SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

KIMBERLY HURRELL-HARRING, et al.

Plaintiffs,

-against-

THE STATE OF NEW YORK,

Defendant.

Albany Co.
Index No. 8866-07

MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS

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Preliminary Statement

Plaintiffs are twenty allegedly indigent individuals with criminal charges pending against them in Onondaga, Ontario, Schulyer, Suffolk and Washington counties ("the Counties"). In this putative class action, they allege that, as a result of structural deficiencies in and the inadequate funding of the State's indigent defense system, the State is depriving or threatening to deprive them of their statutory and constitutional right to counsel. Plaintiffs demand a declaration that the State's indigent defense system is unconstitutional, and an injunction directing the State to overhaul that system in accordance with the recommendations in the June 2006 final report of the Commission on the Future of Indigent Defense Services ("Kaye Commission") (see complaint, Exhibit A).

Defendant State of New York submits this memorandum of law in support of its motion to dismiss. A declaratory judgment action is not available to collaterally attack the adequacy of the Plaintiffs' legal representation in their respective pending criminal prosecutions. Adequate remedies exist in the criminal actions themselves to litigate plaintiffs' claims of ineffective assistance of counsel.

Moreover, plaintiffs' systemic challenge is not justiciable. The individual plaintiffs lack standing to litigate whether individuals in other or future criminal cases might be denied the

right to counsel. The proper forum for plaintiffs' claims that the State should implement the Kaye Commission's recommendations is the Legislature, not the courts, since the structuring and funding of the State's indigent defense system are quintessentially legislative tasks.

The third cause of action, a purported civil rights claim under 42 U.S.C. § 1983, must be dismissed because the State of New York is not a person within the meaning of section 1983. Finally, if the Court permits plaintiffs to litigate whether they are receiving effective assistance of counsel in their pending criminal cases, then the district attorneys from the Counties, the plaintiffs' criminal attorneys and the public defense entities with which they are associated are necessary parties because they may be inequitably affected by the judgment in this case.

STATEMENT OF THE CASE

Article 18-b of the New York County Law mandates that each county in the State, and each city in which a county is wholly contained, provide for the assignment of counsel to indigent individuals charged with a crime. See County Law § 722. The county (or city) must meet this requirement in one of four ways: (1) creating a public defender office; (2) contracting with a legal aid society; (3) establishing an assigned counsel program pursuant to a plan of a bar association that is coordinated by an

administrator; or (4) implementing a combination of any of the foregoing alternatives. County Law § 722(1), (2), (3) and (4).

The complaint alleges the following facts, which are taken as true for the purposes of this motion to dismiss. Plaintiffs are twenty individuals with criminal charges pending against them in the Counties (complaint, ¶¶ 16-35). The plaintiffs with criminal cases pending in Washington County are being represented either by the Washington County Public Defender's office or an attorney who has contracted with the county to provide public defense services (id. at ¶¶ 16, 33-35, 246). The Onondaga and Ontario County criminal defendants are represented by attorneys assigned under the respective county's assigned counsel program (id. at ¶¶ 17-24, 242-43). In the Schuyler County cases, the criminal defendants are represented by the Public Defender's office or the county's "conflict defender" (id. at ¶¶ 25-28, 244). The Suffolk County criminal defendants are represented by the Suffolk County Legal Aid Society (id. at ¶¶ 29-32, 245).

The complaint asserts a legal conclusion that each of the plaintiffs has received or is receiving inadequate assistance of counsel. To support this claim, the complaint alleges, for example, that plaintiff Hurrell-Harring was not represented at arraignment; her public defender first met her at the county jail and failed to move to reduce the felony charge even though there was a legal basis to do so; as a result she pleaded guilty to the

charges and was scheduled to be sentenced in November 2007 (complaint, ¶¶ 41-45). Plaintiff Adams was represented by an attorney at arraignment but was assigned a different attorney during arraignment (id. at ¶ 49). He has never seen his attorney outside of open court (id. at 50). His assigned counsel has repeatedly asked for adjournments, has failed to review the file or prepare for hearings, and failed to meet with Adams (id. at ¶¶ 50-54).

