SUPREME COURT
APR 2010
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STATE OF MICHIGAN

IN THE SUPREME COURT

ON APPEAL FROM THE 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, on behalf of themselves and all other similarly situation,

Plaintiffs-Appellees,

-vs-

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

Defendants-Appellants,

Supreme Court No. 139345

Court of Appeals Nos. 278652, 278858, 278860

Ingham County Circuit Court No. 07-242-CZ

PLAINTIFFS-APPELLEES' BRIEF ON APPEAL

CERTIFICATE OF SERVICE

***** ORAL ARGUMENT REQUESTED *****

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Plaintiffs-Appellants say "Yes".

Defendants-Appellants say "No".

II. DID THE CIRCUIT COURT AND THE COURT OF APPEALS PROPERLY CONCLUDE THAT PLAINTIFFS' CLAIMS ARE JUSTICIABLE; THAT PLAINTIFFS HAVE STANDING TO RAISE THE FEDERAL AND STATE CONSTITUTIONAL CLAIMS PRESENTED IN THIS CASE AND THAT THESE CLAIMS ARE RIPE?

Plaintiffs-Appellants say "Yes".

Defendants-Appellants say "No".

III. DID THE CIRCUIT COURT PROPERLY EXERCISE ITS DISCRETION IN CONCLUDING THAT THIS CASE MET ALL OF THE REQUIREMENTS FOR A CLASS ACTION AS SET OUT IN MCR 3.501(A)(1)?

Plaintiffs-Appellants say "Yes".

Defendants-Appellants say "No".

COUNTERSTATEMENT OF MATERIAL PROCEEDINGS AND FACTS

In 1963, the Supreme Court of the United States recognized in *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed2d 799 (1963), that "in our adversary system of criminal justice, any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344. The Court in *Gideon* further held that the right to counsel guaranteed by the Sixth Amendment to the United States Constitution represented a right so "fundamental and essential" to a fair trial that it was imposed on the states under the Fourteenth Amendment. *Id.* at 342.

Three months after the *Gideon* case was decided, the citizens of Michigan voted to approve a new constitution. That constitution contains a provision guaranteeing that "[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. Article 1, §17 of the Michigan Constitution further provides that no person shall be denied life, liberty or property without due process of law.

This suit for declaratory and injunctive relief was instituted against the State of Michigan and Governor Jennifer M. Granholm because the State of Michigan has failed to meet its obligations under the Sixth and Fourteenth Amendments to the United States Constitution and article 1, §20 and article 1, §17 of the Michigan Constitution. This case was filed in the Ingham County Circuit Court on February 22, 2007, on behalf of eight plaintiffs who were charged with felonies in Berrien, Genesee or Muskegon County and who required a public defender. The case was also brought on behalf of a class of all adults who have been or will be charged with felonies in these three counties, and who require a public defense. Complaint (App. pp. 1b - 49b).

Plaintiffs allege in their complaint that, because of the acts and omissions of the defendants, the indigent defense system in place in the three counties does not comply with constitutional mandates. The complaint alleges that assigned defense counsel in these counties do not have the resources necessary to provide their clients with constitutionally adequate representation, because they lack manageable caseloads, necessary support, as well as appropriate training, supervision and monitoring. Complaint, ¶¶98-108, 120-125 (App. pp. 29b - 32b; 35b - 37b). Assigned counsel have too many cases, with felony caseloads in one county averaging 746 a year. *Id.,* ¶¶123-124 (App. p. 36b). They have either no resources or insufficient resources to hire outside investigators or experts. *Id.*, ¶¶88-92 (App. pp. 25b - 27b). And they often lack the skills, experience and training to handle the cases assigned to them. *Id.*, ¶¶113-117 (App. pp. 33b - 34b). As a consequence, plaintiffs allege that the assigned counsel system in the three counties fails to meet the constitutional requirement because counsel cannot put the prosecution's case to "the crucible of meaningful adversarial testing." *United States v Cronic*, 466 US 648, 656; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Plaintiffs further allege that counsel assigned to represent defendants in felony cases in the three counties do not provide representation at critical stages in the criminal proceeding, particularly: they do not meet with clients prior to critical stages in their criminal proceedings; they do not adequately investigate the charges against their clients; they do not file necessary pre-trial motions, prepare properly for court appearances or provide meaningful representation at sentencings; they do not employ and consult with experts when necessary; and they do not ensure that they are representing clients free from conflicts of interest. Complaint, ¶¶8, 126-129, 131-140 (App. pp. 4b; 37b - 40b).

As a direct result of defendants' failure to ensure that indigent defense providers have the tools necessary to provide constitutionally adequate counsel, plaintiffs allege that their constitutional rights are violated continuously. Because of these violations, plaintiffs have suffered, will continue to suffer, and are at imminent risk of suffering, an array of concrete, irreparable harms. These harms include the wrongful denial of counsel at critical stages of their cases, unnecessarily prolonged detention before trial, the wrongful denial of the right to trial despite meritorious defenses, and the imposition of sentences that are harsher than the facts of the cases warrant. Complaint, ¶¶141-153, (App. pp. 41b - 43b). Plaintiffs also allege that they are compelled to take guilty pleas even when there is no evidence to support the charges against them. Complaint, ¶144 (App. p. 41b).

The complaint contains four counts. Count I asserts a cause of action against Governor Granholm under the federal civil rights statute, 42 USC §1983, based on the denial of the plaintiffs' rights under the Sixth Amendment to the United States Constitution. (App. p. 44b). Count II contains another claim against Governor Granholm under 42 USC §1983 for violation of plaintiffs' Fourteenth Amendment rights. (App. p. 45b). Counts III and IV allege causes of action against both defendants under article 1, §17 and article 1, §20 of the Michigan Constitution. (App. pp. 46b - 47)

Plaintiffs' complaint concludes with a description of the relief being sought in this case. (App. p. 48b). Plaintiffs request a declaratory judgment, decreeing that the defendants have violated their right to counsel guaranteed by the Sixth Amendment to the United States Constitution and article 1, §20 of the Michigan Constitution. *Id.* Plaintiffs further seek a declaratory judgment finding that the defendants have violated plaintiffs' rights under the due process clause of the Fourteenth Amendment and article 1, §17 of the Michigan Constitution. In addition to declaratory relief, the complaint further requests that the court "permanently enjoin

Defendants from subjecting Plaintiffs to practices that violate their rights." *Id.* The complaint also asks the court to "[o]rder appropriate relief requiring Defendants to provide indigent defense programs and representation consistent with the requirements of the United States and Michigan Constitutions." *Id.*

With their complaint, plaintiffs filed a motion for class certification under MCR 3.501. In that motion, plaintiffs requested that the circuit court approve a class consisting of all adults in the three subject counties who have been or will be charged with felonies, who must rely on the state to provide counsel for their defense.

In lieu of filing an answer to the complaint, the defendants filed a motion for summary disposition on April 5, 2007. (App. pp. 50b - 84b). In their motion, defendants raised a number of arguments. They contended that plaintiffs' cause of action was subject to dismissal under MCR 2.116(C)(4) because the circuit court did not have subject matter jurisdiction. Defendants further argued that they were entitled to summary disposition under MCR 2.116(C)(7) based on principles of immunity. Finally, defendants asserted that summary disposition was appropriate under MCR 2.116(C)(8) because plaintiffs had failed to state a claim on which relief could be granted. The defendants' motion for summary disposition consisted entirely of argument based on the allegations contained in plaintiffs' complaint. Defendants did not attach to their motion any affidavits or documentation challenging the substance of the allegations contained in the complaint.

Defendants filed their response to the class certification motion on May 10, 2007. (App. pp. 85b - 110b). In that response, defendants made only three arguments as to why certification of the proposed class was improper. They contended that plaintiffs could not establish the commonality or typicality requirements of MCR 3.501(A)(1)(b) and (c). (App. pp. 87b - 92b). Defendants further asserted that plaintiffs did not meet the requirements of MCR 3.501(A)(1)(e), the subrule which requires that maintenance of a class action be superior to other methods of adjudication. (App. 92b - 94b).

On May 16, 2007, the circuit court conducted a hearing on both defendants' motion for summary disposition and plaintiffs' request for class certification.[1] (App. pp. 97a-112a). At that hearing, the circuit court rejected each of the arguments presented in defendants' motion for summary disposition. (App. pp. 106a-107a). The circuit court first concluded that plaintiffs had standing to raise their constitutional claims and that these claims were ripe. (*Id.*). In reaching this conclusion, the circuit court rejected defendants' argument that plaintiffs had to be convicted first before they could establish standing. *Id.*

The circuit court further rejected defendants' argument that courts were without authority to act because only the Michigan Legislature could appropriate funds from the state treasury. The circuit court found defendants' arguments unpersuasive because, "[t]he plaintiffs are not seeking monetary relief from the state to fund an indigent defense program. They are seeking injunctive and declaratory relief. Therefore, that argument fails." (App. p. 107a).

The circuit court also concluded at the May 16, 2007, hearing that plaintiffs were entitled to certification of the proposed class. In reaching this conclusion, the circuit court first rejected defendants' arguments that the commonality and typicality requirements of MCR 3.501(A)(1) were not satisfied. Focusing on the fact that plaintiffs sought only declaratory and injunctive

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[1]The transcript of this hearing indicates that it occurred on May 15, 2007. The transcript is incorrect; the hearing on the parties' motions took place on May 16, 2007.

relief, the circuit court ruled that it would not "have to explore the unique circumstances of each proposed class member to grant relief." (App. p. 111a). Finally, the circuit court reviewed all of the factors required under MCR 3.501(A)(2) and it determined that a class action would be superior to the methods of adjudicating these claims. (*Id*).

On the same day that the hearing on the parties' motions, the circuit court, at the request of counsel for defendants, signed an order staying further proceedings in the case while defendants pursued available appellate rights. (App. pp. 3a - 4a). Written orders reflecting the circuit court's rulings on the summary disposition and class certification motions were entered on June 5, 2007. (App. pp. 5a - 8a).

On June 14, 2007, defendants filed an appeal of right in the Court of Appeals from the circuit court's denial of their request for summary disposition based on governmental immunity. *Duncan v State of Michigan*, Court of Appeals No. 278652.[2] Defendants also filed applications for leave to appeal in the Court of Appeals with respect to the non-immunity issues raised in their motion for summary disposition, *Duncan v State of Michigan*, Court of Appeals No. 278858, and from the circuit court's order granting class certification. *Duncan v State of Michigan*, Court of Appeals No. 278860.

