*To Be Argued By*:
COREY STOUGHTON
*Time Requested: 30 Minutes*

Albany County Clerk's Index No. 8866-07

# Court of Appeals

**STATE OF NEW YORK**

KIMBERLY HURRELL-HARRING, JAMES ADAMS, JOSEPH BRIGGS, RICKY LEE GLOVER, RICHARD LOVE, JACQUELINE WINBRONE, LANE LOYZELLE, TOSHA STEELE, BRUCE WASHINGTON, SHAWN CHASE, JEMAR JOHNSON, ROBERT TOMBERELLI, CHRISTOPHER YAW, LUTHER WOODROW OF BOOKER, JR., EDWARD KAMINSKI, JOY METZLER, VICTOR TURNER, CANDACE BROOKINS, RANDY HABSHI, and RONALD MCINTYRE, on Behalf of Themselves and All Others Similarly Situated,

*Plaintiffs-Appellants*,

—against—

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

*Defendants-Respondents*.

## REPLY BRIEF FOR PLAINTIFFS-APPELLANTS


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January 14, 2010

## STATEMENT PURSUANT TO RULE 500.13(a)

As of January 14, 2010, two related appeals have been noticed to Supreme Court, Appellate Division, Third Department. Plaintiffs-Appellants are appealing two decisions of Supreme Court, Albany County, that denied Plaintiffs-Appellants' motions for class certification and a preliminary injunction. Neither appeal has been perfected.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## FEDERAL CASES

**STATE CASES**

Page

## CONSTITUTIONS AND STATUTES



## OTHER AUTHORITY

## PRELIMINARY STATEMENT

On this motion to dismiss a class action complaint alleging pervasive and ongoing violations of indigent New Yorkers' constitutional right to counsel, the State's primary argument is that the right to counsel only protects criminal defendants from wrongful conviction. Relying on *Strickland v. Washington*, 466 U.S. 668 (1984), the State further asserts that the right to counsel may be enforced only within the criminal case itself, in CPL § 440 motions, or in federal habeas corpus actions. Under the State's view, egregious and ongoing violations of the right to counsel that result in serious harm to New Yorkers who have not been convicted of any crime can never be remedied through injunctive relief.

The State's excessively narrow view is contrary to well-established law interpreting the scope of the right to counsel. The right to counsel is the right to meaningful and effective assistance at all critical stages of a criminal prosecution. This right is violated when the absence of counsel at critical stages or the failure to deliver meaningful and effective assistance results in harm to defendants. Wrongful conviction is one of those harms, but unnecessary and prolonged pretrial incarceration, overly harsh sentences, denial of critical procedural rights, excessively high bail, and other harms – all of which Appellants allege here – are also grounds for a right-to-counsel

claim, even when deprivation of the right cannot be shown to have prejudiced the outcome of a criminal proceeding.

Prospective relief is available and necessary to redress these violations and to provide full meaning to the constitutional right to counsel. The Amended Complaint pleads an entitlement to prospective relief by alleging: first, numerous instances of actual, ongoing violations of the individual rights of the named Plaintiffs-Appellants and the class of indigent defendants they seek to represent; second, that those violations are caused by systemic deficiencies that are a direct result of the State's failure to supervise, set enforceable standards for, and adequately fund the public defense system; and, third, that those systemic deficiencies create a severe or unacceptably high probability that indigent criminal defendants' rights will be violated in the future, necessitating prospective injunctive relief. Contrary to the State's characterization, the Amended Complaint is not a generalized grievance, but rather contains over 100 pages of specific allegations of serious, widespread, and ongoing violations of indigent defendants' individual rights.

The State's remaining arguments for dismissal are policy considerations that cannot justify the erosion of a constitutional right. The adjudication of constitutional claims like this one is within the core province of the judiciary

and does not inappropriately intrude on any legislative domain. Moreover, the ongoing functioning of the criminal justice system is not threatened with disruption in any manner that could justify closing the courthouse doors to prospective right-to-counsel claims. To the contrary, the proper functioning of the criminal justice system requires that the Court recognize the justiciability of these claims. Without them, there is no adequate remedy for indigent defendants who are left to navigate the criminal justice system and counter the power of the State as an adversary without the guiding hand of counsel.

## ARGUMENT

### I. The State is Wrong in Asserting That the Right to Counsel Is Only a Right to Be Free From Wrongful Conviction.

The right to counsel is an individual right to meaningful and effective assistance of counsel at all critical stages of a criminal prosecution. Brief for Plaintiffs-Appellants at 16-18 (Sept. 28, 2009). The State nominally agrees with this formulation, Brief for Respondents at 14 (Dec. 4, 2009), but in fact asks the Court to read an additional restriction into Article I, § 6 and the Sixth Amendment to define the right as a right to meaningful and effective assistance of counsel at all critical stages only where a deprivation of that right taints the outcome of a criminal proceeding. *Id.* at 20 ("the right to effective assistance of counsel is not violated unless [an attorney's]

inadequacies prejudice the . . . outcome of the process"); *id.* at 46 (arguing that prejudice to the outcome is "an essential element of the constitutional violation itself"). In this formulation, the right to counsel exists only to prevent wrongful conviction, and no other harm is constitutionally cognizable.

The State's cramped and constricted understanding of the right to counsel is unsupported by law, resting on an overbroad reading of *Strickland* that was expressly rejected by the Supreme Court in 2008. It also leaves a great many criminal defendants without remedies for serious injuries flowing from the absence of counsel at critical stages and from the failure to render effective assistance.

The Supreme Court's decision in *Rothgery v. Gillespie County*, --- U.S. ---, 128 S. Ct. 2578 (2008), confirms that the right to counsel does not exclusively address wrongful convictions. In that case, Walter Rothgery sued Gillespie County for damages under Section 1983 for violating his right to counsel by failing to provide an attorney at his initial appearance, where bail was set too high for him to afford. *Id.* at 2582. Rothgery's claim was based solely on the allegation that "if the County had provided a lawyer within a reasonable time after the [initial] hearing, he would not have been indicted, rearrested, or jailed for three weeks." *Id.* at 2582-83. He had no

claim for wrongful conviction, as his indictment had been dismissed after he was finally appointed a competent attorney and before he filed his Section 1983 action. *Id.* at 2582.

The Supreme Court found that Rothgery stated a claim, holding that the right to counsel "applies at the first appearance before a judicial officer at which defendant is told of the formal accusation against him and restrictions are imposed on his liberty." 128 S. Ct. at 2581. Its decision expressly rejected the county defendant's argument that "prejudice to a defendant's liberty" is not a cognizable harm under the Sixth Amendment, bluntly labeling such a proposition "mistaken." *Id.* at 2589. Echoing the allegations of Appellants such as James Adams, who, charged with stealing deodorant from a drug store, had no attorney at arraignment and lost his job after spending more than three months in jail, Am. Compl. ¶¶ 48-63 (R. 215-19), the Supreme Court recognized that Rothgery had been harmed by the absence of counsel at arraignment because he could not find work after three weeks of imprisonment. 128 S. Ct. at 2589.

The State, therefore, is simply wrong when it suggests that wrongful deprivations of defendants' pretrial liberty that result from the absence of counsel at critical stages or from the failure to provide effective assistance, but do not prejudice the ultimate outcome of the proceedings, "are not

injuries of constitutional dimension," Brief for Respondents at 61, or "though regrettable, are not the harms the right to counsel exists to protect against." *Id.* at 48.

This Court has recognized that incarceration of presumptively innocent citizens is so antithetical to justice that to do so for even one day without sufficient justification requires automatic release. In *Maxian v. Brown*, the Court held that criminal defendants must be arraigned within 24 hours after arrest because "the deprivation entailed by prearraignment detention is very great with the potential to cause serious and lasting personal and economic harm to the detainee." 77 N.Y.2d 422, 427 (1991). The harm caused by unnecessary pretrial detention of defendants whose lawyers are not available in early stages to test the prosecutor's case for pretrial confinement is no less severe and, therefore, no less demanding of constitutional protection.