The complaint makes similar allegations about the performance of each of the plaintiff's counsel. Among other things, their attorneys allegedly have failed to meet with clients, investigate their cases and make proper motions (e.g. complaint, ¶¶ 66-71, 80-83, 94-99). Additionally, the named plaintiffs who are being represented by the Public Defender or the Legal Aid Society have been represented by several different attorneys, many of whom are unprepared (e.g. id. at ¶¶ 175-76, 188-90).

These deficiencies in performance, the complaint alleges, are not due to the individual failings of the assigned attorneys, but rather result from structural and systemic failings, including the absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and county-financed public defense system (complaint, ¶¶ 63, 76, 91, 121). Because of these systemic deficiencies, indigent criminal

defendants in the Counties and across the state allegedly "face a severe and unacceptably high risk of not receiving meaningful and effective assistance of counsel" (id. at ¶ 15).

The complaint acknowledges that, in 2003, the Legislature raised the rates of compensation for 18-b lawyers (complaint, ¶ 255). See L. 2003, ch. 62, part J, § 2; County Law § 722-b. Since January 1, 2004, assigned counsel representing defendants charged with felonies are paid $75 per hour for in-court work, out-of-court work, and for appeals. County Law § 722-b(1)(b). For defendants charged with misdemeanors, the rate of compensation is $60 per hour for both in-court and out-of-court work. Id. at § 722-b(1)(a). Although the total amount to be paid on any given matter may not exceed $4,000 for felonies and appeals from felonies and $2,400 for misdemeanor criminal cases, id. at 722-b(2)(a) & (b), attorneys may apply for compensation in excess of these caps upon a showing of "extraordinary circumstances." Id. at 722-b(3). Not surprisingly, then, plaintiffs do not allege that the current rates of compensation for 18-b attorneys are inadequate. An attorney who annually bills the assigned counsel program for 2,000 hours at $75 per hour, for example, would receive $150,000 in compensation.

The complaint also acknowledges that, beyond raising the rates of compensation, the Legislature in 2003 created the Indigent Legal Services Fund to provide, for the first time,

state assistance to counties to share some of the increase in the 18-rates (complaint, ¶ 255 and Exhibit A at 13). Nevertheless, the complaint alleges that state funding "remains a very small percentage of the overall cost of services in the Counties and does not ensure adequate funding levels" (complaint, ¶ 256). Citing the conclusions of the Kaye Commission, the complaint asserts that the current funding system "imposes a large unfunded mandate upon its counties" and results in an uneven distribution of services, undermining the independence of defense providers (id. at ¶ 257).

The system that would best guarantee quality representation, the complaint alleges, would be a statewide defender system that is completely independent and is entirely and adequately state funded (complaint, ¶ 262). Such adequate funding should come from the state's general fund, not from the counties (id.).

The complaint asserts that the State is violating or will violate the plaintiffs' rights under (1) article I § 6 of the New York State Constitution, (2) provisions of the New York County Law and the Criminal Procedure Law, and (3) the sixth and fourteenth amendments to the United States Constitution and 42 U.S.C. § 1983 (complaint, ¶¶ 410-414). Plaintiffs ask the Court to certify the case as a class action, declare that plaintiffs' rights are being violated, order the State to provide a system of public defense that is consistent with the Constitution and laws

of New York State and the U.S. Constitution, and award them attorney's fees (id. at Wherefore clause).

In lieu of an answer, the State now moves to dismiss the complaint.

ARGUMENT

In reviewing defendant's motion to dismiss, although the Court must accept as true the complaint's factual allegations and draw all reasonable inferences in plaintiffs' favor, it "need not accept as true legal conclusions" disguised as factual allegations. Ozdemir v. Caithness Corp., 285 A.D.2d 961, 963 (3d Dep't 2001); see Mass v. Cornell University, 94 N.Y.2d 87, 91 (1999). Thus, this Court need not assume the truth of plaintiffs' sweeping legal conclusions that the State's indigent defense system is "severely dysfunctional and structurally incapable" of providing adequate representation and is depriving or threatening to deprive the plaintiffs and other indigent defendants of their right to counsel (see, e.g., complaint, ¶¶ 4, 5, 7, 63, 257). Moreover, the questions of whether plaintiffs can collaterally attack their pending legal proceedings in this civil action and whether their systemic challenge is even justiciable are both questions of law, not fact.