On February 22, 2008, a two person majority of the Court of Appeals issued orders granting defendants' two applications for leave to appeal. (App. pp. 111b - 112b). Judge Donald S. Owens would have denied both applications. The three appeals were consolidated by order of

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[2]The immunity issues raised in defendants' appeal of right were rejected by the Court of Appeals in its June 11, 2009 opinion. *Duncan v State of Michigan*, 284 Mich App 246, 266-272; 774 NW2d 89 (2009). Defendants have not sought leave to appeal on any of these immunity issues, and these issues are not before this Court.

the Court of Appeals.

On June 11, 2009, a panel of the Court of Appeals issued an opinion affirming the circuit court's decision denying the defendants' motion for summary disposition as well as its decision granting class certification. *Duncan v State of Michigan*, 284 Mich App 246; 774 NW2d 89 (2009). Judge William C. Whitbeck dissented from the majority's conclusions.

Defendants applied for leave to appeal on several of the issues addressed in the Court of Appeals June 11, 2009 opinion. On December 18, 2009, this Court issued an order granting that application.

ARGUMENT

As indicated in the Introduction to defendants' brief to this Court, they raise three issues: (1) whether the relief that might be awarded in this case violates art. 3, §2 of the Michigan Constitution, the separation of powers doctrine; (2) whether plaintiffs' claims are justiciable; and (3) whether the circuit court abused its discretion in certifying this case as a class action. Defendants' Brief, pp. 2-3.

I. THE COURT MUST REJECT THE SEPARATION OF POWER CONCERNS RAISED BY DEFENDANTS.

A. Introduction

In Issue I of their brief, defendants focus on a possible remedy that might be imposed at the conclusion of this case and they argue that plaintiffs' cause of action should be dismissed based on separation of powers concerns.[3] In light of the separation of powers issues that

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[3]The separation of powers issues raised by defendants in this Court are largely based on the contents of the dissenting opinion in the Court of Appeals written by Judge William C. Whitbeck. It is safe to say that Judge Whitbeck's view of the limited scope of judicial authority within our constitutional framework has not always been shared by the defendants in this case. In moving for summary disposition, defendants did *not* contend that the correction of the constitutional inadequacies in Michigan's assigned counsel system was solely the province of the executive and legislative branches. To the contrary, defendants argued in their summary disposition motion that "the changes sought in this lawsuit *are best left to the judiciary*, not individual pre-conviction plaintiffs." (App. p. 64b) (emphasis added). Thus, on the basis of this Court's decision in *46th Circuit Trial Court v County of Crawford*, 476 Mich 131; 719 NW2d 553 (2006), defendants argued in the circuit court that the judiciary has the right "to ensure adequate funding if it finds that its constitutional responsibilities are not being carried out. Such constitutional responsibilities would include ensuring adequate legal services for indigent defendants." (App. p. 64b). Obviously, defendants' separation of powers concerns as expressed in their brief to this Court have evolved considerably over the course of this case.

The complete transformation of defendants' position on this issue is reflected on page 14 of their brief. There, defendants chide the Court of Appeals majority for the references in the majority opinion to *46th Circuit Trial Court*. Defendants' Brief, p. 14 (citing *Duncan*, 284 Mich App at 283-284). Defendants neglect to advise this Court that the views expressed in the defendants so vigorously argue in this Court, there are two important points that should be stressed at the outset.

Somewhat lost in the overheated separation of powers arguments the defendants offer is the fact that this is a suit alleging the violation of rights secured by both the United States and Michigan Constitutions. Plaintiffs have alleged that the acts and omissions of defendants have resulted in the denial of the right to counsel guaranteed by the federal and state constitutions, and that they have been denied due process of law under the Fourteenth Amendment and article 1, §17 of the Michigan Constitution. As will be discussed, *infra*, the right to review claims of unconstitutional conduct on the part of the other branches of Michigan government represents "a core judicial function." *Lewis v State of Michigan*, 464 Mich 781, 789; 629 NW2d 868 (2001).

A second point of overwhelming importance in this appeal is the procedural posture of this case. Plaintiffs filed this case on February 22, 2007. Slightly over one month later, the defendants filed a motion for summary disposition. In that motion, defendants did not challenge in any respect the substance of the allegations contained in the complaint.

The circuit court denied defendants' motion and also granted plaintiffs' request for class certification. Over the past two and a half years, the parties have been involved in the appeal of the circuit court's interlocutory orders. Under these circumstances, there are two incontestable procedural facts that must guide the Court's review of the issues defendants have chosen to raise. First, the allegations contained in the complaint must be accepted as true.[4] Thus, for purposes of

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majority opinion, of which they are now so highly critical, corresponded precisely to the position that *defendants* took in the circuit court.

[4]Defendants' arguments are premised on either MCR 2.116(C)(8) or MCR 2.116(C)(4). In deciding a motion under MCR 2.116(C)(8), the Court's review is limited solely to the contents

the issues defendants argue in this appeal, the Court must accept as true plaintiffs' allegations that the representation provided by assigned defense counsel to plaintiffs and the plaintiff class is not constitutionally adequate. Similarly, the Court must accept as true the allegations in the complaint asserting that the defendants are responsible for the violations of plaintiffs' constitutional right to counsel and due process of law.

There is, however, another procedural aspect of this case that must be emphasized. This case was pending in the circuit court for only a matter of months when defendants obtained a stay of further proceedings (App. p. 3a - 4a), and they appealed to the Michigan Court of Appeals. During the limited period of time that this case was in the circuit court, none of the substantive issues raised in plaintiffs' complaint was litigated. Thus, plaintiffs were not called upon to marshal the facts supportive of their constitutional claims or the defendants' involvement in the denial of plaintiffs' constitutional rights. More pertinent to the separation of powers argument that defendants assert in this Court, in the short period of time that this case was pending in the circuit court, that court obviously never had to address the question of the appropriate remedy to be imposed if plaintiffs were to ultimately prevail on the merits of their constitutional claims.

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of the complaint; all of those allegations must be accepted as true and they must construed in the light most favorable to plaintiffs. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Adair v State of Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). Similarly, if defendants' arguments are construed as being based on MCR 2.116(C)(4) - lack of subject matter jurisdiction - the Court must determine "whether the *pleadings* demonstrate that the defendant was entitled to judgment as a matter of law." *Cork v Applebee's of Michigan*, 239 Mich App 311, 315; 608 NW2d 62 (2000) (emphasis added); *Steele v Department of Corrections*, 215 Mich App 710, 712; 546 NW2d 725 (1996). It is true that, when presented with a motion filed under MCR 2.116(C)(4), a court is required to examine material beyond the complaint, including affidavits, depositions, admissions and documentary evidence, when such material is submitted with a motion filed under that rule. *C.C. Midwest, Inc. v McDougall*, 470 Mich 878; 683 NW2d 142 (2004). But, as noted previously, the defendants herein supplied no such additional documentation with their April 2007 motion for summary disposition.

In their arguments before this Court, defendants have placed an inordinate emphasis on the character of the relief that the circuit court might some day award plaintiffs in the event they prove their right to counsel or due process claims. But, as will be discussed, *infra,* this focus on the relief that might be awarded should plaintiffs establish their claims at trial is clearly premature in a case in which no discovery has yet been taken, no proofs have yet been presented and no finding of liability has yet been made.

B. MCL 775.16

The defendants begin their argument by referring to MCL 775.16 and this state's long tradition of delegating to local authorities matters associated with the appointment of assigned counsel. MCL 775.16 simply provides that the appointment of counsel is to be made under the direction of the chief judge of the circuit court and that an attorney appointed "shall be entitled to receive from the county treasurer" the amount which the chief judge considers reasonable.[5]

The precise point of this reference to MCL 775.16 and Michigan's "tradition" of local involvement in the assigned counsel process is difficult to understand in light of the fact that there is no debate in this case that the constitutional obligation imposed under *Gideon* is one that rests *with the state*. *Gideon*, 372 US at 342-343; *Pointer v Texas*, 380 US 400, 401; 85 S Ct 1065; 13 L Ed 2d 923 (1965) ("[T]he Sixth Amendment's guarantee of right to counsel [is] obligatory upon the States."); *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004) (recognizing that "[t]he Sixth Amendment right to counsel is applicable to the states through the Due Process

[5]While defendants cite MCL 775.16 and its provision for local payment of assigned counsel, it is equally true (and equally unilluminating) that Michigan has a statutory provision calling for state funding of some "trial court operational expenses," which specifically includes the cost of "[a]ssigned counsel provided for indigents accused of criminal offenses or ordinance violations . . ." MCL 600.9947(2)(c).

Clause of the Fourteenth Amendment."); *People v Parshay*, 379 Mich 7, 11; 148 NW2d 869 (1967). While the state may delegate the administration of Michigan's indigent defense system to local governments, that delegation does not excuse the state of its constitutional obligations. Cf *West v Atkins,* 487 US 42, 56; 108 S Ct 2250; 101 L Ed 2d 40 (1998) (holding that a state's decision to contract the provision of prison medical care to a private physician "does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights."). Thus, it is absolutely irrelevant that the state may have placed some aspects of the assigned counsel system in the hands of local authorities.[6]

C. The "Judicial Power" To Adjudicate Constitutional Claims

Article 6, §1 of the Michigan Constitution provides that "[t]he judicial power of the state is vested exclusively in one court of justice." And, as this Court recently recognized, "[s]ince the time of *Marbury v Madison*, [5 US 1 Cranch 137; 2 LE 60 (1803)] interpreting the law has been

[6]In addition to citing MCL 775.16, a statute presently in effect, the defendants have also made a number of references in their brief to a bill, HB 5676, that two legislators recently introduced in the Michigan House of Representatives. A pending piece of legislation has no legal effect. *Dean v Dean*, 175 Mich App 714, 717; 438 NW2d 355 (1989). Nevertheless, defendants appear to suggest that the mere introduction of HB 5676 represents an indication that the resolution of the inadequacies in this state's assigned counsel system should be undertaken by the legislature, not the courts. If this is the point that defendants would have this Court draw from the introduction of HB 5676, defendants are seriously mistaken. HB 5676 proposes much more extensive state control of the assigned counsel system. According to the bill's two sponsors, the stated purpose of this proposal is "to ensure the right to counsel under the constitution of the United States and the state constitution of 1963." H.B. 5676, §17. What the Court should conclude from the introduction of HB 5676 is that two members of the Michigan Legislature have identified constitutional inadequacies in the assigned counsel system as it presently exists. But, the fact that two members of the Michigan Legislature are in agreement with plaintiffs' claims that the assigned counsel system is constitutionally flawed does not in any way displace the courts from their traditional role of determining constitutional rights and adjudicating constitutional claims.

one of the defining aspects of judicial power." *In re Complaint of Rovas Against SBC Michigan*, 482 Mich 90, 98; 754 NW2d 259 (2008). Moreover, as the foundational law of this state, it is exclusively the province of the courts to interpret and apply the Michigan Constitution. See *Grievance Administrator v Fieger*, 476 Mich 231, 253; 719 NW2d 123 (2006) ("The power of judicial review is one that belongs exclusively to the judicial branch of our government"). See also *WPW Aquisition Company v City of Troy*, 466 Mich 117, 125; 643 NW2d 564 (2002) ("construing the meaning of constitutional language is a basic judicial function."); *Lewis v Michigan*, 464 Mich at 788-789 (judicial review of constitutional issues is "a core judicial function since, at least, the decision in *Marbury*. . ."); *Sharp v City of Lansing*, 464 Mich 792, 811; 629 NW2d 873 (2001).

