State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: July 16, 2009 505670

KIMBERLY HURRELL-HARRING et al.,
on Behalf of Themselves
and All Others Similarly
Situated,
Respondents,
v OPINION AND ORDER

STATE OF NEW YORK et al.,
Appellants.

Calendar Date: January 15, 2009

Before: Peters, J.P., Lahtinen, Kavanagh, Stein and McCarthy, JJ.

Andrew M. Cuomo, Attorney General, Albany (Victor Paladino of counsel), for appellants.

Shulte, Roth & Zabel, L.L.P., New York City and Deborah Berkman, New York Civil Liberties Union Foundation, New York City, for respondents.

Kavanagh, J.

Appeals (1) from an order of the Supreme Court (Devine, J.), entered August 12, 2008 in Albany County, which denied a motion by defendant State of New York to dismiss the complaint, and (2) from an order of said court, entered August 12, 2008 in Albany County, which denied said defendant's motion to declare the attorney-client privilege waived as to certain of the named plaintiffs, among others.

Plaintiffs commenced this action against defendant State of New York[1] seeking a declaration that the State's public defense system is systemically deficient and presents a grave and unacceptable risk that indigent criminal defendants are being or will be denied their constitutional right to meaningful and effective assistance of counsel. Plaintiffs also sought an injunction requiring defendants to provide a system that is consistent with those guarantees. Plaintiffs moved for a preliminary injunction and, thereafter, the State moved to dismiss the complaint claiming, among other things, that the complaint failed to state a cause of action. By order to show cause, the State also moved for a declaration that, for the purposes of the instant litigation, certain plaintiffs have waived their attorney-client privilege as to the matters presented in their respective affidavits in support of their motion for a preliminary injunction. In separate orders, Supreme Court denied the motion to dismiss on the condition that plaintiffs file a second amended complaint adding the counties as defendants and denied the State's motion to deem certain plaintiffs' attorney-client privileges waived. Defendants now appeal from both orders.

The critical issue presented by this appeal is whether plaintiffs – more than 20 indigent persons who were or currently are being represented by assigned counsel in criminal actions – have stated a cause of action that is justiciable. Of course, where a motion to dismiss a complaint for failure to state a cause of action is made pursuant to CPLR 3211, "the pleading is to be afforded a liberal construction" (Leon v Martinez, 84 NY2d 83, 87 [1994]), and the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (id. at 87-88; accord Matter of Maron v Silver, 58 AD3d 102, 109 [2008]; see Rubinstein v Salomon, 46 AD3d 536, 538 [2007]; Matter of Niagara Mohawk Power Corp. v State of New York, 300 AD2d 949, 952

[1] Plaintiffs subsequently served an amended complaint naming defendant Governor David Paterson as an additional defendant.

[2002]). Even applying such a rigorous standard to the State's motion, plaintiffs have failed to state a cause of action that is justiciable and, therefore, Supreme Court's order denying the motion should be reversed and plaintiffs' complaint should be dismissed.

While plaintiffs in their complaint raise the specter that individual constitutional rights will be routinely violated unless systemic reforms are immediately implemented in the way legal services are provided to indigent criminal defendants in this state, they do not claim – as the dissent acknowledges – "that the actual representation they received prejudiced their case." In fact, while this state has provided indigent legal services in one form or another for more than 40 years, plaintiffs do not allege, nor do they identify, any relevant appellate history that supports their claim that indigent criminal defendants have been systemically denied their constitutional right to counsel by the way these services have been delivered.[2] The reality is that when plaintiffs' claim is stripped of its constitutional veneer, it is not about indigent criminal defendants being denied their constitutional right to counsel but, instead, it is simply a general complaint as to the quality of legal services offered to indigent criminal defendants in this state. Reduced to its essential terms, plaintiffs' complaint seeks to establish that "deficiencies" exist in the quality of these legal services but, at the same time, fails to show how these "deficiencies" have resulted in a denial of a defendant's right to counsel in their criminal prosecution and

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[2] Indeed, a cursory search of Lexis and Westlaw reflects that ineffective assistance of counsel has rarely been raised as an issue in the approximate 900 appeals from criminal convictions taken in the five relevant counties over the past three years. In approximately 140 appeals where it has been raised as an issue, only two convictions were reversed on that ground. Contrary to the dissent's conclusion that these results are irrelevant, this appellate record – or lack thereof – clearly points out a lack of support for plaintiffs' claim that indigent criminal defendants in these five counties are being systemically denied their Sixth Amendment rights.

how such "deficiencies" had served to affect the outcome of any particular case. In fact, these "deficiencies" have 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. In our view, any decisions to address those "deficiencies" should be made by the executive and legislative branches of government, and not by the Judiciary.

