Court of Appeals of the State of New York

KIMBERLY HURRELL-HARRING, et al.,
On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs-Appellants,

-against-

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

Defendants-Respondents.

BRIEF ON BEHALF OF *AMICI CURIAE*

**NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
NEW YORK STATE BAR ASSOCIATION,
NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS,
NEW YORK COUNTY LAWYERS' ASSOCIATION,
LOUIS STEIN CENTER FOR LAW AND ETHICS AT FORDHAM UNIVERSITY SCHOOL OF LAW,
JACOB BURNS CENTER FOR ETHICS IN THE PRACTICE OF LAW AT
BENJAMIN N. CARDOZO SCHOOL OF LAW,
CRIMINAL JUSTICE CENTER AT PACE UNIVERSITY SCHOOL OF LAW,
CENTER ON LATINO AND LATINA RIGHTS AND EQUALITY
AT CUNY SCHOOL OF LAW,
AND 40 NEW YORK STATE LAW PROFESSORS***

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INTEREST OF *AMICI CURIAE*

National Association of Criminal Defense Lawyers

The National Association of Criminal Defense Lawyers (NACDL) is a not-for-profit professional organization that represents the nation's criminal defense attorneys. NACDL is the preeminent organization advancing the institutional mission of the nation's criminal defense bar to ensure the proper and fair administration of justice, and justice and due process for all persons accused of crime. Founded in 1958, NACDL has a membership of more than 11,000 direct members and an additional 35,000 affiliate members in all 50 states and 30 nations. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. Approximately 700 NACDL members are New York attorneys. The American Bar Association recognizes NACDL as an affiliate organization and accords it representation in the House of Delegates.

In furtherance of its mission to safeguard the rights of the accused and champion fundamental constitutional rights, NACDL frequently appears as *amicus curiae* before the United States Supreme Court, the federal courts of appeal and the highest courts of numerous states. Last year, NACDL appeared as an *amicus* before this Court in *People v. Weaver*, 12 N.Y.3d 433 (2009). In recent years,

NACDL's briefs have been cited on numerous occasions by the Supreme Court in some of the most important criminal law decisions. *See, e.g., Kennedy v. Louisiana*, __ U.S. __, 128 S. Ct. 2641, 2663 (2008); *Rothgery v. Gillespie County*, __ U.S. __, 128 S. Ct. 2578, 2587 (2008); *Blakely v. Washington*, 542 U.S. 296, 312 (2004); *Crawford v. Washington*, 541 U.S. 36, 52 (2004).

NACDL has a specific and demonstrated interest in ensuring that accused persons have access to qualified counsel at every stage of a criminal proceeding. NACDL most recently supported this principle in *Rothgery v. Gillespie County* where NACDL successfully urged the Supreme Court to find that the right to counsel unequivocally attaches at arraignment, the first formal proceeding at which an individual is accused. Access to counsel at that point is critical - often the determinative factor between freedom and confinement. Indeed, the allegations in this case, if true, will establish that this fundamental right is systemically violated in New York State. NACDL, informed by the experience of its membership, is uniquely well positioned to inform this Court of the consequences that are visited upon criminal defendants when they are subjected to representation by overburdened and under-resourced counsel, and why post-conviction remedies are inadequate to redress this deficiency.

Finally, NACDL commits significant institutional resources to ensuring that indigent accused persons have access to meaningful and effective representation.

NACDL maintains a full-time Indigent Defense Counsel whose sole responsibility is to support indigent defense reform efforts throughout the country. The Association is currently pursuing initiatives in at least half a dozen states. Further, NACDL devotes considerable resources to providing back-up support both to public defenders and private counsel who handle assigned cases, and funds a full time Resource Counsel to perform that function. The Association recognizes that a system of criminal justice that provides inferior justice to those whose poverty prevents them from hiring private counsel is inconsistent with fundamental American values, including, most significantly, the constitutional right to counsel.

Accordingly, NACDL brings a perspective that can inform the Court's consideration of the issues in this case, and has a direct interest in seeing that the indigent accused have a vehicle to redress systemically deficient representation.

New York State Bar Association

The New York State Bar Association (NYSBA), a not-for-profit corporation, is America's largest voluntary state bar association. It was founded in 1876, and currently has 77,000 members representing every town, city and county in New York State. The NYSBA's members include defense lawyers, prosecutors, judges, academics, law enforcement officials, and others involved in the criminal justice field. The NYSBA's goals are to cultivate the science of jurisprudence, promote reform in the law, facilitate the administration of justice, and elevate the standards

of integrity, honor, professional skill and courtesy in the legal profession. Over the course of more than 100 years, the NYSBA has sought legislation to simplify and update court procedures, been instrumental in raising judicial standards, established machinery for maintaining the integrity of the profession, advocated providing enhanced, voluntary *pro bono* legal services to the poor, been in the vanguard of efforts to elevate the standards of practice, and achieved national recognition for its continuing program of public education.

The NYSBA has long been a leader in advocating for the provision of legal services to the poor. In 1933 -- more than 30 years before the United States Supreme Court's seminal decision in *Gideon v. Wainwright* – the NYSBA formally endorsed the concept of public defenders to provide representation to indigent criminal defendants. *See Of Practical Benefit*: New York State Bar Association: 1876-2001, at 50-51. In the ensuing decades, the NYSBA continued to advocate for indigent defense services by recommending legislation to promote counsel for eligible defendants, encouraging its members to volunteer to provide *pro bono* services, and providing educational materials regarding the need for, and importance of, legal aid. *Id.* The NYSBA's support of legal aid continued following the Supreme Court's 1963 decision in *Gideon v. Wainwright*, establishing the right of indigent defendants in state court proceedings to state-paid counsel. The NYSBA strongly supported federal and state legislation to create

systems to provide mandated representation in both federal and state courts. The NYSBA's advocacy on behalf of mandated representation continues to the present. These efforts include lobbying for adequate financial support for providers of mandated representation, and advocating for systemic reform to improve the quality of representation provided to indigent defendants. Thus, the NYSBA has a well-demonstrated interest in the quality of representation provided to indigent criminal defendants, and in the efficacy of the legal means to address deficiencies in such representation.

New York State Association of Criminal Defense Lawyers

The New York State Association of Criminal Defense Lawyers (NYSACDL) is a not-for-profit corporation with a subscribed membership of more than 800 attorneys, which includes private practitioners, public defenders, and law professors. It is a recognized State Affiliate of the National Association of Criminal Defense Lawyers. The NYSACDL was founded in 1986 to promote study and research in the field of criminal defense law and the related disciplines. Its goals include promoting the proper administration of criminal justice; fostering, maintaining, and encouraging integrity, independence and expertise of defense lawyers in criminal cases; protecting individual rights and improving the practice of criminal law; enlightening the public on such issues; and promoting the exchange of ideas and research; and appearing as *amicus curiae* in cases of

significant public interest or of professional concern to the criminal defense bar. The NYSACDL has long advocated for systemic reform of the indigent defense system, including for an indigent defense commission and statewide public defender system.

New York County Lawyers' Association

The New York County Lawyers' Association (NYCLA) is a not-for-profit professional organization of approximately 10,000 attorneys practicing primarily in New York County. NYCLA's original Certificate of Incorporation specifically provides that it is to promote reforms in the law and facilitate the administration of justice. NYCLA's Restated Certificate of Incorporation in 1972 provides that one of the means by which the Association is to fulfill its charitable mission is "by arranging for the provision by its members of free legal services for indigent, low income and other persons in need...."

In furtherance of this mission, NYCLA was an original sponsor of New York City's Assigned Counsel Plan, established under Article 18-B of the County Law to provide representation by assigned private counsel in criminal trial and appellate proceedings in the First and Second Departments. Since the Plan's adoption in 1965, NYCLA has provided institutional support for the screening and continuing education components of the Plan, and its members have served on the various Panels and the First Department Central Screening Committee. Indeed,

NYCLA has a *de jure* role in fulfilling the profession's obligation to ensure the availability of qualified, competent counsel to be provided both by an assigned counsel panel and indigent defense organizations. *See* 22 NYCRR Part 612, Rules to Implement a Criminal Courts Panel Plan and 22 NYCRR Part 613, Rules to Implement An Indigent Defense Organization Oversight Committee. In both cases, NYCLA, together with other bar associations, plays an active role in developing and implementing rules and standards to ensure that the indigent have access to qualified and professional representation.

Throughout the years, NYCLA has been a powerful voice in support of providing qualified counsel for the indigent accused. On December 12, 1994, NYCLA created a Task Force on the Representation of the Indigent that examined New York City's system for providing counsel to the indigent and proposed myriad reforms. The initiatives included proposals to provide institutional oversight to ensure that independent indigent defense organizations maintain minimum practice standards; create a statewide oversight board for indigent defense services to ensure statewide compliance with minimum practice standards; ensure adequate funding for indigent defense and insulate those services from political interference; and increase assigned counsel compensation rates.

