

STATE OF MICHIGAN
IN THE SUPREME COURT

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 situated,

Plaintiffs-Appellees,

v

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

Defendants-Appellants.

Supreme Court Nos. 139345, 139346, 139347

Court of Appeals Nos. 278652, 278858,
278860

Ingham County Circuit Court Case No.
07-242-CZ

**BRIEF ON APPEAL – APPELLANTS STATE OF MICHIGAN AND GOVERNOR
JENNIFER GRANHOLM**

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

	<u>Page</u>
INDEX OF AUTHORITIES.....	iii
STATEMENT OF QUESTIONS	vi
INTRODUCTION	1
STATEMENT OF PROCEEDINGS AND FACTS.....	5
ARGUMENT	10
I. In Michigan, indigent defense is governed by provisions of the Code of Criminal Conduct. Here, Plaintiffs do not challenge the current statutory scheme, facially or as applied, but rather, seek an order that would essentially re-draft current statutes, directing specific funding by the State and oversight by the Governor, contrary to the Legislature's intent and in violation of the Separation of Powers doctrine.....	10
A. Standard of Review.....	10
B. Analysis.....	10
1. The Court of Appeals erred in allowing the Circuit Court to order funding from the State Treasury for specific purposes such as training programs, payment of expert fees, and payment of counsel's fees since such relief usurps the power of the Legislature.	12
2. The Court of Appeals erred in allowing the Circuit Court to order the Governor to administrate local systems dictated by the judiciary. Such relief usurps the power of the executive branch.	15
3. Having brought their action against the State and Governor, rather than those counties in which service is challenged, Plaintiffs lack standing and fail to state a claim upon which relief can be granted.	19
II. Prejudice to the defense is a necessary element to a pre-conviction challenge to effective assistance of counsel whether raised pre- or post-conviction and must be analyzed on a case-by-case basis. Plaintiffs have not pled facts sufficient to demonstrate prejudice in a Complaint based on a generalized claim of widespread systemic deficiency in Michigan's indigent defense system. Plaintiffs' Complaint is not justiciable and it fails to state a claim upon which relief may be granted.....	24
A. Standard of Review.....	24
B. Discussion.....	24
1. Prejudice is an essential component of an effective assistance of counsel claim at any stage of litigation.....	25

2. Plaintiffs' claims do not amount to a per se violation of the Sixth Amendment right to effective assistance.	31
3. Because Plaintiffs have not pled facts sufficient to establish prejudice, they lack standing, their claims are not ripe for adjudication, and they have failed to state claims upon which declaratory and injunctive relief may be granted.	35
III. The Court of Appeals erred in certifying a class because establishing prejudice and causation based on widespread and systemic deficiencies to Michigan's public defender system will require individual proofs, and because the processes used in Berrien, Genesee, and Muskegon counties are dissimilar to one another, further requiring individual examination of each Plaintiff's claim on a case-by-case basis. Therefore, no one Plaintiff will serve as an adequate class representative and the class action is an improper method of pursuing these claims.	38
A. Standard of Review.....	38
B. Analysis.....	39
1. Numerosity is not met.....	40
2. Plaintiffs' claims require individualized proofs; therefore, the commonality requirement has not been met.	42
3. Plaintiffs have not demonstrated typicality or adequacy because there are too many individualized circumstances among the named Plaintiffs and the class members, and too many differences among the three named Counties; and because the named counties are not representative of the State's indigent defense system.	46
4. Class action is not a superior method of adjudication	48

INDEX OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<i>46th Circuit Trial Court v County of Crawford</i> , 476 Mich 131; 719 NW2d 553 (2006).....	12
<i>A & M Supply Co v Microsoft Corp</i> , 252 Mich App 580; 654 NW2d 572 (2002).....	42, 48
<i>Cameron v Monroe County Probate Court</i> , 457 Mich 423; 579 NW2d 859 (1998)	19
<i>Coleman v Alabama</i> , 399 US 1; 90 S Ct 1999; 26 L Ed 387 (1970).....	32
<i>Curtis v United States</i> , 511 US 485; 114 S Ct 1732; 128 L Ed 2d 517 (1994)	25
<i>Dix v American Bankers Life Assurance Co of Florida</i> , 429 Mich 410; 415 NW2d 206 (1987).....	48
<i>Duncan v State</i> , 284 Mich App 246; 774 NW2d 89 (2009)	passim
<i>Edgcumbe v Cessna Aircraft Co</i> , 171 Mich App 573; 430 NW2d 788 (1988)	43, 48
<i>General Tel Co v Falcon</i> , 457 US 147; 102 S Ct 2364; 72 L Ed 2d 740 (1982).....	39
<i>Gideon v Wainwright</i> , 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).....	24, 26
<i>Girts v Yanai</i> , 501 F3d 743 (CA 6, 2007).....	25
<i>Grigg v Mich Nat'l Bank</i> , 405 Mich 148; 249 NW2d 290 (1976).....	48
<i>Henry v Dow Chemical</i> , 484 Mich 483; 772 NW2d 301 (2009).....	39, 40
<i>Hurrell-Harring v New York</i> , 883 NYS 2d 349 (App Div 2009)	passim
<i>In re Attorney Fees of Mullkoff</i> , 176 Mich App 82; 438 NW2d 878 (1989).....	19
<i>In re Forfeiture Hearing as to Caplin & Drysdale, Chartered</i> , 837 F2d 637 (CA 4, 1988).....	32
<i>In re Jacobs</i> , 185 Mich App 642; 463 NW2d 171 (1990).....	19
<i>Kennedy v Carlson</i> , 544 NW2d 1 (Minn 1996).....	27, 28
<i>Lee v Grand Rapids Bd of Ed</i> , 184 Mich App 502; 459 NW2d 1 (1989).....	43
<i>Lee v Macomb Co Bd of Comm'rs</i> , 464 Mich 726; 629 NW2d 900 (2001)	10
<i>Lewis v Casey</i> , 518 US 343; 116 S Ct 2174; 135 L Ed 2d 606 (1996).....	2
<i>Luckey v Harris</i> , 860 F2d 1012 (CA 11, 1988)	29
<i>Luckey v Harris</i> , 896 F2d 479 (CA 11, 1989) (<i>Luckey II</i>).....	27

<i>Lujan v Defenders of Wildlife</i> , 504 US 555; 112 S Ct 2130; 119 L Ed 2d 351 (1992)	20
<i>Maiden v Rozwood</i> , 461 Mich 109; 597 NW2d 817 (1999).....	24
<i>Massachusetts v Mellon</i> , 262 US 447; 43 S Ct 597; 67 L Ed 1078 (1923)	20
<i>Michigan Chiropractic Council v Comm'r of the Office of Fin & Ins Servs</i> , 475 Mich 363 (2006)	10, 24, 36
<i>Morris v Slappy</i> , 461 US 1; 103 S Ct 1610; 75 L Ed 2d 610 (1983).....	34, 35
<i>Morris v Slappy</i> , 649 F2d 718 (CA 9, 1981)	34
<i>Musselman v Engler</i> , 448 Mich 503; 533 NW2d 237 (1995).....	12
<i>National Wildlife Federation v Cleveland Cliffs Iron</i> , 471 Mich 608; 684 NW2d 800 (2004)...10, 12, 19, 20, 36	
<i>Neal v James</i> , 252 Mich App 12; 651 NW2d 181 (2002)	45, 46, 47
<i>Ottawa County Controller v Ottawa Probate Judge</i> , 156 Mich App 594; 401 NW2d 869 (1986)	19
<i>Platt v Indiana</i> , 664 NE2d 357 (Ind Ct App 1996).....	27, 28
<i>Powell v Alabama</i> , 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932)	32
<i>Pugh v Rainwater</i> , 483 F2d 778 (CA 5, 1973)	32
<i>Recorder's Court Bar Ass'n v Wayne Circuit Court</i> , 443 Mich 110; 503 NW2d 885 (1993)	11
<i>Rothgery v Gillespie County, Texas</i> , ___US___; 128 S Ct 2578; 171 L Ed 2d 366 (2008) 33, 34	
<i>Sprague v General Motors Corp</i> , 133 F3d 388 (CA 6, 1998).....	42
<i>Straus v Governor</i> , 459 Mich 526; 592 NW2d 53 (1999)	16
<i>Strickland v Washington</i> , 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)	<i>passim</i>
<i>Sun Communities v Leroy Twp</i> , 241 Mich App 665; 617 NW2d 42 (2000).....	10
<i>Sutherland v Governor</i> , 29 Mich 320 (1874).....	16
<i>Tinman v Blue Cross & Blue Shield</i> , 264 Mich App 546; 692 NW2d 58 (2004).....	43, 45
<i>United States v Cronin</i> , 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984)	1, 32, 33
<i>United States v Lopez</i> , 548 US 140; 126 S Ct 2557; 165 L Ed 2d 409 (2006).....	32, 35

<i>United States v Wade</i> , 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967)	32
<i>Washington v Hofbauer</i> , 228 F3d 689 (CA 6, 2000).....	25
<i>Wayne Co v Hathcock</i> , 471 Mich 445; 684 NW2d 765 (2004)	10
<i>Wesche v Mecosta Co Rd Comm</i> , 480 Mich 75; 746 NW2d 847 (2008).....	24
<i>Withey v Osceola Circuit Judge</i> , 108 Mich 168; 65 NW 668 (1895).....	10
<i>Zine v Chrysler Corp</i> , 236 Mich App 261; 600 NW2d 384 (1999).....	<i>passim</i>

Statutes

MCL 600.151	10
MCL 600.8103	19
MCL 600.8301	11, 16
MCL 600.9947	11, 16, 19
MCL 775.16	6, 10, 19

Rules

MCR 2.605	37
MCR 3.501	39, 40
MCR 8.123	7, 10

Constitutional Provisions

Const 1963, art 1, § 20	24
Const 1963, art 5, § 18	15
Const 1963, art 5, § 8	15
Const 1963, art 6, § 3	16
Const 1963, art 9, § 17	12
US Const amend VI	24

STATEMENT OF QUESTIONS

- I. In Michigan, provisions of the Code of Criminal Procedure provide for indigent defense. Here, Plaintiffs do not challenge Michigan's statutory scheme for providing indigent defense, facially or as applied, but rather, seek to have the judiciary re-write these statutes by forcing specific State funding and by requiring oversight by the Governor. Does the requested relief violate the separation of powers doctrine as embodied in Const 1963, art 3, §2?**

Appellants' answer: "Yes"

Appellees' answer: "No"

- II. Prejudice to the defense is a necessary component whether raised pre or post-conviction and must be analyzed on a case-by-case basis. Plaintiffs have not pled facts sufficient to demonstrate prejudice in a Complaint based on a generalized claim of widespread systemic deficiency in Michigan's indigent defense system. Did the Court of Appeals err when it affirmed the Circuit Court's holding that this case is justiciable?**

Appellants' answer: "Yes"

Appellees' answer: "No"

- III. For proper classification, Plaintiffs must meet all five well-established requirements of a class action. Here, the proofs are not generalized in nature because the challenge will require the examination of thousands of cases to establish an actual injury traceable to Defendants. Additionally, the processes used in Berrien, Genesee, and Muskegon counties are dissimilar to one another or other counties in Michigan's indigent defense system. Did the Circuit Court err in certifying the class?**

Appellants' answer: "Yes"

Appellees' answer: "No"

INTRODUCTION

In this case Plaintiffs seek to abrogate the Michigan Legislature's statutory scheme for providing indigent defense. But rather than seek legislative change, they instead ask this Court to decree sweeping and fundamental changes to the State's indigent defense system. This profound request for relief, however, is based on nothing more than a generalized claim that the legal representation for *all* indigent defendants in Genesee, Berrien, and Muskegon Counties violates each criminal defendant's Sixth Amendment right to counsel in the pre-conviction context.

Plaintiffs' case is premised on a basic misunderstanding of a criminal defendant's right to counsel. They claim an abstract right to a particular level and/or quality of representation, and assert that they need demonstrate only the absence of this level of representation. But the United States Supreme Court has said otherwise:

- "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."¹
- "[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair Circuit. Absent some effect of challenged conduct on the reliability of the Circuit process, the Sixth Amendment guarantee is generally not implicated."²

The U. S. Supreme Court has never recognized that the purpose of the Sixth Amendment is to improve the quality of legal representation. Neither that Court nor this Court has ever recognized a pre-conviction cause of action based on a generalized constitutional right to competent counsel claim alleging systemic deficiencies in the representation of indigent

¹ *Strickland v Washington*, 466 US 668, 692; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (emphasis added).

defendants. In fact, the Supreme Court has warned against such claims. Moreover, neither the Supreme Court nor this Court has concluded, or even implied, that the Sixth Amendment right to counsel is to be analyzed under a standard other than "prejudice to the defense" in the pre-trial, as in the post-trial, context. Finally, as the United States Supreme Court has recognized, it is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm. But it is the role of the political branches, not that of the courts, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.³ These distinct roles are "obliterated" if plaintiffs can invoke the intervention of the courts without establishing actual or imminent harm, but instead relying on the mere "status of being subject to a governmental institution that was not organized or managed properly."⁴

In the context of this case three questions are presented. (1) Whether the relief Plaintiffs seek violates the separation of powers doctrine. That is, may the judiciary override a statutorily created and locally funded system of legal services for indigent criminal defendants by ordering the Governor to provide such state-funded services, in accordance with judicially created standards and subject to judicial oversight and direction? (2) Whether this case presents a justiciable controversy. That being, is prejudice a necessary component of a pre-conviction claim for ineffective assistance of counsel? And if so, whether Plaintiffs can satisfy the requirements of standing and ripeness where the alleged acts have yet to occur and there is no injury-in-fact, and where they have not pled facts sufficient to demonstrate either that the inaction of the State and the Governor has caused or will cause the harm alleged, or that the

² *United States v Cronin*, 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984) (internal citations omitted).

³ *Lewis v Casey*, 518 US 343, 349; 116 S Ct 2174; 135 L Ed 2d 606 (1996).

⁴ *Lewis*, 518 US at 349-350.

relief they seek will fix that harm. (3) Whether a class action is an appropriate means to establish the requisite proofs for a pre-conviction ineffective assistance of counsel claim. The first two questions – whether Plaintiffs' request violates the Separation of Powers doctrine and whether it lacks justiciability – are questions of first impression for this Court.

The separation of powers doctrine is violated here because the Circuit Court would be required to re-write Michigan's current statutory provisions for indigent defense. The degree of this violation is further compounded by the fact that the Circuit Court would then be mandating the Legislature to provide that specific funding be included in appropriations, along with the requirement of continuing oversight by the Governor. Neither the Circuit Court nor the Court of Appeals majority adequately addressed the huge practical implications of Plaintiffs' request for relief. The effect of granting such relief would be staggering, as it would not only add budgetary pressures to Michigan's already-strained budget but would also be likely to open the floodgates to pre-conviction litigation during the pendency of criminal actions.

This case does not present a justiciable controversy. To establish ineffective assistance of counsel, prejudice is an essential element at any stage of the litigation, pre or post-conviction. While the test to determine prejudice of unconstitutional proportions in the pre-conviction context has not been fully defined,⁵ this Court should look to *Strickland* and its predecessors 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. As in the case of a post-conviction denial of ineffective assistance of counsel challenge, the pre-trial assertion must be analyzed under the specific facts of each case to determine whether prejudice of an unconstitutional level exists and invalidates the proceedings. Therefore, at this juncture and on

⁵ *Strickland*, 466 US at 685-687.

the facts pled, Plaintiffs' claims are conjectural and hypothetical; do not and cannot show that inaction by the State and the Governor caused the deficiencies they allege; and do not and cannot show that these alleged deficiencies could be redressed by the declaratory and injunctive relief requested here. Plaintiffs' claims simply are not justiciable.

This case is not a viable class action. Plaintiffs have not met their burden of proving information sufficient to establish that each certification prerequisite has been satisfied. The common questions here—whether there have been widespread and systemic constitutional violations, whether the violations were and are being caused by deficiencies in the county indigent defense systems, and whether those deficiencies were caused by the State and the Governor—cannot be answered with generalized proofs. Proving prejudice and causation will require examination of literally thousands of cases; thus, individual proofs will predominate and the class action will be unmanageable.

