SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

KIMBERLY HURRELL-HARRING, JAMES ADAMS, JOSEPH BRIGGS, RICKY LEE GLOVER, RICHARD LOVE, JACQUELINE WINBRONE, LANE LOYZELLE, TOSHA STEELE, BRUCE WASHINGTON, SHAWN CHASE, JEMAR JOHNSON, ROBERT TOMBERELLI, CHRISTOPHER YAW, LUTHER WOODROW OF BOOKER, JR., EDWARD KAMINSKI, JOY METZLER, VICTOR TURNER, CANDACE BROOKINS, RANDY HABSHI, and RONALD McINTYRE, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE STATE OF NEW YORK, Defendant.	Index No. 8866-07 Oral Argument Requested

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

NEW YORK CIVIL LIBERTIES UNION FOUNDATION, by
Corey Stoughton
Arthur Eisenberg
Christopher Dunn
Daniel J. Freeman
125 Broad Street, 19th Floor
New York, N.Y. 10004
Phone: (212) 607-3366
Fax: (212) 607-3329

SCHULTE ROTH & ZABEL LLP
Gary Stein
Danny Greenberg
Sena Kim-Reuter
919 Third Avenue
New York, NY 10022
Phone: (212) 756-2000
Fax: (212) 593-5955

Dated: April 29, 2008
New York, N.Y.

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PRELIMINARY STATEMENT

This is a proposed class action on behalf of indigent criminal defendants in Onondaga, Ontario, Schuyler, Suffolk and Washington counties ("the Counties") alleging that the systemic failures of New York's public defense system are violating indigent defendants' right to counsel under the Constitution and Laws of New York and the United States Constitution. The Complaint was filed after Chief Judge Judith S. Kaye's Commission concluded that "the indigent defense system in New York State is both severely dysfunctional and structurally incapable of providing each poor defendant with the effective legal representation that he or she is guaranteed by the Constitution of the United States and the Constitution and laws of the State of New York . . . [and] has resulted in a disparate, inequitable, and ineffective system for securing constitutional guarantees to those too poor to obtain counsel of their own choosing." Commission on the Future of Indigent Defense Services, *Final Report to the Chief Judge of the State of New York* at 3 (2006) (*Kaye Commission Report*) (attached to Complaint).

Plaintiffs seek declaratory and prospective injunctive relief to require the State to remedy systemic violations of the right to counsel. Contrary to the State's contention in their motion to dismiss, the Complaint does not demand or insist upon any particular restructuring of the public defense system. *See* Mem. in Support of Defendant's Motion to Dismiss at 1 (suggesting that plaintiffs seek implementation of the Kaye Commission's recommendations for reform); *id.* at 6 (suggesting that plaintiffs demand "a statewide defender system"). Moreover, plaintiffs do not allege and do not intend to prove that they have been individually denied effective assistance of counsel requiring reversal of any conviction. Rather, plaintiffs seek a declaration that the structural failings of the public defense system create a severe and unacceptably high risk that plaintiffs and the class of indigent defendants they represent will be denied their constitutional

right to counsel, as well as an order requiring the State to remedy those structural failings. Am. Compl. at 102-03. Thus, the Complaint does not seek retrospective relief, such as the reversal of the conviction of any individual defendant. Instead, it seeks equitable relief to cure the structural deficiencies of the public defense system.

Defendant, the State of New York, has moved to dismiss the Complaint. The State's two primary arguments – that indigent criminal defendants cannot bring a declaratory judgment action to challenge systemic violations of the right to counsel and that such systemic claims are non-justiciable – were both foreclosed by the Appellate Division in the factually and legally indistinguishable case *New York County Lawyers' Ass'n v. State of New York* (*NYCLA*), 294 A.D.2d 69 (1st Dep't 2002), which is controlling authority in this Court. Moreover, these arguments would, if accepted by this Court, completely foreclose systemic challenges to the constitutionality of public defense systems. No plaintiff could ever seek prospective relief to remedy structural failings in the public defense system. This cannot be – and it is not – the law; the judiciary must – and does – have the authority to protect the right to counsel and ensure that the State is operating its public defense system in accordance with constitutional and legal standards.

The State's argument that this suit must be dismissed because plaintiffs with currently pending criminal actions cannot bring a declaratory judgment action for prospective relief from systemic violations of their constitutional and legal right to counsel also conflates the legal standards applicable to systemic, pre-conviction right-to-counsel claims with those applicable to individual, post-conviction ineffective-assistance-of-counsel claims. Further, it mistakenly assumes that plaintiffs have alleged actual prejudice to individual plaintiffs and class members sufficient to state a claim for post-conviction relief based on ineffective assistance of counsel and

that plaintiffs seek relief with respect to their individual criminal cases. Plaintiffs' claims are not collateral attacks on any pending or completed criminal proceedings. Their claims are directed solely at the systemic defects in the public defense system, not at the result of any particular prosecution.

The State's argument that this is not a justiciable controversy because "the structuring and funding of the State's indigent defense system are quintessentially legislative tasks," Mem. in Support of Defendant's Motion to Dismiss at 2, is simply incorrect. The law is clear that the declaration and enforcement of constitutional rights are quintessential judicial tasks regardless of the impact on the political branches of government.

The State also argues that plaintiffs' federal claim should be dismissed because the State cannot be sued in state court under 42 U.S.C. § 1983 for violations of federal law. The State is correct that, in order to effectively plead a cause of action under section 1983, plaintiffs should have named a state official in his individual capacity as a defendant. To that end, plaintiffs submit with this opposition an Amended Complaint (attached to Stoughton Affirmation as Exhibit A) adding the Governor of the State of New York as a defendant. *See* CPLR § 3025(a) ("A party may amend his pleading once without leave of court . . . at any time before the period for responding to it expires or within twenty days after service of a pleading responding to it."). Amendment of the Complaint to add the Governor as a party in his individual capacity cures the technical defect and states a claim for violation of the Sixth and Fourteenth Amendment right to counsel under section 1983.

Finally, the State has argued that the Complaint should be dismissed because plaintiffs failed to join the public defenders and district attorneys involved in the prosecutions of the named plaintiffs. This is simply not a valid ground for dismissal of the Complaint. Moreover,

this argument again rests on the State's fundamental misunderstanding of the nature of plaintiffs' legal claims and the State cites no law to support the notion that such parties are necessary to a systemic public defense reform suit against the State seeking prospective, structural reform.

STATEMENT OF THE CASE

On November 6, 2007, twenty indigent criminal defendants filed a proposed class action Complaint on behalf of themselves and all other criminal defendants in the Counties who are relying or will rely on the State of New York to provide them with meaningful and effective assistance of counsel. The Complaint, now amended, alleges that the State's failure to adequately fund, oversee and set standards for the public defense system results in systemic deficiencies that create a severe and unacceptably high risk that indigent criminal defendants in the Counties will be denied meaningful and effective assistance of counsel. Am. Compl. ¶¶ 8-13, 241-57. The specific systemic deficiencies identified in the Amended Complaint include:

- failure to provide representation at every critical stage where important rights may be adjudicated, including arraignments, *id.* ¶¶ 282-98;
- incoherent or excessively restrictive eligibility standards that operate to wrongfully deny counsel to the poor, *id.* ¶¶ 299-316;
- lack of contact and communication sufficient to establish an attorney-client relationship and permit attorneys to meaningfully represent their clients, *id.* ¶¶ 317-29;
- lack of hiring criteria, performance standards, supervisory controls and training, such that clients are appointed attorneys who lack the necessary skills, knowledge and experience to provide meaningful and effective representation, *id.* ¶¶ 330-45;
- lack of expert and investigative services that are necessary or helpful to build a defense to the charges faced by indigent clients, *id.* ¶¶ 346-56;
- excessive caseloads and workloads that prevent attorneys from providing meaningful and effective representation, *id.* ¶¶ 357-65;
- lack of vertical representation such that attorneys cannot establish meaningful, consistent relationships with clients or guarantee active representation during all critical stages, *id.*

¶¶ 366-71;

- lack of political and professional independence that compromises both the institutional and individual capacities of public defense services providers to serve their clients, *id.* ¶¶ 372-81; and

- chronic under-funding and under-compensation that prevents public defense service providers from providing meaningful and effective representation, *id.* ¶¶ 382-97.