Several courts have expressly rejected the State's narrow interpretation of the right to counsel. As the Eleventh Circuit held in *Luckey v. Harris*, "[t]he Sixth Amendment protects rights that do not affect the outcome of a trial." 860 F.2d 1012, 1017 (11th Cir. 1988). Similarly, the court in *New York County Lawyers' Ass'n v. State* eight years ago rejected the same limited view the State continues to press here, correctly concluding that "the right to effective assistance of counsel in New York is much more

than the right to an outcome . . . ." 192 Misc. 2d 424, 431 (N.Y. County 2002). In affirming a preliminary injunction to remedy barriers to effective assistance of counsel for battered women in New York City child removal proceedings, the federal district court held that effective assistance could not be judged solely by outcomes, because "the damage to constitutional rights is accomplished in the many months preceding the opportunity for a final judicial disposition." *Nicholson v. Williams*, 203 F. Supp. 2d 153, 254 (E.D.N.Y. 2002).

Irrespective of outcome, the absence of counsel at critical stages and the failure to provide effective assistance places indigent defendants in a compromised position vis-à-vis the power of the State prosecutor and erodes their ability to protect their rights over the course of their encounter with the criminal justice system. As the Massachusetts Supreme Court noted in *Lavallee v. Justices in the Hampden Superior Court*, "[t]here are myriad responsibilities that counsel may be required to undertake that must be completed long before trial if a defendant is to benefit meaningfully from his right to counsel" and when counsel fails to engage these responsibilities, "[t]he harm of inaction over a period of time is cumulative." 442 Mass. 228, 235-36 (2004).

If the right to counsel embodied only a right to be free from wrongful conviction, then the right would be wholly redundant with the due process right to a fair trial established in the Fifth Amendment to the U.S. Constitution and in a separate provision of Article I, § 6 of New York's Constitution, which themselves protect against wrongful convictions through any manner of procedural errors, including errors of counsel. Such a reading cannot be squared with the text of either provision. *See, e.g., TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (noting that it is a "cardinal principle" of textual interpretation "that, if it can be prevented, no clause, sentence or word shall be superfluous, void or insignificant."). So understood, a textual consideration of the fair trial provisions and the distinct right to counsel provisions provides a further basis for rejecting the State's argument.

Thus, as *Rothgery* and the other cases cited above affirm, the right to counsel shields against a broader range of constitutionally cognizable harms than the State acknowledges. Those harms include not only pretrial incarceration, but also missed opportunities for alternatives to incarceration that might avoid prison time and a record of criminal conviction with its lifetime of collateral consequences; excessive bail payments resulting from the failure to advocate for reasonable reductions; denial of access to expert services such as psychiatric examinations or ballistics review that could

support a defense or strengthen a defendant's hand in plea negotiation; and unfavorable plea bargains that expose defendants to more serious consequences – especially collateral consequences – than they might have faced with meaningful assistance of counsel.

The State grounds its narrow view of the right to counsel in *Strickland v. Washington*, 466 U.S. 668 (1984). As the Brief for Appellants set forth in detail at 32-33, however, *Strickland* did not alter or abridge the scope of the right to counsel; it merely clarified the now-familiar two-part legal standard for overturning a conviction on Sixth Amendment grounds.[1] The high bar this stringent test sets for indigent defendants is compelled by the need to preserve the finality of convictions. The Supreme Court itself made this abundantly clear in a recent case, stating:

> In *Strickland* ... we announced a two-part test for evaluating claims that a defendant's counsel performed so incompetently in his or her representation of a defendant that the defendant's sentence or conviction should be reversed. We reasoned that

[1] Even within the context of post-conviction proceedings, *Strickland* does not always govern, and therefore it cannot be read to define the scope of the right to counsel. An exception to *Strickland*'s two-part test was established in *United States v. Cronic*, 466 U.S. 648, 658 (1984), decided the same day as *Strickland*, which held that in certain circumstances *Strickland*'s prejudice-based test does not apply. *See also Bell v. Cone*, 535 U.S. 685, 696 (2002) (holding that no showing of prejudice is required in circumstances "where counsel is called upon to render assistance under circumstances where competent counsel likely could not."). Thus, contrary to the State's contention, there is more to the Sixth Amendment than what is written in the *Strickland* decision. To read that decision as defining the sum and substance of the right to counsel is error.

> there would be a sufficient indication that counsel's assistance was defective enough to undermine confidence in a proceeding's result if the defendant proved two things: first, that counsel's 'representation fell below an objective standard of reasonableness,' 466 U.S. at 688; and second, that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' *id.* at 694. Without proof of both deficient performance and prejudice to the defense, we concluded, it could not be said that the sentence or conviction 'resulted from a breakdown in the adversary process that rendered the result of the proceeding unreliable,' *id.* at 687, and the sentence or conviction should stand.

*Bell v. Cone*, 535 U.S. 685, 695 (2002). The holding of *Rothgery* and the cases cited above illustrate that just because the trial record does not demonstrate that counsel's assistance was "defective enough" to call into question a conviction does not necessarily mean there is no violation of rights at all.

It is one thing to say (as courts admittedly have said) that harms short of wrongful conviction cannot justify vacating an otherwise valid conviction and thus do not, standing alone, state a claim under *Strickland*. Society admittedly has an interest in the finality of convictions and in ensuring that criminals serve sentences for their crimes. But it is quite another thing to say that no other harm created by the absence or ineffective assistance of counsel is constitutionally cognizable. As *Rothgery* and the other cases cited

above confirm, the State's narrow conception of the right to counsel is incorrect.

In its brief to the Court, the State addresses the issue of right-to-counsel violations that result in wrongful pretrial incarceration by arguing that there is no constitutional violation if an unrepresented defendant is remanded to jail without bail when a lawyer's assistance could have secured his release and he spends weeks, or even months, incarcerated, as long as he is eventually appointed an attorney who can file for a bail reduction or bring his case to a defensibly reasonable outcome. Brief for Respondents at 21.

In support of this point, the State argues that there is no right to counsel at arraignments in New York. Brief for Respondents at 21-27. This ignores the fact that Appellants have alleged that critical rights are adjudicated in New York arraignments, such that they are, unequivocally, "critical stages" in which counsel must be provided. As the Supreme Court held in *Rothgery*, anytime critical rights are adjudicated at or after an initial appearance where the right to counsel attaches, counsel must be present. 128 S. Ct. 2578; *see also United States v. Wade*, 388 U.S. 218 (1967) (holding that a critical stage is one where "substantial prejudice to the defendant's right inheres and [there is an] ability of counsel to help avoid that prejudice."). The right to assistance of counsel in these proceedings "is not a 'mere formalism,' but

recognizes the point at which . . . the accused 'finds himself faced with the prosecutorial force of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Rothgery*, 128 S. Ct. at 2583 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)).

The State suggests that *Rothgery* held only that the right to counsel attaches at arraignment, not that there is a right to counsel at arraignment. Brief for Respondents at 25. This is an overly narrow reading of the case. *Rothgery* holds that the initial appearance before a judicial officer signals the onset of a prosecution, such that the right to counsel attaches, irrespective of whether counsel's presence at that initial appearance was critical. 128 S. Ct. at 2591. This Court expressed the same view decades ago in *People v. Settles*, 46 N.Y.2d 154, 165-66 (1978). But *Rothgery* goes on to hold that counsel must thereafter be present "to allow for adequate representation in any critical stage before trial . . . ." 128 S. Ct. at 2591. Thus, when critical rights are adjudicated after the right to counsel attaches – including within the same proceeding that triggered the attachment of the right – the absence of counsel violates the Sixth Amendment.