Point I

A declaratory judgment action is not available for the named plaintiffs to challenge the adequacy of the legal representation they are receiving in their pending criminal actions

The claims of the twenty named plaintiffs -- who allege that their assigned public defenders or 18-b counsel are providing them with inadequate representation -- should be dismissed. A declaratory judgment action may not be used by a criminal defendant to litigate factual questions in a pending criminal proceeding. A civil action seeking collateral review of assigned counsel's performance would interfere with pending criminal proceedings and the executive branch's administration of the criminal law. Adequate remedies exist in the criminal proceedings themselves for review of the plaintiffs' claims of ineffective assistance of counsel.

It is well established that, as a general rule, "[a] party against whom a criminal proceeding is pending may not seek declaratory relief." Kelly's Rental, Inc. v. City of New York, 44 N.Y.2d 700, 702 (1978). Accordingly, a criminal defendant may not bring a civil action to adjudicate whether a criminal law is unconstitutional as applied to him or his alleged conduct violates a penal law, where the claims involve factual disputes. Id.; Church of St. Paul and St. Andrew v. Barwick, 67 N.Y.2d 510,

523, cert. denied, 479 U.S. 985 (1986); Reed v. Littleton, 285 N.Y. 150, 153-157 (1937). Similarly, a defendant in a pending criminal proceeding may not bring a declaratory judgment action to challenge an adverse criminal court ruling. See Morgenthau v. Erlbaum, 59 N.Y.2d 143, 149-152 (1983); Matter of Veloz v. Rothwax, 65 N.Y.2d 902, 904 (1985).

Important policy considerations underlie this rule. Courts are "loath to impede or interfere with the executive branch's administration of the criminal law, as would occur if the courts decided in civil proceedings whether certain behavior was criminal." Morgenthau v. Erlbaum, 59 N.Y.2d at 150 (discussing Reed v. Littleton, supra). In addition, where the criminal defendant's claims turn on factual issues, permitting the defendant to maintain a declaratory judgment action "would only delay criminal justice, not expedite it." Id. Although the grant of declaratory relief is discretionary, see C.P.L.R. 3001, it is an abuse of discretion for a court to entertain a declaratory judgment action when adequate remedies are available in the criminal proceeding itself to litigate the defendant's claims. Id. at 148; Matter of Beneke v. Town of Santa Clara, 9 A.D.3d 820, 821 (3d Dep't 2004); Island Swimming Sales, Inc. v. County of Nassau, 88 A.D.2d 990 (2d Dep't 1982).

The exceptions to this general rule have been severely circumscribed. Courts have entertained declaratory judgment

actions to challenge the constitutionality or legality of a statute or regulation only when no question of fact is involved. See Dun & Bradstreet v. City of New York, 276 N.Y. 198, 206 (1937); New York Foreign Trade Zone Operators v. State Liq. Auth., 285 N.Y. 272, 276 (1941); Ulster Home Care, Inc. v. Vacco, 255 A.D.2d 73, 77 (3d Dep't 1999). Courts also have permitted the People -- but not the criminal defendant -- to bring a declaratory judgment action to challenge a criminal court ruling when the case presents a pure question of law that will recur in other prosecutions and the criminal court will decide it in the same way, Morgenthau v. Erlbaum, 59 N.Y.2d at 152, or where there are important issues that would otherwise escape appellate review. Matter of Oglesby v. McKinney, 7 N.Y.3d 561, 565 (2006).

The policy considerations behind this rule are implicated here. Plaintiffs' claims of ineffective assistance of counsel are not pure questions of law, but instead pivot on contested questions of fact that can be adequately addressed in the underlying criminal action. Their prosecutions are being handled not by the State or the Attorney General, but rather by the Counties' respective district attorneys, who have not been named as parties to this action. Discovery in this action relating to the twenty pending prosecutions in five separate counties not only would be logistically difficult, but could interfere with and delay the criminal proceedings. See Matter of Legal Aid

Society v. New York City Police Department, 274 A.D.2d 207, 214 (1st Dep't 2000) (potential interference with pending criminal proceedings is a valid basis to deny disclosure of records under the Freedom of Information Law). This proceeding could also adversely impact speedy trial issues. C.P.L. § 30.30. A ruling here in favor of the named plaintiffs could be used to overturn any convictions that may be obtained. Thus, allowing plaintiffs to litigate their ineffective assistance of counsel claims in this civil action would interfere with the pending criminal proceedings and the Executive's administration of the criminal laws.

