SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

In this case seeking structural reform of New York's broken public defense system, plaintiffs seek an order requiring the State to undertake immediate measures to address some of the most serious systemic constitutional defects in the provision of public defense services in five counties. In support of their motion, plaintiffs relied on the factual conclusions of Chief Judge Judith S. Kaye's Commission on the Future of Indigent Defense Services, including its overall conclusion that "the indigent defense system in New York State is both severely dysfunctional and structurally incapable of providing each poor defendant with the effective legal representation that he or she is guaranteed by the Constitution of the United States and the Constitution and laws of the State of New York . . . [and] has resulted in a disparate, inequitable, and ineffective system for securing constitutional guarantees to those too poor to obtain counsel of their own choosing." Commission on the Future of Indigent Defense Services, *Final Report to the Chief Judge of the State of New York* at 3 (2006) (*Kaye Commission Report*) (attached to Stoughton Affirmation in Support of Motion for Preliminary Injunction as Ex. A).

In addition, plaintiffs submitted extensive factual findings from The Spangenberg Group supporting the Kaye Commission's conclusions; extensive testimony heard by the Kaye Commission detailing the system's failures; the affirmation of Jonathan Gradess, Executive Director of the New York State Defenders' Association, who brings a comprehensive knowledge of New York's public defense system and over 30 years of experience in that system; the affidavit of David Carroll from the National Legal Aid and Defenders' Association, which has conducted extensive studies of the public defense systems in several New York counties; and the affirmations of several lawyers from the counties that are the focus of this case describing the untenable circumstances in which they and their colleagues are forced to practice. This

evidence, summarized in the 35-page Statement of Facts contained in Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction, establishes beyond a doubt that indigent criminal defendants' right to counsel is being systemically violated every day, on an on-going basis, in New York state criminal courts.

In opposition to this motion, the State makes no attempt to dispute any of these facts and offers no countervailing factual record. Indeed, the State entirely ignores this overwhelming proof – not mentioning the Kaye Commission, The Spangenberg Group, or any of the aforementioned expert affiants a single time in their opposition papers – and attacks the legal sufficiency of plaintiffs' motion as if the only facts supporting it were the affidavits of the named plaintiffs and seven additional indigent defendants.

Underlying all of the State's pending arguments before this Court – including its motion to dismiss – is the legally and factually mistaken premise that this case amounts to nothing more than a collective allegation that the individual plaintiffs are receiving "ineffective assistance of counsel," as that term is defined in cases seeking reversal of particular criminal convictions. As detailed in Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss at 7-16, that is not the case. Plaintiffs do not allege and do not intend to prove that they have been individually denied effective assistance of counsel requiring reversal of any conviction. Rather, plaintiffs have offered evidence – and have demonstrated a substantial likelihood of proving in this motion – that massive structural deficiencies in the public defense system create a constitutionally cognizable risk that the class of indigent criminal defendants represented by the named plaintiffs will not receive meaningful and effective assistance of counsel. The experiences of the named plaintiffs and additional criminal defendant affiants are offered to illustrate examples of the harms caused by the broken system and add weight to plaintiffs'

claims, but they are not essential to plaintiffs' proof in light of the fact that the legal standard – proof of a "severe and unacceptably high risk" of deprivations of the right to counsel – does not require actual proof that any individual person was denied their right to counsel. *See* Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss at 7-16 (discussing the legal standard, citing cases).

SUMMARY OF ARGUMENT

In opposition to Plaintiffs' Motion for Preliminary Injunction, the State makes four arguments. First, the State verbatim repeats the legal arguments presented in its pending Motion to Dismiss. *See* Mem. in Opposition to Plaintiffs' Motion at 6-24 (Point II, Section A). These arguments – regarding the availability of declaratory judgment actions, justiciability, the viability of plaintiffs' federal claim, and the joinder of purportedly necessary parties – are fully briefed and addressed in Plaintiffs' Memorandum of Law in Opposition to Defendant's Motion to Dismiss (April 29, 2008). For the sake of efficiency and economy, plaintiffs will not reiterate those points here, but simply incorporate its April 29 memorandum herein.

