

STATE OF MICHIGAN
IN THE 30th JUDICIAL CIRCUIT COURT
COUNTY OF INGHAM

CHRISTOPHER LEE DUNCAN,
BILLY JOE BURR, Jr., STEVEN
CONNOR, ANTONIO TAYLOR,
JOSE DAVILA, JENNIFER
O'SULLIVAN, CHRISTOPHER
MANIES and BRIAN SECREST,
on behalf of themselves and all
others similarly situation,

Case No. 07-242-CZ

HON. LAURA BAIRD

Plaintiffs,

v

STATE OF MICHIGAN and
JENNIFER M. GRANHOLM,
Governor of the State of Michigan,
sued in her official capacity,

Defendants.

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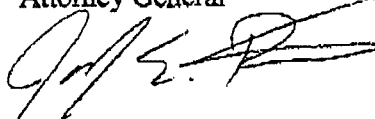
DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

Defendants, State of Michigan and Jennifer M. Granholm, by their attorneys, move for summary disposition under MCR 2.116(C)(4), (C)(7), and (C)(8) for the reasons set forth in the accompanying brief.

WHEREFORE, Defendants respectfully request this Honorable Court to grant its motion for summary disposition, dismiss Plaintiff's complaint with prejudice, and award such further relief this Court deems just and reasonable, including costs and attorney fees.

Respectfully submitted,

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Dated: April 5, 2007
2007005640A/msd

PROOF OF SERVICE

Lisa S. Albro certifies that on the 5th day of April, 2007, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* at their last known addresses via first class mail by depositing same in a United States Post Office depository in Lansing, Michigan with first class postage fully paid.

Lisa S. Albro

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BRIEF IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY DISPOSITION

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INTRODUCTION

Eight Plaintiffs seek declaratory and injunctive relief against the State of Michigan and Governor Jennifer M. Granholm based upon the constitutional guarantees of the right to counsel set forth in the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 17 and 20 of the Michigan Constitution. Plaintiffs assert that the State has a constitutional obligation and duty to provide indigent defendants with adequate counsel and the State—rather than the local county funding units—must provide increased funding, oversight, and training for attorneys who represent indigent defendants. Among other things, Plaintiffs want this Court to issue a permanent injunction enjoining Defendants from subjecting them to practices that violate their rights. Plaintiffs focus their case on indigent defense provided at the trial court level in Berrien, Muskegon, and Genesee Counties, essentially alleging that the system for the delivery of legal services to indigent adults in these three counties results in the Plaintiffs receiving ineffective assistance of counsel. Plaintiffs also seek class certification.

Plaintiffs' Complaint, however, contains numerous deficiencies and should be dismissed. First, Plaintiffs lack standing and their claims seeking declaratory relief are not ripe for adjudication. While Plaintiffs, in their pleadings, presume they will have a viable ineffective assistance of counsel claim, none of the Plaintiffs have been convicted. Accordingly, Plaintiffs fail to establish the necessary requirements of the injunctive relief sought since they fail to show injury in fact and their claims are based upon hypothetical speculative claims of ineffective assistance of counsel.

Second, this Court lacks jurisdiction to issue the relief sought. Although disguised as a claim for prospective injunctive relief, Plaintiffs attempt to seek increased funding for indigent defense services which inherently involves the state treasury. Only the Legislature can

appropriate moneys from the state treasury. Moreover, the Court of Claims, rather than the Circuit Court, has exclusive jurisdiction over claims seeking a monetary judgment against the state and its instrumentalities.

Third, Plaintiffs fail to state a claim for prospective injunctive relief. The constitutional right to counsel is a shield against improper government action. If an individual is not provided "effective" counsel in accord with his or her constitutional rights, recourse is to appeal or otherwise challenge any subsequent conviction. If a criminal defendant raises such a challenge, he or she must show that counsel's performance fell below an objective standard of reasonableness *and* that the deficient performance prejudiced the defense so as to deny defendant a fair trial. Here, Plaintiffs inappropriately turn the constitutional right to counsel on its head and attempt to use that right to force the government to fund, oversee, and train public defenders.