Moreover, procedures exist through which the named plaintiffs and other indigent litigants may press claims of ineffective assistance of counsel, including a direct appeal from a conviction, a motion pursuant to C.P.L. 440, and a writ of habeas corpus. See, e.g., People v. Smith, 63 N.Y. 41, 69 (1984) (reviewing on direct appeal a convicted defendant's allegations of prejudice by delay in appointment of counsel or disparity in funding); People v. Tippins, 173 A.D.2d 512 (2d Dep't 1991), lv. denied, 78 N.Y.2d 1015 (1991), cert. denied sub. nom. Tippins v. New York, 502 U.S. 1064 (1992) (reviewing a defendant's C.P.L. § 440.10 motion to vacate his conviction on the ground that assigned counsel's fraudulent and unethical demand for additional compensation deprived him of the right to effective assistance of

counsel); Strickland v. Washington, 466 U.S. 668, 686-93 (1984) (writ available for defendant to show actual prejudice due to deficiencies in attorney's performance). Such claims of ineffective assistance of counsel can also be raised before the criminal court during the criminal proceedings.

Contrary authority is readily distinguishable. In Donaldson v. State of New York, 156 A.D.2d 290 (1st Dep't 1989), several individuals commenced an action in the Appellate Division seeking a declaration of a right to assigned counsel for indigent respondents in summary eviction proceedings in Housing Court, and a writ of mandamus compelling the implementation of an assigned counsel program. The First Department held that it lacked subject matter jurisdiction over such an action commenced in the Appellate Division, but transferred it to Supreme Court, stating that there appeared "to be a genuine controversy which [was] neither academic nor moot." Id. at 292.

Donaldson involved an alleged right to counsel in a civil proceeding, and thus did not potentially interfere with pending criminal prosecutions. Further, the claim in Donaldson -- whether there was a right to counsel in a particular type of civil proceeding -- was a pure question of law. Here, in contrast, the right to counsel in criminal proceedings (and the various stages of those proceedings) is well settled and thus not in dispute. Rather, at issue here are, among other things,

factual questions, specific to each case, such as whether assigned counsel have provided or are providing the respective plaintiffs with ineffective assistance, and whether that deficient performance is caused by alleged systemic deficiencies in the Counties' assigned counsel programs (as opposed to the failures of individual counsel to fulfill their ethical obligations to their indigent clients).

Nor do plaintiffs gain any support from New York County Lawyers Association v. State of New York, 294 A.D.2d 69 (1st Dep't 2002) ("NYCLA"), a declaratory judgment action that challenged the adequacy of the former rates of compensation for 18-b counsel in New York county. There were no individual criminal defendants with pending criminal proceedings who were named as plaintiffs in NYCLA. The sole plaintiff there was an association of attorneys who asserted third party standing on behalf of their future indigent criminal and Family Court clients. Further, NYCLA did not challenge the adequacy of representation being provided by assigned counsel in any actual, pending criminal proceedings. Rather, the plaintiff in NYCLA asserted only a prospective systemic claim, alleging that as a result of the low rates of compensation there was an unacceptably high risk that assigned counsel would provide ineffective assistance of counsel. See NYCLA, 294 A.D.2d at 77 ("we view the alleged violations of constitutional rights to be based solely

upon a claim of prospective harm"). Thus, although NYCLA raised issues of standing and justiciability, it did not potentially interfere with pending criminal proceedings. The claims of the twenty named plaintiffs here, if permitted to proceed, would undeniably call into question the validity of their pending criminal proceedings and any convictions obtained in them.

Attempting to fit this case under NYCLA, plaintiffs assert that their "proof does not rest on the proposition that they received ineffective assistance of counsel as defined by case law governing individual, post-conviction claims" (see Plaintiffs' memorandum of law in support of motion for preliminary injunction ["P.I. memo."] at 38). Rather, they claim that to prevail they need only show that, as a result of systemic deficiencies, there is a "severe and unacceptably high risk" that they will receive ineffective assistance of counsel (id.). Defendant disputes that this is the legal standard plaintiffs must meet (see Point II, infra). But regardless of what plaintiffs must prove to ultimately prevail, the fact is unavoidable that a determination of plaintiffs' claims will entail an examination of the performance actually being provided by plaintiffs' assigned counsel. The complaint makes detailed allegations about counsel's deficient performance, allegations that defendant denies and would be entitled to explore in discovery and perhaps at a trial if this action were permitted to proceed. Absent such

an inquiry, it would be impossible to determine whether the alleged "risk" exists or not. Moreover, even if the Court were to find only that counsel's performance was deficient without addressing whether that performance prejudiced the outcome of the criminal proceedings, such findings could form the basis for the reversal of any convictions of the plaintiffs. Thus, plaintiffs' putative systemic claim, if permitted to proceed, would undeniably interfere with their ongoing criminal prosecutions and so must be dismissed.