Second, the State argues that plaintiffs have failed to show irreparable harm because the injury to indigent criminal defendants caused by the dysfunctional public defense system is speculative and can be addressed within the context of ongoing criminal proceedings. Mem. in Opposition to Plaintiffs' Motion at 24-25. This argument was squarely rejected in *New York County Lawyers' Ass'n v. State*, 294 A.D.2d 69 (1st Dep't 2002), which is controlling authority.[1] Moreover – again, as argued in Plaintiffs' Opposition to Defendants' Motion to Dismiss –

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

plaintiffs cannot obtain the prospective, structural-reform remedies it seeks in an individual, post-conviction action alleging "ineffective assistance of counsel" because, among other reasons, the only remedy available in that proceeding is reversal of a particular criminal conviction. Thus, the harms plaintiffs allege, which stem from structural deficiencies in the public defense system, cannot be addressed in the context of ongoing criminal proceedings.

Third, the State argues that the balance of equities favors the State because of the "considerable costs of compliance." *See* Mem. in Opposition to Plaintiffs' Motion at 26. The State put in absolutely no evidence of any costs whatsoever, and thus offers no factual basis for the Court to conclude that the burden on the State of complying with the injunction outweighs the cumulative impact of daily deprivations of the constitutional right to counsel experienced by indigent criminal defendants in the Counties.

The State also argues that the balance of equities tips in its favor because "it is without any information to factually oppose this motion." *See* Mem. in Opposition to Plaintiffs' Motion at 26. In particular, the State claims that it has been "unable to oppose the pending motion without a waiver of the attorney-client privilege between the affiants and their criminal attorneys." *Id.* at 3. But the attorney-client privilege between plaintiffs and their criminal defense attorneys poses no barrier to the State's ability to challenge plaintiffs' proof that the systemic failures of the public defense system create a "severe and unacceptably high risk" that indigent defendants will be denied effective assistance of counsel. The fact that the State has been unable – or unwilling – to marshal any facts to dispute plaintiffs' record in this case does not warrant a denial of this motion. The underlying facts of this case have been apparent and known to the State for decades. Many dozens of reports, newspaper articles, studies, hearings, conferences, and panel discussions – not least among them the Kaye Commission Report and the

Spangenberg Group Report – have documented the failings of New York's public defense system exhaustively. *See* Plaintiffs' Mem. in Support of Motion for Preliminary Injunction at 66-67 (citing reports, studies and media coverage). For the State to claim that it has no facts about the crisis in the public defense system because it has been unable to depose the named plaintiffs or their individual attorneys is disingenuous.

Moreover, as argued in plaintiffs' forthcoming May 14, 2008 Memorandum in Opposition to the State's pending motion seeking an order waiving plaintiffs' privilege with their criminal defense attorneys, plaintiffs have not broadly waived the privilege and the State is not entitled to an order to that effect. The better course is entry of plaintiffs' proposed protective order, which balances the need to protect the confidentiality of privileged communications with the State's legitimate interest in discovery regarding the facts surrounding plaintiffs' representation.

Fourth, the State argues that plaintiffs do not have standing to obtain class-wide relief and that the relief they seek is "overbroad" to address the specific harm suffered by any individual plaintiff. *See* Mem. in Opposition to Plaintiffs' Motion at 27-33. The State cites no case law prohibiting the issuance of preliminary relief pending resolution of the class certification issue and ignores ample case law to the contrary. Moreover, the State's overbreadth argument ignores the fact that plaintiffs' proof is premised not on any individual's right to a different lawyer or new trial, but on their right to systemic, prospective relief from the harm caused by the broken public defense system.

Finally, the State argues that the preliminary relief plaintiffs' seek violates the principle of separation of powers because it would "direct the appropriation of public funds." Mem. in Opp. to Plaintiffs' Motion at 14. This is factually incorrect. As evidenced by the plain text of

the order plaintiffs' seek, it does not direct the appropriation of any funds. *See* Notice of Motion (Mar. 27, 2008). As a legal matter, the fact that compliance with the proposed order might require the State to spend money does not implicate separation of powers principles in any way.

