Albany County Clerk's Index No. 8866/07

Court of Appeals

of the

State of New York

KIMBERLY HURRELL-HARRING, *et al.*,

Plaintiffs-Appellants,

– against –

THE STATE OF NEW YORK, GOVERNOR DAVID PATERSON, in his individual capacity,

Defendants-Respondents.

BRIEF OF *AMICI CURIAE* FORMER PROSECUTORS MICHAEL A. BATTLE, ZACHARY W. CARTER, ROBERT B. FISKE, JR., JOSEPH JAFFE, JAMES E. JOHNSON, JOHN S. MARTIN, ROBERT M. MORGENTHAU, OTTO G. OBERMAIER, PETER L. ZIMROTH,

(Amici Parties Continued On Inside Cover)

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Interest of Amici Curiae

Amici are sixty-two former prosecutors who submit this brief because of their lifelong dedication to ensuring that our criminal justice system in New York is fair.

As former state and federal prosecutors in New York, amici have all had substantial responsibility for making critical decisions about whether and how to prosecute cases. Many have held positions of leadership in developing and guiding their offices' policies on prosecution, as described in greater detail in the appendix to this brief.

For example, Robert M. Morgenthau served as New York County's District Attorney for more than thirty years, and as the United States Attorney for the Southern District of New York for almost ten years. Joseph Jaffe served as the District Attorney for Sullivan County, and Peter L. Zimroth was Corporation Counsel for New York City, where he was responsible for overseeing all of the City's juvenile prosecutions in family court. Michael A. Battle served as the United States Attorney for the Western District of New York, Zachary W. Carter served as the United States Attorney for the Eastern District of New York, and Robert B. Fiske, Jr., John S. Martin, and Otto G. Obermaier all served as United States

Attorneys for the Southern District of New York. James E. Johnson served as the Under Secretary of the Treasury for Enforcement, where he oversaw the operations of the Bureau of Alcohol, Tobacco & Firearms, the Secret Service, the United States Customs Service, and the Office of Foreign Assets Control.

Amici are all committed to the principle that the overarching goal for every prosecutor is to secure just results, and they are passionate about the importance of preserving the integrity of the criminal justice system. Amici understand firsthand that the work of prosecutors in obtaining just results is directly undercut when individuals facing prosecution receive inadequate defense services. They are deeply concerned about the damage to the judicial system and public confidence that results from every victory attained against a defendant whose legal representation is deficient.

Amici believe that this suit can and should proceed in a manner that is fair to the State, to the Plaintiffs, to all other criminal defendants, and to the cause of justice. They respectfully submit that it is critically important to prosecutors, as well as to all other participants in the justice system, that the New York courts hear and adjudicate the Plaintiffs' claim that deficiencies in five counties' systems for providing indigent defense services threaten to

deprive criminal defendants of their constitutional right to effective assistance of counsel.

Summary of the Argument

The courts of New York can and should adjudicate the Plaintiffs' challenge to the deficiencies in the provision of indigent defense services in five New York counties that threaten to deprive indigent defendants of their constitutional right to effective assistance of counsel. As the Plaintiffs have shown, it is the province of the judiciary to protect and enforce individuals' constitutional rights, and the judiciary has a particularly strong duty to act here, where the alleged constitutional deficiencies threaten the integrity of the judicial system and its very capacity to render justice.

Amici submit this brief to elaborate on these points from their special perspective as former prosecutors.[1] As set forth in the complaint, individuals charged with crimes in the five counties are regularly denied counsel at critical stages of their proceedings, and far too many defense counsel for the indigent in these counties lack adequate training and supervision, fail to maintain contact with clients, fail to confer with clients to enable them to make informed decisions about their cases, and fail to

[1] Amici refer the Court to the Plaintiffs' merits briefs for a full analysis of the issues raised by the Appellate Division's majority opinion and by the State.

investigate and prepare clients' cases. Deficiencies of this nature undermine the critical role that prosecutors perform in assuring that the criminal justice system operates in a fair and effective manner to produce just outcomes that inspire public confidence.

Adjudication of the Plaintiffs' claims is essential to the preservation of the prosecutors' role and to the operation of the criminal justice system as a whole. Recognizing the judicial system's strong interest in correcting deficiencies that undermine the integrity of criminal proceedings, courts in New York and elsewhere have found similar challenges to inadequate defense services to be justiciable. The same wisdom should guide this Court.

Amici also urge the Court to reject the State's additional arguments against justiciability. Contrary to the State's assertion, post-conviction review in individual cases cannot cure the damage done by the systemic failures in indigent defense services in the five counties. Nor does this lawsuit pose a threat to the integrity of criminal proceedings. Through proper trial management and the appropriate crafting of findings and remedies, this civil action can be adjudicated in a manner that is fair to the State, to the Plaintiffs, to all other criminal defendants, and to the cause of justice.

Argument

I. The deficient system for defending the indigent alleged in the complaint undercuts the work of prosecutors and damages the integrity of the criminal justice system.