As this Court has held, "[t]he guiding principle . . . is 'that in addition to counsel's guiding hand at trial, the accused is guaranteed that he need not stand alone against the State *at any stage of the prosecution*, formal or

informal, in court or out'" where counsel's presence would assist in protecting the defendant's rights. *People v. Claudio*, 59 N.Y.2d 556, 561 (1983) (quoting *Wade*, 388 U.S. at 226) (emphasis in original). Consistent with this view, this Court has found that the absence of counsel at arraignment where a guilty plea is entered violates the right to counsel. *People v. Marincic*, 2 N.Y.2d 181 (1957). Thus, Appellants' allegations that indigent defendants are accepting plea bargains and having critical rights adjudicated without the presence of counsel at arraignment clearly states a claim of a violation of the right to counsel, regardless of whether the outcome of the proceeding is a wrongful conviction.[2]

Section 180.10(3) of the Criminal Procedure Law confirms that arraignments in New York are "critical stages," and states expressly that

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[2] The State cites three lower court cases declining to overturn convictions based on the absence of counsel at arraignment where the defendants could not show prejudice to their convictions or that critical rights were otherwise affected. Brief for Respondents at 24 (citing *People v. Green*, 48 A.D.3d 1056 (4th Dep't 2008); *People v. Smith*, 29 A.D.2d 578 (3d Dep't 1967); and *People v. Combs*, 19 A.D.2d 639 (2d Dep't 1963)). These cases are beside the point, because the Amended Complaint alleges that critical rights are affected in arraignments and other initial appearances where counsel is not provided. Am. Compl. ¶¶ 282-98 (R. 270-74). Indeed, in the only one of these three cases that reflects the modern reality of New York arraignment proceedings, in which critical rights are frequently adjudicated, the Fourth Department found no violation of the right to counsel only because the defendant was not incarcerated and the trial judge entered a plea of not guilty on behalf of the defendant, effectively adjourning the proceeding and postponing any adjudication of critical rights until after the appointment of counsel, consistent with New York statutory law and practice. *Green*, 48 A.D.3d at 1057.

there is a right to counsel therein.[3] That the statute mandates adjournment if counsel is not present, CPL § 180.10(3)(a),(c), only highlights the constitutional error of the current system, where, rather than obtaining an adjournment, unrepresented defendants have critical rights adjudicated without the benefit of counsel, converting the initial appearance into a "critical stage," the absence of counsel at which is unquestionably a constitutional violation. *Claudio*, 59 N.Y.2d at 561; *Wade*, 388 U.S. at 226. Thus, taking Appellants' allegations that critical rights are adjudicated at arraignments as true, as the Court must on this motion, *see, e.g.*, *Leon v. Martinez*, 84 N.Y.2d 83, 88 (1994), it is clear that such arraignments are "critical stages" and that absence of counsel therein violates the right to counsel.

## II. The State is Wrong in Asserting That the Amended Complaint Does Not Allege Violations of Individual Rights.

Resting on its narrow, *Strickland*based approach to the right to counsel, the State argues that Appellants have not stated a claim because they have alleged no actual violation of any individual right. Brief for Respondents at 19, 29. In particular, the State characterizes Appellants' claim as premised

[3]Appellants' complaint, although resting primarily on the constitutional right to counsel established in Article I, § 6 and the Sixth Amendment, also invokes New York's statutory right to counsel provisions, including this provision establishing a right to counsel at arraignment. Am. Compl. ¶ 412 (Second Cause of Action) (R. 303).

on a "generalized right to a system of indigent defense services." Brief for Respondents at 17; *see also id.* at 37-39. This argument misconstrues Appellants' claim, which, far from resting on the notion of a right to any particular system, alleges ongoing, actual violations of the individual right to counsel belonging to both the named plaintiffs and to the class of indigent defendants they seek to represent. *See* Brief for Appellants at 4-10 (describing Appellants' allegations of ongoing violations of indigent criminal defendants' rights, including the named plaintiffs, and specifically highlighting the violation of James Adams, Lane Loyzelle, and Kimberly Hurrell-Harring's rights).

As an initial matter, in accusing Appellants of failing to allege the violation of any actual rights, the State erroneously fails to take Appellants' well-pled allegations as true, an inappropriate tactic on a motion to dismiss. *See, e.g.*, *Leon*, 84 N.Y.2d at 88; *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005). For example, the State suggests that Appellants should have introduced evidence regarding "an alarmingly high or steadily increasing rate of convictions overturned for denials of the right to counsel." Brief for Appellants at 33. The State also inappropriately criticizes other "evidence," characterizing the Kaye Commission Report, which was incorporated into the Amended Complaint, as "hearsay," Brief for

Respondents at 32, and as merely "a work of advocacy." Brief for Respondents at 33. But Appellants have not produced any "evidence" yet, so questions of which evidence Appellants have introduced, the weight accorded to any evidence, and whether any document constitutes admissible evidence, are simply irrelevant at this stage. The sole question is whether the allegations, taken as true and with all reasonable inferences drawn in Appellants' favor, state a claim.

Appellants' extensive allegations plainly do state a claim, describing rampant, ongoing violations of the right to counsel. Those violations fall into two categories: the outright denial of counsel in critical stages to the named plaintiffs and other indigent defendants, including critical-stage arraignments where, because critical rights are adjudicated, the right to counsel unquestionably applies; and the failure to provide meaningful and effective assistance of counsel throughout the criminal prosecution.

The Amended Complaint outlines three ways in which the named plaintiffs and many others of New York's indigent criminal defendants have been left to fend for themselves during critical stages without attorneys. First, public defense attorneys often are not present at critical initial stages, such as arraignments, leaving indigent defendants unrepresented in proceedings where bail is set and plea bargains are offered and entered in the

absence of counsel.[4] Second, indigent criminal defendants charged with low-level offenses are sometimes denied attorneys, in plain violation of the right to counsel.[5] Finally, excessively restrictive eligibility standards operate to deny the right to counsel to indigent criminal defendants who should qualify for assistance.[6]

Other than to dispute that indigent defendants are entitled to be represented when a court remands them to jail, sets bail, or even enters a guilty plea, arguments dispensed of in Part I, *supra*, the State's only response to these allegations is to challenge the allegation of causation between the systemic failings of the public defense system and the absence of counsel at arraignment. Brief for Respondents at 22 (asserting that the absence of counsel at arraignment is "uniquely unconnected to the policies of either the State or the Counties, or the particular institutional arrangements plaintiffs challenge."). Here again, the State's failure to accept Appellants' allegations as true is in error on this motion to dismiss. *See, e.g.*, *Leon*, 84 N.Y.2d at 88. As the Court held in *Campaign for Fiscal*

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[4] Am. Compl. ¶¶ 282-98 (R. 270-74) (general allegations); Am. Compl. ¶¶ 41, 66, 93, 116, 132, 149, 165, 223 (R. 41, 219, 225, 230, 233, 237, 241, 254) (individual named plaintiffs).

[5] Am. Compl. ¶¶ 292-94 (R. 273) (general allegations); Am. Compl. ¶¶139-146 (R. 235-237) (individual named plaintiff).

[6] Am. Compl. ¶¶ 299-316 (R. 274-78) (general allegations); Am. Compl. ¶¶139-146 (R. 235-237) (individual named plaintiff).

*Equity, Inc. v. State (CFE I)*, questions of correlation between systemic State failures and constitutional violations are crucial in evaluating claims for prospective relief, but discussion of them on a motion to dismiss is "premature given the procedural context." 86 N.Y.2d 307, 318 (1995).

In addition, the Amended Complaint describes patterns of representation showing that the named plaintiffs and other indigent defendants are being denied their right to meaningful and effective assistance of counsel. As the Brief for Appellants outlines at 4-10, the named plaintiffs and other indigent defendants are denied expert and investigative services that are essential to their defense;[7] their attorneys do not adequately communicate with them, failing to maintain minimal contacts or return desperate phone calls and letters from clients and their families, leaving clients to languish in jail;[8] their attorneys fail to engage in any preparing motions, prompting some named plaintiffs and indigent defendants to file their own, *pro se* motions, the success of which highlights

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[7] Am. Compl. ¶¶ 346-56 (R. 286-89); Kaye Commission Report at 26-29, 33 (R. 164-67) (general allegations); *id.* ¶¶ 46, 62, 74-75, 81, 95, 111, 118, 127, 135, 152, 170, 182, 201, 209, 217, 227 (R. 215, 218-219, 221, 222, 225, 229, 231, 232, 234, 238, 242, 245, 249, 253, 255) (individual named plaintiffs).