Point II

Plaintiffs' systemic claim is not justiciable

A. Plaintiffs lack standing to challenge the adequacy or representation provided or to be provided to other criminal defendants.

Since the named plaintiffs cannot maintain this civil action to litigate whether their right to counsel has been or is being violated in their pending criminal proceedings, what remains of this action presents a non-justiciable controversy. An individual criminal defendant, who is "properly concerned only with the application of a particular challenged ruling to his case, lacks the requisite standing to seek a declaration of the rights of other parties in subsequent litigation." Veloz v. Rothwax, 65 N.Y.2d at 904. Thus, the named plaintiffs here lack standing to litigate whether other individuals in other or future criminal cases might be denied the effective assistance of

counsel.

Accordingly, all that remains of this case is a generalized grievance in which plaintiffs, or more precisely the New York Civil Liberties Union ("NYCLU") on their behalf, allege that the State's public defense system threatens to deprive unnamed, future indigent criminal defendants in the Counties of the effective assistance of counsel. Such a systemic claim is not justiciable. "Justiciability is an 'untidy' concept but it embraces the constitutional doctrine of separation of powers and refers, in the broad sense, to matters resolvable by the judicial branch of government as opposed to the executive or legislative branches or their extensions." Jiggetts v. Grinker, 75 N.Y.2d 411, 415 (1990). Absent "extraordinary or emergency circumstances," courts will generally not review policy choices or the exercise of functions that have been "demonstrably and textually . . . committed to a coordinate, political branch of government." New York State Inspection, Sec. and Law Enforcement Employess, Dist. Council 82, AFSCME, AFL-CIO v. Cuomo, 64 N.Y.2d 233, 240 (1984).

B. The structure and funding of New York's indigent defense system is a function reserved to the Legislature

The structure and funding of the State's indigent defense system are legislative, not judicial, functions. The Legislature has addressed the structural issue through the enactment of

article 18-b of the New York County Law, which mandates that each county in the State, and each city in which a county is wholly contained, provide for the assignment of counsel to indigent individuals charged with a crime. See County Law § 722.

While plaintiffs allege that the State, through the enactment of article 18-b of the County Law, has "abdicated its responsibility to guarantee the right to counsel" (complaint, ¶ 10), this is a mere legal conclusion. County Law § 722 actually delegates, not abdicates, responsibility to local governments, which are administrative arms of the State. See Seaman v. Fedourich, 16 N.Y.2d 94, 101 (1965). Plaintiffs may prefer that the State adopt the recommendations of the Kaye Commission and establish a statewide public defenders' office, but the structure and funding of the State's indigent defense system are for the Legislature to decide. Courts decide concrete factual and legal disputes involved in cases, not whether a better system for indigent defense should be implemented.

C. Plaintiffs' claims of prospective harm are not justiciable and fail to state a cause of action

Because the named plaintiffs must litigate their ineffective assistance of counsel claims in their pending criminal proceedings, this action, if permitted to proceed, would address plaintiffs' claims that the indigent defense system in the Counties threatens to violate other criminal defendants' right to counsel. But any such claim is not ripe and fails as a matter of

law. It is impossible to determine in advance of a criminal proceeding whether indigent clients will be prejudiced in a constitutional sense by deficiencies in the performance of assigned counsel.