The alleged deficiencies in the five counties' provision of indigent defense services undercut the ability of prosecutors to effectively perform their role in the justice system. When defendants lack representation during critical stages of their proceedings, or when they receive representation from counsel who lack necessary training and supervision, fail to maintain any contact with defendants, fail to confer with defendants to enable them to make informed decisions about their cases, or lack adequate resources to investigate and prepare defendants' cases (Am. Compl. ¶¶ 11-13), prosecutors cannot rely on the adversarial system to ensure accurate results. Systemic failures of this nature also undercut public confidence in the criminal justice system, and lead to harms such as over-incarceration, mistrials, and remands. As former U.S. Attorney General Janet Reno explained, "[t]he bottom line is that our system of justice will only work, and will only inspire complete confidence and trust of the people, if we have strong prosecutors, an impartial judiciary, *and* a strong system of indigent criminal defense." Janet Reno, *Six Building Blocks for Indigent Defense*, 23 Champion, Apr. 1999, at 28. At issue in this case, then, is not only the rights

of individual criminal defendants, but also the very integrity of New York's criminal justice system.

A. Prosecutors cannot ensure that justice is done when defendants lack adequate defense counsel.

As this Court has observed, a prosecutor serves a "dual role" in our criminal justice system, as both an "advocate" and as a "public officer." *People v. Pelchat*, 62 N.Y.2d 97, 105 (1984). Prosecutors are "charged with the duty not only to seek convictions but also to see that justice is done." *Id.* The inadequate system of defense services alleged in the complaint, if proven, will have undermined, and will continue to undermine, prosecutors' ability to fulfill this role.

Critically, "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Herring v. New York*, 422 U.S. 853, 862 (1975). Prosecutors have long recognized that defense counsel for the indigent are necessary to maintain the integrity of the criminal justice system. In 1962, twenty-two state Attorneys General joined a historic amicus brief to provide the United States Supreme Court with the view of prosecutors that petitioner Clarence Gideon deserved competent defense counsel. In *Gideon v. Wainwright*, 372 U.S.

335 (1963), one of the twentieth century's most important cases concerning criminal justice, the amici urged, "[t]he adversary system is one of the glories of Anglo-American jurisprudence, but it rests on the presupposition that competent advocates will fully bring forth all considerations on each side of the case." Brief for the State Government Amici Curiae, *Gideon v. Wainwright*, 1962 WL 115122, at *13-14 (U.S. Nov. 23, 1962).

Prosecutors rely on zealous defense counsel in myriad ways. Generally speaking, defense counsel can be counted on to investigate their clients' cases, test the prosecution's evidence, and advance alternative theories. Moreover, because defense attorneys can speak freely with their clients, they are sometimes the only parties in the justice system in a position to identify and introduce exculpatory evidence, a credible defense, or mitigating information during sentencing.

In addition, a prosecutor's responsibility to disclose potentially exculpatory material is aided by the presence of competent defense counsel. Through the operation of the adversarial system, defense counsel provide a competing perspective that can help to ensure that *Brady* material is disclosed, thereby protecting defendants' rights and helping avoid a situation where the State must retry a defendant years after the fact. *See, e.g.*, *People v. Disimone*, 23 Misc.3d 402, 404-05, 407 (Sup. Ct., Westchester Co. 2009)

(defendant was convicted in 2000, was granted habeas relief based on a *Brady* violation, and is currently facing retrial). New York courts have recognized the important role that defense counsel perform when interacting with the prosecution during the *Brady* disclosure process. *See People v. Vilardi*, 76 N.Y.2d 67, 77 (1990) ("Where the defense itself has provided specific notice of its interest in particular material, heightened rather than lessened prosecutorial care is appropriate.").

The allegations in the Plaintiffs' complaint, however, indicate that in the five counties, defense counsel for the indigent are systematically failing to perform these and other essential defense functions. The experiences of the named Plaintiffs highlight these deficiencies, and demonstrate how the adversarial system breaks down when defense counsel are ineffective. For example:

- James Adams, who was accused of stealing several sticks of deodorant from a drug store, alleges that his attorney (a) never met with him outside of open court, and (b) failed to file a motion to dismiss the indictment even after the *judge* questioned the basis for the indictment in open court. Over the course of these proceedings, during which time Mr. Adams was

incarcerated, he lost his job and his family was evicted from their home. (Am. Compl. ¶¶ 48-63.)

- Jacqueline Winbrone, who was the sole caretaker for her husband on dialysis, alleges that her attorney (a) refused to respond to her requests to discuss her case, (b) failed to obtain a bail reduction hearing for her in a timely manner, and (c) waived her right to a preliminary hearing without consulting her. Ms. Winbrone alleges that her husband died while she was incarcerated because she had no one to care for him and transport him to dialysis. (Am. Compl. ¶¶ 103-110.)
- Kimberly Hurrell-Harring, a nurse who was accused of bringing her husband a small amount of marijuana during a jail visit, alleges that (a) she was not represented at her arraignment, where despite her lack of criminal history her bail was set at $10,000 cash or $20,000 bond, an amount she could not afford to pay, (b) her attorney (whom she met soon after her arraignment) failed to move for her felony charge to be reduced to a misdemeanor, despite clear precedent on point, and (c) she pleaded guilty without knowing the full consequences of her plea. As a result of these errors, Ms. Hurrell-Harring was

imprisoned for several months and will lose her nursing license. (Am. Compl. ¶¶ 39-45.)