Contrary to the suggestions contained in defendants' brief, the adjudication of constitutional cases such as this one represents the very essence of the authority entrusted to the judicial branch under Michigan's constitution: "To adjudicate upon and protect the rights and interests of individual citizens, and to that end to construe and apply the laws, is the peculiar province of the judicial department." *Johnson v Kramer Bros Freight Lines, Inc.*, 357 Mich 254, 258; 98 NW2d 586 (1959), citing Cooley, Constitutional Limitations (7 ed), p. 132; *Charles Reinhart Co v Winiemko*, 444 Mich 579, 591-592; 513 NW2d 773 (1994); *Straus v Governor*, 459 Mich 526, 531; 592 NW2d 53 (1999) (recognizing that it is for the courts to determine "whether some constitutional provision has been violated by an act (or omission) of the executive or legislative branch.").

This Court aptly summarized this fundamental judicial role in constitutional litigation in *National Wildlife Federation v Cleveland Cliffs Iron Company*, 471 Mich 608; 684 NW2d 800

(2004):

> The third great division of the powers of government is the judicial authority . . . The judicial authority consists in applying, according to the principles of right and justice, the constitution and laws to facts and transactions in cases, in which the manner or principles of this application are disputed by the parties interested in them.

Id. at 628, n18, quoting James DeWitt Andrews, ed., 1 *Works of James Wilson* (Chicago: Callahan & Company, 1896), p. 363.

The resolution of the constitutional claims raised in this case fits squarely within the "judicial power" provided in article 6, §1 of Michigan's constitution. As the majority opinion in the Court of Appeals recognized:

> 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.

Duncan, 284 Mich App at 337. Moreover, it is equally well settled that "under our form of government the Constitution confers on the judicial department all the authority necessary to exercise its powers as a coordinate branch of government." *People v Antsey*, 476 Mich 436, 451; 719 NW2d 576 (2006); *Maldonado v Ford Motor Co.*, 476 Mich 372, 390; 719 NW2d 809 (2006); *In Re 1976 PA 267*, 400 Mich 660, 662-663; 255 NW2d 635 (1977). In addition, the "judicial power" assigned to the judicial branch under article 6 of Michigan's Constitution "may not be diminished, exercised by, nor interfered with by the other branches of government without constitutional authorization." *Lapeer County Clerk v Lapeer Circuit Court*, 469 Mich 146, 162;

665 NW2d 452 (2003); *Maldonado*, 476 Mich at 391.

D. The Separation Of Powers Issues Raised By Defendants Cannot Be Addressed In This Interlocutory Appeal

Much like Judge Whitbeck's dissent, the defendants' separation of powers argument focuses exclusively on the conclusion of this case and the remedy that the circuit court might impose if plaintiffs were to prevail on their constitutional claims. Thus, defendants in the Introduction to their brief describe the separation of powers issue which they ask the Court to address as "[w]hether the relief Plaintiffs seek violates the separation of powers doctrine." Defendants' Brief, p. 2.

As will be discussed, *infra*, the defendants have seriously misconstrued the relief that plaintiffs are requesting. But, before proceeding to a discussion of the substance of the possible remedies that the circuit court *might* impose at the conclusion of this case, there is a significant preliminary issue that the Court must first address - whether the separation of powers issue defendants seek to raise is ripe for decision.

This case was pending in the circuit court for less than three months when all further proceedings in that court were stayed at defendants' request. (App. pp. 3a - 4a). Defendants then elected to proceed to the Court of Appeals on all of the issues they raised in their summary disposition motion. It is obvious that this case, in which no answer has been filed, no discovery has been taken and no proofs have been presented, is nowhere near the determination of an appropriate remedy. Indeed, at this early stage in the process, it is possible that the circuit court might conclude that no constitutional violations have taken place and, thus, never reach the question of the appropriate remedy. The Court of Appeals majority, while refusing to dismiss plaintiffs' cause of action at this early stage in the process, examined the nature of the proofs that plaintiffs would have to present at trial, *Duncan*, 284 Mich App at 301-303, and observed that plaintiffs will "have a heavy burden to prove and establish their case," and that "proving their case will be a monumental undertaking for plaintiffs." *Id.* at 303 & n.13. Thus, even the Court of Appeals majority expressed some doubt as to whether the circuit court would ever be called upon to fashion a remedy in this case.

This Court is, therefore, being asked by defendants to address a separation of powers issue which has not yet arisen and may never arise in this case. Under established principles of constitutional adjudication, it is not appropriate for this Court to anticipate the separation of powers issue defendants raise in this interlocutory appeal.

As this Court has recognized on a number of occasions, "[f]ew principles of judicial interpretation are more firmly grounded than this: a court does not grapple with a constitutional issue except as a last resort." *Musselman v Governor*, 450 Mich 574, 577, n.2; 545 NW2d 346 (1996); *County of Wayne v Hathcock,* 471 Mich 445, 456, n. 10; 5684 NW2d 765 (2004); *In Re Recorders Court Bar Association v Wayne County Circuit,* 443 Mich 110, 112, n. 2; 503 NW2d 885 (1993); *Taylor v Auditor General*, 360 Mich 146, 154; 103 NW2d 769 (1960). A necessary component of this reluctance to decide constitutional questions is that this Court will not anticipate constitutional issues. Thus, the Court has held that, "[w]here a constitutional question is presented anticipatorily, the Court is required by the limits on its authority to decline to rule." *Straus*, 459 Mich 545, n.14; see also *General Motors Corp v Attorney General*, 294 Mich 558, 568; 293 NW 751 (1940) ("Constitutional questions are not to be dealt with in the abstract.");

Sullivan v Michigan State Board of Denistry, 268 Mich 427, 429; 256 NW 471 (1934).[7]

In addition to these principles applicable to constitutional litigation, this Court has in recent years sought to delimit the scope of the term "judicial power" as provided in article 6, §1 of the Michigan Constitution. In several cases, the Court has indicated that article 6, §1 of Michigan Constitution compels "the avoidance of deciding hypothetical questions." *National Wildlife Federation*, 471 Mich at 614-615; *Michigan Citizens for Water Conservation v Nestle Waters North America, Inc.,* 479 Mich 280, 293; 737 NW2d 447 (2007); *Michigan Chiropractic Council v Commissioner of the Office of Financial and Insurance Services*, 475 Mich 363, 370; 716 NW2d 561 (2006); *Federated Insurance Company v Oakland County Road Commission*, 475 Mich 286, 292; 715 NW2d 846 (2006). Thus, in at least four cases written over the last six years, this Court has indicated that there is a constitutional component to the prohibition against the judiciary deciding hypothetical questions.

In light of the general rules governing the litigation of constitutional issues as well as the limited scope of the judicial power provided in article 6, §1 of the Michigan Constitution, there

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[7]Among the present members of this Court, perhaps the most extensive discussion of the need to avoid judicial intervention on constitutional questions that have not yet ripened is contained in Judge (now Justice) Stephen J. Markman's partial concurrence/dissent in *Mayor of City of Detroit v State of Michigan*, 228 Mich App 386; 579 NW2d 378 (1998), aff'd in part and rev'd in part *Judicial Attorneys Association v State of Michigan*, 460 Mich 590; 597 NW2d 113 (1999). In that opinion, Justice Markman indicated that "[a] cardinal limitation on the judicial power of constitutional review is 'never to anticipate a question of constitutional law in advance of the necessity of deciding it.'" 228 Mich App at 437, n.8 (Markman J, concurring/dissenting), quoting *Liverpool, New York & Philadelphia Steamship Co v Commissioners of Emigration*, 113 US 33, 39, 5 S Ct 352; 28 L Ed 899 (1885); *United States v Raines*, 362 US 17, 21; 80 S Ct 519; 4 L Ed 2d 524 (1960). Justice Markman further observed in *Mayor of City of Detroit*, that "[w]here a constitutional issue is presented anticipatorily, the Court is *required* to decline to rule with regard to the question." *Id.* at 440-441 (Markman J, concurring/dissenting)(emphasis in original).

is a considerable amount of irony in the defendants' arguments before this Court. Defendants ask this Court to decide a purely hypothetical separation of powers issue associated with a *potential* remedy that *might* be imposed in this case. Defendants couch this separation of powers argument in the concept of judicial restraint. Yet, while offering rhetoric associated with limiting the scope of judicial intrusion on the other branches of government, defendants ask this Court to completely ignore the prudential and/or constitutional limitations imposed on the courts, which categorically prohibit the judiciary from anticipating a constitutional question and prevent this Court from deciding what is at present a purely hypothetical issue of law.