Because the relief Plaintiffs seek is contrary to core concepts of Michigan government, misapprehends U.S. Supreme Court precedent, and dispenses with basic, foundational pleading requirements necessary to sustain a class action, this Court should reverse the decision of the Court of Appeals.

STATEMENT OF PROCEEDINGS AND FACTS

On February 22, 2007, Plaintiffs – eight individuals arrested at various times in 2006 and 2007 – filed a four-count Complaint on their own behalf and on behalf of a class of all present and future indigent persons who are or will face prosecution in Berrien, Muskegon, and Genesee Counties, and who will rely upon those counties to provide them with defense counsel. Rather than await adjudication of their cases, Plaintiffs sought declaratory and prospective injunctive relief against the State and the Governor for claimed pre-conviction systemic injuries due to the representation from their court-appointed attorneys. At the time of the Complaint, none of the Plaintiffs had gone to trial or otherwise had their claims adjudicated.⁶ Further, none of the Plaintiffs attempted to have their assigned attorneys replaced. Thus, *there is no factual record* upon which this Court may evaluate whether any Plaintiff had an inadequate remedy at law or a viable ineffective assistance of counsel claim based on that Plaintiff's individual case.

Plaintiffs allege that the State, rather than the local county funding units or the individual defense attorneys, violated or imminently will violate their rights, as set forth in the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 17 and 20 of the Michigan Constitution of 1963. In their Complaint, Plaintiffs allege systemic barriers to

⁶ Currently, all representative plaintiffs have been adjudicated. Christopher Lee Duncan was sentenced on March 12, 2007, for breaking and entering with intent to commit larceny and is now serving 1-10 years. Billy Joe Burr, Jr., was also sentenced on March 12, 2007, for unlawful use of a motor vehicle and is now serving three years probation. Steven Ray Connor was sentenced and placed on probation on January 27, 2007. Upon information and belief, Anthony Taylor was sentenced on February 26, 2007 for weapons use, reckless use of a firearm and failure to present weapon for inspection and served 72 days in jail. Jose Davila was sentenced on April 12, 2007, for trespass and 3rd Degree home invasion and is now serving two years probation. Christopher Maines was sentenced on May 31, 2007, for 2nd Degree home invasion and resisting/obstructing/assaulting a police officer and is now serving 3-22 years (Count 1) and 21 months-3 years (Count 2). Brian Secrest hired a private attorney before his May 4, 2007 sentencing. Jennifer O'Sullivan was sentenced in the 7th Judicial Circuit, Genesee County, on October 15, 2007.

effective representation, which they claim create a substantial likelihood of denying them their constitutional right to a meaningful opportunity to be heard in a court of law. Such barriers allegedly include inadequate State funding for indigent defense services, little State fiscal oversight or guidance to ensure proper indigent defense services, little State administrative oversight of indigent defense services, failure of the State to provide sufficient training, legal research tools, experts, or investigators, and failure of the State to provide qualified indigent defense attorneys. (Plaintiffs' Complaint, ¶¶ 80-140).

Michigan's indigent defense system

The Court of Appeals' dissenting judge below correctly described Michigan's current approach to operating and funding its indigent criminal defense system:

The Michigan system for providing counsel for indigent criminal defendants has been in effect for some time and, from its inception, it has been local in nature. Indeed, the Michigan Supreme Court over 100 years ago recognized that the procedure for compensating such counsel under a statute reasonably similar to the one currently in effect was "competent" under then-existing precedent. [*Withey v Osceola Circuit Judge*, 108 Mich 168, 169; McGrath 403; 65 NW 668 (1895)]. The current statute (the Indigent Criminal Defense Act), as did its predecessor versions, divides the system for providing counsel to indigent criminal defendants who are unable to procure counsel into two categories:

Upon proper showing [of indigency], the chief judge [of the circuit court] shall appoint . . . an attorney to conduct the accused's examination and to conduct the accused's defense. The attorney appointed by the court shall be entitled to receive from the county treasurer, on the certificate of the chief judge that services have been rendered, the amount which the chief judge considers to be reasonable compensation for the services performed. [MCL 775.16].

Thus, the duty to appoint counsel and to determine reasonable compensation for defense of the indigent at the local level rests with the judicial branch, in the person of the chief judge of the circuit court. The duty to fund such counsel, by way of reasonable compensation, rests with the executive branch, in the person of the county treasurer. And the responsibility of providing such funding lies with the legislative branch, usually the county board of commissioners.

Effective January 1, 2004, the Michigan Supreme Court established the procedure

and record-keeping requirements at the local level for selecting, appointing, and compensating counsel who represent indigent parties in all Circuit courts (the indigent criminal defense court rule) MCR 8.123. Section (B) of the Indigent Criminal Defense Court Rule provides that each such trial court must adopt a local administrative order that describes its procedure for such selection, appointment, and compensation. Section(C) requires each such trial court to submit the local administrative order for review to the State Court Administrator who "shall approve a plan if its provisions will protect the integrity of the judiciary." Thus, the court rule adds a level of state judicial branch responsibility by requiring the State Court Administrator to approve local plans if they will "protect the integrity of the judiciary."⁷

On December 9, 2009, the Michigan Legislature introduced legislation that would create a statewide public defender system.⁸ HB 5676 is currently pending but has not passed the House or Senate. One of the ongoing concerns is how to fund such a system.⁹ It is clear from the text of HB 5676, however, that a statewide indigent defense system will require an appropriation from the Legislature.¹⁰

Procedural history

On April 5, 2007, Defendants filed a motion for summary disposition, arguing that Plaintiffs lack standing and their claims are not ripe for adjudication; that the Circuit Court lacks

⁷ *Duncan v State*, 284 Mich App 246, 346-347; 774 NW2d 89 (2009).

⁸ HB 5676 of 2009, introduced on December 12, 2009 and entitled the "Michigan public defense act," would establish a statewide public defender system to provide effective assistance of counsel to indigent criminal defendants who are entitled by law to assistance of counsel at public expense. (See HB 5676, text of bill in Addendum).

⁹ On Tuesday, June 16, 2009, the House Judiciary Indigent Defense Subcommittee began hearings on the proposed legislation that would create a statewide indigent defense system. Laura Sager of the Campaign for Justice referred to the funding issue as "the elephant in the room." See Gongwer News Service, Vol *48, Report #115. According to testimony by Mary Lannoy, former state budget director and current consultant for the Campaign for Justice, municipal courts and counties currently spend approximately \$80 million on indigent defense; yet compared to per capita spending by other States, she explained that Michigan should be spending approximately \$125 million.

¹⁰ HB 5676 states, "The legislature shall annually make an appropriation to the public defense fund to implement this act and to ensure that the right to counsel under the constitution of the United States, the state constitution of 1963, and this act is adequately funded." HB 5676. (Addendum, Sec 17(4), p 22).

jurisdiction over this matter because the Legislature, not this Court, is the proper entity to appropriate funds from the state treasury; that Plaintiffs improperly seek prospective injunctive relief because Plaintiffs fail to show that they lack an adequate remedy at law and failed to allege facts establishing a viable due process claim; that Plaintiffs sued the wrong parties; that the Court lacks jurisdiction to issue injunctive relief against the Governor; that governmental immunity bars the relief sought against the Governor as to Plaintiffs' State Constitutional claims; and, that governmental immunity bars the claims brought against the State of Michigan.

On May 16, 2007, Ingham County Circuit Court heard argument regarding Defendants' Motion for Summary Disposition and Plaintiffs' Motion for Class Certification. The Circuit Court rendered an oral opinion from the bench, denying the summary disposition motion and granting the class certification motion. She also entered an order granting Defendants' motion for stay.

On June 5, 2007, the Circuit Court issued three separate written orders: 1) an order denying Defendants' motion for summary disposition; 2) an order granting class certification; and, 3) an order denying Plaintiffs' motion for reconsideration of the order granting stay issued on May 16, 2007. The Circuit Court found that Plaintiffs had standing and their claims were ripe for review. The Circuit Court stated it was unsure whether the *Strickland* standard applied to Plaintiffs' pretrial claims of constitutionally inadequate representation, but concluded that it would not have to examine the circumstances of each particular criminal case. Thus, the Circuit Court held that Plaintiffs had stated a claim upon which relief could be granted.

Defendants filed three separate pleadings in the Court of Appeals to address various aspects of the Circuit Court's ruling. First, Defendants filed a claim of appeal by right of that part of the lower court's June 5, 2007 Order that denies governmental immunity to Defendants.

(Court of Appeals #278652). Second, Defendants filed an application for leave to appeal regarding the remaining aspects of the Circuit Court's ruling denying summary disposition. (Court of Appeals # 278858). Third, also pursuant to MCR 7.203(B)(1), Defendants sought leave to appeal the Circuit Court's June 5, 2007 Order Granting Class Certification. (Court of Appeals # 278860).

On February 22, 2008, the Court of Appeals granted the two applications for leave, and on March 26, 2008, granted Defendants' motion to consolidate the three separate appeals.

On appeal, the Court of Appeals affirmed the orders of the Circuit Court, holding that:

defendants are not shielded by governmental immunity, that defendants are proper parties, that the trial court, not the Court of Claims, has jurisdiction, and that the trial court has jurisdiction and authority to order declaratory relief, prohibitory injunctive relief, and some level of mandatory injunctive relief, the full extent of which we need not presently define. We further hold that, on the basis of the pleadings and at this juncture in the lawsuit, plaintiffs have sufficiently alleged facts that, if true, establish standing, establish that the case is ripe for adjudication, and state claims upon which declaratory and injunctive relief can be awarded. Finally, we hold that the trial court properly granted the motion for class certification.¹¹

The 37-page dissenting opinion, however, concluded that the relief requested by Plaintiffs would violate the Separation of Powers doctrine; that Plaintiffs' claims are not justiciable; and, that the Circuit Court erred in certifying the class.¹²

On July 23, 2009, Defendants filed their application for leave to appeal to this Court. On December 18, 2009, this Court granted leave to appeal.

¹¹ *Duncan*, 284 Mich App at 254-255.

¹² *Duncan*, 284 Mich App at 343-344, 396-399.

ARGUMENT

I. In Michigan, indigent defense is governed by provisions of the Code of Criminal Conduct. Here, Plaintiffs do not challenge the current statutory scheme, facially or as applied, but rather, seek an order that would essentially re-draft current statutes, directing specific funding by the State and oversight by the Governor, contrary to the Legislature's intent and in violation of the Separation of Powers doctrine.

A. Standard of Review

A circuit court's decision regarding a motion for summary disposition is reviewed *de novo*.¹³ Constitutional issues and statutory interpretation are also reviewed *de novo*.¹⁴ Questions of justiciability implicate constitutional separation of powers principles.¹⁵

B. Analysis

In Michigan, appointed counsel is governed by provisions of the Code of Criminal Procedure.¹⁶ Under the statutory scheme, appointment of counsel is handled at the local level; counsel is appointed by the circuit court and funded by the county treasury:

Upon proper showing, the chief judge shall appoint . . . an attorney to conduct the accused's examination and to conduct the accused's defense. The attorney appointed by the court shall be entitled to receive from the county treasurer . . . reasonable compensation for the services performed.¹⁷

Providing for appointed counsel at the local level is a framework this Court has approved for over 100 years.¹⁸ This Court has recognized that "a potential myriad of local considerations" may contribute to the determination of what compensation is reasonable, and that determination

¹³ *Sun Communities v Leroy Twp*, 241 Mich App 665, 668; 617 NW2d 42 (2000) .

¹⁴ *Wayne Co v Hathcock*, 471 Mich 445, 455; 684 NW2d 765 (2004).

¹⁵ *Michigan Chiropractic Council v Comm'r of the Office of Fin & Ins Servs*, 475 Mich 363, 369 (2006) (citing *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608; 684 NW2d 800 (2004), and *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726; 629 NW2d 900 (2001)).

¹⁶ MCL 775.16.

¹⁷ MCL 775.16. The State provides limited supplemental funding through the Court Equity Fund. MCL 600.151. MCR 8.123 sets forth the procedure for selecting, appointing, and compensating counsel who represent indigent parties.

¹⁸ See *Withey v Osceola Circuit Judge*, 108 Mich 168; 65 NW 668 (1895).

may vary from one circuit to another.¹⁹ Thus, challenges to the system appointing counsel are usually brought at the local level where that system is created and implemented.²⁰ This is consistent with the funding of all functions related to the operation of the trial courts, which is imposed on the local funding unit, with certain statutory exceptions.²¹

In this case, however, Plaintiffs do not simply challenge the local system for appointment of counsel. As described by the dissent, Plaintiffs seek to implement a new statewide system through the courts rather than the Legislature:

[T]he Duncan plaintiffs do not challenge the constitutionality of that act, either facially or "as applied." Rather, they simply seek to override it, to "switch it off" as it were. The Duncan plaintiffs do not ask the judiciary to "say what the law is" with respect to the indigent criminal defense act. Nor do they challenge the Legislature's enactment of that statute. Rather, they seek to reshape the indigent criminal defense act in a way that they find more desirable. In essence, they seek to have the judiciary *make* the law rather than say what the law is.

It is precisely to such an approach that the doctrine of separation of powers directly applies.²²

In fact, Plaintiffs do not even name county officials as parties. Instead, they seek broad declaratory and injunctive relief against the State and Governor, requiring them to defend systems over which they have no statutory control or authority, for which they have no data or other evidence, and about whose operations they have no specific knowledge. Contrary to the majority opinion below, the relief sought violates the separation of powers by giving a trial court control over functions performed by the legislative and executive branches. Further, such extraordinary relief is unnecessary as Plaintiffs have other available remedies, such as simply

¹⁹ *Recorder's Court Bar Ass'n v Wayne Circuit Court*, 443 Mich 110, 129; 503 NW2d 885 (1993).

²⁰ See *Recorder's Court Bar Ass'n*, 443 Mich at 110.

²¹ MCL 600.8301; MCL 600.9947.

²² *Duncan*, 284 Mich App at 387 (Whitbeck J., dissenting).

filing their suit against those counties in which service is challenged or pursuing an ineffective assistance of counsel claim on appeal from a conviction.

1. **The Court of Appeals erred in allowing the Circuit Court to order funding from the State Treasury for specific purposes such as training programs, payment of expert fees, and payment of counsel's fees since such relief usurps the power of the Legislature.**

Pursuant to Const 1963, art 9, § 17, only the Legislature can appropriate funds from the State Treasury.²³ As this Court explained in *46th Circuit Trial Court v County of Crawford*, the power to tax and appropriate is one of the most fundamental aspects of the Legislature.²⁴ This is because, unlike the other branches, the Legislature is designed for such purpose:

In contrast with the judiciary, for example, the legislature is not restricted in the range of testimony that it may hear as a prelude to enacting public policy, it is better positioned to accommodate competing policy priorities, it is better equipped to effect compromise positions after negotiation and bargaining, it is more regularly and directly accountable to the people, and its membership is more broadly representative of society and its various interests.²⁵

Further, as this Court recognized in *National Wildlife Federation v Cleveland Cliffs Iron Co*, "it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution. . . . The distinction between the two roles would be obliterated if, to invoke intervention of the courts, no actual or imminent harm were needed, but merely the status of being subject to a governmental institution that was not organized or managed properly."²⁶

But that is exactly what is happening in this case. Even accepting the hypothetical nature

²³ Const 1963, art 9, § 17; *Musselman v Engler*, 448 Mich 503, 522; 533 NW2d 237 (1995).

²⁴ *46th Circuit Trial Court v County of Crawford*, 476 Mich 131, 141; 719 NW2d 553 (2006).

²⁵ *46th Circuit Trial Court*, 476 Mich at 142.