See also Am. Compl. ¶¶ 80-86 (alleging that Ricky Lee Glover's attorney told him that he had a "dead case" despite admitting she had not obtained or reviewed any files from the prosecutor or conducted any discovery or independent investigation, and that she failed to move for a bail reduction after charges against Mr. Glover were reduced); Am. Compl. ¶ 169 (alleging that Christopher Yaw's attorney has not met with him to discuss the charges against him, the facts of his case, or whether it would be possible to negotiate a more favorable plea); Am. Compl. ¶¶ 95, 111, 118, 127, 135 (alleging that the attorneys for Richard Love, Jr., Jacqueline Winbrone, Lane Loyzelle, Tosha Steele, and Bruce Washington never conducted an independent investigation into the facts surrounding their cases or the existence of any possible defenses that might be available to them); Am. Compl. ¶ 144 (alleging that Shawn Chase was convicted after his attorney informed him that he would be testifying only ten minutes before he took the stand and failed to even prepare him for testimony).

Deficiencies of this sort are borne not only by defendants, but also by society at large. Inadequate representation generates heavy costs, including unnecessary or excessive incarceration and the risk that culpable individuals

remain free. *See* Attorney General Eric Holder, Address at the Brennan Legacy Award Dinner (Nov. 16, 2009), *available at* http://www.justice.gov/ag/speeches/2009/ag-speech-0911161.html (Attorney General Holder observed that society bears a double cost for a wrongful conviction, "both in the ultimate nightmare scenario of sending an innocent person to jail, and in terms of letting the person who actually committed the crime remain free.").

At its core, the complaint alleges that indigent defendants face an unacceptably high risk that, under the challenged systems in the five counties, they will be denied counsel at critical stages of their proceedings and/or will have counsel that fail to effectively and zealously mount a defense, leading to, among other things, wrongful convictions, overcharging, excessive bail or the wrongful denial of bail, guilty pleas that are not knowing and voluntary, and excessive sentences. If these allegations are true, it is axiomatic that prosecutors will be unable to ensure that "justice is done." *Pelchat*, 62 N.Y.2d at 105.

B. Adequate defense counsel are necessary to ensure public confidence in the fairness of the justice system.

A strong system of defense for the indigent is also critical to ensure public confidence in the justice system – an issue of vital importance to

prosecutors, as well as to the functioning of the justice system as a whole. Simply put, "the very foundation of our system of justice . . . [is] our citizens' confidence in it." *Georgia v. McCollum,* 505 U.S. 42, 49-50 (1992) (quoting *State v. Alvarado*, 221 N.J. Super. 324, 328 (1987)).

As Attorney General Eric Holder recently observed, "[w]hen defense counsel are handicapped by lack of training, time, and resources – or when they're just not there when they should be – we rightfully begin to doubt the process and we start to question the results. We start to wonder: Is justice being done? Is justice being served?" Attorney General Eric Holder, Address at the Brennan Legacy Award Dinner (Nov. 16, 2009), *available at* http://www.justice.gov/ag/speeches/2009/ag-speech-0911161.html.

The allegations in the complaint, as described, raise exactly these concerns. It is not enough that a prosecutor believes that a defendant is guilty and offers evidence that proves guilt. The public must also trust that the resulting conviction is the product of the vigorous adversarial testing that is the hallmark of our system of justice. *See People v. Settles*, 46 N.Y.2d 154, 161 (1978) ("The right of any defendant, however serious or trivial his crime, to stand before a court with counsel at his side to safeguard both his substantive and procedural rights is inviolable and fundamental to our form

of justice."). According to the Plaintiffs' allegations, however, such "vigorous adversarial testing" is far from the norm in the five counties.

This is not simply an abstract question of public relations. Without public confidence in the criminal justice system, victims and witnesses may be unwilling to come forward and juries may refuse to convict a defendant even with clear evidence of guilt. *See, e.g.*, Paul Butler, *Racially-Based Jury Nullification: Black Power in the Criminal Justice System*, 105 Yale L.J. 677, 697 (1995) (arguing that African-American jurors should practice jury nullification because the "criminal justice system is racist and oppressive"). A lack of public confidence in the system can also lead to social unrest, as communities question whether a convicted defendant was treated fairly. *See Settles*, 46 N.Y.2d at 161 ("[T]he assistance of counsel is essential not only to insure the rights of the individual defendant but for the protection and well-being of society as well.").

All of these concerns undermine both the prosecutor's ability to do his or her job effectively and the functioning of the criminal justice system as a whole.

C. Adequate defense counsel reduce inefficiencies and the risk of mistrials and remands.

Adequate defense counsel are also essential for the efficient operation of the justice system. Ineffective defense counsel create delays and distractions for both prosecutors and courts and increase the risk of mistrials and remands, burdening defendants and requiring the unnecessary expenditure of additional resources by the State.

For example, the complaint alleges numerous instances where ineffective representation led to delays in criminal proceedings.[2] Such unnecessary delays waste both prosecutorial and court resources and result in a higher caseload for prosecutors, defense counsel, and the courts. Moreover, such delays leave defendants incarcerated for longer than necessary, which, beyond the obvious individual impact, also poses significant problems for a system in which financial and human resources are already stretched to their limits.

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[2] For example, Tosha Steele's attorney allegedly failed to update her on her case and did not appear in court for an appearance, leading to an adjournment and prolonging her pretrial incarceration. (Am. Compl. ¶¶ 123-28.) Likewise, Edward Kaminski alleges that he was assigned different attorneys at each appearance, leading the attorneys to request adjournments to prepare and resulting in a miscommunication that caused him to miss a court date. (Am. Compl. ¶¶ 188-95.) And Richard Love alleges that his case was delayed because, when he was unable to reach his attorney, he sought to proceed *pro se* and ultimately was assigned new counsel. (Am. Compl. ¶¶ 97-99.)