Fourth, Plaintiffs have sued the wrong parties. Courts have operated historically on local funds and resources for the provision of indigent defense services. Pursuant to statute, the counties, through their county treasurers, pay for court-appointed attorneys and counties are responsible for "maintaining, financing and operating the district court" absent an express exception.

Fifth, even if this Court has jurisdiction over this matter, this Court lacks jurisdiction to issue the injunctive relief sought against the Governor. The Michigan Supreme Court has made clear that the separation of powers principles set forth in the Michigan Constitution precludes mandatory injunctive relief against the Governor.

Sixth, governmental immunity bans the relief sought against the Governor as to Plaintiffs' state constitutional claims.

Finally, to the extent that this lawsuit is an attempt to force the State to appropriate money and direct resources a particular way, governmental immunity bars these claims as well.

While the Governor recognizes that many believe the public defender system could be improved and she is committed to ensuring fair trials, this lawsuit is an inappropriate method for achieving the institutional and structural changes Plaintiffs seek. Change in the public defender system can be accomplished through appropriate legislation and increased oversight by the judiciary and local funding units. The executive branch must not be forced into invading the province of the two other distinct branches of this State's constitutional form of government. Accordingly, Defendants request this Court to dismiss Plaintiffs' Complaint, with prejudice, pursuant to MCR 2.116(C) (4), (7) and (8).

BACKGROUND

Plaintiffs are eight individuals who were arrested at various times in 2006 and 2007 for a variety of crimes. Rather than wait for adjudication of their cases, Plaintiffs seek prospective injunctive relief against the State and its Governor for injuries they claim they *may* suffer should they be convicted. None of the Plaintiffs have gone to trial or otherwise had their claims adjudicated. Further, these Plaintiffs have apparently not attempted to have their assigned attorneys replaced. Thus, this Court has no factual record upon which to evaluate any ineffective assistance of counsel claims they may have resulting from their individual cases.

Rather, they allege that they are bringing this lawsuit against the State of Michigan and its Governor on behalf of all indigent persons who have criminal cases pending in Berrien, Muskegon, and Genesee Counties and who will rely upon those counties to provide them with defense counsel as required by the United States and Michigan Constitutions. Plaintiffs allege that the State, rather than the Counties or the individual defense attorneys, violated or

imminently will violate rights set forth in the Sixth and Fourteenth Amendments to the United States Constitution and Article 1, §§ 17 and 20 of the Michigan Constitution. In their Complaint, Plaintiffs attempt to allege systemic barriers to effective representation which they claim create a substantial likelihood of denying them their constitutional right to a meaningful opportunity to be heard in a court of law. Such barriers allegedly include inadequate State funding for indigent defense services, little State fiscal oversight or guidance to ensure proper indigent defense services, little State administrative oversight of indigent defense services, failure of the State to provide sufficient training, legal research tools, experts, or investigators, and failure of the State to provide qualified indigent defense attorneys. (Complaint ¶¶ 80-140). For the reasons set forth below, Plaintiffs' claims fail as a matter of law.

ARGUMENT

1. Plaintiffs lack standing and their claims are not ripe for adjudication.

A. Plaintiffs' pre-conviction claims are too remote and abstract to warrant the issuance of declaratory injunctive relief.

MCR 2.605(A)(1) provides that a court may issue a declaratory judgment that determines "the rights and legal relations of an interested person." In *Associated Builders & Contractors*, the Michigan Supreme Court held that a plaintiff seeking a declaratory judgment under MCR 2.605 must satisfy three requirements to establish that it is an interested person sufficient for standing purposes.¹ First, the plaintiff must have suffered an injury in fact, which is concrete and particularized, and actual or imminent, and not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. Third, it must be

¹ *Associated Builders & Contractors v Wilbur*, 472 Mich 117, 126-127; 693 NW2d 374 (2005).

likely, and not merely speculative, that the injury will be redressed by a favorable decision.² The Court held in *Associated Builders* that the "'actual controversy' and the 'interested party' requirements of MCR 2.605(A)(1) subsume the limitations on litigants access to the courts imposed by the standing doctrine."³