There is no reason for this Court to anticipate the separation of powers issue that defendants ask this Court to decide. There is no reason for this Court to render what would, in essence, be an advisory opinion on the separation of powers implications associated with a hypothetical remedy that may or may not be imposed in this case. Once again it must be emphasized that defendants elected to bring this case to the Court of Appeals before any discovery had been conducted, before proofs had been assembled or presented and long before the circuit court made any findings as to the merits of plaintiffs' constitutional claims. Having chosen to take an appeal at the very earliest stages of the case, the defendants cannot ask this Court to anticipate a hypothetical constitutional question associated with a potential remedy that is months or even years away.[8]

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[8]Defendants have also made some references in their brief to the fiscal implications of this case on Michigan's treasury. Once again, it is completely premature to consider the possible financial effects on the state of hypothetical remedies that might be imposed at the conclusion of this case. In addition to being premature, any arguments based on the financial impact associated with defendants' compliance with constitutional requirements are inappropriate since the vindication of constitutional rights cannot hinge on whether "it is less expensive to deny [rather] than to afford them." *Watson v Memphis*, 373 US 526, 537; 83 S Ct 1314; 10 L Ed 2d 529

E. Declaratory Relief In This Case Would Raise No Separation Of Powers Concerns

Yet, even if this Court were to anticipate the outcome of this case and reach the remedy issue raised by defendants, the fact remains that their separation of powers argument must still be rejected. Defendants contend that among the possible remedies that might be imposed in this case is a circuit court order compelling funding for the indigent defense system from the state treasury. Like Judge Whitbeck in his dissent, the defendants further suggest that the remedy being sought in this case could result in a court "assum[ing] ongoing operational control" over the assigned counsel system in the subject counties. Defendants' Brief, p. 15, noting *Duncan*, 284 Mich App at 383. In making these arguments, defendants not only ask this court to address purely hypothetical court orders, they also ignore the nature of the relief being sought in this case. Here, plaintiffs have requested both declaratory and injunctive relief and this Court has expressly approved the use of declaratory relief against the governor. *Duncan*, 284 Mich App at 272-273; *Straus*, 459 Mich at 532-533.[9]

(1963). See also *Bounds v Smith*, 430 US 817, 825; 97 S Ct 1491; 52 L Ed 2d 72 (1977) ("[t]he cost of protecting a constitutional right cannot justify its total denial.").

[9]In *Straus*, which involved a request for declaratory and injunctive relief against Michigan's governor, this Court explicitly indicated how the issuance of a declaratory judgment could avoid the separation of powers concerns defendants raise associated with a circuit court injunction. This Court indicated in *Straus* that such declaratory relief "normally will suffice to induce the legislative and executive branches . . . to conform their actions to constitutional requirements . . ." 459 Mich at 532. The *Straus* Court added, "[o]nly when declaratory relief has failed should the courts even begin to consider additional forms of relief in these situations." *Id.* These observations in *Straus* provide additional reasons why this Court must refuse to address defendants' hypothetical remedy arguments at this time. Under the reasoning in *Straus*, the separation of powers confrontation that defendants ask this Court to anticipate should never occur. Rather, as *Straus* acknowledges, the circuit court's issuance of a declaratory judgment that the assigned counsel system violates the United States and Michigan constitutions should normally prompt the executive and legislative branches to respond even in the absence of further

Defendants' separation of powers argument rests on the entirely faulty premise that a finding of liability in this case will automatically lead to a court-ordered, state funded-and-operated system of indigent defense that is subject to continuing operational control by the circuit court. But, as *Straus* demonstrates, this case could end with the issuance of a declaratory judgment in which the circuit court simply concludes that, due to the acts and omissions of defendants, the assigned counsel system in the three subject counties violates the state and federal constitutions.[10]

There is one other factor in this case that may become relevant. While ignoring the *Straus* Court's approval of declaratory relief in these circumstances, defendants have cited language from *Straus* prohibiting a Michigan court from issuing mandatory injunctive relief against the governor. Defendants' Brief, p. 16. The pronouncements in *Straus* arose out of a case involving claims made solely under state law. In this case, however, plaintiffs have also asserted a cause of action under the federal civil rights statute, 42 USC §1983, for violations of their federal constitutional rights.[11]

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action by the court.

[10]The Court should note that similar suits have ended with negotiations between the parties that have led to settlements of their differences which prohibited continuing jurisdiction by the trial court. *See e.g. Rivera v Rowland*, No. CV-95-0545629 S (Conn. Super Ct filed Jan. 5, 1995). In another such case, the court limited its judgment to a declaration that the challenged system was unconstitutional and returned the issue to the legislature to fashion a system comporting with constitutional requirements. See *Jewell v Maynard*, 181 W Va 571, 580-582; 383 SE2d 536 (1989). In another suit of this type, the court ordered an interim solution that would be implemented until the legislature enacted its own corrective legislation. See *State v Lynch*, 796 P2d 1150, 1161-1164 (Okla 1990).

[11]On page 17 of their brief, defendants claim that plaintiffs' complaint does not contain a §1983 claim against the governor. This is incorrect. Both Counts I and II of the Complaint allege a §1983 claim against the governor for violation of plaintiffs Sixth and Fourteenth

II. PLAINTIFFS HAVE STANDING TO RAISE THEIR CONSTITUTIONAL CLAIMS, THESE CLAIMS ARE RIPE FOR ADJUDICATION AND PLAINTIFFS HAVE PROPERLY STATED A CLAIM ON WHICH RELIEF CAN BE GRANTED.

In the second issue in their brief, defendants contend that the constitutional claims that plaintiffs present in this case are not justiciable because plaintiffs either lack standing, cannot establish "prejudice" or because their claims are not ripe for review. Defendants' Brief, pp. 24-38. Defendants are wrong on all three of these arguments.

A. Standing And "Prejudice"

This Court has adopted the following three part test of standing:

> 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 complaint of - the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] 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."

Lee v Macomb County Board of Commissioners, 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).

In a case such as this in which the only factual record consists of plaintiffs' complaint, the determination of whether plaintiffs have standing to bring their claims must be based on the allegations contained in that complaint. See *House Speaker v Governor*, 443 Mich 560, 573; 506 NW2d 190 (1993) ("[f]or purposes of determining standing we must 'accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining

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Amendment rights. (App. pp 44b - 45b).

party.'") quoting *Warth v Seldin*, 422 US 490, 501; 95 S Ct 2197; 45 L Ed 2d 343 (1975); *American Family Ass'n of Michigan v Michigan State University Board of Trustees*, 276 Mich App 42, 46; 739 NW2d 908 (2007); see also *National Wildlife Federation*, 471 Mich at 630-631.

Plaintiffs have alleged that the assigned counsel system in the three counties denies them this right to effective assistance of counsel under the Sixth Amendment and art. 1, §20 of the Michigan Constitution, as well as their rights under the due process clauses of both the federal and state constitutions. The defendants, however, confine their standing argument to the right to counsel claims raised in this case.[12]

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense." US Const, Am VI. Article 1, §20 of the Michigan Constitution contains similar language. In *Gideon*, the Supreme Court of the United States ruled that if an accused is indigent, the Sixth Amendment requires the state to provide counsel at public expense. 372 US at 344-345. The Court later made clear that the right to counsel at the public expense is the right to *effective* assistance of counsel. *McMann v Richardson*, 397 US 759, 771; 90 S Ct 1441; 25 L Ed 2d 763 (1970).

The Supreme Court has further found that the right to counsel protects both the right to a fair trial and the fairness of pre-trial proceedings. See *Maine v Moulton*, 474 US 159, 170; 160 S Ct 477; 88 L Ed 2d 481 (1981) (noting that the 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."). Thus,

[12]Because defendants have failed to challenge plaintiffs' standing with respect to their due process theory, these claims must be allowed to proceed regardless of the outcome of the right to counsel standing issues which have been raised in their appeal.

a person accused of a crime is entitled to the assistance of counsel not only at trial, but at every critical stage in the pre-trial proceedings during which substantive rights may be affected. See *Rothgery v Gillespie County, Texas*, 555 US ___; 128 S Ct 2578, 2592; 171 L Ed 2d 366 (2008) (initial court appearance); *Coleman v Alabama*, 399 US 1, 7; 90 S Ct 1999; 26 L Ed 2d 387 (1970) (preliminary hearing); *United States v Wade*, 388 US 218, 226-227; 87 S Ct 1926; 18 L Ed 2d 1149 (1967) (post-indictment lineup); *Miranda v Arizona*, 384 US 436, 478-479; 86 S Ct 1602; 16 L Ed 2d 694 (1966) (custodial interrogation); *Hamilton v Alabama*, 368 US 52, 55; 82 S Ct 157; 7 L Ed 2d 114 (1961) (arraignment).

In arguing that plaintiffs do not have standing to raise their claims under the Sixth Amendment and article 1, §20, of the Michigan Constitution, defendants completely ignore the allegations contained in the complaint. Each of the eight named plaintiffs have alleged that they suffered an actual or imminent harm as a result of the deficiencies in the assigned counsel system. Complaint, ¶¶16-67 (App. pp. 6b - 18b.)[13] The essence of the actual or threatened harm experienced by the eight named plaintiffs was accurately summarized by the Court of Appeals majority in its June 11, 2009, opinion:

> 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

[13]It is important to note that plaintiffs' standing to pursue their claims is determined as of the date the complaint is filed. See *Federated Insurance Company*, 475 Mich at 290 ("standing refers to the right of a party plaintiff *initially* to invoke the power of the court to adjudicate a claimed injury.") (emphasis in original); cf *Sosna v Iowa*, 419 US 393, 95 S Ct 553; 42 L Ed 2d 532 (1975).

> 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.

Duncan, 284 Mich App at 318-319. In addition to the allegations relating to the eight named plaintiffs, the complaint also included allegations of harm as to the entire class of indigent defendants. Thus, plaintiffs have alleged that as a result of the constitutionally inadequate representation, the members of the plaintiff class:

- Are wrongly denied counsel
- Are incarcerated for unnecessarily long periods of time before trial
- Are pressured into pleading guilty to inappropriate charges, even when they have a meritorious defense
- Are forced to forego their right to trial out of fear that their assigned counsel

would not be prepared for such a trial

- Are subjected to lengthy pre-trial delays if they insist on their right to trial
- Are subjected to punitive charges if they insist on their right to trial
- Are subject to harsher sentences if they plead guilty or are found guilty at trial
- Are wrongfully assessed fees
- Are denied access to alternatives to incarceration.

Complaint, ¶¶141-152 (App. pp. 41b - 43b).

Thus, the complaint contains clear allegations of "injury in fact" sustained by both the individual named plaintiffs and the class. The complaint also contains numerous allegations that the denial of plaintiffs' right to counsel is causally related to the conduct of the defendants. Complaint, ¶¶4-11, 28, 35, 44, 51, 56, 63, 67, 85-90 (App. pp. 3b - 5b, 9b, 11b, 13b, 14b, 16b - 18b, 23b - 26b). Under this Court's decisions in *Lee* and *National Wildlife*, no further analysis of the standing requirement is necessary since the allegations of the complaint clearly supply all of the requirements for standing.

