SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

KIMBERLY HURRELL-HARRING, et al., on Behalf of Themselves and All Others Similarly Situated, Plaintiffs, -against- THE STATE OF NEW YORK, et al., Defendants.	Index No. 8866-07 (Devine, J.)

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO THE STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Corey Stoughton
Taylor Pendergrass
Erin Beth Harrist
Mariko Hirose
Brooke Menschel
Susannah Karlsson
Dana Wolfe
Christopher Dunn
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 19th Floor
New York, New York 10004
(212) 607-3300

SCHULTE ROTH & ZABEL LLP
Gary Stein
Daniel L. Greenberg
Kristie M. Blase
Matthew Yoeli
Mark Arnot
Matthew Schmidt
919 Third Avenue
New York, New York 10022
(212) 756-2000

Attorneys for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

SOURCE **PAGE(S)**

Federal Cases

State Cases

Statutes

Constitutional Provisions

Plaintiffs respectfully submit this memorandum of law in opposition to the three forms of relief sought by Defendants State of New York and Governor Andrew Cuomo ("the State") in their motion: (1) summary judgment on Plaintiffs' claims for constructive and actual denial of counsel; (2) decertification of the class previously certified by the Third Department; and (3) to strike portions of the complaint. As set forth below, the State Defendants' motion should be denied in all respects.

PRELIMINARY STATEMENT

Fifty years after *Gideon v Wainwright*, the promise of meaningful and effective assistance of counsel for indigent criminal defendants in New York remains unfulfilled. Every day, indigent defendants are arraigned without counsel in a system that deliberately fails to meet a constitutional mandate from the Court of Appeals. When defendants do get counsel, their lawyers lack the time and resources to subject the prosecution's case to meaningful adversarial testing. Hard numbers paint a striking picture of ongoing constructive denials of counsel:

- Investigators are hired in 0.3% of cases in a county where 99% of attorneys spent one hour or less conducting investigations; in another county, 98% of all assigned counsel did not bill for any investigator services at all; in a third county, the public defender's office has no investigator on staff and hired investigators only six times in two years.
- Experts are hired in effectively 0% of cases (17 out of tens of thousands) in one county; 1.44% in a second county; and 0.15% (22 of more than 14,000) in a third county, including zero of 23 cases involving charges of manslaughter, homicide, or murder, and only three of more than 1,000 cases involving drug charges.
- Attorneys spend less than an hour on legal research in 95% of felony cases and 99% of misdemeanors in one county; in another county, the amount of time spent on legal

research or writing on felony cases is so low (among those cases that billed for any at all) that in half of cases the average rounds to 0%.

- In 41% of felony cases in one county, zero time is spent preparing for sentencing.
- In more than 1/3 of cases in one county, there is no recorded client contact of any kind—whether in court or out of court by letter or phone—for a full ten days after assignment; over 1,600 indigent defendants have no contact of any kind from their attorneys a full month after appointment; and, in another county, attorneys in more than 20% of cases spent more time filling out the voucher paperwork than they billed for interviewing clients.
- Eleven lawyers were responsible for 2,806 *felony* cases in a single year—an average annual rate of over 250 felony cases per attorney.

This list goes on. Such system-wide evidence builds upon decades of commissions, studies, and newspaper articles that have condemned New York's broken public defense system and called for a solution. That the State has long known about the scope of this system's failure cannot seriously be denied. Indeed, the State official most familiar with the system *admits* that it is broken, readily acknowledging that (a) services for indigent criminal defendants are underfunded and, as a result, the county providers lack the resources necessary to meet professional standards; (b) public defenders are burdened with excessive caseloads statewide; (c) public defenders do not have access to adequate investigative, expert or other support services; and (d) to date, the State has failed to live up to the constitutional standards established by *Gideon* and its progeny.

There has never been the slightest claim by the State or anyone else that New York has a coherent system to insure that indigent criminal defendants receive meaningful and effective

assistance of counsel. There is no such claim because there is no such system. And there is no system because the State has not taken seriously its constitutional obligations under *Gideon*, opting instead to abdicate its responsibilities to the counties without adequate oversight or funding, a policy that puts the Plaintiff Class at risk of actual and constructive denials of counsel. Remarkably, even after this lawsuit was filed, the State has continued to manifest its indifference to the right to counsel by raiding the Indigent Legal Services Fund—set up specifically to help indigent defendants—of a total of *more than $40 million* that it applied to other purposes.

As in any case where the government fails to meet basic constitutional obligations, the Court must step in where the political branches have failed and order the State of New York to protect the right to counsel of the Plaintiff Class. Before getting to that point, however, the Court should deny the State's summary judgment motion in its entirety.

Point I of this Memorandum establishes that the State fails to make the prima facie showing required to establish an entitlement to summary judgment on Plaintiffs' constructive denial of counsel claim—namely, that even when counsel are physically present, deficiencies in the delivery of services create a constitutionally unacceptable risk that the Plaintiff Class will be denied meaningful and effective assistance of counsel. This is so for three reasons. First, as demonstrated in **Part I.A**, *infra*, the State's motion fails to correctly apply the legal theory established by the Court of Appeals in this case. The State ignores that theory and attempts to re-litigate its prior, rejected effort to import the legal standard from ineffective assistance of counsel cases, where an individual defendant seeks to overturn a conviction. Based on this faulty premise, the State asks for summary judgment based solely on the experiences of the class representatives, defying the Appellate Division's holding on class certification. By ignoring the

central legal question of the risk of constitutional violations to the Plaintiff Class, the State fails to establish its entitlement to judgment as a matter of law. Thus, the Court need not wade into the thicket of competing statements and counter-statements of fact because, purely as a matter of law, the State's motion should be denied.

Second, the factual record shows that the State is not entitled to summary judgment on Plaintiffs' constructive denial claim, as demonstrated in **Point I.B.1** below. The evidence of these systemic defiencies—including, among other things, damning admissions from public defense providers and State and County officials deposed in this action, the sworn accounts of former public defenders who experienced the system's failings first hand, the considered opinions of the nation's foremost experts on indigent defense, expert statistical analysis of payment vouchers and court data, and the testimony of Plaintiffs' class representatives and other class members—is nothing short of overwhelming. Whether the issue is systemic failure to investigate cases or consult experts, complete breakdowns in attorney-client communication, or a policy of "triage" in which entire categories of indigent defendants are condemned to representation in name only, the record on summary judgment presents ample grounds for the Court to find triable issues of fact regarding the State's liability for systemic constructive denials of counsel.

Third, even on its own, legally flawed terms, the State's summary judgment motion on the constructive denial claims fails because the State gets the facts pertaining to the class representatives so thoroughly wrong, as argued in **Point I.B.2** below. The State's record is replete with incorrect statements of fact, disputed facts, inadmissible evidence, and conclusory assertions. It also omits material facts that undermine its case to such a great degree that its motion, on its face, fails to meet the standard for summary judgment.

Point II establishes that summary judgment must likewise be denied with respect to Plaintiffs' actual denial of counsel claims – namely that indigent defendants face an unacceptable risk of being denied a lawyer at the critical stage of arraignment[1] and of being denied counsel outright based on flawed financial eligibility determinations. Indeed, the State does not even attempt to argue that there are undisputed facts to refute Plaintiffs' claims, opting instead to shift blame for its own failures to the judiciary. The State's failure to dispute these actual denials of counsel underscores the truth – that every day, New Yorkers face criminal charges without the assistance of counsel because the State has failed to ensure that lawyers are present at arraignment and that financial eligibility standards are applied fairly and not as a means of reducing the overwhelming financial burden the counties are forced to carry by the State's abdication of its *Gideon* responsibilities.

Point III discusses an argument that the State never makes explicitly, but that pervades their motion: that post-litigation changes entitle them to summary judgment. The State has not met its burden to demonstrate that any of the post-litigation changes it identifies have completely cured violations of the right to counsel, particularly on summary judgment, because there are disputed facts about the scope and effectiveness of those changes. Even if they could make such a showing, Plaintiffs would be entitled to an injunction to ensure that violations of the right to counsel do not recur.

Point IV demonstrates that the State's motion to decertify the class should be denied. Brought more than three years after the Appellate Division certified the Plaintiff Class, the State's argument turns entirely on a critique of the sufficiency of some of the class

[1] Indeed, as demonstrated in Plaintiffs' cross-motion, the overwhelming and uncontested proof of the State's systematic failure to provide counsel at arraignment to indigent defendants entitles Plaintiffs to summary judgment on this issue.

representatives' knowledge of the legal theory of case. In fact, the testimony of the class representatives demonstrates more than adequate commitment to this case and the relief sought. The law is clear that class representatives—particularly in cases brought on behalf of indigent persons – are not required to have a sophisticated knowledge of the case. Even if there were any reason to doubt the adequacy of the class representatives, which there is not, the remedy for that problem at this late stage would be to allow Plaintiffs to identify substitute class representatives, not to start all over with a new class action and another six years of duplicative motions and discovery.

The remaining Points of this memorandum of law address the State's incorrect arguments that portions of Plaintiffs' claims are "moot or not alleged" by virtue of the absence of a class representative who experienced specific manifestations of violations of their right to counsel (**Point V**); that portions of Plaintiffs' complaint should be stricken (**Point VI**); and that certain facts should be deemed admitted based on Plaintiffs' responses to the State's requests for admission (**Point VII**). The Court should reject all of those arguments, and deny the State's motion in full.

PROCEDURAL HISTORY

The Complaint and Motion to Dismiss

This case was filed against the State of New York on November 8, 2007, with an amended complaint filed to add the Governor as a party, and a Second Amended Complaint filed pursuant to this Court's order adding the Counties of Onondaga, Ontario, Schuyler, Suffolk and Washington on August 26, 2008. (Affirmation of Adrienne J. Kerwin (August 22, 2013) ("Kerwin Aff.") Ex. A.) The State moved to dismiss, and the Court denied that motion, but the Appellate Division reversed and dismissed the complaint. (Kerwin Aff. Exs. B & C.)

On May 6, 2010, the Court of Appeals reversed the Appellate Division's decision and reinstated the complaint. *Hurrell-Harring v. State of New York*, 15 N.Y.3d 8 (2010). The Court of Appeals held that Plaintiffs stated a claim that "the basic constitutional mandate for the provision of counsel to indigent defendants at all critical stages is at risk of being left unmet because of systemic conditions" such that the State fails to meet "its foundational obligation under *Gideon* to provide legal representation." *Id.* at 25, 19. The Court held that such systemic conditions include "inadequate funding and staffing of indigent defense providers" and "insufficient compliance with the constitutional mandate of *Gideon*." *Id.* at 22, 23; *see also id.* at 15 (holding that Plaintiffs stated a claim that "a costly, largely unfunded and politically unpopular mandate upon local government, has functioned to deprive them and other similarly situated indigent defendants . . . of constitutionally and statutorily guaranteed representational rights").

The Court of Appeals found that the complaint demonstrated a "considerable risk that indigent defendants are, with a fair degree of regularity, being denied constitutionally mandated counsel" in terms of both "actual denials of counsel"—the absence of attorneys at critical stages or the failure to appoint a lawyer to those who cannot afford one – and "constructive denials" of counsel – instances in which the appointment of an attorney is "merely nominal." *Id.* at 22, 26. As examples of "constructive denial," the Court described situations in which lawyers are "unavailable to their clients" or "confer[] with them little, if at all," are "often completely unresponsive to their urgent inquiries and requests from jail, sometimes for months on end," "and ultimately appear[] to do little more on their behalf than act as conduits for plea offers," *id.* at 19-20, as well as instances in which "counsel missed court appearances, and that when they did appear they were not prepared to proceed," *id.* at 20, and where "counsel, although

appointed, were uncommunicative, made virtually no efforts on their nominal clients' behalf . . ., [and] waived important rights without authorization from their clients . . . ." *Id.* at 22.

The Court of Appeals also held that Plaintiffs stated a claim for actual denials of counsel, holding that "arraignment itself must under the circumstances alleged be deemed a critical stage" requiring the presence of counsel. *Id.* at 20. In reaching this conclusion, the Court did not differentiate among the claims of the plaintiffs based on what happened in their individual arraignments. It specifically rejected the suggestion "that the presence of defense counsel is *ever* dispensable" at arraignment, as well as the notion that "counsel, as a general matter, is optional at arraignment." *Id.* at 21 (emphasis added). "Indeed," the Court held, "such a proposition would plainly be untenable since arraignments routinely, and in New York as a matter of statutory design, encompass matters affecting a defendant's liberty and ability to defend against the charges." *Id.*

Class Certification

Shortly after the Court of Appeals' decision, the Appellate Division, Third Department certified a class (hereinafter, "the Plaintiff Class") consisting of "[a]ll indigent persons who have or will have criminal felony, misdemeanor, or lesser charges pending against them in New York state courts in Onondaga, Ontario, Schuyler, Suffolk and Washington counties who are entitled to rely on the government of New York to provide them with meaningful and effective defense counsel." *Hurrell-Harring v. State*, 81 A.D.3d 69, 71 (3d Dep't 2011), *leave to appeal denied by* No. 509581 (3d Dep't Apr. 13, 2011).

In certifying the class, the Appellate Division found that "plaintiffs satisfied all of the prerequisites to class action certification." *Id.* at 72. In finding commonality and typicality among the class members' claims, the Appellate Division held that those claims are not

"premised on performance based claims of ineffective assistance of counsel, thereby obviating any need to conduct individualized inquiries into the performance of the class members' individual attorneys." *Id.* "That the class members may have suffered the deprivation of their constitutional right to counsel in varying manners—be it through outright denial of counsel during arraignment or a bail hearing, or nonrepresentation at a critical stage—does not compel a conclusion" that the class was unworkable. *Id.* at 73. It was sufficient that "the named plaintiffs' claims derive from the same course of conduct that gives rise to the claims of the other class members and is based upon the same legal theory." *Id.* The Appellate Division found "plaintiffs have demonstrated that the representative parties would fairly and adequately protect the interests of the entire class." *Id.* The court noted that "[its] research failed to identify a single case involving claims of systemic deficiencies which seek widespread, systemic reform that has not been maintained as a class action." *Id.* at 75.

The State's Bifurcation Motion

Following the class certification order, on May 16, 2011, the State filed a motion seeking to bifurcate issues pertaining to the class representatives from issues pertaining to the Plaintiff Class. (Affirmation of Kristie M. Blase in Opposition to the State's Motion for Summary Judgment (October 8, 2013) ("Blase Aff.") Ex. 29.) In making that motion, the State unsuccessfully argued (as it argues again in this motion) that "a particularized examination of the facts and circumstances of each [class representative's] criminal prosecution" was necessary to dispose of the "threshold issue" of whether "the rights of the twenty named plaintiffs were actually violated." (*Id.* at 5.) The Court rejected that argument and denied the State's motion on August 5, 2011, holding that the State's "purported threshold issue" would not be dispositive:

> Although defendants appear confident that summary judgment in their favor would be warranted after addressing the class representatives' claims of denial of

> their right to counsel, there is nothing in the record to demonstrate that the entire matter would be resolved after doing so, particularly in light of the fact that the class is to be comprised of members other than the twenty named plaintiffs.

(Kerwin Aff. Ex. J. at 4.)

Discovery and the Depositions of the Class Representatives

The State first began seeking to schedule the depositions of the class representatives in the autumn of 2010. Blase Aff. Ex. 30 (Affirmation of Taylor Pendergrass (Mar. 11, 2011) ¶¶ 4-5).) Plaintiffs immediately informed the State of their position that a protective order was necessary to cover deposition questions regarding confidential attorney-client communications between the class representatives and their criminal defense attorneys. (*Id.*) Plaintiffs' counsel convened a conference call with all Defendants to explain why a protective order was necessary and to achieve agreement on the terms of such an order. (*Id.* ¶ 6.) Following that call, Plaintiffs drafted a proposed protective order and circulated it to all Defendants. (*Id.* ¶ 7.) Some of the Defendant Counties agreed to the order, but the State rejected it. (*Id.* ¶¶ 9-10, 12.) Although Plaintiffs' counsel were still negotiating in good faith to understand the basis of the State's objections, the State noticed the class representatives' depositions on short notice and refused to discuss the issue further. (*Id.* ¶¶ 15-18.) Plaintiffs thereafter filed a motion for a protective order and to stay the State's notices of deposition until a protective order was in place. (*See id.* ¶¶ 2-3, Ex. A.)

The Court granted Plaintiffs' motion for protective order on August 5, 2011, in the same order in which it denied the State's bifurcation motion. (Kerwin Aff. Ex. J.) The State alleges that, after that decision, "the scheduling of Plaintiffs' depositions continued to be difficult," (Kerwin Aff. ¶ 25), but the State does not suggest that Plaintiffs caused all of that difficulty, nor could it. (Affirmation of Susannah Karlsson (October 8, 2013) ("Karlsson Aff.") ¶ 25.) In

response to the State's first effort to schedule those depositions following the Court's issuance of the protective order, in September 2011, Plaintiffs responded promptly with an offer to produce twelve of the twenty class representatives "as soon as you like." (Blase Aff. Ex. 31 (9/19/11 Email).) As to the remaining eight, Plaintiffs informed the State that some were incarcerated and others could not be readily located, and although none were yet seeking to withdraw, "[i]f the status of these individuals changes at any time we will let you know promptly." *Id.*

By late summer 2012, twelve of the class representatives' depositions had been scheduled or completed. In July 2012, Plaintiffs informed the State that Mr. Kaminsky and Mr. Glover would seek to withdraw as class representatives for personal reasons. (Blase Aff. Ex. 32 (7/12/12 Letter).) In August 2012, immediately after the Court denied the parties' final joint request to extend the discovery deadline, Plaintiffs realized that their efforts to contact the remaining class representatives would not succeed prior to the close of discovery. Plaintiffs promptly informed the State that those individuals would also seek to withdraw. (Blase Aff. Ex. 33 (8/24/12 Letter).) Plaintiffs offered that, if the parties would stipulate to withdrawal, Plaintiffs would not introduce any evidence pertaining to them at trial. *Id.*

The State declined Plaintiffs' offer and refused to stipulate to the withdrawal with prejudice of the eight class representatives. Plaintiffs thereafter filed a motion for leave to withdraw, which the State opposed. (Kerwin Aff. Exs. M, N.) Based on the State's objections, the Court denied Plaintiffs' motion. (Kerwin Aff. Ex. O.) Discovery in this case closed on November 30, 2012.

COUNTER-STATEMENT OF FACTS

Plaintiffs' counter-statement of facts, detailing which of the facts put forward by the State are disputed and undisputed and adding other material facts, are set forth in affirmations and affidavits submitted in conjunction with this memorandum.[2] The following is a summary of those facts:

The State's Public Defense "System"

In 1965, the State responded to *Gideon v. Wainwright*, 372 U.S. 335 (1963), by passing N.Y. County Law 18-B, which delegates to the counties the responsibility to create a system for providing counsel to the indigent accused. (*See* Karlsson Aff. ¶¶ 34, 86.) From 1965 until 2010, no state agency had any responsibility for public defense services. (*See id.*) In 2010, following the Court of Appeals' decision in this case, the State created the Office of Indigent Legal Services ("OILS"). (*Id.* ¶ 35.) OILS is charged with studying county public defense systems, promulgating advisory standards for mandated representation, and distributing money to counties from the State's Indigent Legal Services Fund. (*Id.* ¶¶ 35-40.)

OILS has neither the authority nor the capacity to enforce the standards it has promulgated. (*Id.* ¶¶ 35-36, 50-52, 92-93.) OILS has repeatedly sought state funding for the

[2] Plaintiffs have submitted to the Court six attorney affirmations to respond directly to the six affirmations submitted by the State in support of its motion, and to set forth additional material facts that the State overlooked. Those six affirmations, together with the Affidavit of Dr. Gary King (October 1, 2013), Affidavit of Norman Lefstein (October 8, 2013), Affirmation of Robert Boruchowitz (October 7, 2013), and the Affirmation of Corey Stoughton in Support of Plaintiffs' Motion for Partial Summary Judgment (Sept. 6, 2013), set forth all the disputed and undisputed facts pertinent to this motion, including the State's facts, which Plaintiffs have responded to as "disputed" or "undisputed" to ease the Court's consideration of the record. All exhibits Plaintiffs seek to introduce in opposition to this motion are appended either to the Affirmation of Kristie Blase in Opposition to the State's Motion for Summary Judgment (October 8, 2013) ("Blase Aff.") or the Stoughton Affirmation referenced previously. As stated in the Blase Affirmation, Plaintiffs incorporate the record in support of their pending Motion for Partial Summary Judgment into the record on this motion.

purpose of bringing counties into compliance with standards and has been denied that funding. (*Id.* ¶¶ 87-91.)

OILS gives money to counties through "distributions" and "grants." One part of its "distributions" is, until the upcoming fiscal year, automatic with "no strings attached." (*Id.* ¶ 38.) The other part of its "distributions" requires counties to submit a proposal stating how they will use the money. (*Id.*) OILS lacks the capacity to monitor how counties actually use the money and whether or how it improves defense services. (*Id.* ¶¶ 38, 95-97.) OILS's lack of capacity robs indigent defendants of the intended benefits of state spending. For example, Onondaga County absorbs its "automatic" distributions from OILS into the County general fund to offset broader county expenses rather than directing them to the assigned counsel program. (Affirmation of Mariko Hirose (October 8, 2013) ("Hirose Aff.") ¶ 255.)

Moreover, as of the 2014-15 fiscal year, no county is guaranteed *any* state distributions, and OILS's authority to distribute money has been challenged by other state agencies, leaving it uncertain whether any state funds will continue to support public defense in Onondaga, Ontario, Schuyler, Suffolk and Washington counties. (Karlsson Aff. ¶¶ 110, 112-13.)

In each year since it began submitting budget requests, OILS has been denied full funding by the State, (*id.* ¶¶ 121-28), despite admissions from the State's Director of OILS that full funding is "essential to curing New York's long-standing non-compliance with its obligation to provide the effective assistance of counsel to [indigent defendants]" (*id.* ¶ 126).

In terms of "grants," OILS has only begun one grant program, for counsel at arraignments. (*Id.* ¶¶ 115, 129-31.) The Director of OILS, William J. Leahy, admits that this program is insufficiently funded to solve the problem of the absence of counsel at arraignment. (Affirmation of Corey Stoughton in Support of Plaintiffs' Motion for Partial Summary Judgment

(Sept. 6, 2013) ("Stoughton Aff.") ¶¶ 57, 125.) Although there have been discussions and proposals regarding further grants, no progress has been made beyond the planning stage. (*See* Karlsson Aff. ¶¶ 115, 129-30.)

Between 2008 and 2012, the State "swept" more than $40 million from the Indigent Legal Services Fund—the sole source of money provided to county defense programs through OILS—and re-deposited it into the State's General Fund to support other agenda items. (Karlsson Aff. ¶¶ 101-108.) In the current budget year, the State has authorized an additional $11 million "sweep." (*Id.* ¶ 109.) Director Leahy has stated that the survival of his office is contingent on the money in the Indigent Legal Services Fund. (*Id.* ¶ 98.)