[8] Am. Compl. ¶¶ 317-329 (R. 278-82) (general allegations); *id.* ¶¶ 42, 50-54, 56, 59, 67-68, 71-72, 79, 83, 94, 97, 106, 109-10, 117-19, 123-25, 128, 133, 161, 167, 175-76, 188-91, 200, 206-08, 216, 225, 232-33 (R. 214, 216-223, 225, 226, 228-229, 230-231, 232, 234, 240, 241, 243, 246-247, 249, 250-251, 253, 254-255, 256) (individual named plaintiffs).

the ineffectiveness of counsel;[9] their attorneys waive critical rights without their clients' informed consent, and often to the detriment of their clients' interests;[10] they are pressured to take inappropriate plea bargains that are not in their best interests;[11] and they are often appointed counsel with conflicts.[12] In sum, "substandard practice has become the norm." Am. Compl. ¶ 331 (R. 282).

Thus, Appellants do not rest on an assertion of some generalized right to a particular public defense system. Brief for Respondents at 17, 37-39. To the contrary, the Amended Complaint alleges specific violations of the individual right to counsel of both the named plaintiffs and the class they seek to represent. Nor do Appellants merely allege that they are at "risk" of denial of their right to counsel. Brief for Respondents at 16. Appellants allege that their rights – and the rights of the class – have been and are being violated. The "risk" or "probability" element of Appellants' legal claims relates not to the question of whether their rights are being violated, but

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[9] Am. Compl. ¶¶ 55, 84 (R. 217, 223) (individual named plaintiffs).

[10] Am. Compl. ¶¶ 53, 69, 81-82, 108, 125, 160-61, 166, 177, 224 (R. 216-217, 220, 222-223, 228, 232, 240, 241, 244, 254) (individual named plaintiffs).

[11] Am. Compl. ¶¶ 321, 325-26, 360, 363-64 (R. 280-81, 290-91) (general allegations); *id.* ¶¶ 44-45, 136, 153, 161, 169, 178, 183 (R. 214-215, 234, 238, 240, 242, 244, 245) (individual named plaintiffs).

[12] Am. Compl. ¶¶ 372-381 (R. 293-96) (general allegations); *id.* ¶ 88 (R. 220) (individual plaintiff).

whether they are entitled to prospective, systemic relief to prevent future deprivations of the right to counsel. Those deprivations include further deprivations of the named plaintiffs' own rights as well as the ongoing and future deprivations of the rights of the class of indigent criminal defendants they seek to represent. *See* Brief for Appellants at 21-32.

## III. The State is Wrong in Asserting That Prospective Injunctive Relief Is Not Available to Remedy Violations of the Right to Counsel.

Again premised on its incorrect, *Strickland*-centered interpretation of the scope of the right to counsel, the State argues that the right "does not lend itself to vindication by a class action or declaratory judgment seeking institutional reform" and may only "be vindicated in the context of the criminal proceeding itself." Brief for Respondents at 17. But this assertion is contrary to the holding and the outcome of *Rothgery*, 128 S. Ct. 2578, in which the Supreme Court affirmed the validity of a claim seeking to enforce the right to counsel outside the context of the criminal proceeding, in a Section 1983 action for damages. It is also inconsistent with the weight of authority from New York and other jurisdictions that persuasively holds that prospective remedies are available to vindicate the right to counsel, a holding consistent with this Court's long history of recognizing the availability of systemic, prospective relief for ongoing constitutional

violations. Full enforcement of the constitutional guarantee of meaningful and effective assistance of counsel at all critical stages requires the availability of prospective relief because post-conviction relief – in particular, relief confined to the criminal proceeding itself – does not provide an adequate remedy for many deprivations of the right to counsel and cannot remedy the systemic and widespread deprivations alleged in the Amended Complaint.

### A. The State is Wrong in Arguing That a Right-to-Counsel Claim Cannot Be Premised on Systemic Failures.

In the State's view, the right to counsel is enforceable only as a challenge to an outcome of a particular criminal proceeding. Brief for Respondent at 17. This limitation on remedies has no basis in law. In fact, the Supreme Court's recent ruling in favor of the plaintiff in *Rothgery* dispels this notion, as it was a civil action under 42 U.S.C. § 1983 seeking damages for the violation of the right to counsel brought by a person whose criminal charges were dismissed. 128 S. Ct. at 2582. Thus, it cannot be that the right to counsel is enforceable only within a criminal proceeding.[13]

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[13] The State's attempt to analogize the right to counsel to the right to speedy trial is flawed. Brief for Respondents at 46-47. The two rights cannot be compared. As the Supreme Court has held, the right to counsel "is generically different from any of the other rights enshrined in the Constitution for the protection of the accused." *Barker v. Wingo*, 407 U.S. 514, 519 (1972); *see also id.* at 529 (holding that the speedy trial right is simply "unique in its uncertainty as to when and under what circumstances it must be (continued...)

In fact, as other courts have recognized, prospective, systemic relief is available to remedy violations of the right to counsel. *See New York County Lawyers' Ass'n v. State*, 294 A.D.2d 69 (1st Dep't 2002); *Luckey v. Harris*, 860 F.2d 1012 (1988); *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002); *Wallace v. Kern*, 392 F. Supp. 834 (E.D.N.Y. 1973); *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass. 228 (2004); *State v. Peart*, 621 So. 2d 780 (La. 1993); *State v. Smith*, 681 P.2d 1374 (Ariz. 1984); *Duncan v. Michigan*, 774 N.W.2d 89 (Mich. App. 2009); *Best v. Grant County*, No. 04-2-00189 (Wash. Sup. Ct. Oct. 14, 2005); *White v. Martz*, No. CDV-2002-133 (Mont. Dist. Ct. July 25, 2002); *Rivera v.*

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asserted."). In particular, the fact that "deprivation of the right may work to the accused's advantage" makes the speedy trial right "unlike the right to counsel" and other Sixth Amendment rights. *Id.* at 521. This distinction makes a critical difference, because it is the possibility that deprivations of the speedy trial right may be attributable to or even advantageous to the defendant that makes ex ante consideration of the unconstitutional nature of any delay impossible. *Id.* Not so with the right to counsel; there are no circumstances in which deprivations of that right could work to the advantage of the defendant, and therefore no barrier to ex ante determination of whether a deprivation is unconstitutional.

The second reason that the rights cannot be compared is that "the right to speedy trial is a more vague concept than other procedural rights" like the right to counsel. *Id.* at 521. The determination of how long is too long for purposes of assessing the speedy trial right is so "amorphous" that it "necessitates a functional analysis of the right in the particular context of the case." *Id.* at 522. In this sense, as the Supreme Court noted, "[t]here is nothing comparable to the point in the process when a defendant exercises or waives his right to counsel." *Id.* Indeed, as elaborated upon in the discussion of justiciability in Part IV, *infra*, there is nothing amorphous about the well-established standards for evaluating violations of the right to counsel.

*Rowland*, No. CV 950545629S, 1996 WL 636475 (Conn. Sup. Ct. Oct. 23, 1996), discussed in Brief for Appellants at 21-28.

These cases are consistent with this Court's long-standing recognition of the viability of claims for prospective relief from systemic failures that cause deprivations of constitutional rights. This Court approved of such relief for deprivations of the right to a sound basic education in *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893 (2003), the constitutional right to adequate shelter and support for the needy in *Jiggets v. Grinker*, 75 N.Y.2d 411 (1990), and the statutory right to mental health services in *Klostermann v. Cuomo*, 61 N.Y.2d 525 (1984). In all of these cases, the entitlement to prospective relief was established by allegations of existing legal infirmity, caused by systemic deficiencies which were likely to cause ongoing violations of individual rights.