The defendants disregard all of the allegations in the complaint bearing on the existence of actual or imminent injury resulting from the denial of plaintiffs' right to counsel. Instead of addressing the allegations of actual or imminent harm alleged in the complaint, defendants engage in an opaque discussion of "prejudice." Defendants' Brief, pp. 24-36. Defendants maintain that "the plaintiff who raises the effective assistance claim *must* establish prejudice." *Id.* at.27. Plaintiffs do not dispute the fact that they must allege that they have suffered actual or imminent *injury* or *harm* as a result of the defendants' denial of their constitutional right to counsel. But, as discussed previously, that is precisely what plaintiffs have done in their complaint, both with respect to the claims raised by the eight individual plaintiffs and in their general allegations pertaining to class-wide harm.

In asserting that plaintiffs cannot establish "prejudice" the defendants suggest that under the United States Supreme Court's decision in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), plaintiffs must somehow present something more than the actual or imminent harm in fact that they have alleged in this case.[14] In *Strickland*, the Supreme Court ruled that an individual seeking to overturn a criminal conviction on the ground that he received constitutionally inadequate legal representation at trial must demonstrate that he was "prejudiced" by counsel's inadequate performance. *Id.* at 693. The *Strickland* Court defined prejudice in that context as a "reasonable probability that, but for counsel's [] errors, the result of the proceeding would have been different." *Id.* at 694.[15]

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[14]The precise position that defendants are taking based on the Supreme Court's decision in *Strickland* is not entirely clear from their brief. Defendants note that the *Strickland* standard applies "in the post-conviction context" and they specifically state that they are not arguing "that this Court must apply the *Strickland* test to the pre-conviction contest [*sic*]." Defendants' Brief, pp. 25-26. The defendants further describe *Strickland* as recognizing that "'prejudice to the defense' is the applicable constitutional standard no matter where in the criminal process the denial of effective counsel occurs or is raised." Defendants' Brief, p. 27. Thus, these portions of defendants' brief appear to embrace the notion that *any* prejudice to a criminal defendant occasioned by the denial of counsel is sufficient to raise a justiciable issue. Yet, in other portions of their brief, defendants appear to take a completely different position. They contend, for example, that a Sixth Amendment violation is made out only where representation is so inadequate that it "undermine[s] the proper functioning of the adversarial process [so] that the trial cannot be relied on as having produced a just result." Defendants' Brief, p. 25, quoting *Strickland*, 466 US at 686. They further suggest that the "prejudice" which must exist to support an ineffective assistance of counsel claim is prejudice that "invalidates the proceedings." Defendants' Brief, p. 27.

[15]The same day that the decision in *Strickland* was issued, the Supreme Court ruled in *United States v Cronic,* that in the post-conviction context, "prejudice" in the form discussed in *Strickland* is to be presumed in certain cases involving the denial of a Sixth Amendment right. 466 US at 658-660. The Court in *Cronic* identified three circumstances in which a criminal

Thus, the "prejudice" discussed in *Strickland* is directly related to the relief being sought in that case - the overturning of a criminal conviction. The Supreme Court specifically ruled in *Strickland* that professionally unreasonable conduct by counsel representing a defendant "*does not warrant setting aside the judgment of a criminal proceeding* if the error had no effect on the judgment." 466 US at 691 (emphasis added); cf *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002) (indicating that *Strickland*'s two part test was designed to "evaluat[e] claims that a defendants' counsel performed so incompetently in his or her representation . . . that the defendants sentence or conviction should be reversed.")

This Court also recognized in *People v Carbin*, 463 Mich 590; 623 NW2d 884 (2001), that the two-part *Strickland* test was a direct function of the post-conviction relief being sought by the defendant. In *Carbin* this Court noted that, "[a] defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. 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* . . ." 463 Mich at 599-600.

But here, unlike *Strickland* and *Carbin*, plaintiffs do not seek to have a court review and reverse their convictions. The Court of Appeals majority correctly confined the ruling in *Strickland* to the circumstances giving rise to that decision:

> 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

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conviction could be set aside for a Sixth Amendment violation in the absence of any specific showing of prejudice. *Id.* at 659-660; cf *United States v Morris*, 470 F3d 596, 601-602 (6th Cir 2006) (holding that Wayne County's practice of assigning counsel immediately before a "pre-preliminary examination" amounted to a "state impediment to effective assistance of counsel," and, thus, prejudice was to be presumed.

> 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.

Duncan, 284 Mich App at 305.[16]

In rejecting the *Strickland* prejudice standard, the Court of Appeals majority properly recognized that violations of the Sixth Amendment right to counsel take many 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, 623 N.W.2d 884. *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*

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[16]In ruling that the holding in *Strickland* was limited to the factual circumstances underlying that case, the Court of Appeals was following well established law. As this Court wrote in *Hardy v Maxheimer*, 429 Mich 422, 431; 416 NW2d 299 (1987):

> The language used in an opinion of the court must be construed in light of the facts and issues involved in a case under consideration and should not be interpreted as going beyond the scope of matters for adjudication.

see also *Howard Pore, Inc. v Commissioner of Revenue*, 322 Mich 49, 72-73; 33 NW2d 657 (1948); cf *Zenith Radio Corp v United States*, 437 US 443, 462; 98 S Ct 2441; 57 L Ed 2d 337 (1978) ("general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used.") Here, defendants have taken *Strickland*, a case which only involved an attempt to overturn a conviction on Sixth Amendment grounds, and they have suggested that its "prejudice" requirement is to apply to any Sixth Amendment claim, even where plaintiffs do not seek to set aside a conviction.

> *pretrial detention, a failure to file a dispositive motion, entry of a factually unwarranted guilty plea, or a legally unacceptable delay*. And as indicated earlier in this opinion, simply being deprived of the constitutional right to effective representation at a critical stage in the proceedings, in and of itself, gives rise to harm.

284 Mich App at 308-309 (emphasis added).

The Court of Appeals majority's ruling that harm in the Sixth Amendment context can take many forms is entirely consistent with the Eleventh Circuit's ruling in *Luckey v Harris*, 860 F2d 1012, 1017 (11^{th} Cir. 1988). In *Luckey*, the Eleventh Circuit held that, "[t]he sixth amendment 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 sixth amendment." *Id.*; see also *Nicholson v Williams*, 203 F Supp 2d 153, 240 (ED NY, 2002); *New York County Lawyers Association v New York*, 745 NYS2d 376, 430-431; 192 Misc 2d 424 (2002); cf *State v Peart*, 621 So2d 780, 787 (La 1993); *Rivera v Rowland*, 18 Conn L Rptr 117; 1996 WL 636475 (Super Ct 1996).

Finally, the defendants have placed considerable emphasis on the New York Supreme Court Appellate Division's July 2009 decision in *Hurrell-Harring v New York*, 883 NYS2d 349; 66 AD 3d 84 (NY 3d Dep't 2009). The New York Court of Appeals is reviewing the Supreme Court's ruling. The parties in *Hurrell-Harring* have filed their briefs and, as of the date of the filing of this brief, oral argument has not yet taken place in the New York Court of Appeals.

Moreover, the *Hurrell-Harring* decision on which defendants rely is predicated on New York law regarding justiciability and separation of powers. 883 NYS2d at 351-352. These principles of New York law are not applicable to this case. It is also noteworthy that the relief being sought by the plaintiffs in *Hurrell-Harring*, which the New York Appellate Division majority found objectionable, is substantially different from that requested by plaintiffs here. In *Hurrell-Harring,* the plaintiffs asked the court to undertake a series of detailed measures to address the inadequacy in New York's assigned counsel system. It was on partly the basis of the specific relief being sought that the New York Supreme Court identified separation of powers concerns. *Id.* at 352-353.

As discussed previously, this case is fundamentally different. Here plaintiffs have requested a declaration that the systemic problems in the assigned counsel system violates their rights under the federal and state constitutions.

B. Ripeness

Defendants expend two paragraphs in their brief arguing that plaintiffs' claims are not ripe for review. Defendants' Brief, p. 37. The concept of ripeness "prevents the adjudication of hypothetical or contingent claims before an actual injury has been sustained. A claim is not ripe if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all." *Michigan Chiropractic Council*, 475 Mich at 371, n.14, citing *Thomas v Union Carbide Agricultural Products Co*, 473 US 568, 580-581; 105 S Ct 3325; 87 L Ed 2d 409 (1985). Once again, at this stage in the process, it is the allegations in the complaint that must be examined to determine if plaintiffs' claims are ripe. *Michigan Chiropractic*, 475 Mich at 379 (Young, J).

In making their ripeness argument, defendants again ignore the allegations in plaintiffs' complaint. Plaintiffs have alleged that the individual named plaintiffs and the class have suffered or will suffer injury as a result of the constitutional defects in the indigent defense system in the three subject counties. Defendants simply assert that the claims asserted here are not ripe because there has been no "showing" that the defendants are responsible for the constitutional violations alleged herein. Defendants' Brief, p. 37. Whether plaintiffs have made a "showing" of defendants' involvement in the constitutional violations alleged in this case is completely irrelevant. What is relevant is that plaintiff has unquestionably *alleged* that the constitutional violations suffered by named plaintiffs and the plaintiff class are the result of the acts and omissions of the two defendants. (App. pp. 3b-5b, 9b-18b, 23b-26b).

III. THE CIRCUIT COURT'S INDEPENDENT DETERMINATION THAT PLAINTIFFS HAVE PROVIDED SUFFICIENT INFORMATION TO ESTABLISH EACH OF THE PREREQUISITES FOR CLASS CERTIFICATION WAS NOT AN ABUSE OF DISCRETION.