The forgoing paragraphs of the Complaint allege pervasive, systemic failure sufficient to state a claim for prospective relief to remedy violations of the right to counsel. Indeed, contrary to the State's assertion at page 7 of their Memorandum, the Kaye Commission's conclusion that New York's public defense system is "severely dysfunctional and structurally incapable" of meeting constitutional standards, *Kaye Commission Report* at 3, is a factual conclusion incorporated into the Complaint pursuant to CPLR § 3014 that must be accepted as true on this motion to dismiss. This broad factual conclusion follows inevitably from the specific factual findings related to the myriad systemic failures of the public defense system cited in the Complaint paragraphs above and found by the Kaye Commission. The Kaye Commission Report, along with the accompanying report of The Spangenberg Group and the supporting affidavits from experts and defense attorneys submitted in support of plaintiffs' motion for preliminary injunction, constitute the core of plaintiffs' proof in this case.

The experiences of the named plaintiffs, *see* Am. Compl. ¶¶ 39-236, are simply illustrative of how these systemic deficiencies can harm individual public defense clients. Most of the plaintiffs did not have counsel at arraignment, where bail was set so high that they could not pay resting in incarceration, often unnecessary, for weeks or months. *Id.* ¶¶ 41, 66, 93, 116, 132, 149, 165, 223. Most met with their attorneys, if at all, only in the courthouse immediately prior to appearances. *Id.* ¶¶ 42, 50-51, 67, 94, 110, 117, 119, 123-25, 128, 133, 151, 175-76,

188-91, 200, 206-08, 216, 225, 232-33. Their phone calls and letters went unanswered. *Id.* ¶¶ 42, 51-54, 56, 59, 68, 71-72, 79, 83, 97, 106, 109, 119, 151, 167. Several plaintiffs had critical rights waived without their informed consent. *Id.* ¶¶ 53, 69, 81-82, 108, 125, 160-61, 166, 177, 224. Their stories describe unprepared attorneys, errors of law, and missed opportunities for advocacy. *Id.* ¶¶ 43, 50-52, 57-58, 80, 87, 96, 99, 105-08, 126, 134, 162, 174, 180-81, 192-94, 199, 218, 226. Almost none of the plaintiffs report having access to investigative or expert services. *Id.* ¶¶ 46, 62, 74-75, 81, 95, 111, 118, 127, 135, 152, 170, 182, 201, 209, 217, 227. Some filed their own motions because their attorneys were unable or unwilling to do so themselves. *Id.* ¶¶ 55, 84. Many plaintiffs felt pressure to accept guilty pleas from overworked attorneys who failed to counsel their clients regarding the plea or to inform their clients fully of the potential consequences. *Id.* ¶¶ 44-45, 136, 153, 161, 169, 178, 183, 207.

On March 27, 2008, plaintiffs filed a motion for preliminary injunction seeking immediate action to address these ongoing constitutional violations. The motion asks the Court to order the State to undertake the following measures to address the most severe systemic deficiencies in the Counties and to lay the foundation for comprehensive reform: (1) implement standards and procedures to ensure that attorneys appointed to represent indigent 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. The motion is supported by the factual findings contained in the Kaye Commission Report and the accompanying Spangenberg Group Report, as well as affidavits from experts, attorneys, and indigent criminal defendants who have experienced first-hand the harms of the broken public defense system.

On April 14, 2008, the State filed the instant motion to dismiss the Complaint. The return date for both plaintiffs' motion for preliminary injunction and defendant's motion to dismiss is presently set for May 12, 2008.

ARGUMENT

In considering a motion to dismiss for failure to state a claim, the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Whether the plaintiff can ultimately establish the allegations "is not part of the calculus." *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005).

I. PLAINTIFFS ARE NOT REQUIRED TO DEMONSTRATE INDIVIDUAL INSTANCES OF "INEFFECTIVE ASSISTANCE OF COUNSEL" TO STATE A CLAIM OF SYSTEMIC VIOLATIONS OF THE RIGHT TO COUNSEL.

Much of the State's motion to dismiss is premised on the erroneous notion that plaintiffs are alleging individual-level claims of "ineffective assistance of counsel" in their own underlying criminal cases, as that term is defined by cases seeking reversal of particular criminal defendants' convictions. Thus, before turning to the State's specific points, it is worth explaining plaintiffs' legal theory in this systemic challenge seeking prospective relief to reform New York's public defense system and distinguishing it from the legal standard applicable to

post-conviction "ineffective assistance of counsel" claims.

Plaintiffs' claim rests on allegations that structural deficiencies in the public defense system create a constitutionally cognizable risk that the class of indigent criminal defendants represented by the named plaintiffs will not receive meaningful and effective assistance of counsel. The purpose of allegations regarding plaintiffs' individual experiences is simply to demonstrate the types of harm to indigent defendants caused by the broken public defense system. The facts that establish the State's liability for constitutional violations are systemic harms, such as lack of training, performance standards, investigative services, client contact and caseload limits, not the particular experiences of the named plaintiffs. Thus, regardless of whether the allegations regarding any individual plaintiff meets the standard for establishing "ineffective assistance of counsel" sufficient to overturn a conviction, the patterns of representation evident in plaintiffs' collective experience as public defense clients in the Counties support the conclusion that indigent criminal defendants face a severe and unacceptably high risk of being denied meaningful and effective assistance of counsel.

The State's suggestion that plaintiffs must allege individual-level "ineffective assistance of counsel" misconstrues the legal standard for establishing a systemic right-to-counsel claim and fails to understand the distinction between an individual, post-conviction claim of "ineffective assistance" and a class-based, prospective claim of systemic violations of the right to counsel. The proper legal standard for evaluating whether the State is systemically violating the right to counsel asks whether, in light of identifiable systemic failings, plaintiffs and the class of indigent criminal defendants they represent face a "severe and unacceptably high risk" of being denied meaningful and effective assistance of counsel. Proof of individual-level claims of "ineffective assistance" – and the actual prejudice to the criminal defendant those claims may

entail – is not part of this standard.

The seminal case on this issue is *New York County Lawyers' Ass'n v. State* (*NYCLA*), which was a systemic right to counsel challenge to the statutory cap on compensation for assigned counsel. The plaintiffs alleged that "failure to provide sufficient compensation to private counsel . . . has resulted in systematic deficiencies in the Supreme, Criminal and Family Courts in New York City and a risk that indigent adults and children will be denied their rights to meaningful and effective assistance of counsel and due process of law." 188 Misc. 2d 776, 787-88 (Sup. Ct. N.Y. County 2001) (denying motion to dismiss), *aff'd* 294 A.D.2d 69 (1st Dep't 2002). Plaintiffs prevailed both on a motion for preliminary injunction, 192 Misc. 2d 424 (Sup. Ct. N.Y. County 2002), and later at trial, 196 Misc. 2d 761 (Sup. Ct. N.Y. County 2003). The Supreme Court found that indigent defendants faced "severe and unacceptably high risk [of] receiving inadequate legal representation." 192 Misc. 2d at 426. *See also* 196 Misc. 2d at 763 (finding for plaintiffs because they established that indigent criminal defendants "are at unreasonable risk of being subjected to a process that . . . fails to confirm the confidence and reliability in our system of justice."). In issuing a preliminary injunction, the *NYCLA* court reasoned that "[g]ranting prospective relief to secure constitutional standards in state proceedings based on evidence of the likelihood of depriving fundamental and statutory rights has long been within the province of the courts. Evidence that minors and indigent adults will likely receive ineffective assistance of counsel . . . is sufficient to warrant judicial intervention." 192 Misc. 2d at 432 (internal citations omitted).