The State urges the Court to reject these cases in favor of a minority view represented by one federal case and two state cases, one of which has been overturned. Brief for Respondents at 40-43 (citing *Gardner v. Luckey*, 500 F.2d 712 (5th Cir. 1974); *Platt v. State of Indiana*, 664 N.E.2d 357 (Ind. Ct. App. 1996); and *Machado v. Leahy*, No. BRCV200200514, 2004 WL

233335 (Mass. Super. Ct. Jan. 3, 2004), *overturned by Lavallee*, 442 Mass. at 230).[14]

These cases are not persuasive. They are incorrectly premised on the need to show *Strickland*-based prejudice to establish a right to counsel claim. *See Platt*, 664 N.E.2d at 363; *Gardner*, 500 F.2d at 714. And, as discussed more fully below, they wrongly conclude that post-conviction relief is an adequate alternative remedy. *See Platt*, 664 N.E.2d at 363; *Gardner*, 500 F.2d at 713; *Machado*, 2004 WL 233335 at *7. The Court should reject the State's unpersuasive authorities and recognize the majority rule that the right to counsel may be enforced prospectively to obtain relief from violations of the right to counsel caused by systemic failures.

### B. The State is Wrong in Arguing that Post-Conviction Remedies Provide an Adequate Remedy for Violations of the Right to Counsel.

[14] The State also cites *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996), but this case supports Appellants' position. *Kennedy* recognizes that a claim for prospective, systemic relief may be properly stated, 544 N.W.2d at 6 (citing *State v. Smith,* 681 P.2d 1374 (Ariz. 1984); *State v. Peart*, 621 So. 2d 780 (La. 1993); and *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988)), but held for the state on summary judgment because public defender-plaintiff in that case rested solely on evidence of high caseloads, and had not established that he or any of his colleagues was providing, or that any of their clients were "actually receiving ineffective assistance of counsel or that their Sixth Amendment rights have been violated in any identifiable way." 544 N.W.2d at 6. Here, like the plaintiffs *Smith*, *Peart*, and *Luckey*, Appellants have alleged actual violations of their rights.

The State urges the Court to adopt its limited view of the right to counsel on the grounds that post-conviction remedies "provide[] adequate opportunity for criminal defendants to vindicate their right to counsel." Brief for Respondents at 58. But post-conviction review can address only deprivations of the right to counsel that cause wrongful convictions; it leaves no remedy for violations of the right that cause harm short of that outcome. Moreover, the systemic defects of the public defense system mean that, as a practical matter, post-conviction review almost never in fact occurs and, therefore, cannot adequately remedy violations of the right to counsel. Even if such review did occur, it is neither reasonable nor logical to expect a system that failed to furnish adequate assistance before conviction to do so after conviction. Finally, post-hoc review of a record tainted by ineffective assistance cannot uncover, and therefore cannot remedy, many instances of violations of the right to counsel that have serious consequences, including potential wrongful convictions. For these reasons, post-conviction review is not an adequate remedy.

*1. Post-Conviction Relief Cannot Remedy Serious Violations of the Right to Counsel that Do Not Result in Wrongful Conviction.*

As argued in the Brief for Appellants at 36-38 and in Part I, *supra*, if post-conviction relief within the context of a criminal proceeding is the only

remedy available for violations of the right to counsel, then myriad harms caused by violations of the right cannot be remedied. To say that unnecessary imprisonment, excessive sentences, uncounseled waiver of pretrial hearing rights, and excessive bail are not constitutionally cognizable harms is callous and legally incorrect.

Post-conviction relief in the context of the criminal proceeding, therefore, is an adequate remedy only for those defendants who have a case for wrongful conviction, because only those individuals could ever be in a position to demonstrate that ineffective assistance of counsel resulted in an erroneous outcome.[15] The right to counsel does not belong solely to this narrow class of people. The State's view leaves no remedy for innocent citizens caught up in the criminal justice system who are actually acquitted or whose charges are dropped, and no remedy for those unfortunate citizens whose guilt of the crime charged is undeniable and unmitigated. *See* Brief for Appellants at 37-39.

### 2. *The Systemic Deficiencies Alleged in the Complaint Render Post-Conviction Relief an Inadequate Remedy for Violations of the Right to Counsel.*

[15] *See* Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. Crim. L. & Criminology 242, 278 (1997).

As discussed in the Brief for Appellants at 39-41, the systemic deficiencies that cause deprivations of the right at the trial level ensure that, as a practical matter, post-conviction relief cannot redress the vast majority of deprivations of the right to counsel.

Most importantly, the inadequacies of trial counsel mean that, as a practical matter, post-conviction relief never occurs in New York. Because of ineffective assistance, indigent defendants routinely waive their right to appeal and post-conviction proceedings, thus foreclosing this avenue of relief. Am. Compl. ¶ 364 (R. 290-91). They are pressured to take these pleas by overburdened, under-trained attorneys who have not adequately consulted with their clients or performed any independent investigation into the charges. Am. Compl. ¶¶ 321, 325-26, 360-64 (R. 280-81, 290-91). Many defendants accept these pleas because they have been wrongly incarcerated for prolonged periods, making acceptance of an unfavorable plea their only avenue to release. *See, e.g.,* Am. Compl. ¶¶ 44, 136 (R. 214, 234) (relating how Appellants Kimberly Hurrell-Harring and Bruce Washington felt pressured to accept plea agreements because it appeared to be their only opportunity to be released from jail).

As a result, the rate of appeals by public defense attorneys in the Counties is low – hovering around one percent. Am. Compl. ¶ 364 (R. 290-

291). This statistic, which was derived from annual reporting to the Office of Court Administration, includes appeals on any grounds, not just ineffective assistance. The State dubiously speculates – with no citation to any authority – that "criminal defendants acting pro se routinely raise claims of ineffective assistance of counsel in post-conviction proceedings." Brief for Respondent at 59. In fact, for the same reasons that appeal rates are low, CPL § 440 motions raising ineffective assistance claims likely are low as well, an issue Appellants understand proposed *amicus curiae* will address. In short, courts are rarely given the opportunity to remedy right-to-counsel violations in post-conviction proceedings, rendering impossible meaningful redress via such mechanisms.[16]

Even if it were true that indigent defendants were asserting their rights in post-conviction proceedings, they do not receive effective assistance of counsel in those proceedings, rendering the possibility of effective relief extremely unlikely. Obtaining effective relief after conviction depends on assistance of counsel from New York's public defense lawyers, no less so

[16] The State argues that the low rate of appeals and CPL § 440 motions occurs because criminal defendants choose not to exercise their rights. Brief for Respondent at 59. Here again, however, the State fails to accept Appellants' allegations as true. Appellants allege that the high rate of waivers is the result of a broken system in which overburdened, under-resourced, and ill-trained attorneys are pressured to dispose of cases quickly at the expense of their clients' interests. Am. Compl. ¶ 364 (R. 290-91). The State is not is a position to dispute this at this stage. *See Leon*, 84 N.Y.2d at 88.

than at trial. But indigent criminal defendants are no better served by counsel in post-conviction proceedings than they are at earlier stages, rendering those proceedings "a meaningless ritual," as the Supreme Court recognized in affirming the right to counsel on appeal in *Douglas v. California*, 372 U.S. 353, 358 (1963). Post-conviction review may be adequate to remedy some of the inevitable, unpreventable errors within an otherwise normally functioning public defense system. But when the entire system operates to render the provision of effective assistance nearly impossible, as the Amended Complaint alleges,[17] post-conviction remedies alone are no remedy at all.

*3. Post-Conviction Relief Cannot Identify, and Therefore Cannot Remedy, Many Injuries Resulting From Ineffective Assistance of Counsel, Including Some Wrongful Convictions.*

Post-conviction review cannot reveal many instances of harm to defendants' interests that result from the absence of counsel at critical stages and ineffective assistance. The cumulative detrimental effects of deprivations of the right to counsel are disguised because the trial record will

[17] The State claims that Appellants "do not allege any widespread ineffectiveness in the Counties on the part of assigned appellate counsel." Brief for Respondent at 59. More to the point, Appellants allege that indigent defendants are rarely assigned appellate counsel because they rarely are able to exercise their right to appeal. Even so, the Amended Complaint's allegations relate to all public defense service providers in the Counties, and do not distinguish between those who represent indigent defendants at trial and those who do so on appeal.

be necessarily limited by defense counsel's absences and failures. Justice Marshall identified this problem in *Strickland*, noting that:

> It is often very difficult to tell whether a defendant convicted after a trial in which he was ineffectively represented would have fared better if his lawyer had been competent. Seemingly impregnable cases can sometimes be dismantled by good defense counsel. On the basis of a cold record, it may be impossible for a reviewing court confidently to ascertain how the government's evidence and arguments would have stood up against rebuttal and cross-examination by a shrewd, well-prepared lawyer. The difficulties of estimating prejudice after the fact are exacerbated by the possibility that evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel.