To address the crisis in indigent defense, which is precisely the subject of this litigation, several years ago NYCLA was the plaintiff in successful litigation

that obtained declarative and injunctive relief establishing systemic deficiency. *NYCLA v. State*, 763 N.Y.S.2d 397, 196 Misc.2d 761 (Sup Ct NY Cty 2003). In a preliminary ruling denying the State's motion to dismiss, the Supreme Court stated that "NYCLA has played a significant and unique role in the creation and implementation of the Assigned Counsel Plan that reflects its history and charitable purposes in the monitoring and oversight of the Plan and the training of its attorneys." *NYCLA v. Pataki*, 188 Misc. 2d 776, 783, 727 N.Y.S.2d 851 (Sup Ct NY Cty 2001). In affirming that decision, the Appellate Division observed that "NYCLA is an important bar association, which has played a significant role in the creation and implementation of the Assigned Counsel Plan in New York County, which continues to train attorneys to provide effective representation to children and adults under the Plan." *NYCLA v. State*, 294 A.D.2d 69, 75 (1st Dept, 2002).

Accordingly, NYCLA has a direct and well-established interest in ensuring that indigent accused have adequate legal means to pursue systemic deficiency when it impairs the right to meaningful and effective representation at all stages of a criminal prosecution.

Louis Stein Center for Law and Ethics at Fordham University School of Law, Jacob Burns Center for Ethics in the Practice of Law at Benjamin N. Cardozo School of Law, Criminal Justice Center at Pace University School of Law, City University of New York School of Law's Center on Latino and Latina Rights and Equality

and

New York State Law Professors

Aviva Abramovsky, Syracuse University College of Law; Sameer Ashar, CUNY School of Law[1]; Ursula Bentele, Brooklyn Law School; Adele Bernhard, Pace University School of Law; Guyora Binder, University at Buffalo Law School; Jennifer Blasser, Cardozo School of Law; Beryl Blaustone, CUNY School of Law; John H. Blume, Cornell University Law School; Frank Bress, New York Law School; Susan Bryant, CUNY School of Law; Stacy Caplow, Brooklyn Law School; Jay D. Carlisle II, Pace University Law School; Eugene Cerruti, New York Law School; Tucker B. Culbertson, Syracuse University College of Law; Christopher Fabricant, Pace University Law School; Monroe Freedman, Hofstra University Law School; Philip Genty, Columbia School of Law; Stephen E. Gottlieb, Albany Law School; Keri K. Gould, St. John's University School of Law; Bruce Green, Fordham University School of Law; William Hellerstein, Brooklyn Law School; Mariana Hogan, New York Law School; K. Babe Howell, CUNY School of Law; Michael J. Hutter, Albany Law School; Ramzi Kassem, CUNY School of Law; Jeffrey Kirchmeier, CUNY School of Law; Richard Klein, Touro College Jacob D. Fuchsberg Law Center; Donna Hae Kyun Lee, CUNY School of Law; Stephen Loffredo, CUNY School of Law; Mary A. Lynch, Albany Law School; Holly Maguigan, New York University Law School; Jonathan Oberman, Cardozo School of Law; Martha Rayner, Fordham University School of Law; Alex Reinert, Cardozo School of Law; Jenny Rivera, CUNY School of Law; Laurie Shanks, Albany Law School; Roy D. Simon, Hofstra University School of Law; Bradley Wendel, Cornell University School of Law; Ellen Yaroshefsky, Cardozo School of Law; Steven Zeidman, CUNY School of Law.

[1] CUNY School of Law Professors are listed as such for identification purposes only.

Louis Stein Center for Law and Ethics (the Stein Center), which is based at Fordham University School of Law, examines the critical role of lawyers in building a more just society, and explores how ethical values inform and improve the legal profession. The Stein Center supports a wide range of conferences, publications, and independent research and encourages dialogue on a variety of issues, including criminal justice, immigration policy, arbitration and mediation, the lawyer's role in a contemporary democracy, judicial independence, and lawyers and governance. Above all, the Stein Center seeks to promote an understanding of "ethical legal practice" that goes beyond adherence to the rules set forth in professional codes of conduct. In their teaching, scholarship, and academic and continuing legal education programs, the Stein Center and affiliated Fordham Law faculty have spent more than fifteen years examining ethical issues in the administration of criminal justice, including the ethical obligations of criminal defense lawyers and prosecutors.

Jacob Burns Center for Ethics in the Practice of Law at Cardozo School of Law sponsors courses, programs, and events that provoke dialogue and critical thought on ethical and moral issues of professional responsibility. The Center helps prepare students to face, with integrity, the difficult and important questions that arise in all areas of legal practice. In the past five years, the Center's work has focused upon ethical issues in the criminal justice system. The Center has

sponsored and organized conferences, programs, and publications related to the exercise of prosecutorial discretion and ethical obligations of criminal defense lawyers. The Center sponsors a Criminal Justice Ethics Roundtable on a bimonthly basis where judges, prosecutors, defense attorneys, and academics gather informally to examine critical ethical issues in the criminal justice system.

Pace Criminal Justice Center (PCJC) encourages research and conversation on the theory and practice of criminal law and the synergy between them, through teaching, symposia, colloquia, and conferences. The PCJC generates educational opportunities for Pace Law students while simultaneously providing Pace faculty with an ideal environment to develop research projects and improve teaching. The PCJC provides opportunities for interdisciplinary collaboration between scholars, policymakers, and practitioners in and outside the Pace community. It expects to provide a forum for community involvement in the discussion of issues pertaining to our criminal justice system and to make resources available to those interested in advancing legal reforms aimed at stemming the expansion of the criminal law and promoting the fair and ethical prosecution of criminal defendants.

City University of New York School of Law's Center on Latino and Latina Rights and Equality (CLORE) focuses on issues impacting the Latino community in the United States, with the goal of developing progressive strategies

for legal reform. The Center seeks to educate lawyers, law students, scholars and the general public on the status of Latinos and Latinas, as well as to advocate for expanded rights in the areas that affect the growing Latino population. Through its educational, advocacy and litigation-related projects, CLORE explores substantive legal issues on a broad range of public interest lawyering topics, including issues related to Latinos and Latinas in the criminal justice system. Approximately 79% of the New York State prison population is African American and Latino, and African Americans and Latinos constitute 91% of the New York City jail population. According to a Bureau of Justice Special Report, 73% of Hispanics in State prison had public defenders or assigned counsel. Given the significant impact of New York State's criminal justice system on Latino individuals and on the Latino Community, and the reliance of individual Latinas and Latinos on appointed counsel, CLORE has a unique interest in supporting efforts for systemic change through the judicial process, intended to ensure equal and adequate access to legal representation and the provision of a fair system of justice.

The above four legal Centers and 40 professors of law from each and every law school in New York State, join this brief because the current indigent defense system in New York State fosters and, in some cases, compels substandard practice, often making it difficult or impossible for lawyers to fulfill the ethical standards that guide the legal profession.

These centers and law faculty are familiar with the fundamental constitutional rights afforded to criminal defendants, and the ethical obligations imposed on lawyers for the accused. These rights include the constitutional right to the assistance of counsel as well as the inherent right to the effective assistance of that counsel and to the more specific constitutional obligations that comprise the right to the effective assistance of counsel (e.g., the duty to investigate and the duty to communicate with and sufficiently advise the accused). They teach future lawyers about the full panoply of rights subsumed within the Sixth Amendment.

Those who serve as clinical faculty train students to become ethical, responsible, and thoughtful practitioners, inculcated with the skills and values mandated by the American Bar Association Section on Legal Education and Admissions to the Bar, *Report of the Task Force on Law Schools and the Profession: Narrowing the Gap* (July 1992) (better known as the "MacCrate Report"). They emphasize the obligation of lawyers to provide services to those who cannot afford to pay for those services, and the obligation to provide those services with the same degree of professionalism and excellence as would be provided to those with the means to privately retain legal representation.

Those who serve as ethics experts train students that understanding applicable ethical rules, and conducting themselves accordingly, is a critical responsibility of every attorney. They teach students about the component parts of

effective assistance of counsel and the particular ethical requirements of criminal defense practice, and hope and expect that these will serve as lodestars for the students throughout their careers. Through analyses of the Model Rules of Professional Conduct and the American Bar Association Standards for Criminal Justice, students learn of the necessity for defense attorneys to conduct themselves according to a set of standards and mandates that serve to ensure that clients receive ethical and effective representation.

The centers and law faculty joining this brief recognize the crisis that afflicts indigent criminal defense in New York. They know the conditions in the courts and offices where their students practice after graduation. They know that in many locations throughout the state, the sheer numbers of cases lawyers are expected to handle, and the limited resources available to them, have an adverse impact on their ability to provide effective assistance of counsel. They recognize that constitutional and ethical rules are often honored in the breach, and that this is in large part attributable to under-funded and under-resourced defense organizations that saddle their attorneys with unmanageable caseloads. They understand the profound consequences of this systemic deficiency for countless thousands of indigent accused. In particular, in an era in which the collateral consequences of even the most minor criminal conviction may trigger life-altering disabilities, there

is a desperate need to redress the constitutional infirmity of New York's indigent defense system.

These centers and law faculty also recognize that the executive and legislative branches have persistently failed to address this burgeoning crisis, one which was fully documented by the judicial branch in the Report of the Kaye Commission on the Future of Indigent Defense Services (2006). For that reason, these custodians of the future of the legal profession join this brief to signal their belief that it is imperative that the Court of Appeals permit plaintiffs to seek declarative and injunctive relief to redress the deficiencies in the indigent defense system. These deficiencies make it highly likely that countless accused will be deprived of effective representation.