Initially, we note that plaintiffs' claim is based on a fundamental misunderstanding of the constitutional dimensions of a defendant's right to counsel in a criminal action. The Sixth Amendment to the US Constitution insures, among other things, that each person charged with the commission of a crime has the right to a speedy and public trial, an impartial jury and the "Assistance of Counsel for his [or her] defence." As interpreted under both the US and NY Constitutions, this guarantee has been found to be synonymous with the right to the effective assistance of counsel (see Custis v United States, 511 US 485, 507 [1994]; Strickland v Washington, 466 US 668, 686 [1984]; Schulz v Marshall, 528 F Supp 2d 77, 91 [ED NY 2007]), and is violated not whenever there is a flaw or "deficiency" in the quality of the legal representation provided indigent criminal defendants, but when that 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" (Strickland v Washington, 466 US at 686; see Washington v Hofbauer, 228 F3d 689, 702 [6th Cir 2000]; accord Girts v Yanai, 501 F3d 743, 756-757 [6th Cir 2007], cert denied ___ US ___, 129 S Ct 92 [2008]). While the tests employed under both federal and state law to measure the effectiveness of counsel are to some extent different, neither recognizes the right for its own sake but, rather, for the effect it has in insuring that a defendant charged with a crime has been treated fairly and the criminal action has produced a fair result (see People v Schulz, 4 NY3d 521, 530-531 [2005]; People v Henry, 95 NY2d 563, 566 [2000]; People v Benevento, 91 NY2d 708, 711 [1998]; People v Powers, 262 AD2d 713, 716 [1999], lv denied 93 NY2d 1005 [1999]). 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 programs that provide indigent criminal defendants with legal assistance in their criminal prosecutions.

How these programs are funded and administered does not necessarily implicate the constitutional right to counsel and, as such, the claims made in this action on behalf of these plaintiffs are not justiciable. Justiciability involves the constitutional separation of powers and determines what matters should be resolved by the Judiciary, as opposed to the executive or legislative branches of governments (see Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo, 64 NY2d 233, 238-239 [1984]; see also Jiggetts v Grinker, 75 NY2d 411, 415-416 [1990]). With that principle in mind, it must be remembered that 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 (see Jiggetts v Grinker, 75 NY2d at 415-416; see also Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo, 64 NY2d at 239; Jones v Beame, 45 NY2d 402, 407 [1978]; New York Civ. Liberties Union v State of New York, 3 AD3d 811, 814 [2004], affd 4 NY3d 175 [2005]). Yet, it is precisely those types of choices that plaintiffs seek to have the Judiciary render in this action.

The true nature of the relief plaintiffs seek is spelled out in their motion for a preliminary injunction.[3] Specifically, they asked that an order be issued that directs the State to:

> "1. Implement standards and procedures to ensure that attorneys appointed to represent indigent

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[3] While plaintiffs rely on the report of Former Chief Judge Kaye's Commission on the Future of Indigent Defense Services (hereinafter the Kaye Commission Report), they deny that they are seeking in this action the implementation of the report's principal recommendation that a "statewide defender office" be created to provide indigent legal services.

criminal defendants have sufficient qualifications and training;

2. Establish caseload and workload limits to ensure that public defense attorneys have adequate time to devote to each client's case;

3. Guarantee that every eligible indigent criminal defendant is assigned a public defense attorney within 24 hours of arrest who is present at every critical proceeding and consults with each client in advance of any critical proceeding to ensure that the attorney is sufficiently prepared for any such proceeding;

4. Ensure that investigators and experts are available to every public defense attorney for every case in which an attorney deems that investigative or expert services would be useful to the defense; and

5. Establish uniform written standards and procedures for determining eligibility for the assignment of a public defense attorney."