*Strickland*, 466 U.S. at 710 (Marshall, J., dissenting) (footnote omitted). This logic applies with equal force to plea-bargain outcomes. On the basis of a record tainted by ineffective assistance, it is impossible to know whether an attorney who had conducted an investigation, consulted fully with his client, or engaged in pretrial motion practice would have been able to obtain a plea to a lesser charge or avoid a guilty plea altogether. Throughout the adversarial process, the strength or weakness of public defense attorneys' advocacy impacts not only the outcome, but an appellate reviewer's capacity to assess the fairness of that outcome. Thus, relying solely on post-conviction review ensures that some wrongful convictions caused by ineffective assistance will not be remedied.

## IV. The State is Wrong in Asserting That This Claim is Nonjusticiable.

The State's nonjusticiability arguments do little to correct for the doctrine's reputation for being "untidy." *Jiggets v. Grinker*, 75 N.Y.2d 411, 415 (1990). Nonetheless, its claims appear to raise three distinct notions: first, that Appellants have alleged only a "generalized grievance" as opposed to specific constitutional injury, a claim dispensed with in Parts I & II, *supra*; second, that adjudication of Appellants' constitutional rights violates the separation of powers, a notion that rests on the erroneous conclusion that this constitutional claim is different from the constitutional claims this Court has adjudicated in the past; and, third, that Appellants' claims are moot. This latter claim, asserted with almost no discussion of relevant legal authority, fails to account for this Court's well-established exception to the mootness doctrine for cases raising significant legal issues that are capable of repetition but evading review.

### A. Recognizing Appellants' Claim Would Not Violate the Separation of Powers.

The State argues that adjudication of Appellants' claim "would violate separation of powers principles." Brief for Respondents at 31. Although its rationale is not always clear, the State's position appears to be premised on the mistaken notion, refuted in Parts I and II, *supra*, that Appellants present

a claim to an alternative system of providing public defense services. *Id.* at 31-33. To the contrary, adjudication of this case, which presents claims based on violations of the individual right to counsel, is a straightforward exercise of constitutional interpretation and enforcement – the core of the judiciary's function. It does not unduly interfere with any legislative prerogative. As argued in Brief for Appellants at 49-57, this case is indistinguishable from *Klostermann v. Cuomo*, 61 N.Y.2d 535 (1984); *CFE I*, 86 N.Y.2d 307 (1995), and a long line of cases from this Court clearly establishing that claims for prospective relief from constitutional violations are justiciable controversies that do not inappropriately tread on the prerogatives of the political branches. When a constitutional or statutory right places an obligation on the State – as the right to counsel obliges the State to ensure the provision of meaningful and effective assistance of counsel at all critical stages – enforcement of that mandate is the proper task of the judiciary.

The State's attempt to distinguish *CFE* is unpersuasive, suggesting the right to education is uniquely justiciable because "New York's Constitution imposes express responsibility on the State to maintain a 'system' of free public education. It contains no similar provision requiring it to maintain a system of indigent defense counsel." Brief for Respondent at 37. This

misreads *CFE*, creating an artificial distinction between the right to a sound basic education and the right to counsel. The question in *CFE* was whether the State was fulfilling its "duty . . . to ensure the availability of a sound basic education to all the children of the State." *CFE I*, 86 N.Y.2d at 315. In this case, the question is whether the State is fulfilling its duty to ensure the availability of meaningful and effective assistance of counsel at all critical stages to the indigent criminal defendants of the State. The constitutional issue presented in *CFE* was no different, and therefore no more or less justiciable, than the constitutional issue presented here.

The notion that some uniquely "systemic" aspect of the right to a sound basic education motivated the Court's ruling on the justiciability question appears nowhere in the *CFE* decision. Indeed, the State's argument is puzzling given that it is precisely the individual nature of these rights – and the Judiciary's obligation to secure those rights against state intrusion – that creates a justiciable controversy. *See Klostermann*, 61 N.Y.2d at 535 (noting that the claim was justiciable because adjudication involved the "mere declaration and enforcement of the individual's rights that have already been conferred"). Indeed, it cannot be that the justiciability of the controversy in *CFE* turned on the uniquely "systemic" nature of the education right, since this Court has affirmed the justiciability of claims

based on the enforcement of mandatory legal standards in other individual-rights contexts as well. *See, e.g., Klostermann*, 61 N.Y.2d at 535; *Jiggets v. Grinker*, 75 N.Y.2d 411, 415-16 (1990); *McCain v. Koch*, 70 N.Y.2d 109, 119-20 (1987).

The State attempts to distinguish these cases by arguing that "none . . . required the Judiciary to evaluate the adequacy of a system for providing service in the absence of a standard established by the Constitution, statute or regulation." Brief for Respondents at 34-35. But neither does this case. The standard by which to evaluate whether the failures of the public defense system are causing deprivations of the right to counsel is established by Article I, § 6 and the Sixth Amendment. This is no different from *Klostermann*, where plaintiffs sought enforcement of a constitutional mandate that the State provide treatment for mentally ill citizens "under the least restrictive conditions suitable to plaintiffs' needs." 61 N.Y.2d at 533. Likewise, in *CFE*, the Court enforced a constitutional mandate to provide a "sound basic education." *See CFE II*, 100 N.Y.2d at 905-08. These constitutional obligations are no more inherently justiciable than the obligation to provide meaningful and effective assistance of counsel at all critical stages.

Indeed, this suit presents much more specific standards for the judiciary to apply, as the Court has decades of right-to-counsel jurisprudence upon which to draw in determining the appropriate standards. Although much of this jurisprudence arises from individual claims, certain principles emerge from this body of law – such as the necessity of attorneys at arraignments where critical rights are adjudicated, Brief for Appellants at 16-17 (citing cases); the importance of the provision of a qualified, properly trained attorney capable of mounting a defense, Brief for Appellants at 17 n.3 (citing cases); the need to afford attorneys sufficient time to devote to their clients, which is made impossible by overwhelming workloads, Brief for Appellants at 18 n.4 (citing cases); the importance of meaningful attorney-client communication, Brief for Appellants at 18 n.5 (citing cases); and the need to provide access to expert and investigatory resources. Brief for Appellants at 18 n.6 (citing cases).

In addition to this well-established body of case law, Appellants have grounded their specific allegations in well-accepted national and state standards for evaluating the constitutional adequacy of a public defense system. Am. Compl. ¶¶ 278-80 (R. 269). These standards reflect a national consensus on the definition of "meaningful and effective assistance" and the

requirements of public defense delivery systems. Each of the allegations of the Amended Complaint expressly references these standards.[18]

This Court frequently uses professional standards as guides to evaluating right to counsel claims.[19] The Supreme Court, likewise, routinely uses national standards to aid in assessing Sixth Amendment claims.[20]

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[18] *See* Am. Compl. ¶ 284 (R. 270-271) (failure to provide attorneys at critical stages); ¶ 301 (274-275) (incoherent and excessively restrictive eligibility standards); ¶ 302 (R. 275) (delays after arraignment in appointment of counsel); ¶ 319 (R. 279) (lack of sufficient or meaningful attorney-client communication); ¶ 332 (R. 282-283) (sufficient hiring criteria); ¶ 333 (R. 283) (performance standards and supervisory controls); ¶ 345 (R. 286) (mandatory training programs); ¶ 348 (R. 287) (adequate support staff, including investigators, and conducting investigations where appropriate); ¶ 349 (R. 287-288) (provision of expert services where appropriate); ¶ 365 (R. 291) (caseload management); ¶ 368 (R. 292) (continuous representation); ¶ 375 (R. 293-294) (professional and political independence); ¶¶ 383-85 (R. 297-297) (adequate compensation).