In addition to the money distributed from the Indigent Legal Services Fund, the State provides a small amount of money to three of the five Defendant Counties through a program called Aid to Defense, administered by the Division of Criminal Justice Services ("DCJS"). (*Id.* ¶ 132.) DCJS does nothing to ensure that Aid to Defense funds are used to address deficiencies in indigent defense representation. (*Id.* ¶¶ 135-42.) Aid to Defense is a mere drop in the bucket of counties' *Gideon* spending. For example, in Onondaga County, which receives the second-greatest amount of Aid to Defense of any of the Defendant Counties, Aid to Defense represents only around 2% of actual expenditures on criminal defense representation. (Hirose Aff. ¶ 256.) In Ontario, county officials have described Aid to Defense as "nominal." (Affirmation of Brooke Menschel (October 8, 2013) ("Menschel Aff.") ¶ 177.) The amount DCJS gives counties for Aid to Defense is dwarfed by the amount DCJS distributes in prosecution grants. (Karlsson Aff. ¶¶ 146-76.)

State money, from both OILS and DCJS, accounts for between 16% and 28% of the Defendant Counties' spending on mandated representation. (*Id.* ¶ 183.) The Director of OILS

admitted that the funds he distributes are insufficient to solve the systemic deficiencies his office has identified in county public defense systems across the state. (*Id.* ¶ 114.)

The Five Defendant Counties—Onondaga, Ontario, Schuyler, Suffolk, and Washington—represent all the various systems counties can use to deliver public defense services and all of the various faults of the State's abdication of responsibility for that system.

Onondaga. In 2004, Onondaga County awarded a contract to the Assigned Counsel Program ("Onondaga ACP") for trial-level indigent defense. The County chose Onondaga ACP for the stated rationale that the County could save money that way. (Hirose Aff. ¶ 248.) Since 2006, Onondaga County has renewed ACP's contract and set its budget without any effort to measure the quality of representation; the sole concern has been financial. (*Id.* ¶¶ 249-51, 259.) Despite a rise in the cost of providing services, ACP's actual expenditures were lower in 2012 than in 2006. (*Id.* ¶¶ 253-54.) And, ACP's budget every year for at least the past four years has been roughly half of the budget of the Onondaga County District Attorney's Office. (*Id.* ¶ 260.)

Under-resourced as it is, Onondaga ACP does almost nothing to ensure that indigent defendants receive meaningful and effective assistance of counsel. Its Executive Director admits straightforwardly that meeting professional standards and controlling workloads are left entirely to individual counsel; ACP does not supervise attorneys and does not enforce any rules about practice. (*Id.* ¶¶ 5, 279-80.) Although Onondaga ACP pays the statutory rate for assigned counsel, it undermines that compensation with policies that refuse reimbursement for routine expenses and by capping the hourly rate for investigators. (*Id.* ¶¶ 281-83.) It delays payment on many hundreds of attorney vouchers for things like "meetings w/client," "correspondence with client," "motions," "reviewing facts," "research," and "trial prep." (*Id.* ¶ 14; Blase Aff. Ex. 68.) The full ACP voucher review process results in delay of at least two months, and up to years,

after the completion of a case. (*Id.* ¶¶ 284-85.) Attorneys have been driven away from representing indigent defendants because of the ACP's payment practices. (*Id.* ¶¶ 41, 286.)

The pressure to sacrifice necessary representation is directly linked to the systemic deficiencies in program funding and independence. The Onondaga ACP Executive Director testified that the legislature once put a quarter of a million dollars in a contingent fund until she could assure them that she was "enhancing" voucher review and being more diligent in controlling payment to attorneys. (*Id.* ¶ 32.) A subsequent ACP Annual Report confirmed that ACP complied. (*Id.*) The Executive Director candidly testified that the ACP voucher review process is a factor in why the cost-per-case for the ACP is low. (*Id.*)

Ontario. When this case was filed, Ontario County provided public defense services exclusively through an Assigned Counsel Program (ACP). (Menschel Aff. ¶ 4.) Beginning in 2010—in a post-litigation remedial measure—Ontario County began providing public defense services through a Public Defender Office, with the ACP providing such services only when there is a conflict. (*Id.* ¶¶ 5, 94.) Desire to control the rising cost of the Assigned Counsel Program was a main factor that prompted the change in systems. (*Id.* ¶ 225.) Since its inception, the Public Defender's Office has been underfunded. For example, in the 2011 budget cycle, the Public Defender's Office received almost $400,000 less than it requested in its budget proposal. (*Id.* ¶ 187.) Notwithstanding the County's failure to fully fund the Public Defender's Office, county law requires the Public Defender to accept all non-conflict criminal cases even if the Office is already carrying an excessive caseload or workload. (*Id.* ¶ 168.) The County has not evaluated whether the switch to a Public Defender has improved the quality of services. (*Id.*) To the extent that the County has monitored the Public Defender at all, the purpose has been to ensure that "the public funds are being spent efficiently." (*Id.*)

Political pressure to keep cost down has also affected assigned counsel. The County imposed a change in billing practices, urging the Assigned Counsel Administrator to rein in costs. (*Id.* ¶ 225.) The Assigned Counsel Program Administrator has questioned attorneys who submit especially high vouchers and attorneys have had their vouchers cut, including for too much time spent on client communication. (*Id.* ¶ 214.)

Although the State argues that the Ontario Public Defender's Office has taken a range of steps to reform previously inadequate policies and practices and address violations of the right to counsel,[3] it concedes that the Assigned Counsel Program remains the same as it was when this case was filed. (*Id.* ¶¶ 189, 193; *see also id.* ¶¶ 6, 188.) The Assigned Counsel Program does not supervise or support the work of panel attorneys. (*Id.* ¶¶ 198, 285-88, 290.) It does not provide any training or impose any training requirements, or even monitor whether attorneys complete CLE requirements. (*Id.* ¶¶ 327-30.) It has minimal qualification standards for attorneys to get on panels, and no requirements pertaining to criminal law experience. (*Id.* ¶¶ 334-36.) The Assigned Counsel Administrator does not monitor the caseloads or workloads of panel attorneys and has no policies on monitoring, limiting or controlling caseloads or workloads. (*Id.* ¶ 205.) It does not have legal research resources or a legal library available to panel attorneys and does not pay counsel for the cost of legal research through electronic databases such as Westlaw. (*Id.* ¶ 150.) The County has reduced the Assigned Counsel Program's administrative budget, (*Id.* ¶

[3] Even with respect to the Public Defender's Office, the record contains material disputes regarding the extent of the improvements and whether they have been sufficient to remedy previous violations—including disputes about supervisory structures, caseload/workload, how assignments are made, whether conflicts are identified, whether and how arraignments are covered, and the extent of county supervision. (*See, e.g.*, Menschel Aff. ¶¶ 103, 105-06, 108,110-13, 135, 138-39, 142-47, 157-59, 166-68.)

250), making it yet more difficult for the program to oversee or support assigned counsel representation.

Washington. Washington County provides indigent defense services through the Washington County Public Defender's Office, and an Assigned Counsel Program that handles conflict cases. (Affirmation of Matthew Schmidt (October 8, 2013) ("Schmidt Aff.") ¶¶ 5, 127.) Although the Public Defender has no full-time attorneys, it was responsible for 1,423 cases in 2011. (*Id.* ¶ 142.) The Office is staffed by a First Public Defender, six Assistant Public Defenders and a Public Defender Administrator. (*Id.* ¶¶ 5, 129.) There are no paralegals or legal assistants on staff, and none of the attorneys work full time. (*Id.* ¶ 135.) The Chief Public Defender and all of the Assistant Public Defenders maintain private practices in addition to their public defense case loads. (*Id.* ¶¶ 128, 130, 132.) When confronted with a time conflict between a private client and a public defense client, one Assistant Public Defender candidly admits putting the private client's case first. (*Id.* ¶ 141.)

Although there is an ongoing tension between Assistant Public Defenders' public and private case loads, the office has no written performance standards, no formal training, and provides minimal supervision. (*Id.* ¶ 136.) The Office has no system for assigning conflicts, and no written policy on how to identify when a conflict exists. (*Id.* ¶ 147.) The seven attorneys share a single computer. (*Id.* ¶ 134.)

Despite limited resources and an active public defense docket, the Chief Defender does nothing to formally track the case loads of the Assistant Public Defenders. (*Id.* ¶ 138.) Twice a year, an administrative staff member will ask the Assistant Public Defenders to inform her of their caseloads, and will write the numbers on a Post-It note, which she does not retain. (*Id.*) There is no requirement that attorneys report on or track their private practice caseloads. (*Id.*)

Schuyler. Public defense services in Schuyler County are provided by the Public Defender's Office, a Conflict Defender or Assigned Counsel attorneys. (Affirmation of Matthew Yoeli (October 8, 2013) ("Yoeli Aff.") ¶ 3.) Compared to their colleagues at the District Attorney's Office, these public defense providers are expected to provide legal services with fewer resources and at a fraction of the compensation. (*See id.* ¶¶ 237-244, 249-250.) The State does little to ameliorate these discrepancies, and State funding of Article 18-B expenditures in Schuyler represents a fraction of the total expenses incurred by those providers. (Yoeli Aff. ¶¶ 237-240, 288-89; Karlsson Aff. ¶ 183.) Given that, it is unsurprising that, in response to this lawsuit, Schuyler County candidly admitted that "the State has abdicated its responsibility to guarantee the right to counsel for indigent persons and has left each of its sixty-two counties to establish, fund and administer their own public defense programs, with little or no fiscal and administrative oversight or funding from the State." (Yoeli Aff. ¶ 288 (citing Answer on Behalf of Schuyler County, dated September 24, 2008).)

Schuyler County essentially has no written policies or procedures that govern the provision of indigent legal services (Yoeli Aff. ¶ 232), and lacks formal mechanisms for appointing, training and supervising public defenders (*id.* ¶¶ 7, 15-17, 43-44, 70, 85, 107, 232-33, 249, 291). These deficiencies are highlighted by the apparent absence of an assigned counsel plan (*id.* ¶ 232), the complete lack of oversight of the Conflict Defender and Assigned Counsel attorneys (*id.* ¶¶ 85, 233), and the fact that eligibility determinations are not based on uniform standards (*id.* ¶¶ 43-44).

Public defense providers in Schuyler do not take advantage of the resources that are available to them. Although these providers handle approximately 350-400 criminal cases per year, 80-100 of which are felonies (*id.* ¶¶ 247-48), over nearly a two-year period investigators

were used only a handful of times and an expert was used only once. (*See id.* ¶¶ 75, 234; *see also id.* ¶ 127.)

Suffolk. Criminal public defense services are provided in Suffolk County primarily through the Suffolk County Legal Aid Society ("LAS"). (Affirmation of Erin Beth Harrist (October 8, 2013) ("Harrist Aff.") ¶ 3.) LAS carries more than 25,000 criminal cases each year, yet has had at most 71 attorneys and five investigators, and has no paralegals or legal assistants. (*Id.* ¶¶ 116, 212-21, 226.) Its five investigators lack investigative training and experience, and spend the majority of their time doing administrative tasks and screening defendants for eligibility rather than investigating clients' cases. (*Id.* ¶¶ 79, 116, 119.)

LAS has no written policies on training or supervision, has only informal training programs, and has recently cut back on the little formal supervision it used to provide. (*Id.* ¶¶ 29-30, 189-90.) To the extent that it exists, supervision focuses on how quickly attorneys dispose of cases, not on how counsel serve their clients' interests, creating pressure on attorneys to sacrifice clients' rights. (*Id.* ¶ 43.)

LAS has never been fully funded. (*Id.* ¶ 148.) The head of LAS testified that LAS's "resources are very, very slim and they're stretched to the limit, as you can see." (*Id.* ¶ 125.) He continued, "Do I need more staff attorneys? Of course. You've got to be kidding me. I've been asking for staff attorneys for the last 15 years." (*Id.* ¶ 125.) The denial of requests for sufficient attorneys to cover LAS's caseload is a long-standing pattern. (*Id.* ¶¶ 57, 228-31.)

LAS staff attorneys start at lower salaries than attorneys in the District Attorney's Office and the pay gap widens over time due to disparities in annual salary increases, benefits, and overtime policies. (*See id.* ¶ 243-45.) LAS attorneys have been driven away by LAS's working conditions – mainly to the District Attorneys' Office. (*Id.* ¶ 233.)

Caseloads have risen "drastically," in the words of LAS's director. (*Id.* ¶ 222.) In one of LAS's divisions, eleven attorneys were assigned to at least 2,806 felony cases in a single year. (*Id.* ¶¶ 68, 212.) LAS has no caseload or workload standards and does not effectively track attorneys' caseloads. (*Id.* ¶ 54.) But LAS's own estimations suggest attorneys are carrying hundreds of cases each year, sometimes even hundreds at any given time, including felony cases. (*Id.* ¶¶ 54, 209-11.)

LAS confesses the need to "triage" clients because its lawyers lack the "time and resources" to adequately serve all indigent defendants. (*Id.* ¶ 46.) To cope with the lack of resources, LAS is forced to segment client representation by stages of the cases in order to ensure that attorneys are available to cover court appearances, such that indigent defendants have multiple attorneys throughout the course of their cases. (*Id.* ¶¶ 50, 192.)

Systemic Violations of the Right to Counsel

Across all five counties, the cumulative effect of the forgoing facts is clear: on a system-wide level, attorneys' ability to provide minimally adequate representation to their clients is crippled. Documents and data maintained by the court system and by indigent defense providers themselves point to profound, systemic dysfunction in client communication, the use of experts and investigators, and a myriad of other indices of actual and constructive denials of counsel. This is starkly illustrated by numbers and percentages that the State cannot plausibly assert can be resolved in their favor on summary judgment.[4]

[4] A few points about this data: First, the data on ACP attorney vouchers from Ontario and Onondaga Counties, and the data on expert and investigator vouchers from Onondaga and Suffolk Counties, analyzes all—100%—of the services that were rendered within the timeframe represented by Defendants' document production.

Second, as a result of the way that the Office of Court Administration ("OCA") gathers data on people charged with criminal offenses, the OCA data significantly undercounts the frequency and scope of harms daily faced by indigent defendants in the five Counties. OCA only

For example, there is an overwhelming lack of adequate communication between attorneys and their indigent clients. In in nearly one-third of cases in one county there was no recorded client contact of any kind—whether in court, out of court, or by letter or phone—for a full ten days after the attorney had been assigned the case. (King Aff.[5] Ex. A at 60.) As common sense and expert opinion make clear, this time frame is critical both for the client and for the purpose of diligent investigative and preparatory work. A staggering 15% of Onondaga ACP clients—over 1,600—were still waiting for some word from their attorneys a full month after the attorney's appointment. (*Id.* at 45, 60.) Once contact does ensue, indigent defendants rarely, and sometimes never, meet with their attorneys. In 2010, Onondaga ACP attorneys billed zero time—none—for any client meeting in over 25% of all cases. (*Id.* at 61.) For clients facing felony charges—where the urgency for client interviews and prompt investigation are even more pronounced—only 1 out of every 4 clients is lucky enough to get their attorney's in-person attention within two weeks. (*Id.* at 63.) These numbers are consonant with the overall picture for the legal representation provided to poor people accused of crimes in Onondaga: over half of

---

requires courts to report the dispositions of "fingerprintable offenses." As a result, the OCA data excludes people facing some of the most frequently charged "non-fingerprintable" offenses, such as trespass (NYPL 140.05), unlawful possession of marijuana (NYPL 221.05) and disorderly conduct (NYPL 240.20). A full list of non-fingerprintable offenses is available in the Division of Criminal Justice Services Code Manual,
available at www.criminaljustice.ny.gov/crimnet/ccman/ccman.htm.

Additionally, the OCA data does not contain information regarding cases that have been sealed for youthful offenders or pursuant to New York's sealing statute (CPL 160.50). In many of the counties, the number of sealed cases equals the number of unsealed cases, meaning that the OCA data set produced in discovery sets only the very lowest bound on the number of criminal cases in the county that would be handled by the indigent defense providers. (*See* King Aff. Ex. A at 10, 38, 75, 110, 118).)

When even limited data demonstrates such serious concerns with the most conservative, minimum counts, Defendants cannot plausibly assert that they are entitled to summary judgment on systemic actual and constructive denials of counsel in the five Counties.

[5] "King Aff." refers to the affidavit of Dr. Gary King, dated October 1, 2013 and submitted in support of this opposition.

all attorneys spent less than four hours *in total* defending individual clients facing *felony* cases (*Id.* at 51.)

The picture for client communication in Ontario is similar for those represented by assigned counsel. Over one-quarter of clients received a grand total of 30 minutes or less communicating with their attorneys. (*Id.* at 96.) Over 30% of clients facing *felony* charges received an hour or less of the attorney's time communicating about their case. (*Id.* at 97.) In nearly 20% of cases, attorneys spent more time filling out the voucher paperwork than he or she billed for interviewing the client. (*Id.* at 108.) In Schuyler County, assigned counsel attorneys billed for no client communication whatsoever in no less than 11% of cases, and in more than 20% of cases never spoke to their clients in person. (Yoeli Aff. ¶ 256.)[6]

The indigent defense providers' own data ties together the consistent stories of plaintiffs and class members with regard to investigation: public defenders in the five counties rarely, if ever, investigate their clients' cases. In 2011, the Onondaga Assigned Counsel Program, which has no staff investigators, handled 14,372 active criminal cases. (King Aff. Ex. A at 67.) Investigators were hired to work on a mere 0.3% of those cases, and 99.4% of ACP attorneys spent one hour or less conducting any investigation themselves. (*Id.* at 46, 67.) In 2011, Onondaga ACP attorneys represented clients in twenty-three cases involving charges of manslaughter, homicide, or murder, and hired investigators in just three of those cases.[7] (*Id.* at 67-70.) In Ontario, on more than 60% of cases attorneys did not bill for any investigation at all. (*Id.* at 103.) In 52% of cases attorney spent more time preparing a payment voucher than

---

[6] Data from Washington County is not available because that program does not keep any data or track attorneys' actions in any manner.

[7] These charges include: Homicide, Crim Negligent; Manslaughter 1; Murder 1 Att; Murder 2; Murder 2 Att. (*See* King Aff. Ex. A at 67-69.)

investigating their client's case. (*Id.* at 108.) 72% of attorneys recorded more time on voucher preparation than they did on interviewing witnesses. (*Id.*)

Similarly, clients facing even the most serious charges, involving technical and complex issues of proof, almost never have the benefit of experts working on their behalf. In 2011, Onondaga ACP attorneys hired experts in 0.15% (or 22) of their 14,372 active cases. (*Id.* at 67.) Experts were used in zero of the twenty-three cases involving charges of manslaughter, homicide, or murder that were handled by Onondaga ACP. (*Id.* at 67-70) Although Onondaga ACP attorneys provided representation in over 1,000 cases where defendants were facing drug charges,[8] experts were utilized in just 3 (or 0.3%) of those cases. (*Id.* at 67-70.) In Suffolk, experts were employed in a total of just *seventeen* cases over approximately two years—effectively an expert rate of 0% given the tens of thousands of cases handled in Suffolk every year. (*Id.* at 32.) Similarly, in Ontario, attorneys billed for the use of experts in less than 1.44% of cases between 2010-2012. (*Id.* at 99.)

The State's failure to adequately fund or supervise the Counties' systems manifests in numerous other telling indicators of broken indigent defense systems. In Onondaga, ACP attorneys spent less than an hour on legal research in 95% of felony cases and in 99% of misdemeanor cases. (*Id.* at 46.) Those attorneys similarly spent less than an hour on reviewing or obtaining discovery material in 95% of felony cases. (*Id.*) In Ontario, over half of all felony cases were resolved with less than four hours of *total* attorney time, and the amount of time attorneys spent on legal research or writing on felony cases is so low (among those cases that billed for any legal research or writing at all) that the average rounds to zero (even at two

[8] These charges include: Drugs: Drugs Crim Poss 1; Drugs Crim Poss 2; Drugs Crim Poss 3; Drugs Crim Poss 3 Att; Drugs Crim Poss 4; Drugs Crim Poss 5; Drugs Crim Poss 7; Drugs Crim Sale 2; Drugs Crim Sale 3; Drugs Crim Sale 5. (*See* King Aff. Ex. A at 67-69.)

decimal points) for half of these cases. (*Id.* at 91, 104.) Furthermore, in half of felony cases, the Ontario ACP attorney spent less than ½ hour preparing for sentencing, and in 41% of cases there is no time spent on sentencing whatsoever. (*Id. at* 105.) Finally, an estimated 30% of all Ontario ACP misdemeanor cases drag on for 150 days or more. (*Id.* at 100.)

The Class Members' Experiences

The class representatives' stories show how these numbers translate into real-world experience. Those facts are set forth in full in Part I.B.2, *infra.* The following facts regarding more recent class member experiences make clear that the actual and constructive denials suffered by the class representatives continue.

Ms. April Ramirez was arrested and charged with grand larceny in Ontario County on June 25, 2012. (Menschel Aff. ¶ 380.) She was arraigned without counsel and, without asking her about her financial situation, the judge set bail she was unable to afford. (*Id.* ¶¶ 381-83.) Ms. Ramirez first met her ACP attorney at her next court appearance, when an attorney stood beside her after her case was called. (*Id.* ¶¶ 386-87.) After a conversation of only a few moments following the appearance, her attorney left without providing his contact information and without discussing what would happen next in her case. (*Id.* ¶¶ 389-95.) Without almost any communication from her lawyer prior to her next court date, Ms. Ramirez first learned of a plea offer made by the DA in open court. (*Id.* ¶¶ 401-405.) Despite Ms. Ramirez's questions about the plea offer, her attorney did not adjourn the hearing or provide any answers. (*Id.* ¶ 405.) Ms. Ramirez pled guilty and was ultimately sentenced to a $305 fine, three years of probation, and four weekends in jail, conditions that she was not fully informed of when she took the plea. (*Id.* ¶¶ 406, 413-14.)

Mr. Robert Kulas, a resident of Onondaga County, was arraigned on or about October 30, 2011, on charges of assault and tampering with evidence. (Hirose Aff. ¶ 394.) At his arraignment, Mr. Kulas was handed a sheet of paper with his assigned lawyer's name. This lawyer never responded to multiple calls and letters from Mr. Kulas and from his friends and relatives. (*Id.* ¶ 396.) The first and last time Mr. Kulas was able to speak with his attorney was purely by accident. Mr. Kulas stopped him while the lawyer was in the jail to meet with another inmate. (*Id.*) Without hearing about the facts of the case or conducting any investigation, the attorney advised Mr. Kulas to take a five-year plea agreement, and additional time for a parole violation. (*Id.*) After Mr. Kulas's attorney said he needed to leave because time was running out on the parking meter, Mr. Kulas never heard from him again. (Blase Aff. Ex. 134, Kulas Aff. ¶ 10.) For five months, Mr. Kulas sat in jail without court proceedings and no apparent representation. (*Id.* ¶ 11.)

Ms. Callaway, who was arrested on October 14, 2012 in Suffolk County, had five LAS attorneys over the course of her case. (Harrist Aff. ¶¶ 270, 275, 281, 286, 294, 303.) After she was indicted, Ms. Callaway was brought to the courtroom ten times for court hearings, all of which were adjourned at the request of the defense. (*Id.* ¶¶ 296-98.) When Ms. Callaway was sentenced, she had been in jail for approximately 11 months. (Id. ¶ 309.) Despite the fact that there were multiple witnesses to the incident that formed the basis of her arrest and likely video footage of the incident, her Suffolk LAS attorneys never conducted any investigation. (Id. ¶¶ 271-72, 283, 308.)