In effect, plaintiffs seek an order that would "reorder priorities, allocate the limited resources available and in effect direct how" these programs should be administered (Jones v Beame, 45 NY2d at 407) – all of which are actions that, if implemented, would inevitably involve the Judiciary in "'the management and operation of public enterprises'" (id., quoting Matter of Abrams v New York City Tr. Auth., 39 NY2d 990, 992 [1976]). While these requests are all made under the color of constitutional reform, none, when viewed in the proper context, even attempts to address the question as to whether an individual's Sixth Amendment right to counsel has been violated in the underlying criminal action.

There can be little doubt that what plaintiffs seek in this action – a massive overhaul of this state's public defense system – has obvious and ominous implications for the constitutional

principle of separation of powers. Their claim, if granted, necessarily involves the judicial assumption of traditional legislative prerogatives. While not unprecedented, the Judiciary should only assume such powers if the facts submitted in support of the claim document that the need for the relief requested is both manifest and emergent (see Jiggetts v Grinker, 75 NY2d at 415; Matter of New York State Inspection, Sec. & Law Enforcement Empls. Dist. Council 82, AFSCME, AFL-CIO v Cuomo, 64 NY2d at 240-241; compare Matter of Swinton v Safir, 93 NY2d 758, 763 [1999]).[4] Plaintiffs have simply not made such a showing in this action. They ignore any relevant appellate history and base their request for this extraordinary relief entirely upon a prediction that if these reforms are not immediately adopted, a high risk exists that indigent criminal defendants will be deprived of their constitutional right to counsel in the future. Such speculation cannot be the vehicle upon which to base the grant of such extraordinary relief.[5]

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[4] While there are obvious legislative avenues that could have been pursued by plaintiffs, there is no evidence in the record that plaintiffs explored these alternatives.

[5] The authority relied upon by the dissent involved claims that, as pleaded, allege that the harm to be prevented either had already occurred (see Klostermann v Cuomo, 61 NY2d 525, 531 [1984]), was ongoing, or was "inevitable" (Matter of Swinton v Safir, 93 NY2d at 763). In New York County Lawyers' Assn. v State of New York (294 AD2d 69 [2002]), the Court observed that the "action was commenced in response to the widely recognized crisis in New York's assigned counsel system" and relied upon a factual finding contained in an investigative report to the effect that inadequate compensation rates had actually caused a "drastic drop" in the number of attorneys willing to represent indigent defendants (id. at 71). It further observed that this reduction in the number of attorneys willing to participate in the assigned counsel system in turn resulted in "major disruptions in the handling of criminal prosecutions and Family Court cases" (id.).

In support of their claims, plaintiffs rely on the Kaye Commission Report and its conclusion that "nothing short of major, far-reaching, reform can insure that New York meets its constitutional and statutory obligations to provide quality representation to every indigent person accused of a crime or other offense." While factual assertions in plaintiffs' complaint must, for purposes of this motion, be accepted as true, and plaintiffs are entitled to the benefit of every possible inference that reasonably flows from such established facts, legal conclusions, even those set forth in this report, are not afforded the same presumption (see Fernicola v New York State Ins. Fund, 293 AD2d 844, 844 [2002]; McNeary v Niagara Mohawk Power Corp., 286 AD2d 522, 523-524 [2001]). Further, it seems to be somewhat ironic that plaintiffs rely so heavily on a document that was obviously prepared as an impetus for legislative reform of New York's assigned counsel system.