Although settlement of the case prevented the First Department from passing on the merits of the decision at trial, it issued an earlier opinion upholding the denial of the state's motion to dismiss. 294 A.D.2d 69 (1st Dep't 2002). This decision, which is controlling

authority in this Court[1] and represents the highest level decision on the standard for systemic indigent defense reform cases in New York state, rejected the State's contention – the same contention it re-asserts here – that proof of specific incidents in which an individual's right to counsel had actually been violated are necessary to state a claim. Quoting the Court of Appeals directly, the First Department held that "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.'" 294 A.D.2d at 74 (quoting *Swinton v. Safir*, 93 N.Y.2d 758, 765-66 (1999)).

The First Department's decision in *NYCLA* soundly rests on authority from the Court of Appeals holding that constitutional claims for prospective relief need only allege a likelihood of harm – not actual instances of harm – to state a claim. *Swinton v. Safir*, 93 N.Y.2d 758 (1999), involved a terminated police officer's attempt to get a name-clearing hearing and expungement of stigmatizing material from his personnel file before it could be disseminated to future employers. Using the language quoted by the First Department in *NYCLA* and reproduced in the text above, the Court of Appeals found that the plaintiff did not need to allege any actual harm in order to receive prospective relief. To bring the doctrine full circle, the Court of Appeals in *Swinton* cited with approval to a federal systemic public defense reform case, *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), for the proposition that risk of constitutional violation rather than specific proof of actual violations is the standard for prospective relief, providing further doctrinal support for application of the "severe and unacceptably high risk" standard to this public defense reform case. *Swinton*, 93 N.Y.2d at 765-66.

[1] "[T]the doctrine of *stare decisis* requires trial courts in this department to follow precedents set by the Appellate Division of another department until the Court of Appeals or this court pronounces a contrary rule." *Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664-65 (2d Dep't 1984).

The State completely overlooks this controlling authority from *NYCLA* and *Swinton*, relying instead on three cases from other states in which courts dismissed systemic public defense reform lawsuits because, in those courts' view, right to counsel claims can only be considered in the individual, post-conviction context. Mem. in Support of Defendant's Motion to Dismiss at 20-22 (citing *Platt v. State of Indiana*, 664 N.E.2d 357 (Ind. Ct. App. 1996); *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996); and *Machado v. Leahy*, 2004 WL 233335 (Mass. Super. Ct. 2004)). In contrast to the First Department's decision in *NYCLA*, which expressly rejected the reasoning of these courts, none of these cases are binding authority; therefore they should not inform the Court's opinion.[2]

Moreover, the cases the State cites represent the minority view. The majority of systemic reform cases in federal and state courts around the country recognize that pre-conviction, systemic right-to-counsel claims are viable in the absence of proof of individual instances of "ineffective assistance of counsel" and support application of the *NYCLA* standard of "severe and unacceptably high risk" to such cases. The leading case is the one cited with approval by the

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[2] These cases are also factually distinguishable. *Kennedy v. Carlson* dismissed the plaintiffs' case on summary judgment – not on a motion to dismiss – because plaintiffs there had failed to produce any evidence that the public defender office in Minnesota provided substandard representation to its clients or that there were any serious problems in the challenged system. 544 N.W. 1 (Minn. 1996). Here, plaintiffs have alleged widespread problems with New York's public defense system sufficient to state claim for relief. *Machado v. Leahy*, 2004 WL 233335 (Mass. Super. Ct. 2004), an unreported decision from a lower court in Massachusetts, dismissed a case brought by public defense attorneys seeking increased compensation because their allegations that present rates of compensation violated constitutional standards were merely "vague generalizations." *Id.* at *4. Here, plaintiffs have filed a Complaint of over 100 pages consisting of specific allegations of systemic failure in the public defense system, supported by the comprehensive report of the Kaye Commission. The facts contained therein go far beyond "vague generalizations." Moreover, *Machado* appears to have been overruled, or at least contradicted, by a published decision of a Massachusetts court. *See Lavallee v. Justices in the Hampden Superior Court*, 422 Mass. 228 (2004). *Platt v. Indiana*, 664 N.E.2d 357 (Ind. Ct. App. 1996) does adopt the State's view that the constitutional right to counsel extends no further than the limited, post-conviction relief available under *Strickland v. Washington*, 466 U.S. 668 (1984), but that holding from an intermediate Indiana state court is not controlling, is not persuasive, and has been rejected by the overwhelming weight of authority.

New York Court of Appeals in *Swinton*, *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988). In *Luckey*, the Eleventh Circuit held that "[i]n a suit for prospective relief [seeking reform to Georgia's public defense system] the plaintiff's burden is to show 'the likelihood of substantial and immediate irreparable injury . . . ." 860 F.2d 1012, 1017 (11th Cir. 1988) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)), *rev'd on abstention grounds*, *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992). The *Luckey* court went on to explain the critical distinction between claims alleging systemic, prospective violations of the right to counsel and traditional "ineffectiveness" claims following a finding of guilt:

> The sixth amendment protects rights that do not affect the outcome of the trial. Thus, deficiencies that do not meet the "ineffectiveness" standard may nonetheless violate a defendant's rights under the sixth amendment. . . . Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief – whether the defendant is entitled to have his or her conviction overturned – rather than to the question of whether such a right exists and can be protected prospectively.

860 F.2d at 1017.

The State attempts to discredit *Luckey*, arguing that it is "not persuasive" and cannot be reconciled with the "actual prejudice" standard for evaluating individual claims of ineffective assistance of counsel articulated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Mem. in Support of Defendant's Motion to Dismiss at 23-24. The State's argument, however, fails to address the Eleventh Circuit's clearly drawn distinction between *individual, post-conviction* claims of ineffective assistance of counsel – which are governed by *Strickland* – and *systemic, pre-conviction* claims that systemic deficiencies cumulatively violate the constitutional right to counsel. As explained in the block quote above, the rationale for the "actual prejudice" standard is to ensure that the relief sought by individual defendants claiming ineffective assistance – namely, invalidation of a conviction – only occurs in cases in which the

ineffective assistance actually implicated that conviction. In a prospective, systemic right-to-counsel claim like this case and the *Luckey* case, no party seeks to invalidate a single conviction. Thus, it is fully consistent with *Strickland* to hold that allegations of actual prejudice to any individual indigent defendant are not required to state a systemic right-to-counsel claim. Moreover, the State's attempt to discredit *Luckey* is particularly unpersuasive in light of the Court of Appeals' express endorsement of the decision in *Swinton*. 93 N.Y.2d at 765-66.

Luckey is only one in a long line of pre-conviction systemic reform cases in which courts have expressly rejected a requirement of proof of individual instances of ineffective assistance of counsel and actual prejudice. *Nicholson v. Williams*, 203 F. Supp.2d 153 (E.D.N.Y. 2002), was a class action by battered women challenging systemic barriers to their effective representation in child removal proceedings. In that case, the Eastern District of New York expressly rejected application of *Strickland*'s post-conviction standard and held that "[t]he appropriate test for determining whether the system for appointed counsel is adequate should be whether counsel so appointed are reasonably likely to render . . . reasonably effective assistance. . . . A system for appointed counsel may be challenged successfully if the evidence demonstrates that the system itself so greatly hinders the effectiveness of the counsel it appoints that a presumption of effectiveness is based on an unbelievable hypothesis of competence." *Id.* at 240 (internal quotation and citation omitted). As in *Nicholson*, plaintiffs here successfully state a claim for constitutional violations of the right to counsel by demonstrating systemic failures that create an unacceptable risk of ineffective assistance of counsel, not by specific allegations of ineffectiveness in any particular individual's case.