INTRODUCTION

This Court should recognize that, where systemic deficiencies deprive the indigent accused of assistance of counsel at critical stages of the adversarial process and create a high probability that they will be denied meaningful and effective representation, plaintiffs-appellants have pled a cognizable claim for prospective relief. In so doing, the Court should reject the post-hoc remedial standard in *Strickland* applied to vacate convictions as both inapplicable and ineffective to redress the ongoing and imminent threat of actual harm to the rights of poor people to have effective assistance of counsel in criminal proceedings.

Amici are united in the view that there is a cause of action for declaratory and injunctive relief where there is evidence of systemic deficiency that creates an unacceptably high risk that indigent accused persons will be deprived of their constitutional right to effective assistance of counsel. This is the only vehicle by which the judicial branch may address systemically the litany of harms alleged by plaintiffs and the proposed class. It will permit prospective corrective measures to improve the State's broken indigent defense system without necessitating the dismissal of any pending criminal charges or the reversal of any conviction. Pending findings of fact by the trial court, *amici* do not address the precise contours of any such injunctive relief.

Time and again, when confronted with claims that an indigent defense system is incapable of fulfilling the constitutional obligation to afford effective assistance of counsel, states assert, as a barrier to prospective relief, the argument that the *Strickland* standard is the sole vehicle for relief of Sixth Amendment violations. Increasingly, courts decline to impose this barrier. This is a seminal opportunity for the highest court of one of the most populous, important and influential states to address the patent inadequacy of this relief. Because of New York's historic, pre-*Gideon* commitment to the right to counsel for the poor, the eyes of the nation will be on New York as it decides this crucial issue.

Particularly because the abstention doctrine may sometimes operate as a bar to federal consideration of widespread systemic deficiency at the state level, it is incumbent on state courts to address prospectively constitutional deficiencies in state-controlled indigent defense systems. This Court should recognize the availability of prospective relief to redress imminent, systemic risks posed by inadequacies in the indigent defendant system rather than rely upon a case-by-case, after-the-fact approach that is available only to remedy constitutionally defective convictions.

The decision in this case will have profound consequences for indigent reform efforts throughout the country and will permanently define the contours of the right to counsel in New York State. The bar association a*mici* share a long and

distinguished heritage of advancing their missions to ensure the fair administration of justice and as advocates for the provision of qualified counsel to the indigent. Each organization recognizes that the right to effective counsel at every critical stage of the adversary process is fundamental to justice and fairness. Other *amici*, including individual law professors from all of the State's law schools as well as legal ethics and practice centers, share a universal commitment to prepare future attorneys to uphold the fundamental values of the profession and to ensure that the ethical standards of the profession are adhered to both in word and deed. It is for these reasons, as well as to advance the integrity of the criminal justice system, that these *amici* urge this Court not to "erect impenetrable barriers" to claims for prospective relief. *NYCLA v. Pataki*, 188 Misc.2d 776, 787; 727 N.Y.S.2d 851, 859 (Sup Ct, NY Cty 2001), *aff'd, NYCLA v. State*, 294 A.D.2d 69, 742 N.Y.S.2d 16 (1st Dept., 2002)). Indeed, the assertion of this position fulfills a fundamental professional duty of all attorneys and the organizations that represent them:

> A lawyer, ..., is [ ] *an officer of the legal system with special responsibility for the quality of justice*....As an officer of the legal system, each lawyer has a duty to uphold the legal process; to demonstrate respect for the legal system; to seek improvement of the law; and to further the public's understanding of and confidence in the rule of law and the justice system because, in a constitutional democracy, legal institutions depend on popular participation and support to maintain their authority.

New York Rules of Professional Conduct, Preamble: A Lawyer's Responsibilities (Effective April 1, 2009) (emphasis added).[2]

The rule the Court adopts here must recognize that systemic, constitutionally deficient assistance of counsel cannot be put beyond the reach of the courts; that the problem of the system-wide deprivation of counsel transcends an individual remedy for the convicted; and that this decision has an impact on both the integrity of the legal profession and the perception of the State's system of indigent defense.[3]

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[2] *See also ABA Criminal Justice Section Standards: Defense Section, Standard 4-1-2(d)* ("Defense counsel should seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to defense counsel's attention, he or she should stimulate efforts for remedial action.").

[3] In 2001, the Open Society Institute and NLADA commissioned a public opinion study on indigent defense that found that the majority of Americans believe that, in the interests of fairness, government should guarantee effective indigent defense services. Beldon Russonello & Stewart, Open Society Institute, National Legal Aid and Defender Association, *Americans Consider Indigent Defense: Analysis of a National Study of Public Opinion* (2002), *available at* http://www.nlada.org/DMS/Documents/1075394127.32?Belden%20Russonello%20Polling%20short%20report.pdf (last visited Jan. 5, 2010); *see also* Remarks of Attorney General Eric Holder at the American Council of Chief Defenders Conference, June 24, 2009 ("We know that defenders in many jurisdictions carry huge caseloads that make it difficult for them to fulfill their legal and ethical responsibilities to their clients. We hear of lawyers who cannot interview their clients properly, file appropriate motions, conduct fact investigations, or do many of the other

ARGUMENT

"Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he has." *United States v. Cronic,* 466 U.S. 648, 654 (1984), *quoting* Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L.REV. 1, 8 (1956). "[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems [] to be an obvious truth." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

The constitutional right to effective assistance of counsel[4] is more "than meeting the adversary presentation of the prosecutor," but protects "a different, albeit related, aspect of counsel's role, that of expert professional whose assistance is necessary in a legal system governed by complex rules and procedures for the defendant to obtain a decision at all – much less a favorable decision – on the merits of the case." *Evitts v. Lucey*, 469 U.S. 387, 394 n. 6 (1985). To safeguard

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things an attorney should be able to do as a matter of course."), *available at* http://www.justice.gov/ag/speeches/2009/ag-speech-090624.html (last visited Jan. 20, 2010).

[4] The argument that the ineffective assistance of counsel standard under the United States Constitution is inappropriate to redress systemic deficiency also applies to the broader New York post-conviction standard under Article 1 section 6. N.Y. CONST. art. I, § 6. *See* Part III *infra.*

this right, this Court must reject the limited post-conviction, remedial standard set forth in *Strickland* as the governing standard in this case.[5]

The Appellate Division majority's conclusion that a post-conviction remedy is the sole vehicle to challenge systemic deficiencies that undermine the representation of the indigent accused at every stage of the prosecution effectively eviscerates the right to counsel and undermines the constitutional guarantee to effective assistance of counsel. To uphold this reading of the Constitution "would convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied, by mere formal appointment." *Cronic*, 466 U.S. at 655-56, *citing Avery v. Alabama*, 308 U.S. 444 (1940). Precluding a cause of action to remedy systemic failure would effectively limit the opportunity to vindicate that right for

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[5] "Accepting the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible inference," Plaintiffs have set forth in their pleading an indigent defense system that creates a severe and unacceptably high risk that indigent defendants are being or will be deprived of their right to effective assistance of counsel. *Leon v. Martinez*, 84 N.Y.2d 83, 87, 87-88 (1984). "Proof of a likelihood of the occurrence of a threatened deprivation of constitutional rights is sufficient to justify prospective or preventive remedies . . . without awaiting actual injury." *Swinton v. Safir*, 93 N.Y.2d 758, 765-766 (1999), *citing Luckey v. Harris*), 860 F.2d 1012, 1017 (11th Cir. 1988 [indigent defense services] and *Farmer v. Brennan*, 511 U.S. 825 (1994) [cruel and unusual punishment] and *Helling v. McKinney,* 509 U.S. 25, 32 - 33 (1993) ("It would be odd to deny an injunction to inmates who plainly proved an unsafe, life threatening condition in their prison on the ground that nothing yet had happened to them....a remedy for unsafe conditions need not await a tragic event."); *accord New York County Lawyers' Assn v. State of New York*, 294 A.D.2d at 74 (2002).

those who are ultimately convicted, and would insulate the State from any accountability for pervasive and ongoing failure to meet its constitutional mandate. Perversely, such a result would provide a permanent disincentive for the State to reform an already broken indigent defense system and, paradoxically, provide relief only to those found guilty. Moreover, should this Court preclude a cause of action to remedy systemic failures, it would limit its own ability as a co-equal branch to ensure a functioning justice system. It would confound logic and justice for a court to find evidence of systematic constitutional wrong-doing, but then limit the judiciary's authority to address it unless or until it produces a particular harm. To provide no relief while the rights of countless indigent accused are routinely violated is antithetical to the fundamental role of the judiciary as the ultimate guardian of constitutional rights.

The Court's decision on whether to permit these claims to be heard will materially affect whether the constitutional guarantee of effective assistance of counsel is a baseline right to a fair process or a hazy, aspirational goal that is vindicated only in the most extreme cases of abuse or denial.

I. The *Strickland* Post-Conviction, Remedial Standard Is the Wrong Standard in a Class Action Claim Seeking Prospective Relief to Halt and Prevent System-Wide Deficiencies in How the State Meets Its Constitutional Obligation to Provide Indigent Defendants Effective Assistance of Counsel.

