alleges that the state has provided little or no funding, or fiscal or administrative oversight, opting to continue a centuries-old practice of delegating to the counties the responsibility for funding and administering indigent defense services. It is alleged that defendants have done nothing to ensure that the counties have in place the necessary funding, policies, standards, qualifications, programs, training, guidelines, and other resources that would enable attorneys to provide constitutionally adequate representation. The complaint goes into particularized factual detail on each of these matters, e.g., "Neither the Berrien nor Muskegon County programs have written job descriptions or qualifications." It is further alleged that the lack of fiscal oversight, administrative oversight, funding, policies, standards, programs, qualifications, training, guidelines, and other resources results in defense providers who have too many cases, lack sufficient support staff, are unable to obtain investigators and experts, lack the tools necessary to do their jobs, are wanting in skills and experience to handle assigned cases, and who essentially cannot put a prosecutor's case to the crucible of meaningful adversarial testing. As an example, plaintiffs allege that, as a result of inadequate training, "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." Plaintiffs then allege that these systemic problems result in the wrongful denial of counsel, deficient performance, wrongful convictions, unnecessary or prolonged pretrial detentions, inappropriate guilty pleas, and unwarranted harsh sentences. In other words, defendants have violated plaintiffs' constitutional rights. Well-pleaded factual allegations relative to causation have been presented and not solely mere legal conclusions. The paragraphs in the complaint that are conclusory form the framework of the complaint and are

(continued…)

This case involves indigent criminal defendants who were, are, and will be subjected to the court-appointed, indigent defense systems employed by the relevant counties. And there are extensive allegations concerning detrimental and harmful effects on these criminal defendants, as they pass through the systems, caused by ineffective attorneys, which, in turn, is allegedly the result of the state's and the Governor's failure to protect the constitutional rights of indigent defendants. Accordingly, there are sufficient allegations of a causal connection between the injuries and the complained-of conduct, and plaintiffs have also indicated that the injuries would be redressed by a favorable court decision granting the prayed-for equitable relief. See *Michigan Citizens*, *supra* at 294-295. We hold that, on the basis of the pleadings and at this juncture in the lawsuit, plaintiffs have sufficiently alleged facts that, if true, establish standing, establish that the case is ripe for adjudication, and state claims upon which declaratory and injunctive relief can be awarded. Stated differently, the case is presently justiciable, because a case or controversy exists. Whether plaintiffs can ultimately prove their allegations and establish their case is a matter for another day.

6. Class Certification

Defendants maintain that the trial court erred in granting plaintiffs' motion to certify the class. Defendants contend that plaintiffs failed to show that a class action is the superior way to litigate the claims. In support of the superiority argument, defendants assert that a "class action serves no useful purpose because the requested relief may be obtained from an individual action and would automatically accrue to the benefit of others similarly situated." As part of the superiority argument, defendants also argue that a class action suit is inconvenient, impractical, and unmanageable under the applicable *Strickland* standard, which requires examination of individual proofs. In further support of the superiority argument, defendants argue that the class is unmanageable because the three counties are too factually disparate, that the class creates practical problems in litigating the claims, that indigent criminal defendants will suffer no adverse effect if this Court decertifies the class, and that plaintiffs have adequate remedies at law. Finally, defendants maintain that plaintiffs failed to demonstrate commonality, where the alleged systemic violations will require individualized proof and the relief would not be the same for all class members. The trial court, on the basis of the pleadings, ruled contrary to each one of defendants' arguments, finding that plaintiffs established commonality, superiority, and typicality.

In *Neal v James*, 252 Mich App 12, 15-16; 651 NW2d 181 (2002), this Court articulated some general principles applicable in determining whether a class should be certified:

(…continued)

more than sufficiently supported by factual allegations. See *Ashcroft*, ___ US at ___; 129 S Ct at 1950; 173 L Ed 2d at 884 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity[.]"). Further, the allegations plausibly suggest unconstitutional conduct and practices by defendants and entitlement to relief, and while the causation allegations may be difficult to prove and establish, we cannot conclude that it is impossible to prove causation. We, as an appellate court, should not engage in trying the case, nor deny plaintiffs the opportunity to present their proofs.