Similarly, ripeness prevents the adjudication of hypothetical or contingent claims before an actual injury has been sustained.⁴ A claim is not ripe if it rests upon "contingent future events that may or may not occur as anticipated, or indeed may not occur at all."⁵

Here, Plaintiffs fail to establish the necessary requirements of the declaratory judgment test since they cannot show either standing or ripeness. The Plaintiffs assume that they will have a viable ineffective assistance of counsel claim. They have not, however, been convicted. Nor have they alleged a denial of any request for new counsel. While Plaintiffs claim the State has abdicated its constitutional obligation to ensure adequate representation to indigent persons, any attempt to resolve the merits of the case in the manner Plaintiffs seeks would invoke "too remote and abstract an inquiry for the proper exercise of the judicial function."⁶ Accordingly, their claim must be dismissed pursuant to MCR 2.116 (C)(4).

² *Associated Builders*, 472 Mich at 127; see also *Mich Educ Ass'n v Superintendent of Pub Instruction*, 272 Mich App 1, 5; 724 NW2d 478 (2006).

³ *Associated Builders*, 472 Mich at 126.

⁴ *Michigan Chiropractic Council*, 475 Mich 363, 371, fn 14; 716 NW2d 561 (2005).

⁵ *Michigan Chiropractic Council v Commissioner of the Office of Financial and Insurance Services*, 475 Mich 363, 371, fn 14, citing *Thomas v Union Carbide Agricultural Products Co*, 473 US 568, 580-581; 105 S Ct 3325; 87 L Ed 2d 409 (1985).

⁶ *Renne v Geary*, 501 US 312, 323; 11 S Ct 2331; 115 L Ed 2d 288 (1991), quoting *International Longshoremen and Warehousemen's Union, Local 37 v Boyd*, 347 US 222, 224 (1954); see also, *Up and Out of Poverty v Michigan*, 210 Mich App 162, 170, n 5; 533 NW2d 339 (1995).

B. The judiciary, rather than these pre-conviction Plaintiffs, is the proper party to seek changes in indigent defense legal services.

Moreover, the changes sought in this lawsuit are best left to the judiciary, not individual pre-conviction plaintiffs. As the Michigan Supreme Court recently stated in *46 Circuit Trial Court v County of Crawford*, the judiciary has the "inherent power" to seek the funding necessary to sustain its ability to function in carrying out its constitutional responsibilities.⁷ Additionally, in *46 Circuit Trial Court*, the Supreme Court recognized that the Constitution imposes a duty on a county board of commissioners to appropriate funds "reasonable and necessary" to allow the court to function serviceably in carrying out its constitutional responsibilities.⁸ Thus, Courts can sue to ensure adequate funding if it finds that its constitutional responsibilities are not being carried out. Such constitutional responsibilities would include ensuring adequate legal services for indigent defendants.

2. The Circuit Court lacks jurisdiction over this matter.

A. The Legislature, not this Court, is the proper entity to appropriate funds from the state treasury.

In this lawsuit, Plaintiffs contend that Defendants provide inadequate funding for the provision of indigent defense services in felony criminal actions at the trial stage in the three Counties or any other county in the State. (Complaint, ¶¶ 88, 89, 103, 104, 157, 164, 170, 177). In their request for relief, Plaintiffs ask this Court to "[o]rder appropriate relief requiring Defendants to provide indigent defense programs and representation consistent with the requirements of the United States and Michigan Constitutions." (Complaint "RELIEF

⁷ *46 Circuit Trial Court v County of Crawford*, 476 Mich 131, 146-147; 719 NW2d 553 (2006).

⁸ *46 Circuit Trial Court*, 476 Mich at 157. See also *17th District Probate Court v Gladwin County Board of Commissioners*, 155 Mich App 433; 401 NW2d 50 (1986)(The probate court possesses inherent power to compel adequate funding for necessary judicial functions from the county board beyond the sums appropriated by the county board of commissioners).

