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

APPELLANTS' REPLY BRIEF

MICHAEL A. COX
Attorney General

B. Eric Restuccia (P49550)
Solicitor General
Counsel of Record

Margaret A. Nelson (P30342)
Ann Sherman (P67762)
Assistant Attorneys General
Attorneys for Defendants-Appellants State of Michigan and Governor Jennifer Granholm
P.O. Box 30736
Lansing, Michigan 48909
517.373.6434

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ARGUMENT

I. The Separation of Powers argument is ripe for review and supports dismissal of this case.

Plaintiffs respond to Defendants' Separation of Powers arguments by first raising a threshold argument that the Separation of Powers issue is not ripe for review by this Court. They argue that the question is, at least at this juncture, hypothetical. Unquestionably, constitutional questions should not be presented anticipatorily, which is exactly why this lawsuit should fail—because Plaintiffs have made a sweeping constitutional challenge out of isolated examples of alleged ineffective assistance of counsel without the requisite showing of injury-in-fact. But based on the way Plaintiffs have postured this case, the Separation of Powers question is ripe for review and not just purely advisory.

Plaintiffs and the Court of Appeals majority claim it is Defendants and the dissenting judge in the Court of Appeals who are suggesting a sweeping remedy. But it is Plaintiffs who have asked for this relief. Systemic overhaul and the need for additional funding, which would require an appropriation from the Treasury, are not just speculative—they *are* the relief requested. Money is the very essence of Plaintiffs' arguments and their claims for relief, even if they have not expressly requested monetary relief from the State to fund an indigent defense program. Plaintiffs argue that "[c]ounties don't have the resources necessary…They have either no resources or insufficient resources to hire outside investigators or experts. And they often lack the skills, experience, and training to handle the case assigned to them." (Pls' Br, p 2). Plaintiffs seek better-compensated attorneys with more resources. Thus, consideration of the Separation of Powers doctrine here is not anticipatory.

Plaintiffs also accuse Defendants of arguing inconsistently with regard to the separation of powers issues, characterizing these arguments as having "evolved considerably over the course

of this case." (Pls' Brief, p 8, fn 3). Specifically, they cite to Defendants' summary disposition motion, in which Defendants argued that "the changes sought in this lawsuit are best left to the judiciary, not individual pre-conviction Plaintiffs." (Pls' App. P 64b). Plaintiffs completely mischaracterize that argument, the nature of which was that the judiciary would have been the proper party to bring a lawsuit to seek increased funding to carry out its constitutional responsibilities, because it could use its inherent powers, set forth in *46th Circuit Trial Court v County of Crawford*,[1] to compel appropriations from the State Treasury. (Pls' App, 64b, Defs' Mtn for SD, p 6). The position we took in the summary motion is *not that the court as a decision-making body or in a judicial capacity is best suited to resolve this*, but rather, that the court in its role as administrator of the indigent defense program—through each individual county circuit—would be in a better position to seek the necessary funding for adequate operation of its appointed counsel system. Throughout this litigation, Defendants have consistently argued that this case violates the Separation of Powers doctrine.

On the merits, the cases cited by Plaintiffs in support of their argument that this Court has the judicial authority to decide constitutional questions miss the mark. Plaintiffs' Separation of Powers argument speaks to the merits of the case. The cases they cite discuss the actual merits of the case and action directly related to the named defendant(s) for constitutional violations within the defendants' authority to remedy. In contrast, Defendants' Separation of Powers argument is addressing judicial restraints that are jurisdictional in nature and question the very ability of the Court to proceed given the circumstances presented here.

Plaintiffs argue that this Court can simply issue declaratory relief—which fits squarely within the courts' judicial power to adjudicate constitutional claims—without actually appropriating any money from the Treasury or ordering the executive branch to reorganize the

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[1] *46 Circuit Trial Court v County of Crawford*, 476 Mich 131; 719 NW2d 553 (2006).

structure or funding mechanisms for the State's indigent defense system. There are three problems with this argument. First, this request for declaratory relief is a thinly veiled request for funding—in other words, funding would not be a mere ancillary effect of a declaration of constitutional rights. Second, Plaintiffs are requesting this Court to establish policy, not to determine that a program adopted by a particular county is unconstitutional. Such policy concerns are within the sole purview of the Legislature. Plaintiffs impermissibly seek 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. Third, declaratory relief against the Governor does not resolve this controversy because the Governor cannot provide the remedy.