To establish a Sixth Amendment claim of ineffective assistance of counsel, a criminal defendant must show not only that counsel's performance was deficient, but also that the deficiency prejudiced the defendant, that is, likely affected the outcome of the proceeding. See Strickland v. Washington, 466 U.S. 668, 687 (1984). As under federal law, in New York "a claim of ineffective assistance of counsel will be sustained only when it is shown that counsel partook 'an inexplicably prejudicial course.'" People v. Benevento, 91 N.Y.2d 708, 713 (1998) (quoting People v. Zaborski, 59 N.Y.2d 863, 865 [1983]). New York's "meaningful representation" standard "include[s] a prejudice component which focuses on the 'fairness of the process as a whole rather than [any] particular impact on the outcome of the case.'" People v. Henry, 95 N.Y.2d 563, 566 (2000) (quoting People v. Benevento, 91 N.Y.2d at 714).

Whether an individual will receive meaningful representation cannot be answered in the abstract and in advance of a criminal proceeding. This is so because there is "no set litmus test for determining what constitutes ineffective or inadequate representation." People v. Mason, 263 A.D.2d 73, 78 (1st Dep't

2000). Whether counsel's performance was ineffective depends on an examination of "the evidence, the law, and the circumstances of a particular case," People v. Baldi, 54 N.Y.2d 137, 147 (1981) -- an inquiry that can occur only after the criminal proceedings are completed.

A similar analysis applies to plaintiffs' allegations that some of them were not represented at arraignment (see, e.g., complaint, ¶¶ 41, 66). Unlike claims of ineffective assistance of counsel, where a showing of prejudice is required to establish a constitutional violation, when counsel is denied entirely at a "critical stage" of a criminal proceeding, the Court will presume prejudice. See Mickens v. Taylor, 535 U.S. 162, 166 (2002); People v. Margan, 157 A.D.2d 64, 66 (2d Dep't 1990). However, in New York, the failure to provide counsel at arraignment is not necessarily considered the denial of counsel at a critical stage and, thus, does not automatically require the reversal of a criminal conviction. See People v. Green, ___ A.D.3d ___, 849 N.Y.S.2d 826 (4th Dep't 2008); People v. Smith, 29 A.D.2d 578 (3d Dep't 1967); People v. Combs, 19 A.D.2d 639 (2d Dep't 1963).[1]

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[1]In Hamilton v. Alabama, 368 U.S. 52 (1961), the Court held that under Alabama law, arraignment is a critical stage of criminal proceeding because important defenses could be lost if not asserted at that time. But in People v. Combs, 19 A.D.2d 639 (2d Dep't 1963), the Appellate Division found that "there is a radical difference between the law of Alabama" and the law of New York with respect to arraignment, and that a showing of prejudice is therefore required to reverse a conviction based on the denial of counsel at arraignment.

Whether the denial of counsel at arraignment warrants reversal depends on whether the defendant suffered prejudice, see People v. Green, supra, People v. Smith, supra, People v. Combs, supra. That inquiry, like a claim of deficient performance by counsel, cannot be determined in advance and in a factual vacuum, but must be determined after-the-fact in the context of the criminal proceeding itself. Plaintiffs thus cannot litigate those claims here.

For these reasons, courts in other jurisdictions have found similar systemic challenges to be non-justiciable. In Platt v. State of Indiana, 664 N.E.2d 357, 362 (Ind. Ct. App. 1996), cert. denied, 520 U.S. 1187 (1997), a proposed class of indigent defendants alleged that "the system for providing legal counsel for indigents in Marion County lacks sufficient funds for pretrial investigation and preparation which inherently causes ineffective assistance of counsel at trial." Id. The court held that the case was not ripe for review because a violation of the right to counsel "will arise only after a defendant has shown he was prejudiced by an unfair trial." Id. at 363. "This prejudice," the court stated, "is essential to a viable Sixth Amendment claim and will exhibit itself only upon a showing that the outcome of the proceeding was unreliable." Id. Therefore, it held, the plaintiffs' claims were not reviewable "as we have no proceeding and outcome from which to base our analysis." Id.

Similarly, in Kennedy v. Carlson, 544 N.W.2d 1, 6-8 (Minn. 1996), the court dismissed as non-justiciable a suit by a public defender challenging the state statute establishing the funding system for Minnesota's public defenders. There, the plaintiff claimed that his clients were exposed to the possibility of substandard legal representation because the underfunding of the system caused public defenders to be "overworked and understaffed" and to carry excessive caseloads. The court held that the public defender's "claims of constitutional violations are too speculative and hypothetical to support jurisdiction in this court." 544 N.W.2d at 8.