The majority's decision below applying the *Strickland* standard, a post-conviction, outcome-determinative remedy for ineffective assistance of counsel, is the wrong standard in this case.[6] *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland* sets forth the minimum standard of reasonably effective assistance required under the Sixth Amendment before a court will invoke the drastic remedy of overturning a criminal conviction. *Id.* But, *Strickland* "of necessity" requires a "case-by-case analysis" and applies only as a remedy in individual, post-conviction proceedings. *Williams v. Taylor*, 529 U.S. 362 (2000) (*quoting Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in judgment).[7] In a case seeking prospective relief for cessation and prevention of widespread, imminent future harm to the right to counsel at every critical stage of the proceedings, *Strickland* is simply inapplicable.

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[6] *Strickland* requires defendants to show that: (1) the attorney's performance fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that but for counsel's unprofessional errors, *the result* of the proceeding would have been different. *Kieser v. New York,* 56 F.3d 16, 18 (2d Cir.1995) (*quoting Strickland,* 466 U.S. at 694) (emphasis added).

[7] *See also Rompilla v. Beard*, 545 U.S. 374, 393-94 (2005) ("[T]oday's decision simply applies our longstanding case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient under *Strickland*." (O'Connor, J. concurring)).

A. Reliance Upon a Post-Conviction, Remedial Standard Would Significantly Limit the Meaning and Applicability of the Right to Effective Assistance of Counsel.

Strickland is a wholly inadequate remedy when the deficient representation itself precludes a convicted defendant from proving that counsel's dereliction caused such harm as would have altered the outcome.[8] In fact, just in the universe of cases in which wrongful conviction has been established by DNA evidence, there is growing evidence that ineffective representation not only leads to erroneous conviction, but also forecloses meaningful appellate review. *See* Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel, Report of the National Right to Counsel Committee,[9] at 44 – 47 (April 2009); *see also* Brandon L. Garrett, *Judging Innocence*, 108 Columbia L. Rev. 55 (2008).

Worse, *Strickland* affords no relief whatsoever to defendants whose cases are pending and are ultimately acquitted or whose cases will be dismissed, but who nevertheless have a constitutional right to the effective assistance of counsel. Pre-trial, pre-conviction systemic deficiencies that indisputably deny and threaten to

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[8] For example, failure to promptly and comprehensively confer with a client may result in the loss of witnesses and evidence that cannot later be redressed. If competent counsel is lacking at the outset, arguments in support of pre-trial release will never be marshaled on a defendant's behalf, which can result in a plethora of collateral consequences to the individual, as well as hamper preparation of a defense. Similarly, failure to investigate or develop mitigating evidence frequently results in an inadequate record to establish a nexus between counsel's deficiency and the outcome. *See infra* at 45-49.

[9] A complete copy of the Report is available at http://www.nlada.org/DMS/Documents/1239831988.5/Justice%20Denied_%20Right%20to%20Counsel%20Report.pdf (last visited on Jan. 27, 2010).

deny that right -- rather than the performance of any one attorney in any single case – cannot be redressed through a wait-and-see, post-conviction, "but-for" analysis. "Whether the accused has been prejudiced by the denial of a right is an issue that relates to relief – whether the defendant is entitled to have his or her conviction overturned – rather than to the question of whether such a right exists and can be protected prospectively." *See Luckey v. Harris,* 860 F.2d 1012, 1017 (11th Cir. 1988) (internal citations omitted), *rev'd on abstention grounds*, *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992). "Widespread and systemic instances of deficient performance caused by a poorly equipped appointed-counsel system will not cease and be cured with a case-by-case examination of individual criminal appeals, given that prejudice is generally required and often not established." *Duncan v. State of Michigan,* 284 Mich.App. 246 (June 11, 2009), *appeal granted by Duncan v. State*, 775 N.W.2d 745 (Mich. Dec 18, 2009).[10]

Strickland measures post-conviction harm when the dereliction of counsel is so extreme as to warrant the reversal of the conviction. Although the deprivation of effective assistance of counsel may not in every case warrant the draconian remedy of reversal and vacation of the conviction, that is not to say that the right is not being systematically violated nor that it cannot be prospectively safeguarded.

[10] As of this time, the case is scheduled to be heard by the Michigan Supreme Court in spring 2010.

The *Strickland* standard may provide an adequate remedy to address individual, post-conviction relief for the ineffective assistance of counsel in egregious circumstances. However, the primary concerns that limit the *Strickland* remedy to the narrow subset of cases in which ineffective assistance demonstrably resulted in a conviction – finality in judgments, preservation of judicial resources, and reluctance to second-guess strategic decisions of counsel -- are neither at issue in pre-trial phases of the litigation nor appropriate considerations to prevent addressing ongoing, system-wide harm. *See Luckey*, 860 F.2d at 1017. Furthermore, in cases of wrongful conviction, even the *Strickland* remedy is an inadequate substitute for systemic redress that may prevent the wrongful conviction in the first place.

The Supreme Court also made clear in a decision announced the same day as *Strickland* that circumstances "may be present on some occasions when although counsel is available to assist the accused during trial, *the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.*" *Cronic*, 466 U.S. 648, 659-60 (1984) (emphasis added). Thus, the State's assertion that "[w]hether a lawyer's allegedly poor performance will amount to ineffective representation cannot be answered in the abstract and in advance of a criminal proceeding, or even while a proceeding is ongoing," (Resp.

Br. at 19) directly contravenes the circumstances identified by the Supreme Court in *Cronic*. *Id.* In short, although also a post-conviction case, the *Cronic* Court acknowledges a situation where the *Strickland* standard -- a presumption of effectiveness reviewed through the actual impact on the outcome – is unjustified to acknowledge the constitutional deprivation.

> In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. (*citing U.S. v. Cronic,* at 659 n.25.) Prejudice in these circumstances is *so likely that case-by-case inquiry into prejudice is not worth the cost.* (*Id* at 658.) Moreover, such circumstances involve impairments of the Sixth Amendment right that are *easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent.*

Strickland, 466 U.S. at 696 (emphasis added).

Plaintiffs' complaint has pleaded numerous specific and material deficiencies in the indigent defense system. Those deficiencies are easy to identify and create a likelihood of prejudice so apparent and pervasive that "case-by-case inquiry" after the fact "is not worth the cost" of waiting for a post-trial inquiry into the actual adverse effect on each and every case. *Id.* These deficiencies include routine delay in appointment of counsel; absence of counsel at arraignment; counsel who do not or cannot accept calls or voicemail or respond to letters; counsel who cannot or do not meet with clients except immediately prior to court appearances, if at all. Such practices, on a widespread, systemic scale state a

colorable claim for the constructive denial of counsel and reflect a current and ongoing deficiency in how the State meets its constitutional responsibility. As further demonstrated in the complaint, these deficiencies not only affect the determination of guilt or innocence of the indigent accused but cause severe and unremedied collateral consequences, such as incarceration, loss of employment or contact with family at critical times, and other harms.

Plaintiffs have alleged broad and recurring deficiencies in the indigent defense system, which if proved, suggest it is unlikely "*that any lawyer, even a fully competent one,*" can "*provide effective assistance*" even "*without inquiry into the actual conduct of the trial.*" *Cronic*, 466 U.S. at 659-60 (emphasis added). *Cronic* suggests that under these circumstances, it is essential that the judicial branch act to prevent the egregious harm that permeates the process, rather than wait to see, on an individual case-by-case basis, if an eventual conviction has been so tainted as to require its reversal.

B. Numerous Courts Have Concluded That the Remedial Post-Conviction Standard Is Inappropriate to Address Systemic Deficiency.

The Appellate Division majority's "wait-and-see," outcome-determinative approach, which forecloses prospective, systemic relief, undermines the presumption of innocence attached to every person facing prosecution by the State and the reality that a percentage of accused persons are in fact innocent. In

addition, it ignores the fact that courts, with increasing frequency, consider pre-conviction claims of constitutionally deficient representation. The majority opinion below fails to address how many reversals based on the *Strickland* standard would suffice to demonstrate a constitutional crisis in the way that the State meets its constitutional obligation to provide effective assistance of counsel to the indigent and the need for systemic relief. *See, e.g.* Decision at 3, n.2. The approach suggests that regardless of the demonstrable claims of ineffective assistance, under *Strickland* only individualized adjudications in case after case can ever diagnose and cure a system-wide constitutional infirmity. The decision is tantamount to holding that no claim for ineffective assistance of counsel accrues until after a conviction. As such it is in direct conflict with Supreme Court authority to the contrary. *See, e.g., Geders v. United States*, 425 U.S. 80 (1976) (order preventing defendant from consulting his counsel during an overnight recess impinged upon his Sixth Amendment right to the assistance of counsel); *see also Holloway v. Arkansas*, 435 U.S. 475 (1978) (failure to grant *pre-trial* motion or investigate need for separate counsel based on potential conflict in joint representation, deprived defendants of effective assistance). An approach that would require some magic threshold number of *Strickland* reversals, with the inherent challenge of later re-trial, also raises a probability that some guilty may go free. This is hardly the vehicle to correct a deficient system. At best, it is a cynical

and false surrogate for the actual vindication of the constitutional right of the poor to have access to qualified counsel.