Finally, there can be no doubt that this action will, if allowed to continue, have an impact on related criminal actions. While plaintiffs assert that this action will not have any effect on their criminal prosecutions, the fact is that plaintiffs, in both their original and amended complaints, seek a declaration that in these criminal actions their "rights are being violated." Such a claim, to be proven, will necessarily involve some of the same issues that undoubtedly will be raised in the underlying criminal actions and will inevitably result in a collateral review of assigned counsels' performances in some, if not all, of those actions. In fact, plaintiffs, in support of the relief they seek in this action, have submitted 23 affidavits that detail the deficiencies they claim occurred in their assigned counsels' performances in the underlying criminal actions. The content of these affidavits make the very same claims that would be made in a criminal action to support a claim that they have not received meaningful assistance from counsel and have been denied their right under the Sixth Amendment. Among other things, these affidavits claim that the indigent criminal defendants had little or no meaningful contact with their assigned counsel, counsel performed an inadequate investigation and was not prepared to participate in any of the criminal actions, failed to make motions, did not fully explain the ramifications of testifying, pressured defendants into entering

pleas and/or waiving their rights to testify and simply performed poorly at trial. Without exception, each of these claims should be raised and resolved in the action where the violation of the constitutional right is alleged to have occurred.

In that regard, sound public policy requires that severe restrictions be placed upon the ability of criminal defendants to litigate claims in a civil action that can be, and ought to be, resolved in the criminal actions (see Matter of Veloz v Rothwax, 65 NY2d 902, 904 [1985]; Matter of Morganthau v Erlbaum, 59 NY2d 143, 149-152 [1983], cert denied 464 US 993 [1983]). No showing has been made here that the remedies traditionally available in criminal actions – applications pursuant to CPL article 440, direct appeals from a conviction and writs of habeus corpus – cannot effectively address any claim that these plaintiffs have been denied their constitutional right to counsel in the underlying criminal actions (see People v Smith, 63 NY2d 41, 69 [1984], cert denied 469 US 1227 [1985]; People v Tippins, 173 AD2d 512, 513-515 [1991], lv denied 78 NY2d 1015 [1991], cert denied 502 US 1064 [1990]; see also Strickland v Washington, 466 US at 686-693). And it is inconceivable that if plaintiffs prevail in this action and obtain a declaration that their "rights are being violated" by the quality of legal representation they are receiving in their criminal prosecutions, they will not use such a ruling to challenge any convictions that may have been obtained. Simply stated, it is within the context of the criminal action that the Sixth Amendment right to counsel exists and that any violation of that right will occur. It necessarily follows that it is within that action that any violation of such a right ought to be established and the appropriate remedy needed to address that violation ought to be pursued.

As a result of our decision, we need not address the issues raised by Supreme Court's denial of the State's motion to declare the attorney-client privilege waived as to certain of the named plaintiffs, and the appeal therefrom is dismissed as academic.

Lahtinen and McCarthy, JJ., concur.

Peters, J.P. (dissenting).

We respectfully dissent. Initially, while we agree that the majority has properly articulated our standard of review on this motion to dismiss (see Leon v Martinez, 84 NY2d 83, 87-88 [1994]), we do not believe that it has applied such standard and examined the instant claim in the proper light. Our charge here is simply to determine whether plaintiffs would be entitled to relief on any reasonable view of the facts stated (see Campaign for Fiscal Equity v State of New York, 86 NY2d 307, 318 [1995]; 219 Broadway Corp. v Alexander's, Inc., 46 NY2d 506, 509 [1979]). For the reasons stated below, we believe they would be. Whether plaintiffs can ultimately prove their allegations and establish their case is a matter for another day. Likewise, the majority's lengthy analysis of potential remedies is patently premature at this juncture.

Moreover, we strongly disagree with the majority's conclusion that plaintiffs' claim is based on a fundamental misunderstanding of the constitutional dimensions of the right to counsel in a criminal action. In our opinion, the majority's view as to what is encompassed by this right may aptly be characterized as myopic.

It is fundamental to our constitutional jurisprudence, at both the federal and state levels, that the right to counsel assures to a defendant "'the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence'" (Gideon v Wainwright, 372 US 335, 345 [1963] [emphasis added], quoting Powell v State of Alabama, 287 US 45, 68-69 [1932]; see Coleman v State of Alabama, 399 US 1, 7 [1970]; People v Settles, 46 NY2d 154, 160-161 [1978]; People ex rel. Burgess v Riseley, 66 How. Pr. [NY] 67 [1883]). In our state, the right of a criminal defendant "to interpose an attorney between himself [or herself] and the sometimes awesome power of the sovereign has long been a cherished principle" which dates back to our prerevolutionary constitutional law, and the protections granted by our State Constitution have developed independently and been extended beyond those afforded by the Federal Constitution (People v