The complaint also demonstrates how plea bargaining – an essential tool for prosecutors – can be compromised by inadequate defense counsel.[3] Plea bargaining allows prosecutors to conserve resources and focus their attention on the most difficult cases. When plea bargaining is undermined by inadequate defense counsel, such as when defense counsel fail to negotiate plea agreements vigorously, fail to notify defendants of plea offers, or fail to inform defendants of the direct and collateral consequences of accepting or rejecting such offers, the result can be excessive charges, excessive sentences, over-incarceration, and even missed opportunities for prosecutors to bring more cases. Prosecutors may also lose the chance to develop cooperation agreements, which can benefit defendants while also serving as a critical tool for investigating and developing cases against criminal enterprises.

Moreover, when confronted with incompetent defense counsel, prosecutors face difficult ethical questions about when and how to intercede to safeguard the integrity of the proceedings. *See* Vanessa Merton, *What Do You Do When You Meet a "Walking Violation of the Sixth Amendment" If*

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[3] For example, James Adams alleges that he never learned of the prosecution's plea offer to him (Am. Compl. ¶ 52), while Jemar Johnson alleges that she currently is unable to make an informed decision about whether to accept a plea offer because her attorney never explained to her the full consequences of a conviction. (Am. Compl. ¶ 153.)

You're Trying to Put That Lawyer's Client in Jail?, 69 Fordham L. Rev. 997, 1019-42 (2000) (discussing the unclear ethical rules governing when prosecutors must intervene in the face of incompetent defense counsel); *see also People v. Santorelli*, 95 N.Y.2d 412, 420-21 (2000) (stating that prosecutors' mandate to ensure that justice is done "gives rise to special responsibilities – constitutional, statutory, ethical, personal – to safeguard the integrity of criminal proceedings and fairness in the criminal process"). Inadequate defense counsel necessarily distract prosecutors from developing and presenting their case because they cannot rely on the adversarial system to protect defendants' rights and interests.

Lastly, cases without adequate defense counsel are more likely to result in withdrawn pleas or mistrials, or in a remand for a new trial after an appeal or a habeas petition, thereby burdening prosecutors' offices even when defendants are guilty. As former Attorney General Reno observed, "Just ask a prosecutor, an arresting officer, or even a victim of crime: would they rather face a vigorous defense at trial or risk an overturned conviction and retrial?" Janet Reno, *Six Building Blocks for Indigent Defense*, 23 Champion, Apr. 1999, at 28. Not only do re-trials create new costs and burdens for already-stretched prosecutors' offices, but the passage of time may make it harder to secure a second conviction because evidence may

have been lost or destroyed and witnesses' memories may have faded. *See, e.g., People v. Taveras*, 10 N.Y.3d 227, 233 (2008) ("In the event defendant was successful on appeal and required a new trial, the People's case would be hampered by having to locate and prepare witnesses whose memories would have likely faded, thereby affecting the People's ability to sustain their burden at trial."). Moreover, even when an individual loses a post-conviction appeal or collateral proceeding alleging ineffective assistance of counsel, society still bears a large cost in addressing such allegations. Prosecutors (and the court system as a whole) face real administrative burdens in the form of expensive and lengthy proceedings that can tie up the resources of the court and the prosecutor's office for months, if not years.

* * *

Former Chief Justice Burger observed that our criminal justice system is like a three-legged stool, made up of the judge, the prosecution, and the defense. *See* William H. Erickson, *A Book Review with an Eye to Ethics*, 81 Mich. L. Rev. 1191, 1192 (1983) (citing Address by Chief Justice Warren E. Burger, Second Plenary Session, American Bar Association Annual Meeting (July 16, 1971)). If any one of these legs is weak, our justice system cannot stand firmly. As the above discussion demonstrates, a deficient system of

defense for the indigent does not just affect the rights of the accused, it also undermines the entire criminal justice system, including the prosecutors.

II. Because courts have the power and responsibility to protect the integrity of the judicial system, this Court should find the Plaintiffs' claims justiciable.

When alleged systemic deficiencies threaten the very functioning of the criminal justice system, the judicial branch can – and must – intercede to protect its own integrity. New York courts can, of course, issue prospective relief to correct ongoing constitutional violations. *See, e.g., Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893, 925 (2003) ("[I]t is the province of the Judicial branch to define, and safeguard, rights provided by the New York State Constitution, and order redress for violation of them."). But the courts have an even greater responsibility to adjudicate claims for such relief when, as in the instant case, systemic deficiencies threaten the integrity of the judicial process itself. Recognizing the power of the judicial branch to protect its own integrity, courts in fact have interceded, in both New York and across the country, to ensure that cases challenging systemic deficiencies in state indigent defense systems are allowed to proceed.