Plaintiffs agree with defendants that "a party seeking class certification is required to provide the certifying court with information sufficient to establish that each prerequisite for class certification . . . is in fact satisfied." *Henry v Dow Chemical Company*, 484 Mich 483, 502; 772 NW2d 301 (2009). But, defendants' arguments as to why plaintiffs have not established those prerequisites is based on a misapplication of *Henry*. This Court in *Henry* made it clear that a trial court may certify a class based only on the pleadings when "the pleadings set forth sufficient information to satisfy the court that each prerequisite is in fact met", "such as in cases where the facts necessary to support this finding are uncontested or admitted by the opposing party." *Id.* at 502-503. Defendants have never contested the facts alleged in plaintiffs' complaint. Instead, they offer legal arguments as to why the (uncontested) facts alleged by plaintiffs do not or cannot state a claim. Despite this fact, defendants contend that this Court should review the facts for clear error. Defendants' Brief, p. 49. Consistent with *Henry*, this Court should not review the circuit court's factual findings for clear error, but should decide whether that court's decision to certify a class based on the detailed, uncontested facts in the complaint was an abuse of discretion. *Henry*, 484 Mich at 496. And, this Court's review for abuse of discretion must be undertaken with the understanding that circuit courts have "broad discretion to determine whether a class will be certified." *Id.* at 504. The complaint here, which is 49-pages long, sets forth numerous specific examples to support plaintiffs' claims that defendants have abdicated their responsibility to provide the proposed class with constitutionally adequate representation. The complaint, therefore, provides "information sufficient to establish that each prerequisite for class certification . . . is in fact satisfied." *Id.* at 502. For this reason, the circuit court's decision to certify the class based only on the pleadings was proper.

Defendants' challenge to the circuit court's decision to certify the plaintiff class, like their challenge to the circuit court's denial of their motion to dismiss, is a premature (and inappropriate) argument that essentially asks this Court to rule on the merits of the case. In so doing, defendants ignore this Court's clear admonition in *Henry* that "courts must not abandon the well-accepted prohibition against assessing the merits of a party's underlying claims at this early stage in the proceedings." 484 Mich at 503. Rather than assess the merits of a case, *Henry* reaffirmed that the proper focus for class certification should be an analysis of whether the following circumstances exist:

> (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 class 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.

484 Mich at 496-497; MCR 3.501(A)(1). As described in detail below, plaintiffs' complaint provides information satisfying each of these requirements.

In addition to misapplying *Henry*, defendants also rest in part on a mischaracterization of the nature of plaintiffs' claims and the relief that they request. To be clear, the legal theory underlying plaintiffs' allegations is that:

(1) As a matter of uniform policy and practice, defendants fail to provide administrative oversight, support and funding for the indigent defense services in the subject counties and thus fail to ensure that indigent defense providers have the tools necessary to provide constitutionally adequate indigent defense in the counties;[17]

(2) as a direct result, all plaintiffs face a very real and immediate likelihood that they will not receive constitutionally adequate representation, and in fact, extraordinary numbers do not;

(3) defendants are therefore violating plaintiffs' constitutional rights and;

(4) plaintiffs are harmed by these widespread and systemic violations of their constitutional rights.

To prevail on their theory, plaintiffs will not have to produce individualized proofs of *Strickland*-prejudice because, as discussed *supra*, this is not the standard for pre-conviction claims, which require only a showing of justiciable injury or harm. Moreover, this lawsuit will not require individual determinations of injury and compensation because plaintiffs herein do not seek money damages. Instead, they seek declaratory and injunctive relief on behalf of the class as a whole. The circuit court properly recognized that in suits such as this one, where individualized determinations of injury and compensation are not required, the issue of class certification is much more easily resolved. (App. p. 111a).

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[17] The failure to act can constitute a uniform policy for which a defendant may be held liable. Cf *Powers v Hamilton County Public Defender Commission*, 501 F3d 592, 607 (6th Cir 2007) (determining that an allegation that a Public Defender Office had a policy of failing to seek indigency hearing on behalf of criminal defendants facing jail time for unpaid fees represented a cognizable claim for recovery under 42 USC §1983.)

This case represents the type of litigation in which class action is not only entirely appropriate, but necessary. "There has been no erosion of the class action as an appropriate means of vindicating constitutional rights," particularly in situations involving indigent individuals who have no other means to protect their rights. *D.S. v New York City Dep't of Education*, 255 FRD 59, 66 (ED NY, 2008).[18] This Court should therefore affirm that the circuit court's certification of the plaintiff class was not an abuse of discretion. *Henry*, 484 Mich at 495-496.[19]

A. Standard of Review

The trial court's factual findings with respect to the class certification motion are reviewed for clear error and the decisions within the circuit court's exercise of discretion are reviewed for abuse of discretion. *Henry*, 484 Mich at 496-497. Where, as here, defendants' arguments are based entirely on the legal principles that apply to uncontested facts, this Court's review should be confined to addressing whether the circuit court abused its discretion. Such an abuse of discretion occurs "only when the trial court's decision is outside the range of reasonable and principled outcomes." *Saffian v Simmons*, 477 Mich 8, 12; 727 NW2d 132 (2007); see *Maldonado*, 476 Mich at 388. This Court specifically emphasized in *Henry* the "need to preserve" the trial court's "broad discretion to determine whether a class will be certified." 484 Mich at 504.

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[18] "There being little Michigan case law construing MCR 3.501, it is appropriate to consider federal cases construing the similar federal court rule (F.R. Civ. P. 23) for guidance." *Zine v Chrysler Corp.*, 236 Mich App 261, 288, n.12; 600 NW2d 384 (1999).

[19] The circuit court conducted its class certification analysis prior to the release of this Court's decision in *Henry*. If this Court determines that the trial court did not comply with the standard established in *Henry*, it should remand the case for reconsideration as it has done in *Henry* and in two post-*Henry* cases. *Duskin v Dep't of Human Services*, ___ Mich ___; 777 NW2d 168 (2010); *Brindley v Severstal North America, Inc*, ___ Mich ___; 775 NW2d 742 (2009).

B. The Plaintiff Class is so Numerous that Joinder of all Members is Impracticable

Defendants began their challenge to the circuit court's class action ruling by claiming that the numerosity requirement of MCR 3.501(A)(1)(a) was not met here. Plaintiffs would note as an initial matter that defendants have waived their right to contest class certification on this ground. In their response to plaintiffs' motion for class certification, defendants raised only three issues. (App. pp. 87b-94b). They contended that plaintiffs did not satisfy the commonality and typicality requirements of MCR 3.501A(1)(c) and (d), and that they failed to establish that maintenance of the case as a class action would be superior to other forms of adjudication as required by MCR 3.501(A)(1)(e). Defendants did not challenge numerosity. The circuit court recognized this fact at the May 16, 2007 hearing during which the class certification motion was argued. At that hearing the court correctly noted that commonality, typicality and superiority were the *only* elements in controversy. (App. p. 111a).

This Court has held that a failure to raise an issue in the circuit court waives review of that issue on appeal. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008); *Intertown Corp v Appeal Board of Michigan Unemployment Compensation Comm.*, 328 Mich 363, 366; 43 NW2d 888 (1950); see also *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000) ("The rule that issues for appeal must be preserved in the record . . . by objection is a sound one.").

Even if defendants had preserved this argument it is clear that the proposed class meets the numerosity requirement. The prerequisite of numerosity is met when the plaintiff class is so numerous that joinder of all members is impracticable. MCR 3.501(A)(1). As defendants correctly acknowledge, "[t]here is no particular minimum number of members necessary to meet the numerosity requirement, and the exact number of members need not be known as long as general knowledge and common sense indicate that the class is large." *Zine v Chrysler Corp*, 236 Mich App 261, 288; 600 NW2d 384 (1999). Plaintiffs' complaint provides sufficient information so that "a reasonable estimate of the number of members can be determined." *Hill v City of Warren*, 276 Mich App 299, 310; 740 NW2d 706 (2007). Plaintiffs have also adequately defined the class 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." Complaint ¶71 (App. p. 19b). Common sense and general knowledge dictate that at any given point in time, hundreds of indigent adults with criminal cases pending in the three counties rely on appointed defense counsel for legal representation. Complaint ¶ 72 (App. p. 19b). Thus, joinder is impracticable.

Defendants do not dispute these allegations. Instead, they contend that plaintiffs fail to satisfy the numerosity requirement because they have not alleged sufficient facts to demonstrate that every single class member will be "prejudiced precisely because of the deficiencies of appointed counsel." Defendants' Brief, p. 41. This argument misapprehends both the plaintiffs' claims and the law governing the numerosity requirement.

First, as explained in detail above, plaintiffs do not need to demonstrate *Strickland*-prejudice to establish their right to counsel claims under the Sixth Amendment and article 1, §20 of the Michigan Constitution. They simply need to demonstrate real or threatened injury. See *Pennell v City of San Jose*, 485 US 1, 8; 108 S Ct 849; 99 LEd2d 1 (1988). Quite simply, plaintiffs do not need to "await consummation of the threatened injury before seeking relief in court." *Richmond Tenants Organization, Inc. v Kemp,* 956 F2d 1300, 1305 (4th Cir, 1992), citing

Babbitt v United Farm Workers Nat'l Union, 442 US 289, 298; 99 S Ct 2301; 60 LEd2d 895 (1979).[20]

Second, contrary to defendants' argument, the Michigan Court of Appeals decision in *Zine* does not hold that "each class member must have suffered actual injury" to establish numerosity. Defendants' Brief, p. 41. Instead, plaintiffs need only show that there is a "sizeable number" of individuals who have standing in order to obtain class certification. *Zine*, 236 Mich App at 289; see also *DG ex rel Stricklin v Devaughn,* ___ F3d ___, 2010 WL 430845, *5 (10th Cir. 2010) ("A class will often include persons who have not been injured by the defendant's conduct.. . .Such a possibility or indeed inevitability does not preclude class certification").[21]

In the complaint, plaintiffs make numerous allegations establishing the pervasive nature of the deficiencies in the counties' indigent defense programs, and cite repeated "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" such as "unnecessarily prolonged pretrial detention, a failure to file a dispositive motion, entry of a factually unwarranted guilty plea, or a legally unacceptable pretrial delay." *Duncan*, 284 Mich App at 308-309; Complaint ¶¶131-149 (App. pp. 38b-42b). These accounts – which defendants have not challenged -- not only demonstrate that a large number of plaintiffs have already suffered actual

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[20] See also *Smith v Arkansas Dep't of Correction,* 103 F3d 637, 644 (8th Cir, 1996); *Loa-Herrera v Trominski*, 231 F3d 984, 988 (5th Cir, 2000); *Dimarzo v Cahill*, 575 F2d 15, 18 (1st Cir, 1978); *Raich v Gonzales*, 500 F3d 850, 857 (9th Cir, 2007).