Settles, 46 NY2d at 160; see People v Ramos, 99 NY2d 27, 32-33 [2002]; People v West, 81 NY2d 370, 373 [1993]; People v Cunningham, 49 NY2d 203, 207 [1980]; People v Hobson, 39 NY2d 479, 483-484 [1976]). In fact, as the right to counsel may well be the most basic constitutional right of all, this state has "consistently exercised the highest degree of vigilance in safeguarding the right of an accused to have the assistance of an attorney at every stage of the legal proceedings against him [or her]" (People v Cunningham, 49 NY2d at 207 [emphasis added]; see People v Ramos, 99 NY2d at 32-33; People v West, 81 NY2d at 373; People v Hodge, 53 NY2d 313, 317-318 [1981]). Effective assistance is "essential not only to insure the rights of the individual defendant but for the protection and well-being of society as well" and is "inviolable and fundamental to our form of justice," which ideally seeks equal representation between the state and a criminal defendant (People v Settles, 46 NY2d at 161; see People v Hodge, 53 NY2d at 318).

When determining what constitutes effective representation, it has been held that the "most critical period" of the proceedings against defendants may well be "from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation [are] vitally important"; indeed, defendants are as much entitled to the aid of counsel during this period as they are at the trial itself (Powell v State of Alabama, 287 US at 57; see Michigan v Harvey, 494 US 344, 348 [1990]; Coleman v State of Alabama, 399 US at 7; Massiah v United States, 377 US 201, 205 [1964]; People v Tomaselli, 7 NY2d 350, 354 [1960]; People v McLaughlin, 291 NY 480, 482-483 [1944]; People ex rel. Burgess v Riseley, 66 How. Pr. [NY] 67 [1883]). Toward that end, "the right to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare both the law and the facts relevant to the defense" (People v Droz, 39 NY2d 457, 462 [1976]; see People v Cyrus, 48 AD3d 150, 154 [2007], lv denied 10 NY3d 763 [2008]; People v Fogle, 10 AD3d 618, 619 [2004]; People v Bussey, 6 AD3d 621, 623 [2004], lv denied 4 NY3d 828 [2005]; People v Rojas, 213 AD2d 56, 67 [1995], lv denied 87 NY2d 907 [1995]; People ex rel. Burgess v Riseley, 66 How. Pr. [NY] 67 [1883]). Importantly, it is now well settled that the denial of the effective assistance of counsel, whether at a preliminary

stage or at the trial itself, is of constitutional dimension (see People v Stultz, 2 NY3d 277, 282-283 [2004]; People v Wicks, 76 NY2d 128, 132 [1990]; People v Hodge, 53 NY2d at 320; People v Droz, 39 NY2d at 459). Significantly, our Court of Appeals has held that the constitutional right to counsel at every stage of the proceedings is so fundamental that, even when a defendant is competently represented at trial, the deprivation of representation during preparation for trial can warrant the reversal of a conviction and dismissal of an indictment (see People v Hilliard, 73 NY2d 584, 586-587 [1989]).

In light of the foregoing, plaintiffs' allegations – which include, among others, that they were not represented at arraignment which, in many cases, resulted in a denial of bail or a high bail being set causing extended pretrial detention;[1] that their rights to appear, and to an indictment, before a grand jury were waived by counsel without consultation; that they were denied the opportunity to meet and confer with counsel in any meaningful way; that counsel refused to accept telephone calls during the representation; that counsel failed to perform any independent investigation regarding plaintiffs' cases; and that plaintiffs were not informed by counsel of the full consequences of their guilty pleas – set forth clear deficiencies that, without question, implicate plaintiffs' right to counsel under our Federal and State Constitutions.