²⁶ *Nat'l Wildlife Fed'n*, 471 Mich at 619-620 (quoting *Lewis*, 518 US at 349-350; 116 S Ct 2174; 135 L Ed 2d 606 (1996)).

of Plaintiffs' prospective allegations, the relief requested is a court-ordered appropriation from the State Treasury for specific purposes, including:

- Money for the same or similar training as prosecuting attorneys. (§ 91).
- Access to the Michigan State Police Forensic Science Division. (§ 92).
- Reimbursement for collect calls to counsel. (§ 134).
- Money to hire investigators. (§ 135).
- Money for copying court files and police records. (§ 136).
- Money for motion fees costs. (§ 137).
- Money for any necessary training. (§§ 138-140).
- Statewide standards for eligibility, attorney training and access to resources. (§ 94).

Notably, the need for an appropriation from the State Treasury is underscored by the language of HB 5675, a pending bill that would create a statewide indigent defense system. HB 5676 *mandates* that the Legislature make an *annual appropriation* to the public defense fund to implement the Act.²⁷

Rather than squarely addressing this issue, the Court of Appeals adopted a blind eye and deaf ear approach. While acknowledging that funding is at the core of this action, the Court of Appeals nonetheless deemed it "unnecessary" to reach the issue:

We further recognize that, should plaintiffs prevail, funding and legislation would seemingly appear to be the measures needed to be taken to correct constitutional violations. However, we are not prepared to rule on the issue whether the trial court has the authority to order appropriations, legislation, or comparable steps. It is unnecessary to do so at this juncture in the proceedings.²⁸

The Court of Appeals then suggested that "if the state takes corrective action without further need for intervention by the trial court, injunctive relief and the authority to issue constitutionally questionable forms of such relief would no longer be at issue."²⁹ Thus, because the Court of Appeals could "only speculate at this time regarding the measures ultimately needed to be taken

²⁷ HB 6576 of 2009. (Addendum 1, Sec 17(4), p 22).

²⁸ *Duncan*, 284 Mich App at 279.

²⁹ *Duncan*, 284 Mich App at 279.

in order to come into compliance," it declined to reach the issue.³⁰ "Only when all other possibilities are exhausted and explored . . . does there arise issues regarding appropriations and legislation, the separation of powers, and the full extent of court jurisdiction and authority."³¹ The problem with this approach, however, is that it ignores the very standard that a court must apply on review, as well as the realistic impact of continuing what is, ultimately, futile litigation. It fails to recognize that the authority of the Circuit Court to order additional and specific funding from the State is squarely at issue, as that is precisely the relief demanded by Plaintiffs and a basis upon which Defendants sought summary disposition.³²

Furthermore, while the Court of Appeals disclaims ruling on the separation of powers issue, it went on to do so, interpreting this Court's opinion in *46th Circuit Trial Court* to arguably support the Circuit Court's authority to order the State funding sought by Plaintiffs:

If indeed there exist systemic constitutional deficiencies in regard to the right to counsel and the right to the effective assistance of counsel, it is certainly arguable that *46th Circuit Trial Court* lends authority for a court to order defendants to provide funding at a level that is constitutionally satisfactory. The state of Michigan has an obligation under *Gideon* to provide indigent defendants with court-appointed counsel, and the "state" is comprised of three branches, including the judiciary. Const 1963, art 3, § 2. Ultimately, it is the judiciary, on a daily basis, that is integrally involved with ensuring that, before prosecutions go forward, indigent defendants are provided counsel, without which the court could not carry out its constitutional responsibilities.³³

Thus, as the Court of Appeals' dissent accurately describes, the majority opinion

³⁰ *Duncan*, 284 Mich App at 280.

³¹ *Duncan*, 284 Mich App at 280-281.

³² As the dissenting opinion notes, Plaintiffs' claims are inexorably tied to a statewide rather than a county-administered system. See footnote 1 of the dissenting opinion, which recites numerous allegations by Plaintiffs that are tied to specific funding and oversight by the State. *Duncan*, 284 Mich App at 344, 345, n 1 (Whitbeck, J. dissenting).

³³ *Duncan*, 284 Mich App at 283-284. The "sharply circumscribed" inherent power to self-appropriate "necessary" funding does not include the relief requested by Plaintiffs, particularly given that *46th Circuit* contemplates an impasse between the judiciary and legislature rather than Plaintiffs' suggestion for better operation. See *46th Circuit Trial Court*, 476 Mich at 142-144.

effectively hands over to the Circuit Court not only legislative discretion on the proper public policy to implement but also the Legislature's checkbook:

[T]he majority has issued an open invitation to the trial court to assume ongoing operational control over the systems for providing defense counsel to indigent criminal defendants in Berrien, Genesee, and Muskegon counties. And with that invitation comes a blank check, to force sufficient state level legislative appropriations and executive branch acquiescence to bring those operations to a point -- if such a point could ever be achieved -- that satisfies the trial court's determination of the judiciary's responsibilities to carry out its functions in a "constitutionally sound manner."³⁴

Plaintiffs are not simply challenging the indigent defense services in these three counties. They have framed their action, allegations, and relief to require specific appropriations from the State Treasury. The issue for summary disposition is not just whether Plaintiffs can show that services are deficient, but also whether they may use the courts to force specific state funding and oversight to correct these deficiencies.³⁵

2. The Court of Appeals erred in allowing the Circuit Court to order the Governor to administrate local systems dictated by the judiciary. Such relief usurps the power of the executive branch.

Under Mich. Const. 1963, art. 5, § 1, executive power is vested in the Governor. Among her duties, the Governor is charged with enforcing the laws of the State³⁶ and proposing a budget for the ensuing fiscal year.³⁷

Here, Plaintiffs attempt to elevate these issues from the local funding level to the State. Plaintiffs allege the Governor has failed to enforce their right to effective assistance of counsel by ceding oversight and funding to the counties and failing to provide adequate state funding.

³⁴ *Duncan*, 284 Mich App at 383.

³⁵ "[T]here are multiple correct methods of prefunding, and the method most appropriate in a specific situation is a matter of policy." *Musselman v Governor*, 450 Mich 574, 584; 545 NW2d 346 (1996).

³⁶ Const 1963, art 5, § 8.

³⁷ Const 1963, art 5, § 18.

(Complaint, ¶¶ 10, 11, 88, 89, 104, 141, 156, 157, 160, 163, 164, 167, 170, 171, 174, 177, 178, and 181). Yet the funding of trial court operations has always been assigned to the local level by the Legislature, with certain statutory exceptions.³⁸ Further, Plaintiffs allege the Governor has failed to oversee the Supreme Court Administrator's Office and enforce court rules.³⁹ (Complaint, ¶¶ 95-97). Therefore, in addition to declaratory relief, Plaintiffs requested that the Circuit Court, "[p]ermanently enjoin Defendants from subjecting Plaintiffs to practices that violate their rights," "[o]rder appropriate relief requirement Defendants to provide indigent defense programs and representation consistent with the requirements of the United States and Michigan Constitutions," and "[g]rant such other and further . . . equitable relief as the Court deems appropriate, just and proper to protect Plaintiffs from further harm by Defendants." (Complaint, Relief Requested).

As far back as 1874, in the seminal case *Sutherland v Governor*, this Court has expressed concern over such relief violating the separation of powers.⁴⁰ More recently, in *Straus v Governor*, this Court expressed its "doubt with respect to the propriety of injunctive relief against the Governor," stating, "It is clear that separation of power principles . . . preclude mandatory injunctive relief, mandamus, against the Governor."⁴¹

The Court of Appeals, however, disagreed. After noting Plaintiffs also seek declaratory and prohibitory injunctive relief—and suggesting such relief could include *prohibiting*

³⁸ MCL 600.8301; MCL 600.9947.

³⁹ The SCAO, however, is an arm of the judiciary. Const 1963, art 6, § 3 provides "the Supreme Court shall appoint an administrator of the courts and other assistants of the Supreme Court as may be necessary to aid in the administration of the Courts of this State. The administrator shall perform administrative duties assigned by the Court."

⁴⁰ *Sutherland v Governor*, 29 Mich 320, 321 (1874).

⁴¹ *Straus v Governor*, 459 Mich 526, 532; 592 NW2d 53 (1999).

*prosecution of indigent defendants*⁴²—the Court of Appeals found support for mandatory injunctive relief as well:

We believe that there may exist a basis to subject the Governor to a mandamus order under Michigan law in regard to state constitutional violations, if this case reflects the existence of impediments to the ability of the judiciary to carry out its duties in compliance with constitutional principles relative to indigent defendants being prosecuted in state courtrooms.⁴³

The Court of Appeals notes that *Straus* did not involve a claim brought under 42 USC 1983, and that "a state official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official-capacity actions for prospective relief are not treated as actions against the State."⁴⁴ Therefore, it concluded, "The Governor can thus be sued for injunctive relief under 42 USC 1983, which makes clear that equitable relief is available for a federal constitutional violation." The Court of Appeals further concluded that "[t]here is no language in 42 USC 1983 suggesting that equitable relief in the form of a mandatory injunction or mandamus is not available against the Governor, or that there is a distinction to be made between prohibitory injunctive relief and mandatory injunctive relief."⁴⁵ Yet, the Complaint here does not assert a federal claim under 42 USC § 1983 against the Governor. This analysis, employed by the Court of Appeals, completely misses the mark.

Defendants do not seek to immunize the Governor from federal constitutional violations through the operation of State law. To the contrary, Defendants seek to avoid an unconstitutional exercise of power to correct perceived errors in state law. As the dissent

⁴² "Such a remedy could potentially entail a cessation of criminal prosecutions against indigent defendants absent constitutional compliance with the right to counsel." *Duncan*, 284 Mich App at 273.

⁴³ *Duncan*, 284 Mich App at 273, 274.

⁴⁴ *Duncan*, 284 Mich App at 274 (quoting *Will v Michigan Dep't of State Police*, 491 US 58, 71 n10; 109 S Ct 2304; 105 L Ed 2d 45 (1989)).

⁴⁵ *Duncan*, 284 Mich App at 275.

accurately observes, the policy implications of allowing the relief Plaintiffs seek are "staggering," putting the judicial branch in charge of funding, the executive branch in charge of court administration, and a circuit court in one county in charge of court rules and funding for other counties:

First, such operational control would override the explicit provisions of the Indigent Criminal Defense Act.

Second, such operational control would give the trial court the opportunity, and perhaps even the obligation, to nullify the provisions of the indigent criminal defense court rule, thereby superseding the authority of the Supreme Court and the State Court Administrator.

Third, vesting such operational control in one circuit court creates the anomaly of giving that circuit court the power to direct some of the operations of three other, theoretically co-equal, circuit courts.

Fourth, the record of judicial operational control of executive branch operations, such as prisons and schools, has been, to be charitable, decidedly mixed.

Fifth, and finally, such operational control is in direct contravention of the basic concept of separation of powers.⁴⁶

The dissent is correct. The sort of operational control contemplated in Plaintiffs' action, and at least left open by the Court of Appeals, would violate the separation of powers. The issue is not whether any scenario exists under which a court could issue mandamus against the Governor, but rather, what set of facts could possibly warrant issuing such an extraordinary remedy in this case. If, as Plaintiffs allege, the counties and SCAO are not fulfilling their duties set forth by statute and court rule, it is not for the Governor to rush in and take over those functions. Nor is it proper for the courts to order her to do so. The Governor may exercise authority over the judicial branch under Const 1963, art 3, § 2 only when explicitly authorized by the Constitution. Nothing in Michigan's Constitution authorizes the Governor to exercise

⁴⁶ *Duncan*, 284 Mich App at 383, 384 (Whitbeck, J., dissenting).

supervisory authority over the judicial branch. The administration of the courts through SCAO and the adoption of court rules are functions of the "One Court of Justice" system under Const 1963, art 6, § 1. Rather, the Legislature may choose to implement and fund a statewide system. And, of course, each Plaintiff has a cause of action in that county where the violation is alleged.

3. Having brought their action against the State and Governor, rather than those counties in which service is challenged, Plaintiffs lack standing and fail to state a claim upon which relief can be granted.

Michigan's current statutory scheme provides for appointment of counsel to indigent defendants at the local level⁴⁷ in which the trial court determines and awards reasonable compensation for appointed attorneys.⁴⁸ The counties pay the appointed attorney the amount the county's chief judge considers reasonable compensation for the services performed.⁴⁹ Plaintiffs do not, however, challenge the current statutory scheme, facially or as applied. Despite claiming inadequate service from the counties, Plaintiffs have not sued any county officials.⁵⁰ Thus, as noted in the dissent below, it is possible the Circuit Court could grant the requested relief without any determination of the facial or as applied validity of the current statutory scheme.⁵¹

As this Court explained in *National Wildlife*, it is not for the judiciary to decide matters of public policy—a limitation that is maintained in large part through the doctrine of standing.⁵² Because administration of any statute "is essentially a matter of public and not of individual concern," a party must be able to show actual or imminent injury as the result of its enforcement.

⁴⁷ MCL 775.16.

⁴⁸ *In re Attorney Fees of Mullkoff*, 176 Mich App 82, 85; 438 NW2d 878 (1989).

⁴⁹ *In re Jacobs*, 185 Mich App 642, 645; 463 NW2d 171 (1990). See also, *Ottawa County Controller v Ottawa Probate Judge*, 156 Mich App 594, 601-602; 401 NW2d 869 (1986) (County board required to appropriate money for probate court operations).

⁵⁰ Under MCL 600.8103, the funding units are responsible for maintaining, financing and operating the respective district court. Under MCL 600.9947, the counties are responsible for a majority of the funding of circuit court operations. See also *Cameron v Monroe County Probate Court*, 457 Mich 423, 426; 579 NW2d 859 (1998).

⁵¹ *Duncan*, 284 Mich App at 387.

Otherwise the court would not be resolving a controversy, but rather, assuming a position of authority over the governmental acts of co-equal departments.⁵³ As to the realm of judicially cognizable disputes, this Court has recognized:

Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of the Congress and the Chief Executive. . . . To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art II, § 3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," and to become "virtually continuing monitors of the wisdom and soundness of Executive action. We have always rejected that vision of our role [Citations omitted; emphasis in original.]"⁵⁴

Plaintiffs here seek as relief a different system than that established by current legislation. Citizens who seek a statewide appointment system instead of the system required by statute, may engage in the political process. In fact, legislation to create a statewide indigent defense system is pending before the Legislature⁵⁵—where the delicate balance between policy and the State's ability to fund policy belongs. Significantly, one of the purposes of the pending Act is to "[e]nsure that adequate state funding of the state public defense system is provided and managed in a fiscally responsible manner." (Addendum, Sec 17(2)e, p 2). The bill mandates that the State of Michigan "shall be responsible for all costs of the public defense system and public defense services to ensure the right to counsel under the constitution of the United States and the state constitution of 1963." (Addendum, Sec 17(1), p 21). And as mentioned above, HB 5676 *mandates* that the Legislature make an *annual appropriation* to the public defense fund to

⁵² *Nat'l Wildlife Fed'n*, 471 Mich at 615.

⁵³ *Nat'l Wildlife Fed'n*, 471 Mich at 616 (quoting *Massachusetts v Mellon*, 262 US 447, 487-489; 43 S Ct 597; 67 L Ed 1078 (1923)).

⁵⁴ *Nat'l Wildlife Fed'n*, 471 Mich at 617 (quoting *Lujan v Defenders of Wildlife*, 504 US 555, 576-577; 112 S Ct 2130; 119 L Ed 2d 351 (1992)).

implement the Act.⁵⁶ This underscores Defendants' argument that the massive overhaul Plaintiffs seek would require the Circuit Court to force the Legislature to appropriate funds.

As of this writing, the bill has not passed either the House or the Senate. But as the dissent correctly notes, the mere fact the political process has thus far not resolved the matter does not mean Plaintiffs can achieve policy goals through the courts:

[I]t is the Legislature -- where matters of public policy are openly debated and openly decided upon -- whose responsibility it is to make the law. And, by enactment of the indigent criminal defense act, the Legislature has done just that, it has made the law. It may now be advisable to change the law. Indeed, the majority recognizes that there are efforts underway to do so. But, to date, those efforts--whether for good reasons or bad--have been unsuccessful. The Duncan plaintiffs invite the judiciary to impose changes that, to date, their advocates have been unable to secure through the legislative process.⁵⁷

While this lawsuit may be more expedient than the political process, there is a fundamental difference between assessing the quality of counsel being received in a particular county by indigent defendants and issuing an order directing specific state funding and oversight.