ARGUMENT

I. PLAINTIFFS HAVE SHOWN IRREPARABLE HARM.

The evidence assembled in plaintiffs' motion paints a dire picture of the harm to indigent defendants resulting from systemic violations of their right to counsel. They face both the risk and the reality of:

- wrongful denial of representation, whether based on improper eligibility determinations or the absence of counsel at critical stages, *see* Plaintiffs' Mem. in Support of Preliminary Injunction at 12-16, 25-29;

- unnecessary or prolonged pre-trial detention, whether based on delays in the appointment of counsel or lack of advocacy by counsel, *see* Plaintiffs' Mem. in Support of Preliminary Injunction at 13-15;

- excessive or inappropriate bail determinations, which have been shown to increase the likelihood of conviction, *see* Plaintiffs' Mem. in Support of Preliminary Injunction at 13-15;

- waiver of meritorious defenses due to untrained, unsupervised or inexperienced counsel, *see* Plaintiffs' Mem. in Support of Preliminary Injunction at 6-12, 22;

- guilty pleas to inappropriate charges, based on pressure to plea by overworked counsel or mistaken advice from untrained, unsupervised or inexperienced counsel, *see* Plaintiffs' Mem. in Support of Preliminary Injunction at 9, 14-15, 18-19;

- guilty pleas taken without adequate knowledge and awareness of the full, collateral consequences of the pleas, *see* Plaintiffs' Mem. in Support of Preliminary Injunction at 9-10;

- possible wrongful conviction of crimes, *see* Plaintiffs' Mem. in Support of Preliminary Injunction at 9, 14; and

- harsher sentences than the facts of the case warrant and few alternatives to incarceration, *see* Plaintiffs' Mem. in Support of Preliminary Injunction at 9.

The notion that this list of harms does not constitute "irreparable injury" is beyond consideration. As one experienced public defense practitioner testified, "[i]ndigent criminal defendants are routinely over-sentenced and possibly wrongfully convicted because the system cannot provide them with adequate representation." Affirmation of J.A. Session (Feb. 26, 2008) ¶ 10. They are "[s]ubjected . . . to outrageous indignities in a system in which their own lawyers have been made pawns in the game of resources allocation." Affirmation of Jonathan E. Gradess (Mar. 10, 2008) ¶ 17. In issuing a preliminary injunction in the seminal *NYCLA* case, the Supreme Court, New York County, found "uncontroverted evidence" of irreparable harm where plaintiffs showed that "defendants endure protracted pretrial detention, particularly in homicides and 'serious' felony cases." 192 Misc.2d 424, 433 (Sup. Ct. N.Y. County 2002). The evidence assembled in plaintiffs' motion and summarized above includes such protracted, unnecessary pretrial detention and more.

The State does not actually dispute any of these facts; it simply asserts that they lack "certainty and immediacy" and are "fanciful or theoretical." Mem. in Opposition to Plaintiffs' Motion at 24. Yet, the State offers no logical or factual basis for casting doubt on plaintiffs' proof, which speaks for itself. In light of the precedent set by the issuance of a preliminary injunction on similar proof in *NYCLA*, and in light of the undeniable impact of the crisis in the public defense system on indigent criminal defendants, irreparable harm should be found.

The State suggests that there is no irreparable harm because the individual plaintiffs can address any harm to them in the context of their ongoing criminal proceedings. *See* Mem. in Opposition to Plaintiffs' Motion at 25. This argument was squarely rejected by the First

Department in the *NYCLA* case, which is controlling authority. 294 A.D.2d at 76 ("Nor do we agree with the State's contention that those rights can be effectively protected in the context of individuals' post-judgment remedies, such as appeals of convictions on grounds of ineffective assistance, or write of habeas corpus."). Indeed, the harms plaintiff allege – i.e., the absence of counsel in critical proceedings, attorneys so overworked that they cannot adequately represent their clients, attorneys who do not meet with their clients, etc. – demonstrate precisely why individual defense attorneys within criminal justice system cannot be relied upon to correct these harms. Often those attorneys are not present at all, and when they are they are incapable of addressing the systemic failures of public defense system because they are themselves victims of the system.

Moreover, the notion that an individual criminal defendant represented by a lawyer laboring under the impossible conditions established by the factual record here could bring a systemic reform suit against the State of New York strains the imagination. As Judge Suarez noted in the lower court opinion in *NYCLA*, evidence of systemic failures in the public defense system means that indigent defendants are "not able to assert their own rights because of the magnitude of the litigation in question and the lack of resources available to them." 188 Misc. 2d at 783. Thus, it cannot be said that indigent criminal defendants have an adequate remedy in the context of their ongoing criminal proceedings to obtain systemic, prospective reform of the public defense system.