Mr. Shippee was arrested in Washington County and arraigned on a robbery charge. (Schmidt Aff. ¶ 191). He was arraigned without counsel. (*Id.*) Despite the judge telling Mr. Shippee that he was eligible for public defense and did not need to apply, the PD's Office

required him to submit an application. (*Id.* ¶ 193.) The PD's Office never responded to the application, or the multiple letters sent by Mr. Shippee. (*Id.* ¶¶ 193-94.) The first time Mr. Shippee became aware that he had a lawyer was when he received a notice that his right to a preliminary hearing had been waived. (*Id.* ¶ 195.)

The consistency of these experiences, combined with the overwhelming percentages reflected in the data, and the documents and testimony of providers themselves, demonstrates system-wide failure, not merely unusual or aberrational instances of actual and constructive denials of counsel. Whether the State Defendants can put forward any alternative explanation for these system-wide numbers or for the experiences of these class members is a fact question that must be tested at trial and cannot be resolved on summary judgment.

ARGUMENT

It is "well settled" under New York law that summary judgment is a "drastic remedy" that should not be granted "where there is any doubt as to the existence of such issues, or where the issue is 'arguable.'" *Glick & Dolleck, Inc. v. Tri-Pac Exp. Corp.*, 22 N.Y.2d 439, 441 (1968), *Benizzi v. Bank of Hudson*, 50 A.D.3d 1372, 1373 (3d Dep't 2008); *In re Suzanne RR.*, 35 A.D.3d 1012 (3d Dep't 2006). The Court must view the evidence "in a light most favorable to the nonmoving party and accord that party the benefit of every reasonable inference from the record proof." *Black v. Kohl's Dep't Stores, Inc.*, 80 A.D.3d 958 (3d Dep't 2011).

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law . . . Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986) (internal citations omitted). The moving party bears the burden of proof. *Yun Tung Chow v. Reckitt & Colman, Inc.*, 17 N.Y.3d 29, 33 (2011).

I. THE COURT SHOULD DENY SUMMARY JUDGMENT TO THE STATE ON PLAINTIFFS' CONSTRUCTIVE DENIAL OF COUNSEL CLAIMS.

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. Const. Amend. VI. The Constitution of the State of New York, Article 1 § 6, similarly provides that a "party accused shall be allowed to appear and defend in person and with counsel." As the United States Supreme Court noted in the seminal case of *Gideon v. Wainwright*, "[t]he assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty." 372 U.S. 335, 343 (1963). "The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not . . . be done." *Id.*

Plaintiffs in this action allege systemic deprivations of the right to counsel and seek prospective injunctive relief to prevent future injury. This claim will be established by proof that indigent criminal defendants in the five Defendant Counties face a constitutionally unacceptable risk of actual or constructive denial of counsel caused by systemic deficiencies in the delivery of public defense services. Such proof will include admissions from public defense providers and State and County officials about their lack of capacity, testimony from attorneys who have direct experience with the system's limitations, system-wide data about representational failings, the opinions of the nation's foremost experts on public defense systems and professional standards, and the accounts of indigent defendants. Cumulatively, this evidence will show that defense attorneys lack the time and resources to subject the prosecution's case to meaningful adversarial testing and establish Plaintiffs' entitlement to an injunction to cure the systemic causes of violations of the right to counsel.

The sections that follow demonstrate that the State's motion for summary judgment on Plaintiffs' constructive denial claims should be denied for three reasons: (1) because the State

fails to apply the correct legal standard; (2) because the factual record overwhelmingly demonstrates evidence of ongoing constructive denials of counsel; and (3) because the State's own record, on its face, fails to provide the Court with grounds for summary judgment

A. The Court Should Deny Summary Judgment Because The State Has Applied an Incorrect Legal Standard.

The Court need not wade into the thicket of competing statements and counter-statements of fact pertaining to Plaintiffs' constructive denial claims because the legal theory underlying the State's motion for summary judgment is foreclosed by the Court of Appeals, the Appellate Division, and this Court's controlling decisions in this case. The State's primary argument is that Plaintiffs fail on what the State deems a "threshold issue," because the class representatives received adequate representation from their attorneys and any deficiencies in performance were attributable to "reasonable strategic or tactical decisions." (State's Mem. at 17, 22.) Drawing heavily on ineffective-assistance-of-counsel cases (*id.* at 29-32), the State spends more than 70 pages of its legal memorandum defending the performance of the class representatives' criminal defense attorneys. (*Id.* at 32-113.)

The question of the overall quality of these attorneys' performance and whether the class representatives got "good deals" are not "threshold issues." They are not even issues at all. This is so for three key reasons. First, the Court of Appeals rejected the notion explicitly when it rejected the legal standard governing ineffective assistance of counsel cases in favor of its own legal standard, articulated above. Second, the Court of Appeals' and Appellate Division's controlling authority focuses on systemic deficiencies and the risk they pose to indigent defendants as a class rather than attorney performance in individual cases. Finally, the State ignores the Appellate Division's class certification order and focuses only on the class representatives, ignoring the claims of the Plaintiff Class.

This Court is well aware of the fundamental legal flaw in the State's argument since it has already held that:

> Although defendants appear confident that summary judgment in their favor would be warranted after addressing the class representatives' claims of denial of their right to counsel, there is nothing in the record to demonstrate that the entire matter would be resolved after doing so, particularly in light of the fact that the class is to be comprised of members other than the twenty named plaintiffs.

(Kerwin Aff. Ex. J. at 4.)

Individually and cumulatively, the legal flaws in the State's summary judgment motion undo its entire infrastructure and require denial of the motion even without consideration of the State's flawed and insufficient factual record.

1. The State's Failure to Apply the Legal Standard Established by the Court of Appeals and Its Improper Reliance on Ineffective Assistance of Counsel Cases.

In denying the State's motion to dismiss, the Court of Appeals held that the right to counsel encompasses claims that "the basic constitutional mandate for the provision of counsel to indigent defendants at all critical stages is *at risk* of being left unmet *because of systemic conditions*" such that the State fails to meet "its foundational obligation under *Gideon* to provide legal representation." *Hurrell-Harring v. State*, 15 N.Y.3d 8, 25, 19 (2010) (emphasis added); *see also id.* at 23 ("The basic, unadorned question presented . . . is whether the State has met its obligation to provide counsel"); *id.* at 26 (finding Plaintiffs' claims predicated on a "considerable risk that indigent defendants are, with a fair degree of regularity, being denied constitutionally mandated counsel"). Thus, the key elements of Plaintiffs' *Gideon* claim are (1) demonstration of systemic conditions that (2) create a constitutionally unacceptable risk of violations of the right to counsel.

Such risks include the risk of "constructive denials" of counsel – instances in which the appointment of an attorney is "merely nominal." *Id.* at 22. The Court of Appeals described

examples of such "constructive denials," as including situations in which lawyers are "unavailable to their clients" or "confer[] with them little, if at all," are "often completely unresponsive to their urgent inquiries and requests from jail, sometimes for months on end," "and ultimately appear[] to do little more on their behalf than act as conduits for plea offers . . . ." *Id.* at 19-20. Evidence of constructive denial may also be shown by instances in which "counsel missed court appearances, and that when they did appear they were not prepared to proceed . . . ." *Id.* at 20. The Court further noted that constructive denials of counsel may be shown where "counsel, although appointed, were uncommunicative, made virtually no efforts on their nominal clients' behalf . . ., [and] waived important rights without authorization from their clients . . . ." *Id.* at 22.

Although "constructive denial" issues touch on the nature of the attorney-client relationship and the overall standard of representation provided to indigent defendants, *Gideon*-based constructive denial claims are not merely "ineffective assistance of counsel-plus" claims. As the Court of Appeals held, a critical distinction between "ineffective assistance of counsel" claims and *Gideon* claims is that the latter are premised on systemic deficiencies in the delivery of public defense services, rather than individual counsel's strategic (or unstrategic) decisions. Thus, Plaintiffs must show that constructive denials occur "because of inadequate funding and staffing of indigent defense providers" and "by reason of insufficient compliance with the constitutional mandate of *Gideon*." *Id.* at 22, 23; *see also id.* at 15 (holding that a constructive denial claim may be premised on proof that the State's imposition of "a costly, largely unfunded and politically unpopular mandate upon local government, has functioned to deprive them and other similarly situated indigent defendants . . . of constitutionally and statutorily guaranteed representational rights").

The State purports to ground its argument in the rulings of this Court and the Court of Appeals, (State's Mem. at 17-18), and to understand the difference between ineffective assistance of counsel claims and *Gideon* claims. (*Id.* at 19.) But the State fails to apply the *Hurrell-Harring* legal standard and instead cites ineffective assistance cases—including, most prominently, *United States v. Cronic*, 466 U.S. 648 (1984)—that arise in the context of a post-conviction motion, appeal, or writ of habeas corpus. (*See id.* at 19 (alleging, incorrectly, "that the appropriate inquiry is . . . whether [plaintiffs] can establish a systemic denial—actual or constructive—of representation itself under *Cronic*"); *see also id.* at 21, 30-32[9]).

The Court of Appeals has already rejected the State's effort to import the legal standard from ineffective assistance of counsel cases into this case. *Hurrell-Harring*, 15 N.Y.3d at 18-19. In defining for itself the legal standard applicable to this *Gideon* claim, the Court of Appeals endorsed and built upon the notion, established by the U.S. Supreme Court in *Cronic*, that "actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Hurrell-Harring,* 15 N.Y.3d at 24 (citing *Cronic*, 466 U.S. at 659 and n. 25). But the Court of Appeals was not suggesting that *Cronic* defines the legal standard for liability in this case; in fact, it expressly rejected that proposition. *Id.* at 18-19.

To be clear: Plaintiffs are not suggesting that ineffective assistance of counsel cases are completely irrelevant to assessing the legal claims in this case. Ineffective assistance of counsel cases may define what elements of representation are so critical to the right to counsel that their

[9] Citing, *inter alia*, *Moss v. Hofbauer*, 286 F.3d 851 (6th Cir. 2002); *Ivory v. Jackson*, 509 F.3d 284 (6th Cir. 2007); *Childress v. Johnson*, 103 F.3d 1221 (5th Cir. 1997); *Fuller v. Sherry*, 405 Fed. Appx. 980 (6th Cir. 2010); *Mitchell v. Mason*, 325 F.3d 732 (6th Cir. 2003); *Glover v. Miro*, 262 F.3d 268 (4th Cir. 2001); *United States v. Rogers*, 13 Fed. Appx. 386 (7th Cir. 2001); *Griffen v. Aiken*, 775 F.2d 1226 (4th Cir. 1985); *Maxon v. Bell*, 2010 U.S. Dist. LEXIS 143872 (W.D. Mich. 2010).

absence constitutes constructive denial of that right.[10] But the Court cannot lose sight of the principle that drove the Court of Appeals' rejection of the State's arguments on the motion to dismiss—namely, that cases seeking to overturn a conviction are about whether or not that defendant's representation was unfair, whereas cases seeking prospective injunctive relief are about whether systemic deficiencies create a widespread risk of violations of the right to counsel. The State loses sight of this principle when it argues that this case is about whether individual plaintiffs—the class representatives—can establish violations of the right to counsel in their individual cases under *Cronic*. (State's Mem. at 19.) Ultimately, this case must be judged is established by the legal standard set by the Court of Appeals in *Hurrell-Harring*, 15 N.Y.3d 8 (2010), not by the legal standard of *Cronic* or its progeny.

Thus, the State's heavy reliance on *Cronic* and other ineffective-assistance-of-counsel cases demonstrates that its summary judgment motion is foreclosed by the Court of Appeals' decision. This Court should reject the State's attempt to re-litigate legal issues it has already lost and deny its motion for summary judgment.

2. The Question of Whether or Not Individual Attorneys' Performances Were Legally Deficient Is Not at Issue.

As the Court of Appeals held in denying the State's motion to dismiss more than three years ago, this case is not "a lumping together of 20 generic ineffective assistance of counsel claims." *Hurrell-Harring*, 15 N.Y.3d at 23 (quotation omitted). Plaintiffs' constructive denial claims "are not the sort of contextually sensitive claims that are typically involved when ineffectiveness is alleged. The basic, unadorned question presented . . . is whether the State has

[10] Thus, for example, Plaintiffs have no theoretical objection to the State's citation to such cases in debating the importance of expert testimony, client communications, and investigations of charges and defenses. (*See, e.g.*, State's Mem. at 32 (citing *United States v. Morris*, 470 F.3d 596 (6th Cir. 2006), for the proposition that the failure to communicate confidentially with a client for more than a few minutes prior to first appearance is a "constructive denial of counsel").)

met its obligation to provide counsel, not whether under all the circumstances counsel's performance was inadequate or prejudicial." *Id.* "The questions properly raised in this Sixth Amendment-ground action, we think, go not to whether ineffectiveness has assumed systemic dimensions, but rather to whether the State has met its foundational obligation under *Gideon* to provide legal representation." *Id.* at 19. In certifying the class, the Appellate Division further held that that this case explicitly, and by order of the Court of Appeals, is not "premised on performance-based claims of ineffective assistance of counsel." *Hurrell-Harring v. State*, 81 A.D.3d 69, 72 (3d Dep't 2011). This "obviat[es] any need to conduct individualized inquiries into the performance of the class members' individual attorneys." *Id.*

Thus, the State's 70-page focus on individualized inquiries into the performance of the class representatives' individual attorneys (*see* State's Mem. at 32-114) cannot form the basis of summary judgment.

3. The Claims of the Class Representatives Are Relevant to, But Not Dispositive of, the Claims of the Plaintiff Class.

The central focus of this case is the Plaintiff Class, whose claims are not dependent on the claims of the class representatives. *See Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 572 (2d Cir. 1982) ("[P]rovided the initial certification was proper . . . the claims of the class members would not need to be mooted or destroyed because subsequent events or the proof at trial had undermined the named plaintiffs' individual claims.") (quoting *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 406 n.12 (1977)); *Umar v. Johnson*, 173 F.R.D. 494, 504 (N.D. Ill. 1997) ("[O]nce a class has been certified it acquires an existence separate and apart from that of the individual named plaintiff, so that the failure of his or her individual claim does not impair the class'[s] entitlement to relief.").

The class representatives are just that: *representatives* of the real party in interest, the Plaintiff Class. Indeed, as the Court of Appeals has held, the class representatives' own claims are moot; they only retain their status in this litigation by virtue of "the well-established exception to the mootness doctrine for recurring claims of public importance typically evading review." *Hurrell-Harring*, 15 N.Y.3d at 24, n.5. Thus, when the State argues that Plaintiffs "must connect the plaintiffs to their theories," (State's Mem. at 2), that is true, but "plaintiffs" means "Plaintiff Class," not solely the class representatives.

This is not to say that what happened to the class representatives is irrelevant to the question of liability. To the contrary, evidence of what has happened to indigent criminal defendants who are no longer members of the Plaintiff Class by virtue of the termination of their criminal cases is probative of the risk of harm to the Plaintiff Class and, therefore, probative of the State's liability. Plaintiffs will establish at trial that members of the Plaintiff Class are at ongoing risk of constructive denials of counsel insofar as indigent defendants' attorneys often have been "unavailable to their clients—that they conferred with them little, if at all, were often completely unresponsive to their urgent inquiries and requests from jail, sometimes from months on end, waived important rights without consulting them, and ultimately appeared to do little more on their behalf than act as conduits for plea offers" and other examples of constructive denial detailed by the Court of Appeals. *Hurrell-Harring*, 15 N.Y.3d at 19. But because the Plaintiff Class is the party in interest, the State cannot obtain summary judgment merely by attacking the claims of the class representatives.

The State cites this Court's decision denying the State's motion to bifurcate discovery between issues particular to the class representatives and issues pertaining to the Plaintiff Class. (State's Mem. at 17 (citing Kerwin Aff. Ex. J).) But in that decision, the Court rejected exactly

the proposition the State advances here, when it noted: "Although defendants appear confident that summary judgment in their favor would be warranted after addressing the class representatives' claims of denial of their right to counsel, there is nothing in the record to demonstrate that this entire matter would be resolved after doing so, particularly in light of the fact that the class is to be comprised of members other than the twenty named plaintiffs." (Kerwin Aff. Ex. J at 4.)

As the preceding discussion makes clear, controlling authority in this case from the Court of Appeals, the Appellate Division and this Court forecloses the State's theory of summary judgment. The State's summary judgment motion reflects its failure to come to terms with those controlling decisions. For this reason alone, and without any need to examine the State's factual record, the Court should deny summary judgment.

B. The Court Should Deny Summary Judgment Because the State Has Failed to Establish a Record of Undisputed, Material Facts Sufficient to Support Judgment as a Matter of Law.

The State's motion fails as a matter of law but, in addition, the State is moving on a record that cannot possibly support summary judgment. This is so for two reasons.

First, the factual record demonstrates that the Plaintiff Class faces a constitutionally unacceptable risk of constructive denials of counsel as a result of systemic failures stemming from the State's failure to properly fund and oversee the public defense system. The State's meager attempt to deny the existence of systemic deficiencies across the Defendant Counties ignores material facts that run counter to its position and mischaracterizes or misstates many of the purportedly undisputed facts upon which it relies.

Second, the State's factual record pertaining to the class representatives—the overwhelming focus of the State's presentation—is replete with inadmissible and disputed facts,

and omits so many facts that are unfavorable to its position, that even on its own, legally flawed terms, the State has not established an entitlement to summary judgment.

1. The Record Demonstrates that Systemic Deficiencies Create a Constitutionally Unacceptable Risk of Constructive Denials of the Plaintiff Class's Right to Counsel.

   a. *The State Has Improperly Abdicated its Responsibility to Protect the Right to Counsel.*

As it concedes in this motion, the State of New York addresses *Gideon*'s obligation to provide counsel to indigent criminal defendants by delegating that obligation to New York's counties. (State's Mem. at 3; Karlsson Aff. ¶ 34 (citing N.Y. County Law Art. 18-A, 18-B).) In other words, the State itself has no system for the provision of public defense services; its "system" is to pass the buck to county governments. (*Id.*)

The State does not even attempt to argue that any of the steps it takes, whether through funding programs or the efforts of the Office of Indigent Legal Services, are sufficient to ensure that the *Gideon* mandate is met. The State has presented no evidence demonstrating the effectiveness of any of its policies or initiatives. It fails to acknowledge that, notwithstanding all the progress that has been made since the filing of this lawsuit, the State still funds only a fraction of the costs of public defense and regularly diverts money intended to support indigent defendants to other legislative priorities. This approach is sadly consistent with New York State's long-established policy of shifting the burden to county governments and refusing to accept its ultimate legal responsibility for the provision of public defense services.

From 1965 until 2010, no state agency had any responsibility for public defense services. (Karlsson Aff. ¶ 86.) In 2010, following the Court of Appeals' decision in this case, the State—in a post-litigation policy change—created the Office of Indigent Legal Services ("OILS"). N.Y. Exec. Law § 832. As the State itself notes, the only three steps OILS or any other part of the

State government takes to monitor or support county public defense systems are (1) studying and gathering information about county public defense systems (*see* Karlsson Aff. ¶¶ 35-36); (2) the promulgation of advisory standards governing the provision of mandated representation (*id.* ¶¶ 50-52); and (3) the distribution of some state funds through OILS and the New York State Division of Criminal Justice Services ("DCJS") (*id.* ¶¶ 37-40, 45-49, 59-61).[11] The record submitted by the State on its motion for summary judgment establishes that there are no other steps that the State takes to ensure that the *Gideon* mandate is met.

The three steps the State takes with respect to public defense services are not sufficient to ensure that the Counties are able to provide meaningful and effective assistance of counsel to indigent criminal defendants.

First, although the State gives itself a great deal of credit for the establishment of OILS in 2010 (*see* State's Mem. at 3-4), it concedes that—beyond the distribution of funds discussed below—OILS's statutory mandate is limited to gathering information and promulgating unenforceable (and unenforced) standards. (*Id.* at 3-4; Karlsson Aff. ¶¶ 35-36, 50-52.) In fact, the Director of OILS, William J. Leahy, acknowledges that "most, perhaps all, counties, do not currently comply" with its standards. (Karlsson Aff. ¶ 88.) OILS repeatedly has sought state funding for the purposes of bringing counties into compliance with standards and has been denied that funding, leaving state standards meaningless. (*Id.* ¶¶ 87-94.) As Plaintiffs' expert concluded, "the Office of Indigent Legal Services is underfunded and promulgates only non-

[11] In passing, the State mentions the small amount of state funds that is allocated annually to the Public Defense Backup Center of the New York State Defenders Association ("NYSDA"). (State's Mem. at 4; Karlsson Aff. ¶ 60.) While the Backup Center exists to support defenders, no one could argue that its existence suffices to satisfy the *Gideon* mandate. Moreover, the money the state provides to the Backup Center is now and has always been wholly insufficient to accomplish its stated goals. (Blase Aff. Ex. 50 (Affirmation of Jonathan Gradess (October 1, 2013)). In its motion, the State does not contend otherwise.

mandatory standards that can be and are easily breached by Counties that lack the will and/or adequate funding to implement them." (Lefstein Aff. ¶¶ 3(d), 25-26.)

Second, the State's funding of public defense covers only a small fraction of the cost of the *Gideon* mandate. In the Defendant Counties, State money (including from both OILS and DCJS) makes up between 16% and 28% of the counties' spending on mandated representation. (Karlsson Aff. ¶ 183.) The counties are left to shoulder the vast majority of the financial burden—and all of the administrative and political burden—of providing counsel to the poor. The Director of OILS candidly admitted that the state funds it distributes are totally insufficient to solve the problems the state knows to exist in the public defense system. (*Id.* ¶ 114.)

From its relatively small pool of money, the State regularly steals funds meant to support indigent defense. Between 2008 and 2012, the State raided more than $40 million from the Indigent Legal Services Fund and re-deposited it into the State's General Fund to support other agenda items. (Karlsson Aff. ¶¶ 101-108.) In the current budget year, the State has authorized an additional $11 million "sweep," which would bring the total amount taken from the State's "dedicated" fund for indigent defense to more than $50 million over five years. (Karlsson Aff. ¶ 109.) The Director of OILS testified that continuing his office's work is contingent on whether there remains sufficient money in that dedicated fund. (*Id.* ¶ 98.)

Although OILS is the centerpiece of the State's response to this lawsuit and the problem of public defense, the State has never funded OILS at the level necessary for it to fulfill its statutory mandate; Director Leahy admitted that he "has been hamstrung by . . . seriously inadequate" funding. (Karlsson Aff. ¶¶ 45-46, 95-97, 121-28.) OILS has not been able to address known upstate caseload problems (*id.* ¶ 114-15, 119), fully fund its grant programs (*id.* ¶¶ 121-30), monitor how counties spend state money to determine whether it actually assist

indigent defense representation (*id.* ¶¶ 38, 98), or provide assistance to counties to help them meet OILS's standards (*id.* ¶¶ 53, 87-91), all because of the state's continued underfunding of OILS.