For example, as detailed in the complaint, plaintiff James Adams was arrested on July 31, 2007 and accused of stealing several sticks of deodorant from a drug store. He was charged with, among other things, robbery in the third degree and burglary in the third degree. As a result, his bail was set at $2,500, which he could not afford. After several adjournments and a court appearance at which his assigned counsel did not appear, Adams attempted to file his own pro se motion and even contacted the District Attorney directly to proffer his defense. Repeated efforts by Adams and his wife to contact his attorney by telephone failed – either the voice-mail box was full or requests

[1] We also note that failure to provide counsel during arraignment violates CPL 210.15.

for return calls were ignored. At a court appearance in October 2007, the court expressed concern that Adams had been overcharged and, after reviewing the grand jury minutes on its own initiative, ordered his attorney to file a motion to dismiss the indictment, which apparently had not been done as of the commencement of this action. Adams lost his job as a result of his incarceration, and his wife, two daughters and granddaughter were evicted from their home. Similarly, plaintiff Lane Loyzelle was arrested in September 2007 and charged with petit larceny for allegedly stealing $20 from two acquaintances. He was not represented at arraignment and bail was set at $2,500, which he could not afford. Loyzelle met his attorney once, for five minutes, before an October 2007 court appearance in a holding area full of other inmates. By the time this action was commenced, Loyzelle had been incarcerated for six weeks, had lost his job as a result, and had not had any contact with his attorney for nearly a month.

Thus, in our view, it is not plaintiffs, but the majority, that misunderstand the dimensions of the constitutional right to counsel. With significant deficiencies alleged by plaintiffs, a justiciable cause of action has clearly been stated. Justiciability, in a general sense, refers "to matters resolvable by the judicial branch of government as opposed to the executive or legislative branches or their extensions" (Jiggetts v Grinker, 75 NY2d 411, 415 [1990]; see New York County Lawyers' Assn. v State of New York, 294 AD2d 69, 72 [2002]). Indeed, as the majority aptly notes, "[t]he paramount concern is that the [J]udiciary not undertake tasks that the other branches are better suited to perform" (Klostermann v Cuomo, 61 NY2d 525, 535 [1984]; see Jones v Beame, 45 NY2d 402, 409 [1978]). While complex choices that involve selecting among competing priorities and the allocation of public funds are typically best left to the decision-making of the other coordinate branches of government, "it is nevertheless the responsibility of the courts to adjudicate contentions that actions taken by the Legislature . . . fail to conform to the mandates of the Constitutions" (Board of Educ., Levittown Union Free School Dist. v Nyquist, 57 NY2d 27, 39 [1982], appeal dismissed 459 US 1139 [1983]; see Campaign for Fiscal Equity v State of New York, 86 NY2d 307, 314-318 [1995], supra; New York County Lawyers' Assn. v State of New

York, 294 AD2d at 72-73; see also Duncan v State of Michigan, 2009 Mich. App. LEXIS 1380, *4-5, 2009 WL 1640975, ___ [Mich Ct of Appeals, June 1, 2009]). Indeed, claims of nonjusticiability "are particularly unconvincing when uttered in response to a claim that existing conditions violate an individual's constitutional rights" (Klostermann v Cuomo, 61 NY2d at 537; see New York County Lawyers' Assn. v State of New York, 294 AD2d at 72-73). As articulated by the court in Duncan v State of Michigan (2009 Mich. App. LEXIS 1380, at *3-4), a recent decision concerning the precise issues now before this Court:

> "We cannot accept the proposition that the constitutional rights of our citizens, even those accused of crimes and too poor to afford counsel, are not deserving and worthy of any protection by the [J]udiciary in a situation where the executive and legislative branches fail to comply with constitutional mandates and abdicate their constitutional responsibilities, either intentionally or neglectfully. If not the courts, then whom."

There is no dispute that both our Federal and State Constitutions guarantee the right to counsel to all criminal defendants where loss of liberty is at stake and, where a defendant is unable to retain an attorney, require that the state provide counsel (see Argersinger v Hamlin, 407 US 25, 37 [1972]; Gideon v Wainwright, 372 US at 344; Matter of Smiley, 36 NY2d 433, 437 [1975]; People v Witenski, 15 NY2d 392, 397 [1965]). And, the constitutional right to counsel is the right to the effective assistance of counsel (see Strickland v Washington, 466 US 668, 686 [1984]; People v Benevento, 91 NY2d 708, 711 [1998]). Plaintiffs in this action having alleged that defendant State of New York has failed its duty in this regard, in that the current state of the public defense system creates a severe and unacceptably high risk that indigent criminal defendants are being or will be deprived of their constitutional right to the effective assistance of counsel, the courts have the responsibility to examine the allegations and adjudicate the