Plaintiffs have argued that Defendants' separation of powers argument is not ripe for review—that there is nothing to review at this stage of the proceedings. They further argued that the nature and scope of relief must await the completion of discovery, the development of a factual record, a hearing or trial on the merits, and a finding of unconstitutionality. (Pls' Resp to App for Leave, pp 6-7). In other words, Plaintiffs must be given the opportunity to troll the

⁵⁵ HB 5676 of 2009 (Addendum).

⁵⁶ HB 6576. (Addendum, Sec 17(4), p 22).

⁵⁷ *Duncan*, 284 Mich App at 387, 388 (Whitbeck J. dissenting). In *National Wildlife*, this Court cautioned against misperceiving the judicial power as "a forum for giving parties who were unsuccessful in the legislative and executive processes simply another chance to prevail." *Nat'l Wildlife Fed'n*, 471 Mich at 616.

system for facts establishing standing and injuries, and to fashion a remedy at the State's expense where a substantial legal issue, dispositive of their claims, exists.

Defendants' separation of powers argument is both ripe for review and critical to the legal sufficiency of this case. Plaintiffs cannot avoid its import by masking their pleas for funding and massive overhaul behind a "mere" request for declaratory and injunctive relief. Plaintiffs argue they seek only declaratory and injunctive relief, but their Complaint, the relief sought and the arguments presented in opposition brief on appeal belie this claim.⁵⁸

Indeed the essence of their Complaint is a funding issue and an effort for a sweeping overhaul of the current county system by creating a statewide, state-funded system. The granting of requested relief here would require the judicial exercise of both executive and legislative power by determining the system, the type and quality of services required, and the level of appropriation needed to meet constitutional muster—all without first deciding that Plaintiffs have actually suffered a "prejudice to their defense." This action seeks to avoid the available and necessary executive and legislative processes to effect a change in the State's appointed counsel system, substituting a judicial solution that compels specific executive and legislative action while removing all discretion and deliberate process from their decision-making. Defendants

⁵⁸ For example, while Plaintiffs contend that their Complaint does not ask for court-ordered appropriation from the State Treasury (App'ees Resp Br to App for Leave at p 8), they allege that Defendants have failed to "take any steps to ensure that the indigent defense services in the Counties are *adequately funded* and administered." (Compl, p 10, emphasis added). Their Complaint also broadly alleges that it is Defendants' failure to "provide *funding* or oversight" to the named counties or "any of the State's counties" that has created a "broken indigent defense system." (Compl, p 11, emphasis added). Indeed, in addition to asking the Court to declare Defendants' actions unconstitutional and unlawful and to permanently enjoin Defendants from violating their rights, Plaintiffs' Complaint requests that the court "*order appropriate relief requiring Defendants to provide indigent defense programs and representation consistent with the requirements of the United States and Michigan Constitutions*" and "[g]rant such other and further declaratory and equitable relief as the Court deems appropriate, just and proper" (Complaint, p 48, emphasis added.)

would be exposed to continuous enforcement actions once such a declaration and injunction were entered.

Absent a reversal of the Court of Appeals majority here, this Court needs to anticipate the very real probability that it leaves in the hands of a single circuit court the ability to order the adoption and funding of a statewide indigent defense system. That this "might not happen" is of little comfort. Under any potential remedy offered by Plaintiffs—even alternative remedies "negotiated" in the course of this litigation—the judiciary forces the other branches of government to restructure the indigent defense system and its funding to comply either with a judicially enacted program or its threat. Essentially, this Court is being asked to engage in risk analysis—which is a function to be performed by our Legislature, not our courts.

The Supreme Court of New York recognized a similar challenge to its appointed counsel program as being a clear violation of the Separation of Powers doctrine in *Hurrell-Harring v State of New York*.⁵⁹ There, the Court determined plaintiffs' claims were not justiciable and dismissed the complaint, recognizing that the "deficiencies" alleged by the class of indigent defendants had "more to do with how these programs are funded and administered than how individuals have been deprived of the meaningful assistance of counsel in defending against criminal charges pending against them."⁶⁰ In that Court's view, "complex choices that entail selecting among competing priorities and allocating finite resources are matters best left to the sound exercise of the discretion of the coordinate branches of government and are not the type that the Judiciary, to be frank, is designed or well suited to make."⁶¹ Here, Defendants'

⁵⁹ *Hurrell-Harring v New York*, 883 NYS 2d 349, 352, 353 (App Div 2009).

⁶⁰ *Hurrell-Harring*, 883 NYS 2d at 351-352.

⁶¹ *Hurrell-Harring*, 883 NYS 2d at 352 (internal citations omitted).

separation of powers argument is ripe for review and Plaintiffs' case should be dismissed because it seeks relief that constitutes a *prima facie* violation of the separation of powers.

II. Prejudice to the defense is a necessary element to a pre-conviction challenge to effective assistance of counsel whether raised pre- or post-conviction and must be analyzed on a case-by-case basis. Plaintiffs have not pled facts sufficient to demonstrate prejudice in a Complaint based on a generalized claim of widespread systemic deficiency in Michigan's indigent defense system. Plaintiffs' Complaint is not justiciable and it fails to state a claim upon which relief may be granted.

A. Standard of Review

Matters of justiciability are reviewed de novo.⁶² Likewise, grant or denial of summary disposition is reviewed do novo.⁶³

B. Discussion

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."⁶⁴ The Michigan Constitution provides for the same right.⁶⁵ In *Gideon v Wainwright*, the U. S. Supreme Court set forth the importance of providing counsel for indigent criminal defendants.⁶⁶ Defendants do not question that importance. *Gideon* did not, however, address the effectiveness of appointed counsel who represent criminal defendants. Nor, since *Gideon*, has our highest court specifically addressed effectiveness of counsel in the pre-conviction context. Certainly, the Supreme Court has never presumed to tell the States what kind of system it must put in place to assure indigent criminal defendants' right to effective assistance of counsel. What is known about the standard of effectiveness, and what must be applied to the significant questions in this case, must be gleaned from the substantial body of Supreme Court caselaw discussing the Sixth Amendment.

⁶² *Michigan Chiropractic Council*, 475 Mich at 369.

⁶³ *Wesche v Mecosta Co Rd Comm*, 480 Mich 75, 83; 746 NW2d 847 (2008); *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

⁶⁴ US Const amend VI.

⁶⁵ Const 1963, art 1, § 20.

The U. S. Supreme Court has never indicated that the Sixth Amendment's purpose is to improve the quality of legal representation, although this guarantee has been found to be synonymous with the right to effective assistance of counsel.⁶⁷ Nor is it violated by every flaw or deficiency in the quality of the legal representation provided. Rather, a constitutional violation occurs when that legal representation, taken as a whole, is so inadequate as to "undermine the proper functioning of the adversarial process [so] that the trial cannot be relied on as having produced a just result."⁶⁸

Neither federal nor state law recognizes the right to counsel standing alone—for its own sake—but instead, for the effect it has in ensuring that a defendant charged with a crime is treated fairly and the criminal action has produced a fair result. As the New York Supreme Court noted in *Hurrell-Harring*, it "is not, as plaintiffs allege, a general right that can be asserted in a civil action to support a claim that seeks to compel other branches of government to allocate additional public resources and intensify administrative oversight" of legal representation in criminal prosecutions of indigent defendants."⁶⁹ Simply put, neither the U.S. Supreme Court nor this Court has ever concluded, or even implied, that the Sixth Amendment right to counsel is analyzed any standard other than "prejudice to the defense" in the pre-trial, as in the post-trial, context.

1. Prejudice is an essential component of an effective assistance of counsel claim at any stage of litigation.

Supreme Court precedent unfailingly stresses prejudice as an essential element of a Sixth Amendment claim. For example, in the post-conviction context, the Court in *Strickland v*

⁶⁶ *Gideon v Wainright*, 372 US 335, 344; 83 S Ct 792; 9 L Ed 2d 799 (1963).

⁶⁷ *Curtis v United States*, 511 US 485, 507; 114 S Ct 1732; 128 L Ed 2d 517 (1994); *Strickland*, 466 US at 686.

⁶⁸ *Strickland*, 466 US at 686; see also *Washington v Hofbauer*, 228 F3d 689, 702 (CA 6, 2000); *Girts v Yanai*, 501 F3d 743, 756-757 (CA 6, 2007).

Washington established a two-part test that required not only a showing of ineffective assistance but also a showing that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial.⁷⁰ Numerous Supreme Court cases underscore the importance of prejudice by limiting the situations where prejudice may be assumed in this context.⁷¹

We know from *Gideon* that, standing alone, there is no Sixth Amendment right to counsel enforceable against the States; that right is safeguarded against state action by the Due Process Clause of the Fourteenth Amendment.⁷² Therefore, the enforceable constitutional violation is the prejudice that attaches at any critical stage from the failure to provide effective assistance of counsel. In other words, it is a prejudice to the process itself. Accordingly, indigent criminal defendants challenging the pre-conviction effectiveness of counsel must establish prejudice.

Since the inception of this litigation, Defendants have argued that prejudice is a requirement of an ineffective assistance of counsel claim at any stage of the litigation. But prejudice cannot be divorced from pre-conviction analysis. Contrary, however, to Plaintiffs and the Court of Appeals majority, Defendants do not argue that this Court must apply the *Strickland* test to the pre-conviction contest. As the dissent below points out, neither *Gideon* nor *Strickland* "presume[d] to tell the states *how* to assure that indigent criminal defendants receive effective assistance of counsel."⁷³

⁶⁹ *Hurrell-Harring*, 883 NYS 2d at 352.

⁷⁰ *Strickland*, 466 US at 700.

⁷¹ See e.g., *Strickland*, 466 US at 692 (discussing actual or constructive denial of the assistance of counsel altogether).

⁷² *Gideon*, 372 US at 341-343.

⁷³ *Duncan*, 284 Mich at 357 (Whitbeck, J., dissenting).

Whether this Court adopts *Strickland* or fashions a different test to fit the pre-conviction setting, if one is even possible before the full outcome is known,⁷⁴ the plaintiff who raises the effective assistance claim *must* establish prejudice. Such an approach fulfills the constitutional mandate of *Gideon* while avoiding the very speculation and factually unsupported presumption of prejudice upon which Plaintiffs' claims are based. To divorce the element of prejudice from this claim simply because Plaintiffs raise it in a pre-trial application not only avoids the historic analysis of this constitutional right, but also destroys the limitation recognized by precedent. While the test to determine prejudice of unconstitutional proportions in the pretrial context has not been fully defined,⁷⁵ this Court should look to *Strickland* and its predecessors 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. Further, as with a post-conviction denial of ineffective assistance of counsel challenges, the pre-conviction assertion must be analyzed under the specific facts of each case to determine whether prejudice of an unconstitutional level exists and invalidates the proceedings. This approach is also supported by the majority opinions in *Hurrell-Harring*,⁷⁶ *Platt v Indiana*⁷⁷ and *Kennedy v Carlson*,⁷⁸ and the dissenting opinions in this case⁷⁹ and *Luckey v Harris (Luckey II)*.⁸⁰

⁷⁴ In *Strickland*, the United States Supreme Court held that the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 US at 688. Any standard adopted by this Court for determining pre-conviction prejudice would need to 1) define the level of prejudice that creates a constitutional violation, by setting forth an objective reasonableness standard for pre-conviction assistance, with reference to all counsel, appointed and retained; and 2) provide guidance as to how to determine whether widespread, systematic, pervasive deficiency actually caused the prejudice.

⁷⁵ *Strickland*, 466 US at 685-687.

⁷⁶ *Hurrell-Harring*, 883 NYS 2d at 351.

⁷⁷ *Platt v Indiana*, 664 NE2d 357, 363-364 (Ind Ct App 1996), *cert denied*, 520 US 1187 (1997)).

⁷⁸ *Kennedy v Carlson*, 544 NW2d 1, 6-8 (Minn 1996).

⁷⁹ *Duncan*, 284 Mich App at 380 (Whitbeck, J., dissenting).

⁸⁰ *Luckey v Harris*, 896 F2d 479, 480 (CA 11, 1989) (*Luckey II*) (Edmondson, J., dissenting).

The New York Supreme Court in *Hurrell-Harring* noted that the plaintiffs challenging that New York's public defense system was systematically deficient had failed to show either how the alleged "deficiencies" in the system had resulted in a denial of a defendant's right to counsel in their criminal prosecution or how these "deficiencies" had served to affect the outcome of any particular case.⁸¹ In *Platt v Indiana*, the Indiana Court of Appeals denied a motion by a class of indigent defendants for injunctive relief, recognizing the necessity of establishing prejudice in the pre-conviction process, and reasoning that the plaintiffs' claims of a likelihood of prejudice were too speculative and that appellate and post-conviction relief provided adequate remedy at law to review Sixth Amendment claims.⁸² In *Kennedy v Carlson*, too, the Minnesota Supreme Court dismissed as non-justiciable a suit by a public defender challenging the statute establishing the funding system for Minnesota's public defenders, concluding that the public defenders' claims of constitutional violations were too speculative and hypothetical to support jurisdiction" because the public defender showed no evidence that his clients actually had been prejudiced due to ineffective assistance of counsel."⁸³

Similarly, the Court of Appeals dissent in this case recognized that:

absent a showing here that [Plaintiffs'] attorneys' claimed deficiencies prejudicially affected their right to receive a fair trial as opposed to merely claiming violation of an abstract right to a particular level of representation, the Duncan plaintiffs cannot show that the State has violated their Sixth Amendment right to a fair trial.⁸⁴

Likewise, in *Luckey v Harris*, pre-conviction indigent defendants alleged deficiencies in Georgia's indigent defense system and asked the court to issue an order requiring the state

⁸¹ *Hurrell-Harring*, 883 NYS 2d at 351.

⁸² *Platt v Indiana*, 664 NE2d at 363-64.

⁸³ *Kennedy v Carlson*, 544 NW2d 1, 6-8 (Minn 1996).

⁸⁴ *Duncan*, 284 Mich App at 380 (Whitbeck, J., dissenting).

defendants to meet minimum constitutional standards in providing criminal defense services.⁸⁵

Although on appeal the Eleventh Circuit concluded that deficiencies that do not meet the "ineffectiveness standard may nonetheless violate the Sixth Amendment right to counsel, the dissent in *Luckey II* properly recognized that:

[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to *constitute ineffective assistance* under the constitution.⁸⁶

Here, the Court of Appeals erred when it concluded that the prejudice prong of the *Strickland* test is inapplicable to pre-conviction suits, and that justiciability does not equate 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."⁸⁷

While the Court of Appeals purported to reject the prejudice component, it plainly applied a *Strickland* analysis by repeatedly referring to both deficient performance (performance falling below a standard of objective reasonableness) and prejudice (depriving the defendant of a fair trial)—the two prongs of the *Strickland* test:

Here criminal defendants do not sustain harm, for purposes of justiciability analysis and the constitutional right to effective assistance of counsel, simply because of their status as indigent defendants with court-appointed counsel subject to prosecutorial proceedings in a system with presumed existing deficiencies. *There needs to be an instance of deficient performance or inadequate representation, i.e. 'representation [falling] below an objective standard of reasonableness.'*⁸⁸

* * *

We further hold that justiciable injury or harm is shown when court-appointed counsel's performance or representation is deficient relative to a critical stage in

⁸⁵ *Luckey v Harris*, 860 F2d 1012, 1013 (CA 11, 1988), vacated on other grounds, 967 F2d 673 (CA 11, 1989).

⁸⁶ *Luckey II*, 896 F2d at 480.

⁸⁷ *Duncan*, 284 Mich App at 305.