The court reached a similar conclusion in Machado v. Leahy, 17 Mass. L. Rep. 26, 2004 Mass. Super. LEXIS 14 (Mass. Super. Ct. 2004). There, the plaintiffs -- eleven attorneys who accept assigned counsel cases -- alleged that low compensation rates have created a "'severe and unacceptably high risk' that indigent persons will be denied their rights to counsel and to due process, and that, without fair compensation for bar counsel, the Massachusetts system of providing constitutionally required representation will likely soon collapse." 2004 Mass. Super LEXIS at *11. The Massachusetts court concluded that these allegations were too vague and not "sufficiently anchored in the alleged facts to create a specific, ascertainable controversy." Id. at *16.

The Massachusetts court also found that the plaintiffs' claims raised serious separation of powers concerns. Although the court stated that it had the inherent authority to ensure the proper operation of the judiciary, it found that the plaintiffs had failed to allege facts justifying resort to the judiciary's inherent authority in order to safeguard their clients' constitutional rights or the Court's core functions. 2004 Mass. Super. LEXIS at *23. "Established methods are available to the judiciary and plaintiffs' clients to address any actual instances of ineffective representation resulting from the low compensation." Indigent defendants, the court noted, could "seek relief through appeals and new trial motions premised on ineffective assistance grounds." Id. "Should the foreshadowed 'systemic failure' materialize," the court reasoned, "the volume of overturned convictions and retrials of civil matters attributable to underfunding of assigned counsel would effectively convey to the Legislature the need to increase funding, and it would more likely warrant exercise of the judiciary's inherent authority to protect the clients' rights and the proper operation of the courts." Id.

A similar conclusion is warranted here. While plaintiffs allege instances of deficient performance by assigned counsel in the Counties, they have not alleged that there have been numerous, widespread instances in which courts have overturned

convictions based on findings of ineffective assistance or the denial of counsel.

Although the First Department in NYCLA found the case to be justiciable, that case is distinguishable. The plaintiff in NYCLA challenged only the adequacy of the rates of compensation for assigned counsel in New York City. See NYCLA, 294 A.D.2d at 72. Deciding whether a compensation rate is adequate is a task that courts routinely perform in a variety of contexts. See, e.g., Jiggetts, 75 N.Y.2d at 415-416 (claim that public assistance benefits were inadequate under statutory standard was justiciable); Matter of Nazareth Home of the Franciscan Sisters v. Novello, 7 N.Y.3d 538, 545-46 (2006) (reviewing adequacy of Medicaid reimbursement rates). Here, in contrast, plaintiffs ask the Court ultimately to decide, among other things, whether the State should have a statewide public defender's office or continue with its decentralized system, whether funding for the indigent defense system should be borne by the State or local governments, and whether there should be statewide hiring and performance standards. All of these issues are policy questions that are properly entrusted to the Legislature.

Plaintiffs' heavy reliance (P.I. memo at 42-43) on Luckey v. Harris, 860 F.2d 1012 (11th Cir. 1988), cert. denied, 493 U.S. 957 (1990), for the proposition that they can maintain this prospective systemic action is misplaced. The Eleventh Circuit's

rationale for rejecting the Strickland standard is not persuasive. According to Luckey, "[t]he sixth amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the 'ineffectiveness' standard may nonetheless violate a defendant's rights under the sixth amendment." 860 F.2d at 1017.

Luckey's view of the sixth amendment cannot be squared with precedent of the United States Supreme Court and the New York Court of Appeals holding that the "'fundamental right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial in an adversarial system of justice.'" People v. Benevento, 91 N.Y.2d 708, 711 (1998) (quoting People v. Claudio, 83 N.Y.2d 76, 80 [1993]). "'Absent some effect of challenged conduct on the reliability of the . . . process, the [effective counsel] guarantee is generally not implicated.'" Roe v. Flores-Ortega, 528 U.S. 470, 482 (2000) (quoting United States v. Cronic, 466 U.S. 648, 658 [1984]).

Indeed, Luckey's unprecedented view of the right to counsel was strongly criticized in a four-judge dissent from the denial of en banc review. See Luckey v. Harris, 896 F.2d 479 (11th Cir. 1989). The dissenters cogently noted that

> The sixth amendment right to counsel is not an abstract right to a particular level of representation; it is the right to the representation necessary for a fair trial. There can be no sixth amendment violation in the

> absence of prejudice at a particular trial. Put differently, if there is no prejudice, the alleged sixth amendment violation is not merely harmless; there is no violation at all.