Such an approach is a grossly inefficient use of already over-taxed judicial resources. Inviting and requiring more and more appeals and post-conviction collateral attacks in case after case, one case at a time, to redress deficiencies that are systemic in origin, is a wasteful redundancy. For these reasons, courts in many jurisdictions throughout the country reject the onerous, post-conviction *Strickland* analysis in claims seeking equitable relief for system-wide deprivations of the assistance of counsel.

The Appellate Division's holding ignores this emerging body of law. Most recently, the Michigan court held in a class action claim that "[a]pplying the two-part test from *Strickland* here as an absolute requirement defies logic, where the allegations concern widespread, systemic instances of constitutionally inadequate representation, and where the requested remedy in the form of prospective relief seeks to curb and halt continuing acts of deficient performance." *Duncan v. State of Michigan,* 284 Mich.App. 246 (June 11, 2009), *appeal granted by* Duncan v. State, 775 N.W.2d 745 (Mich. Dec 18, 2009); *see also Best v. Grant County*, No. 04-2-00189-0, Slip Op. (Sup Ct Wash, Oct. 14, 2004) ("This court does not believe the *Strickland* test...is the appropriate test to apply to determine whether the Grant County public defender system creates an atmosphere in which there exists a well-

grounded fear of immediate invasion of the right of effective assistance of counsel as an institution.").[11]

Prospective, equitable relief to curb infirmities in how the State meets its constitutional mandate under the Sixth and Fourteenth Amendment is not a novel innovation in the law. For more than twenty years, courts have held "the [*Strickland*] standard is inappropriate for a civil suit seeking prospective relief. The 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." *Luckey v Harris*, 860 F.2d 1012 (11th Cir. 1988) *rev'd on abstention grounds sub nom, Luckey v. Miller*,

[11] *See also Kenny A. v. Perdue*, 356 F.Supp.2d 1353 (N.D. Ga. 2005) (in class action claim for prospective relief alleging constitutional violation of assistance of counsel, members "need not establish that ineffective assistance was inevitable for each of class members," but instead, the "likelihood of substantial and immediate irreparable injury [and] inadequate remedy at law."); *Lavalee v. Justices in Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004) (cataloguing myriad responsibilities counsel may be required to undertake "long before trial" and holding pre-trial indigent defendants without counsel entitled to prospective equitable relief "in view of []the serious likelihood that without assistance ...the petitioners currently are being deprived of counsel to an extent that raises serious concerns about whether they will ultimately receive the effective assistance of trial counsel."); *Nicholson v. Williams*, 2002 WL 448452, at *81 (E.D.N.Y. Mar. 18, 2002) (holding *Strickland* standard inapplicable to pre-conviction claims alleging systemic barriers to effective representation in proceedings related to removal of children from parental custody.); *White v. Martz*, No. CDV-2002-133, Memorandum and Order (D.Mont., July 24, 2002) (in case brought by pre-conviction defendants alleging systemic deficiencies, "the *Strickland* standard does not preclude claims of pretrial defendants seeking prospective relief."); *Mississippi v. Quitman County*, 807 So.2d 401, 408-09 (Miss. 2001) (holding that plaintiff had adequately pleaded state had breached its constitutional obligation to provide indigent defendant with effective assistance of counsel prospectively at the motion phase); *Rivera v. Rowland,* No. CV 950545629S (Conn Super Ct 1996) (plaintiff's claims of state lack of funding and supervision of indigent defense services provided by public defender resulting in systemic deficiencies sufficient to survive defendant's motion to dismiss.).

976 F.2d 673 (11th Cir. 1992). In *Luckey*, a case cited with approval by this Court (*see Swinton v. Safir*, 93 N.Y.2d 758 (1999)), plaintiffs alleged a real and immediate threat of harm to the constitutional rights of indigent defendants as a result of systemic deficiencies in Georgia's indigent defense system. *Id.* The state argued that such rights could be asserted in individual, post-conviction claims that satisfied the *Strickland* standard. *Id.* The Eleventh Circuit rejected that defense, holding that it was "inappropriate" to apply the retrospective *Strickland* standard to an action for prospective relief to redress the probability of imminent constitutional deprivation. *Id.*; *see also NYCLA v. State*, 192 Misc.2d 424, 431, 745 N.Y.S.2d 376, 384 (Sup Ct NY Cty 2002) ("... this court finds the more taxing two-prong *Strickland* standard used to vacate criminal convictions inappropriate in a civil action that seeks prospective relief .... [B]ecause the right to effective assistance of counsel in New York is much more than just the right to an outcome, threatened injury is enough to satisfy the prejudice element and obtain prospective injunctive relief to prevent further harm."). *Luckey's* eventual reversal on federal abstention grounds underscores the urgency and import of a state court's recognition of the claim and duty to provide access to address widespread, ongoing, and imminent deprivation of the right. Since defective state indigent defense systems arguably may not be subject to federal review due to the abstention doctrine, state courts play a key role in vindicating the right to counsel.

The State's position that the right to counsel is an individual one that cannot be protected by a challenge to the "system" entrusted to deliver it is nothing short of wordplay. *See* Resp. Br. at 37-39. In 1963, the United States Supreme Court made clear that the Sixth Amendment right to the assistance of counsel is a fundamental right applicable to the states by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *See McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970) ("the right to counsel is the right to the effective assistance of counsel."). The obligation to provide counsel to indigent defendants in state prosecutions of criminal cases belongs to the state. *Gideon*, 372 U.S. 335 (1963). While it may be true that "the constitution does not require New York to create and fund any particular "infrastructure" or "system for the assignment of counsel for the indigent" (Resp. Br. at 37-39), the obligation to provide counsel to those who cannot afford one undeniably rests with the State. *Gideon*, 372 U.S. 335. If the State chooses to meet the constitutional mandate by creating a "system," it is axiomatic that the "system" it creates must meet a constitutional threshold to protect the right it was implemented to deliver.[12] If the system the State has created to meet this constitutional mandate is defective, it is the responsibility of

[12] Simply because the State has created a "framework" that is intended to fulfill the promise of *Gideon*, it cannot be seriously contended that mere creation alone satisfies the constitutional mandate. *See contra*, Brief for Amicus Curiae District Attorney's Association of the State of New York at p. 9, (Arguing, *inter alia,* that "[t]he mere existence of an indigent representation obligation alone belies any claim arising from a purported denial of counsel.").

the judiciary to redress the infirmity and prevent ongoing or imminent future harm before it occurs.[13] And, it should do so prospectively, without waiting to cull statistics on the threshold volume of egregious errors that warrant new trials.

C. Reliance Upon a Post-Conviction Remedial Standard Would Cripple the Judiciary's Capacity to Remedy Systemic Constitutional Wrongs Within the Justice System.

The notion that a multitude of *Strickland* reversals could produce systemic reform is pure speculation, which hinges on the hope that eventually the political branches would act to correct the problem. As this Court is aware, those branches sometimes fail to remedy inequities for myriad reasons. If the State's argument prevails, no matter how frequently courts reverse on the basis of ineffective assistance of counsel, there would be no circumstance under which the judicial branch would have the power to provide equitable relief unless a cause of action to redress systemic deficiency is recognized. Indeed, arguably it would be a dereliction of the Court's responsibility if it were to diagnose constitutional injury on a systemic basis and at the same time deprive itself the right to cure it. This Court should reject the State's argument that *Strickland* is the appropriate standard to measure and prevent ongoing and future harm threatened by the constitutionally deficient system illustrated in this case.

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[13] Although the issue of justiciability is not specifically briefed herein, *amici* here join in the arguments set forth in both Plaintiffs-Appellants briefs and in the briefs of fellow *amici* that this claim is justiciable and must be reached by this Court. *See Marbury v. Madison*, 5 U.S. 137 (1803) and *NYCLA v. State*, 294 A.D.2d 69 (1st Dept. 2002).

II. The Sixth Amendment Right to Effective Assistance of Counsel Is Broader than the Right to Assistance at Trial and Requires More than the Mere Appointment of Counsel.

Since the *Strickland* standard was formulated to address a post-conviction review designed to target "confidence in the outcome," there are myriad injuries and prejudices suffered as a result of the denial of the Sixth Amendment right that the *Strickland* formula can never, and indeed was never, designed to address.

Last year, the United States Supreme Court underscored the importance of the right to counsel at every phase of a criminal case, irrespective of the outcome. *Rothgery v. Gillespie*, __ U.S. __, 128 S.Ct. 2578 (2008). In an 8-1 ruling, the Court held that a criminal defendant's initial appearance before a judge marks the beginning of adversarial judicial proceedings and triggers attachment of the defendant's Sixth Amendment right to counsel whether or not the prosecutor is aware of or involved in that appearance. This right to counsel applies whenever a defendant learns of the charges against him or her and has his or her liberty subject to restriction. *Id.*

In *Rothgery*, an indigent defendant was arrested and arraigned on an erroneous complaint alleging he was a felon in possession of a firearm. He was not a felon. He could not afford a lawyer and was not provided one until after he had been released on bond and was subsequently rearrested on an indictment.