Similarly, in *Wallace v. Kern*, 392 F. Supp. 834, 845-46 (E.D.N.Y. 1973), *rev'd on abstention grounds*, 481 F.2d 621 (2d Cir. 1973), a class of felony defendants sought a

preliminary injunction to cap public defender caseloads based on evidence that excessive caseloads create the risk that lawyers cannot adequately consult with clients or investigate their cases. The district court granted that injunction based on system-wide proof of excessive attorney caseloads, rejecting the State of New York's argument that proof of individual-level "ineffective assistance of counsel" was necessary in prospective, systemic reform cases. *Id.* at 845-46.

State courts around the country have also applied standards based on systemic risk and rejected a requirement of case-specific injury in claims for prospective relief from systemic violations of the right to counsel. *See Best v. Grant County*, No. 04-2-00189 (Wash. Sup. Ct. Oct. 14, 2005) (denying summary judgment to county defendant in systemic indigent defense reform suit on grounds that individual constitutional injury is not required, as proof of systemic defects creates undue risk of constitutional injury) (attached to Stoughton Affirmation as Exhibit C); *Lavallee v. Justices in the Hampden Superior Court*, 422 Mass. 228 (2004) (judgment for plaintiffs in case challenging systemic violations of the right to counsel based on low rates of attorney compensation, expressly rejecting the state's demand that plaintiffs show "actual harm" and holding that proof of systemic failures that "may likely result in irremediable harm if not corrected" was sufficient); *White v. Martz*, No. CDV-2002-133 (Mont. Dist. Ct. July 25, 2002) (rejecting a motion to dismiss, holding that allegations that particular individual defendants are not receiving adequate assistance are not necessary in a systemic, pre-conviction challenge and that proof of a "likelihood" of constitutional injury will suffice) (attached to Stoughton Affirmation as Ex. D); *Rivera v. Rowland*, No. CV 950545629S, 1996 WL 636475 at *5 (Conn. Sup. Ct. Oct. 23, 1996) (denying a motion to dismiss in a state-wide public defense reform class action and finding that plaintiffs state a claim by alleging that they "are at imminent risk of

harm" due to, among other things, extreme caseloads and inadequate financial and human resources); *State v. Peart*, 621 So. 2d 780, 791 (La. 1993) (finding a constitutional violation where evidence of systemic flaws proved that "defendants who must depend on [the public defense system] are not likely to be receiving the reasonably effective assistance of counsel the constitution guarantees"); *State v. Smith*, 681 P.2d 1374, 1384 (Ariz. 1984) (finding that systemic deficiencies in the public defense system created a rebuttable presumption of inadequate assistance of counsel in any individual case without requiring specific proof of actual "ineffective assistance of counsel" in any individual case).

In short, controlling New York authority in *NYCLA* and *Swinton* – as well as the overwhelming majority of cases from outside this jurisdiction – establish that proof of individual instances of "ineffective assistance of counsel" is not required to state a claim in this case. Thus, the State's contention that "[t]he complaint asserts a legal conclusion that each of the plaintiffs has received or is receiving inadequate assistance of counsel," Mem. in Support of Defendant's Motion to Dismiss at 3; that "a ruling here in favor of the named plaintiffs could be used to overturn any convictions that may be obtained," *id.* at 11; and that "the named plaintiffs must litigate their ineffective assistance of counsel claims in their pending criminal proceedings," *id.* at 17, are incorrect. Moreover, the State's contention that, in individual claims of ineffective assistance of counsel "a criminal defendant must show not only that counsel's performance was deficient, but also that the deficiency prejudiced the defendant," Mem. in Support of Defendant's Motion to Dismiss at 18, is a non sequitur.[3] The standard of proof for individual, post-conviction

[3] Moreover, this statement is incorrect as a matter of law. Although it is true that under *Strickland v. Washington*, 466 U.S. 668 (1984), an individual bringing a post-conviction claim of ineffective assistance of counsel must show actual prejudice to his case, New York courts have consistently rejected this heightened standard. *See, e.g., People v. Henry*, 95 N.Y.2d 563, 565-66 (2000); *People v. Benevento*, 91 N.Y.2d 708, 712-14 (1998).

claims of ineffective assistance is simply not the same as the legal standard of proof for a systemic, pre-conviction claim such as this case.[4]

Indeed, the State's suggestion to the contrary would foreclose the possibility of ever bringing a systemic, pre-conviction challenge to violations of the right to counsel. If, as the State suggests, a plaintiff must allege that he received "ineffective assistance of counsel" in order to bring a systemic challenge to the public defense system and if, as the State suggests, a claim of "ineffective assistance of counsel" requires proof of actual prejudice to a criminal defendant's case, then no indigent criminal defendant could ever seek prospective relief from the violation of the right to counsel prior to conviction because he would be unable to show the requisite prejudice until after conviction. Indigent criminal defendants would be left with no means to seek prospective judicial relief from the harm caused by the systemic failings of New York's public defense system.

Thus, based on controlling precedent from the Appellate Division that is supported by the majority of cases from outside New York courts as well practical considerations counseling in favor of permitting prospective judicial review of violations of the right to counsel, it is clear that plaintiffs have stated a claim that the overwhelming structural failures of New York's public defense create a "severe and unacceptably high risk" that indigent defendants in the Counties are being or will be denied meaningful and effective assistance of counsel. Plaintiffs need not allege, and do not intend to prove, that they individually have received or will receive

[4] The State singles out plaintiffs' allegations regarding the deprivation of the right to counsel during arraignment, arguing that "in New York, the failure to provide counsel at arraignment is not necessarily considered the denial of counsel at a critical stage . . . ." *Mem. in Support of Defendant's Motion to Dismiss* at 19. Although plaintiffs dispute this contention, it is not necessary to do so at this stage; the point for purposes of this motion to dismiss is that plaintiffs have alleged that the systematic deprivation of the right to counsel at arraignment creates a risk of the violation of the right to counsel because it is common in arraignments for critical rights like bail to be adjudicated and for guilty pleas to be entered and accepted. *See* Am. Compl. ¶¶ 283-299.

"ineffective assistance of counsel" that would warrant reversal of their convictions.

II. DEFENDANT'S POINTS IN SUPPORT OF ITS MOTION TO DISMISS ARE MERITLESS.

A. Plaintiffs With Pending Criminal Proceedings May Bring a Declaratory Judgment Action Seeking Prospective, Pre-Conviction Relief for Systemic Violations of the Right to Counsel.