This lack of action is deliberate; the State has long known of the problems with public defense in New York. In 2006, former Chief Judge Judith S. Kaye and a commission of experts pronounced the State in violation of its obligation to provide meaningful assistance of counsel. (Karlsson Aff. ¶¶ 79-82.) Based on more than a year of investigation and containing extensive factual findings, the Kaye Commission Report declared New York "severely dysfunctional" and "structurally incapable" of providing effective representation (*id.*), and found that the "fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused." (*Id.*)

That was only the latest in a long line of reports condemning the State's persistent failure to fulfill the *Gideon* mandate. From the 1980s onward, numerous studies and publications—some produced at the behest of the State—as well as hearings before government agencies drew the State's attention to the public defense crisis. (*See id.* ¶¶ 65-76, 83-85.)

More recently, the State's own Director of the Office of Indigent Legal Services, William Leahy, has admitted that the State's system still suffers from the deficiencies identified in the Kaye Commission Report. (Blase Aff. Ex. 34, Leahy Dep. 142:23 – 143:5.) He confirmed that there are inadequate investigative and expert resources for defenders, an absence of standards for accepting assignments through the assigned counsel programs, and an absence of performance evaluations statewide. (*Id.* 10:5-22.) He acknowledged that defenders face "excessive caseloads, [fail] to provide sufficient personal attention to every client," and provide

"[i]nsufficient time to consult with the client, to investigate the case; to consider an appropriately aggressive litigation posture." (*Id.* 172:12 – 173:14.) He admitted that the measures the State has undertaken have been insufficient to remedy the deficiencies identified in the Kaye Commission report (*id.* 174:14 – 175:1), that current state and county budgets are "not nearly" enough to fix the deficiencies and reach state and national performance standards (*id.* 88:10-17, 91:12 – 92:1, 98:18-23), and that the State is responsible for the current conditions, admitting that deficiencies in county public defender systems are "a result of the state tossing the ball to the counties in 1965." (*Id.* 171:19 – 172:6.) These statements conclusively establish not only the State's notice of constitutional violations, but its liability for them.

b. The Plaintiff Class Faces a Constitutionally Unacceptable Risk of Constructive Denials of Counsel.

As a result of the State's abdication of responsibility, indigent defendants face systemic risks of constructive denial of counsel. Those denials include the system-wide failure to investigate clients' charges and defenses; the complete failure to use expert witnesses to test the prosecution's case and support possible defenses; complete breakdowns in attorney-client communication; and a lack of any meaningful advocacy on behalf of clients.

The factual record proving systemic constructive denials of counsel speaks for itself. Moreover, as Plaintiffs' experts, Professor Norman Lefstein and Professor Robert Boruchowitz, have noted, those constructive denials violate well-understood and widely accepted professional standards designed to protect the constitutional right to counsel.

i. Failure to Investigate Charges and Defenses

"Essential to any representation, and to the attorney's consideration of the best course of action on behalf of the client, is the attorney's investigation of the law, the facts, and the issues that are relevant to the case." *People v. Oliveras*, 21 N.Y.3d 339, 346 (2013). *See also People v.*

Droz, 39 N.Y.2d 457, 462 (1976) ("[I]t is elementary that 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. Bennett*, 29 N.Y.2d 463, 466 (1972) ("A defendant's right to representation does entitle him to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed"). Plaintiffs' experts agree that "investigation is a critical element of effective representation." (Boruchowitz Aff. ¶ 124, 248; *see also* Lefstein Aff. ¶¶ 74-75 (noting that "it is obviously imperative that defense lawyers routinely investigate their cases").)

The State itself cites case law establishing that systemic failures to investigate prove constructive denial of counsel. (*See* State's Mem. at 133-34 (citing *People v. Jones*, 186 Cal. App.4th 216 (Cal. App. 1st Dist. 2010); *Apple v. Horn*, 250 F.3d 203 (3d Cir. 2001) and *State v. Peart*, 621 So.2d 780 (La. 1993); *id.* at 32 (citing *United States v. Morris*, 470 F.3d 596, 601-02 (6th Cir. 2006) (holding that a Michigan county's practice of assigning counsel shortly before a preliminary hearing violated the right to counsel because "defense counsel is given very little time to review any discovery material before advising her client regarding a plea," and basing its legal conclusion in part on "ABA Standards for Criminal Justice")[12].)

[12] The State suggests that, categorically, "decisions about what to investigate, and to what extent, are analyzed under the ineffective assistance of counsel standard" and "issues relating to an attorney's experience and training" are not susceptible to pre-conviction, systemic challenges seeking prospective injunctive relief. (State's Mem. at 133, 142-43.) This is simply a re-hash of the argument the State made, and the Court of Appeals rejected, on the motion to dismiss. *See Hurrell-Harring*, 15 N.Y.3d at 24 (holding that right to counsel claims may be brought both in the *Strickland* post-conviction context and in a systemic challenge). The Court of Appeals already denied the State's effort to dismiss Plaintiffs' claims on the pleadings, and this Court should not permit them to use this motion as an effort to review or overturn the Court of Appeals' binding decision.

The record demonstrates that counsel systematically do not conduct appropriate investigations. In 98% of all assigned counsel cases one county—96% of all felonies and 99% of misdemeanors—attorneys did not bill for any investigator services at all. (Menschel Aff. ¶ 207.) Investigators are used by attorneys in a second county in less than one percent of cases (0.29%) of cases. (Hirose Aff. ¶ 320.) In yet a third county, the public defender's office has no investigator on staff and all defense providers combined—Public Defender, Conflict Defender, and assigned counsel—hired investigators only six times in two years. (Yoeli Aff. ¶ 234.) In a fourth county, the Public Defender's Office has no staff investigators and estimated that it contracts with an investigator in "zero to one" cases per year. (Schmidt Aff. ¶¶ 151-52.)

Remarkably, the State cites some of this same evidence of the systematical failure to investigate in *support* of its summary judgment motion, suggesting that investigating less than a handful of many hundreds of criminal cases is constitutionally acceptable practice. (*See* State's Mem. at 135-36.) However, controlling case law, Plaintiffs' experts, and common sense support the conclusion that these facts cannot be reconciled with the obligation under *Gideon* to provide meaningful and effective assistance of counsel to the poor. (Lefstein Aff. ¶¶ 73-75; Boruchowitz Aff. ¶ 246.)

Plaintiffs' experts have also explained that, even if individual attorneys are compensating for the lack of investigators by conducting their own investigations, that practice impairs adequate representation. (Lefstein Aff. ¶ 90 & n. 10.) But, even if that practice were justifiable, the data show that lawyers do not do investigations either. Attorneys in one county spent more than an hour on factual investigation (or on communication with an expert witness or an investigator) in less than 1% of all cases and in 2% of all felonies. (Hirose Aff. ¶¶ 316-17.) In felony cases, that same set of lawyers billed, on average, less than seven minutes each case for

communication with witnesses (and a little over one minute in misdemeanor cases). (*Id.* ¶ 319.) In over 60% of cases in another county, assigned counsel attorneys did not bill for any investigation at all. (Menschel Aff. ¶ 302.) In 50% of all felony cases in that county, attorneys billed for an average of 6 minutes of investigation or less. (*Id.* ¶ 304.) In more than 50% of all cases in that same county, attorneys billed more time for filling out a payment voucher than for investigations. (*Id.* ¶ 308.)

The experiences of class members further demonstrate that attorneys do not hire investigators even where clients want their attorneys to use investigative services or suggest specific reasons why investigations should be done. (Blase Aff. Ex. 11 ¶¶ 5-7, 9; *Id.* Ex. 14 ¶¶ 24; *Id.* Ex. 111 ¶ 8; *Id.* Ex. 203 ¶ 16; *Id.* Ex. 205 ¶¶ 9-11, 21-22; *Id.* Ex. 206; *Id.* Ex. 231 ¶¶ 12, 18, 20; *Id.* Ex. 233 ¶ 15; *Id.* Ex. 272 ¶¶ 39-40, 43, 51.)

The State's evidentiary presentation fails to grapple with these concrete facts. The State points out that some, but not all, providers have a few staff investigators and that other providers have indeterminate "funds are available" for investigators (*see* State's Mem. at 135-37), but that does not establish an undisputed fact that such resources are sufficient, let alone that indigent defendants' cases are properly investigated.

In fact, there is evidence that these resources are totally insufficient. For example, the total dollar amount spent on investigators in Onondaga County indigent defense cases in 2011 was $28,161. (King Aff. Ex. A at 67.) By way of contrast, in 2011, the Onondaga District Attorney spent $997,414 to maintain a staff of a dozen or more full-time investigators for 43 attorneys, as well as several legal interns, who are "on-call twenty four hours a day" to investigate on behalf of the prosecution. (Hirose Aff. ¶¶ 262, 264-65; Blase Aff. Ex. 120 at 3-104).

In Suffolk County, the Legal Aid Society has five investigators for more than 70 attorneys, which Plaintiffs' experts have concluded is "insufficient to support its caseload or provide constitutionally adequate representation to its clients." (Harrist Aff. ¶¶ 116, 221; Boruchowitz Aff. ¶¶ 121, 124-25.) Moreover, LAS's investigators are not professional investigators and they spend the majority of their time doing administrative tasks—mainly "run[ning] files from [LAS's] office to the district court" and screening for eligibility determinations—not investigating clients' cases. (Harrist Aff. ¶¶ 79, 116, 119.) In Washington County there are no staff investigators, which Plaintiffs' expert concluded was a violation of professional standards given the workload of that office. (Boruchowitz Aff. ¶ 241.)

There is no question but that these failures to investigate are linked to systemic deficiencies beyond the obvious question of financial resources. For example, Onondaga ACP caps rates for investigators, and attorneys testified that the low rates and the burdensome reimbursement process inhibit attorneys' ability to retain such services or to obtain quality work product. (Hirose Aff. ¶¶ 73, 77, 283.) Plaintiffs' experts confirmed that these policies "may impact the ability of attorneys to attain competent assistance for their client's cases." (Lefstein Aff. ¶¶ 87-88.) Ontario ACP does not assist attorneys in identifying investigators willing to accept ACP's rates, and attorneys testified that the lack of funding for investigators means they are forced to do their own investigations or forgo investigations. (Menschel Aff. ¶¶ 22, 297, 301.)

The State argues that providers' requests for investigators are not denied. (*See* State's Mem. at 135-37.) First, that fact is based only on self-serving testimony, and is disputed. (*See, e.g.*, Hirose Aff. ¶ 77.) Second, even if it was true, it would only suggest that attorneys do not make such requests, not that indigent defendants' cases are adequately investigated.

Given these facts, Plaintiffs' expert concluded that across the five Defendant Counties, "[c]ases are routinely not investigated" such that "indigent criminal defendants are at a constant and unacceptably high risk of suffering . . . constructive denials of the right to counsel." (Lefstein Aff. ¶ 4.) Thus, the record on the failure to investigate clients' claims is sufficient, standing alone, to demonstrate that the Court should deny the State's motion for summary judgment.

ii. Failure to Utilize Expert Consultants and Witnesses, and Language Interpreters

The law is clear that there is a range of common criminal charges and routine defendant-specific situations in which the failure to retain an expert violates the right to counsel. *See, e.g.*, *People v. Rentz*, 67 N.Y.2d 829, 831 (1986) (stating that the failure to have an expert examine a defendant with a possible mental defect "presents a colorable claim" of denial of the right to counsel); *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985) (holding that indigent defendants have a right to psychiatric experts for purposes of an insanity defense); *People v. Cotton*, 226 A.D.2d 738, 739 (2d Dep't 1996) (holding that the court erred in denying an attorney funds for an independent expert to determine drug weight); *People v. Jones*, 210 A.D.2d 904, 905 (4th Dep't 1994) (holding that the court erred in denying an attorney's application for a mental health evaluation); *People v. Tyson*, 209 A.D.2d 354, 455 (1st Dep't 1994) (holding that the court erred in denying an attorney funds to retain a voice recognition expert); *Eve v. Senkowski*, 321 F.3d 110, 128 (2d Cir. 2003) (holding that counsel provided constitutionally deficient representation in a child sexual abuse case by failing to call a medical expert to examine physical evidence).

Plaintiffs' expert testified that, "using . . . expert witnesses is key to providing a constitutionally adequate defense." (Boruchowitz Aff. ¶ 248.) Based on Professor Boruchowitz's experience running a defender program, he concludes a robust rate of using

experts in a variety of case types is necessary for adequate representation of their clients. (*See* Boruchowitz Aff. ¶ 131; *see also* Lefstein Aff. ¶ 76 ("Standards routinely stress the importance of experts being available in a variety of fields.")

The data show that experts are almost never used in the Defendant Counties to test the prosecution's case against an indigent client. Experts are retained in a fraction of one percent of cases (0.15%) of one county, (Hirose Aff. ¶ 322,) and 2% of cases in another. (Menschel Aff. ¶ 207.) In a third county, all indigent defense counsel combined have used an expert once in nearly two years. (Yoeli Aff. ¶ 234.) The Public Defender in a fourth county could not recall ever using an expert witness, except once in a high-profile murder case. (Schmidt Aff. ¶ 150.) In approximately a two-year period, during which Suffolk LAS disposed of multiple tens of thousands of cases, attorneys used experts only 17 times. (Harrist Aff. ¶ 218, 220, 225.)[13] Attorneys who were deposed in this case candidly testified that they never use experts in indigent defendants' cases, or use them rarely. (Menschel Aff. ¶ 22.) Plaintiffs' experts affirm that the rate of use of experts in the counties is unacceptable practice; indeed, one of them labeled the practice "inexplicable, a sign of a broken public defense system . . . ." (Boruchowitz Aff. ¶¶ 131-33, 250; *see also* Lefstein Aff. ¶¶ 92, 104, 117-18, 132, 139-41.)

The same problems plague the use of necessary translation services. In Onondaga County, for example, attorneys must apply to the court in order to be reimbursed for the use of an interpreter for client communications, following the same burdensome process as expert and investigator applications. (Hirose Aff. ¶¶ 73-75.) One ACP attorney, however, did not know that she could obtain interpreters this way. (Blase Aff. Ex. 69, Cagnina Aff. ¶ 22.) Another

[13] A senior supervising attorney from LAS thought cap on expert compensation was $300, when it is in fact $1000, demonstrating how infrequently LAS uses experts. (Harrist Aff. ¶ 122.)

stated that he understood from a conversation with the ACP that he could not obtain translators through ACP and that in any event identifying an interpreter, negotiating rates, obtaining qualifications, and applying for permission to use an interpreter made the whole process impractical for purposes of communicating with a client. (Blase Aff. Ex. 70, Parry Aff. ¶ 11.)

As with investigations, the State has no record on the frequency of the use of experts. It argues that some providers have a "budget [that] provides for expert services" (State's Mem. at 135), but that does not establish that budgets are sufficient or that experts are used when necessary to meaningfully test the prosecutor's case.

The State also argues—as it does regarding investigations—that providers' requests for experts are not denied. (State's Mem. at 135-37.) This is a disputed fact. For example, the State specifically singles out Suffolk as an example of this (*see* State's Mem. at 136 ("No LAS requests to County Court for experts have been denied")), but LAS's own testimony showed that requests for experts have been denied, demonstrating that the office's financial inability to support their attorneys' need for experts hampers client representation, as well as a factual dispute that precludes summary judgment. (Harrist Aff. ¶¶ 118, 123.) The record also demonstrates that judges deny applications for expert witnesses in Onondaga County, (Hirose Aff. ¶ 77), and Ontario County. (Menschel Aff. ¶ 22.)

Thus, the systemic failure to use experts to subject the prosecution's case to meaningful adversarial testing and investigate defenses establishes that the State is not entitled to summary judgment.

iii. Failure to Communicate with Clients in a Manner Necessary for Defense

The Court of Appeals held that constructive denial of counsel includes instances where appointed lawyers are unable to do more than "confer[] with [clients] little, if at all," are "often

completely unresponsive to their urgent inquiries and requests from jail, sometimes for months on end," are "uncommunicative," "waive[] important rights without authorization from their clients," and "ultimately appear[] to do little more on their behalf than act as conduits for plea offers." *Hurrell-Harring*, 15 N.Y.3d at 19, 22. Like the Court of Appeals, Plaintiffs' experts place great emphasis on the importance of attorney-client communication. (*See, e.g.*. Lefstein Aff. ¶¶ 143-47.)

The data show that attorneys spend little, if any, time communicating with clients. Remarkably, in more than 700 cases each year, assigned counsel in one county never communicate with their client at all. (Hirose Aff. ¶¶ 252, 315.) In 25-30% of cases in that county, attorneys never once met their client outside of court. (*Id.* ¶ 314.) Attorneys in another county billed for zero client contact in over 16% of assigned counsel cases, and in more than one-third of cases, never conducted a client interview. (Menschel Aff. ¶¶ 266, 276.)[14] In a third county, assigned counsel attorneys billed for no client communication whatsoever in at least 11% of cases, and in more than 20% of cases never spoke to their clients in person. (Yoeli Aff. ¶ 256.) In Suffolk, Plaintiffs' expert observed a case in which Legal Aid attorneys confessed in open court that counsel had not visited an incarcerated client in 35 days, despite the fact that the prosecution's plea offer was pending and set to expire. (Boruchowitz Dec. ¶ 74.)

In 43% of all cases in one county—and more than one-third of felonies—attorneys spent less than one hour on client communications of any kind during the course of the case. (Hirose Aff. ¶ 306, 307.)[15] In misdemeanor cases, attorneys spent, on average, about 40 minutes

[14] In nearly 20% of all cases in Ontario, attorneys billed more time for filling out vouchers than on client interviews. (*Id.* at 270.)

[15] The Court undoubtedly does not need a more granular picture, particularly on summary judgment, but it is notable that the more granular the picture, the more the inadequacy of

speaking, writing, or meeting with their client over the course of the entire case. (Hirose Aff. ¶ 313.) Plaintiffs' experts have opined that the *initial meeting* with a client should be "at least one hour." (Boruchowitz Aff. ¶ 103-04.)

For those clients who are lucky enough to have any meaningful contact with their attorney, long delays in lawyer-client communications jeopardize their rights and contribute to the constructive denial of counsel. In nearly one-third of cases in one county, there was no recorded client contact of any kind—whether in court, out of court, or by letter or phone—for a full ten days after the attorney had been assigned the case. (King Aff. Ex. A at 60.) As common sense and expert opinion make clear, the initial days after arrest are critical both for the client and for the purpose of diligent investigative and preparatory work. (Lefstein Aff. ¶¶ 142, 144, 147; Boruchowitz Aff. ¶¶ 103-04.) A staggering 15% of Onondaga ACP clients—over 1,600—were still waiting for some word from their attorneys a full month after the attorney's appointment. (King Aff. Ex. A at 45, 60.)

A harried in-court conversation within earshot of others, or a fax or letter, is no substitute for an in-person interview with the client, as Plaintiffs' experts make clear. (Lefstein Aff. ¶ 146.) But when rare instances of client contact do occur, they are almost always not in person. In 2010, Onondaga ACP attorneys billed zero time—none—for any out-of-court client meeting in over 25% of all cases. (King Aff. Ex. A at 61.) In only 16% of cases did the clients have an in-

---

communication becomes clear. On average, Onondaga ACP attorneys billed the following amounts of time in each case on out-of-court client meetings: 1.39 hours for cases including a felony charge, 0.70 hours for cases with a misdemeanor as the most severe charge, and 0.81 hours for cases with a violation as the most severe charge. (Hirose Aff. ¶ 309.) On the telephone with the client: 0.49 hours for cases including a felony charge, 0.54 hours for cases with a misdemeanor as the most severe charge, and 0.43 hours for cases with a violation as the most severe charge. (*Id.* ¶ 310.) On correspondence with the client: 0.28 hours for cases including a felony charge, 0.27 hours for cases with a misdemeanor as the most severe charge, and 0.22 hours for cases with a violation as the most severe charge. (*Id.* ¶ 311.)

person meeting with their attorneys in the first 72 hours of assignment—a critical time frame for investigative and evidentiary purposes. (*Id.*; Lefstein Aff. ¶¶ 142, 144, 147.)[16] In almost one-third of all cases, the client had the first face-to-face out-of-court contact with his or her attorney more than 14 days after the attorney was assigned. (King Aff. Ex. A at 61.) For clients facing felony charges—where the urgency for client interviews and prompt investigation are even more pronounced—1 out of every 4 clients that received any out-of-court attention waited over two weeks for that contact. (*Id.* at 63.) On average in Onondaga, it takes 9 days from assignment for attorneys to communicate in any way with their clients outside of court. (Hirose Aff. ¶ 292.)

Beyond this system-wide data, the record contains ample anecdotal evidence that attorneys do not, in fact communicate with their clients, visit clients in jail, conduct client interviews, or counsel their clients regarding their charges and defenses. The experiences of class members also strongly suggest that, when attorneys communicate with their clients at all, it is only after long delays, shortly before or after court appearances, and consists mainly of delivering a prosecutor's plea offer. (*See, e.g.*, Harrist Aff. ¶ 92, Schmidt Aff. ¶¶ 166-68; Menschel Aff. ¶¶ 296, 349-52, 361-62, 386-90, 428; Blase Aff. Ex. 9, ¶¶ 6. 8-14; *Id.* Ex. 19 ¶¶ 7; *Id.* Ex. 20 ¶¶ 7, 10; *Id.* Ex. 103 ¶¶ 6-8; *Id.* Ex. 134 ¶¶ 7-12; *Id.* Ex. 210 ¶¶ 11-14; *Id.* Ex. 270 ¶¶ 11-15; Ex. 135 ¶¶ 4-6; Ex. 111 ¶ 8.)

The State focuses on evidence about available *means* of communication with incarcerated clients and puts forth self-serving generalizations about providers' expectations or assumptions about what defense attorneys do or should do. (State's Mem. at 123-29.) Such facts, even if

[16] In over half of cases, the attorney billed for no activity of any kind—even reviewing the file—in the first seventy-two hours. (King Aff. Ex. A at 65.)

undisputed[17], would establish only the hypothetical possibility of client communication. The State puts forth no direct evidence to contradict Plaintiffs' evidence that attorneys, system-wide, actually do not communicate sufficiently with their clients.

The record on this motion is more than sufficient to establish a breakdown in attorney-client communication that, especially when considered in combination with the lack of investigation, experts, and other failures, is sufficient to state a claim for constructive denial of counsel. The State cites several cases for the proposition that "only a complete breakdown in communications" can violate the right to counsel. (State's Mem. at 123-24 (citing cases).) Even if that is the proper legal standard, the record described above meets that standard. Thus, whatever the legal standard, the Court should deny summary judgment.

But the State is wrong in suggesting that only "complete breakdowns" in communication are relevant evidence in establishing systemic problems in communication. The Court of Appeals took a more nuanced approach, acknowledging that a range of communications failures are relevant to assessing whether the Plaintiff Class faces an unacceptable risk of being denied their right to counsel, such as the frequency with which lawyers waive rights without consulting clients, communicate with incarcerated clients, and respond to request from clients and their families. *Hurrell-Harring*, 15 N.Y.3d at 19, 22.