⁸⁸ *Duncan*, 284 Mich App at 297 (emphasis added) (quoting *Strickland*, 466 US at 688).

the proceedings and, absent a showing that it affected the reliability of a verdict, the deficient performance results in a detriment to a criminal defendant that is relevant or meaningful in some fashion.⁸⁹

Moreover, the Court of Appeals alludes to the prejudice requirement, describing Plaintiffs' necessary proofs in this case as a "monumental" burden.⁹⁰ It describes this heavy burden:

We hold that, in the context of this class action civil suit seeking prospective relief for alleged widespread constitutional violations, injury or harm is shown when court-appointed counsel's representation falls below an objective standard of reasonableness (deficient performance) and results in an unreliable verdict or unfair trial, when a criminal defendant is actually or constructively denied the assistance of counsel altogether at a critical stage in the proceedings, or when counsel's performance is deficient under circumstances in which prejudice would be presumed in a typical criminal case. We further hold that injury or harm is shown when court-appointed counsel's performance or representation is deficient relative to a critical stage in the proceedings and, absent a showing that it affected the reliability of a verdict, the deficient performance results in a detriment to a criminal defendant that is relevant and meaningful in some fashion, e.g., unwarranted pretrial detention. Finally, we hold that, when it is shown that court-appointed counsel's representation falls below an objective standard of reasonableness with respect to a critical stage in the proceedings, there has been an invasion of a legally protected interest and harm occurs. Plaintiffs must additionally show that instances of deficient performance and denial of counsel are widespread and systemic and that they are caused by weaknesses and problems in the court-appointed, indigent defense systems employed by the three counties, which are attributable to and ultimately caused by defendants' constitutional failures [internal footnote omitted]. If the aggregate of harm reaches such a level as to be pervasive and persistent (widespread and systemic), the case is justiciable and declaratory relief is appropriate, as well as injunctive relief to preclude future harm and constitutional violations that can reasonably be deemed imminent in light of the existing aggregate of harm.⁹¹

Where this analysis fails, however, is in applying this heavy burden—a burden that essentially distills down to a prejudice standard—only to a proceeding on the merits and not to Plaintiffs' claims as pled.

⁸⁹ *Duncan*, 284 Mich App at 302.

⁹⁰ *Duncan*, 284 Mich App at 303.

⁹¹ *Duncan*, 284 Mich App at 302, 303 (citation omitted).

The Court of Appeals concludes that Plaintiffs' Complaint has sufficiently alleged facts that, if true, establish standing, establish that the case is ripe for adjudication, and that state claims upon which declaratory and injunctive relief can be awarded.⁹² But the class consists of *future* indigent criminal defendants, not just the representative Plaintiffs. Plaintiffs have not, nor can they, establish what has not yet occurred. Nor have they set forth facts sufficient to demonstrate that harm is systematic such that the actions of appointed counsel will lead to an unfair outcome.

Without explicitly saying so, both the Circuit Court and the Court of Appeals made a determination that the *Duncan* Plaintiffs' allegations were sufficient to warrant a presumption of prejudice.⁹³ The majority refutes this characterization, but its allowance of Plaintiffs' pre-conviction claims on the facts pled requires the presumption that inactions of the State and the Governor have so prejudiced indigent criminal defendants that they have been or will be denied their constitutional right to effective counsel and a fair trial. The Court below all but admitted that it presumed prejudice by stating that "[w]idespread and systemic instances of deficient performance caused by a poorly equipped appointed-counsel system will not cease and be cured with a case-by-case examination of individual criminal appeals, *given that prejudice is generally required and often not established.*"⁹⁴

2. Plaintiffs' claims do not amount to a per se violation of the Sixth Amendment right to effective assistance.

Plaintiffs have not pled facts sufficient to warrant a presumption of prejudice.⁹⁵ Such a presumption may—as the dissent recognizes—"avoid[] the conceptually impossible process in a pre-conviction case of assessing the performance of the indigent criminal defendant's counsel

⁹² *Duncan*, 284 Mich App at 370.

⁹³ *Duncan*, 284 Mich App at 361 (Whitbeck J., dissenting).

⁹⁴ *Duncan*, 284 Mich App at 307 (emphasis added).

when, for the most part, that performance has yet to occur," but it is not supported by Plaintiffs' actual claims in this case. Nor does it comport with constitutional caselaw.

The U. S. Supreme Court has held that "[c]laims of ineffective assistance are generally to be resolved through an inquiry into the fairness of a particular prosecution, and not by per se rulemaking."⁹⁶ That Court has clearly defined and limited those circumstances where the cost of litigating its effect in a particular case is unjustified and prejudice may be assumed:⁹⁷ where no counsel has been appointed;⁹⁸ where counsel is not present for a post-conviction line-up;⁹⁹ where the right to a pre-trial hearing has been denied;¹⁰⁰ and where there is joint representation of co-defendants and conflict of interest is apparent.¹⁰¹ But the Supreme Court has never assumed prejudice and waived the actual prejudice requirement—pre or post-conviction—on grounds such as those asserted in this case. In fact, the Court has made clear that apart from circumstances of the magnitude outlined above, "there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt."¹⁰²

Neither *Gideon* nor its progeny guarantees an indigent criminal defendant a particular attorney, an attorney who possesses a particular level of skill or experience, or a predetermined

⁹⁵ *Duncan*, 284 Mich App at 361 (Whitbeck J., dissenting) (citing *Strickland*, 466 US at 692).

⁹⁶ *In re Forfeiture Hearing as to Caplin & Drysdale*, Chartered, 837 F2d 637 (CA 4, 1988) (citing *Cronic*, 466 US at 648 & *Strickland*, 466 US at 668).

⁹⁷ *Cronic*, 466 US at 658 and cases cited therein.

⁹⁸ *Coleman v Alabama*, 399 US 1, 7; 90 S Ct 1999; 26 L Ed 387 (1970) (citing *Powell v Alabama*, 287 US 45, 69; 53 S Ct 55; 77 L Ed 158 (1932)); see also *Cronic*, 466 US at 659.

⁹⁹ *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

¹⁰⁰ See *Pugh v Rainwater*, 483 F2d 778, 787 (CA 5, 1973), *aff'd in part, rev'd in part* on other grounds sub nom *Gerstein v Pugh*, 420 US 103; 95 S Ct 854; 43 L Ed 2d 54 (1975).

¹⁰¹ *United States v Lopez*, 548 US 140; 126 S Ct 2557, 2561; 165 L Ed 2d 409 (2006) (articulating the right to be represented by counsel free from joint representation of conflicts of interests).

¹⁰² *Cronic*, 466 US at 659.

amount of outside resources to be available to the appointed counsel. Indeed, the Supreme Court has expressly cautioned against forming a "checklist for judicial evaluation of attorney performance," reiterating instead that the inquiry must be whether counsel's assistance was reasonable considering all the circumstances.¹⁰³ Even prevailing norms of practice such as ABA standards are only "guides" to determining what is reasonable and cannot take account of the variety of circumstances faced by defense counsel representing a criminal defendant.¹⁰⁴ The Sixth Amendment refers simply to "counsel," but does not specify the particular requirements of effective assistance. *Strickland* specifically rejected "detailed guidelines" that would encourage the proliferation of ineffectiveness challenges in the post-conviction analysis of prejudice.¹⁰⁵ Instead, the Supreme Court has instructed courts to "presume that the [appointed] lawyer is competent to provide the guiding hand that defendant needs . . ."¹⁰⁶ and to require that indigent criminal defendants meet their burden of demonstrating a constitutional violation.¹⁰⁷

Plaintiffs ignore this instruction and suggest, instead, that their pre-conviction claims challenging the quality of representation deserve the same treatment as claims alleging the absence of representation. In their response to Defendants' application, Plaintiffs, citing *Rothgery v Gillespie County*,¹⁰⁸ asserted a pre-conviction Sixth Amendment right to essentially dictate the quality of counsel and the investigative resources at counsel's disposal. But *Rothgery* lends no support to Plaintiffs' claims since it merely reiterates that the right to counsel (i.e. to have counsel appointed) attaches at the initial appearance before a judicial officer, whether by

¹⁰³ *Strickland*, 466 US at 688.

¹⁰⁴ *Strickland*, 466 US at 688-689.

¹⁰⁵ *Strickland*, 466 US at 688.

¹⁰⁶ *Cronic*, 466 US at 658 (internal citation omitted).

¹⁰⁷ *Cronic*, 466 US at 658.

¹⁰⁸ *Rothgery v Gillespie County, Texas*, ___ US ___, 128 S Ct 2578; 171 L Ed 2d 366 (2008).

way of formal charge, preliminary hearing, indictment, information, or arraignment."¹⁰⁹ Indeed, contrary to already established Supreme Court precedent,¹¹⁰ the plaintiff in that case was taken before a magistrate judge, informed of the formal accusation against him, and sent to jail until he posted bail, yet was not appointed counsel.¹¹¹ *Rothgery's* refusal to ignore "prejudice to defendant's pretrial liberty" refers to the presumed prejudice of the absence of counsel. Had Mr. Rothgery been appointed counsel at his first appearance before a judicial officer—as he should have been—his counsel would have been presumed competent absent a showing of prejudice. But, unlike *Rothgery*, where prejudice was presumed because plaintiff had no counsel at all at a critical stage, Plaintiffs here are not alleging that Michigan fails to appoint counsel at the first or subsequent proceedings. In fact, *Rothgery* lists Michigan as among the states that "take the first step toward appointing counsel 'before, at, or just after initial appearance.'"¹¹² *Rothgery* does not establish a right to a particular level of skill, experience, salary, or investigative resources.

The U. S. Supreme Court in *Morris v Slappy* expressly rejected the very expansive approach of the Sixth Amendment right to counsel that Plaintiffs seek here and that was recognized by the Court of Appeals below.¹¹³ In *Morris* the Ninth Circuit had concluded the Sixth Amendment right to counsel "would be without substance if it did not include the right to a *meaningful attorney-client relationship*."¹¹⁴ The Ninth Circuit held the trial judge abused his discretion and violated this right by denying a motion for a continuance based on the substitution

¹⁰⁹ *Rothgery*, 128 S Ct at 2583.

¹¹⁰ *Rothgery*, 128 S Ct at 2584.

¹¹¹ *Rothgery*, 128 S Ct at 2578.

¹¹² *Rothgery*, 128 S Ct at 2587 (citing Michigan: see Mich. Rules Crim. Proc 6.005 (West 2008)).

¹¹³ *Morris v Slappy*, 461 US 1; 103 S Ct 1610; 75 L Ed 2d 610 (1983).

¹¹⁴ *Morris v Slappy*, 649 F2d 718, 720 (CA 9, 1981) (emphasis in original), rev'd and remanded, 461 US 1 (1983)).

of appointed counsel just six days prior to trial.¹¹⁵ The Supreme Court reversed, holding that the Ninth Circuit had "misread the record and the controlling law and announced a *new constitutional standard which is unsupported by any authority*."¹¹⁶ *Morris* clarified that "[n]o court could possibly guarantee that a defendant will develop the kind of rapport with his attorney—privately retained or provided by the public—that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel."¹¹⁷ Additionally, *United States v Lopez* recently clarified that the right to secure counsel of one's choice is reserved for those who do not require appointed counsel.¹¹⁸

The adoption of Plaintiffs' argument that they have a pre-conviction right to appointed counsel with a particular level of experience, skill, compensation, or predetermined investigative resources at their disposal—without any demonstration of actual prejudice—and the granting of Plaintiff's requested relief, would lead to the very result rejected in *Strickland* and *Morris*: detailed guidelines as to what constitutes "competent counsel." Direct appeals from a conviction and writ of habeas corpus are both effective remedies to address any claim that these Plaintiffs have been denied effective assistance of counsel.¹¹⁹

3. Because Plaintiffs have not pled facts sufficient to establish prejudice, they lack standing, their claims are not ripe for adjudication, and they have failed to state claims upon which declaratory and injunctive relief may be granted.

a. Standing

Standing requires three elements: (i) the plaintiff must have suffered an injury-in-fact – an invasion of a legally protected interest that is concrete and particularized, and actual or

¹¹⁵ *Morris*, 649 F2d at 718.

¹¹⁶ *Morris*, 461 US at 12 (emphasis added).

¹¹⁷ *Morris*, 461 US at 13-14.

¹¹⁸ *Lopez*, 548 US at 144.

¹¹⁹ *Hurrell-Harring*, 883 NYS 2d at 355.

imminent, not conjectural or hypothetical; (ii) there must be a causal connection between the injury and the conduct complained of, i.e., the injury has to be fairly traceable to the challenged action of the defendant rather than the result of the independent action of a party not before the court; and (iii) it must be likely, not speculative, that the injury will be redressed by a favorable decision.¹²⁰

Plaintiffs have not pled facts sufficient to establish prejudice based on widespread, systematic deficiencies in Michigan's public defender system, as distinguished from their generalized complaint as to the quality of legal services offered to indigent criminal defendants. Therefore, they have not established the injury-in-fact component of standing. Plaintiffs' claims that present and future indigent criminal defendants in Michigan will receive ineffective assistance of counsel due to the alleged widespread deficiencies in Michigan's indigent defense system, are too speculative and hypothetical. Neither have Plaintiffs demonstrated that the alleged violation has been caused by the State and the Governor or that their changes will ensure effective assistance for indigent criminal defendants at every stage.

The Court of Appeals acknowledges that Plaintiffs "must prove widespread and systematic constitutional violations that are actual or imminent, constituting the harm necessary to establish justiciability."¹²¹ But the majority was content to allow Plaintiffs to proceed without sufficient facts to demonstrate the necessary harm, causation, and redressibility. Justiciability doctrines exist for this very purpose—to ensure that lawsuits are appropriate for judicial action.

¹²⁰ *National Wildlife Federation*, 471 Mich at 614-615 (internal quotations omitted).

b. Ripeness

For similar reasons, Plaintiffs' claims are not ripe. Ripeness precludes the adjudication of hypothetical or contingent claims prior to actual injury. An action is not ripe if it rests on contingent future events that may not occur as anticipated or may not occur at all.¹²²

Here, there has been no showing that the State and the Governor caused the alleged deficient performance at the local level. Again, the majority is content to allow Plaintiffs to proceed when their claims do not sufficiently plead facts necessary to establish the alleged harms. As the dissent notes, Plaintiffs' Complaint does not allege a single fact that supports their generalized assertions that the alleged inaction of the State and the Governor has *caused* the deficient performance that the *Duncan* plaintiffs outline. Given that Plaintiffs' complaints are contingent upon future events that may never occur, "the harm asserted has not matured sufficiently to warrant judicial intervention."¹²³ Indeed, the actions of appointed counsel *may not* fall below the standard of objective reasonableness, and indigent criminal defendants *may not* be prejudiced by these actions so as to be deprived of a fair trial.

c. Plaintiffs' requested declaratory and injunctive relief

The rights and legal relations of a party may be declared only when there is an actual controversy.¹²⁴ As to injunctive relief, it is an extraordinary remedy that is available only when there is no adequate remedy at law and there exists the danger of irreparable injury that is real and imminent.

The Court of Appeals concludes that Plaintiffs "would be entitled to declaratory relief, in the context of this case and assuming establishment of causation, if they can show widespread

¹²¹ *Duncan*, 284 Mich App at 299.

¹²² *Michigan Chiropractic Council*, 475 Mich at 371, n 14.

¹²³ *Duncan*, 284 Mich App at 376 (Whitbeck, J., dissenting).

and systemic instances of actual harm."¹²⁵ It similarly concludes that since the right to prospective injunctive relief is whether the harm sought to be avoided in the future is imminent, "the harm [here] is imminent if plaintiffs can show widespread and systemic instances of actual harm that have occurred in the past under the current indigent defense systems being employed by the counties."¹²⁶

As argued above, there is no actual controversy in this case; therefore, declaratory relief is inappropriate. So, too, is injunctive relief. First, there is no imminent danger of irreparable injury—only conjectural, hypothetical injury based on some future inaction. Second, contrary to Plaintiffs' assertion (Complaint, ¶ 153), they have an adequate remedy at law. They may raise a post-conviction challenge on appeal and through habeas corpus proceedings. Such post-conviction proceedings would resolve many of Plaintiffs' claims and challenges. Plaintiffs' claims for declaratory and injunctive relief should be denied as a matter of law.