[21] Defendants erroneously claim that the *Zine* court's refusal to certify the plaintiff class rested on this "viability of claims" argument. Defendants' Brief, p. 41. Instead, *Zine* determined that numerosity was not satisfied because the plaintiffs there never "indicated even approximately how many people might come within th[e class] nor did they indicate a basis for reasonably estimating the size of the [class]." *Zine,* 236 Mich App at 289. This criticism of the proposed class in *Zine* does not apply here.

injuries, but also make clear that every member of the plaintiff class faces a real or imminent threat of harm so long as they continue to be exposed to this broken system. Because plaintiffs' allegations demonstrate that each member of the plaintiff class has a viable claim for injunctive and declaratory relief and that joinder is impracticable, they have satisfied the numerosity requirement.[22]

C. Common Questions of Law and Fact Predominate Over Individual Questions.

The commonality factor is satisfied when there is a common question of fact or law that applies to the entire class, the resolution of which will advance the litigation. See *Hill*, 276 Mich App at 311; *Zine,* 236 Mich App at 289. The Court of Appeals has recognized that this factor "does not require *all* issues in the litigation to be common, it merely requires the common issue or issues to predominate over those that require individualized proof." *Hill*, 276 Mich App at 311 (emphasis in original). Individual issues that are not directly relevant to the actual claims or that may be resolved after the determination of a central common question do not defeat commonality. Instead, "[w]hen common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis . . . . even though other

[22]Defendants have also included in their new numerosity argument a suggestion that because the proposed class is "fluid," that fact should somehow militate against finding compliance with the numerosity requirement. Defendants' Brief, p. 41. Plaintiffs would note that several federal courts have recognized that, where there is fluidity within a class, there is more reason to find numerosity. See e.g. *Matyasoszky v Housing Authority of City of Bridgeport,* 226 FRD 35, 40-41 (D Conn, 2005); *Williams v Gill*, 98 FRD 463, 469 (ND Ill, 1983). The defendants have also indicated in their brief that it is "concerning" that class members might be able to raise a claim of ineffective assistance of counsel in a post-conviction appeal or through habeas corpus proceedings. Defendants' Brief, p. 42. Plaintiffs do not believe that the subset of cases in which ineffective assistance is actually raised will have any impact on MCR 3.501(A)'s numerosity requirement.

important matters will have to be tried separately." *Multi-Ethnic Immigrant Workers Organizing Network v City of Los Angeles*, 246 FRD 621, 634 (CD Cal, 2007) (internal quotation marks omitted); see also *Blihovde v St Croix County, Wisconsin,* 219 FRD 607, 620 (WD Wis 2003) ("Common issues need not be dispositive of the entire suit. A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions.") (internal quotation marks and citations omitted).

Plaintiffs' claims for injunctive and declaratory relief plainly revolve around common legal and factual issues regarding defendants' uniform policy of failing to do anything to ensure that indigent defense providers have the tools necessary to provide constitutionally adequate defense in the three subject counties. Complaint ¶¶ 74-75 (App. p. 20b). The existence of this policy, its systemic impact and its constitutionality are the predominant liability issues in every single class member's claim. See *Dodge v County of Orange*, 226 FRD 177, 181 (SD NY, 2005) ("Case law suggests that, when a uniformly applied policy is challenged, the validity of the policy predominates over individual issues.") Where, as here, "the class is challenging a uniform policy, the validity of that policy predominates over individual issues and class certification is appropriate." *Blihovde*, 219 FRD at 620 (citing cases); see also *Romano v SLS Residential Inc*, 246 FRD 432, 446 (SD NY, 2007) ("[D]efendants again argue that some individualized determinations will be required here. But as noted already this would be the case in almost any class action. Where, as here, plaintiff is arguing injury from systemic practices and policies, common issues will often outweigh the individual ones.").

It was not an abuse of discretion for the circuit court to conclude as it did at the May 17, 2007 hearing on plaintiffs' class certification motion:

> [T]he plaintiffs are seeking injunctive and declaratory relief and the defendants are violating – that the defendants are violating the plaintiffs' constitutional rights. The Court does not believe that it would have to explore the unique circumstances of each proposed class member to grant relief. The Court finds that the plaintiffs' assertion that the defendants have abdicated their constitutional responsibilities by failing to provide adequate representation meets the commonality requirement.

(App. p. 111a). Indeed, in so holding, the trial court aligned itself with numerous courts that have rejected challenges similar to those raised by defendants based on the finding that in cases involving uniform policies, individual issues "share a common source" and therefore do not threaten to predominate the common issues in the claim. *Multi-Ethnic Immigrant Workers,* 246 FRD at 635; see also *Otsuka v Polo Ralph Lauren Corp*, 251 FRD 439, 447 (ND Cal, 2008); *Jones v Murphy*, 256 FRD 519, 523-525 (D Md, 2009); *Kincaid v City of Fresno,* 244 FRD 597, 606 (ED Cal, 2007); *Barnes v District of Columbia*, 242 FRD 113, 123 (D DC, 2007).[23]

The cases on which defendants rely are easily distinguished, as each turns on numerous individualized inquiries and involves claims for money damages.[24] While individual case-by-case

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[23]Perhaps most analogous to the case at bar are suits challenging suspicionless strip search policies. In these cases, courts have routinely and explicitly held that specific individualized issues regarding whether adequate evidence exists to support a finding of reasonable suspicion justifying the search of each individual plaintiff should not destroy commonality. See, e.g., *Dodge*, 226 FRD at 181-183; *Johnson v District of Columbia*, 248 FRD 46, 56-57 (D DC, 2008); *McBean v City of New York*, 260 FRD 120, 138 (SD NY, 2009); *Tardiff v Knox County*, 218 FRD 332, 336-337 (D Me, 2003); *Marriot v County of Montgomery*, 227 FRD 159, 173 (ND NY, 2005).

[24] See *Tinman v Blue Cross & Blue Shield*, 264 Mich App 546, 563-565; 692 NW2d 58 (2004) (no commonality where a "highly individualized inquiry" involving numerous questions was needed to determine whether defendants violated the statutes in question); *Zine*, 236 Mich App at 289 (no commonality where seven individualized questions would need to be answered as to each class member to determine whether Chrysler had violated the Michigan Consumer Protection Act); *Lee v Grand Rapids Bd of Education*, 184 Mich App 502, 505-506; 459 NW2d 1 (1989) (no commonality for plaintiffs pregnancy discrimination claims because there was no single pregnancy leave policy during the relevant period); cf *Edgcumbe v Cessna Aircraft Co,* 171 Mich App 573, 575-576; 430 NW2d 788 (1988) (denying certification on the basis of superiority without mentioning commonality).

inquiries might have a unique bearing for each class member in a case for damages, in this case for injunctive and declaratory relief they are only important insofar as they establish the existence of an environment that subjects every class member to a similar, substantial threat of imminent harm. In this way, the "specific instances" of harm simply constitute "a piece in the larger puzzle relative to establishing a basis for prospective, system-wide relief. " *Duncan*, 284 Mich App at 331-332. Thus, as the Court of Appeals majority held, "the factual question *that will be of any relevance to all class members* revolves around the establishment of widespread and systematic 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." *Id.* at 332 (emphasis in original).[25]

D. Plaintiffs' Claims are Typical of the Claims of the Plaintiff Class

To satisfy the typicality requirement, plaintiffs must demonstrate that their claims are based on the same legal theory and arise from the same event or practice that gives rise to the claims of other class members. *Hill*, 276 Mich App at 313; *Newsome v Up-To-Date Laundry, Inc*, 219 FRD 356, 362 (D Md, 2004). Plaintiffs need not establish that their claims are factually identical to those of the larger class in order to satisfy the typicality requirement. *Hill*, 276 Mich App at 313. "[T]ypicality is not destroyed simply because there are some factual variations between claims of the representatives and other class members." *Barnes v District of Columbia*, 242 FRD 113, 122 (D DC, 2007). As the trial court correctly held, "[s]ince all the members of the

[25] Defendants' argument may be addressed in a full hearing on the merits of the case, but it does not predominate the central question regarding the existence and constitutionality of defendants' uniform policy that is common to all plaintiffs. See *Streeter v Sheriff of Cook County*, 256 FRD 609, 614 (ND Ill, 2009); *Dodge*, 226 FRD at 181-183.

proposed class challenge the same deficiencies in Michigan's indigent defense system, the typicality requirement has been met." (App. p. 111a).

The typicality requirement is very similar to, and often merges with, the question of commonality. See *General Telegraph Co of Southwest v Falcon*, 457 US 147, 157 n13; 102 S Ct 2364; 72 L Ed 2d 740 (1982). Therefore, the reasoning discussed in the prior section of this brief also establishes that plaintiffs have satisfied the typicality requirement.

This case is similar to *Streeter v Sheriff of Cook County*, 256 FRD 609, 612 (ND Ill, 2009), in which a class was certified in a case challenging a county jail's strip search policy. In *Streeter*, the court determined that the plaintiffs satisfied the typicality requirement because their challenges all relied on the same legal theory that the defendants' strip search policy violated their Fourth Amendment right to be free from unreasonable searches. *Id.* at 612-613. Here, plaintiffs' claims and those of the plaintiff class all are based on the same legal theory - that defendants' uniform policy fails to ensure that indigent defense providers have the tools necessary to provide constitutionally adequate indigent defense in the counties and that, therefore, defendants have violated their obligations under the United States and Michigan constitutions. This plainly constitutes a "common core of allegation" that satisfies the typicality requirement. *Hill*, 276 Mich App at 313.

Defendants' only response is the assertion that there are too many individual factual circumstances to warrant a finding of typicality. Defendants' Brief, p. 46. But, "as in the case of commonality requirement, some individual differences do not preclude certification of the class where, as here, the name plaintiffs' central claim is the same as the class members." *Romano*, 246 FRD at 445; see also *Baby Neal v Casey,* 43 F3d 48, 58 (3rd Cir, 1994) ("[C]ases challenging the same unlawful conduct which affects both the named and the putative class usually satisfy the typicality requirement irrespective of the varying fact patterns underlying the individual claims."); *Newsome*, 219 FRD at 362 (finding typicality where "plaintiffs' claims rest on a pattern or practice of racial discrimination theory" notwithstanding factual differences in the treatment of different individuals); *Otsuka*, 251 FRD at 446 (finding typicality because "[a]lthough absent class members may have missed more or fewer rest breaks than the named plaintiffs, all were subjected to the same alleged policies with regard to rest breaks"). Like *Streeter,* "the likelihood of some range of variation in how different groups" of indigent defendants "were treated does not undermine the fact that the claims of each class member share a common factual basis and legal theory." *Streeter*, 256 FRD at 613 (internal quotation marks omitted).[26]

E. Plaintiffs Can Fairly and Adequately Assert and Protect the Interests of the Plaintiff Class

At the outset, it is important to reiterate that in responding to plaintiffs' class certification motion defendants never challenged the assertion that plaintiffs satisfied the adequacy requirement. (App. pp. 85b-110b). Therefore, defendants have failed to preserve this issue for appeal. But, even if defendants had not waived a challenge to the adequacy requirement, it is clear that plaintiffs have provided sufficient information to satisfy this prerequisite such that the trial court's decision to certify the class was not an abuse of discretion.