Plaintiffs cite *Straus v Governor* for the proposition that declaratory relief will normally suffice to induce legislative and executive branches to conform to constitutional requirements[2] (Pls' Brief on Appeal, pp 21-22). But declaratory relief against the Governor in this case would not result in any resolution of this matter because the Governor cannot address the constitutional issue. It is not within her purview to either define or adopt the policy that would govern the operations of the indigent defense program or make the appropriations to fund it. The challenge here is not to an Executive action, decision, or Order that is within the Governor's purview or control, as in *Straus*. Any relief after a finding of unconstitutionality in this case would require legislative change and legislative appropriation and, therefore, is within the control of the Legislature—which is not a party. Further, the remedy for any changes that are local rather than systemic lies with the three exemplar counties—and Plaintiffs have not named them in this

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

lawsuit either. In short, declaratory relief against the Governor cannot solve a constitutional problem where she cannot provide the remedy.

II. This case is not justiciable.

It is the role of the courts to provide relief to claimants who have suffered or will imminently suffer.[3] Plaintiffs have not met this burden. They have not supported their allegations of injury or imminent injury, as they must.[4] Plaintiffs' standing requirements are not met merely because they "allege" injury and a causal connection to the State and the Governor. Plaintiffs must support these allegations by *showing* a harm resulting from a cognizable right under the due process clause or the Sixth Amendment. They must also *show* that this injury is directly traceable to the unlawful conduct of the State and the Governor. Finally, they must show that restructuring and increased funding will redress the harm alleged.

Plaintiffs have never clearly identified what the injury or harm is. They make general assertions that the laundry list of deficiencies they set forth violates due process and the Sixth Amendment right to counsel. But nothing that Plaintiffs have identified in their Complaint or that the Court of Appeals majority cites in its opinion is a violation of the Sixth Amendment right to counsel. If Defendants have no Sixth Amendment obligation to provide particular counsel or resources, then the lack of these cannot be a constitutional violation. The right to counsel articulated in *Gideon v Wainwright* is the prejudice to the process resulting from the failure to provide reasonably competent counsel at all critical stages.[5] It is this due process violation that is redressable to the State—and is this injury Plaintiffs fail to allege. Contrary to Plaintiffs' argument, neither the Sixth Amendment nor the Supreme Court limits this constitutional injury to the trial and post-trial process: "The purpose of the sixth Amendment

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[3] *Lewis v Casey*, 471 Mich 608, 619; 684 NW2d 800 (2004).
[4] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 631; 684 NW2d 800 (2004).

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."[6] Because Plaintiffs have not alleged such an injury, they have not alleged harm of constitutional proportions.

Further, the nexus between the alleged harms and acts or omissions by the State and the Governor is missing here. The actions and omissions Plaintiffs identify as "harms" are not just associated with indigent defendants. These things can and do happen whether counsel is appointed or retained. Other than a plaintiff having been "wrongly denied counsel or having suffered a deficiency that the United States Supreme Court has recognized as warranting per se prejudice, Plaintiffs' allegations of harm are neither unique to indigent defendants nor a violation of Sixth Amendment rights. Based on Plaintiffs' "proofs," it is just as likely that the harm Plaintiffs allege was caused either by poor judgment or strategy on the part of specific assigned counsel in specific circumstances. Assigned counsel may have been experienced, adequately compensated, and had access to adequate resources and still engaged in such conduct. Defendants agree that wrongful denial of counsel requires the presumption of prejudice. Here, however, none of the named Plaintiffs and putative class representatives have pled any facts indicating that they have been wrongly denied counsel. While the Complaint generally alleges the wrongful denial of counsel as a potential harm, none of the Plaintiffs have suffered such a harm, and thus, do not have standing to assert such a claim on behalf of the class.

The distinction between the right to counsel at all critical stages and the right to a particular kind of counsel is similar to the distinction in *Lewis v Casey* between the established

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[5] *Gideon v Wainwright*, 372 US 335, 341; 83 S Ct 792; 9 L Ed 2d 799 (1963).
[6] *Strickland v Washington*, 466 US 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

right of access to the Courts and the right to a law library.[7] Just as an inmate cannot establish actual injury by establishing that a law library is subpar in some theoretical sense, Plaintiffs cannot establish injury-in-fact by establishing that Michigan's indigent defense system is subpar, where *Gideon* does not recognize the right to other than reasonably competent counsel—which can only be determined on a case-by-case basis.