While released on a pre-indictment bond for six months, and prior to being held in custody for three weeks on the erroneous indictment, Rothgery was unable to find employment due to the pending criminal charge. When finally appointed, counsel was able to compile the paperwork to prove Rothgery was not a prior felon and the indictment was dismissed. The Supreme Court specifically rejected the state's request to "ignore prejudice to the defendant's pretrial liberty," under the Sixth Amendment analysis. *Id.* at 2589.

The Supreme Court held that "counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage *before trial*, as well as at trial itself." *Id.* at 2590 (emphasis added). Although the Court did not decide "whether the six month delay in appointment of counsel resulted in prejudice to Rothgery's Sixth Amendment rights" because that question was not before it, the Court unequivocally held that the right attached when "the government has used the judicial machinery to signal a commitment to prosecute" and noted that when it does, "the accused *at least* is entitled to the presence of appointed counsel during any 'critical stage' of the post-attachment proceedings." *Id.* at 2591, *citing Brewer v. Williams*, 430 U.S. 387 (1977) and *Michigan v. Jackson*, 475 U.S. 625 (1986) (emphasis added)[14]; *see also Higazy v.*

[14] Although *Michigan v. Jackson's* prophylactic rule excluding statements made during police-initiated interrogations after a defendant's assertion of his right to counsel under the Sixth amendment was overruled by *Montejo v. Louisiana*, __ U.S. __, 129 S.Ct. 2079 (2009), the core

FBI Agent Michael Templeton, 505 F.3d 161 (2nd Cir 2007) (" ...a bail hearing is a 'critical stage of the State's criminal process at which the accused is as much entitled to such aid (of counsel)... as at the trial itself.'"), *quoting Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (internal quotation marks and citation omitted; ellipsis in original)).[15]

Thus, the *Rothgery* case forcefully underscores the imperative for effective assistance of counsel pre-trial, and that prejudice to the indigent accused can occur even in the absence of any conviction – a circumstance that the post-conviction *Strickland* standard does not address. The *Strickland* post-conviction "but for" analysis could never redress Rothgery's wrongful arrest and three weeks of unnecessary incarceration. Since Rothgery was never convicted, the *Strickland* post-conviction standard was inapplicable. That is precisely the reason why prospective claims based on systemic, recurring violations of the right to counsel

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proposition for which it was cited in *Rothgery* concerning the attachment of the right to counsel at the time proceedings have been initiated and the plethora of cases string-cited for that fundamental proposition included therein, was not. *See Jackson*, 475 U.S. at 629, n. 3 (1986) (*citing Brewer v. Williams,* 430 U.S. 387 (1977)), *quoting Kirby v. Illinois*, 406 U.S. 682 (1972); *United State v. Gouveia*, 467 U.S. 180 (*quoting Kirby*); *Estelle v. Smith*, 451 U.S. 454 (1981) (*quoting Kirby*); *Moore v. Illinois*, 434 U.S. 220 (1977) (*quoting Kirby*). *Cf. Powell v. Alabama*, 287 U.S. 45 (1932) ("[T]he most critical period of the proceedings against these defendants' was "from the time of their arraignment until the beginning of their trial."), (additional citations omitted.).

[15] *Amici* have ascertained the outcome of the case following the Supreme Court's remand to determine whether the violation of Rothgery's right to counsel actually resulted in prejudice. Not surprisingly, the County reached a settlement with Mr. Rothgery, compensating him $40,000 for his three weeks of unnecessary confinement. Zeke MacCormack, *Gillespie County Paying for Legal Mistake*, SAN ANTONIO EXPRESS-NEWS, Apr. 30, 2009, at 3B.

must be cognizable. Indeed, the point is *not* that each claim must be redressed individually, for that is plainly not possible in a system that forecloses interlocutory appeal, but rather that this Court should permit plaintiffs to directly address the ongoing and recurrent nature of the alleged constitutional deficiencies.

In New York, there is no ambiguity about the significance of an arraignment. With charges referred and the prosecutorial authority fully engaged, the game is afoot. *Amici*, each of which has extensive experience in representing the accused, can attest that the time commencing with arraignment is critical to effective representation. Any delay in access to counsel can be the difference between freedom and confinement, and in many cases, the delay in access may forever foreclose discovery of evidence critical to assert a meritorious defense. In addition, the State's argument that it is somehow sufficient that the accused met with assigned counsel "usually within days" of arraignment (Resp. Br. at 21), betrays an alarmingly cavalier unawareness of the vital role that counsel plays at this critical time.

Notwithstanding the fact that the United States Supreme Court specifically noted that New York State is one of the forty-three states (along with the Federal Government and the District of Columbia) to provide by statute for the prompt appointment of counsel (*Rothgery v. Gillespie*, __ U.S. __, 128 S.Ct. 2587 n.14 (2008)), the State defends the systemic violation of that right, even while

conceding that bail determinations were made in the absence of counsel. *See* Resp. Br. at 21-27. In this regard, it is important to consider the precise New York statute cited by the Supreme Court in *Rothgery*, N.Y. CPL Section 180.10.[16] The statute unequivocally provides for "the right to the aid of counsel *at the arraignment and at every subsequent stage of the action.*" CPL 180.10(3) (emphasis added). There is nothing qualified about that right. The State argues that "the statute contemplates that the defendant's first court appearance may be without counsel." This argument is predicated upon subsequent language in the subsection that prescribes a procedure for persons who appear without counsel. But the fact that an accused of means may opt to appear without counsel, and thus may seek an adjournment to retain one, does not vitiate the right of the poor to have counsel at the arraignment. Indeed, the same statute, subsection 180.10(3)(c), specifically provides for the right to have counsel assigned by the court where the defendant is financially unable to obtain counsel and 180.10 (4) obligates the court to "take such affirmative action as is necessary to effectuate" the enumerated rights, including the right to have the assistance of counsel at the arraignment.

[16] N.Y. CPL § 180.10, "Proceedings upon felony complaint, arraignment, defendant's rights, court's instructions and bail matters" deal with the right to counsel at a felony arraignment. N.Y. CPL § 170.10 is the companion statute that makes similar provisions in the case of misdemeanor arraignments.

Accordingly, rather than acknowledge that the plaintiffs have alleged pervasive practices that, if proved, establish that New York is in non-compliance with specific statutory obligations, as well as the United States and New York Constitutions, the State urges this Court to take the extraordinary step of approving a delay in the appointment of counsel until some indefinite time after the commencement of adversarial proceedings.

The State further endeavors to escape *Rothgery*'s constitutional mandate by obfuscating the import of the Court's declining "to *set out* the scope of an individual's post-attachment right to the presence of counsel" and declining to set forth a catalogue of "critical stages" in the post-attachment proceedings. *Rothgery*, 128 S.Ct. at 2591 (emphasis added). From that, the State contends that "[w]hile the right to counsel may 'attach' or commence prior to trial, its purpose is to insure the integrity and fairness of the trial process." Resp. Br. at 27. The State asserts that the constitutional right to counsel is merely an aspirational goal until some ill-defined point when its presence becomes essential to the fairness of the trial. Thus, because the State concludes that "the arraignment and setting of bail do not have a close connection with the fairness of the trial ... the absence of counsel from these proceedings does not per se violate the constitution right of counsel." Resp. Br. at 27. This attempt to separate the commencement of the proceedings from the rest of the trial process is a false and constitutionally impermissible distinction.

The "trial process" itself begins at attachment. The point is that "a defendant subject to accusation after initial appearance is headed for trial and *needs to get a lawyer working*, whether to attempt to avoid that trial or to be ready with a defense when the trial date arrives." *Rothgery,* 128 S.Ct. at 2590 (emphasis added). The *Rothgery* Court plainly held that "counsel *must* be appointed within a reasonable time after attachment to allow for adequate representation at *any* critical stage *before* trial, as well as at trial itself." *Rothgery*, 128 S.Ct. at 2591. The Court pointed to case law as defining "critical stages as proceedings between an individual and agents of the State (whether 'formal or informal, in court or out') that amount to 'trial-like confrontations,' at which counsel would help the accused 'in coping with legal problems or ... meeting his adversary.'" *Id.* n.16 (emphasis added) (internal citations omitted). It is precisely such "legal problems," and therefore poor people's constitutional rights, that are at issue here.

Under New York processes, there can be no doubt that the arraignment and every point thereafter are critical stages in the proceeding. The State's position that counsel is not constitutionally required at an arraignment (Resp. Br. at 24) misreads a handful of cases which actually demonstrate the inapplicability of the *Strickland* standard to remedy systemic deprivation of that right. *See People v. Green*, 48 A.D.3d 1056 (4th Dep't.), *lv. denied*, 10 N.Y.3d 934 (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). In all three cases cited, the defendant sought to vacate a subsequent guilty plea, and the respective courts declined to find prejudice arising from the absence of counsel at the arraignment. The foundational case is a 1963 decision that denied a writ of *coram nobis* because there was no showing of any actual prejudice that tainted the subsequent, fully counseled, guilty plea. *See People v. Combs*, 19 A.D.2d 639 (2d Dep't. 1963). Indeed, in the one recent case cited (*Green*, 48 A.D.3d 1056), the court merely held that a subsequent, fully counseled plea need not be set aside where the court entered a not guilty plea on behalf of a hospitalized defendant and the claim concerning absence of counsel at arraignment was not preserved for review. These decisions do not support the extraordinary assertion that New York State is not constitutionally obligated to provide counsel at arraignment. Rather, they vividly illustrate why a post-conviction ineffective-assistance-of-counsel claim is inadequate to address a system that routinely denies that right.