REQUESTED," ¶ E). Essentially, Plaintiffs seek an order from this Court requiring the State to provide additional funds for the public defender programs in Muskegon, Berrien, and Genesee Counties. Moreover, Plaintiffs fail to clearly indicate in their Complaint that they are not seeking financial relief from the State treasury as a remedy in this case. Such an order, therefore, would necessarily entail this Court requiring Defendants to appropriate funds from the state treasury.

Pursuant to art 9, § 17 of the Michigan Constitution, only the legislature has authority to appropriate funds from the state treasury.⁹ This Court lacks the authority to require the Legislature to appropriate funds.¹⁰ Since only the Legislature has the constitutional authority to appropriate funds, and the Court lacks the authority to require the Legislature to appropriate funds, this Court cannot issue an order appropriating funds from the state treasury.

B. The Court of Claims has exclusive jurisdiction over this matter.

Moreover, Plaintiffs' request for "adequate" funding from Defendants to fund the indigent defense services is essentially a constitutionally-based claim for monetary relief from the State. Even if Plaintiffs attempt to argue that their Complaint is seeking solely declaratory relief, the Court of Claims, not the Circuit Court, would be the proper forum to litigate this requested relief against the State.¹¹ The Court of Claims jurisdiction is exclusive and extends to "all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies".¹² Constitutional claims

⁹ Mich Const, art 9, § 17; *Musselman v Engler*, 448 Mich 503, 522; 533 NW2d 237 (1995).

¹⁰ *Musselman*, 448 Mich at 522.

¹¹ *Parkwood v State Housing Dev Auth*, 468 Mich 763; 664 NW2d 185 (2003).

¹² MCL 600.6419(1). See also, *Silverman v Board of Regents*, 445 Mich 209, 217 (1994); *Kell v Johnson*, 186 Mich App 562, 562 (1990).

arising out of violations of civil rights have been regarded as a "species of tort liability".¹³

Moreover, such claims have been compared to personal injury actions for purposes of determining the applicable statute of limitations.¹⁴ Since *ex delicto* claims encompass wrongs against persons which are not restricted solely to traditional torts, and, civil rights actions are in the nature of torts and can be regarded as delicts, the Court of Claims has subject-matter jurisdiction over plaintiff's constitutionally-based claims.¹⁵

Because the relief sought against the State of Michigan and the Governor implicate the State treasury and because the Court of Claims has exclusive authority over such actions against the State, this Court lacks subject matter jurisdiction over Plaintiffs' claims. Summary disposition is, therefore, warranted under MCR 2.116 (C)(4).

3. Plaintiffs fail to state a claim upon which relief may be granted.

As this Court is well aware, injunctive relief is an extraordinary remedy that issues only when justice requires.¹⁶ In order to establish this equitable relief, Plaintiffs must show that they have no adequate remedy at law, and there exists a real and imminent danger of irreparable injury.¹⁷

A. Plaintiffs improperly seek prospective injunctive relief based on claims of ineffective assistance of counsel.

Plaintiffs claim that the public defender programs in Berrien, Genesee, and Muskegon Counties effectively deny indigent criminal defendants the effective assistance of counsel. Importantly, Plaintiffs are not challenging the outcomes of their criminal prosecutions, but

¹³ *Carey v Piphus*, 435 US 247, 253; 98 S Ct 1042; 55 L Ed 2d 252 (1978)

¹⁴ *Wilson v Garcia*, 471 US 261; 105 S Ct 1938; 85 L Ed 2d 254 (1985).

¹⁵ *Lowery v Dep't of Corrections*, 146 Mich App 342, 380 NW2d 99 (1985), *lv den* 425 Mich. 870 (1986)

¹⁶ *Fancy v Ergrin*, 177 Mich App 714, 719; 442 NW2d 765 (1989).

instead are challenging the level of funding, oversight, and training provided by the State to the Counties for their public defender programs. Plaintiffs want an order from this Court requiring the State to provide additional funds, oversight, and training for the defender programs in these Counties.