Notably, in *New York County Lawyers' Ass'n v. State* (*NYCLA*), 294 A.D.2d 69 (1st Dep't 2002), the First Department found justiciable a claim

(strikingly similar to the one at issue here) that the levels of attorney compensation under certain state statutes "have resulted in such systemic deficiencies in the assigned counsel system that a severe and unacceptably high risk has been created that children and indigent adults will be denied their constitutional rights to meaningful and effective assistance of assigned counsel." *Id.* at 71-72. Recognizing that the suit fell within the court's general power to redress prospective constitutional harm, the Appellate Division rejected arguments that it should decline to hear the case because the plaintiffs' claim necessitated second-guessing compensation levels approved by the Legislature. Rather, the Appellate Division concluded that "the matter must be deemed justiciable" because "at the heart of the present action is the demand that the court system ensure that *its processes* do not cause systemic violations of constitutional guarantees." *Id.* at 73 (emphasis added).

Just as in *NYCLA*, the Plaintiffs here allege deficiencies in the indigent defense system, which collectively create a severe and unacceptably high risk that indigent defendants in five counties will be denied effective assistance of counsel. (Am. Compl. ¶ 15.) As explained in Point I, *supra*, these allegations do not just implicate the rights of the individual defendants. Rather, they call into question the integrity of the entire judicial process.

Further, as in *NYCLA*, because this case turns on the State's non-discretionary obligations, it is decidedly "[not] an area in which [the court] is ill-equipped to undertake the responsibility [to resolve the question] and [in which] other branches of government are far more suited to the task." *Id.* at 72 (internal quotation marks omitted); *see also People v. Ramos*, 99 N.Y.2d 27, 32 (2002) ("The State constitutional right to counsel is a cherished principle worthy of the highest degree of [judicial] vigilance.") (internal citations and quotation marks omitted). Simply put, when systemic constitutional deficiencies undermine the court's own functioning, courts can and must intercede.

Other state courts have come to the same conclusion, finding that challenges to systemic deficiencies in indigent defense services are justiciable, largely because of the impact of such deficiencies on the judicial system itself. *See Duncan v. State*, 774 N.W.2d 89, 113-14 (Mich. App. 2009) ("Ultimately, it is the judiciary, on a daily basis, that is integrally involved with ensuring that, before prosecutors go forward, indigent defendants are provided counsel, without which the court could not carry out its constitutional responsibilities."); *In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Pub. Defender*, 561 So.2d 1130, 1132-33 (Fla. 1990) (holding that "courts have the inherent authority to issue

orders addressing" Florida's deficient defense system, where "woefully inadequate funding of the public defenders' offices" had created a backlog of appellate cases that had turned into "a crisis situation of constitutional dimensions"); *State v. Quitman County*, 807 So.2d 401, 406, 410 (Miss. 2001) (rejecting the argument that "financing of public defenders is a legislative matter for which the courts can provide no remedy" because "the courts may act in cases of necessity where the Legislature fails to furnish the essentials required for the operation of an independent and effective court"); *see also Rivera v. Rowland*, 1996 Conn. Super. LEXIS 2800, at *14 (Conn. Super. Ct. Oct. 23, 1996) ("[T]he important claims being made in this case, relating to the quality of representation being provided to indigent defendants in our state, make this a matter of peculiar concern to the judicial branch.").

In suggesting that the courts should bow to legislative judgments (in this instance, legislative inaction) about the design and operation of the five counties' systems for representing the indigent, the Third Department fundamentally misunderstood the judiciary's role in New York's constitutional system. New York law vests a court "with all powers reasonably required to enable it to . . . perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its

lawful action effective." *Wehringer v. Brannigan*, 232 A.D.2d 206, 207 (1st Dep't 1996) (internal quotation marks omitted), *appeal dismissed*, 89 N.Y.2d 980 (1997). Indeed, "the judicial branch *must* retain the inherent power to protect itself from the impairment of its ability to function if it is to continue in existence as an independent, coequal branch of government." *Maron v. Silver*, 58 A.D.3d 102, 108 (3d Dep't 2008); *see also New York County Lawyers' Ass'n v. State* (*NYCLA II*), 192 Misc.2d 424, 436 (Sup. Ct., New York Co. 2002) ("[W]hen legislative appropriations prove insufficient and legislative inaction obstructs the judiciary's ability to function, the judiciary has the inherent authority to bring the deficient state statute into compliance with the constitution."); *Bruno v. Codd*, 47 N.Y.2d 582, 588 (1979) (finding a dispute justiciable when it involves "the operation and administration of the courts by the courts"); *Matter of McCoy v Mayor of City of N.Y.*, 73 Misc.2d 508, 510 (Sup. Ct., New York Co. 1973) ("The judiciary has the right and power to protect itself from the impairment of its functions . . . .").

As explained in Point I, *supra*, by drawing into question the accuracy of the court system's results, undermining public confidence in its decisions, and harming the efficient administration of justice, the deficiencies alleged in the complaint go to the heart of the court's dignity, independence, and

integrity. Under these circumstances, the judiciary's inherent authority to protect its status as an equal branch of government mandates adjudicating the Plaintiffs' claims. *See NYCLA II*, 192 Misc.2d at 436-37 ("[L]ong standing maxims rooted in the doctrine of separation of powers must yield in equity on a showing that the State's failure to raise the current compensation rates adversely affects the judiciary's ability to function and presumptively subjects innocent indigent citizens to increased risks of adverse adjudications and convictions merely because of their poverty."); *see also 46th Circuit Trial Court v. Crawford Co.*, 476 Mich. 131, 143 (Mich. 2006) ("[T]he judiciary's 'inherent power' to compel appropriations sufficient to enable it to carry out its constitutional responsibilities is a function of the separation of powers provided for in the Michigan Constitution.").