III. The Court of Appeals erred in certifying a class because establishing prejudice and causation based on widespread and systemic deficiencies to Michigan's public defender system will require individual proofs, and because the processes used in Berrien, Genesee, and Muskegon counties are dissimilar to one another, further requiring individual examination of each Plaintiff's claim on a case-by-case basis. Therefore, no one Plaintiff will serve as an adequate class representative and the class action is an improper method of pursuing these claims.

A. Standard of Review

This Court reviews the trial court's decision on class certification under the clearly erroneous standard.¹²⁷ A trial court's findings of fact are clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has

¹²⁴ MCR 2.605.

¹²⁵ *Duncan*, 284 Mich App at 301.

¹²⁶ *Duncan*, 284 Mich App at 301-302.

¹²⁷ *Zine v Chrysler Corp*, 236 Mich App 261, 270; 600 NW2d 384 (1999)).

been made.¹²⁸ When evaluating a motion for class certification, a trial court is required to accept as true the allegations made in support of the request for certification, without examining the merits of the case.¹²⁹ The party requesting certification of the class action bears the burden of demonstrating that the conditions for certification found in MCR 3.501 are satisfied.¹³⁰ This Court may refer to federal cases that construe the federal rules concerning class certification.¹³¹

B. Analysis

Class action is appropriate *only* when each of the following five requirements is met:

- (a) the class is so numerous that joinder of all members is impracticable;
- (b) there are question of law or fact common to the members of the class that predominate over questions affecting only individual members;
- (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
- (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
- (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.¹³²

Class action is not merely an alternative form of adjudication; it is an exception to the general rule that litigation is conducted by and on behalf of individual named parties only. For this reason, plaintiffs must meet all the prerequisites for class action set forth under MCL 3.501.

This Court in *Henry v Dow Chemical Company* recently clarified the proper analysis for determining whether the prerequisites for class certification have been met.¹³³ This Court: 1) held that strict adherence to the class certification requirements is required and that the affirmative burden is on the party seeking class certification;¹³⁴ 2) determined that a certifying

¹²⁸ *Zine*, 236 Mich App at 270.

¹²⁹ *Henry v Dow Chemical*, ___ Mich ___, 772 NW2d 301, 303 (2009).

¹³⁰ *Henry v Dow Chemical*, 484 Mich 483; 772 NW2d 301, 310 (2009).

¹³¹ *Zine v Chrysler Corp*, 236 Mich App 261, 287; 600 NW2d 384 (1999) (internal citation omitted).

¹³² MCR 3.501.

¹³³ *Henry*, 772 Mich at 307-311.

¹³⁴ *Henry*, 772 Mich at 310.

court may not simply accept a party's bare assertion that the prerequisites have been met, but rather, must require that a party seeking class certification "provide the certifying court with information sufficient to establish that each prerequisite for class certification in MCR 3.501(A)(1) is in fact satisfied;"¹³⁵ and, 3) clarified that the trial court's factual findings are reviewed for clear error while decisions within the trial court's discretion are reviewed for abuse of discretion.¹³⁶

Plaintiffs attempt to make an end run around *Henry* by asserting generalized claims that avoiding the requisite proofs and the requisite prejudice necessary in the pre-conviction context. But these generalized claims do not meet the standard articulated in MCR 3.501A(1) and explained in *Henry*. Plaintiffs fail to show that there are sufficient numbers who have suffered actual injury; fail to show how—with mere generalized assertions of inaction and without examining countless individual cases—they will prove either the widespread and systemic constitutional violations they allege or that these violations are attributable to the alleged deficiencies in the county indigent defense systems; and fail to allege sufficient facts to give rise to a presumption that the proposed class has been prejudiced by the alleged deficiencies. Thus, Plaintiffs have not strictly adhered to even one of the five class certification requirements.

The Circuit Court in this case did what this Court said it may not do: it simply "rubber-stamped" Plaintiffs' allegations that the class certification prerequisites had been met.¹³⁷

1. Numerosity is not met.

The purported class in this case is:

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

¹³⁵ *Henry*, 772 Mich at 311.

¹³⁶ *Henry*, 772 Mich at 307.

¹³⁷ See *Henry*, 772 Mich at 311.

services. The Class includes all indigent adults against whom felony criminal charges will be brought in Berrien, Genesee, and Muskegon Counties during the pendency of this action.¹³⁸

Although there is no particular minimum number of members necessary to meet the minimum requirement, it is not enough for Plaintiffs to assert the existence of a large number of class members. Plaintiffs must "present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members."¹³⁹ To maintain a lawsuit, the Plaintiffs must have suffered an actual injury. The numerosity requirement is not met if only a portion of the class would have viable claims.

In *Zine v Chrysler Corp*, the plaintiffs alleged that booklets provided to purchasers of Chrysler vehicles contained misleading information about car buyers' remedies if they received a defective vehicle.¹⁴⁰ Although the number of class members—582,658—seemingly satisfied the minimum evidentiary requirement for establishing the number for a reasonable estimate of class members, the Court held that plaintiffs did not satisfy the numerosity requirement because each class member must have suffered actual injury to have standing to sue.¹⁴¹

Here, Plaintiffs have not demonstrated that all class members have standing to sue, and thus, have viable claims. They have not alleged sufficient facts to demonstrate that appointed counsel assigned to each of these criminal defendants under Michigan's indigent defense system would fall below the objective standard of reasonableness, or that each of these criminal defendants was or will be prejudiced precisely because of the deficiencies of appointed counsel. Further, this potential class is very fluid; since the claims presented here are based on pre-conviction activities, representatives and members would come in and out of the class as their

¹³⁸ *Duncan*, 284 Mich App at 330.

¹³⁹ *Zine*, 236 Mich App at 288.

¹⁴⁰ *Zine*, 236 Mich App at 265.

criminal prosecutions are completed. Equally concerning is the fact that class members could raise the issue of ineffective assistance of counsel on appeal in a post-conviction appeal or habeas corpus petition, which could potentially impact this litigation based on a collateral estoppel effect. Additionally, Plaintiffs have not and cannot allege sufficient facts to give rise to a presumption of prejudice as to all class members. Because Plaintiffs have not demonstrated that class members have suffered actual injury and thus would have standing to sue, Plaintiffs have not established a class so sufficiently numerous as to meet the numerosity requirement.

2. Plaintiffs' claims require individualized proofs; therefore, the commonality requirement has not been met.

To satisfy the commonality, Plaintiffs must demonstrate that the issues that apply to the class as a whole predominate over those requiring individual proof. Thus, at the class certification stage, Plaintiffs must show that the alleged constitutional violations here can be proven with common evidence on a class-wide basis.¹⁴² "[A]t a sufficiently abstract level of generalization, almost any set of claims can be said to display commonality,"¹⁴³ and if this were the extent of the analysis, every class would be certified. Yet, not every common question suffices because not every common question can be answered with generalized proofs.

In *Zine*, the Court of Appeals held the commonality requirement was not satisfied in a class action involving various statements made by Chrysler Corporation in booklets that accompanied new car purchases.¹⁴⁴ The Court recognized that it would have to determine the type of use for which the car was purchased, how often the vehicle had been taken in for repairs,

¹⁴¹ *Zine*, 236 Mich App at 289.

¹⁴² *A & M Supply Co v Microsoft Corp*, 252 Mich App 580, 582; 654 NW2d 572 (2002); *Zine*, 236 Mich App at 289.

¹⁴³ *Sprague v General Motors Corp*, 133 F3d 388, 397 (CA 6, 1998).

¹⁴⁴ *Zine*, 236 Mich App at 270, 289 n 14.

and whether each class member was aware of the lemon law after reading the booklet.¹⁴⁵

Similarly, individualized factual and legal issues were held to predominate over common issues in *Lee v Grand Rapids Board of Education*,¹⁴⁶ *Tinman v Blue Cross & Blue Shield*,¹⁴⁷ and *Edgcumbe v Cessna Aircraft Co.*¹⁴⁸

Plaintiffs argue that commonality is met because this case involves systemic constitutional violations and relief would be the same for all class members. Not so. Since prejudice is an essential element of any Sixth Amendment violation, Plaintiffs' claim that there have been widespread and systematic constitutional violations—like the claims in *Zine*, *Lee*, *Tinman*, and *Edgcumbe*—requires an examination of the circumstances of particular cases.¹⁴⁹ In other words, it will require individualized proofs. It will "necessarily require the trial court to look at countless cases from each of the three counties to examine whether and how individual

¹⁴⁵ *Zine*, 236 Mich App at 290.

¹⁴⁶ *Lee v Grand Rapids Bd of Ed*, 184 Mich App 502, 505-506; 459 NW2d 1 (1989) (holding that in a dispute over the Board's sick leave policy, which allegedly treated pregnancy-related disabilities different from other disabilities, individualized factual and legal issues predominated over any common issues, including collective bargaining agreement issues, whether plaintiffs were off work because of pregnancy-related disabilities or because they wanted to stay home with their children, or whether plaintiffs were denied use of paid sick leave because their disabilities were caused by pregnancy or because they had previously used up their paid sick leave).

¹⁴⁷ *Tinman v Blue Cross & Blue Shield*, 264 Mich App 546, 563-565; 692 NW2d 58 (2004) (reversing the trial court's decision to certify the class where the trial court had held that the commonality requirement had been met by Blue Cross and Blue Shield's alleged systematic practice of rejecting emergency claims based on the final diagnosis. The *Tinman* court held that individualized inquiries predominated over the broadly stated common question in the case).

¹⁴⁸ *Edgcumbe v Cessna Aircraft Co.*, 171 Mich App 573, 575-576; 430 NW2d 788 (1988). (affirming the trial court's ruling that class action would not serve the convenient administration of justice where unique factual and legal issues such as whether a plaintiff purchased an aircraft in new or used condition and how that related to the application of warranties, or whether a plaintiff's airplane was used as part of a commercial venture, presented complicated legal questions that would make a class action inconvenient).

¹⁴⁹ Any determination here that the Counties' current policies and procedures *per se* violate the Sixth Amendment right to counsel by causing an unfair trial *in every case*, undermines the basic understanding that prejudice is a necessary element of a Sixth Amendment claim.

indigent defendants have suffered violations of their constitutional rights."¹⁵⁰ Proving that appointed counsel fell below the objective reasonableness standard at a pre-conviction stage of the litigation requires examining the individual counsel's skills and qualifications, their actions, the nature and needs of the given case, and the resources expended at each stage of the litigation to meet those needs, in order to determine if a constitutional violation occurred. Again, these individual facts must be assessed on a case-by-case basis to determine causation—i.e., whether the violations have been and will be caused by the State and the Governor. As noted by the dissent, the Circuit Court will have to "look at untold numbers of individual cases to examine the cause for the purported violations."¹⁵¹ The majority noted these same varied and case-specific proofs, describing Plaintiffs' burden as monumental, yet concluded the requirement was met.¹⁵²

Plaintiffs hope to rely on generalized harms such as the rate of attorney pay, years of experience, and limitations on the availability of resources to assist the attorney, while avoiding having to show a connection between rates of pay, experience, or resources and the alleged inadequate representation—all of which, when stripped of their "constitutional veneer," assert nothing more than a general complaint as to the quality of legal services offered indigent criminal defendants, a claim that generally does not survive judicial scrutiny at any phase of the criminal process.¹⁵³ As long as there are attorneys providing constitutionally adequate representation under the current policies and procedures, based on objectively reasonable standards, the causation element remains unmet. This wholly defeats Plaintiffs' claims that generalized proofs predominate. Indeed, experienced attorneys with vast resources at their disposal can provide representation that falls below the standard of objective reasonableness. The

¹⁵⁰ *Duncan*, 284 Mich App at 394 (Whitbeck, J., dissenting).

¹⁵¹ *Duncan*, 284 Mich App at 394 (Whitbeck, J., dissenting).

¹⁵² *Duncan*, 284 Mich App at 303, 304 n 13.

bottom line is that without individualized proofs, it cannot be said that any of the appointed counsel fall below an objectively reasonable standard that renders the result unreliable.¹⁵⁴

As the dissent points out, "the Duncan plaintiffs based their entire case against the State and the Governor on generalized assertions of inaction," and "such inaction cannot be an actionable, specific policy or practice."¹⁵⁵ Even the *Duncan* majority concedes "this action will require contemplation of *specific instances* of deficient performance and *instances* of the actual or constructive denial of counsel."¹⁵⁶ Then, inexplicably, the Court concludes that this evidence has no bearing on the particular criminal case or available appellate remedies, but merely constitutes "a piece in the larger puzzle relative to establishing a basis for prospective, system-wide relief."¹⁵⁷ This circular logic ignores the fact that this evidence goes to the very heart of establishing the injury-in-fact requirement of each individual class member, causation, and the availability of an alternative remedy sufficient to defeat the prospective relief sought.

Even if a common question exists here—namely, whether deficiencies in Michigan's public defender system are attributable to Defendants—this alone is not sufficient to establish commonality.¹⁵⁸ The common question must be answered with common evidence on a class-wide basis. That cannot be achieved here because individual proofs related to each criminal defense, in each criminal case, in each identified county, predominate over generalized proofs.

¹⁵³ See *Hurrell-Harring*, 883 NYS 2d at 351.

¹⁵⁴ *Strickland*, 466 US at 687.

¹⁵⁵ *Zine*, 236 Mich App at 289.

¹⁵⁶ *Duncan*, 284 Mich App at 331.

¹⁵⁷ *Duncan*, 284 Mich App at 331-332.

¹⁵⁸ *Tinman*, 264 Mich App at 563-564; *Neal*, 225 Mich App at 21.

3. Plaintiffs have not demonstrated typicality or adequacy because there are too many individualized circumstances among the named Plaintiffs and the class members, and too many differences among the three named Counties; and because the named counties are not representative of the State's indigent defense system.

Typicality focuses on whether the claims of named representatives have the same essential characteristics as the claims of the class at large.¹⁵⁹ To satisfy this requirement, the claims of the class representatives must arise from the same event, practice, or course of conduct.¹⁶⁰ Demonstrating the adequacy prong requires that "the representative parties will fairly and adequately assert and protect the interests of the class."¹⁶¹ This requires that the class representatives be able to fairly and adequately represent the interests of the class as a whole.¹⁶²

The class representatives here are eight individuals who were arrested at various times in 2006 and 2007 for a variety of crimes. Plaintiffs argue these representatives are typical because Defendants have abdicated their constitutional responsibilities to every class member by failing to ensure that indigent defense counsel have the tools necessary to provide constitutionally adequate representation. But there are too many different factual circumstances relevant to each individual case to show that the Plaintiffs' claims contain a common core of allegations.

Each county and court employs its own system for providing counsel, including the method of selecting and paying for counsel, and requirements and training for counsel, each with some level of review by the State Court Administrative Office (SCAO). Plaintiffs have not demonstrated that they are typical of the class as a whole. Indeed, they cannot. Each county uses a different appointed counsel process. Each Plaintiff came into the system with different charges, issues, and needs based on their respective cases. Plaintiffs cannot adequately represent

¹⁵⁹ *Neal*, 252 Mich App 12, 22-23, *overruled in part on other grounds by Henry*, 772 NW at 313 (citing *Allen v Chicago*, 828 F Supp 543 (ND Ill, 1993)).

¹⁶⁰ *Neal*, 252 Mich App at 22.

¹⁶¹ *Neal*, 252 Mich App at 22.

class members who have not yet been charged or whose cases have been affected differently by a county's policies and procedures.

Importantly, the interests of the class members are potentially in conflict with one another. For example, in counties where attorneys are paid by a flat rate, a plaintiff who was convicted of a felony in a relatively straightforward criminal case may not be adequate to represent a class member convicted of a felony in a more complex case.

The three named Counties are also not uniform in the "tools" they use. Berrien and Muskegon Counties, for example, have contracts with local attorneys and pay on a flat rate, while Genesee County has an assigned counsel system where judges appoint individual lawyers to represent indigent criminal defendants. Furthermore, even within the three Counties there are differences in the application of these tools to individually convicted felons. For example, in Berrien County, a judge refuses to appoint counsel if the criminal defendant makes bail; this is not true in the other two Counties. Therefore, Plaintiffs from Berrien County who do not make bail cannot adequately represent class members from Berrien County who do make bail. Plaintiffs from Berrien County cannot adequately represent those from Muskegon and Genesee Counties.