The State argues that relief is not available in this case because the individual plaintiffs whose criminal cases are currently pending cannot bring a systemic, pre-conviction challenge to the provision of public defense services in New York State.[5]

This argument is foreclosed by the First Department's decision in the *NYCLA* case, which held that NYCLA had third-party standing on behalf of indigent criminal defendants to bring a systemic right to counsel challenge to State's policy of under-compensating assigned counsel attorneys. *NYCLA*, 294 A.D.2d at 75 (finding that NYCLA has third-party standing on behalf of "the children and indigent adults whose constitutional rights are at issue."); 188 Misc. 2d at 783 (holding that NYCLA had standing as "an effective proponent of the third-party children and indigent adults" who were at risk of being denied effective assistance of counsel). A prerequisite to third party standing is a finding that the right-holders themselves would be able to assert the claim. *See, e.g.*, *National Organization for Women v. State Division of Human Rights*, 34 N.Y.2d 416, 420 (1974) (finding that NOW has standing to challenge sex discrimination based

[5] Even assuming the State were somehow to prevail on its argument that those plaintiffs with pending criminal proceedings cannot bring a pre-conviction, systemic challenge to the constitutionality of New York's public defense system, several of the plaintiffs no longer have pending criminal cases. *See* Affidavit of Plaintiff Adams in Support of Plaintiffs' Motion for Preliminary Injunction (February 11, 2008) ¶¶ 26-27; Affidavit of Plaintiff Loyzelle (December 12, 2007) ¶ 14; Affidavit of Plaintiff Steele (January 16, 2008) ¶ 12; Affidavit of Plaintiff Tomberelli (November 15, 2007) ¶ 23; Affidavit of Plaintiff Booker (November 20, 2007) ¶ 19 ; Affidavit of Plaintiff Habshi (December 14, 2007) ¶ 12; Affidavit of Plaintiff Hurrell-Harring (November 16, 2007) ¶¶ 9-10; Affidavit of Plaintiff McIntyre (December 18, 2007) ¶¶ 22-23. Thus, the State has not challenged the standing of all named plaintiffs.

on the direct standing of their members). Indeed, the test for establishing third-party standing expressly conditions the third party's standing on its relationship to the actual right-holders, the likelihood that the right-holders would be able to litigate their rights on their own behalf, and whether permitting standing would enhance the right-holders' interests. *People v. Kern*, 149 A.D.2d 187, 233 (2d Dep't 1989), *aff'd* 75 N.Y.2d 638 (1990). Thus, the First Department's determination that NYCLA had standing on behalf of its indigent clients entailed a determination that those clients – and thus indigent criminal defendants in general – had a viable cause of action to seek prospective relief for systemic claims of the right to counsel.

Moreover, as the *NYCLA* court noted, a declaratory judgment action must be available here because to hold otherwise "would erect an impenetrable barrier to any judicial scrutiny of legislative action or inaction in this case, where presumptively innocent citizens are subjected to increased risks of adverse adjudications and convictions merely because of their poverty. . . . [I]t would exempt from judicial review the failure of the State to comply with its statutory and constitutional obligations." 188 Misc. 2d at 787.

The State attempts to distinguish *NYCLA* on the grounds that "NYCLA did not challenge the adequacy of representation being provided by assigned counsel in any actual, pending criminal proceedings." Mem. in Support of Defendant's Motion to Dismiss at 13. As explained in Section I above, plaintiffs in this case also do not challenge the adequacy of representation in any specific pending criminal proceeding. The legal theory of this case is precisely the same as that asserted by the plaintiffs in *NYCLA*. Although plaintiffs here have alleged facts about their experiences that demonstrate some of the harms that can result from systemic failures in the public defense system, *see, e.g.*, Am. Compl. ¶¶ 39-236, those allegations are not offered for the purpose of stating a claim of individual relief on behalf of any individual criminal defendant.

Rather, they collectively illustrate the types of harm to indigent defendants caused by the structural flaws in the public defense system.

The cases cited by the State are simply inapplicable to the present case. *Morganthau v. Erlbraum*, 59 N.Y.2d 143 (1983), *Kelly's Rental, Inc. v. City of New York*, 44 N.Y.2d 700 (1978), *Reed v. Littleton*, 275 N.Y. 150 (1937), *Beneke v. Town of Santa Clara*, 9 A.D.2d 820 (3d Dep't 2004), and *Island Swimming Sales, Inc. v. County of Nassau*, 88 A.D.2d 990 (2d Dep't 1982), all stand for the proposition that courts cannot enjoin enforcement of criminal statutes through declaratory judgment or Article 78 proceedings. Instead, these cases hold that potential targets of arguably unconstitutional criminal enforcement actions must bring their challenge in the context of a criminal proceeding.[6] Plaintiffs here do not seek to enjoin enforcement of any criminal statute. They seek to require the State to fulfill its constitutional and legal responsibility to provide meaningful and effective assistance of counsel to poor persons accused of crimes. Thus, the "important policy considerations" cited by the State, such as interfering with the executive branch's administration of the criminal law or delaying criminal proceedings, *see* Mem. in Support of Defendant's Motion to Dismiss at 9, are not implicated by this action.

Nonetheless, relying exclusively on this readily distinguishable case law, the State urges this Court to create a new doctrine barring systemic challenges by criminal defendants to vindicate their constitutional rights, arguing that the same "important policy considerations" are implicated. There is no basis in law for such a radical limitation on the power of the judiciary to address constitutional violations occurring in the criminal justice context. As explained above,

[6] *Church of St. Paul & St. Andrew v. Barwick*, 67 N.Y.2d 510 (1986), also cited by the State, held that a constitutional challenge to a landmarks law was not ripe until it was actually enforced against the churches who sought to challenge it, particularly since the Landmarks Commission had given no indication of any intent to enforce criminal sanctions against the plaintiff churches. This case is simply irrelevant to the instant matter, where plaintiffs and the class they seek to represent have already been subjected to a public defense system that fails to meet constitutional standards.

that theory would overturn the First Department's decision in *NYCLA*, as well as foreclose any systemic challenge to unconstitutional practices in the criminal courts. The State's novel attempt to expand the prohibition on prospective challenges to the enforcement of criminal laws to include a prohibition on constitutional challenges to the State's failure to provide basic constitutional rights to criminal defendants should, therefore, be rejected.

Even if there were a legal basis for the State's proposed limitation on the Court's power, the State is simply wrong to argue that the same policy considerations underlying cases like *Erlbraum* and *Kelly's Rental* are implicated by this case. First, the State incorrectly argues that a "ruling here in favor of the named plaintiffs could be used to overturn any convictions that may be obtained" and thus interfere with pending criminal proceedings. Mem. in Support of Defendant's Motion to Dismiss at 11. This is incorrect because, as discussed in Part I above, plaintiffs have not alleged and do not intend to prove that any individual criminal defendant has a valid individual claim of ineffective assistance of counsel. Rather, plaintiffs have alleged that the systemic failures in the public defense system create a "severe and unacceptably high risk" that indigent defendants as a class are being denied or will be denied meaningful and effective assistance of counsel.

The State suggests that a finding that indigent criminal defendants in the Counties face a "severe and unacceptably high risk" of being denied the right to counsel "could form the basis for the reversal of any convictions of the plaintiffs," Mem. in Support of Defendant's Motion to Dismiss at 15, but this is purely speculative. A finding of "severe and unacceptably high risk" would not be specific to the facts of plaintiffs' cases. Rather, it would be based on the systemic failures alleged in the Complaint that affect all indigent criminal defendants in the Counties. Such a finding would fall far short of demonstrating that any individual criminal defendant –

whether a plaintiff in this suit or otherwise – has met the fact-based, case-specific standard for establishing an individual claim of "ineffective assistance of counsel" warranting reversal of a conviction.

Although it is true that plaintiffs have alleged facts in the Complaint related to the nature of their representation in their individual criminal actions, those facts – such as how often and under what circumstances plaintiffs met with their attorneys – are not being adjudicated in plaintiffs' criminal proceedings. They are not facts related to the underlying criminal charges, to the issue of guilt, or to any defense being offered in those cases. Thus, there are no grounds for believing that any part of the adjudication of this case would interfere with any ongoing criminal proceeding. The State has not cited – and cannot cite – any authority for the proposition that the Court may not issue a declaratory judgment because facts at issue in that civil action might one day be useful in a collateral, post-conviction challenge to a criminal conviction.