[19] *See, e.g., Settles*, 46 N.Y.2d at 164 (citing the ABA Code of Professional Responsibility to determine when the right attaches); *People v. Medina*, 44 N.Y.2d 199, 208 (1978) (citing the ABA Code to determining whether there is good cause to replace a counsel for cause); *People v. Bennett*, 29 N.Y.2d 462, 466-67 (1972) (citing ABA standards for the proposition that counsel must conduct adequate investigations); *People v. Henriquez*, 3 N.Y.3d 210, 226-27 (2004) (Smith, J., dissenting) (citing ABA standards as a benchmark for evaluating effective assistance of counsel).

[20] *See, e.g., Bobby v. Van Hook*, --- U.S. ---, 130 S. Ct. 13, 16-17 (Nov. 9, 2009) (endorsing the use of existing professional practice standards as guides (but not "inexorable commands") to assessing right to counsel claims); *Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (citing ABA standards to criticize an attorney's failure to properly investigate and noting that the ABA standards describe the obligations of defense counsel "in terms no one could misunderstand"); *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003) (re-emphasizing the appropriateness of *Strickland*'s reliance on ABA standards and looking to ABA standards to find scope of counsel's investigation into mitigating factors for death penalty sentencing phase inadequate); *Roe v. Flores-Ortega*, 528 U.S. 470, 490 (2000) (Souter, J., dissenting) (citing ABA standards on defense counsel's duty to consult with client and endorsing the use of standards to evaluate ineffective assistance cases); *Strickland*, 466 U.S. at 688 (holding that "prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for Criminal (continued...)

Unsurprisingly, therefore, national and state standards have also been used by courts considering public defense reform litigation to determine whether violations of the right to counsel can be attributed to systemic deficiencies. *See, e.g., New York County Lawyers' Ass'n v. State*,, 196 Misc.2d 761, 775 (N.Y.Sup. 2003); *State v. Peart*, 621 So. 2d 780 (La. 1993); *State v. Smith*, 681 P.2d 1374 (Ariz. 1984); *Wallace*, 392 F. Supp. at 847 ("Comparing the level of representation now provided by The Legal Aid Society with the American Bar Association Standards, it becomes evident that the overburdened, fragmented system used by Legal Aid does not measure up to the constitutionally required level.").

Thus, even more so than in *Klostermann*, *CFE*, or the other previous cases in which the Court has recognized the justiciability of similar claims, the judiciary here has ample, explicit, and well-grounded "measuring sticks" for evaluating Appellants' claim that systemic deficiencies are causing the violation of indigent criminal defendants' right to counsel in New York.

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Justice 4-1.1 to 4-8.6 (2d ed. 1980) ('The Defense Function') are guides to determining what is reasonable" attorney performance for purposes of the Sixth Amendment); *see also Grenier v. Wells*, 417 F.3d 305, 321 (2d Cir. 2005) ("Norms of practice, reflected in national standards like the American Bar Association (ABA) Standards for Criminal Justice, are useful guides for evaluating reasonableness. The Supreme Court has frequently cited the ABA Standards in its decisions evaluating the constitutional sufficiency of defense counsel's investigations.") (internal citations omitted).

The State's argument that this claim is somehow nonjusticiable because the Court might find it difficult to define the scope of the right to counsel should, therefore, be rejected.

The State also suggests that Appellants' claim is nonjusticiable because they seek to dictate which system the political branches choose to distribute public defense services. Brief for Respondents at 38. This is not the case. Appellants do not ask the Court to second-guess the judgment of the legislature regarding which system of providing public defense services is optimal. Appellants ask the Court to apply well-established constitutional standards to find that there are ongoing violations of indigent criminal defendants' right to counsel and order the State to remedy the causes of those violations. It may well be, as the State suggests, that New York "could fulfill its constitutional responsibility on an entirely ad hoc basis through pro bono assignments." *Id.* But there can be no question but that the state must fulfill its constitutional responsibility and that Appellants allege it is not doing so.

The State further suggests that the Court should foreclose prospective relief from violations of the constitutional right to counsel out of deference to the "Legislature's judgment as to the proper vehicle for review of right to counsel claims" – i.e., "post-conviction review." Brief for Respondents at

36. But the legislature has no role in determining what relief is available for constitutional violations. *See, e.g. Hamdi v. Rumsfeld*, 542 U.S. 507, 536-537 (2004); *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997). That is the province of this Court.

### B. Appellants' Claims Are Not Moot.

The State suggests in an aside that Appellants' claims are moot because their "criminal cases have concluded before the resolution of this case." Brief for Respondents at 28. Beyond the fact that this claim is raised for the first time on appeal, the State cites no New York law supporting this proposition.[21] In fact, the State's position is rebuffed by decades of Court of Appeals case law detailing established exceptions to the mootness doctrine when, as here, the claims of the individual plaintiffs touch on issues of substantial public importance and repeatedly occur yet would evade ultimate review under a narrow reading of the mootness doctrine. *See, e.g., Friends of Pine Bush v. Planning Bd. of Albany*, 59 N.Y.2d 849, 851 (1983); *Hearst*

[21] The only case the State does cite is *O'Shea v. Littleton*, 414 U.S. 488 (1974). That case is a standing case, not a mootness case, and is, therefore, wholly inapplicable. *O'Shea* merely holds that plaintiffs who never had standing to challenge a government practice cannot bring a class claim challenging that practice. 414 U.S. at 495-96. The State does not – and cannot – deny that the named plaintiffs had standing to bring this claim at the time the Complaint was filed, when all of them unquestionably had active criminal cases in which they were represented, or were entitled to be represented, by public defense attorneys. Am. Compl. ¶¶ 16-35 (R. 209-212). *O'Shea* does not speak to the possible mootness of claims of plaintiffs who once did have standing, or to the well-established exceptions to that mootness doctrine under New York law.

*Corp. v. Clyne*, 50 N.Y.2d 707, 713-714 (1980); *Beattie v. New York State Bd. of Parole*, 39 N.Y.2d 445, 446 (1976); *Bell v. Waterfront Com. of New York Harbor*, 20 N.Y.2d 54, 61 (1967); *Matter of Plumbing Assn. v. Thruway Auth.*, 5 N.Y.2d 420, 422 n.1 (1959). In *Beattie*, the Court did not dismiss as moot a claim challenging the failure to provide a timely parole revocation hearing even though the charges against that named plaintiff had been dismissed. Likewise here, Appellants' claims challenging violations of the right to counsel are not moot even if their charges have been resolved.

## V. The State is Wrong in Suggesting that this Case Will So Interfere With Ongoing Criminal Proceedings As To Require Dismissal.

The State argues that Appellants cannot "use collateral civil proceedings to prevent a violation of a criminal trial right" because they would "interfere with ongoing criminal proceedings." Brief for Respondent at 49. Specifically, the State speculates that discovery in this case could interfere with ongoing criminal proceedings, *id.* at 54, and that a ruling in this case might inspire future criminal proceedings challenging the named Plaintiffs and other indigent defendants' convictions. *Id.* Neither of these concerns is a valid basis for abstaining from consideration of a constitutional claim. The State should face a high burden to show a specific, actual danger to the sanctity of the criminal process sufficient to foreclose a remedy for constitutional violations, particularly when there do not exist adequate

alternative avenues for relief. *See* Brief for Appellants at 35-42; Part III.B., *supra*. It has not met that burden.

### A. Speculation that Discovery in This Action Might Affect Ongoing Criminal Proceedings is Not Grounds for Abstention.

The State argues that discovery into the representation received by the named plaintiffs would be "deeply disruptive of the underlying criminal proceedings." Brief for Respondents at 54. The State is in no position to make this argument when, at the same time, it argues to the Court that the named plaintiffs' criminal proceedings have terminated. Brief for Respondents at 28. The State attempts to sidestep the issue of the termination or eventual termination of the named plaintiffs' proceedings by suggesting that, should this case continue, Appellants would be required to amend the complaint to add new plaintiffs who presently face criminal charges because the named plaintiffs' claims would be moot. Brief for Respondents at 52. This is not the case. Appellants will not need to amend their Complaint because of the well-established exceptions to the mootness doctrine in this Court's jurisprudence. *See* Part IV.B., *supra*.