As Justice Peters of the Appellate Division, Third Department, joined by Justice Stein, wrote in dissent in this case, "[j]usticiability of the instant claim is even more compelling given that the constitutional right at issue is so interwoven with, and necessarily implicates, the proper functioning of the court system itself." *Hurrell-Harring v. State*, 66 A.D.3d 84, 96 (3d Dep't 2009). Because courts have the responsibility to remedy systemic constitutional deficiencies when the deficiencies undermine the courts

themselves, this Court should uphold the power of the New York courts to adjudicate the Plaintiffs' claims.

III. The State's remaining objections to justiciability lack merit.

A. The alleged deficiencies in the five counties' indigent defense systems cannot be cured by post-conviction review in individual cases.

The alleged systemic deficiencies in the five counties' provision of defense services cannot be cured through post-conviction review. First, as alleged by the Plaintiffs, much of the harm caused to criminal defendants by the absence of counsel or by ineffective assistance of counsel – such as the unnecessary denial of bail or a defendant remaining incarcerated during unnecessary pretrial delays – occurs at the pre-trial and pre-conviction stages. Post-conviction review *cannot* remedy the deprivation of liberty that occurs in these circumstances, or the broader harms to the criminal justice system and to society that result from such systemic failures. This is especially true when the charges against a defendant are later dropped or when a defendant is acquitted at trial.

Further, the very high legal standard that a defendant must satisfy to reverse a conviction – a lack of "meaningful representation" under *People v. Baldi*, 54 N.Y.2d 137, 147 (1981) – focuses almost exclusively on the

outcome of the case, rather than on whether the defendant was separately harmed as a result of ineffective assistance of counsel in the course of the representation. *See People v. Stultz*, 2 N.Y.3d 277, 283-84 (2004) (explaining that "we are not indifferent to whether the defendant was or was not prejudiced by trial counsel's ineffectiveness" and "would, indeed, be skeptical of an ineffective assistance of counsel claim absent any showing of prejudice"). This high standard is understandable in the context of post-conviction review because the defendant is seeking the reversal of a conviction. But post-conviction review is simply not designed to address the kind of systemic failings raised in the Plaintiffs' complaint.

Indeed, the State's argument would render many serious, systemic deficiencies in representation effectively unreviewable in a constitutional challenge. For example, under the State's theory, even if individuals are routinely incarcerated unnecessarily during pre-trial proceedings due to inadequately trained lawyers, the deficiencies causing these injuries cannot, and will never, be subject to a justiciable suit because the deficient representation does not affect the outcome of their cases. Failures by counsel to negotiate plea agreements adequately will likewise escape review. In effect, the State seeks to carve out from judicial oversight much of the critical role that lawyers play in ensuring that defendants are treated fairly in

criminal proceedings. The right to counsel is not, and should not, be limited in such a fashion.

Additionally, even when a convicted defendant raises a claim of ineffective assistance that meets *Baldi*'s standard and thereby prevails in post-conviction proceedings, the harm to both the individual and the criminal justice system from ineffective counsel may leave a stain that can never fully be removed. As recent news stories demonstrate, a wrongful conviction – particularly one that involves years of incarceration – can do profound harm to a defendant, as well as his or her family, friends, and employers, and the larger community, in ways that post-conviction relief can never begin to address. *See* The Innocence Project, *Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, 7-11, *available at* http://www.innocenceproject.org/docs/Innocence_Project_Compensation_Report.pdf (discussing the psychological, physical, and financial obstacles that exonerated defendants face); *see also* Fernanda Santos & Janet Roberts, *Putting a Price on a Wrongful Conviction*, N.Y. Times, Dec. 2, 2007, at 44 (same).

Such limitations on the effectiveness of post-conviction remedies are exactly why the judicial branch has the equitable power to issue prospective

relief in response to a threatened deprivation of constitutional rights. *See Swinton v. Safir*, 93 N.Y.2d 758, 765-66 (1999) (discussing the principle that "proof of a likelihood of the occurrence of a threatened deprivation of constitutional rights is sufficient to justify prospective or preventive remedies under 42 U.S.C. § 1983, without awaiting actual injury"). The complaint alleges just such a threat, and the judicial branch's authority to issue prospective relief in such circumstances is well-established. *Accord People v. Donovan*, 13 N.Y.2d 148, 153-54 (1963) ("It cannot be overemphasized that our legal system is concerned as much with the integrity of the judicial process as with the issue of guilt or innocence.").

B. This case will not have a significant impact on individual prosecutions, and even if there were some impact, it would not bear on justiciability.

This case can also proceed in a manner that is fair to the State, to the Plaintiffs, and to all criminal defendants, notwithstanding the State's argument that it will interfere with pending criminal cases or culminate in a ruling prompting a wave of overturned criminal convictions. As former prosecutors, amici are sensitive to the State's concerns, but feel strongly that they reflect issues of case management – not justiciability – and that the trial court is capable of overseeing this lawsuit in a manner that avoids the State's

parade of horribles. As former prosecutors and experienced litigators, amici know that the New York courts are well equipped to adjudicate the Plaintiffs' claims in a fair and appropriate manner.