Luckey, 896 F.2d at 480. Much like the plaintiffs in Luckey, plaintiffs here seek not to litigate whether their constitutional rights have been violated, but rather to impose a court-ordered overhaul of the indigent defense system, a task properly reserved to the Legislature. The complaint should therefore be dismissed as non-justiciable.

Point III

Plaintiffs' third cause of action must be dismissed because the State is not a person subject to suit under 42 U.S.C. § 1983

Plaintiffs' third cause of action alleges that the State of New York is violating their rights under the sixth and fourteenth amendment and 42 U.S.C. § 1983 ("section 1983") (complaint, ¶ 414). Section 1983 "is not itself a source of substantive rights but merely provides a method for vindicating federal rights conferred elsewhere." Graham v. Connor, 490 U.S. 386, 393-94 (1989). Thus, section 1983 is really just the vehicle for enforcing whatever federal rights plaintiffs may have. Plaintiffs' section 1983 claim is improperly pled and must therefore be dismissed.

Actions under section 1983 may be maintained only against a "person," and it is well settled that the state is not a person within the meaning of section 1983. See Will v. Michigan Dept.

of State Police, 491 U.S. 58, 71 (1989); Haywood v. Drones, 9 N.Y.3d 481, 489 (2007). In Will, the Supreme Court held that this rule applies even when the section 1983 action is brought in state court. See also Matter of Gable Transport, Inc. v. State of New York, 29 A.D.3d 1125, 1128 (3d Dep't 2006); Matter of Giaquinto v Commissioner of New York State Dept. of Health, 39 A.D.3d 922, 923-924 (3d Dep't), lv. granted, 9 N.Y.3d 812 (2007).

There is an exception to this rule when the plaintiff seeks prospective injunctive relief against a state official to enjoin an ongoing violation of federal law. See Will, 491 U.S. at 71 n.10; Ford v. Reynolds, 316 F.3d 351, 355 (2d Cir. 2003). However, this exception, first recognized in Ex Parte Young, 209 U.S. 123, 159-60 (1908), applies only when the suit is brought against a state official and "has no application in suits against the States and their agencies, which are barred regardless of the relief sought." Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993); see Alabama v. Pugh, 438 U.S. 781 (1978). Here, the complaint names the State of New York as the sole defendant (complaint, ¶ 36). Because the State is not a person even when the complaint seeks prospective injunctive relief, the third cause of action fails to state a cause of action and must therefore be dismissed.

Point IV

The district attorneys of the Counties are necessary parties, as are the plaintiffs' assigned defense counsel

If this Court permits the named plaintiffs to litigate whether they received or are receiving ineffective assistance of counsel in their pending criminal cases, then the district attorneys in the Counties are necessary parties under C.P.L.R. 1001(a). The district attorney, not the Attorney General, is responsible for prosecuting the offenses with which the plaintiffs are charged. See County Law § 700(1). The district attorney is a local, not a state, officer and is not subject to the State's control. See Matter of Kelley v. Amodeo, 57 N.Y.2d 522, 535-36 (1982); Fisher v. State of New York, 10 N.Y.2d 60 (1961); N.Y. Const. art. XIII, § 13(a). A ruling in this action that the named plaintiffs received or are receiving the ineffective assistance of counsel would imperil any convictions that the district attorneys might obtain. Thus, they would be "inequitably affected by a judgment" in this action within the meaning of C.P.L.R. 1001(a). See Matter of Thomas v. Justices of the Supreme Court of the State of New York, Queens Co., 304 A.D.2d 585 (2d Dep't 2003); Matter of Barnwell v. Breslin, ___ A.D.3d ___, 846 N.Y.S.2d 480, 481 (3d Dep't 2007). This same analysis applies with equal force to plaintiffs' defense counsel and the entities they are associated with. Accordingly, the

action should be dismissed under C.P.L.R. 1003, or the court should order the plaintiffs to join the district attorneys and plaintiffs' defense counsel and the Legal Aid/Public Defender/Assigned Counsel/Conflict Defender they are associated with as parties under C.P.L.R. 1001(a).

CONCLUSION

The Court should grant defendant's motion to dismiss the complaint.

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Respectfully submitted,

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