III. Plaintiffs have not met the requirements for class certification.

As this Court recognized in *Henry*, the purpose of the strictly articulated prerequisites would be defeated if Plaintiffs' only burden is simply to state that it meets the prerequisites and support that with bare assertions.[8] That is what Plaintiffs do here. *Henry* requires *information sufficient* to establish that each prerequisite is satisfied—not just Plaintiffs' unsupported allegations or legal conclusions. *Henry* encourages courts to look beneath the surface of the Complaint, rather than "rubber stamp[ing]" a party's allegations that the prerequisites are met.[9]

Plaintiffs have not come forward with information sufficient to establish that any of requisite class action elements have been met. Plaintiffs argue that a class action is necessary because they have no other means of protecting their rights. But this is not true. Plaintiffs can file motions to replace deficient counsel, and file post-conviction actions regarding effective assistance of counsel. Moreover, Plaintiffs cannot dispense with the jurisdictional requirement of standing simply because a class action is their preferred method of litigating these claims. The Supreme Court has recognized that standing to litigate in federal court is not dispensed in gross.[10] As discussed above, Plaintiffs do not have standing because they have not pled facts sufficient to demonstrate a violation of their federal constitutional rights that is connected to the

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[7] *Lewis*, 518 US at 351.
[8] *Henry v Dow*, ___Mich___; 772 NW2d 301 (2009).
[9] *Henry*, 772 NW2d at 311.
[10] *Lewis*, 518 US at 358.

action or inaction of the State or the Governor—not just an "injury." Plaintiffs have offered mere speculation and conclusory allegations; these are not sufficient to establish numerosity.

With regard to commonality, the absence of money damages does not automatically remove the need for individualized proofs. This case will require individualized proofs to demonstrate both injury and a causal connection to the State and the Governor. Without these individualized inquires, a court would have to presume what it cannot: that the deficiencies outlined in Plaintiffs' Complaint are sufficiently widespread and that the inadequate representation is caused only by the system and not by any other cause.

In support of their commonality arguments, Plaintiffs cite *Streeter v Sheriff of Cook County*. But that case can be distinguished. In analyzing whether a challenge to strip searches in the county jail was properly a class action, the court in *Streeter* found the commonality had been met because the conduct toward members of the proposed class was standardized. The conduct was a strip search of inmates at a particular division in a particular jail during a particular time period and only following a court appearance.[11] The case did not involve different jails or divisions within a jail, or different kinds of searches or search methods.

Similarly, with regard to typicality, Plaintiffs have not pled facts sufficient to support their alleged common core of allegation that defendants all were or are subject to constitutionally inadequate indigent defense because of the inadequate "tools" available. The tools used in the three named counties vary widely and cannot support this common core of allegation. The result of the county-based system is that each county has had a great deal of control over its own "tools." For example, this Court in *Records Court Bar Ass'n v Wayne Circuit Court* recognized

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[11] *Streeter v Sheriff of Cook County*, 256 FRD 609, 2009 US Dist LEXIS 29134 at *2-*3 (April 7, 2009).

both the local and varying character of counties' payment systems for indigent defense,[12] *Recorders Court* also recognized the "potential myriad of local considerations" that enters into a chief judge's determination of reasonable compensation," noting that what constitutes reasonable compensation "may necessarily vary among the circuits."[13] Likewise, the Retired Judges' Amicus Curiae Brief in this case acknowledges the current system has "83 counties delivering public defense *in 83 different ways with different levels of funding."* (*Duncan v State*, Amicus Brief of Retired Judges Giovan, O'Hair, and Burress, p 3, emphasis added). Testimony from judges at the most recent House Judiciary hearing on pending HB 5676 of 2009, the bill that would create a statewide public defense system, underscored the "tremendous discrepancy in funding and approach" to court appointed counsel that has developed within our courts and local funding units, noting that some courts "do more today than others."[14] While some range of factual variation will not defeat typicality, the potential for significant variation in compensation, criterion for appointing counsel, and caseloads even among the three named counties defeats the typicality factor. It also underscores the need for individualized inquiry, which defeats the superiority factor.

The lack of uniformity in these "tools" also defeats the adequacy factor because Plaintiffs are not similarly affected by the alleged unconstitutional policy of the State and the Governor. Clearly, some counties may have more tools than others or offer better compensation than other counties. In some counties, Plaintiff class members make bail while others do not—and this is

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[12] *Recorders Court Bar Ass'n v Wayne Circuit Cour*t, 443 Mich 110, 129; 503 NW2d 885 (1993).

[13] *Recorders Court Bar Assn*, 443 Mich at 129.