The State also suggests that discovery in this case "could interfere with and delay [the plaintiffs'] criminal proceedings." Mem. in Support of Defendant's Motion to Dismiss at 10. The State does not explain how discovery would create this result, particularly given that the facts alleged with regard to the plaintiffs relate to their representation, not to issues being adjudicated in their criminal proceedings. In any case, the Court has broad power to control the scope and timing of discovery, and the appropriate response to the State's concern is to place reasonable limitations on discovery so as to avoid unnecessary delay in any pending criminal action rather than to dismiss the lawsuit on standing grounds and foreclose the opportunity for judicial review of this important matter.

Finally, the State suggests that plaintiffs could raise their claim for prospective relief from the constitutional violations created by the systemic failures of the public defense system in

the context of individual, post-conviction claims of ineffective assistance of counsel brought by direct appeal or collateral attack on a conviction in their underlying criminal actions. *See* Mem. in Support of Defendant's Motion to Dismiss at 11-12. This is yet another attempt to resurrect an argument squarely rejected by the First Department in the *NYCLA* case. 294 A.D.2d at 76 ("Nor do we agree with the State's contention that those rights can be effectively protected in the context of individuals' post-judgment remedies, such as appeals of convictions on grounds of ineffective assistance, or write of habeas corpus."). In the Supreme Court, Judge Suarez specifically noted that the evidence of systemic failures in the public defense system meant that indigent defendants "would not be able to assert their own rights because of the magnitude of the litigation in question and the lack of resources available to them." 188 Misc. 2d at 783. Indeed, the notion that an individual criminal defendant represented by a lawyer laboring under the impossible conditions alleged in the Complaint could bring a systemic reform suit against the State of New York strains the imagination. Thus, it cannot be said that indigent criminal defendants have an adequate remedy in the form of post-conviction relief to obtain systemic, prospective reform of the public defense system.

Moreover, prospective relief cannot be obtained after a constitutional violation has already occurred. The remedy plaintiffs seek – systemic reform of the public defense system – is not available to an individual defendant in a post-conviction claim of ineffective assistance. There, the remedy is reversal of an individual conviction. It is simply not the case that plaintiffs could bring their claim for prospective relief in the context of direct or collateral appeal in their underlying criminal cases.

Furthermore, as alleged in the Complaint and in the affidavits accompanying plaintiffs' motion for preliminary injunction, the vast majority of indigent criminal defendants plead guilty

and, in so doing, often waive their right to appeal. Am. Compl. ¶¶ 290, 297, 399. The harms experienced by those criminal defendants – which, as alleged in the Complaint, may include pleading to excessive charges or prolonged and unnecessary pre-trial incarceration, *see id.* ¶¶ 13, 399 – cannot be remedied in the manner the State suggests, as post-conviction relief is most often foreclosed.

The State's claim that post-conviction relief suffices to vindicate plaintiffs' rights also assumes that indigent criminal defendants who wish to challenge the unconstitutionality of New York's public defense system will be found guilty of the crimes for which they have been charged. An indigent criminal defendant could experience harm resulting from the systemic failures of the public defense system – for example, prolonged and unnecessary pretrial incarceration – and nonetheless be acquitted or have the charges dropped. This occurred, by way of example, in the case of Plaintiff Jaqueline Winbrone, who was held in jail for two months on a charge that was ultimately dropped. *See* Local Court Criminal Disposition Report (attached to Stoughton Affirmation as Exhibit B). She was not represented at arraignment, was denied bail, and could not reach her lawyer for several days. Am. Compl. ¶¶ 103-112. As a result of her incarceration, her sick husband, for whom she was the sole caretaker, passed away. *Id.* ¶ 104. Ms. Winbrone and similarly situated indigent criminal defendants have no mechanism except for a declaratory judgment action like this one to challenge the systemic defects in New York's public defense system that caused her harm.

Even if the Court were, on some novel theory, to extend the rule prohibiting declaratory judgment actions enjoining enforcement of criminal laws to cover this case, there are important exceptions to that rule that would apply here. In particular, the Court of Appeals recently held that declaratory judgment actions are appropriate – regardless of their potential interference with

ongoing criminal proceedings – if "they are necessary to resolve important issues that could otherwise never reach a[] . . . court." *Oglesby v. McKinney*, 7 N.Y.3d 561, 565 (2006) (issuing declaratory judgment finding trial court's practice of requiring that all jurors in criminal trials be city residents was unlawful). Here, for the reasons stated above, a comprehensive, systemic challenge to the State's failure to adequately fund, set standards for, and oversee the public defense system is highly unlikely to ever reach a court if the only avenue for such a challenge is post-conviction relief in individual criminal cases.

Furthermore, as established by the main case cited by the State, there is an exception to the prohibition on declaratory judgment actions for cases challenging the constitutionality of a systemic procedural defect in criminal proceedings. *See, e.g.*, *Erlbaum*, 59 N.Y.2d at 152 (holding that declaratory relief is available despite the impact on pending criminal proceedings because the challenged practice is "procedural" in nature "of the sort that is likely to recur and to be decided in the same manner regardless of the facts underlying the criminal charges"); *Ritter v. Surles*, 144 Misc. 2d 945, 946-47 (Sup. Ct. Westchester County 1988) (entertaining declaratory judgment to challenge involuntary pretrial commitment of incompetent criminal defendants, despite potential effect on pending proceedings). Here, plaintiffs challenge the systemic procedural failure to guarantee the appointment of meaningful and effective counsel to indigent criminal defendants. As argued in Part I above, this issue does not turn on the facts underlying any particular defendant's charges. The systemic failings of the public defense system recur in every criminal prosecution involving a public defense attorney.[7] Thus, even following the

[7] The State suggests that this exception applies only to actions brought by the People (i.e,. District Attorneys), but it simply cannot be that prosecutors have the capacity to challenge unlawful systemic practices in criminal courts but criminal defendants do not. Indeed, the *Ritter* case cited above and the seminal *NYCLA* case are precisely that kind of challenge brought on behalf of criminal defendants.

distinguishable case law the State urges on the Court, it is clear that this declaratory judgment action is proper.

In short, plaintiffs have standing to bring a pre-conviction claim for declaratory judgment challenging the systemic violation of the right to counsel caused by the State's failure to adequately fund, oversee and set enforceable standards for the provision of public defense services in the Counties. The fact that some of the plaintiffs may have pending criminal proceedings does not affect that standing. The State's attempt to create a new rule to the contrary ignores on-point case law, rests on erroneous assumptions about the nature of plaintiffs' claims, and would effectively foreclose the possibility of any judicial challenge to the State's systemic failure to guarantee the constitutional right to meaningful and effective assistance of counsel.[8]

B. Systemic Constitutional Right to Counsel Claims Are Justiciable.

The State next argues that plaintiffs' constitutional right to counsel claims are not justiciable because "[t]he structure and funding of New York's indigent defense system is a function reserved to the Legislature." Mem. in Support of Defendant's Motion to Dismiss at 16.

[8] The State suggests in passing that plaintiffs "lack standing to litigate whether other individuals in other or future criminal cases might be denied the effective assistance of counsel." *Mem. in Support of Defendant's Motion to Dismiss* at 15-16. This suggestion is beside the point. Plaintiffs need not litigate whether other individuals are being denied effective assistance of counsel; their claim is that systemic deficiencies create a constitutionally unacceptable risk that they are being or will be denied their right to counsel. Moreover, this allegation ignores the fact that plaintiffs have brought this case as a class action on behalf of all indigent criminal defendants in the Counties. The single cited by the State for this proposition is easily distinguishable. *Veloz v. Rothwax*, 65 N.Y.2d 902 (1985), held that individual judicial decisions in the course of a criminal trial may only be challenged on direct appeal and thus an individual criminal defendant may not use a mandamus proceeding to challenge a trial court's decision to shorten the statutory time period in which that defendant could make pre-trial motions. *Veloz* was not a class action suit and did not challenge a state policy or practice; as the Court of Appeals noted, the case was "concerned only with the application of a particular challenged ruling to [the defendant's] case." *Id.* at 904. *Veloz*, therefore, simply does not speak to the issue of standing to bring a systemic public defense reform suit seeking prospective relief on behalf of a class of indigent criminal defendants.