Even the State's own cases refute its "complete breakdown" theory. In *United States v. Morris*, 470 F.3d 596 (6th Cir. 2006), cited in the State's Mem. at 32, the Sixth Circuit held that

---

[17] These facts are disputed. For example, in Ontario, assigned counsel frequently do not accept collect calls from the jail, limiting their communication with incarcerated clients. (Menschel Aff. ¶¶ 286-88.) Attorneys are not reimbursed, or have vouchers cut, for traveling to meet clients who are incarcerated. (Menschel Aff. ¶ 214, 291.) In Onondaga, where the jail set up a voice mail system because of problems with attorneys accepting collect calls, not all attorneys set up their voice mail boxes and communication problems from jail continue. (Hirose Aff. ¶¶ 55-56.)

a Michigan county's practice of assigning counsel shortly before a preliminary hearing violated the right to counsel. In so holding, that court that "[t]he fact that [a defendant's] counsel gave him *some* advice does not preclude a finding of constructive denial of counsel" premised on a lack of meaningful communication. *Id.* at 602. Rather, circumstances such as "the lack of time" and "the lack of privacy for attorney-client consultation" precluded effective communication. *Id.* In reaching this conclusion, the Sixth Circuit based its legal conclusion in part on "ABA Standards for Criminal Justice [that] provide that a thorough discussion with the client is necessary at the outset of representation." *Id.* at 601.

iv. Lack of Preparation for Court Appearances, Failure to File Motions, Lack of Sentencing Advocacy, Low Trial Rates and Other Indications of Systemic Constructive Denials of Counsel

Beyond investigators, experts, and client communication, there is a range of further indications of attorneys' inability to subject the prosecution's case to meaningful adversarial testing. As the Court of Appeals held, constructive denial may be established where lawyers "ultimately appear[] to do little more on their behalf than act as conduits for plea offers." *Hurrell-Harring*, 15 N.Y.3d at 19. This statement reflects the by now common-sense notion that advocacy in the pre-trial phase is the core function of a defense attorney, a notion also recognized by the United States Supreme Court. "[P]lea bargaining is . . . not some adjunct to the criminal justice system; it *is* the criminal justice system." *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). Thus, "negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistances of counsel." *Id.* at 1406 (citing *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010)).

The data show, however, that attorneys frequently do nothing for their clients in the plea-bargaining stage. In one county, nearly half of all attorneys spent less than four hours *in total*

disposing of their felony cases prior to the plea. (Hirose Aff. ¶ 331.) In half of misdemeanor cases, attorneys spent two hours or less disposing of the client's case. (*Id.* ¶ 332.) In 10% of felony cases—which represents thousands of cases—attorneys reported that they pled their clients out after spending less than one hour total time on the case. (*Id.* ¶ 333.) In 10% of misdemeanors, attorneys disposed of the case in 36 minutes or less. (*Id.* ¶ 334.) In another county, attorneys billed two hours or less on the entire case in 13% of cases. (Menschel Aff. ¶ 271.)

The data discussed in the previous section regarding long delays in attorney-client communication—often one of an attorney's first steps in opening a case—suggest more generally that indigent defendants' cases languish in critical early stages when attorneys should be preparing a plea bargaining strategy informed by appropriate factual and legal investigation. The data confirm, however, that all too often no action occurs in those critical early stages: in 10% of the cases in one county, it took 6 days or more from assignment for public defense attorneys to engage in any services—even just reviewing the case file— on behalf of their client. (Hirose Aff. ¶ 303.)

The data also show that attorneys almost never obtain or review discovery material or do any legal research and writing to defend their clients. In 99% of all cases—and 95% of felonies—attorneys in one county billed an hour or less on obtaining or reviewing discovery material. (*Id.* ¶¶ 326-27.) In 98% of all cases—and 95% of felonies—attorneys in one county billed an hour or less on legal research. (*Id.* ¶¶ 323-24.) In 64% of all assigned counsel cases in another county—including 50% of felonies— attorneys did not bill for any research and writing. (Menschel Aff. ¶¶ 320-21.) In over 50% of those cases, attorneys billed more time for filling out a voucher than on research and writing. (*Id.* ¶ 323.)

Documents from Suffolk County provide a window into how systemic conditions create a "defense culture" of non-representation. Those documents show that defenders are forced to "triage" clients because, as they candidly acknowledge, they do not have the "time and resources" to adequately serve all their clients. (Harrist Aff. ¶ 46.) Training materials inform new attorneys that under prevailing conditions, they can expect to spend only about 5-10 minutes with their clients. (*Id.* ¶ 88.) Based on his personal observations of attorney practice in Suffolk, Plaintiffs' expert concluded that "LAS attorneys do not understand the range of potential impacts or consequences of a guilty plea and do not explain these consequences to their clients." (Boruchowitz Aff. ¶ 163.) In another county, one of the two attorneys in the Public Defender's Office signaled a similar "defense culture" issue when he admitted that he will not even bother to make a basic discovery motion until the District Attorney has made a plea offer and the client has rejected it. (Yoeli Aff. ¶ 231.) Such non-representation in the critical plea-bargaining stage is, under the modern understanding of the right to counsel, a clear constitutional violation. *See Frye*, 132 S. Ct. at 1406-07.

Plaintiffs' experts identified this systemic non-representation as far out of keeping with prevailing professional standards. Professor Boruchowitz described it as "jarring" and noted that the frequent use of the term "'triage' has connotations better suited to an emergency room. . . . Defenders should not liken their work to sorting victims in a disaster or an emergency room." (Boruchowitz Aff. ¶ 106-08) He noted that, in his opinion such a defense culture "results from the recognition by LAS that LAS attorneys' workloads are too high to provide adequate representation to indigent clients." (*Id.* ¶ 106.) Professor Lefstein concluded that although the direct evidence of this defense culture was specific to Suffolk LAS, "[i]t seems likely that a similar culture permeates the conduct of defense providers in the other Defendant Counties since

in those counties, as in Suffolk, there are insufficient client communications, infrequent trials, and an absence of investigations and lawyer supervision." (Lefstein Aff. ¶ 101.)

The numbers also show that this "triage culture," in which lawyers rarely consider taking cases to trial and defenders' primary role is to deliver a "standard" plea offer, is not hypothetical: in one county, the number of public defense cases that are actually resolved at trial is a tiny fraction of one percent (0.14%). (Harrist Aff. ¶¶ 45, 193.) In another—the only other county for which data is available—the percentage of cases where public defense attorneys billed for any "trial prep" is less than 1.3%. (Hirose Aff. ¶ 329.) One attorney in that county testified that he inherited a case from an attorney who said it was "not worth it" for him to take cases to trial. (Hirose Aff. ¶ 329.)

The record also suggests that poor people get worse outcomes. The data show that poor people are less likely than those with private counsel to get pre-trial release and more likely to end up with cash bail or remand to jail. In one county, private attorneys secured their client's release on their own recognizance in felony cases in approximately 35% of cases, while clients represented by court-appointed counsel were released on recognizance less than 15% of the time. (King Aff. Ex. A at 22.) For misdemeanor cases, those who could afford private counsel were released without bail in 67% of cases, while indigent clients—those least likely to be able to afford any amount of monetary bail—were released in 33%-47% of cases depending on the provider type. (*Id.* at 23.)

Given these facts, it is no surprise that Plaintiffs' expert, Professor Lefstein, concluded that "across the five Defendants Counties there is an unacceptably high risk that indigent persons charged with criminal conduct do not receive the kind of representation to which they are constitutionally entitled, and this risk is caused by the State's uniform failure to provide the

minimum oversight and funding necessary to safeguard this fundamental constitutional right." (Lefstein Aff. ¶ 218.) Similarly, Professor Boruchowitz, who examined only Suffolk and Washington counties, reached the conclusion that those systems "fail[] to meet professional standards, or to put it another way, the system performance is not reasonable under prevailing professional norms, and in so failing, the system risks effectively denying representation to indigent criminal defendants. . . . defenders are failing consistently to subject the prosecution's case to meaningful adversarial testing and as a result the State is failing to meet its foundational constitutional obligation to provide counsel to eligible persons." (Boruchowitz Aff. ¶ 178; *see also id.* ¶ 35.)

In response to these facts about the absence of meaningful adversarial testing, the State offers no factual record in support of its motion, let alone any facts sufficient to demonstrate an undisputed record that would entitle it to summary judgment.

c. The Five Counties' Public Defense Systems Suffer from Systemic Deficiencies that Prevent Attorneys from Meeting their Constitutional Obligations to their Clients.

The facts set forth above establish that indigent defendants in the five Defendants Counties face an unacceptably high risk of constructive denials of counsel. As the facts below demonstrate, that risk is inextricably linked to systemic deficiencies such as a lack of resources; excessive workloads; a lack of political independence; and insufficient qualification systems, supervision, and training. As Plaintiffs' experts noted, the existence of such systemic deficiencies "invariably undermines effective client representation." (Lefstein Aff. ¶ 31.)

i. Lack of Necessary Resources and Political Pressures to Prioritize Cost Savings Over Client Representation

The State's lack of financial support for the *Gideon* mandate has already been discussed. In the vacuum created by the State's abdication of responsibility, the counties face enormous

political and financial pressure to sacrifice indigent criminal defendants' right to counsel in the name of cost savings.

For example, there is ample evidence of political pressure on the Onondaga ACP to keep its costs down. In 2004, Onondaga County awarded a contract to the Assigned Counsel Program ("Onondaga ACP") for trial-level indigent defense. The County chose the Onondaga ACP to save money. (Hirose Aff. ¶ 248.) Plaintiffs' expert concludes that "[t]his decision sent a signal to the Onondaga ACP that it would continue to be awarded contracts for providing defense services if it managed to keep down the cost of providing counsel regardless of the quality of defense representation provided." (Lefstein Aff. ¶ 34.) He further concluded based on reviews of documents exchanged between ACP and the County that "it is a sign of a seriously flawed system that the relationship between Onondaga County and the ACP is focused exclusively on finances and cost." (*Id.* ¶ 38.)

Despite a rise in the cost of providing services, ACP's actual expenditures in 2012 were lower than they were in 2006. (*Id.* ¶¶ 253-54.) The Executive Director of ACP testified that there were some years that ACP requested less in their budget application than they determined they would need to provide mandated representation, based on County pressure. (Hirose Aff. ¶ 81.) Despite ACP's exercise in self-denial, the County always appropriates less than ACP requests. (*Id.*) The reduction in the 2009 adopted budget occurred despite the fact that the ACP Executive Director wrote to the County to say that she had been meeting increases in assignments with a decreasing cost-per-case, and that she had "hit the wall with that and cannot decrease cost per case further, without impacting quality of services." (*Id.*) The Executive Director candidly acknowledged that her program's funding is "never enough." (*Id.*) As Plaintiffs' expert has noted, "[w]hen there is a lack of political independence, it is often

exceedingly difficult for those in charge of defense programs to strongly protest inadequate funding to county officials even when they know their funding is woefully deficient." (Lefstein Aff. ¶ 32.)

In addition to this general fiscal pressure, the legislature has demonstrated particular hostility to funding the ACP, with one legislator expressing his "distress[] that the people that [the ACP] represents, rob, plunder, rape, etc. in [the] community and [the County is] now going to spend $6.5 million to help them out." (Hirose Aff. ¶ 81.) Another legislator at the same meeting asked about other options for providing indigent defense, to which the ACP Executive Director referenced the 2004 process for picking the Onondaga ACP as the trial-level indigent defense provider and reminded the legislature that a public defender office would cost more. (*Id.*) Indeed, the Onondaga County legislature redirects money from the State that is meant for indigent defense and uses it to offset other county expenses, an action the State is unable to prevent because it has not sufficiently funded the Office of Indigent Legal Services to effectively monitor counties' use of state funds. (Id. ¶ 255; Karlsson Aff. ¶¶ 94, 95.)

Although Onondaga ACP pays the statutory rate for assigned counsel, it undermines that compensation with policies that refuse reimbursement for routine expenses and by limiting rates for investigators. (Hirose Aff. ¶¶ 282-83.) It delays payment on many hundreds of attorney vouchers for things like "meetings w/client," "correspondence with client," "motions," "reviewing facts," "research," and "trial prep." (*Id.* ¶ 14; Blase Aff. Ex. 68.) The full ACP voucher review process results in delay of at least two months, and up to years after the completion of a case. (Hirose Aff. ¶¶ 284-85.) Attorneys have been driven away from representing indigent defendants because of the ACP's payment practices. (*Id.* ¶¶ 41, 286.)

The pressure to sacrifice necessary representation is directly linked to the systemic deficiencies in program funding and independence. The Onondaga ACP Executive Director testified that the legislature once put a quarter of a million dollars in a contingent fund until she could assure them that she was "enhancing" voucher review and being more diligent in controlling payment to attorneys. (*Id.* ¶ 32.) A subsequent ACP Annual Report confirmed that ACP complied. (*Id.*) The Executive Director candidly testified that the ACP voucher review process is a factor in why the cost-per-case for the ACP is low. (*Id.*)

In Ontario County, the desire to control the rising cost of the Assigned Counsel Program was a main factor that prompted Ontario County to change from an Assigned Counsel Program to the Office of the Public Defender. (Menschel Aff. ¶ 225.) Since its inception, the Public Defender's Office has been underfunded. For example, in the 2011 budget cycle, the Public Defender's Office received almost $400,000 less than it requested in its budget proposal. (*Id.* ¶ 187.) Political pressure to keep cost down has also affected assigned counsel. The County recently imposed a change in billing practices, urging the Assigned Counsel Administrator to rein in costs. (*Id.* ¶ 225.) The Administrator has questioned attorneys who submit especially high vouchers, and those attorneys have had their vouchers reduced, including for "excessive" time spent on client communication or for being, in the Administrator's judgment, too high. (*Id.* ¶ 214.)

In Washington County, public defenders are paid part-time wages for what many of them described as full-time jobs. (Schmidt Aff. ¶ 130.) Every single attorney in that office—even the ones who are considered full time—carries a private practice in order to make a living. (*Id.* ¶ 132) The Public Defender's compensation is less than half of the District Attorney's. (*Id.* ¶ 131.) Similarly, in Schuyler County, the Public Defender makes $40,000 less than the District

Attorney. (Yoeli Aff. ¶ 241.) Plaintiffs' expert concluded that disparities like this violate professional standards and impair defenders' ability to fairly represent their clients. (Boruchowitz Aff. ¶¶ 229-37.)

The head of Suffolk LAS testified that LAS's "resources are very, very slim and they're stretched to the limit, as you can see." (Harrist Aff. ¶ 125.) He continued, "Do I need more staff attorneys? Of course. You've got to be kidding me. I've been asking for staff attorneys for the last 15 years." (*Id.* ¶ 125.) As with nearly every other defender program, LAS has never received the money they need to provide services. (*Id.* ¶ 148.) There is no doubt that political pressure to keep cost down infects LAS practice. Average cost per case is ten times less than the private bar, which LAS advertises as a point of pride to the County government when it seeks to have its contract renewed. (*Id.* ¶ 240.) Based on his review of Suffolk's resources, Plaintiffs' expert had no trouble concluding that LAS "is inadequately funded" and that "inadequate funding and repeated refusal by the County to increase funding to requested levels leads to an increased risk that indigent defendants in Suffolk County will receive inadequate representation." (Boruchowitz Aff. ¶ 48.)

With such constrained budgets across all five counties, the lawyers who valiantly carry out the mandate of *Gideon* operate with poverty-level resources. The Washington County Public Defender's Office has seven lawyers and one computer among them. (Schmidt Aff. ¶¶ 5, 134.) The Ontario Assigned Counsel Program does not have legal research resources or a legal library available to panel attorneys and they are not reimbursed for the cost of legal research through an electronic database such as Westlaw. (Menschel Aff. ¶ 150.) Suffolk LAS has five investigators for more than 70 lawyers, and no paralegals or legal assistants, for an organization that disposes of tens of thousands of criminal cases per year. (Harrist Aff. ¶¶ 116, 220-21, 226.) LAS

attorneys have been driven away by LAS's working conditions – mainly to the District Attorneys' Office. (Harrist Aff. ¶ 233.)

Indeed, the inadequacy of resources for public defense is underscored by comparisons to the vast resources of defenders' prosecutorial counterparts. Suffolk LAS has five investigators; the county District Attorney's Office has 56, not to mention the resources of local law enforcement. (Harrist Aff. ¶¶ 116, 224.) LAS have no paralegals or legal assistants; the District Attorney's Office has 8. (*Id.* ¶¶ 226-27.) The Onondaga DA employs a number of support staff, including paralegals, legal secretaries, investigators, process servers, court stenographers information aids, and a person who helps manage the office budget. (Hirose Aff. ¶¶ 261, 264-66.) The Onondaga DA has access to electronic legal research, a fully stocked in-house library, and a fleet of cars. (*Id.* ¶¶ 275-77.) Assigned counsel attorneys, by contrast, are paid the statutory minimum and may not bill for even the most basic overhead expenses; the ACP's budget is only about half the District Attorney's. (*Id.* ¶ 260.)

To establish as an undisputed proposition that defenders have the resources they need to subject the prosecution's cases to meaningful adversarial testing, the State proffers the following: that the Ontario Public Defender's Office has a library and Westlaw access, and one attorney and one investigator speaks some Spanish; the Schuyler Public Defender's Office has a library, LEXIS account, and a budget for case management software; the Washington County Public Defender's Office has not had staff reductions in a few years and has a Westlaw account; the Suffolk County Legal Aid Society's lawyers "feel" that they have enough resources, and they have Westlaw; and, in Onondaga, "ACP attorneys utilize the resources of their private offices." (State's Mem. 137-38.) Even if all these facts were undisputed (and they are not), this showing is utterly insufficient to entitle the State to summary judgment.

ii. Excessive Workloads, Insufficient Staffing, and the Absence of Support Services

The Court of Appeals has emphasized that the right to counsel includes the right to have an attorney who has enough time for his clients. *See People v. Droz*, 39 N.Y.2d 457, 462 (1976); *People v. Bennett*, 29 N.Y.2d 462, 466 (1977). In May of this year, the Supreme Court of Florida struck down as unconstitutional a rule requiring the Miami-Dade County Public Defender to continue to accept cases notwithstanding that its caseload "far exceeds any recognized standard for the maximum number of felony cases a criminal defense attorney should handle annually," holding that a showing of high caseloads establishes "a substantial risk that the representation of [one] or more clients will be materially limited by the lawyer's responsibilities to another client." *Public Defender, Eleventh Judicial Circuit of Florida v. State of Florida*, 115 So.3d 261, 279 (Fla. 2013).

As Plaintiffs' experts note, "[h]igh caseloads prevent lawyers from having enough time to provide effective representation, because attorneys are unable to interview clients effectively, conduct investigations, counsel clients about pleas offered at arraignment, and do other necessary preparation." (Boruchowitz Aff. ¶ 89; *see also* Lefstein Aff.¶ 77.)

Plaintiffs' experts, who each have been studying the issue of caseload and workload measurement for decades each, both endorse the notion that any caseload in excess of 150 felonies or 400 misdemeanors per year creates an unacceptable risk of violations of the right to counsel. (Lefstein Aff. ¶ 77; Boruchowitz Aff. ¶ 76, 78-79.) As both experts note, this notion is embodied in the New York State Bar Association's standards as well. (Lefstein Aff. ¶ 77; Boruchowitz Aff. ¶ 79.) In fact, as to several of the Defendant Counties, Plaintiffs' experts suggested that the maximum should be lowered because of county-specific dynamics such as the

need to travel long distances between far-flung justice courts and the lack of any support staff. (Boruchowitz Aff. ¶¶ 77, 214; Lefstein Aff. ¶ 98.)

The State does not require caseload tracking and management and, so, none of the providers in the Defendant Counties monitor attorney caseloads effectively and none have any policies defining acceptable caseload standards. (Menschel Aff. ¶¶ 205, 232, 315-16; Harrist Aff. ¶ 54; Hirose Aff. ¶¶ 8, 40; Yoeli Aff. ¶¶ 27, 232; Schmidt Aff. ¶ 138.) At best, some providers engage in ad hoc efforts to control workload by shifting work around when problems happen to come to their attention, or by jotting attorneys' caseloads down on a Post-It Note, which is then discarded. (*See, e.g.*, Harrist Aff. ¶ 54, Schmidt Aff. ¶ 14.) This failure itself is in violation of professional standards. (Lefstein Aff. ¶ 78; Boruchowitz Aff. ¶ 210.)

Onondaga ACP has a rule capping annual felony assignments at 60, but it does not enforce that rule and has no limitation on the number of misdemeanors or private practice cases panel attorneys may accept in addition to their 60 felony assignments. (Hirose Aff. ¶¶ 38-39.) Such a "caseload standard" is meaningless. (Lefstein Aff. ¶ 82.)

Thus, although there are few statistics on individual attorney caseloads, that absence is a function of the system's indifference to the problem, not a lack of proof. Despite the State's indifference, the testimony and documents provide concrete evidence of excessive workloads. The most recent LAS Budget Request notes that "attorney caseloads are up drastically." (Harrist Aff. ¶ 222.) It goes on to report that the total number of LAS cases has risen 7% in the past several years. (*Id.*) In the County Court Bureau, which covers felonies, eleven attorneys were assigned to at least 2,806 felony cases in a single year. (*Id.* ¶ 212.) This indicates that each of those County Court attorneys had, on average, a caseload of at least 255 felony cases that year.

(Harrist Aff. ¶¶ 68, 212.)[18] LAS's own estimation is that attorneys in its District Court Bureau carry an average of six hundred cases per year, and 200 cases at any given time, which includes a mix of felonies and misdemeanors. (Harrist Aff. ¶¶ 209, 211.)

LAS attorneys testified that, as a result of their workloads, they lack the time and resources to properly represent their clients or to conduct necessary investigations, and a supervising attorney in the District Court division of LAS testified that he hears those complaints from his staff. (Harrist Aff. ¶¶ 119, 126.) In a candid email exchange, senior attorneys at LAS note that, in one court:

> staff attorneys were frequently required to cover courts where the caseload far exceeded a number that could be reasonably handled by a single attorney. . . .[R]epresentation under these conditions would be of marginal quality at best. For the better part of a year this condition was more or less the norm for the Bureau. . . .Effective quality representation became secondary to surviving the current assignment.

(Boruchowitz Aff. ¶ 83-84; *see also id.* ¶ 87 stating Professor Boruchowitz's opinion that "many of the factors reported [in this email] remain problems today, leading to a high risk that many indigent LAS clients will received inadequate representation").

Suffolk LAS has also tried on multiple occasions, mostly unsuccessfully, to get funding to hire new attorneys to deal with their high caseloads. (Harrist Aff. ¶ 125.) Indeed, the State

---

[18] The State tries to chip away at this evidence by making claims about the content of LAS attorneys' caseload, suggesting that a substantial percentage consists of "easier" cases such as Aggravated Unlicensed Operation, *see* State's Mem. at 120, but even that is a disputed fact. The data from OCA suggest that the number of AUO charges carried by Suffolk LAS attorneys—in particular, the number of non-felony AUO charges, with no other accompanying felony charges—is much lower. (Harrist Aff. ¶ 53.) In any case, Plaintiffs' experts disagreed with the State's assumption that a high percentage of AUO cases would make caseload standards irrelevant. (*See* Lefstein Aff. ¶ 79; Boruchowitz Aff. ¶¶ 97-102.) Notably, Plaintiffs' experts also rejected the State's arguments that LAS' attorneys being assigned to one judge, having a number of violation of probation cases, or having several cases in later stages of adjudication would justify their unacceptably high workloads. (Boruchowitz Aff. ¶¶ 105, 109, 110-12, 115-20.)

tries to move for summary judgment based on a *request* for additional attorneys that was *denied* by Suffolk County, thus demonstrating exactly why the State's record fails to establish their entitlement to summary judgment. (*Id.* ¶¶ 57, 148.) The denial of requests for sufficient attorneys to cover LAS's caseload is a long-standing pattern. (*Id.* ¶¶ 57, 228-31.)