The State's claim that post-conviction relief suffices to vindicate plaintiffs' rights also assumes that indigent criminal defendants who wish to challenge the unconstitutionality of New York's public defense system will be found guilty of the crimes for which they have been charged. An indigent criminal defendant could experience irreparable harm resulting from the

systemic failures of the public defense system – for example, prolonged and unnecessary pretrial incarceration – and nonetheless be acquitted or have the charges dropped. This occurred, by way of example, in the case of Plaintiff Jaqueline Winbrone, who was held in jail for two months on a charge that was ultimately dropped. *See* Local Court Criminal Disposition Report (attached to Stoughton Affirmation in Opposition to Defendant's Motion to Dismiss as Exhibit B). The irreparable harm experienced by Ms. Winbrone and similarly situated indigent criminal defendants cannot be remedied in the context of ongoing criminal proceedings.

II. THE BALANCE OF EQUITIES FAVORS PRELIMINARY RELIEF.

The State argues that the balance of equities favors the State because of the "considerable costs of compliance" and because "it is without any information to factually oppose this motion." *See* Mem. in Opposition to Plaintiffs' Motion at 26.

The first point is directly addressed in Plaintiffs' opening Memorandum of Law in Support of Motion for Preliminary Injunction at 65 (citing *Klostermann v. Cuomo*, 61 N.Y.2d 525, 537 (1984); *Varshavsky v. Perales*, 202 A.D.2d 155, 156 (1st Dep't 1994); *Doe v. Dinkins*, 192 A.D.2d 270, 600 N.Y.S.2d 939 (1st Dep't 1993); *Brad H. v. City of New York*, 185 Misc. 2d 420, 431 (Sup. Ct. N.Y. County 2000); and *Thrower v. Perales*, 138 Misc. 2d 172, 178 (Sup. Ct. N.Y. County 1987)). The State does not engage plaintiffs' argument or address this case law, which broadly rejects the notion that the administrative costs of complying with constitutional mandates tips the balance of equities in favor of the government. Moreover, the State offers no factual basis for concluding that the costs of issuing a preliminary injunction in this case outweigh the irreparable injuries experienced by indigent criminal defendants as a result of the State's failure to comply with constitutional and legal mandates regarding the right to counsel.

The second point, that the State lacks "any information to factually oppose" plaintiffs' motion for preliminary injunction, is not a relevant factor in weighing the balance of equities, and the State cites no case law to support the notion that it should be.

Moreover, the State has access to ample information that it might have used to factually oppose this motion. To present just a few examples: The State is in sole possession of information related to its own policies and practices (or lack thereof) regarding the provision of public defense services, which are the core subject of this lawsuit. It is in possession of information about the counties' public defense programs gathered by the Office of Court Administration and the Comptroller in conjunction with the distribution of the State's Indigent Legal Services Fund (ILSF). *See, e.g.*, ILSF Reports (attached to Affidavit of Demetrius Thomas submitted in support of Motion for Preliminary Injunction as Exhibit B). And it has access to information in the possession of the Counties regarding their policies and practices governing the provision of public defense services. Nothing has prevented the State from marshalling this information in its defense in the six weeks since plaintiffs served their motion for preliminary injunction (or in the six months since plaintiffs filed the Complaint).

Furthermore, nothing has prevented the State from seeking leave from the Court to pursue discovery from plaintiffs or any third party in this time period. That it has failed to do so, and thus failed to present any factual record in opposition to plaintiffs' motion, is a problem of its own making.

The notion that the State could not develop any such factual record without first obtaining an order deeming the attorney-client privilege between plaintiffs and their criminal defense attorneys waived, *see* Def.'s Mem. in Opposition to Plaintiffs' Motion at 3-5, is utterly illogical. As argued above, this case is not about whether any of the plaintiffs – or, indeed, any individual

criminal defendant – has actually received or is actually receiving "ineffective assistance of counsel." More importantly, plaintiffs are not required to prove this fact – and do not intend to prove this fact – in order to state their claim. *See* Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss at 7-16 (establishing that the legal standard for establishing a systemic right to counsel claim is proof of a "severe and unacceptably high risk" of deprivations of the right to counsel and that actual proof that any individual person was denied their right to counsel is not required). This case is about the State's failure to ensure that that the public defense system is operating in accordance with constitutional and legal standards and to remedy the structural deficiencies in that system. Proof of systemic constitutional failure derives from the Kaye Commission, The Spangenberg Group, NLADA studies, NYSDA experts, and affidavits of attorneys with knowledge of the system. All of this evidence is independent of the testimony from the individual plaintiffs and no attorney-client privilege has prevented the State from acquiring or examining this information.