[14] See, e.g., the testimony of Tom Boyd, Chief Judge of the 55th District Court for Ingham County, given at the hearing on HB 5676 held on March 15, 2009, at the House Building in Lansing, available at http://www.house.mi.gov/committeeinfo.asp?lstcommittees=judiciary&submit=Go#CommitteeTestimony

no trivial difference. One named Plaintiff, Brian Secrest, even hired a private attorney before his May 4, 2007 sentencing. Plaintiffs have not established the adequacy of these named Plaintiffs to represent the class. It is beyond argument that a class representative must suffer the same injury as the class members.[15]

IV. Plaintiffs' procedural arguments are without merit.

A. Defendants have not conceded the facts.

Plaintiffs allege that Defendants have not challenged the substance of the arguments, and have thereby conceded the facts. But at this stage where Defendants have filed a C(8) motion, they do not have to challenge Plaintiffs' factual assertions. Defendants have focused on, and attacked, the legal sufficiency of Plaintiffs' claims. Additionally, while the Court must focus on the facts as pled and accept them as true, much of what Plaintiffs' identify as "facts" are nothing more than the ultimate legal conclusions posturing as facts—which neither Defendants nor the courts need accept. For example, Plaintiffs assert that Defendants must accept as true the allegation that the Defendants are responsible for the violations of Plaintiffs' constitutional right to counsel and due process of law. (Plaintiffs' Brief on Appeal, p 10). But this "factual" allegation embodies the core legal question whether Plaintiffs have a Sixth Amendment right to particular counsel and resources that the State and Governor have not provided. The facts Plaintiffs do allege are not sufficient to state Sixth or Fourteenth Amendment violation.

B. Plaintiffs have not waived arguments as to numerosity or adequacy for purposes of class action decertification.

Plaintiffs also claim that Defendants have waived any arguments as to the numerosity or adequacy requirements for class action by not addressing them in their *Brief in Opposition to Plaintiffs' Motion for Class Certification* below. This argument is meritless, particularly since the

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[15] *Gen Tel Co of the Southwest v Falcon*, 457 US 147, 156; 102 S Ct 2364; 72 L Ed 2d 740

majority Court of Appeals Opinion addressed all five factors and the dissent discussed the numerosity factor at length. Therefore, all five factors are within this Court's purview in considering this application for leave.

C. Defendants have not waived arguments pertaining to Plaintiffs' due process claims.

Plaintiffs also claim Defendants have waived any arguments as to Plaintiffs' due process claims by confining the standing argument to the right to counsel claims raised in this case. (Pls' Brief on Appeal, p 25). This mischaracterizes Defendants' arguments and demonstrates a fundamental lack of understanding about these two interrelated claims. The Sixth Amendment standing alone is not enforceable against the States. It is only enforceable against the States through the Due Process Clause of the Fourteenth Amendment.[16]

From the beginning of this case, Defendants have argued that the State's current indigent defense system does not violate Sixth Amendment obligations as enforced through the Fourteenth Amendment's due process clause, because the "harms" alleged by Plaintiffs do not adversely affect the process. This is the essence of Plaintiffs' due process claim. Plaintiffs' due process and Sixth Amendment claims are not two separate, unrelated causes of action. Where the State meets its obligations imposed by the Sixth Amendment—i.e., where there has been no prejudice to the process—there is no due process violation. Defendants have consistently argued these issues, from the Circuit Court through the application for leave to appeal.

RELIEF SOUGHT

THEREFORE, Defendants are entitled to the Relief requested in their Brief on Appeal.

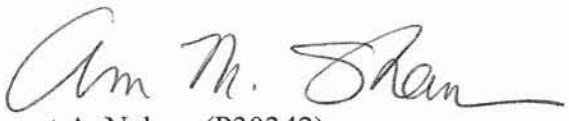
(1982).

[16] *Powell v Alabama*, 387 US 45; 53 S Ct 55; 77L Ed 158 (1932); *Gideon*, 372 US at 341; *People v Williams*, 470 Mich 634, 641; 683 NW2d 597(2004).

Respectfully submitted,

MICHAEL A. COX
Attorney General

B. Eric Restuccia (P49550)
Solicitor General
Counsel of Record



Margaret A. Nelson (P30342)
Ann Sherman (P67762)
Assistant Attorneys General
Attorneys for Defendants-Appellants State of Michigan and Governor Jennifer Granholm
P.O. Box 30736
Lansing, Michigan 48909
517.373.6434

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