Plaintiffs' expert concluded that, in Washington County, the workloads carried by attorneys in the Public Defender Office violated professional standards. (Boruchowitz Aff. ¶¶214-16.) Professor Boruchowitz stated, based on his review of the documents and deposition testimony, that "the Washington County Public Defender and the assistant defenders have an excessive caseload, and they do not have enough time to provide effective representation to all of their clients. . . Because of a combination of a large defender caseload, inadequate support staff, the geography of the county, and significant private practice responsibilities, all of the public defenders in Washington County have a workload that does not permit them to provide consistently effective representation to their clients." (*Id.* ¶ 218.)

The Ontario County Public Defender testified that she has difficulty keeping her attorneys' misdemeanor caseloads under the 400 maximum set by professional standards. (Menschel Aff. ¶¶ 110-12.) Anecdotal evidence of attorney practice suggests that panel attorneys' workloads are excessive and do affect their representation of clients—including evidence that panel attorneys are not able to respond to communications from clients and are forced to miss court appearances because of their caseload. (Menschel Aff. ¶¶ 110-12, 283, 400.)

Some counties have a policy of not refusing case assignments—a policy likely linked to political pressure to keep its contract with the county at lowest possible cost—that contributes to its overwhelming caseload problem and itself violates ethical rules and professional norms

designed to protect the rights of indigent criminal defendants. (Harrist Aff. ¶ 208; Menschel Aff. ¶ 168; Boruchowitz Aff. ¶ 80-82.)

One Onondaga ACP attorney who testified that ACP assignments are about half of his total workload also stated that he has taken in the neighborhood of 400-600 cases per year, about 70% of which are felonies. (Hirose Aff. ¶ 38.) Plaintiffs' expert described these numbers as "extraordinary and unacceptably high." (Lefstein Aff. ¶ 84.) Another Onondaga ACP attorney who also testified that ACP assignments are about half of his total workload carried 242 ACP cases in 2010, 305 ACP cases in 2011, and 229 ACP cases in 2012. (Hirose Aff. ¶ 38.) The two attorneys with the highest caseloads from the ACP in 2011 were carrying over 400 ACP cases. (*Id.* ¶ 40.) ACP attorneys have testified to the financial pressure to take too many cases caused by the low rates of compensation and the practice of cutting attorney vouchers. (*Id.* ¶ 41, 286.)

Thus, the State's claim that "there is no evidence that the caseloads in the Five Counties are excessive or affect attorneys' representation of clients," (State's Mem. at 117), is demonstrably false. The State tries to distract from the lack of undisputed facts in its favor by debating how one measures "caseload," arguing that "there are no bright lines to be drawn in determining the level at which a caseload becomes excessive." (*Id.* at 117.) As an initial matter, even if this is true, it is a reason why this case should go to trial, so that the Court can determine whether, in the absence of bright lines, caseloads are in fact excessive.

But even if the Court were to resolve this debate now, the State's proposition is wrong. Both of Plaintiffs' experts examined the State's argument and rejected it explicitly, noting that the State "misunderstands" the meaning and the purpose of caseload standards, and explaining

why, if anything, the caseload standards should be even lower in some of the counties. (Lefstein Aff. ¶ 77 n.9; Boruchowitz Aff. ¶ 92-94.)

The State has put forth no expert witness to offer a contrary opinion. In support of its position, the State relies on the testimony of William J. Leahy, the Director of the Office of Indigent Legal Services. (State's Mem. at 117-18.) But the State misinterprets Director Leahy's testimony. Mr. Leahy testified that he does not believe that the NAC caseload guidelines are "some magical or appropriate or final solution to the problem of public defender caseload," but only because they may be too high. (Blase Aff. Ex. 34, Leahy Dep. 132:5-13 ("You can have 150 felony defendants on a certain type of felony and you can be almost guaranteed that you're not going to have enough time to provide adequate representation to those clients.").) Director Leahy testified that public defender caseloads should *never* exceed the NAC limits, (*id.* at 133:24-134:3), and that the existence of providers that carry caseloads in excess of the NAC limits—such as "most upstate counties [where] they're exceeded by a factor of 1.5 or 2 or 3 or 4 or 5"—is a problem. (*Id.* at 134:3-11.) Director Leahy testified that "for counties that are in excess of the so called national maximum, it would be a very useful starting point to get down to that level." (*Id.* at 134:11-15.) Indeed, Mr. Leahy explicitly testified that caseloads across the counties are excessive. (*Id.*) Thus, Director Leahy agrees with Plaintiffs' experts and, what is more, conclusively establishes that upstate county defenders carry excessive caseloads that jeopardize indigent defendants' right to counsel.

Notwithstanding the State's position that numbers cannot tell the whole story, the State points to numbers as the basis for its summary judgment motion, arguing that an OILS report found that "Ontario, Schuyler, and Washington Counties are in compliance with the national

standards." (State's Mem. at 118.[19]) The Court should reject this contention for two reasons. First, the report is not credible because the Director of the agency that produced it disavowed its results. Director Leahy testified that the report is based on inaccurate, self-reported county caseload data that are "imperfect," "inadequate," and often incomplete. (Blase Aff. Ex. 34, Leahy Dep. 135:18-136:16.) Furthermore, the report omits family court, parolee, violation and other representation from the calculation entirely, such that—as Director Leahy acknowledged—the report underestimates workloads by a large degree. (*Id.* 127:15-128:4.)

Second, even if the Court were to credit this report notwithstanding the fact that its author has disavowed it, its existence creates, at most, a *disputed* fact as to caseload and workload issues. That is not a sufficient basis to grant summary judgment. A trial is necessary to weigh the evidence presented on whether excessive workloads impair representation of indigent defendants.

iii. Lack of Necessary Attorney Qualification Systems, Hiring Requirements, Training, and Supervision

As a threshold matter, the State argues that the Court should not consider facts pertaining to "the supervision, training and experience of assigned counsel or public defenders" because the Court of Appeals foreclosed it. (State's Mem. at 139.) This is incorrect. The Court of Appeals foreclosed "*remedies* specifically addressed to attorney performance, such as uniform hiring, training and practice standards." *Hurrell-Harring*, 15 N.Y.3d at 25 (emphasis added). Plaintiffs do not seek such remedies.

[19] It is not exactly clear what report the State is attempting to rely on. OILS had done at least four caseload studies at the time of Mr. Leahy's deposition, (*see* Blase Aff. Ex. 34, Leahy Dep. 124:8-130:19), none of which appear at Exhibit X to the Kerwin Affirmation (there is no Exhibit X to the Kerwin Affirmation), but they are all based on the same flawed data. (*Id.* 129:24-130:19.)

Nothing in the language quoted by the State suggests that the Court should ignore systemic failures such as the absence of attorney qualification systems, hiring requirements, training, and supervision. To the contrary, the Court of Appeals *required* that such "systemic conditions" be considered. *Hurrell-Harring*, 15 N.Y.3d at 25 (holding that the Court must consider whether "the basic constitutional mandate for the provision of counsel to indigent defendants at all critical stages is at risk of being left unmet because of systemic conditions"). Thus, Plaintiffs should be permitted to establish at trial that systemic failures regarding to hiring and qualification systems, the lack of necessary training, and the absence of any meaningful oversight of the public defense system contribute to the constitutionally unacceptable risk of constructive denials of counsel. Following a finding of liability, the Court of Appeals' decisions has foreclosed remedies such as "uniform hiring, training, and practice standards," *id.* at 25, but not remedies directing the State to provide the resources necessary to ensure that county systems are sufficiently supported.

There is no question but that the factual record supports a finding of systemic failures in qualification systems, training and supervision. The Onondaga Assigned Counsel Program makes it perfectly plain that they do not supervise the work of panel attorneys. (Hirose Aff. ¶ 25.) It has only minimal annual training requirements, the extent of ACP's involvement in training programs is disputed. (*Id.* ¶¶ 22-23). The Assigned Counsel Plan Administrator has no written process for monitoring or acting on client complaints and whether or not the Administrator acts on them is disputed. (*Id.* ¶ 8.)

Likewise, the Ontario Assigned Counsel Program does supervise or support the work of panel attorneys. (Menschel Aff. ¶ 198, 297-99, 317, 327-29.) It does not provide any training or impose any training requirements, or even monitor whether attorneys complete CLE

requirements. (*Id.* ¶¶ 327-29.) The County imposes only minimal qualification standards on attorneys seeking to accept assigned counsel cases. (*Id.* ¶¶ 233-37.) The Assigned Counsel Administrator does not review or act on client complaints, despite the fact that the program receives many of them. (*Id.* ¶¶ 256-57, 262-63.)

Washington County has no formal training, no performance reviews, and no written standards for attorney practice. (Schmidt Aff. ¶ 136.) Plaintiffs' experts concluded that given the caseload of the Public Defender and his administrative responsibilities, and based on the Public Defender's testimony about his supervisory practices, there is a "lack of supervision in the Washington County Public Defender's Office [that] violates" professional standards. (Boruchowitz Aff. ¶¶ 186-87.) Likewise, Professor Boruchowitz concluded that the training afforded to public defenders in Washington County violates professional standards and "increases the risk that indigent criminal defendants will not be provided effective representation." (*Id.* ¶¶ 191-92.)

In Schuyler, the Public Defender's Office has no written policies whatsoever and there is no formal process for evaluations of conflicts counsel. (Yoeli Aff. ¶¶ 16, 17, 19, 232-33.) The office does not offer any training programs or require any training of its attorneys. (Yoeli Aff. ¶ 7.)

In Suffolk, a lack of funding means LAS cannot afford to hire attorneys with criminal defense experience. (Harrist Aff. ¶ 5.) The nature and quality of LAS's training program is the subject of substantial dispute between the parties (highlighting the inappropriateness of summary judgment), but testimony indicates that it is largely informal. (Harrist Aff. ¶ 29.)[20] One attorney

[20] The underlying reason for this dispute is that Suffolk LAS has no written policies on training and supervision – itself an indication of a problematic system. (Harrist ¶¶ 183-84.)

characterized joining LAS as being "thrown out there without the proper training." (*Id.* ¶ 35) The nature and extent of LAS's attorney supervision is likewise the subject of a dispute rendering this case inappropriate for summary judgment, but there is evidence that the very supervision the State points to as the basis for its motion (*see* State's Mem. at 140-42), has subsequently been cut due to staff losses. (Harrist Aff. ¶¶ 29-30.) Attorneys testified that they were not supervised and could not access more experienced attorneys for assistance. (*Id.*)

When attorneys are supervised and evaluated, there is evidence that such evaluations are based on how quickly attorneys dispose of cases, not on how counsel serve their clients' interests. Mr. Mitchell, the Attorney in Charge of LAS, testified that one of the factors considered in evaluations is that the attorneys "had a volume of 50 cases and they've moved 35 of them." (Harrist Aff. ¶ 43.) Other attorneys testified that the number of cases they disposed of were part of evaluations and that they felt pressure to dispose of cases faster in order to get a promotion or a raise. (*Id.*)

In response to this record, the State concedes that assigned counsel attorneys are totally unsupervised, (State's Mem. at 142), and relies on disputed facts to make the case that defenders are "well supervised." (State's Mem. at 139). For example, in Washington County the State argues that public defenders are "well supervised" because the office administrator keeps an Excel spreadsheet to track cases. (*Id.* at 140.) But the existence of that spreadsheet is disputed. (Schmidt Aff. ¶ 12.) As noted above, the State suggests the existence of a supervisory structure within Suffolk LAS that other evidence shows has been dismantled by subsequent budget cuts. (State's Mem. at 139-42; Harrist Aff. ¶¶ 29-30.)

As a further indication of the failure of the public defense system to sufficiently supervise the representation of indigent criminal defendants, none of the county providers have systems in

place to ensure that conflicts of interest are identified and avoided. The Ontario Public Defender's Office has no formal process for identifying conflicts. As the State concedes (State's Mem. at 130), individual attorneys are responsible for ensuring that they, themselves, are free of any conflicts. But they do not always utilize the system for checking, and the Public Defender sometimes checks for conflicts, but not always. (Menschel Aff. ¶ 157.) In Suffolk, LAS also leaves conflicts checks up to individual attorneys and does not monitor whether they do them. (Harrist Aff. ¶¶ 128-29.) In Washington County, the Public Defender's office administrator testified that the office does not have sufficient resources to maintain a system to identify conflicts. (Schmidt Aff. ¶ 78.)

The forgoing sections demonstrate that the State's abdication of its *Gideon* responsibilities is an abject failure. The record contains overwhelming proof that indigent defendants face a constitutionally unacceptable risk of constructive denials of counsel due to systemic deficiencies in the delivery of counsel to the poor, a record more than sufficient to entitle Plaintiffs to trial on their claims of constructive denials of their right to counsel.

2. The State Has Failed to Establish Its Entitlement to Judgment as a Matter of Law Based on the Record Pertaining to the Class Representatives.

The State tries to obtain summary judgment primarily by defending the performance of the attorneys who represented the class representatives. (State's Mem. at 32-114.) For the reasons stated in Part I.A., *supra*, even if the State could establish undisputed facts showing that the class representatives' attorneys performed well, that would not be sufficient grounds for summary judgment.

But, in fact, the State has not succeeded in demonstrating an entitlement to summary judgment even on its own, legally faulty terms. This is so for two reasons. First, the State's factual record pertaining to the class representatives is riddled with inadmissible evidence and

disputed facts. Second, the State overlooks or ignores undisputed facts that establish that the class representatives were, in fact, harmed by deficiencies in the public defense system. Each of these points is made in full below.

a. The State's Factual Presentation Pertaining to the Class Representatives Relies Primarily on Inadmissible Evidence and Disputed Facts.

To obtain summary judgment, the State's record must establish undisputed facts based on admissible evidence. *Alvarez*, 68 N.Y.2d 324. But, as the Plaintiffs' accompanying cross-motion makes clear, a substantial portion of the State's record consists of disputed facts and inadmissible evidence. In all, Plaintiffs have moved to strike 340 of the State's factual allegations, and many more are disputed in the affirmations accompanying this motion.

The weaknesses in the State's record are fatal. For example, stripped of inadmissible and disputed facts, the State's record on class representative Jacqueline Winbrone reads as follows: In 2007, she was represented by Tom Marris, a member of the Onondaga County ACP. (Hirose Aff. ¶ 95.) Mr. Marris asked a colleague to appear in court on his behalf in her case on September 17, 2007. (*Id.* ¶ 96.) At that court appearance, Mr. Marris's colleague waived Ms. Winbrone's case for grand jury action. (*Id.*) Ms. Winbrone was subsequently placed on pre-trial release. (*Id.* ¶ 102.) With regard to class representative Joseph Briggs, the State offers essentially no admissible, undisputed facts whatsoever. (*See* Hirose Aff. ¶ 131-66.)

The Motion to Strike explains the full impact of the State's failure to create an adequate record. These examples illustrate, however, that the State's reliance on inadmissible evidence and disputed facts forecloses summary judgment in their favor, because based on admissible evidence alone, the State has not met its burden to show that undisputed facts entitle it to judgment as a matter of law.

b. The State's Factual Presentation Pertaining to the Class Representatives Overlooks or Ignores Undisputed, Material Facts that Preclude Summary Judgment.

In addition to being plagued by inadmissible evidence and false or disputed facts, the record the State offers regarding the class representatives is materially incomplete. The State overlooks or ignores material facts that demonstrate how the class representatives' stories powerfully illustrate the failures of the public defense system.

James Adams was accused of shoplifting a few bars of deodorant from a drug store, and the State initiated criminal proceedings against him without legal counsel. (Hirose Aff. ¶¶ 344-45.) With no lawyer present the judge set bail at $2,500, an amount that was for Mr. Adams, like for so many indigent class members, far out of his reach and resulted in his incarceration which in turn led to the loss of his job and his family's eviction. (*Id.* ¶¶ 345, 355.) Although Mr. Adams was technically "assigned" an attorney at arraignment, he did not hear from his attorney until a week later, at a preliminary hearing. (*Id.* ¶ 347.) The hearing was adjourned because the attorney was not prepared. (*Id.*) Mr. Adams's attorney did not speak to him at the preliminary hearing and missed a subsequent court conference. (*Id.* ¶¶ 347-48.) At the court conference that his attorney missed, Mr. Adams overheard the judge and the prosecutor in a discourse about a possible plea that his attorney had never conveyed to him. (*Id.* ¶ 348.) As Mr. Adams sat in his jail cell still unable to make bail, he did not hear from his attorney for *over 90 days*. (*Id.* ¶ 349.) Mr. Adams's attorney also delayed for 90 days before finally engaging an expert that the attorney conceded was fundamental to his defense, and waited 180 days to conduct an investigation that ultimately led to Mr. Adams acquittal on the most serious charges against him. (*Id.* ¶¶ 330-334.)

Jacqueline Winbrone was arraigned on criminal possession of a weapon charges after her husband placed a gun, without her knowledge, in her car. (*Id.* ¶¶ 92, 377.) At arraignment, the court set $10,000 bail which she could not afford. (*Id.* ¶ 93, 371-72.) Ms. Winbrone called her attorney every day for five straight days with no response, and he did not talk to her for over a week, until after her husband had died while she was in pretrial incarceration. (*Id.* ¶ 95, 374, 376.) During the first week that Ms. Winbrone sat in jail without access to a lawyer, her attorney's colleague waived the case for grand jury without consulting her. (*Id.* ¶ 375.) Ms. Winbrone's attorney continued to be unavailable during the 50 days she was in jail and throughout the case, refusing to speak to Ms. Winbrone about the facts of her case, misstating the facts of her case to the court, and failing to even notify Ms. Winbrone when her case was ultimately dismissed. (*Id.* ¶¶ 381-82, 384-86.)

The State started criminal proceedings against Joseph Briggs on burglary charges without providing him any legal counsel. (*Id.* ¶ 356-57.) Mr. Briggs sat in jail for a month without a court hearing and without hearing from his attorney. (*Id.* ¶¶ 359-60.) At the first conference, at which Mr. Briggs met his attorney for the first time, his attorney said nothing on the record except to incorrectly state Mr. Briggs's name. (*Id.* ¶¶ 364-65.) Mr. Briggs also found out at this first conference that his attorney had waived his preliminary hearing without talking to him, and had failed to convey a plea offer to him. (*Id.* ¶¶ 361-63.) Mr. Briggs's attorney also waived his right to testify before the grand jury without consulting him. (*Id.* ¶ 366.) Another attorney was assigned for Mr. Briggs after his first attorney failed to show up at the next court conference, but the second attorney also did not talk to him for a month and then asked to be removed from the case. (*Id.* ¶¶ 367-68.)

Richard Love, as well, was arraigned without counsel, on larceny charges. (*Id.* ¶ 335-36.) Mr. Love did not have substantive communications with his lawyer for the month and a half that he represented him, and the attorney failed to communicate a plea that had been offered. (*Id.* ¶ 339, 342.) In fact, this attorney visited Mr. Love one time—to ask Mr. Love to sign paperwork so the lawyer could get paid. (*Id.* ¶ 339.)

In Washington County, named plaintiff Kimberly Hurrell-Harring, a certified nursing assistant working two jobs to support her two girls and her disabled mother, was arrested after she capitulated to her imprisoned husband's threats and brought him less than an ounce of marijuana. (Schmidt Aff. ¶¶ 87, 101, 170.) When Ms. Hurrell-Harring was arraigned, she was not provided with any lawyer, and therefore had no advocate on her side to argue that $10,000 cash bail was wholly unnecessary to secure the future court appearance of a working mother with children who had no prior criminal history, and was far out of proportion to her modest financial circumstances. (*Id.* ¶¶ 91-92, 170-71). She could not make bail, leaving her family without its primary caretaker while she waited nearly fourteen days in a jail cell for her attorney to meet with her. (*Id.* ¶¶ 93, 170.) When her public defender met with her, which occurred a total of only two times out of court during her entire case, it was to summarily convey a plea offer using terms like "6/5 split" without giving any explanation of what that meant, and all but instructing Ms. Hurrell-Harring to waive pre-trial rights with no explanation of what she was waiving or the consequences of doing so. (*Id.* ¶¶ 100, 101.) In the meantime, her attorney did not return her phone calls for weeks at a time, and also disregarded the advice of a lawyer who made him aware of a strong legal argument—upheld by the Third Department and Court of Appeals—that the accusations against Ms. Hurrell-Harring did not constitute a crime under New York law. (*Id.* ¶¶ 168, 170.) Even with other lawyers doing the basic legal research that Ms. Hurrell-Harring's

public defender should have done in the first instance, her attorney still did nothing with this information. (*Id.* ¶ 170.) Instead, when the public defender stood by Ms. Hurrell-Harring's side at her sentencing, he raised no issues as his client, a working mother with no prior criminal history, was sentenced to 180 days of incarceration and five years of probation. (*Id.* ¶ 170.)

For Randy Habshi, who had long struggled with multiple drug addictions, not only did the State get criminal proceedings underway for burglary and related charges without providing him with any counsel, it was not until his third appearance that his lawyer appeared in court—though the attorney's attendance at future court appearances would prove to be less than guaranteed. (*Id.* ¶¶ 113, 115, 123, 175, 179.) With no advocate on his side to argue for conditions of pre-trial conditions of release that he could satisfy, Mr. Habshi was remanded to jail. (*Id.* ¶ 176.) From his jail cell, Mr. Habshi began an experience familiar for many class members—months of no contact from his attorney, ignored phone calls to the attorney by his family, the summary delivery of a single plea offer, and an unexplained failure by the attorney to show up for a court appearance and no communication for weeks thereafter. (*Id.* ¶¶ 118-19, 120, 123, 178.) Mr. Habshi was left with the non-choice faced by so many class members: accept the plea offer for which the defense attorney appeared to be a little more than a messenger for the district attorney, or go to trial with an advocate who barely communicated, failed to appear in court without explanation, and wouldn't return phone calls. Mr. Habshi, forced into an obvious choice by the actual and constructive denials of counsel he experienced for months, plead guilty and was sentenced to four years of incarceration. (Schmidt Aff. ¶ 125.)

Lane Loyzelle was charged with petit larceny and the State arraigned him without any legal counsel. (Menschel Aff. ¶ 24; 342-44.) Mr. Loyzelle's *pro se* arguments were unavailing in convincing the court to set bail at an amount he could afford, and the $2,500 bail that was set

was beyond Mr. Loyzelle's means and resulted in his pretrial incarceration and loss of his job. (*Id.* ¶¶ 345-48.) While he awaited his day in court from a jail cell, Mr. Loyzelle was not visited by an attorney for the next 13 days. (*Id.* ¶ 335, 336.) In fact, Mr. Loyzelle did not meet his attorney until he was brought back to court where he spoke with his attorney in the holding area for five minutes. (*Id.* ¶ 349-50.) Mr. Loyzelle asked his attorney to come visit him in the jail so that they could speak privately, but no visits occurred for months. (*Id.* ¶ 339-40.) Instead, Mr. Loyzelle next saw his attorney only briefly before his next two court appearances, speaking hurriedly in public areas of the courtroom where other people could overhear their conversations. (*Id.* ¶ 351.) Mr. Loyzelle never heard from his attorney by phone and received only one letter. (*Id.* ¶ 355-56.) Indeed, his attorney did not personally visit Mr. Loyzelle in jail until December, months after the prosecution began, when he delivered plea offers for the first time. (*Id.* ¶¶ 44, 52, 355.) With little choice and no confidence in proceeding to trial with an attorney who had barely spoken with him for months while he was incarcerated, Mr. Loyzelle accepted the plea offer and pled guilty and received nearly three months incarceration. (*Id.* ¶ 56.)