It is well established that "[a]ssistance begins with the appointment of counsel, it does not end there." *Cronic,* 466 U.S. at 654, *quoting United States v. Decoster*, 199 U.S. App. D.C. 359, 382 (MacKinnon, J., concurring), *cert. denied* 444 U.S. 944 (1979).

> [T]he [Supreme Court] has ...recognized that the assistance of counsel cannot be limited to participation in a trial; *to deprive a person of counsel during the period prior to trial may be more*

> *damaging than denial of counsel during the trial itself.* Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, [the Supreme Court] has found that the right attaches at earlier, "critical" stages in the criminal justice process...

Maine v. Moulton, 474 U.S. 159, 170 (1985) (emphasis added).

As Plaintiffs allege in the complaint and stress in their main brief, many indigent defendants, like Rothgery, do and will experience prolonged pre-trial delay, prolonged pretrial detention, and denial of bail or bail review, and will suffer injury despite being acquitted, receiving time served, or having their charges reduced or dismissed. These defendants, despite a positive ultimate outcome in the criminal case, nevertheless lose licenses, homes, jobs, education, time, opportunity, and income as a result of the denial of prompt, effective assistance of counsel. All of these injuries are actual or threatened harm allegedly caused by the inadequacy of appointed representation provided by the State. This is true regardless of the results of the trial or the guilt or innocence of the defendant. *See, e.g., Kimmelman v. Morrison*, 477 U.S. 365, 380 (1986) (" [W]e decline to hold either that the guarantee of effective assistance of counsel belongs solely to the innocent or that it attaches only to matters affecting the determination of actual guilt."); *see also Best v. Grant County*, No. 04-2-00189-0, Slip Op. (Sup Ct Wash Oct. 14, 2005) ("The right to effective assistance of counsel extends to all persons accused of felonies not just those who are innocent. Harm is not limited to locking up innocent people."). Such injuries, "short of conviction" as alleged in Plaintiff's complaint,

are not merely "regrettable" collateral side effects of every criminal prosecution, (Resp. Br. at 48), but stem directly from the lack of prompt communication, inadequate investigation, and overall ineffective representation.

Injury is particularly apparent if proceedings ultimately result in dismissal of the charges or waiver of appellate review by plea or acquittal. *See* Pl.'s Br. at 37. Such deprivations are never capable of post-conviction review under *Strickland* because they do not have an impact on the final outcome of the proceedings.

"Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him." *Brewer*, 430 U.S. at 398 (1977) (internal citations omitted). Defense counsel's responsibilities commence long before trial and encompass attorney-client communication, investigation, and informed decision-making that may never be apparent in a trial court and, if deficient, cannot be remedied post-conviction under *Strickland*.

That is why courts not only recognize the pre-trial right to effective assistance of counsel, but New York State and American Bar Association standards dictate it. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (citing the ABA

standards as "standards to which we long have referred as 'guides to determining what is reasonable.'"); *see also Bobby v. Van Hook*, __ U.S. __, 130 S.Ct. 13, 16 (2009) ("[P]rofessional [ABA] standards ...can be useful as 'guides' to what reasonableness entails, but only to the extent they describe professional norms prevailing when the representation took place."). For example, the ABA's standards underscore that "[m]any important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the earliest opportunity and take all necessary action to vindicate such rights. ..." *Standard 4-3-6: Prompt Action to Protect the Accused*; and further that "[a]s soon as practicable, defense counsel should seek to determine all relevant facts known to the accused...." *Standard 4-3-2(a): Interviewing the Client.*[17] Likewise, the standards provide that defense counsel "should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction...." *Criminal Justice Section Standards: Defense Section, Standard 4-4-1: Duty to Investigate*; *see also* 22 NYCRR 1200.32

[17] *See also* New York State Bar Association, *Standards for Providing Mandated Representation*, adopted by the NYSBA House of Delegates, April 2, 2005, Performance I-7 (c): Effective representation should include "at a minimum b. Investigating the facts concerning the offense charged, including; (i) interviewing the client; (ii) seeking discovery and disclosure from the prosecutor of the people's evidence . . . (iii) obtaining relevant information from other sources; (iv) interviewing witnesses to the relevant events, and (v) obtaining corroborating evidence for any relevant defenses."

(counsel has "a duty to investigate the facts, the controlling law and to zealously advocate the litigant's cause.").[18]

Crime scenes change, wounds heal, memories fade, and witnesses, (particularly witnesses within a transient, indigent community), quite often disappear. Once these memories, evidence, and witnesses are lost by a failure of counsel to uncover, pursue, or investigate, no amount of post-conviction review can ever restore them. Witnesses, memories, and physical evidence, that could be located, recalled, or accounted for through prompt communication, swift investigation, or an early, comprehensive client interview are essential to an effective defense. This evidence, the procurement and preservation of which rests squarely on the shoulders of defense counsel, if lost or neglected, may never be unearthed, much less remedied through a post-conviction *Strickland* challenge.

No matter how effective trial counsel may appear or how reliable the results of the proceeding appear to be, no application of a post-conviction proceeding will ever recall, locate, or recover evidence that could have been secured through prompt, comprehensive investigation and communication. If evidence is lost or

[18] *See also* NYSBA Standards, *supra* at n. 17, Performance I-3: "An attorney must: (a) communicate with his or her client on a regular basis during the course of representation, ... ; (b) communicate with family or friends of the client, to the extent that the client waives the attorney client privilege; (c) inform the client on a regular basis of the progress of the case; (d) ensure the client sees copies of all documents prepared or received by the attorney; and (e) provide the client with the opportunity to make an intelligent and well-informed decision in those instances when such a decision is to be made by the client."

unknown because of counsel's dereliction, the injury may be no less profound, if not legally cognizable, in a "but for" post-conviction *Strickland* analysis. These types of Sixth Amendment deprivations, wherein the ineffectiveness itself masks the constitutional deprivation, may never be unearthed, much less remedied, in a post-conviction *Strickland* analysis. Former Attorney General Janet Reno observed that "[i]n the end, a good lawyer is the best defense against wrongful conviction."[19]

Indeed, one of counsel's most important duties is to establish early and regular contact with a criminally accused client to ascertain critical facts, as the ability to recall essential details, provide explanations, or recount an alibi fades with time. *See ABA Defense Attorneys Function Standard 4-3.2*: Interviewing the Client ("As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused.").

Similarly, physical injury to the accused or evidence of a defendant's mental state at or near the time of the alleged crime may never be discovered, preserved, or presented if over-burdened or unresponsive counsel, for whatever reason, fails to promptly meet with a client. *See, e.g., ABA Defense Attorneys Function Standard 4-1.3 (e): Delays, Punctuality and Workload* ("Defense counsel should

[19] Office of Justice Programs, U.S. Dept. of Justice, Nat'l Symposium on Indigent Defense 2000, at vii (2000).

not carry a workload that, by reason of is excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges or may lead to the breach of professional obligations.").[20]

In addition, procedural complexities that in New York can mean the difference between release, a more favorable pre-indictment plea, a dismissal, or reduction of the charges are all a labyrinth of obstacles for the layperson that require the prompt and expert assistance of or action by a lawyer. *United States v. Gouveia*, 467 U.S. 180, 189 (1984) (noting that the Court has extended the right to counsel to situations where "the accused [is] confronted, just as at trial, by *the procedural system*, or by his expert adversary or both.") (emphasis added); *United States v. Ash*, 413 U.S. 300, 307 (1973) (recognizing counsel's critical role as a "guide through complex legal technicalities"). "Even the intelligent and educated layman has small and sometimes no skill in the science of law.... He requires the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

By way of example and without limitation, if a New York lawyer waives a client's C.P.L.180.80 rights without the client's knowledge or input, a defendant

[20] *See also* NYSBA Standards, *supra* at n. 17, Workloads G-1: "The objective of providing high quality mandated representation to all indigent persons cannot be accomplished by even the ablest and most industrious attorneys in the face of excessive workloads. To permit counsel to satisfy their ethical obligations to their clients, every institutional provider of mandated representation, and every assigned counsel plan, shall establish caseload limits for individual attorneys in the system."

can be held in jail unnecessarily pre-indictment, and in many jurisdictions, if the rights are not waived, a client may miss out on a more favorable plea disposition often offered only in exchange for a waiver of 180.80 rights pre-indictment. [21] Similarly, if an attorney fails to timely meet or adequately communicate with a client, a defendant may unwittingly forego an opportunity to request that the grand jury call a designated defense witness or forego the opportunity to promptly testify personally while events are still fresh. C.P.L. 190.50(5) and (6)[22]; *See also ABA Defense Attorneys Function Standard 4-3-8 (a): Duty to Keep Client Informed* ("Defense counsel should keep the client informed of the developments in the case and the progress of preparing the defense and should promptly comply with reasonable requests for information.).[23] These are substantive rights that require

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[21] NY CPL § 180.80 provides for the release of a defendant against whom a felony complaint has been filed and "who since the time of arrest or subsequent thereto has been held in custody pending disposition of such felony complaint and who has been confined for a period of more than one hundred twenty hours ... without either a disposition or commencement of the felony complaint or commencement of a hearing thereon."