> Because there is limited case law in Michigan addressing class certifications, this Court may refer to federal cases construing the federal rules on class certification. When evaluating a motion for class certification, the trial court is required to accept the allegations made in support of the request for certification as true. The merits of the case are not examined. The burden is on the plaintiff to show that the requirements for class certification exist. [Citations omitted.]

"The five factors a court must consider when deciding whether to certify a class are found in MCR 3.501(A)(1), and a plaintiff seeking to certify a class must show that *all* five enumerated requirements are satisfied." *Hill*, *supra* at 310, citing *A&M Supply Co v Microsoft Corp*, 252 Mich App 580, 597-598; 654 NW2d 572 (2002) (emphasis in original). MCR 3.501(A)(1) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members in a class action only if:
>
> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.

a. Number of Class Members and Practicality of Joinder

The first requirement for class certification is that the class must be "so numerous that joinder of all members is impracticable[.]" MCR 3.501(A)(1)(a). In the complaint, plaintiffs indicate:

> 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.

We agree with plaintiffs that the class, as defined in the complaint, is sufficiently numerous so as to make joinder of each class member impractical. We also reject the dissent's argument challenging this ruling under *Zine*, *supra*. In *Zine*, this Court was concerned with

lemon-law booklets issued by Chrysler that were distributed to purchasers of new vehicles and that were allegedly misleading. We find *Zine* distinguishable because it did not entail the type of prospective, system-wide relief sought here, it did not involve a fluid class of plaintiffs such as exists in the case at bar, and because it did not present allegations of widespread and systemic instances of harm, as we have defined the term "harm" in this opinion.

b. Commonality of Legal and Factual Questions

The second requirement for class certification is that there must be "questions of law or fact common to the members of the class that predominate over questions affecting only individual members[.]" MCR 3.501(A)(1)(b). While this action will require contemplation of specific instances of deficient performance and instances of the actual or constructive denial of counsel, the ultimate broad factual questions common to all members in the class, given the type of relief sought, is whether there have been widespread and systemic constitutional violations, whether the violations were and are being caused by deficiencies in the county indigent defense systems, and whether the system deficiencies were and are attributable to or resulted from the action or inaction of defendants. Any evidence concerning individual prosecutions has no bearing on those particular criminal cases and the available appellate remedies, except to the extent of any effect on a pending case caused by a system-wide remedy resulting from an order or judgment rendered in this action. The evidence pertaining to individual prosecutions merely constitutes a piece in the larger puzzle relative to establishing a basis for prospective, system-wide relief. In the context of this type of civil rights action, unlike the situation in *Zine*, the factual question *that will be of any relevance to all class members* revolves around the establishment of widespread and systemic instances of deficient performance and denial of counsel; the case's viability with regard to all members depends on an aggregation of harm that is pervasive and persistent.

The dissent's reliance on *Neal* is equally misplaced. The case involved claims of racial discrimination brought by a class of African-Americans who held or had sought employment with the city of Detroit's law department. The trial court certified the class, and this Court reversed for failure to satisfy the commonality requirement. The *Neal* panel reached its holding because "individual factual circumstances pertinent to each plaintiff will need to be reviewed, and individual, fact-specific inquiries will need to be made in evaluating why certain individuals were not hired or promoted, or why other individuals were discharged or not retained." *Neal*, *supra* at 20. Importantly, the Court thereafter stated that the plaintiffs had "simply not shown that there was any specific policy or practice followed by defendants to satisfy the 'commonality' requirement[.]" *Id.* Here, plaintiffs' case is built on defendants' and the counties' policies and practices, it requires proof of widespread and systemic constitutional violations before any relief is available, and it focuses on system-wide, prospective relief. *Neal* is simply inapposite.