This argument is plainly contrary to well-established and controlling New York law and misconstrues the relief plaintiffs seek.

The State's suggestion that indigent criminal defendants must rely on the political branches and may not seek redress from the judiciary for violations of their constitutional rights betrays the very notion of a constitution as a bulwark against the tyranny of the majority. The right to counsel, embodied in the Sixth Amendment to the U.S. Constitution and Article 9 of the Constitution of the State of New York, is a fundamental right belonging to a politically disenfranchised minority. *See, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). Its enforcement cannot be left to the whim of elected officials. *See* John Hart Ely, *Democracy and Distrust* 103, 172-79 (1980) (discussing the court's role in protecting underrepresented classes, including criminals, from the tyranny of the majority). Indeed, the Complaint alleges that the inaction of elected officials is precisely the cause of the systemic violation of this fundamental right. Since the earliest days of the Republic, it has been "a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 1 Cranch 137, 147 (1803)

As the Court of Appeals has more recently stated, claims of non-justiciability "are particularly unconvincing when uttered in response to a claim that existing conditions violate an individual's constitutional rights." *Klostermann v. Cuomo*, 61 N.Y.2d 525, 537 (1984). The fact that judicial review of an issue may affect traditionally legislative or executive functions or may require the expenditure of funds does not make the issue non-justiciable. *Id.* In *Klostermann*, the Court of Appeals considered the claims of a group of mentally ill patients who alleged that the State had violated their statutory and constitutional rights by not ensuring adequate supervision, treatment and housing upon their release from state institutions. *Id.* at 531-32. The

patients sought a declaration that the State violated their rights by failing to "create, implement, and monitor" a plan for services upon their release . . . ." *Id.* The State defendants moved to dismiss, arguing that the claim was nonjusticiable because it involved a matter "within the competence of the executive and legislative branches" rather than the judiciary. *Id.* at 533. In a unanimous opinion, the Court of Appeals rejected the State's argument and found the claim justiciable. The court noted that the State "fail[ed] to distinguish between a court's imposition of its own policy determination upon its governmental partners and its mere declaration and enforcement of the individual's rights that have already been conferred by other branches of government" and held that "[t]he appropriate forum to determine the respective rights and obligations of the parties is in the judicial branch." *Id.* at 535-36.

Courts have repeatedly emphasized that "merely because a case may have political overtones, involve public policy, or implicate some seemingly internal affairs of the executive or legislative branches does not render the matter nonjusticiable. . . . Indeed, to avoid resolving questions of law merely because a case touches upon a political issue or involves acts of the executive would ultimately undermine the function of the judiciary as a coequal branch of government." *Boung Jae Jang v. Brown*, 161 A.D.2d 49, 55 (2d Dep't 1990) (rejecting the government's claim that a case seeking to compel a police department to fulfill its legal duty to enforce court protective orders was nonjusticiable); *see also McCain v. Koch*, 70 N.Y.2d 109, 119 (1987) (holding that an action to compel city to provide social services to the homeless is justiciable); *Wilkins v. Perales*, 128 Misc.2d 265, 269 (Sup. Ct. NY County 1985) (action to compel State to provide shelter to homeless is justiciable). If the courts may review whether a given school funding regime fulfills the State's constitutional responsibility, *see Campaign for Fiscal Equity, Inc. v. State of New York*, 86 N.Y.2d 307, 315 (1995), then surely plaintiffs'

claims must be justiciable as well. Indeed, the court's power is even more compelling here because, unlike in the school funding cases, "the subject of the present suit is the operation and administration of the courts by the courts." *Bruno v. Codd*, 47 N.Y.2d 582, 588 (1979) (finding that a claim that battered spouses' rights to orders of protection were systemically violated by the policies of governmental authorities was justiciable).

Given this authority, it is unsurprising that this exact issue was decided – and the State's argument rejected – by the Appellate Division in the *NYCLA* case. The First Department clearly held in that case that "the courts must have the authority" to examine whether the State's failure to provide adequate pay for assigned counsel "creates or results in the alleged constitutional infirmity." 294 A.D.2d at 72. As here, "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. We therefore conclude that the matter must be deemed justiciable." *Id.*

To counter this controlling, on-point authority, the State cites only one 50-year-old case to support its argument: *Seaman v. Fedourich*, 16 N.Y.2d 94 (1965). *See* Mem. in Support of Defendant's Motion to Dismiss at 17. That case, which held that a districting plan adopted by a municipality violated the constitutional principle of "one person, one vote," does not even reference the doctrine of justiciability, and the State does not explain how the case supports its argument. If anything, the fact that the Court of Appeals in *Seaman* adjudicated a legislative body's determination of how to apportion legislative districts demonstrates the basic principle that, where constitutional rights are at stake, the judiciary must adjudicate issues that tread on traditional legislative functions. *See also Baker v. Carr*, 369 U.S. 186 (1962) (holding that a constitutional violation benefiting a legislative majority could not be shielded from judicial review as a "political question").

The State also attempts to distinguish *NYCLA* by arguing that while the Court might have authority to "decid[e] whether a compensation rate is adequate," it cannot provide the remedy plaintiffs seek here. Mem. in Support of Defendant's Motion to Dismiss at 23. The State misinterprets *NYCLA*. That case did not hold that NYCLA's claim was justiciable because it merely sought to decide a compensation rate; rather it clearly stated the broader proposition that courts must have the authority to determine whether the State's action or inaction is causing systemic violations of constitutional guarantees such as the right to counsel. 294 A.D.2d at 73-74.

The State also mischaracterizes the relief plaintiffs seek in this case. The Complaint does not ask the Court to "decide whether the State should have a statewide public defender's office . . . ." Mem. in Support of Defendant's Motion to Dismiss at 23. The Complaint asks the Court to issue a declaration that the present system violates indigent defendants' rights and to order the State to "provide a system of public defense consistent with the Constitution and laws of the State of New York and the United States Constitution." Am. Compl., Prayer for Relief ¶¶ 3, 4. In other words, the Court should order the State to implement a public defense system that meets constitutional standards, but it need not dictate the precise form that system must take. Claims seeking to declare and enforce the State's duty to perform a task it is legally obligated to perform "do not present a nonjusticiable controversy merely because the activity contemplated on the State's part may be complex and rife with the exercise of discretion." *Klostermann*, 61 N.Y. at 530. As in *Klostermann*, plaintiffs here do not ask the Court to choose among competing policies; rather, they ask the Court to order the State to meet well-established constitutional standards for protecting the right to meaningful and effective assistance of counsel.

The State's justiciability argument at most suggests a limitation on the type of relief the

Court may provide in this case; it is not a reason to dismiss the Complaint. The question of exactly what declaratory, injunctive, or other relief the Court may ultimately order to remedy any constitutional violations it finds is not properly before the Court on this motion to dismiss and should be reserved until such time as the Court is prepared to order such relief. As the Court of Appeals noted in *Campaign for Fiscal Equity*, "[A]ny discussion of funding or reallocation [remedies] is premature, because the only issue before the Court at this time is whether plaintiffs have pleaded a viable cause of action." 86 N.Y.2d at 316 n.4. At this stage of the litigation, the Court must consider only whether plaintiffs' claims are justiciable, not whether some aspect of the relief the Court might ultimately order would be permissible.