First, while the State argues that this lawsuit will lead to intractable discovery disputes turning on privileged attorney-client information, discovery questions arising from the potential waiver of attorney-client privilege are routine issues for trial courts, and the court has many tools to protect the interests of both the State and criminal defendants. As an initial matter, to the extent that the Plaintiffs must waive attorney-client privilege in order for their suit to go forward, this issue is irrelevant to justiciability.[4] The decision to pursue the case and waive the privilege rests with the Plaintiffs, and has nothing to do with whether the complaint states a claim or with the court's capacity to hear the case. *See People v. Osorio*, 75 N.Y.2d 80, 84 (1989) ("[Attorney-client] privilege belongs to the client . . . .").

Moreover, in arguing that the waiver and discovery of otherwise privileged information will necessarily interfere with pending criminal

[4] The trial court in this case has already ruled that the State "has failed to show that every plaintiff has completely waived the attorney-client privilege" and that "the extent of a waiver, if any, must be based upon the allegations of the complaint and the affidavits with respect to each individual plaintiff, and upon the nature of the responses of the various criminal defense attorneys with respect to strategies or other issues which might render the client's communications highly relevant to whether the attorney had provided or was providing adequate assistance of counsel." (Order Denying Def.'s Mot. for an Order Deeming the Attorney-Client Privilege Waived, R. 341-42.)

proceedings, the State overlooks "a trial court['s] . . . broad discretion to oversee the discovery process." *Castillo v. Henry Schein, Inc.*, 259 A.D.2d 651, 652 (2d Dep't 1999); *see also Andon v. 302-304 Mott St. Assocs.*, 94 N.Y.2d 740, 745 (2000) ("[D]iscovery determinations rest within the sound discretion of the trial court . . . ."). For instance, the trial court may be able to avoid interference with pending criminal cases by staggering discovery or narrowing discovery to those Plaintiffs whose criminal cases have already terminated. Indeed, it is highly unlikely that any of the Plaintiffs' criminal cases will remain active by the time this action reaches trial. *See Hurrell-Harring*, 66 A.D.3d at 98 (Peters, J., dissenting) (pointing out that "the criminal actions of approximately half of the named plaintiffs had terminated as of the date of [the trial court's] August 2008 order").[5]

Further, to the extent any cases do remain active, the Plaintiffs and the State could negotiate a confidentiality agreement and protective order that would permit discovery of information ordinarily subject to the attorney-client privilege, but would bar the State from using any information prejudicial to the Plaintiffs in other proceedings. *See* N.Y. C.P.L.R. §

[5] Nor is the State correct that the Plaintiffs would need to amend the complaint to add new plaintiffs if the named Plaintiffs' criminal cases all terminate. This case falls under the well-established exception to the doctrine of mootness, because the issue it raises "(1) is likely to recur, (2) will typically evade review and (3) is substantial and novel." *Chenier v. Richard W.*, 82 N.Y.2d 830, 832 (1993).

3103(a) ("The court may at any time on its own initiative, or on motion of any party . . . make a protective order denying, limiting, conditioning or regulating the use of any disclosure device."); *Kimmel v. State*, 302 A.D.2d 908 (4th Dep't 2003) (reversing trial court's decision not to grant protective order providing for the confidentiality of police records). A confidentiality agreement and protective order along these lines would fully preserve the State's interest in obtaining needed discovery, but would also prevent any prejudice from occurring to any individual facing charges in a pending case. Indeed, as the Plaintiffs informed the trial court, a Montana court hearing an analogous challenge to that state's system for defending the indigent relied on a protective order of this nature for this precise purpose. (*See* Protective Order, Ex C to Pl.'s Opp'n to Def.'s Order to Show Cause, R. 636-40.)

Of course, the appropriateness and content of a protective order or other devices to manage discovery would depend on the specific issues raised in discovery. But that is exactly the point. It is premature to argue about whether and how discovery should be managed, because the parties have not yet had the opportunity to even begin discovery, let alone crystallize their disputes. Indeed, it is far from clear that discovery will even center on privileged information. Because the complaint rests on a claim of systemic deficiencies, it is far more likely that discovery will focus on

whether such systemic deficiencies exist, as well as on expert testimony as to whether defense counsel can provide adequate representation in the face of such deficiencies.[6] What is clear, however, is that the trial court has ample tools to ensure that the proceedings are fair. This Court should reject the State's attempt to transform ordinary case management issues into a bar to justiciability.

Similarly, the State's argument that the trial court's findings and remedies could be used to overturn criminal convictions is both overstated and irrelevant to the question of justiciability. The appropriate scope of a court's remedies and findings is a case management question over which a court has significant discretion, and is a separate issue from whether the Plaintiffs' complaint states a justiciable claim. *See 511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151-52 (2002) ("The motion [to dismiss] must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action

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[6] Moreover, many of the Plaintiffs' allegations about their own representation do not require inquiry into privileged material, but rather center on non-privileged questions such as whether an attorney met with the Plaintiff before a court appearance. *See, e.g.*, Am. Compl. ¶¶ 41-42 (Kimberly Hurrell-Harring alleging that she was not represented at her arraignment and that the attorney she was subsequently assigned refused to take any of her phone calls); Am. Compl. ¶ 50 (James Adams alleging that he has never seen his attorney outside of open court); Am. Compl. ¶ 117 (Lane Loyzelle alleging that he has met with his attorney only once, in a meeting that took place immediately before a court appearance, lasted approximately five minutes, and took place in a holding area outside the courtroom in full hearing of other inmates).

cognizable at law.") (internal quotation marks omitted). The question of what remedies and findings the court can and should make will depend on the facts and issues upon which the lawsuit ultimately turns – questions that are impossible to answer at such an early stage of the litigation.