This is not to say that the State is not entitled to discovery regarding the information presented in the individual plaintiffs' affidavits. As argued in plaintiffs' forthcoming May 14, 2008 Memorandum in Opposition to the State's motion seeking an order broadly waiving the attorney-client privilege, the State may conduct such discovery pursuant to a Protective Order designed to protect the confidentiality of attorney-client communications. But the State's argument that the existence of the privilege has prevented it from responding to this motion is disingenuous. Indeed, despite having been served with plaintiffs' motion six weeks ago, the State only filed its motion seeking waiver of the privilege one week before its response to plaintiffs' motion was due. Thus, the Court should not deny plaintiffs' motion for preliminary injunction on this basis.

III. THE COURT MAY ISSUE CLASSWIDE PRELIMINARY RELIEF IN A PROPOSED CLASS ACTION.

The State argues that plaintiffs have not moved for class certification and thus cannot obtain classwide relief. *See* Mem. in Opposition to Plaintiffs' Motion at 27-32. As a result, the State argues that the relief plaintiffs seek is "overbroad" in that it does not "address any specific harm suffered by any individual." *Id.* at 32-33. This argument is flawed for two reasons. First, plaintiffs are entitled to *preliminary* classwide relief prior to moving for class certification. Second, the relief plaintiffs seek is not overbroad, in that plaintiffs seek relief to address the structural defects that continue to prejudice their cases and the cases of the class members whom they seek to represent. The only means to obtain that relief is through prospective, systemic reform measures like the ones sought in this motion for preliminary injunction.

A. Plaintiffs Are Entitled to Preliminary Classwide Relief Pending Adjudication of the Issue of Class Certification.

As argued in plaintiffs' opening Memorandum in Support of Motion for Preliminary Injunction at 68-69, plaintiffs are entitled to preliminary, classwide relief prior to an adjudication of an order certifying the class. The State does not engage plaintiffs' argument except to point out that some of the cases plaintiffs cite involve "challenges to statutes." *See* Mem. in Opposition to Plaintiffs' Motion at 28. Not all of them do, of course. *See, e.g., Olson v. Wing*, 281 F. Supp. 2d 476 (E.D.N.Y. 2003) (issuing pre-certification classwide preliminary injunction ordering State of New York to continue providing emergency medical assistance to class of Medicaid recipients); *New York State National Organization for Women v. Terry*, 697 F. Supp. 1324 (S.D.N.Y. 1988) (issuing pre-certification classwide preliminary relief restraining defendants from obstructing access to women's health facilities); *Weight Watchers of Phila. v.*

Weight Watchers Int'l, 53 F.R.D. 647 (E.D.N.Y. 1971) (issuing pre-certification preliminary classwide relief in contract dispute). As argued in plaintiffs' opening Memorandum, New York state courts regularly look to federal law regarding class action issues. *See* Memorandum in Support of Motion for Preliminary Injunction at 68, n.56. Moreover, the State does not explain why this fact distinguishes those cases. Regardless of whether the cases involve challenges to state action in the form of a legislative enactment or governmental inaction in the face of a constitutional mandate, the principle remains the same that where preliminary relief is sought on behalf of a class, certification of the class is not a prerequisite. Notably, the State does not cite to a single case in which classwide preliminary injunctive relief was denied because the plaintiffs had not yet filed for class certification.

The rule permitting preliminary classwide relief is logical in light of the mandatory procedural rules governing civil litigation in New York, which prohibit plaintiffs from filing their motion for class certification until after resolution of a defendant's motion to dismiss. CPLR § 902 prohibits plaintiffs from moving for class certification after the time for filing a responsive pleading has expired. Pursuant to CPLR § 3211(f), service of a motion to dismiss extends the time to file a responsive pleading until ten days after service of the order resolving the motion to dismiss. It cannot be the case that plaintiffs in a proposed class action must always endure irreparable harm until after resolution of a defendant's motion to dismiss, which may in some instances take years to resolve. Thus, the Court must have the authority to issue preliminary classwide relief in this proposed class action prior to full consideration of class certification.[2]

[2] In their opening Memorandum in Support of Motion for Preliminary Injunction, plaintiffs argued in the alternative that the Court could issue a preliminary injunction based on a finding that plaintiffs are likely to succeed on their motion for class certification. *See* Plaintiffs' Mem. in Support of Motion for