[22] NY CPL § 190.50 (5) and (6) provides for a defendant in certain instances to testify before the grand jury if, *inter alia,* "he serves upon the district attorney of the county a written notice making such a request and an address to which communications may be sent," and also to "request the grand jury, either orally or in writing, to cause a person designated by him to be called as a witness is such proceeding."

[23] *See also* NYSBA Standards, *supra* at n. 17, Performance I-3: "An attorney must: "(a) communicate with his or her client on a regular basis during the course of representation, preferably in a private face-to-face discussion; (b) communicate with family or friends of the client, to the extent that the client waives the attorney-client privilege; (c) inform the client on a regular basis of the progress of the case; (d) ensure the client sees copies of all documents prepared by or received by the attorney; and (e) provide the client with the opportunity to make an intelligent and well-informed decision in those instances when such decision is to be made by the client..."

prompt action by focused, effective, and engaged counsel. No layperson could be expected to have knowledge of or ability to weigh the consequences of such decisions without the assistance of informed and communicative counsel. Nevertheless, such a decision may mean the difference between pre-trial liberty and all its attendant benefits, and prolonged incarceration with all of its consequences. Regardless of the outcome of the ultimate proceeding, such prejudice can never be effectively remedied in many cases under a *Strickland* analysis.

Since the Sixth Amendment right is one that protects the accused pre-trial regardless of guilt or innocence, this Court should not wait for the post-conviction demonstration of error to stem widespread, systemic deprivation of effective counsel. Paradoxically, it is the countless innocent and wrongly accused persons, now and in the future, who will suffer the greatest harm if this court forecloses a cause of action for prospective relief. Surely, New Yorkers deserve better.

III. The New York Constitution Affords Broader Protection of the Right to Effective Assistance of Counsel and Is Cognizable Prospectively.

Even were this Court to apply the post-conviction, ineffective-assistance-of-counsel standard as the appropriate baseline measure, it should reject the State's claim that systemic deficiency can be redressed only via a case-by-case post-conviction attack because New York's Constitution offers broader protection of the

right to counsel than the federal *Strickland* outcome-determinative test.[24] N.Y. Const. art. I, § 6.

New York State has a proud, pre-*Gideon* tradition recognizing the need for and right to counsel for indigent defendants in criminal cases. As early as the late 19th century, decades prior to the Supreme Court's landmark decision in *Gideon v. Wainwright*, the New York State legislature adopted Section 308 of the Code of Criminal Procedure, which required the court to assign counsel if the defendant appeared for arraignment without counsel and indicated a desire for the aid of counsel in felony cases. Code of Criminal Procedure of the State of New York,

[24] New York has a long history of providing broader, stauncher protections under its own State Constitution than its federal counterpart. *See, e.g., People v. Elwell*, 50 N.Y.2d 231, 234 (1980) ("[t]o the extent that [U.S. Supreme Court precedent] may be read as imposing a less stringent test under the Federal Constitution, we decline to construe the parallel provision of our State Constitution similarly and adopt the rule set forth above as a matter of State constitutional law."); *People v. Belton*, 55 N.Y.2d 49, 51 (1982) (greater state constitutional protection in automobile searches incident to arrest); *People v. P.J. Video*, 68 N.Y.2d 296, 304 (1986) (rejecting the need for state-federal constitutional uniformity "when weighed against the ability to protect fundamental constitutional rights" in the context of probable cause for allegedly obscene materials); *People v. Torres*, 74 N.Y.2d 224, 226 (1989) (rejecting Supreme Court expansive view of "stop and frisk" procedures as applied to automobiles under State Constitutional analysis); *People v. Dunn*, 77 N.Y.2d 19, 24 (1990) ("At the outset, we note that in the past this Court has not hesitated to interpret Article I, § 12 independently of its Federal counterpart when the analysis adopted by the Supreme Court ... has threatened to undercut the right of our citizens to be free from unreasonable government intrusions."); *People v. Robinson*, 97 N.Y.2d 341, 349 (2001) ("[T]his Court has not hesitated to expand the rights of New York citizens beyond those required by the Federal Constitution when a longstanding New York interest was involved....") (internal citations omitted); *see generally* Robert Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decision Making*, 62 BROOK.L.REV.1 (1996).

Sect. 308 (1893) [Am'd Ch. 521 of 1893]; *see also People ex rel. Ransom v. Board, etc.* 78 N.Y. 622 (1879). But,

> "[e]ven prior to section 308 of the Code of Criminal Procedure, there was inherent power in the courts to assign counsel to defend a prisoner who was without an attorney and unable to employ one. 'There has been no time in the governmental history of this State when the court lacked the power to assign counsel for the defense of indigent persons charged with crime (*People ex rel. Saunders v. Board of Supervisors of Erie County*, 1 Sheld. 517); and it has been a part of the obligation assumed by counsel upon their admission to the bar to defend poor prisoners upon assignment by the court.'"

People v. Price, 262 N.Y. 410, 412 (1933) (citation omitted).

This Court continued that "[w]here ... a defendant upon arraignment or at any other stage of the proceeding appears without counsel and desires the aid of counsel the court must assign an attorney to defend him." *Id.* at 413 (internal citation omitted). Again, in 1978 this Court reiterated that:

> [s]o valued is the right to counsel in this State, it has developed independent of its Federal counterpart. Thus, we have extended the protections afforded by our State Constitution beyond those of the Federal – well before certain Federal rights were recognized.

People v. Settles, 46 N.Y.2d 154, 161 (1978) (internal citations omitted).

The New York standard for ineffective assistance was announced in *People v. Baldi*, 54 N.Y.2d 137 (1981). The core of the *Baldi* standard is "whether [the] defendant received 'meaningful representation.'" *People v. Benevento*, 91 N.Y.2d 708, 712 (1998). This Court has held that "meaningful representation" includes a

prejudice inquiry but "focuses on the fairness of the process as a whole rather than [any] particular outcome of the case" *People v. Henry*, 95 N.Y.2d 563 (2000) (*quoting Benevento*, 674 N.Y.S.2d 629), and has acknowledged that the *Baldi* standard is "somewhat different" from the *Strickland* test. *People v. Claudio*, 83 N.Y.2d 76 (1993); *see also Henry*, 95 N.Y.2d 563, 566 ("This Court has previously recognized the differences between the Federal and State tests for ineffectiveness...."). Even though both standards have a prejudice component, the "touchstone of the New York test is 'the fairness of the process as a whole,' *Benevento*, 674 N.Y.S.2d 629, while the federal test considers the outcome of the proceeding for the defendant." *Eze v. Senkowski*, 321 F.3d 110, 123 (2nd Cir. 2003) (citation omitted). In short, "New York is concerned as much with the integrity of the process as with the issue of guilt or innocence." *NYCLA v. New York,* 192 Misc.2d 424, 431, *citing People v. Donovan,* 13 N.Y.2d 148 (1963). "[B]ecause the right to effective assistance of counsel in New York is much more than just the right to an outcome, threatened injury is enough to satisfy the prejudice element and obtain injunctive relief to prevent further harm." *Id.*

By definition, a "process" is ongoing – not outcome determinative. The New York constitutional standard protects the right of defendants throughout the process: from start to finish and at every phase in between. *See Benevento*, 674 N.Y.S.2d 629. The absence of effective representation from the commencement of

the adversarial proceeding taints the fairness of the entire process. If the plaintiffs can successfully demonstrate that even this alone is occurring on an ongoing, systemic basis, threatening imminent harm to the indigent accused, *amici* urge that New York's Constitution compels prospective equitable relief.

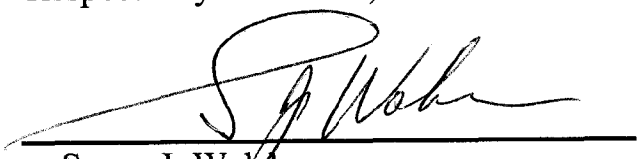
It would indeed be a sad irony if the state that led the nation in articulating and advancing the right to effective assistance of counsel were now to capitulate to the cramped view that it is a right that can only be vindicated one case at a time, in the most extreme instances of its denial. The Court should recognize that upon a showing of systemic and ongoing deficiencies in the system through which the State fulfills its mandate to provide counsel for the indigent accused, a cause of action for equitable relief is essential to vindicate this valued right.

CONCLUSION

Accordingly, for the reasons set forth above, the Court of Appeals should hold that if systemic deficiencies create an unacceptably high risk that indigent defendants are being or will be deprived of the constitutional right to effective assistance of counsel, a cause of action for declaratory and injunctive relief may proceed.

Date: New York, New York
February 2, 2010

Respectfully submitted,



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NEXT DAY DELIVERY

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the Attorney(s) in this action at the address designated by said attorney(s) for that purpose by depositing the same enclosed in a properly addressed wrapper in a depository under the exclusive care, custody and control of United Parcel Service within the State of New Jersey for overnight, next day delivery.

Victor Torres

(Re: Hurrell-Harring v. The State of New York)

Sworn to before me on
February 2, 2010

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