Moreover, regardless of how this case progresses, the impact of this lawsuit on criminal convictions will necessarily be minor. The essence of the complaint is that there are systemic deficiencies in five counties' provision of defense services, which threaten to deprive criminal defendants of their constitutional right to effective assistance of counsel at all stages of their proceedings. If the Plaintiffs prevail on this claim and on their request for prospective systematic relief, the adjudication would not determine that every individual receiving defense services in the five counties has actually received ineffective assistance, but only that the system threatens to cause such constitutional violations and therefore warrants injunctive relief to cure the deficiencies going forward.

Because a defendant must prove that he or she was denied meaningful representation within the contours of his or her particular case in order to succeed on an ineffective assistance of counsel claim, *see Baldi*, 54 N.Y.2d at 147; *People v. Rivera*, 71 N.Y.2d 705, 708-09 (1988), findings of systemic defects in the five counties' provision of indigent defense services

would provide no basis for overturning the convictions of individual defendants who received such services. Nor would such findings "flip the presumption of competent representation on its head" by creating a presumption that a defendant's counsel was ineffective, as postulated in the amicus brief submitted by the District Attorneys Association of the State of New York. (DAASNY Br. 18.) Rather, a defendant would still need to point to deficiencies in his or her own case that denied the defendant meaningful representation within the meaning of *Baldi*, and would still need to meet "the well-settled, high burden of demonstrating that he was deprived of a fair trial." *People v. Hobot*, 84 N.Y.2d 1021, 1022 (1995).

Indeed, a mere finding of systemic deficiencies would be insufficient to authorize even an evidentiary *hearing* on a defendant's article 440 motion. *See People v. Satterfield*, 66 N.Y.2d 796, 799 (1985) (holding that to qualify for a hearing the defendant "must show that the nonrecord facts sought to be established are material and would entitle him to relief"); C.P.L. § 440.30(1).

Although it is possible that the trial court could make findings about the legal representation that was provided to one (or more) of the named Plaintiffs that could be relevant to a post-conviction proceeding, the impact

of any such findings would not be severe or problematic.[7] To start, if such findings were made, the law of collateral estoppel would ensure that the findings could be used in a post-conviction proceeding only if the State's interests were adequately protected in the suit where the findings were made. *See Kaufman v. Lilly Co.*, 65 N.Y.2d 449, 455 (1985) (explaining that for collateral estoppel to apply, "the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and . . . the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination").

Moreover, such findings would, at most, preclude the State from contesting certain factual issues in a particular post-conviction proceeding. They would not constitute decisions on the ultimate legal question as to whether a particular defendant's conviction should be overturned, because the fact that a defendant received inadequate representation at certain stages of his or her criminal proceeding does not establish that he or she meets the strict legal standard for overturning a conviction established by *Baldi* and its progeny. *See People v. Hamms*, 55 A.D.3d 1142, 1145 (3d Dep't 2008) (explaining that when a court is asked to review a claim of ineffective

[7] For example, the trial court might find that a particular Plaintiff received ineffective assistance at certain stages of his or her criminal case, as part of its determination that such a constitutional violation illustrates a systemic deficiency.

assistance, it must consider the "record in its totality," evaluating whether "the defense strategy or the alleged errors so negatively impacted the trial that defendant was denied meaningful representation"). Indeed, as explained in Point III(A), *supra*, many of the deficiencies alleged in the complaint did not affect the outcomes of criminal cases and therefore would not support the reversal of a conviction even if there were individualized findings regarding ineffective assistance.

And finally, should individual findings supporting the overturning of criminal convictions be made, they would involve particular fact issues in only a handful of cases and would not, as the State and the DAASNY imagine, serve as a basis for the wholesale reversal of a large number of convictions.

In sum, the concerns raised by the State and by the DAASNY reflect ordinary case management challenges that the courts are well-equipped to address and abate. They do not undermine the justiciability of this case, and this Court should not hesitate to allow it to proceed.

* * *

At its core, this case alleges that five of New York's counties have severe deficiencies in their systems for defending the indigent, creating an unacceptably high risk that individuals in those counties will be denied

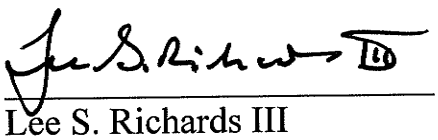
counsel at critical stages of their proceedings and will receive ineffective assistance of counsel. In light of the seriousness of the allegations, amici submit that the judicial branch has the authority, the capacity, and the responsibility to appropriately adjudicate the Plaintiffs' claims. Although the complaint raises critical questions about the integrity of the criminal justice systems in the five counties, the discovery and case management questions it presents are essentially routine. Those questions can be addressed without disrupting individual cases, and the Plaintiffs' claims can be adjudicated without improperly causing the reversal of convictions. Under these circumstances, denying the Plaintiffs the opportunity to develop a record and to have their claims adjudicated would be an abdication of the New York courts' responsibility to ensure that criminal proceedings against indigent defendants meet the demands of the federal and state constitutions.

Conclusion

For the foregoing reasons, this Court should reverse the decision of the Appellate Division and remand for proceedings on the merits in the trial court.

Dated: New York, New York
February 4, 2010

Respectfully submitted,



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