dispute (see Board of Educ., Levittown Union Free School Dist. v Nyquist, 57 NY2d at 39; Campaign for Fiscal Equity v State of New York, 86 NY2d at 314-318; New York County Lawyers' Assn. v State of New York, 294 AD2d at 72-73). Justiciability 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. That is, the Judiciary has a heightened responsibility to act where, as here, the subject of the dispute involves "the operation and administration of the courts by the courts" (Bruno v Codd, 47 NY2d 582, 588 [1979]; accord New York County Lawyers' Assn. v State of New York, 294 AD2d at 73) and implicates the ability of "the court system [to] ensure that its processes do not cause systemic violations of constitutional guarantees" (New York County Lawyers' Assn. v State of New York, 294 AD2d at 73).

Concerns about costs, fiscal impact and the difficulty courts may encounter in fashioning and then enforcing particularized remedies appropriate to repair unconstitutional action, while not to be ignored, cannot be sufficient to require us to turn a blind eye to constitutional compliance, despite the majority's position to the contrary (see Board of Educ., Levittown Union Free School Dist. v Nyquist, 57 NY2d at 39; Duncan v State of Michigan, 2009 Mich. App. LEXIS 1380, at *4-5). To avoid deciding the instant dispute on that basis would wholly "'undermine the function of the [J]udiciary as a coequal branch of government'" (Matter of Boung Jae Jang v Brown, 161 AD2d 49, 55 [1990], quoting Matter of Anderson v Krupsak, 40 NY2d 397, 404 [1976]).

Nor do we believe that plaintiffs' claims are rendered nonjusticiable by virtue of the fact that prospective injury is alleged; "proof of a likelihood of the occurrence of a threatened deprivation of constitutional rights is sufficient to justify prospective or preventive remedies . . . without awaiting actual injury" (Matter of Swinton v Safir, 93 NY2d 758, 765-766 [1999], citing Luckey v Harris, 860 F2d 1012, 1017 [11th Cir 1988]; accord New York County Lawyer's Assn. v State of New York, 294

AD2d at 74).[2] Accordingly, we would find that the present dispute is justiciable.

Further, we are unpersuaded by defendants' argument and the majority's position that an ultimate finding in favor of plaintiffs – that the systemic deficiencies in this state's public defense system create a grave and unacceptably high risk that indigent defendants will not receive effective assistance – could successfully be used by any of the plaintiffs in a collateral or appellate attack to his or her individual conviction. In order to so challenge their convictions, plaintiffs, like any criminal defendant, would have to demonstrate not only that counsels' performance was deficient, but also that the actual representation they received prejudiced their cases (see Strickland v Washington, 466 US 668 [1984], supra) such that they were deprived of meaningful representation (see People v Benevento, 91 NY2d 708 [1998], supra). Moreover, we simply cannot agree that plaintiffs have adequate remedies at law in that they may challenge the effectiveness of counsel in the context of their individual criminal cases by way of a direct appeal, CPL article 440 motion or habeas corpus proceeding. Certainly, widespread and systemic instances of deficient performance caused by an ill-equipped assigned counsel system will not be cured through a case-by-case examination of individual criminal convictions (see New York County Lawyers'

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[2] We cannot agree with the majority's attempt to distinguish both Swinton v Safir (93 NY2d 758 [1999], supra) and New York County Lawyer's Assn. v State of New York (294 AD2d 69 [2002], supra) on the ground that, unlike here, the harm to be prevented was "ongoing or 'inevitable.'" In the first place, the complaint unequivocally alleges that the constitutional rights of indigent defendants – as illustrated by the cases of the named plaintiffs – have already been, or are currently being, violated. Moreover, taking as true the allegations in the complaint, as we must, plaintiffs allege and specify gross deficiencies in this state's indigent defense system that, if proven, would demonstrate an imminent and inevitable risk that the constitutional rights of those persons similarly situated will be violated.