Next, there is also commonality with respect to the legal questions, which all concern state and federal constitutional rights to due process and to counsel. We conclude that the allegations in the complaint satisfy the commonality requirement in regard to both the factual and legal questions presented.

c. Typicality of Claims

The third requirement for class certification is that there must be "claims . . . of the representative parties [that] are typical of the claims . . . of the class[.]" MCR 3.501(A)(1)(c). As reflected in our earlier review of the allegations in the complaint, the claims of the named plaintiffs, which pertained mostly to deficient performance of counsel at critical pretrial stages of the criminal proceedings, are typical of the allegations of the class members. We conclude that the allegations in the complaint satisfy the typicality requirement.

d. Protection of Interests by Representative Parties

The fourth requirement for class certification is that "the representative parties [must] fairly and adequately assert and protect the interests of the class[.]" MCR 3.501(A)(1)(d). Plaintiffs allege:

> [The] 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.

Given that "the trial court is required to accept the allegations made in support of the request for certification as true" when evaluating a class certification motion, *Neal*, *supra* at 15, and considering the quoted allegations, we conclude that MCR 3.501(A)(1)(d) has been satisfied.

e. Superiority

With respect to the fifth factor, whether "the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice," MCR 3.501(A)(1)(e), MCR 3.501(A)(2) provides:

> In determining whether the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice, the court shall consider among other matters the following factors:
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> (a) whether the prosecution of separate actions by or against individual members of the class would create a risk of
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> (i) inconsistent or varying adjudications with respect to individual members of the class that would confront the party opposing the class with incompatible standards of conduct; or
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> (ii) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(b) whether final equitable or declaratory relief might be appropriate with respect to the class;

(c) whether the action will be manageable as a class action;

(d) whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions;

(e) whether it is probable that the amount which may be recovered by individual class members will be large enough in relation to the expense and effort of administering the action to justify a class action; and

(f) whether members of the class have a significant interest in controlling the prosecution or defense of separate actions.

In *Edgcumbe v Cessna Aircraft Co*, 171 Mich App 573, 575; 430 NW2d 788 (1988), this Court explained that "[t]he requirement of MCR 3.501(A)(1)(e), that the class action be superior to other methods of adjudication in promoting the convenient administration of justice, is an outgrowth of the equitable heritage of class actions and a recognition of the practical limitations on the judiciary's capability to resolve disputes." The relevant concern in determining the convenient administration of justice is whether the issues are so disparate as to make a class action suit unmanageable. *Dix v American Bankers Life Assurance Co of Florida*, 429 Mich 410, 419; 415 NW2d 206 (1987). "Matters such as diversity of defenses, counterclaims, et cetera may bear upon the determination of whether a class action suit will promote the convenient administration of justice." *Lee v Grand Rapids Bd of Ed*, 184 Mich App 502, 505; 459 NW2d 1 (1989).

On examination and consideration of the enumerated factors relative to superiority, MCR 3.501(A)(2), we conclude that they weigh in favor of certification of the class. It is vital to keep in mind the nature of plaintiffs' complaint in analyzing the class certification issue. Plaintiffs will need to establish widespread instances of ineffective assistance of counsel and denial of counsel. Because criminal prosecutions in the three counties are not being stayed during the pendency of this litigation, class members constitute a fluid class and the attendant criminal proceedings will continually be in flux. Indeed, the prosecutions of the named plaintiffs, to our knowledge, have been mostly resolved. Promoting the convenient administration of justice necessarily demands that this case proceed as a class action. In *Reynolds v Giuliani*, 118 F Supp 2d 352, 391-392 (SD NY, 2000), the federal district court commented:

[C]lass certification is not a mere formality because it will insure against the danger of this action becoming moot. This case involves a fluid class where the claims of the named plaintiffs may become moot prior to completion of this litigation. The danger of mootness is magnified by the fact that defendants have the ability to moot the claims of the named plaintiffs, thereby evading judicial review of their conduct. Thus, this Court, like other courts under these circumstances, believes that class certification is necessary. *See Greklek v. Toia*, 565 F.2d 1259, 1261 (2d Cir. 1977) (affirming district court's grant of class