[26] Toward the conclusion of their typicality and adequacy argument, defendants raise the specter of a state-wide claim, arguing that "the three named counties are not typical of Michigan's indigent defense system" and that "[t]his is problematic to class certification here, where despite attempts to ignore the sweeping posture of Plaintiffs' request for relief, Plaintiffs are plainly calling for a centralized, statewide, state-funded system." Defendants' Brief, p. 47. Given that plaintiffs have *never* made statewide claims or asked for statewide relief, this strawman argument cannot be used to defeat class certification.

Whether the representative parties can fairly and adequately assert and protect the interests of the plaintiff class is a two-step inquiry. First, plaintiffs must establish that their counsel is qualified and generally able to conduct the litigation. Second, plaintiffs must establish that members of the proposed class do not have antagonistic or conflicting interests. *National Association for the Advancement of Colored People v North Hudson Regional Fire & Rescue*, 255 FRD 374, 383-384 (D NJ, 2009).

There is no question that the plaintiffs have satisfied the first prong of this test.[27] As the Supreme Court of the United States has noted, the second prong of adequacy of representation "tends to merge with the commonality and typicality criteria[.]" *Amchem Products, Inc. v Windsor*, 521 US 591, 626, n. 20; 117 S Ct 2231; 138 L Ed 2d 689 (1997)(internal quotation marks omitted); *North Hudson*, 255 FRD at 384. Consequently, the reasoning outlined above as to why there is commonality and typicality also establishes that plaintiffs have satisfied the second prong of the adequacy test.

Defendants' arguments turn on the erroneous assumption that the named plaintiffs cannot adequately represent the interests of class members unless they have all experienced identical factual circumstances. Defendants' Brief, pp. 46-47. This is not the appropriate standard. In and of themselves, factual differences do not destroy adequacy. See, e.g. *Hill*, 276 Mich App at 313.

[27] Defendants have not challenged the qualifications of plaintiffs' counsel, who are attorneys employed by the American Civil Liberties Union Foundation ("ACLU"), and the ACLU Fund of Michigan, nonprofit legal organizations whose attorneys have substantial experience and expertise in class action and indigent criminal defense matters. Plaintiffs are also represented by Frank D. Eaman PLLC, a private law firm with extensive experience in criminal litigation, and Cravath, Swaine & Moore LLP, a law firm with extensive complex civil litigation experience. In addition to this wide and varied experience, plaintiffs' attorneys have also committed sufficient resources to represent the plaintiff class.

Where, as here, plaintiffs show that any differences between them do not lead to conflicting interests, the adequacy requirement is satisfied.[28]

None of the "differences" noted by defendants makes the interests of the class members antagonistic to one another. It may be true that some plaintiff class members make bail, while others do not. It may also be true that some are charged in complex felony cases while others are charged in simpler ones. Defendants' Brief, pp. 46-47. But these differences do not change plaintiffs' core allegation that defendants' uniform practice fails to ensure that indigent defense providers have the tools necessary to provide constitutionally adequate indigent defense in the three subject counties. Moreover, those differences do not pit plaintiff class members against each other. Cf *Neal v James*, 252 Mich App 12, 23; 651 NW2d 181 (2002), *rev'd on other grounds, Henry*, 484 Mich at 505, n. 39 (determining plaintiffs could not adequately represent the interests of the plaintiff class "[b]ecause there are claims that some members were denied promotions, [and thus] there may be conflicts among the class members related to competitions for the same positions"). None of the small differences highlighted by the defendants alter the fact that each member of the plaintiff class is similarly affected by defendants' unconstitutional policy.

That the counties manage and administer their indigent defense systems differently likewise does not defeat adequacy. All members of the plaintiff class, regardless of the county in which they are charged, challenge the failure of the state and the governor to ensure that indigent defense providers have the tools necessary to provide constitutionally adequate defense in the counties. All members of the plaintiff class allege that this failure deprives them of constitutionally adequate legal representation or places them at imminent risk of such deprivation

[28] Notably, the potential for conflicting interests is drastically reduced where, as here, plaintiffs seek only injunctive relief and do not ask for money damages.

by preventing the attorneys in the counties' indigent defense programs from engaging in even the most basic tasks of defense representation. Plaintiffs have thus satisfied the adequacy requirement because "[t]he gravamen of the named plaintiffs' claims is the same as that of the other class members." *Hill*, 276 Mich App at 313.

F. A Class Action is Superior to Other Available Methods of Adjudication.

The circuit court did not abuse its discretion in determining that plaintiffs' had satisfied the superiority requirement. To the contrary, its holding was supported by a detailed analysis of each of the factors set forth in MCR 3.501(A)(2). The circuit court ruled at the May 16, 2007 hearing:

> First, whether the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent adjudications and whether those adjudications would be dispositive of the interest of other members not parties to the adjudications. The Court finds that there is a possibility of inconsistent adjudications with respect to individual class members which would have a high likelihood in resulting in varying standards being placed on the defendants. Also these adjudications would likely impair the ability of other class members to protect their own interests. The second factor is not relevant since the proposed class seeks equitable relief. Third, whether the action will be manageable as a class action, I hope so. The Court finds the action will be manageable as there will be no need to determine individual damages. Fourth, 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. Since proving the claims will be highly complex and require the investment of significant resources, the Court finds that a class action would be more appropriate. The last factor is not relevant. There is no monetary value being sought by the proposed class.

(App. p. 111a).

Defendants implicitly concede that plaintiffs have satisfied all but perhaps the least important factor – manageability. As the Eleventh Circuit has noted, "[t]his concern will rarely, if ever, be in itself sufficient to prevent certification of a class," as "[c]ourts are generally reluctant to deny class certification based on speculative problems with case management" and "[e]ven potentially severe management issues have been held insufficient to defeat class certification." *Klay v Humana, Inc*, 382 F3d 1241, 1272-1273 (11th Cir, 2004) (citing cases).

Defendants' argument regarding the manageability component of MCR 3.501(A)(2) is simply a rehash of arguments it has made previously with respect to commonality. But, as this Court has recognized, "[n]o two claims are likely to be exactly similar." *Dix v American Bankers Life Assurance Co of Florida*, 429 Mich 410, 419; 415 NW2d 206 (1987).[29] As a result, the relevant concern with respect to this fifth factor is "whether the issues are so disparate as to make a class action unmanageable." *Hill*, 276 Mich App at 717 (quoting *Dix*, 429 Mich at 419).

Defendants argue that such disparity exists here, but their argument is based on the mistaken assumption that individual factual inquiries will predominate plaintiffs' claims. Defendants' Brief, pp. 47-49. Because "the arguments made under this factor are essentially duplicative of the arguments already discussed[,]" they should be rejected for the same reasons. *Hill*, 276 Mich App at 717 (rejecting defendants' argument that individual inquiries destroyed superiority on the basis of the court's analysis of numerosity, commonality and typicality).

Moreover, a court's superiority analysis cannot be conducted in a vacuum. See *Hanlon v Chrysler Corp*, 150 F3d 1011, 1023 (9th Cir, 1998); *Klay,* 382 F3d at 1269, 1273. Thus, the appropriate inquiry is not whether the class action will create significant management problems per se, but rather whether the class action will create relatively more management problems than any of the alternatives that can realistically achieve the plaintiffs' objectives. See *Hanlon,* 150 F3d

[29] Although *Dix* was decided under a former class certification rule, the Court explicitly recognized that its analysis would apply to MCR 3.501 as well. See *Dix,* 429 Mich at 414, n 6 (explaining that the "convenient administration of justice" requirement is essentially the same as that set forth in MCR 3.501(A)(1)(e)); *Hill*, 236 Mich App at 314.

at 1023; *Klay,* 382 F3d at 1269, 1273. For this reason, concerns regarding cost and judicial efficiency weigh in favor of class certification where the plaintiff class seeks injunctive relief to remedy a systemic problem. See *Jones v Murphy*, 256 FRD 519, 526 (D Md, 2009)(class action is superior method to challenge policy of suspicionless searches); *Newsome,* 219 FRD at 363-366 (class action is superior method to challenge systemic race discrimination); *Welch v Board of Directors of Wildwood Golf Club*, 146 FRD 131, 138 (WD Pa, 1993) (class action is superior method to challenge systemic gender discrimination). In such instances, it is both impractical and unduly burdensome to require individual class members to sue separately, as this "would result in duplicative, redundant discovery and require multiple courts to analyze the same evidence or the same legal issues." *Kincaid,* 244 FRD at 607.[30]

Here, a class action is not merely manageable, but indeed is the only vehicle that could provide any measure of relief if a constitutional violation is found. Individual criminal appeals simply cannot provide plaintiffs with the systemic relief they seek because individual remedies cannot address the ongoing violations of plaintiffs' constitutional rights resulting from defendants' abdication of their constitutional responsibilities. Courts have routinely certified class action suits despite potential management difficulties, recognizing that although "the easiest way for any court to handle complex litigation is simply to deny certification," this would have the unacceptable result of "permitting a defendant to violate [the Constitution] with impunity." See *Gilkey v Central Clearing Co*, 202 FRD 515, 529 (ED Mich, 2001). Should plaintiffs prevail on the merits of their constitutional claims, it is only if a class is certified that this Court (and

[30] To the extent the circuit court feels it is necessary, it retains the discretion to create subclasses to manage its own proceedings as the case develops. *Oakwood Homeowners Ass'n, Inc v Ford Motor Co*, 77 Mich App 197, 220-221; 258 NW2d 475 (1977).

plaintiffs) can be assured that defendants will accord relief to all individuals harmed by the systemic failure alleged in the complaint. Here, a class action is the superior method of adjudication.

RELIEF REQUESTED

Based on the foregoing, plaintiffs-appellees respectfully request that this Court affirm the Court of Appeals June 11, 2009 decision in its entirety and remand this case to the Ingham County Circuit Court for further proceedings.

Respectfully submitted,

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