Assn. v State of New York, 294 AD2d at 76). Also, such remedies would obviously be unavailable to those criminal defendants, including some of the named plaintiffs in this action, who, for example, did not have counsel during arraignment, bail hearings or other material stages of the proceedings, but who were ultimately acquitted or whose charges were eventually dismissed.[3] "The right to counsel must mean more than just the right to an outcome" (Duncan v State of Michigan, 2009 Mich. App. LEXIS 1380, at *84).

To the extent that the majority also takes the position that resolution of plaintiffs' claims would interfere with the conduct of plaintiffs' criminal trials, we fail to see how this provides a basis to dismiss plaintiffs' claims at this juncture. As Supreme Court noted, the criminal actions of approximately half of the named plaintiffs had terminated as of the date of its August 2008 order, and the likelihood that the remaining plaintiffs' criminal actions will remain active by the time a trial is held in the instant action is extremely slim. Moreover, in the unlikely event that such is the case, any delay in the criminal action could be curtailed by limitations on discovery and the admission of trial evidence in this action.

Finally, the majority's "cursory search" of appellate history pertaining to reversals on grounds of ineffective assistance is simply irrelevant to the issues presented here.

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[3] Plaintiff Jacqueline Winbrone, for example, was arrested in September 2007 and charged with possession of a loaded firearm in the second degree after a firearm was found in the family car. Winbrone was the sole caretaker of her husband, who needed transportation to dialysis treatment several times per week. After bail was set at $10,000, Winbrone unsuccessfully attempted to contact her attorney to seek a bail reduction in order to care for her husband. Days later, Winbrone's husband died and, still unable to contact her attorney, she was unable to attend the funeral. In early November 2007, after writing to the court and contacting a prisoners' rights organization, Winbrone was released on her own recognizance. Ultimately, the charge against Winbrone was dismissed.

First, a finding of widespread reversals on ineffective assistance of counsel grounds, while arguably pertinent to whether plaintiffs can ultimately establish their claim, has no bearing on whether they have stated a cause of action for prospective relief based on a substantial and imminent threat of the deprivation of their constitutional rights as well as those of persons similarly situated. Moreover, the fundamental flaw in the majority's and defendants' position is that the standards set forth in Strickland v Washington (466 US 668 [1984], supra) and People v Benevento (91 NY2d 708 [1998], supra) for evaluating whether counsel's performance was effective under the Federal and State Constitutions, respectively, are simply not applicable here. To be sure, in the context of a criminal appeal or CPL article 440 motion, where a criminal defendant is seeking the drastic remedy of vacating his or her conviction, it is entirely logical to require a showing of prejudice resulting from counsel's deficient representation. Yet, it is neither logical nor workable to apply these standards to a civil claim where the allegations concern systemic instances of constitutionally inadequate representation and where the remedy sought is in the form of prospective relief seeking to prevent future harm.

Thus, in our view, because plaintiffs have asserted constitutional claims that render this matter justiciable, and plaintiffs need only allege facts that fit within a cognizable claim at this very early stage in the proceedings, we would affirm Supreme Court's order denying the State's motion to dismiss.

Stein, J., concurs.

ORDERED that the order entered August 12, 2008 that denied defendant State of New York's motion to dismiss the complaint is reversed, on the law, without costs, motion granted and complaint dismissed.

ORDERED that the appeal from the order entered August 12, 2008 that denied defendant State of New York's motion to declare the attorney-client privilege waived as to certain of the named plaintiffs is dismissed, as academic, without costs.

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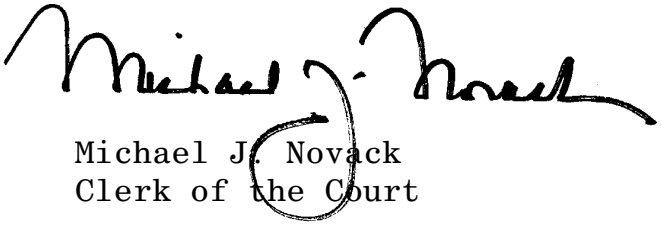

Michael J. Novack
Clerk of the Court