Significantly, the three named Counties are not typical of Michigan's indigent defense system. This 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.

- ". . . but the failings in those counties [Berrien, Genesee, and Muskegon Counties] and the types of harms suffered by these Plaintiffs, are by no means limited or unique to the three Counties. Defendants [sic] failure to provide funding or oversight to any of the State's counties have caused similar problems throughout the State."(Complaint, p 11.)

¹⁶² *Neal*, 252 Mich App at 22.

- Michigan provides no funding specifically for the provisions of indigent defense services in felony criminal actions at the trial state in the three Counties or any other county in the State. (Complaint, p 88.)

Plaintiffs have not demonstrated typicality or adequacy.

4. **Class action is not a superior method of adjudication**

The maintenance of an action as a class action must be superior to other available methods of adjudication in promoting the convenient administration of justice. The relevant concern in determining the convenient administration of justice is whether the issues are so disparate as to make a class action suit unmanageable.¹⁶³ Class action is a superior form of action only when it is a more convenient way than individual suits to decide the legal questions presented.¹⁶⁴ In deciding this factor, the court may consider the practical problems that can arise if the class action is allowed to proceed.¹⁶⁵

The superiority requirement is closely tied to the commonality requirement because class action is not a superior form of litigation where a great deal of individualized inquiry will be needed to prove plaintiffs' claims. Plaintiffs cannot satisfy this requirement because proving Defendants' allegations about systematic and deficiencies would require individualized inquiries.

The majority impliedly alluded to this unmanageability when it discussed the approach to be taken on remand:

While we leave it to the trial court to determine the parameters of what constitutes "widespread," "systemic," or "pervasive" constitutional violations or harm, the court must take into consideration the level or degree of any shown harm, giving more weight to instances of deficient performance that resulted in unreliable verdicts and instances where the right to counsel was denied, with less weight

¹⁶³ *Dix v American Bankers Life Assurance Co of Florida*, 429 Mich 410, 419; 415 NW2d 206 (1987) (holding that class action was suitable where the alleged misrepresentations involved only a single type of policy and individual claims differed only slightly); *Grigg v Mich Nat'l Bank*, 405 Mich 148, 184; 249 NW2d 290 (1976); *Edgcumbe*, 171 Mich App at 575.

¹⁶⁴ *A & M*, 252 Mich App at 601.

¹⁶⁵ *A & M*, 252 Mich App at 601.

being given where there is mere deficient performance. *** To summarize the approach to be taken on remand, plaintiffs must show the existence of widespread and systemic instances of actual or constructive denial of counsel and instances of deficient performance by counsel, *which instances may have varied and relevant levels of egregiousness*, all causally connected to defendants' conduct. Furthermore, because *the proofs could be so wide ranging*, it would reflect poor judgment on our part to set a numerical threshold with respect to the courts determination of whether the instances of harm, if shown, are sufficiently "widespread and systemic" as to justify relief.¹⁶⁶

As recognized even by the majority, the proofs here will necessarily have to be varied and wide-ranging. The widespread, systematic deficiencies alleged by Plaintiffs must be demonstrated by a thorough review of literally thousands of specific cases to determine whether there has been deficient performance and actual or constructive denial of counsel, and whether the indigent defendant in those cases was prejudiced such as to constitute a deprivation of the constitutional right to a fair trial. Such numerous and individualized inquiries would be unmanageable, and accordingly, class action is not a superior form of adjudication here.

In sum, Plaintiffs have not strictly adhered to the requirements for a class action as required by this Court in *Henry*. The Circuit Court's certification of a class in this case was clear error and should be reversed by this Court.

CONCLUSION

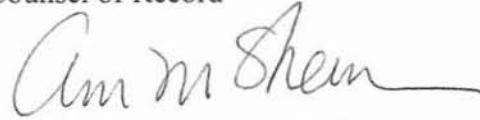
For the foregoing reasons Defendants-Appellants respectfully request that this Court reverse the Circuit Court's denial of Defendants' Motion for Summary Disposition under MCR 2.116(C)(8), and remand this case to the Circuit Court for entry of summary disposition in favor of Defendants State of Michigan and Governor Granholm. Alternatively, Defendants-Appellants respectfully request that if this case goes forward, this Court decertify the class.

¹⁶⁶ *Duncan*, 284 Mich App at 303, 304 (emphasis added).

Respectfully submitted,

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A handwritten signature in cursive script, reading "Ann M. Sherman", followed by a horizontal line extending to the right.

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Dated: February 8, 2010

ADDENDUM

HOUSE BILL No. 5676

December 9, 2009, Introduced by Reps. Constan and Amash and referred to the Committee on Judiciary.

A bill to create the Michigan public defense act; to provide for a public defense commission; to provide for a state office of public defense; to provide for a state public defender and a state appellate defender; to provide for attorney representation of indigent criminal and juvenile defendants; to provide standards for the appointment of legal counsel; to create the public defense fund; to provide for deposits into and expenditures from the fund; to provide for the assessment of certain fees; to require dissemination of certain information to the public; and to repeal acts and parts of acts.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. This act shall be known and may be cited as the "Michigan public defense act".

Sec. 2. The purpose of this act is to do all of the following:

(a) Establish a state public defense system to provide effective assistance of counsel to criminal defendants who are eligible for appointed counsel and juveniles in delinquency proceedings who are entitled by law to assistance of counsel at public expense.

(b) Ensure the system is free from undue political interference and conflicts of interest.

(c) Provide that public defense services are delivered by qualified and competent counsel in a manner that is fair and consistent throughout the state.

(d) Establish a system that uses state employees, contracted services, and members of the private bar in a manner that is responsive to, and respectful of, community needs and interests.

(e) Ensure that adequate state funding of the state public defense system is provided and managed in a fiscally responsible manner.

Sec. 3. As used in this act:

(a) "Adult" means an individual 17 years of age or older.

(b) "Appellate defense bureau" or "bureau" means the appellate defense bureau created under section 10.

(c) "Assigned counsel" means an attorney in private practice who is not employed by the state office of public defense, a nonprofit office of public defense, or a county office of public defense and who is appointed by the state office of public defense to represent eligible individuals.

(d) "Case" means a legal proceeding that charges an individual with the commission of a crime or a delinquency or status offense

in a court of this state, a postconviction or postadjudication proceeding, or another matter designated by the court or the commission as a case under this act. A case may involve multiple charges if those charges arise out of the same transaction or occurrence or out of a related series of transactions or occurrences.

(e) "Conflict counsel" means an attorney appointed to provide public defense services in a case where a conflict of interest exists.

(f) "Contract defense counsel" means an attorney providing public defense services as a member of a contract defense office.

(g) "Contract defense office" means an attorney or group of attorneys in private practice who contract with the office to provide public defense services and who are not organized as a nonprofit office of public defense or a county office of public defense.

(h) "Contribution fee" means the amount an eligible individual is assessed to recover a portion of the cost of legal representation.

(i) "County office of public defense" means an office staffed by county employees that provides public defense services under contract with the office of public defense.

(j) "Court" means the supreme court, court of appeals, circuit court, district court, family court, probate court, or municipal court.

(k) "Eligible individual" means an adult or juvenile determined to be eligible for public defense services under this

act.

(l) "Juvenile" means an individual under the age of 17 charged in the family division of the circuit court or in the general division of the circuit court with violating a criminal law or an individual under the age of 17 charged in the family division of the circuit court under section 2(a)(2) of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.2.

(m) "Nonprofit office of public defense" means a nonprofit corporation recognized under section 501(c)(3) of the internal revenue code of 1986, 26 USC 501, that provides public defense services under contract with the state office of public defense.

(n) "Plan" means the commission plan for providing public defense services throughout this state.

(o) "Professional" means an expert, mental health and substance abuse treatment specialist, educational specialist, forensic evidence examiner including without limitation a DNA expert, ballistic analyst, accident reconstruction expert, mitigation expert, investigator, interpreter, dispositional specialist, and any other individual employed or under contract to provide professional services within the criminal justice system.

(p) "Public defense commission" or "commission" means the public defense commission created under section 5.

(q) "Public defense fund" means the public defense fund created under section 17.

(r) "Public defense services" means legal representation and other services provided by the office to eligible individuals.

(s) "Region" means a judicial circuit or group of judicial

circuits designated by the commission as an administrative unit to oversee the provision of public defense services.

(t) "Regional office" means an office administered by a regional director appointed by the state public defender to oversee public defense services in a region.

(u) "State appellate defender" means the state appellate defender appointed under section 8.

(v) "State office of public defense" or "office" means the state office of public defense created under section 5.

(w) "State public defender" or "public defender" means an attorney employed full-time by the office, a nonprofit office of public defense, or a court office of public defense and who is not engaged in the private practice of law.

(x) "State public defense system", "state system", or "system" means the state public defense system created under section 5.

Sec. 4. A court may order the office to appoint counsel under this act in the following cases:

(a) In cases in which an individual is entitled by law to assistance of counsel at public expense because of financial inability to retain private counsel, subject to a determination of eligibility under this act, including any of the following:

(i) For an individual charged with a felony or charged with a misdemeanor for which there is a possibility of incarceration.

(ii) For an individual charged with a probation violation and for an individual seeking or subject to the amendment of probation.

(iii) For an individual appealing a misdemeanor conviction or a felony conviction or an adjudication of delinquency or seeking

other postconviction relief as directed by the commission.

(iv) For a witness in a criminal grand jury proceeding convened under chapter VII of the code of criminal procedure, 1927 PA 175, MCL 767.1 to 767.96.

(b) In cases in which an individual is entitled by law to the assistance of counsel at public expense regardless of the individual's financial ability to retain private counsel, including any of the following:

(i) For a juvenile in a proceeding under chapter XIIIA of the probate code of 1939, 1939 PA 288, MCL 712A.1 to 712A.32.

(ii) For a juvenile entitled to assigned counsel in a proceeding under the interstate compact for juveniles, 2003 PA 56, MCL 3.691 to 3.692.

(c) In other matters as directed by the court or approved by the commission.

Sec. 5. (1) The state public defense system is created to provide public defense services throughout this state.

(2) The public defense commission is created to head the state system, supervise the office, and establish policies to implement this act.

(3) The state office of public defense is created in the judicial branch of state government to administer the system and its regional offices under the supervision and direction of the commission.

(4) The office is an autonomous entity having all statutory authority, powers, duties, functions, records, personnel, property, unexpended balances of appropriations, allocations, and other

funds, including the functions of budgeting, personnel, locating offices, and other management functions.

Sec. 6. (1) The commission shall consist of 9 members who shall be appointed by the governor for terms of 3 years. Of the 9 members, 2 members shall be recommended by the supreme court, 1 member shall be recommended by the Michigan judges' association, 1 member shall be recommended by the Michigan district judges' association, 2 members shall be recommended by the state bar of Michigan, 2 members shall be recommended by the criminal defense attorneys association of this state, and 1 member, who is not an attorney, shall be selected from members of the general public by the governor. Appointments to the commission shall reasonably reflect the population, geographic, and rural and urban diversity of this state.

(2) Not fewer than 1 individual appointed to the commission shall have significant experience in the representation of juveniles in delinquency proceedings or a demonstrated commitment to quality representation of juveniles in those proceedings. Not fewer than 1 individual appointed to the commission shall have significant experience in criminal appeals.

(3) At the time of appointment or while serving on the commission, a member of the commission shall not be a sitting judge or prosecuting attorney, or an individual employed by a prosecuting attorney, a law enforcement agency, a probation department, or the Michigan department of corrections, and shall not be a criminal defense attorney employed by, or under contract with, the office.

(4) All commission members shall be appointed for terms of 3

years and shall hold office until their successors are appointed. The terms of the members shall be staggered. Initially, 3 members shall be appointed for a term of 3 years each, 3 members shall be appointed for a term of 2 years, and 3 members shall be appointed for a term of 1 year.

(5) The governor shall fill a vacancy occurring in the membership of the commission, for the unexpired term only, in the same manner as the original appointment and in a timely manner.

(6) Members of the commission shall not receive a salary in that capacity but shall be reimbursed for their reasonable, actual, and necessary expenses by the state treasurer.

(7) The commission shall establish procedures for the conduct of its affairs and elect a presiding officer from among its members.

(8) The commission shall promulgate policies necessary to carry out its powers and duties under this act.

(9) The commission shall convene a public hearing before a proposed policy becomes effective.

(10) Commission policies shall be placed in an appropriate manual, made publicly available on an internet website, and made available to all attorneys and professionals providing public defense services, the supreme court, the senate and house appropriations committees, and the senate and house fiscal agencies.

Sec. 7. (1) The commission shall, with the assistance of the office, develop a plan using methods consistent with the purposes described in this act for providing public defense services that

divides the state into defense regions sufficient to provide efficient provision of public defense services throughout this state while addressing local needs. The plan shall do all of the following:

(a) Establish an office in each region to oversee the provision of all public defense services, as provided under the commission's strategic plan, under the supervision of a regional public defender.

(b) Ensure assigned counsel is a component of each regional delivery system.

(c) Ensure that nonprofit state and county public defense offices providing public defense services before the effective date of this act are included in the plan for providing public defense services in their regions, subject to compliance by those offices with terms of their contracts with the office. Nothing in this act shall cause a reduction in the total compensation for an employee of any of those offices below his or her total compensation on the effective date of this act.

(d) Allocate sufficient personnel, resources, training, supervision, and physical facilities in each region to ensure the efficient provision of effective assistance of counsel to eligible individuals.

(e) Avoid conflicts of interest in the administration of public defense services and in the appointment of conflict counsel.

(f) Establish policies for the receipt and resolution of complaints from the courts, prosecutors, clients, and members of the public.

(g) Establish policies for the collection and reporting of detailed expenditure and caseload data to support ongoing planning for defense service delivery and budgeting.

(2) The commission shall hold not less than 3 public hearings on the proposed plan in separate geographical regions of this state before adopting the plan.

(3) The commission shall periodically review any revisions to the plan recommended by the office, and take such action it considers appropriate.

(4) The commission shall ensure that client-related data remain secure and that policies regarding access to that data and procedures are established by the office to ensure confidentiality.

(5) The commission shall assist in the implementation of programs that improve the criminal justice system and reduce recidivism.

Sec. 8. (1) The commission shall establish the qualifications, duties, and compensation of the state public defender and state appellate defender. The commission shall appoint the state public defender to head the office of public defense and the state appellate defender to head the appellate defense bureau, after considering qualified applicants.

(2) The commission shall regularly evaluate the performance of the state public defender and the state appellate defender and establish policies for the operation of the state office of public defense.

(3) The commission shall ensure that attorneys employed by the office, including the state public defender and state appellate

defender, meet all of the following criteria:

(a) Are licensed to practice law in this state and are members in good standing of the state bar of Michigan.

(b) Take and subscribe to the oath required by the constitution before taking office.

(c) Perform duties as may be provided by law.

(d) Represent eligible defendants as required by the office.

(e) Are prohibited from engaging in the private practice of law or as an attorney or counselor in a court of this state except in the exercise of his or her duties under this act.

(4) The commission shall review and approve proposals by the state public defender to create permanent attorney and staff positions within the office.

(5) All appointees and employees of the office are considered employees of the judicial branch of state government and are exempt from civil service under section 5 of article XI of the state constitution of 1963.

(6) The commission shall adopt personnel policies and procedures, and may adopt those policies and procedures by reference to policies and procedures of other governmental agencies.

(7) Compensation for full-time public defenders and staff employed by the office shall be not less than the compensation paid to assistant prosecuting attorneys and prosecuting attorney staff with comparable duties and responsibilities in their respective regions.

(8) The commission shall review and approve budget proposals

submitted by the state public defender.

Sec. 9. (1) The state public defender shall be the chief administrative officer of the office and shall manage and oversee the office while maintaining and honoring the independence of the appellate defender bureau in matters related to representation of clients and the supervision of its personnel. The state public defender shall hire or contract for and supervise personnel necessary to perform the function of the office and to implement commission policies, the plan, and this act.

(2) The state public defender's duties include all of the following:

(a) Acting as secretary to the commission and providing administrative staff support to the commission.