B. The Systemic, Prospective Relief Plaintiffs Seek is Not Overbroad.

The State argues that the relief plaintiffs seek is overbroad because it will not address the specific experiences of the named plaintiffs. *See* Mem. in Opposition to Plaintiffs' Motion at 28-32. The State does not explain its position clearly but, whatever its argument is, its contentions regarding the particular aspects of the plaintiffs' experiences as public defense clients are simply beside the point. As argued above and in plaintiffs' opening Memorandum in Support of Motion for Preliminary Injunction, plaintiffs' entitlement to preliminary injunctive relief does not rest on the affidavits of the named plaintiffs but on the allegations of systemic failure presented in the Kaye Commission Report, The Spangenberg Group's report, the NLADA's reports about the Counties, the affirmations and affidavits of experts from NLADA and NYSDA, and the affirmations of various attorneys with first-hand knowledge of the system. The facts contained therein establish a severe and unacceptably high risk of the deprivation of their right to meaningful and effective assistance of counsel, as defined both by case law and by relevant national and state standards. *See* Plaintiffs' Memorandum in Support of Preliminary Injunction

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Preliminary Injunction at 69, n.57. The State argues that the court "may not 'pass upon whether the action is entitled to class action status'" until plaintiffs actually file a motion, *see* Mem. in Opposition to Plaintiffs' Motion at 27 (quoting *Long Island Region NAACP v. Town of North Hempstead*, 102 Misc. 2d 704 (Sup. Ct. Nassau County 1979), but the case the State cites does not involve a motion for preliminary injunction and thus does not foreclose a preliminary inquiry into the merits of class certification for the limited purpose of determining whether preliminary relief is warranted. Moreover, although plaintiffs have not yet presented a full factual and legal record on the issue of class certification, there is ample ground for the Court to decide that plaintiffs have a likelihood of success on that issue. To prove a likelihood of success on the merits, plaintiffs need not present absolute proof of their case. "The [likelihood of success] requirement does not compel a demonstration that success on the merits is practically a certitude." *Egan v. N.Y. Care Plus Ins. Co.*, 266 A.D.2d 600, 601-02 (3d Dep't 1999); *see also McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co.*, 114 A.D.2d 165, 172-73 (2d Dep't 1986) (finding that "a prima facie showing of a right to relief is sufficient; actual proof of the case should be left to further court proceedings"). Plaintiffs have stated a prima facie case for class certification. *See* Plaintiffs' Mem. in Support of Motion for Preliminary Injunction at 69, n.57. Thus, although the Court need not make any determination regarding class certification in order to grant plaintiffs' motion for preliminary injunction, the Court could, in the alternative, make a preliminary finding of a likelihood of success.

at 49-59. Plaintiffs, all of whom had cases pending at the time the Complaint was filed and many of whom continue to have pending cases, are entitled to relief from the systemic violation of the right to counsel on their own behalf and on behalf of the class they seek to represent.

IV. THE PRELIMINARY RELIEF PLAINTIFFS SEEK DOES NOT VIOLATE THE SEPARATION OF POWERS.

The State argues that the relief plaintiffs seek violates the separation of powers because it would "direct the appropriation of public funds." *See* Mem. in Opposition to Plaintiffs' Motion at 14. This is factually incorrect; plaintiffs do not seek that remedy. Plaintiffs seek a court order requiring the State to comply with its constitutional and legal obligation to undertake the following measures: (1) implement standards and procedures to ensure that attorneys appointed to represent indigent criminal defendants have sufficient qualifications and training; (2) establish caseload and workload limits to ensure that public defense attorneys have adequate time to devote to each client's case; (3) guarantee that every eligible indigent criminal defendant is assigned a public defense attorney within 24 hours of arrest who is present at every critical proceeding and consults with each client in advance of any critical proceeding to ensure that the attorney is sufficiently prepared for any such proceeding; (4) ensure that investigators and experts are available to every public defense attorney for every case in which an attorney deems that investigative or expert services would be useful to the defense; and (5) establish uniform written standards and procedures for determining eligibility for the assignment of a public defense attorney. *See* Notice of Motion (Mar. 27, 2008). No aspect of this order directs the appropriation of public funds.

The fact that an order requiring the State to comply with constitutional mandates might, in its implementation, require the expenditure of funds does not make the issue non-justiciable.