C. The Governor May Be Sued in State Court in His Individual Capacity Under 42 U.S.C. § 1983.

The Amended Complaint adds Governor Paterson, in his individual capacity, as a defendant in this action. As the State correctly points out in its motion to dismiss, this amendment is necessary to state plaintiffs' Sixth and Fourteenth Amendment claims because the State is not a cognizable "person" under 42 U.S.C. § 1983. The Governor, however, is a "person" under § 1983 and thus the Amended Complaint cures the defect in the original complaint and obviates the State's motion to dismiss the federal constitutional claim.

"It is well-settled that a state official may be made a party to a suit seeking to enjoin the enforcement of an allegedly unconstitutional act if that official plays some role in the enforcement of the act." *Schulz v. Williams*, 44 F.3d 48, 61 n.13 (2d Cir. 1994) (quotation and citations omitted). "Of course, a State official in his or her official capacity, when sued for injunctive relief, would be a person under § 1983 because official capacity actions for prospective relief are not treated as actions against the State." *Will v. Michigan Dep't of State*

Police, 491 U.S. 58, 71 n.10 (1989); *see also Ex Parte Young*, 209 U.S. 123, 157 (1908). The Amended Complaint alleges that the Governor of the State of New York is responsible for enforcing the Sixth and Fourteenth Amendments of the U.S. Constitution as they apply to the provision of public defense services within New York State. Am. Compl. ¶ 36(a); *see also* N.Y. Const. art. IV, § 3. By virtue of his office, the Governor bears ultimate accountability for the State's failure to enforce these constitutional standards and may therefore be sued under § 1983.

D. The Complaint Should Not Be Dismissed for Failure to Join District Attorneys and Criminal Defense Lawyers.

Finally, the State argues that the prosecutors and criminal defense attorneys involved in the named plaintiffs' prosecutions are "necessary parties." As an initial matter, this is not grounds to dismiss the Complaint. Even if the State were correct that these individuals are necessary parties, which it is not, the sole remedy is to join those parties. CPLR § 1003; *Red Hook/Gowanus Chamber of Commerce v. New York City Bd. of Standards & Appeals*, 5 N.Y.3d 452, 458 (2005).

In any case, the district attorneys and public defenders involved in the named plaintiffs' cases are not "necessary parties" pursuant to CPLR § 1001. Once again, the State's argument is premised on the erroneous assumption that plaintiffs are asserting individual-level claims of "ineffective assistance of counsel" in their individual criminal proceedings. *See* Mem. in Support of Motion to Dismiss at 27 ("*If this Court permits the named plaintiffs to litigate whether they received or are receiving ineffective assistance of counsel in their pending criminal cases*, then the district attorneys in the Counties are necessary parties") (emphasis added). As explained fully in Part I of this memorandum, plaintiffs are not litigating whether they received or are receiving ineffective assistance of counsel in their pending criminal cases.

The relief plaintiffs seek is directed to the State, not to any county-level official, and is systemic in nature, not related to any individual pending prosecution. Thus, prosecutors' interests in individual prosecutions will not be "inequitably affected" by judgment in this case.[9] "The language of the CPLR clearly does not allow joinder of all persons who might feel some effect or impact from a judicial order or judgment; rather, the Legislature limited participation in lawsuits to those who might be affected 'inequitably.'" *Awwad v. Capital Region Otolaryngology Head & Neck Group LLP*, 18 Misc. 3d 1111(A) at *10 (Sup. Ct. Albany County 2007) (refusing to join current employer of a doctor who was challenging a non-compete clause in his former employment contract, despite the fact that current employer would lose the doctor's services if the non-compete clause was enforced). Moreover, the State does not even attempt to explain how the interests of public defense attorneys could be inequitably affected by this case, which seeks to alleviate the extraordinarily difficult working conditions in which they are forced to operate. *Schulz v. DeSantis*, 218 A.D.2d 256, 259-60 (3d Dep't 1996) ("The definition of a necessary party has been strictly construed and is limited to 'those cases and only those cases where the determination of the court will *adversely* affect the rights of nonparties.'") (quoting *Castaways Motel v. Schuyler*, 24 N.Y.2d 120, 125 (1969)).

Furthermore, the State has failed to articulate an interest of these parties that the State, in defending against the suit, is not already likely to represent. On this ground alone, the various attorneys are not "necessary parties." *See Doner v. State of New York*, 262 A.D.2d 750 (3d Dep't 1999) ("[W]hen the interests of the nonjoined party and a party who has been joined stand or fall

[9] Moreover, following the State's rationale, the prosecutors and defense attorneys in the named plaintiffs' cases are no more "necessary parties" than the prosecutors and defense attorneys in every criminal prosecution of every indigent defendant in the Counties, as they are all equally implicated by the systemic failings of the public defense system, especially given the status of this case as a proposed class action.

together . . . thereby diminishing any potential prejudice, joinder may be excused.") (internal quotation and citations omitted); *Country Village Towers Corp. v. Preston Communications, Inc.*, 289 A.D.2d 363 (2d Dep't 2001) (joinder unnecessary where non-joined party does not have interests substantially independent from joined party); *Awwad*, 18 Misc.3d 1111(A) at *10 ("Our appellate courts have interpreted [the joinder] provision to mean that there is no error in failing to join a person whose interests 'stand and fall' with the interests of one or more of the named parties.").

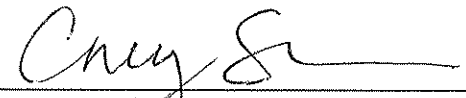
The two cases cited by the State do not support its argument. *Thomas v. Justices of the Supreme Court of the State of New York, Queens County*, 304 A.D.2d 585 (2d Dep't 2003), held that the District Attorney of Queens County was a necessary party in an Article 78 proceeding to preclude retrial of a particular criminal defendant. *Barnwell v. Breslin*, 46 A.D.3d 990 (3d Dep't 2007), held that the District Attorney of Albany County was a necessary party in an Article 78 proceeding seeking to compel a judge to accept a particular criminal defendant's guilty plea. Unlike those cases, this case is not an Article 78 proceeding seeking to compel specific action in any particular criminal proceeding. The only relief sought here, as explained in Part I, is an order requiring the State to bring the public defense system in the Counties in compliance with constitutional standards. The State simply has no case law to support its motion to join individual attorneys and, in light of the systemic nature of the relief plaintiffs seek, provides no logical premise for requiring their joinder.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court deny defendant's motion to dismiss.

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION FOUNDATION, by



Corey Stoughton
Arthur Eisenberg
Christopher Dunn
Daniel J. Freeman
125 Broad Street, 19th Floor
New York, N.Y. 10004
Phone: (212) 607-3366
Fax: (212) 607-3329

-and-

SCHULTE ROTH & ZABEL LLP

Gary Stein
Danny Greenberg
Sena Kim-Reuter
919 Third Avenue
New York, NY 10022
Phone: (212) 756-2000
Fax: (212) 593-5955

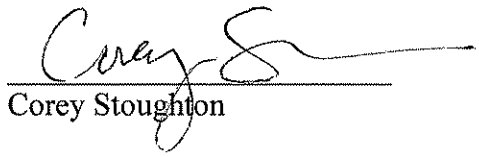
Attorneys for Plaintiffs

Dated: April 29, 2008
New York, N.Y.

AFFIRMATION OF SERVICE

I hereby certify that on April 29, 2008, I caused to be served by email and Federal Express the attached Memorandum in Opposition to Defendant's Motion to Dismiss on the following counsel of record:

David Cochran
Assistant Attorney General
Division of State Counsel, Litigation Bureau
The Capitol
Albany, N.Y. 12224
(518) 474-4402



Corey Stoughton