> certification in action requesting declaratory and injunctive relief "since only class certification could avert the substantial possibility of the litigation becoming moot prior to the decision"); *Alston v. Coughlin*, 109 F.R.D. 609, 612 (S.D. N.Y. 1986) ("[t]he plaintiff's interest in averting the possibility of the action becoming moot, with the concomitant interest in judicial economy, makes class certification in this case more than an empty formality"); *Jane B.* [*v New York City Dep't of Social Services*] 117 F.R.D. [64, 72 (SO NY, 1987)] ("[a]n additional reason for granting the motion for certification lies in avoiding problems of mootness"); *Ashe* [*v Bd of Elections*] 124 F.R.D. [45, 51 (ED NY, 1989)] ("[a] further ground for finding class certification to be more than a 'formality' here is to avoid the danger of the individual plaintiffs' claims becoming moot before a final adjudication"); *Koster v. Perales*, 108 F.R.D. 46, 54 (E.D. N.Y. 1985) (class certification is necessary when "absent certification, there is a substantial danger of mootness"). Accordingly, plaintiffs' motion for class certification is granted.

We have the same mootness dangers if this case is not pursued through the vehicle of a class action lawsuit. This fact alone defeats most of defendants' arguments on the issue of class certification, e.g., the argument that a class action serves no useful purpose. Absent class certification, and even assuming that no mootness issue exists, the prosecution of separate actions would create a risk of inconsistent or varying adjudications. MCR 3.501(A)(2)(a). Furthermore, equitable and declaratory relief would not only be appropriate for the class on establishing its case, it is the only relief being sought. MCR 3.501(A)(2)(b). Additionally, we find that the action would be manageable as a class action, that any claims by individual class members would be insufficient to support separate actions in view of the complexity of the issues or the expense in litigation, that recoverable dollar amounts are not at issue, and that individual class members do not have a significant interest in controlling separate actions. MCR 3.501(A)(2)(c) through (f). Defendants' arguments to the contrary, including those hinging on the now rejected two-part *Strickland* test, are unavailing.

IV. Summary

We respectfully disagree with our dissenting colleague's criticisms of this opinion and, to the extent not already addressed above, feel compelled to respond. This case certainly presents difficult issues, requiring us, in part, to tread in unchartered legal waters. There are, however, some fundamental principles at play here.

It is well-accepted that part of the judiciary's role and function in our tripartite system of government is to interpret constitutional provisions, apply constitutional requirements to the facts at hand, and safeguard and protect constitutional rights, all through entry of orders and judgments as guided by stare decisis. That the judiciary can declare executive and legislative conduct unconstitutional, can prohibit continuing unconstitutional conduct by the two other branches of government, and can demand constitutional compliance, hardly seem to be foreign principles in the jurisprudence of this state and the country. For support, we need not look any further than the historic landmark case of *Marbury*, *supra* at 177-180, in which Chief Justice John Marshall so eloquently stated:

The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act, contrary to the constitution, is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable. Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of, in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow, in fact, what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So, if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case, conformable to the law, disregarding the constitution; or conformable to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case: this is of the very essence of judicial duty. If then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply. Those, then, who controvert the principle, that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed as pleasure.

That it thus reduces to nothing, what we have deemed the greatest improvement on political institutions, a written constitution, would, of itself, be sufficient, in America, where written constitutions have been viewed with so

> much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection. The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say, that in using it, the constitution should not be looked into? That a case arising under the constitution should be decided, without examining the instrument under which it arises? This is too extravagant to be maintained. In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey? There are many other parts of the constitution which serve to illustrate this subject.
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> [I]t is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of *courts*, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support! The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear, that I will administer justice, without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as _____, according to the best of my abilities and understanding, agreeably to *the constitution*, and laws of the United States." Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? [I]f it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime. [Paragraphs reconfigured; emphasis added.]