In *Klostermann v. Cuomo*, 61 N.Y.2d 525 (1984), the Court of Appeals considered the claims of a group of mentally ill patients who alleged that the State had violated their statutory and constitutional rights by not ensuring adequate supervision, treatment and housing upon their release from state institutions. *Id.* at 531-32. The patients sought a declaration that the State violated their rights by failing to "create, implement, and monitor a plan for services upon their release . . . ." *Id.* In a unanimous opinion, the Court of Appeals rejected the State's argument that the claim was non-justiciable, despite its implications for the distribution of governmental resources. The court emphasized that a claim that a "controversy is nonjusticiable because any adjudication in support of plaintiffs will necessarily require the expenditure of funds and a concomitant allocation of resources" is "particularly unconvincing when uttered in response to a claim that existing conditions violate an individual's constitutional rights." *Id.* at 537. Indeed, New York courts routinely issue orders that necessarily require the allocation of funds to ensure compliance. *See, e.g., Campaign for Fiscal Equity, Inc. v. State of New York*, 100 N.Y.2d 893 (2003) (approving an order altering funding schemes for educational services because of constitutional inequities); *Boung Jae Jang v. Brown*, 161 A.D.2d 49, 55 (2d Dep't 1990) (rejecting the government's claim that a case seeking to compel a police department to fulfill its legal duty to enforce court protective orders was nonjusticiable); *McCain v. Koch*, 70 N.Y.2d 109, 119 (1987) (holding that an action to compel city to provide social services to the homeless is justiciable); *Wilkins v. Perales*, 128 Misc. 2d 265, 269 (Sup. Ct. NY County 1985) (action to compel State to provide shelter to homeless is justiciable).

The main case cited by the State, *In re Order on Prosecution of Criminal Appeals*, 561 So.2d 1130 (Fla. 1990), supports plaintiffs' position.[3] In that case, which sought emergency

[3] The two other cases cited by the State are simply inapposite. *Matter of Smiley*, 36 N.Y.2d 433 (1975),

relief to address the long delays in indigent criminal defendants' appeals cause by chronic underfunding and understaffing of the local public defender's office, the Court declined to "order the Legislature to appropriate funds." *Id.* at 1139. Likewise, here, plaintiffs do not ask the Court to order the Legislature to appropriate funds. However, Florida's highest court did order a specific procedure for ensuring that the backlog of criminal appeals was addressed and conflicts counsel was available when appropriate, thus affirming this Court's authority to issue orders required to bring the public defense system in line with constitutional standards. *Id.* at 1138. And the Florida Supreme Court went further, ruling that

> if sufficient funds were not appropriated within sixty days from the filing of opinion, and counsel hired and appearances filed within 120 days from the filing of opinion, courts with appropriate jurisdiction would entertain motions for writs of habeas corpus from those indigent appellants whose appellate briefs were delinquent 60 days or more, and upon finding merit to those petitions, will order immediate release pending appeal of indigent convicted felons who are otherwise bondable.

561 So.2d at 1130. Though one can conceive of a similar order in this case (for example, requiring the release of all pretrial detainees who do not have counsel at arraignment or have not met with their attorney for unreasonable periods of time), plaintiffs do not seek such a drastic remedy. The point remains that the remedy approved of in the case that the State cites to support its position no less required the expenditure of public funds (i.e., to hire sufficient attorneys to represent the backlog of indigent appellants) than does the order plaintiffs seek here. Thus, consistent with both the legal authority cited by the State and the conclusive legal authority from

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held that the court could not order the State to pay for assigned counsel in a civil case because the legislature had not created a right to counsel in civil cases. Here, a constitutional and statutory right to counsel does exist and the Court's authority to ensure that it is enforced is clear. Similarly, *Matter of Enrique R.*, 126 A.D.2d 169 (1st Dep't 1987), held that the Family Court cannot direct the Commissioner of Social Services to commence an Article 78 proceeding against the New York City Housing Authority in order to benefit a particular litigant in Family Court. That holding cannot be interpreted to prevent this Court from ordering the State to remedy constitutional defects in the public defense system simply because implementation of that remedy might cost money.

New York courts cited above, the preliminary relief plaintiffs seek is not prohibited by any separation of powers principle.

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request that the Court grant their motion for a preliminary injunction.

Respectfully submitted,

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Dated: May 8, 2008
New York, N.Y.

AFFIRMATION OF SERVICE

I hereby certify that on May 8, 2008, I caused to be served by email and First Class Mail the attached Reply Memorandum in Support of Motion for Preliminary Injunction on the following counsel of record:

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