Tosha Steele was charged with criminal possession of a controlled substance in the third degree, and arraigned without counsel. (*Id.* ¶¶ 20, 66, 358-60.) Had a legal advocate been present on her behalf, that attorney could have made clear that bail was legally permissible notwithstanding a parole hold. (*Id.* ¶ 67). Without that advocate, bail was denied and Ms. Steele was remanded to incarceration. A full five days passed before she first met her attorney just before a court appearance, where a rushed conversation took place in the holding area outside the courtroom where other people could overhear their conversation. (*Id.* ¶ 362.) During the brief conversation, Ms. Steele's attorney did not discuss her version of events or any possible defenses to the charges. (*Id.* ¶¶ 68, 363.) Nearly two more weeks passed before Ms. Steele saw her

attorney again in court, where the attorney waived her pretrial rights with no consultation whatsoever. (*Id.* ¶¶ 70, 72, 365-66.) Weeks passed with no other meeting from her attorney, when Ms. Steele was taken to court—without any prior notice—for a hearing in which her attorney never appeared. (*Id.* ¶¶ 367-69.) After months without any communication while Ms. Steele was in jail, her attorney summarily delivered a plea deal to her. (*Id.* ¶ 371.) Ms. Steele pled guilty based on her attorney's advice. (*Id.* ¶ 88, 372.)

Shawn Chase's story is told by three profoundly flawed numbers: he waited approximately five months for his first meeting with his attorney, ultimately got about 30 total minutes of his attorney's attention, and afterward was sentenced to 90 days in jail. When Mr. Chase was accused in 2007 of driving while intoxicated and other traffic infractions, he was just 20 years old and working two jobs to try to make ends meet while attending school. (Yoeli Aff. ¶ 258.) When Mr. Chase was arraigned, he had no legal counsel to explain the charges or what he could expect next. (*Id.* ¶ 257.) The public defender's office discouraged Mr. Chase from even applying for a public defender, telling him that his charges—which included the possibility of jail time—were only traffic infractions that were unlikely to qualify him for legal representation. (*See Id.* ¶ 259.) While these charges hung over Mr. Chase's head for months, he applied unsuccessfully for a public defender three times, and was denied not because he personally was not indigent, but because of the income of his parents. (*See Id.* ¶¶ 260-62.) Mr. Chase waited over four months until his own dogged efforts finally secured him a supposed advocate, but that attorney met with him for a grand total of 30 minutes to prepare for trial, 15 minutes of which took place the day of trial when the attorney instructed Mr. Chase, with no prior warning or consultation, to waive his Fifth Amendment rights and to take the stand. (*See Id.* ¶¶ 263-66.)

After months of having no attorney and very little total communication from his trial attorney, Mr. Chase found himself incarcerated. (*Id.* ¶¶ 177, 262, 265.)

Christopher Yaw was helping out on his family's farm and expecting a child with his girlfriend when he was accused of a committing a larceny. (*Id.* ¶¶ 267-68.) At his arraignment, bail was set in the amount of $5,000 cash or $10,000 bond, an amount for Mr. Yaw that was, like for so many indigent defendants, unattainably high and that resulted in his pre-trial incarceration. (*See Id.* ¶ 269.) Mr. Yaw's arraignment without counsel was hardly the end of his ordeal. Over the next few months his attorney was out of reach, failed to show up for court, and communicated very little to him except to tell him to waive pretrial rights. (*See Id.* ¶¶ 270-73.) Mr. Yaw took matters into his own hands and learned that the plea deal offered by the district attorney was no better than the sentence he would receive at trial—a bitter irony given that Mr. Yaw's counsel had commanded Mr. Yaw to waive his right to a preliminary hearing on his felony charges to curry favor with the district attorney and avoid annoying him. (*See Id.* ¶¶ 270, 274.) Ultimately, for reasons that had nothing to do with the advocacy of his public defender, Mr. Yaw was finally granted release on recognizance, as he might have been from day one had he had an advocate on his side at his arraignment. (*See Id.* ¶ 191.)

The experience of plaintiff Robert Tomberelli underscores that the consequences of the State's failures for class members extends beyond just the adjudication of guilt or innocence. In 2007, Mr. Tomberelli was working at Eastman Farms, and was accused of driving while intoxicated and other infractions. (*Id.* ¶¶ 206, 278.) At the outset of his criminal case, Mr. Tomberell had no legal representation. (*Id.* ¶ 208.) From arraignment forward, the level of Mr. Tomberelli's legal representation improved only by small degrees in a manner familiar to class members: what little communication Mr. Tomberelli received from his attorneys took the form

of cursory commands to waive his pretrial rights with little or no explanation of what he was forfeiting, or pressure from his county court attorney to evaluate and agree to a guilty plea in a single meeting that would affect the next five years of his life. (*Id.* ¶¶ 279-285.) As a result, Mr. Tomberelli was sentenced to 18 months of drug court without his county court attorney explaining to him what that would entail or that it could cost him $600 over the course of five years' of probation, on top a $1,000 fine. (*Id.* ¶¶ 222, 286-87.). These modest amounts can be crushing burdens for indigent persons, and carry serious consequences if they are not paid, but they were never even raised, let alone discussed, between Mr. Tomberelli and his county court attorney. (*Id.* ¶¶ 286-87.)

On September 28, 2007, Luther Booker was arrested and charged with criminal possession of stolen property. (Harrist Aff. ¶ 154.) He was not interviewed by an attorney prior to his arraignment and the LAS attorney at his arraignment failed to make an argument to reduce his bail, which he was unable to pay. (*Id.* ¶ 246.) At his second appearance, Mr. Booker had a second attorney. (*Id.* ¶ 248.) The brief five-minute conversation Mr. Booker had with his attorney, held within earshot of other inmates and corrections officers in the court's holding area, was just long enough for Mr. Booker to plead with his attorney to make a motion to reduce his bail so that he could return to his job and his family, including his pregnant girlfriend. (*Id.* ¶¶ 249-52.) Despite this express request, the attorney made no motion and Mr. Booker continued to wait for his day in court from a jail cell. (*Id.* ¶ 253.)

Mr. Booker heard nothing from his attorney for 14 more days. (*Id.* ¶ 254.) When he finally saw his attorney again during a court appearance, she waived his right to a preliminary hearing without discussing it with him or the explaining the consequences of doing so. (*Id.* ¶ 255-57.) With the judge looking on, his attorney told him for the first time of a plea of eight

months and that it was the best offer he could get. (*Id.* ¶ 257.) Mr. Booker agreed to take the offer because it was presented as his only option, but the stark confusion caused by the virtual non-existence of any attorney-client relationship became clear during the allocution and the judge voided the plea. (*Id.* ¶¶ 258-59.) Despite assurance from his attorney that she would explain what had just happened during the bewildering court proceeding, she failed to meet him as promised. (*Id.* ¶ 260.)

Mr. Booker was told he was being assigned a third LAS attorney in less than a month, but the same pattern of representation—known to thousands of class members—was virtually unchanged. (*Id.* ¶ 261.) Despite calling repeatedly, LAS would not tell Mr. Booker the contact information for his new lawyer, and no LAS lawyer ever called him back. (*Id.* ¶¶ 261, 269.) No attorney appeared for him at his next court date on October 22, 2007, resulting in an adjournment. (*Id.* ¶ 262.) The next day, like always, the only attention Mr. Booker could get from his attorney was for a couple of minutes at court in the presence of other detaines and corrections officers. (*Id.* ¶ 264.) His attorney, who had just met Mr. Booker minutes before, made clear that pleading guilty was Mr. Booker's only option. (*Id.* ¶ 265). Facing the same bleak choice class members in Suffolk do every day, and wholly dependent on a rotating cast of attorneys who gave his case no attention outside of the courtroom, Mr. Booker took the plea. (*Id.* ¶¶ 265-66.) Mr. Booker's new baby was put up for adoption because the mother could not support the child without Mr. Booker's assistance. (*Id.* ¶ 252.)

These experiences—as well as those of the additional class members submitted in opposition to this motion—provide further evidence of past and ongoing violations of the right to counsel, and support a conclusion that the Plaintiff Class faces a constitutionally unacceptable

risk of constructive denials of counsel due to systemic deficiencies in the delivery of defense services.

II. THE COURT SHOULD DENY SUMMARY JUDGMENT TO THE STATE ON PLAINTIFFS' ACTUAL DENIAL OF COUNSEL CLAIMS.

In addition to Plaintiffs' constructive denial claims, the State seeks summary judgment on the question of whether the Plaintiff Class faces a constitutionally unacceptable risk of actual denials of counsel. The State's arguments on this point turn not on a factual record but on a series of flawed legal arguments, discussed below.

A. The Court Should Deny Summary Judgment on Plaintiffs' Claims Pertaining to Representation at Arraignment.

Not only are there no undisputed facts sufficient to entitle the State to summary judgment on Plaintiffs' claim of denials of counsel at arraignment, but Plaintiffs themselves are entitled to summary judgment on that claim. *See* Plaintiffs' Memorandum of Law in Support of Motion for Partial Summary Judgment (September 6, 2013); Affirmation of Corey Stoughton in Support of Plaintiffs' Motion for Partial Summary Judgment (September 6, 2013) ("Stoughton Aff.").

In support of summary judgment, the State makes the same three flawed arguments that it makes in opposition to Plaintiffs' cross-motion. Plaintiffs have fully addressed these arguments on that motion and, rather than repeat them here, fully incorporate the record and arguments on the cross-motion. In short summary, the State's first argument, that arraignment is not a *per se* critical stage, (State's Mem. at 24), fails because the Court of Appeals' decision to the contrary is law of the case and law of this State. The State's second argument, that the failure to provide counsel at arraignment is the fault of the judiciary, (*see id.* at 25-26), is factually incorrect and, in any case, no excuse for the State's failure to provide counsel as required by *Gideon*. Finally, the State's argument that post-litigation policy changes will "improve" representation at

arraignments, (*see id.* at 26-27), fails because it is undisputed that those policy changes will not cure the problem and, in any case, post-litigation policy changes do not defeat the State's liability to the Plaintiff Class for deprivations of counsel at arraignment.

Beyond these points, which are fully addressed in Plaintiffs' memoranda of law in support of its cross-motion, two additional points illustrate why, specifically, the State's own summary judgment motion on the issue of counsel at arraignment must be denied.

First, the evidence indisputably demonstrates that class members continue to face actual denials of counsel at their arraignments in courts where there is an admitted lack of systems for ensuring the presence of attorneys. The absence of systems to guarantee the presence of counsel at arraignments poses the obvious risk that indigent defendants will actually be arraigned without a defense attorney present. The class representatives—nine of whom were arraigned without counsel—demonstrate that this risk is more than hypothetical. In fact, class members continue to be arraigned without counsel in the Defendant Counties, as recently as six months ago. (*See* Hirose Aff. ¶¶ 390, 392, 397; Menschel Aff. ¶¶ 377, 381, 416; Schmidt Aff. ¶¶ 191, 196, 200-01.) The analysis of the Office of Court Administration data demonstrates that these experiences are far from unique. In 2010, thousands of people were arraigned on fingerprintable offenses alone in the very Justice Courts where the Counties admit they sporadically, if ever, provide representation at initial appearances. (*See* King Aff. Ex. A at 13, 41, 78, 121.) In East Hampton Village Court, just one of the Suffolk County courts where there is no system to ensure that people are arraigned with counsel, there were 263 new, fingerprintable cases arraigned in 2010. (Harrist Aff. at ¶¶ 195-196.) In Schuyler County, nearly two-thirds of people charged with fingerprintable offenses had their initial court appearances in Justice Courts where the Schuyler

Public Defender rarely actually covers arraignments. (Yoeli Aff. ¶¶ 22, 63, 228; Stoughton Aff. ¶¶ 73-76.)

Second, not only are the State's arguments wrong for the reasons explained in Plaintiffs' memoranda on the cross-motion, but—more importantly for purposes of this summary judgment motion—they would not entitle the State to summary judgment in any event. The State has made no factual presentation that would allow the Court to conclude that lawyers are present at arraignment always, or even often enough. The State admits that 9 of 12 class representatives were denied counsel at arraignment. (State's Mem. at 61, 65, 75, 78, 83, 89, 96, 106 (conceding with respect to Chase, Tomberelli, Yaw, Hurrell-Harring, Habshi, Loyzelle, Adams, Briggs and Love).) The fact that many people do and some people do not get counsel at arraignment is consistent with Plaintiffs' claims that there is no system in place to ensure counsel at arraignment. The only "system" that the State points to is its recent OILS grant for counsel at first appearance, but the Director of OILS, William J. Leahy, admits that program is insufficiently funded to ensure counsel at all arraignments. Stoughton Aff. ¶¶ 57, 125. That is no "system" at all. The facts demonstrate that, by design, indigent defendants are unrepresented at arraignment, and the State has failed to solve this problem. Thus, Plaintiffs are entitled to summary judgment in their favor on this claim.

B. The Court Should Deny Summary Judgment on Plaintiffs' Claims Pertaining to Improper Eligibility Determinations.

As with the arraignments issue, the State does not claim to have created an undisputed factual record establishing that Plaintiffs' eligibility claims cannot be proven. In fact, the State offers *no* record on this point. Instead, the State wrongly asserts that the Court should grant summary judgment because "plaintiffs are necessarily seeking to obtain relief to which only the judiciary would be subject." State's Mem. at 28.

This is incorrect. The fact that the judiciary is *involved* in making eligibility determinations has already been recognized by the Court of Appeals and was not grounds for dismissing Plaintiffs' eligibility claims as a matter of law. *See Hurrell-Harring*, 15 N.Y.3d at 19 (upholding Plaintiffs' claims regarding "denials of representation to indigent defendants *based on the subjective judgments of individual jurists*") (emphasis added). Although the judiciary is the ultimate arbiter of eligibility determinations as a matter of law, the evidence shows that in many if not all cases, eligibility determinations are made by the county provider in the first instance, not by the judiciary. (Yoeli Aff. ¶¶ 42, 251; Schmidt Aff. ¶¶ 143-46; Harrist Aff. ¶¶ 75, 79; Hirose Aff. ¶¶ 44-48; Menschel Aff. ¶¶ 115-30.) As Plaintiffs' expert noted, in some counties there "is no formal mechanism for a defendant to appeal a denial of eligibility," such that wrongful denials never reach the court's attention. (Boruchowitz Aff. ¶ 193.)

The evidence also shows that, as a result of these determinations, wrongful denials occur. The State does not deny this. Examples from the record are plentiful. Most of the counties lack written eligibility standards and make determinations based on the arbitrary, discretionary decisions of a staff person—or even the probation department. (Harrist Aff. ¶¶ 75, 223; Yoeli Aff. ¶ 43.) As a result, indigent defendants are denied counsel even when they are unemployed, when their income is well under 125% of the federal poverty line, or based on their girlfriend's

income. (Yoeli Aff. ¶¶ 254-55; Schmidt Aff. ¶¶ 25, 26.) Plaintiffs' expert reviewed certain eligibility decisions in Washington County and determined that there was evidence of wrongful denials of counsel. (Boruchowitz Aff. ¶¶ 197-98.)

Where there are written policies, those policies on their face deny counsel to people who cannot actually afford a lawyer, by considering only assets but not liabilities, counting as "income" sustenance benefits such as disability and SSI, and disqualifying applicants based on illiquid assets such as a car or a mobile home. (Hirose Aff. ¶ 47.) Some counties deny eligibility to anyone under the age of 21 whose parents may be able to afford a lawyer, or who cannot produce proof one way or the other about parental income. (Menschel Aff. ¶ 124; Hirose Aff. ¶ 47(5).)

The record shows several specific examples of excluding individuals under 21 who patently could not afford private counsel—including one denied because his parents owned real estate, even though the client was a student, the father was on unemployment benefits, and the mother was on disability workers' compensation (Hirose Aff. ¶ 52); one who had no information about his parents' income, as he did not know his father's name and did not live with his mother (*id.*); and several who either were not in touch with their parents or whose parents refused to provide financial information. (*Id.*) Plaintiff Shawn Chase waited five months for an attorney because of a denial of eligibility based on his parents' income. (Yoeli Aff. ¶¶ 140, 142, 264.)

Other counties create procedural barriers to deeming clients eligible. In Onondaga, many applicants for public defense services are denied for failure to submit paperwork. (Hirose Aff. ¶50.) The records show that one applicant was denied because the attorney had difficulty obtaining financial information from the client because the client did not speak English well. (Hirose Aff. ¶ 52). To apply for representation in Washington County, clients who are not

incarcerated must arrange a meeting with the office administrator. (Schmidt Aff. ¶ 143-45). These appointments are only available Monday through Thursday 10am-3pm, minus an hour for lunch, and applicants must bring extensive paperwork, including their court documents and proof of income for every person in their home. (*Id.*)

It is also clear that the volume of denial of counsel based on these flawed eligibility policies is high. For example, in a single year Onondaga ACP attorneys were relieved from representing a client in 986 cases. Of this number, attorneys were relieved because of ineligibility (including failure to submit paperwork) in 541 cases. (Hirose Aff. ¶ 50.)[21] Onondaga ACP has made attempts to pressure judges to affirm the ACP recommendations on ineligibility to realize cost savings, further demonstrating how reform of public defense policies would cure violations of the right to counsel notwithstanding the judiciary's role. (Hirose Aff. ¶48.)

This evidence indicates that either courts are not reviewing eligibility denials or, if they are, they are ratifying the flawed eligibility decisions made by county providers. Thus, an order directing the State to impose rational, fair eligibility standards would cure violations of the right to counsel. The State has created no factual record to the contrary and, if it did, that would only establish the existence of disputed facts. Thus, the State has offered the Court no basis on which to grant summary judgment.

[21] The State claims (or at least implies) that no one in Onondaga County ever is really denied a lawyer because even if Onondaga ACP makes bad eligibility determinations, the courts override them. The data presented above, which is based on a case-by-case review of actual eligibility determinations, completely refutes this claim, as it shows that judges permitted ACP attorneys to withdraw from representation based on ACP's eligibility determinations. (Hirose Aff. ¶ 50.)

III. POST-LITIGATION POLICY CHANGES DO NOT ENTITLE THE STATE TO SUMMARY JUDGMENT.

The State argues throughout its motion that the State is entitled to summary judgment because post-litigation policy changes have cured some of the violations of the right to counsel alleged in Plaintiffs' complaint. For example, the State argues that:

- Schuyler County has ceased denying counsel to persons under 21 based on parental income or the failure to produce evidence of parental income, and made the eligibility application process easier. (State's Mem. at 28; Yoeli Aff. ¶¶ 32-33, 36.)

- Schuyler County switched from a part-time to a full-time public defender who no longer has a private practice and the hours of the Assistant Public Defender have increased. (Yoeli Aff. ¶¶ 5-6, 11, 14.)

- Washington County added two new part-time assistant public defenders, at 15 hours/week. (Schmidt Aff. ¶ 59.)

- Suffolk LAS upgraded their case management software and implemented a videoconferencing program. (Harrist Aff. ¶¶ 55, 100-01.)

- Ontario County has a new Public Defender's Office. (Menschel Aff. ¶¶ 94, 96-98, 100-03, 108-09, 115-17, 120-29, 131-32, 135, 138-53, 156-60, 168.)

- The State is mitigating actual denials at arraignment through an OILS grant program in four out of five counties. (State's Mem. at 26-27.)

The Defendants never make the case that any of these post-litigation changes are sufficient to cure violations of the right to counsel. Any attempt to make such an argument would fail because of disputes in the record about these very facts. A defendant bears the burden of proving that "voluntary cessation" has completely cured illegal activity and, even where it is proven, such voluntary discontinuance is not, by itself, a defense to injunctive relief. *See, e.g., Spitzer v. Gen. Elec. Co., Inc.*, 302 A.D.2d 314, 316 (1st Dep't 2003) (affirming entry of injunction after voluntary cessation of illegal activity to ensure continued protection of consumers); *Lefkowitz v. Parker*, 78 Misc.2d 224, 226 (Sup. Ct. N.Y. Cnty. 1974) ("voluntary discontinuance of unlawful practices does not restrict the Court from enjoining such behavior").

Indeed, even where a defendant can decisively meet its burden to prove that voluntary action has cured the complained-of conduct, an injunction is generally appropriate and necessary, as it will ensure the relief is permanent and cause no prejudice to the enjoined party. *See State v. Midland Equities of New York, Inc.*, 117 Misc.2d 203.206 (Sup. Ct. 1982) ("even if the Court were to credit respondents' representations with regard to future activity, an order granting injunctive relief would not harm respondents and could be properly granted"); *see also Gen. Elec. Co., Inc.*, 302 A.D.2d at 316 (granting an injunction even after defendant had voluntarily complied because the injunction would not cause prejudice); *State by Lefkowitz v. Bevis Indus., Inc.*, 63 Misc.2d 1088, 1092 (Sup. Ct. 1970) ("Since respondents assert that virtually all of these acts have been discontinued, issuance of the injunction will certainly not prejudice them").

Federal courts routinely confront circumstances in institutional reform cases involving claims for prospective relief where governmental entities claim on the eve of trial, precisely as the State does now, that voluntary changes have cured the problem. The federal precedent regarding such claims is instructive, notwithstanding the fact that the federal courts apply far more stringent mootness standards than New York law does. *See City of New York v. Maul*, 59 A.D.3d 187, 192 (1st Dep't 2009) *aff'd*, 14 N.Y.3d 499 (2010) (noting "the United States Supreme Court's constrained exception to the mootness doctrine . . . is grounded in the United States Constitution's case and controversy clause, which has no analog in the New York State Constitution"). Under the federal standard, a defendant attempting to avoid an injunction through voluntary cessation has the heavy burden of showing that "(1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *See Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 174 (2000); *Clear Channel Outdoor, Inc. v. City of New*

York, 594 F.3d 94, 110-11 (2d Cir. 2010). Thus, even where the government undertakes voluntary remedies that are "indicative of a degree of good faith," that does not carry the "formidable burden of making absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *See New York Pub. Interest Research Grp. v. Whitman*, 321 F.3d 316, 327 (2d Cir. 2003).

The State has made no claim that voluntary conduct has permanently and completely cured the ongoing harm to indigent defendants in the five counties. As a threshold matter, and dispositive of the current motion, there are numerous disputes of material fact regarding the post-litigation changes, foreclosing the resolution on summary judgment. (*See* Menschel Aff. ¶¶ 94, 103-06, 110-15, 117-18, 124, 131, 134-35, 138-39, 142-43, 146-47, 153, 156-59, 166, 168, 177, 188, 194-95 (disputing claims regarding Ontario's system changes); Schmidt Aff. ¶ 59 (disputing claims regarding Washington's system changes); Harrist Aff. ¶¶ 55, 100-01 (disputing claims regarding Suffolk's system change); Stoughton Aff. ¶¶ 57, 125-32 (disputing claims regarding OILS's counsel at first appearance grant).)