Moving forward more than 200 years, the United States Supreme Court in *Boumediene*, *supra*, reiterated the principles from *Marbury*. The Court stated that abstaining from questions requiring political judgments reflects recognition that such matters are best left to the political branches and not the judiciary. *Boumediene*, *supra*, 553 US at ___; 128 S Ct at 2259; 171 L Ed 2d at 77. *However*, "[t]o hold [that] the political branches have the power to switch the Constitution on or off at will is quite another [matter]." *Id.* This would unacceptably "permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say 'what the law is.'" *Id.*, quoting *Marbury*, *supra* at 177.

Political judgments are involved in determining the manner and method by which a state proceeds in providing representation for indigent criminal defendants, including, as in Michigan, delegation of representation matters to local counties and chief judges. But if the state has allegedly failed to satisfy its constitutional obligations with its chosen approach, i.e., switching off state and federal constitutions, it is up to the judiciary to judge whether the state has indeed acted consistent with constitutional requirements. From *Marbury* to *Boumediene*, this field has been defined as including the interpretation of constitutional language, the application of

constitutional principles, the judging of constitutional compliance, and the safeguarding of constitutional rights. This is all that is occurring in this case. Without allowing for court examination and possible intervention, the Governor and the Legislature effectively determine "what the law is" with respect to the right to counsel and the right to the effective assistance of counsel.

We are not setting public policy. Rather, we are simply indicating that the judiciary can evaluate the constitutional compliance of policies implemented by the two political branches of government. We are not suggesting that the judiciary can dictate to the other branches of government the type of system to employ in providing representation for indigent defendants. The judiciary, however, can and must have a say with respect to whether a chosen system is constitutionally sound. The judiciary clearly cannot require the political branches to use a "better" system than a system currently in place, where the existing system sufficiently safeguards constitutional rights. See *Grand Traverse Co*, *supra* at 472 (it is for the Legislature to decide whether to implement a more desirable system).

Concerns have been expressed with expenses that may be incurred by state taxpayers and the state to operate an indigent defense system. Assuming this were to occur, we first note that the taxpayers of this state are already bearing the burden of paying for the representation of indigent defendants; it is just being accomplished through different taxing authorities. Importantly, economic concerns did not dissuade the Supreme Court in *Gideon* from construing the United States Constitution in a manner that mandates effective assistance of counsel for indigent defendants. Further, during these economically challenging times, the judiciary, in addressing constitutional issues, must be reminded of the words of Chief Justice Warren Berger in *Bowsher v Synar*, 478 US 714, 736; 106 S Ct 3181; 92 L Ed 2d 583 (1986):

> No one can doubt that Congress and the President are confronted with fiscal and economic problems of unprecedented magnitude, but "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . . ." [Citation omitted.]

With respect to the expressed concerns about the possible prospect that the state will have to operate an indigent defense system at the trial level, we care not whether it is the state, administrative agencies, counties, municipalities, courts, or any other bodies, alone or in combination, that operate a system providing representation for indigent criminal defendants. Our *only* concern is that whatever system is adopted, regardless of what entity operates the system, it must safeguard the constitutional rights to counsel and the effective assistance of counsel. Plaintiffs have filed a complaint containing sufficient allegations that those constitutional rights are not currently being protected in the three counties at issue under the systems employed by those counties, which can ultimately be blamed on defendants' constitutional failures. Plaintiffs are thus entitled to have their day in court.

V. Conclusion

We hold that defendants are not shielded by governmental immunity, that defendants are proper parties, that the trial court, not the Court of Claims, has jurisdiction, and that the trial court has jurisdiction and authority to order declaratory relief, prohibitory injunctive relief, and some level of mandatory injunctive relief, the full extent of which we need not presently define. We further hold that, on the basis of the pleadings and at this juncture in the lawsuit, plaintiffs have sufficiently alleged facts that, if true, establish standing, establish that the case is ripe for adjudication, and state claims upon which declaratory and injunctive relief can be awarded. Finally, we hold that the trial court properly granted the motion for class certification.

Affirmed.

Sawyer, J., concurred.

/s/ William B. Murphy
/s/ David H. Sawyer