(b) Assisting the commission in establishing the state system and maintaining the system and establishing and enforcing the policies required under this act.

(c) Establishing procedures to implement commission policies.

(d) Assisting the commission in developing the initial plan for the provision of public defense services throughout this state and submitting it to the commission for approval.

(e) Establishing procedures to provide for the approval, payment, recording, reporting, and managing of defense expenses paid under this act.

(f) Establishing an information technology system and procedures to ensure that personnel providing public defense services use information technology and workload management systems so that detailed expenditure and workload data are accurately

collected, recorded, and reported.

(g) Establishing procedures for managing workloads and assigning cases in a manner that ensures public defense attorneys are assigned cases according to experience, training, and manageable workloads, taking into account case complexity, the severity of the charges and potential punishments, and the legal skills required to provide effective assistance of counsel.

(h) Establishing procedures to prevent conflicts of interest and, when they occur, ensuring conflicts are handled according to professional ethical standards.

(i) Establishing and supervising a training, performance monitoring, and evaluation program for all attorneys, professionals, and administrative support staff providing public defense services.

(j) Establishing procedures to handle complaints from clients, judges, other criminal justice personnel, and the public, and ensuring clients are aware of procedures for bringing complaints.

(k) Establishing administrative procedures for regional offices.

(l) Reviewing the commission plan on an annual basis and recommending modifications as required.

(m) Submitting biennial reports for the commission's approval and dissemination of certain information in accordance with this act.

(n) Serving as a liaison between the commission and the court.

(o) Requesting funding for additional personnel if workload standards are consistently exceeded.

(p) Seeking gifts, grants, and donations that may be available through federal, state, or local governments, foundations, corporations, private individuals, or other sources to help fund the system.

(q) Exploring and assisting in the development of programs to improve the criminal justice system and reduce recidivism.

(r) Working with the commission and the state appellate defender to provide the efficient and effective delivery of public defense services.

(s) Performing all other duties assigned by the commission under this act.

Sec. 10. (1) The appellate defense bureau is created in the office. The commission shall hire and supervise a state appellate defender to manage the bureau. The commission shall establish policies to ensure the independence of the appellate defense bureau and to avoid conflicts of interest in the administration of the system.

(2) The state appellate defender's duties include all of the following:

(a) Assisting the commission in developing the initial plan, with the state public defender, for providing public defense services throughout this state and submitting it to the commission for approval.

(b) Managing the appellate defense bureau and overseeing the provision of appellate, postconviction, and postadjudication public defense services.

(c) Hiring or contracting for and supervising the personnel

authorized by the commission to perform the functions of the bureau and to implement commission policies, office procedures, and this act.

(d) Ensuring assigned counsel and attorneys employed by, or under contract with, the bureau who are providing appellate public defense services comply with the commission policies, office procedures, and this act.

(e) Collecting data, keeping a detailed record of bureau expenses and appellate public defense services, and submitting records and reports to the state public defender as required to implement commission policies, office procedures, and this act.

(f) Maintaining a repository of pleadings, databases, and legal resources and making them available to all attorneys providing public defense services.

(g) Ensuring that conflicts are promptly identified and handled in a manner consistent with professional ethics and this act.

(h) Recommending appellate policies and procedures and assisting the state public defender in implementing commission policies, office procedures, and this act.

(i) Working with the commission and the state public defender to provide efficient and effective provision of public defense services.

Sec. 11. The state public defender shall establish regional offices and appoint regional public defenders to oversee the efficient provision and oversight of nonappellate public defense services within those regions. Within their respective regions,

regional public defenders' duties include all of the following:

(a) Ensuring that the provision of nonappellate public defense services in the region is in compliance with commission policies, office procedures, and this act.

(b) Administering the regional office and supervising and evaluating regional office staff.

(c) Ensuring that the regional office works closely with the courts in the region to ensure efficient and effective defense representation.

(d) Maintaining rosters of qualified assigned counsel.

(e) Appointing attorneys in a timely manner and ensuring case assignments are fairly distributed to attorneys who provide public defense services in the region.

(f) Monitoring workloads, notifying the office of public defense when workload standards are consistently exceeded, and making recommendations to ensure compliance with workload standards.

(g) Collecting data and preparing reports as required by the commission and the office.

(h) Ensuring attorneys in the region have access to the resources, professionals, and training required by the plan.

(i) Implementing training, and implementing performance monitoring and evaluation programs for attorneys providing public defense services in the region.

Sec. 12. (1) All attorneys providing public defense services under this act shall be licensed to practice law in this state and be members in good standing of the state bar of Michigan.

(2) The commission shall establish state standards for public defense services to ensure services are provided by competent counsel and in a manner that is fair and consistent throughout the state. The standards shall address all of the following:

(a) The level of education and experience required to provide effective representation, based on case complexity and severity of the charges and potential punishments.

(b) Acceptable workloads that take into account case complexity, the severity of charges, client factors such as mental illness, and potential punishments in a case.

(c) The availability of, access to, and use of professional services that may be required for a case, including, but not limited to, paralegals, investigators, and expert witnesses.

(d) The availability of, access to, and use of technology and legal resources.

(e) The availability of, access to, and completion of training and continuing education requirements.

(f) Practice standards.

(g) Performance criteria.

(h) Performance evaluation procedures.

(3) The commission shall establish procedures to monitor workloads and policies to prevent workload in excess of commission standards.

(4) An attorney or professional providing public defense services shall not be required to maintain a workload in excess of the workload standards established by the commission.

(5) The commission shall establish policies to ensure that all

of the following criteria are met:

(a) Attorneys are appointed to represent clients in a timely and equitable manner.

(b) Cases are assigned to attorneys with the skills, training, and experience to handle them and whose workloads are within the limits established by commission policies.

(c) Conflicts of interest are identified and those cases involving a conflict of interest are handled according to professional and ethical standards. There shall be a presumption that all codefendants have conflicts that require the appointment of conflict counsel.

(d) In appropriate cases, clients are assessed for mental illness, addiction, and other underlying issues and a client rehabilitation plan is provided to the sentencing judge. The plan shall use available community resources, rather than incarceration, where appropriate.

(6) This act does not permit the commission or the office to interfere with the reasonable professional judgment exercised by an attorney in connection with his or her representation of an individual eligible for public defense services.

Sec. 13. (1) When a court orders the office to appoint counsel, the office shall immediately appoint counsel, even if the individual has yet to be determined eligible for public defense services.

(2) An individual for whom counsel is appointed is entitled to the full benefit of public defense services until that individual is determined to be ineligible for services or the individual

wishes to proceed pro se and the court permits him or her to do so.

(3) A qualified attorney shall be appointed to meet with any juvenile who wishes to waive his or her right to counsel to ensure he or she fully understands the consequences of that waiver.

(4) The attorney providing public defense services shall continually represent his or her adult client from that client's initial assignment of counsel through sentencing, unless otherwise provided by commission policies or relieved of his or her duties. The attorney providing public defense services to a juvenile in the family division of the circuit court shall continually represent that juvenile from the initial assignment of counsel until the case is dismissed or closed, including all postdisposition hearings, unless otherwise provided by commission policies or relieved of his or her duties.

Sec. 14. (1) The commission shall establish policies to ensure contracting for public defense services is done fairly and consistently statewide and within each region. The policies established under this subsection shall provide for all of the following:

(a) Attorney qualifications.

(b) Adherence to standards promulgated by the commission, including, but not limited to, performance standards.

(c) Standards defining adequate access by attorneys to support services, including technology, legal resources, professionals, and administrative support staff.

(d) Workload standards that define, among other things, the extent to which attorneys employed by a contract defense office may

engage in private practice.

(e) Reporting and workload monitoring.

(f) Supervision, performance monitoring, and performance evaluation.

(g) Conflict resolution.

(h) Training and continuing education, in accordance with commission standards.

(2) The state public defender shall provide for contract oversight and enforcement to ensure compliance with commission policies, office procedures, and this act.

(3) Contracts executed under this section shall not be based solely on a fixed fee paid regardless of the number of cases assigned.

(4) The commission shall establish reasonable compensation rates for contracted services.

(5) The state office of public defense shall ensure that payments to contractors are made in a timely fashion.

Sec. 15. The office may enter into agreements and contracts with departments and agencies of the judicial or executive branch of state government, as well as local units of government, including counties and municipalities, to carry out its duties under this act.

Sec. 16. (1) The commission shall establish policies governing the manner in which cases are allocated to assigned counsel to ensure that cases are allocated in a fair and equitable manner.

(2) The commission shall require assigned counsel to comply with all commission policies, office procedures, and this act,

including those regarding qualifications, performance, training, continuing education, supervision, workloads, conflicts of interest, and reporting.

(3) The commission shall require assigned counsel to have the physical facilities, equipment, access to professionals, including experts and investigators, and administrative support to provide effective assistance of counsel.

(4) The office shall establish procedures to ensure assigned counsel's compliance with commission policies, office procedures, and this act.

(5) The commission shall establish a reasonable compensation schedule for assigned counsel and review those rates every 2 years.

(6) The office shall ensure payments to assigned counsel are made in a timely fashion.

Sec. 17. (1) This state shall be responsible for all costs of the public defense system and public defense services to ensure the right to counsel under the constitution of the United States and the state constitution of 1963.

(2) The public defense fund is created as a separate account in the department of treasury. Money in the fund shall be used only for the operation of the system. The unencumbered balance and all interest earnings remaining in the fund at the close of the fiscal year shall remain in the fund and shall not revert to the general fund.

(3) All contribution fees collected by the courts under section 1k(1)(b)(iii) of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.1k, if any, shall be deposited in

the public defense fund for use by the office.

(4) The legislature shall annually make an appropriation to the public defense fund to implement this act and to ensure that the right to counsel under the constitution of the United States, the state constitution of 1963, and this act is adequately funded.

(5) The public defense fund shall be administered by the commission, through the office, in compliance with policies promulgated by the commission and the laws of this state. The commission, through the office, may solicit additional funding for the state public defense service system from federal, state, and local governments, and foundations, corporations, individuals, and any other public or private sources, provided that the receipt of those funds does not conflict with the commission's mission or create an appearance of impropriety. The funds, if received, shall be deposited in the public defense fund. The funds, if received, do not diminish the responsibility of this state under this section.

Sec. 18. The commission shall establish and maintain an internet website containing all of the following information:

(a) All policies and procedures in effect for the operation and administration of the state public defense system.

(b) All standards established or being considered by the commission or the state public defender.

(c) The number of regional public defenders, including a description of the geographic region supervised by each.

(d) The number of assigned counsel and attorneys employed by the office or employed by entities that have contracted with the system who are providing public defense services and identified by

region.

(e) The number of attorneys and other staff supervised by each regional public defender.

(f) The number of new cases in which counsel was assigned to represent a party, disaggregated by region, court, and case type.

(g) The total number of individuals represented by the office identified by region, court, and case type.

(h) The annual caseload and workload of each attorney providing public defense services identified by region, court, and case type.

(i) The training programs conducted by the office and the number of attorney and nonattorney staff that attended each program.

(j) The continuing education courses on criminal defense or criminal procedure attended by each attorney providing public defense services.

(k) Detailed expenditure data by region, court, and case type.

(l) All other financial, client demographic, and workload data needed to assist in determining the appropriate amount of funding needed to ensure the delivery of effective representation and to assist in planning.

Sec. 19. (1) An applicant is eligible for appointed counsel under this act if 1 or more of the following criteria apply:

(a) The applicant's income is not more than 133% of the poverty level set according to the most current federal poverty guidelines updated periodically in the federal register by the United States department of health and human services under the

authority of 42 USC 9902(2).

(b) The applicant qualifies for and receives public assistance, including, but not limited to, food assistance, medicaid benefits administered under section 105 of the social welfare act, 1939 PA 280, MCL 400.105, and social security disability benefits, resides in public housing, or receives other means-tested assistance.

(c) The applicant, at the time representation is requested, does not have readily available or unencumbered assets, credit, or other means to retain counsel and to provide for other costs of his or her defense without subjecting the applicant or the applicant's dependents to substantial financial hardship, and has not disposed of any assets since the date and time of the charged offense with the intent or for the purpose of establishing eligibility for assistance under this act. An applicant or an applicant's dependents shall be considered to suffer substantial financial hardship if they would be deprived of funds needed for basic living necessities including, but not limited to, food, shelter, clothing, necessary medical expenses, and child support.

(d) The applicant is a juvenile whose parents would otherwise be eligible for public defense services under this section or are unwilling to retain counsel to represent the juvenile.

(2) Eligibility shall not be denied solely because of an applicant's ability to post bail or solely because the applicant is employed.

(3) The courts shall conduct all eligibility screening under policies established by the commission. The presiding judge,

prosecuting attorney, an employee of a prosecuting attorney, or an attorney providing public defense services shall not conduct eligibility screening.

(4) An individual shall be screened for eligibility as soon as possible after arrest, detention, or request for counsel.

(5) Eligibility determination proceedings are confidential. Information divulged during the screening process shall not be used against an applicant in any civil or criminal proceeding, except in the sentencing phase when determining restitution, to enforce collections, or to prosecute perjury under this act.

(6) If the court determines there is no substantial financial hardship under this section, the court shall set forth the factors upon which the determination was made in the record.

(7) An applicant has a right to appeal the determination of ineligibility. While the appeal is pending, the office shall provide public defense services.

(8) The court may modify a determination of eligibility if additional material information becomes available or if the applicant's financial circumstances change.

(9) In determining an applicant's income, a court shall use the applicant's federal adjusted gross income, without regard to loss, as that term is defined in section 62 of the internal revenue code of 1986, 26 USC 62, plus all nontaxable income including, but not limited to, all of the following:

(a) The amount of a pension or annuity, including railroad retirement act benefits and veterans' disability benefits.

(b) The amount of capital gains excluded from adjusted gross

income.

(c) Alimony.

(d) Child support money.

(e) Nontaxable strike benefits.

(f) Cash public assistance and relief.

(g) Interest on federal, state, county, and municipal bonds.

(h) All payments received under the social security act, 42 USC 301 to 1397jj, except social security income paid directly to a nursing home.

(10) A determination of eligibility shall not be reexamined absent compelling reason.

(11) The commission shall promulgate policies to implement this section that accomplish all of the following:

(a) Ensure that the eligibility determination process is fair and consistent throughout this state.

(b) Avoid unnecessary duplication of processes.

Sec. 20. (1) The court may order an adult who receives public defense services or the parents of a juvenile who receives public defense services to pay a portion of the costs associated with receiving those services under section 1k(1)(b)(iii) of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.1k. The order shall be made on the record at the time of sentencing, and after a determination that repayment will not constitute a substantial financial hardship under section 19. The order shall be contained in the judgment of sentence.

(2) Subsection (1) does not apply to cases ending in acquittal or dismissal of all charges.

(3) An individual who has been ordered to pay a portion of the cost of public defense service may petition the court at any time to waive the payment, if that payment will result in substantial financial hardship to the person or the person's dependents' substantial financial hardship as that term is described in section 19.

(4) An attorney providing public defense services shall not pursue payment from his or her client for any costs related to public defense services.

(5) A person shall not be imprisoned, denied bond, denied counsel, have his or her probation or parole revoked, or otherwise face a penalty for failure to pay all or any portion of public defense services under this act, unless a court determines both of the following:

(a) That the failure to pay is willful.

(b) That the individual is able to make the payment without substantial financial hardship to that individual or his or her dependents under section 19.

(6) The court may enforce a person's obligation to pay all or any portion of the cost of legal representation under this act in the same manner as a judgment in a civil action, if the enforcement will not impose a substantial financial hardship under section 19.

(7) An applicant shall be informed at the time of eligibility screening, both orally and in writing, that he or she may be assessed a portion of the cost of his or her public defense services, if a court determines that the assessment will not cause substantial financial hardship under section 19. If possible, the

applicant also shall be provided with the projected amount of the portion of that cost.

(8) An order for payment of costs for public defense services under this section is the exclusive means by which the cost of public defense services shall be recouped.

Sec. 21. The appellate defender act, 1978 PA 620, MCL 780.11 to 780.719, is repealed.