In any case, the State's assertion that discovery could interfere with ongoing criminal proceedings is mere speculation. It has cited no actual ongoing proceeding with which to interfere, and has presented no actual

scenario for interference therein. The State does not explain how depositions of public defense attorneys or other discovery regarding the representation received by the named plaintiffs or any other indigent defendant would affect ongoing criminal proceedings in so dramatic a manner as to require dismissal of this action.

Even if there were a plausible scenario for some interference, the nature of that purported potential interference presents a weak case for abstention since it bears no relationship to the type of disruption of criminal proceedings at issue in the cases cited by the State. Those cases – *Rush v. Mordue*, 68 N.Y.2d 348 (1986); *State v. King*, 36 N.Y.2d 59 (1975); *Lipari v. Owens*, 70 N.Y.2d 731 (1987); *Patel v. Breslin*, 45 A.D.3d 1240 (3d Dep't 2007); *Veloz v. Rothwax*, 65 N.Y.2d 902 (1985); *Morganthau v. Erlbaum*, 59 N.Y.2d 143 (1983) – stand for the proposition that criminal defendants may not attack the rulings of judges presiding in their cases by means of a collateral civil proceeding. Appellants do not seek a collateral writ of prohibition or a declaratory judgment in the nature of prohibition against the action of a judge presiding over a criminal case. And the prospect of discovery into the representation being provided in the Counties does not threaten to disrupt or undermine any judicial ruling in any criminal case.

In fact, the State's cases undermine rather than support the case for abstention. This Court has repeatedly emphasized that an exception to the abstention rule should be made "where the claim is substantial, implicates a fundamental constitutional right, and where the harm caused . . . could not be adequately redressed through the ordinary channels of appeal." *Rush*, 68 N.Y.2d at 354 (affirming a writ of prohibition to bar the unlawful prosecution of a criminal defendant); *see also Morganthau v. Erlbaum*, 59 N.Y.2d 143 (1983); *Oglesby v. McKinney*, 7 N.Y.3d 561 (2006). The State acknowledges the existence of this well-established exception, Brief for Respondents at 50, yet does not address whether this case falls within it.[22] It clearly does. This case – challenging the State's decades-long failure to secure the fundamental right to counsel for indigent New Yorkers – is substantial and implicates one of the most fundamental of constitutional rights. *See Cronic*, 466 U.S. at 654. And Appellants' claims cannot be adequately redressed through ordinary channels of individual criminal appeals. *See* Brief for Appellants at 35-42; Part III.B., *supra*.

[22] The State suggests that this exception applies only to collateral actions brought by the prosecution in a criminal proceeding, Brief for Respondents at 50, but that uneven proposition is refuted by this Court's decision in *Rush*, which affirmed a writ of prohibition sought by a criminal defendant. 68 N.Y.2d at 354-55.

Should the State's speculative concerns materialize in a tangible way, the trial court can decide how to manage those concerns. This approach permits a factual record to develop regarding the actual impact discovery may have and permits the court to use its inherent powers to fashion a solution to such problems short of dismissal. Such solutions may include controls on the timing and scope of discovery.[23] Thus, rather than articulate a radical new abstention doctrine foreclosing all claims for prospective injunctive relief from violations of the right to counsel, the Court should remand to allow the lower court an opportunity to grapple with and resolve any complexities that may (or may not) arise in the course of this litigation.

### B. Speculation that the Named Plaintiffs Might Collaterally Attack Their Convictions Is Not Grounds For Abstention.

The State argues that "any ruling here in favor of the named plaintiffs . . . could and would likely be used by the named plaintiffs to overturn any convictions that may be obtained in their cases," and further that a ruling "would call into question the validity of other convictions obtained in the Counties." Brief for Respondents at 54. Presumably, the State envisions

[23] Such measures need not be "one-sided," as the State suggests. Brief for Respondents at 56. The court may, for example, institute a protective order controlling the scope or timing of both parties' depositions of public defense service providers to ensure minimal impact on their practice. In any case, it should be left to the trial court in the first instance to make its own judgment about the appropriate balance to be struck and for appellate courts to review that judgment in due course.

that a ruling here could be used as evidence in future appeals or collateral attacks on indigent defendants' convictions.

A ruling here, however, would not affect any indigent criminal defendant's ability to prove an entitlement to overturn his conviction because the legal questions relevant to that question are different from the legal questions to be adjudicated in this case. *See* Brief for Appellants at 47. The named plaintiffs do not present allegations about the propriety of the outcomes of their criminal cases or about the performance of their attorneys "taken as a whole," nor must they. *See* Part I, *supra*. Nor could they have, since none of their criminal cases had concluded at the time the complaint was filed. Am. Compl. ¶¶ 16-35 (R. 209-212). Similarly, the Amended Complaint does not present these allegations regarding other defendants' cases because Appellants' claim does not turn on proof of wrongful convictions. *Id.* Thus, regardless of whether a ruling in this case finds that the State is responsible for perpetuating a public defense system that causes violations of the right to counsel (a finding that, in any case, the report of the Kaye Commission on the Future of Indigent Defense has already made), any future consideration of whether a defendant is entitled to have his conviction reversed will require independent legal analysis and independent legal judgment. The State's concerns, therefore, are groundless, as are the

concerns of *amicus curiae* the New York District Attorneys' Association, which appears to mistakenly assume that a ruling in this case would dictate, as a matter of law, that indigent defendants in the Counties are entitled to reversal of their convictions. Brief for *Amicus Curiae* the District Attorneys' Association of New York at 8, 16 (December 2009).[24]

It is conceivable that some facts relevant to the instant claim – facts regarding the representation provided to the named plaintiffs, for example – could one day be relevant to a hypothetical, future post-conviction proceeding seeking to overturn a conviction. Even if those factual questions could be accorded some preclusive effect in such a proceeding, however, this does not render Appellants' present claims nonjusticiable. The State will have a full and fair opportunity to litigate any such factual matter in this proceeding, such that justice will not suffer if a ruling on some factual matter later impacts another judicial proceeding. In any case, these are case

[24] The District Attorneys' Association also appears to assume, mistakenly, that Appellants seek to revise or amend the well-established standard governing post-conviction right-to-counsel claims. *See* Brief for *Amicus Curiae* the District Attorneys' Association of New York at 8 (December 2009) (suggesting that Appellants "seek to undo the well-settled rule that an attorney's competence must be assumed" in evaluating post-conviction claims of ineffective assistance). To the contrary, Appellants' argument is that the legal standard governing right-to-counsel claims seeking prospective relief is simply different to the legal standard governing post-conviction relief. Brief for Appellants at 32-35; Part I, *supra*. Thus, there is no reason to fear that a ruling here would alter or affect the legal standard applicable to any future appeal or CPL § 440 action alleging ineffective assistance of counsel.

management matters for the judges presiding over the hypothetical post-conviction proceedings the State prematurely anticipated. They are not grounds for the Court to abstain from this case.

Indeed, the State's concern here bears no relationship whatsoever to the abstention cases cited in support of its position. Those cases stand for the principle that courts should avoid issuing collateral writs of prohibition that interfere directly in *ongoing* criminal cases. They do not provide support for abstaining from adjudication of a constitutional claim because a ruling therein could have secondary effects on *future* criminal proceedings. In our common law system, all rulings have potential impacts on the cases that follow. This is not a cause for concern, let alone a cause for abstention from consideration of a constitutional claim.

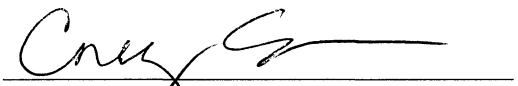
In sum, a ruling in this case will not force the legal system to revisit the convictions of indigent defendants in the Counties. The finality of any given conviction would be no more or less vulnerable to a right to counsel claim should this Court permit the adjudication of this case.

## CONCLUSION

For the foregoing reasons, Appellants urge the Court to reverse the Appellate Division's order dismissing this case and remand to the trial court for further proceedings.

Dated: January 14, 2010
New York, New York

Respectfully submitted,



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