Furthermore, even in the unlikely event that the State Defendants were able to prove at trial that certain changes have "completely and irrevocably eradicated" systemic constitutional violations, Defendants still could not meet their "formidable burden" to show the decades-long pattern of constitutional violations would not recur in the absence of an injunction. To the contrary, the State's tenacious resistance, over the course of seven years of litigation, indicates that absent a finding of liability and an injunction there is every reason to believe that violations will once again recur. An injunctive order cementing whatever limited voluntary changes defendants have made will cause no prejudice and ensure that the class members' right to counsel is fully and permanently safeguarded.

The import of the voluntary changes highlighted by the State should not, however, be overlooked by the Court. While these actions fall far short of demonstrating that the constitutional violations have been eradicated, let alone that they permanently guard against a risk of backsliding, what they do show is that the State is capable of conceiving of and implementing good-faith solutions to the systemic deficiencies challenged in this action. Should the Court find the State liable and charge it "with the task of devising a Constitutionally sound program" to assure the right to counsel is effectuated for all class members, the post-litigation voluntary changes highlighted by the State show they have the capacity to effectuate such an order. *See Bounds v. Smith*, 430 U.S. 817, 818-19 (1977) (noting that, in institutional reform cases, ordering the government to first come forward with a remedial plan, subject to briefing by the other party and ultimately modified as necessary before being ordered as permanent injunctive relief by the Court, appropriately gives the State the first opportunity to identify what "alternative would most easily and economically fulfill" its constitutional duty). Indeed, these changes may very well be important elements of a comprehensive remedial plan proposed by the State and ultimately ordered by this Court.

IV. THE COURT SHOULD NOT DECERTIFY THE PLAINTIFF CLASS.

In 2010, the Appellate Division found, based on testimony from the class representatives, that "plaintiffs have demonstrated that the representative parties would fairly and adequately protect the interests of the entire class." *Hurrell-Harring*, 81 A.D.3d at 73. The State claims that the twelve class representatives' depositions revealed insufficient "knowledge of the lawsuit" to such a degree that the Court should disregard that prior testimony, revisit the Appellate Division's conclusion, and decertify the class based on the inadequacy of the class representatives. (State's Mem. at 10.)

The State's motion should be rejected for two reasons.[22] First, the purported deficiencies the State identifies in the answers to deposition questions are not relevant to adequacy of representation. Thus, the State has not provided the Court with a sufficient basis to challenge the Appellate Division's prior conclusion. Second, if the Court were to find that the existing class representatives were "inadequate," which they are not, the appropriate remedy would be to allow Plaintiffs an opportunity to substitute new class representatives, not to dismiss this case after years of litigation and start all over anew, with a duplicative second class action lawsuit challenging the State's failure to fulfill its *Gideon* obligations.

In certifying the class, the Appellate Division noted that "[the court's] research failed to identify a single case involving claims of systemic deficiencies which seek widespread, systemic reform that has not been maintained as a class action." *Id.* at 75. Particularly in light of the Appellate Division's prior order and the late stage of this multi-year, complex systemic reform litigation, the Court should not take the unprecedented step of decertifying the class.

A. The Class Representatives' Answers to the State's Deposition Questions Do Not Raise Any Valid Concerns Pertaining to Adequacy of Representation.

Each of the remaining twelve class representatives submitted testimony regarding their ability and willingness to represent the class. (*See* Blase Aff. Exs. 28, 292.) The class representatives' depositions further solidify their adequacy as representatives of the class. They stated, when questioned, that they maintained ongoing contact with class counsel in an effort to

---

[22] The Court could also find that the State fails to raise a serious case for decertification because it does not challenge the adequacy of all the class representatives; only some. The State does not cite any actual deficiency in the capacity of class representatives Kimberly Hurrell-Harring, Jacqueline Winbrone, Christopher Yaw, Shawn Chase, or James Adams. In fact, the State admits in its own papers that Ms. Winbrone, Ms. Steele, and Mr. Chase "have a very basic understanding of the purpose of this litigation," (State's Mem. at 12), which is all that courts require to demonstrate adequacy of representation. *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 371 (1966).

stay involved in the litigation.[23] Many expressed their desire to use the lawsuit to improve the public defender system in New York,[24] and acknowledged the function of the class action suit as a means of achieving such improvements.[25]

The State argues that some of the class representatives cannot adequately represent the class because they could not explain to the deposing Assistant Attorney General certain legal principles, such as what a deposition is, what the legal definition of a class representative is, what the purpose of an affidavit is, or what the legal theory underlying this novel case is. (State's Mem. at 13 (citing the depositions of Mr. Briggs, Mr. Tomberelli, Mr. Love, Mr. Loyzelle, Ms. Booker, and Ms. Steele).[26]) No doubt this would be true of most non-lawyers, but

---

[23] *See* Blase Aff. Ex. 292 (Booker Dep. at 87; Briggs Dep. 22; Chase Dep. 60; Love Dep. 23-24; Tomberelli Dep. 39-42). Mr. Love testified, for example, that he had been following the case and understands that aspects of the case have gone up to the Court of Appeals and received a favorable decision. (Blase Aff. Ex. 292 (Love Dep. 20: 22-25, 21: 2-25).)

[24] *See* Blase Aff. Ex. 292 (Chase Dep. 58 (describing the case as a "[c]lass action lawsuit for—against New York States and their public defender system" and stating that he joined the litigation in order that "the Public Defender program for New York State get some financial help or training...so none of this stuff happens to any other people"); Tomberelli Dep. 57:14-16 (describing his role as a class representative as meaning "I'm trying to help [the class members] get better representation from the public defenders that they did something wrong"); Winbrone Dep. 53:3-5 (describing the case as "about poor representation of the public defenders of New York"); Yaw Dep. 81: 12-15 (stating that he wanted to be a party of this litigation because "[p]resumably there is a lot of loopholes and not a lot of guidelines for the public defender system in New York" and that public defenders have an "overburdened caseload"); Loyzelle Dep. 87-88 (describing the class as comprised of "people not feeling that they were represented properly and adequately by assigned counsel"); Steele Dep. Tr. at 9 (noting that she "and a couple other people were named Plaintiffs in a lawsuit against public defenders in the counties that are not representing us right")).

[25] *See* Blase Aff. Ex. 292 (Booker Dep. Tr. at 8 ("That everybody have the same reason why they are filing as a class. Pertaining to the—being represented by Legal Aid"); Steele Dep. Tr. at 9-10 ("[L]ike a group of people that come together to put your... complaints against something that's happened")).

[26] To the extent that the State's claim for decertification turns on arguments about whether or not the class representatives' claims have merit or the specious argument that some of the class

that is no reason to declare non-lawyers inadequate class representatives, nor does the State cite any authority or provide any reason why it should be.

In fact, the Appellate Division has held that it is reversible error to require class representatives to have a sophisticated knowledge of the legal theories and litigation practices of complex litigation.[27] *See, e.g., Brandon v. Chefetz*, 106 A.D.2d 162, 170 (1st Dep't 1985) (reversing a trial court's denial of class certification based on a class representative's failure to answer questions about the law where "it is not reasonable to expect that a layman . . . would have detailed knowledge of the matters at issue"); *Stern v. Carter*, 82 A.D.2d 321, 344 (2d Dep't 1981) (holding that deposition questions directed at class representatives asking about legal claims are "highly irrelevant since essentially they require an analysis of the law by the witness").[28]

---

representatives ultimately got a "good deal" or at least felt like they did (*see, e.g.*, State's Mem. at 14-16), those issues have already been address in Part I, *supra*. In any case, when considering the issue of class certification, the merits of a class representative's claim is not the issue. *See, e.g., Bloom v. Cunard Line, Ltd.*, 76 A.D.2d 237, 240 (1st Dep't 1980) ("To the extent that the merits of the action may be considered in determining whether class action is appropriate, inquiry is limited to a determination as to whether on the surface there appears to be a cause of action for relief which is neither spurious nor sham.").

[27] The tenor of the State's often aggressive deposition questions revealed its attorney's lack of understanding of class certification law. For example, the State continuously pressed the class representatives to name the courts that had issued legal decisions in this case and to name the legal issues those courts decided. (*See, e.g.*, Blase Aff. Ex. 292 (Love Dep. 21:3-23:25); Tomberelli Dep. 58:14-59:21; Briggs Dep. 25:6-26:24, 27:6-10); Steele Dep. 11:18-12:12.)

[28] The irrelevance of the plaintiffs' knowledge of the legal claims and legal theories is reinforced by the undisputed previous finding of the adequacy of class counsel. As the State's own cases demonstrate, the only reason courts have ever found it necessary to test class representatives' "familiarity with the lawsuit" is to ensure that they can "act as a check on the attorneys." *Pruitt v. Rockefeller Center Prop., Inc.*, 167 A.D.2d 14, 24 (1st Dep't 1991). While such checks and balances might be wise in a case like *Pruitt*, which involved a money-damages class action brought by private, for-profit attorneys on behalf of consumers against a large corporation, there is no such concern here, where class counsel is a not-for-profit and a law firm acting in a *pro*

Likewise, the U.S. Supreme Court in *Surowitz* expressly disapproved of attacks on the adequacy of a class representative based on the representative's ignorance. 383 U.S. at 370-74. Federal courts in New York have also condemned "attacking the class representative's adequacy on ignorance" and suggested instead an interpretation of the "knowledge requirement with a view toward typicality concerns and conflicts of interest," none of which are concerns here. *Moskowitz v. La Suisse, Societe d'Assurances Sur La Vie*, 282 F.R.D. 54, 72 (S.D.N.Y. 2010) (*citing Baffa v. Donaldson, Lukin & Jenrette Sec. Corp.*, 222 F.3d 52, 61 (2d Cir. 2000)). Therefore, as a matter of law and common sense, the State's specific points regarding purported deficiencies in the class representatives' "knowledge of the case" fail to establish the inadequacy of their representation.

There is a deep irony in the State's criticism of the class representatives for failing to "articulate how [their] representation rises to a Constitutional violation" (State's Mem. at 14), and for having an understanding of criminal procedure shaped by "the show *Law and Order*." *Id.* at 16. In 1932, in *Powell v. Alabama*, the U.S. Supreme Court first articulated the notion of the right to counsel for the poor, holding:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

---

bono capacity, each of whom have decades of experience in complex litigation and representation of the poor. (*See generally* Blase Aff. Exs. 28, 292.)

287 U.S. 45, 69 (1932). The deposition testimony the State cites demonstrate the necessity of this class action to vindicate indigent defendants' constitutional right to counsel. It does not provide any basis for decertification.

B. The Remedy for a Late-Stage Finding of Inadequate Representation Would Be Substitution of New Class Representatives, Not Decertification of the Class.

As the U.S. Supreme Court has held, "provided the initial certification was proper . . . the claims of the class members would not need to be mooted or destroyed because subsequent events or the proof at trial had undermined the named plaintiffs' individual claims." *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 406 n.12 (1977) (citing *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 752-57 (1976)). Thus, "if for some reason it is later determined by the court that the representative Plaintiffs are inadequate, the court could substitute another class plaintiff for the representative plaintiff in question or simply allow the remaining Plaintiffs to proceed with the class action." *Shahriar v. Smith & Wollensky Rest. Grp., Inc.*,659 F.3d 234, 253 (2d Cir. 2011); *see also Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 572 (2d Cir. 1982) (finding "no need for decertification" where it became clear after discovery that the class representatives were not appropriate); *Morangelli v. Chemed Corp.*, 922 F. Supp. 2d 278, 315 (E.D.N.Y. 2013) (allowing 90 days for the substitution to new plaintiffs where court found the existing class representatives inadequate).[29] The reason for such a rule is clear: the alternative would be an immensely inefficient process of restarting a case all over again with "the delay and expense of a new suit, which at long last will merely bring the parties to the point where they now are." *Hackner v. Guaranty Trust Co.*, 117 F.2d 95, 98 (2d Cir. 1941).

[29] Plaintiffs' research could find no New York state authority on this question, but as the parties have both noted on prior occasions, New York courts have found that "[f]ederal jurisprudence is helpful in analyzing CPLR 901 issues because CPLR article 9 has much in common with Federal rule 23." *City of New York v. Maul*, 14 N.Y.3d 499, 510 (2010) (internal citation and quotation omitted).

Thus, even if the State's arguments about the adequacy of the class representatives had merit, which they do not, the Court should not decertify the class.

V. NONE OF PLAINTIFFS CLAIMS ARE "MOOT OR NOT ALLEGED."

Throughout the State's motion, it argues that various issues are "moot or not alleged" because no class representative "represents" that issue. (*See, e.g.*, Kerwin Aff. ¶¶ 30-33 (alleging that various issues are "moot or not alleged"); State's Mem. at 9 (seeking to "strike" the "Suffolk County caseloads claim" because of the absence of a class member with a "caseloads claim");[30] *id.* at 28 (claiming that no class representative "represents" Plaintiffs' claim of denials of counsel resulting from eligibility determinations); *id.* 116 (claiming that no class representative "is representative of the representation currently being provided in Ontario County under its current system").)

The State's argument is foreclosed by the Appellate Division's ruling, consistent with decades of class action precedent, that "plaintiffs have demonstrated that the representative parties would fairly and adequately protect the interests *of the entire class*" not only the class members who experienced identical violations of the right to counsel. *Hurrell-Harring*, 81 A.D.3d at 73 (emphasis added).[31] It further held that the fact "[t]hat the class members may have suffered the deprivation of their constitutional right to counsel in varying manners" was

---

[30] The State's argument that the Court should strike Plaintiffs' "Suffolk County caseloads claim," State's Mem. at 9, is based on a failure to understand both Plaintiffs' claim and the nature of a class action. Plaintiffs' *sole claim* is that the State of New York fails to meet its foundational obligation to provide meaningful and effective assistance of counsel to indigent defendants. Members of the Plaintiff Class are the victims of that failure, in that they face a constitutionally unacceptable risk of actual and constructive violations of their right to counsel. High caseloads are *evidence* of Plaintiffs' claim; they are not themselves a "claim" that could be stricken.

[31] The Court cannot permit the State to re-litigate points it lost when the Third Department certified this class in the first place. *See Jacobs v. Macy's East, Inc.*, 17 A.D.3d 318, 320 (2d Dep't 2005) (declining to decertify a class, in part because the decertification motion turned on arguments "that were previously raised and decided against them by this [c]ourt").

irrelevant because "the named plaintiffs' claims derive from the same course of conduct that gives rise to the claims of the other class members and is based upon the same legal theory." *Id.* That "same course of conduct" is the State's abdication of responsibility for *Gideon*, which puts the Plaintiff Class at risk of actual and constructive denials of counsel.

The State cites no law to support its argument that Plaintiffs must have a class member for every aspect of their claims. Nor could the State do so, because the law does not require it. The typicality requirement of a class action is satisfied "even if the class representative cannot personally assert all the claims made on behalf of the class." *Cheng v. Oxford Health Plans, Inc.*, 84 A.D.3d 673, 675 (1st Dep't 2011) (citation omitted); *see also Pludeman v. Northern Leasing Sys., Inc.*, 74 A.D.3d 420, 423 (1st Dep't 2010); *Pruitt v. Rockefeller Ctr. Properties, Inc.*, 167 A.D.2d 14, 22 (1st Dep't 1991). Courts are specifically instructed to avoid a "nice inspection of the claims of each class member." *Weinberg v. Hertz Corp.*, 116 A.D.2d 1, 7 (1st Dep't 1986) *aff'd*, 69 N.Y.2d 979 (1987).

It is irrelevant whether each of Plaintiffs' claims are "represented" in each county or for each manifestation of violations of the right to counsel, because all the class representatives seek the same relief on behalf of the class of indigent defendants they represent—namely, an injunction against the state. *Nawrocki v. Proto Constr. & Dev. Corp.*, 82 A.D.3d 534, 535 (1st Dep't 2011) (holding that material differences in the circumstances of class representatives are "irrelevant" as long as the "plaintiffs seek the same relief as the class members"). As the Court of Appeals found, the "basic, unadorned question presented [here] is whether the State has met its obligation to provide counsel." *Hurrell-Harring*, 15 N.Y.3d at 23. "It is this concrete legal issue, and the constitutional right to counsel sought to be vindicated, that is common to all

members of the class and transcends any individual questions." *Hurrell-Harring*, 81 A.D.3d at 73.

Therefore, the premise on which the State's argument is based—that Plaintiffs only have standing to complain of harms if there is a class representative who experienced that harm in each county—is incorrect. The Appellate Division held that the "varying manners" in which deprivations of the right to counsel play out in each county do not detract from the unity of the class's claims that actual and constructive violations of the right to counsel are attributable to the State's failure to meet its foundational obligation under *Gideon*.

VI. THE COURT SHOULD DENY THE STATE'S MOTION TO STRIKE AND PERMIT SEVEN CLASS REPRESENTATIVES TO WITHDRAW WITH PREJUDICE.

In Point I of their Memorandum of Law, the State asks the Court to preclude Plaintiffs from "pursuing the portions of the complaint pertaining to" the seven class representatives who still seek leave to withdraw from this class action, as well as the one who has withdrawn. (State's Mem. at 7-8.) When Plaintiffs moved for precisely the same relief—namely, the withdrawal of those eight class representatives with prejudice to their individual claims, along with a stipulation that Plaintiffs would not offer any evidence about those individuals at trial—the State opposed the motion, and the Court denied it. (Kerwin Aff. Ex. O.) Plaintiffs' appeal from the denial of that motion is now pending. (Karlsson Aff. ¶ 21.)

The only difference between what the State seeks now and what it opposed previously is semantic: the State desires that the release of the class representatives be labeled "striking a pleading" rather than a voluntary dismissal with prejudice. The State's motion now makes it clear that the parties agree that the seven class representatives should be dismissed from this litigation with prejudice, as Mr. Kaminsky was in October 2012. The Court should accomplish

this shared goal by allowing the seven to withdraw. The State may object inasmuch as they seek some sort of moral victory for having had those seven class representatives "stricken" from this case. Battles for such moral victories are an inappropriate waste of the parties' and the Court's resources.

Therefore, as the State has now withdrawn any objection, the Court should reconsider and grant Plaintiffs' prior motion for leave to withdraw Ricky Lee Glover, Candace Brookins, Jemar Johnson, Ronald McIntyre, Joy Metzler, Victor Turner, and Bruce Washington as class representatives, with prejudice.

VII. PLAINTIFFS HAVE NOT DEFAULTED ON THE STATE'S REQUESTS FOR ADMISSION.

In a passing sentence, and with no legal support or citation whatsoever, the State asserts that Plaintiffs have admitted all of the facts contained in the State's First Notice to Admit because the class representatives themselves did not sign those responses. (State's Mem. at 14.) As an initial matter, the State does not actually use any of those purported admissions in its summary judgment motion. Therefore, the issue is not ripe and the Court has no reason to address this issue at this time. However, if the Court were to address this issue, it should find no merit in the State's position. The State cites no authority in support of that position and it is incorrect as a matter of law, for three separate and independent reasons.

First, in a class action where the parties do not reside in the same county, as is the case here, verification by the class representatives is not required; the verification of class counsel is sufficient. CPLR 3020(d)(3). Therefore, Plaintiffs properly verified their responses.

Second, even if Class Counsel's signature was insufficient, which it is not, the defect is a technical one that Plaintiffs should be given an opportunity to cure, not one that should dictate this Court's consideration of the merits. As the Third Department has held, "[A]n omitted or

flawed verification is a defect which can be ignored in the absence of any showing of prejudice . . . '[t]here is so scant an advantage emanating from verification that the party who deems himself entitled to a verified pleading can be deemed unprejudiced if he doesn't get it.'" *Rose v. Smith*, 220 A.D.2d 922, 923 (3d Dep't 1995) (quoting Siegel, N.Y. Prac. § 235, at 350 (2d ed.)); *see also Capital Newspapers Div.–Hearst Corp. v. Vanderbilt,* 44 Misc.2d 542, 543-44 (Sup. Ct., Albany Cnty. 1964) (ignoring a defect in verification absent prejudice). If the Court decides that further verification is required, the Court should exercise its discretion to order such further verification, rather than deny Plaintiffs a fair trial by deeming disputed matters admitted and, on that basis, granting summary judgment. *Dodd v. Colbert*, 64 A.D.3d 982, 984 (3d Dep't 2009) (finding verification required but that the remedy is an order to re-submit with proper verification); *Capital Newspapers*, 44 Misc.2d at 543 (noting that the alternative to ignoring the verification defect would be to require re-submission of the document, which the court decided not to do because it would only cause delay for the sake of a formality).[32]

Finally, whether or not any given fact is "admitted" depends first and foremost on whether the individual request was proper. Plaintiffs objected to several of the specific requests to admit, which objections the State has ignored and failed to cure. *See* Kerwin Aff. Ex. L (listing Plaintiffs' detailed objections). Improper requests to admit cannot establish admitted facts even where a party completely fails to respond to the request. *Stanger v. Morgan*, 100 A.D.3d 545, 546 (1st Dep't 2012) (denying an admission despite the answering party's failure to verify its response because the request to admit was improper); *HSBC Bank USA, N.A. v. Halls*,

[32] The Appellate Division, Third Department, has even permitted a party to withdraw a previous admission made in response to a request to admit, where the party sought to dispute that matter at trial. *Webb v. Tire and Brake Distrib.*, 13 A.D.3d 835, 838 (3d Dept. 2004). Thus, there is no basis for the State to claim any admission for purposes of this motion regarding a fact Plaintiffs intend to dispute at trial.

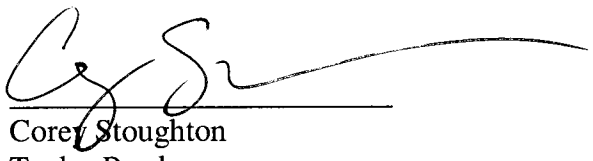
98 A.D.3d 718, 721 (2d Dep't 2012) (denying an admission, and a motion for summary judgment based on that admission, despite the answering party's failure to respond to the notice to admit, because the request to admit was on an improper issue). The State has unhelpfully failed to specify which facts it seeks to deem admitted for purposes of this motion, leaving the Court and Plaintiffs with no way to assess the threshold question of whether the request to admit that fact was improper or not. Therefore, the Court should require the State to specify which facts, if any, it deems to have "admitted," and allow Plaintiffs an opportunity to defend their objections to the particular request at issue. Absent that, the Court should not deem any facts admitted.

Thus, none of the disputed "facts" in the State's First Notice to Admit should be deemed admitted. The State must be held to the burden of establishing actual facts to entitle it to summary judgment. For the reasons stated above, the State has not done so.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the Court deny the State's motion for summary judgment, motion for class decertification, and motion for a discovery sanction.

Dated: New York, New York
October 8, 2013



Corey Stoughton
Taylor Pendergrass
Erin Harrist
Mariko Hirose
Brooke Menschel
Susannah Karlsson
Dana Wolfe
Christopher Dunn

NEW YORK CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 19th Floor
New York, New York 10004
(212) 607-3300

-and-

SCHULTE ROTH & ZABEL LLP
Gary Stein
Daniel L. Greenberg
Kristie M. Blase
Mark Arnot
Matthew Yoeli
Matthew Schmidt
919 Third Avenue
New York, New York 10022
(212) 756-2000

Attorneys for Plaintiffs