The Sixth Amendment to the United States Constitution affords defendants the right to counsel when facing criminal charges. "The right to counsel is considered fundamental because it is essential to a fair trial."¹⁸ The right to counsel encompasses the right to effective assistance of counsel.¹⁹ If a criminal defendant is either denied counsel or denied the effective assistance of counsel, he or she is entitled to relief.²⁰

Before a criminal defendant is entitled to relief based on ineffective assistance of counsel, however, his or her claim must be evaluated under the standards established by the United States Supreme Court in *Strickland v Washington*.²¹ To prove a claim of ineffective assistance of counsel under *Strickland*, a criminal defendant "must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." In addition to showing a serious deficiency, "the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."²² Failure to make the

¹⁷ *Charter Township of Bloomfield v Oakland County Clerk*, 253 Mich App 1, 15; 654 NW2d 610 (2002).

¹⁸ *People v Pubrat*, 451 Mich 589, 593; 548 NW2d 595 (1996), citing *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

¹⁹ *Pubrat*, 451 Mich at 593, citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

²⁰ *Pubrat*, 451 Mich at 594.

²¹ *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

²² *Strickland*, 466 US at 687.

required showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim.²³

As to Plaintiffs' claims of ineffective assistance of counsel brought under the Michigan Constitution, in *People v Pickens*, the Michigan Supreme Court adopted the ineffective assistance of counsel standard articulated by *Strickland* for such claims.²⁴ The Court held that the Michigan Constitution offers the same level of protection in ineffective assistance of counsel claims as the United States Constitution.²⁵

The right to counsel under the Federal and State Constitutions is inextricably tied to the fairness of a criminal defendant's trial, and therefore, alleged violations of the Constitutional right to counsel must be determined on a case-by-case basis. As the United States Supreme Court stated in *United States v Cronic*²⁶, "the right to 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. Absent some effect of challenged conduct on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated."²⁷ Any violation of the Sixth Amendment must be viewed in the context of the whole trial process, as the determination of the effectiveness of counsel is whether the defendant had the assistance necessary to justify reliance on the outcome of the proceeding.²⁸

The right to counsel is not the right to a particular level of representation, but instead is the right to the representation necessary for a fair trial. As the Court stated in *Strickland*, "the

²³ *Strickland*, 466 US at 700.

²⁴ *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

²⁵ *Pickens*, 446 Mich at 302.

²⁶ *United States v Cronic*, 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

²⁷ *Cronic*, 466 US at 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984)(*emphasis added*) (citations omitted).

²⁸ *Strickland*, 466 US at 692.

purpose of the effective assistance guarantee of the Sixth Amendment is not to improve legal representation . . . [t]he purpose is simply to ensure that criminal defendants receive a fair trial."²⁹ The Court in *Strickland* made clear that the performance inquiry in any ineffective assistance of counsel claim requires a review of the particular circumstances of the case³⁰:

In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. . . . Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

The analysis in *Strickland* requires a review of the facts of a particular criminal prosecution to determine whether the ineffective assistance of counsel claim is viable.

There are some circumstances where prejudice is presumed without inquiry into the actual conduct of the trial.³¹ These circumstances include when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.³² "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt."³³ Although there may be circumstances in which prejudice may be presumed, prejudice *must be* shown in each case.

²⁹ *Strickland*, 466 US at 689.

³⁰ *Strickland*, 466 US at 688-689.

³¹ *Cronic*, 466 US at 658.

³² *Cronic*, 466 US at 659, fn 25 (citations omitted).

³³ *Cronic*, 466 US at 659, fn 26 (citations omitted).

Because a specific showing of prejudicial impact is an essential element of any Sixth Amendment claim, these types of claims cannot be adjudicated separately from a particular case. Meaning, it is not proper for Plaintiffs in this case to allege violations of their constitutional right to counsel by claiming generalized harm based on perceived inadequacies in funding and oversight of the public defender programs in these three Counties. Through this lawsuit, Plaintiffs are attempting to do that which Courts have repeatedly stated is not the purpose of the Sixth Amendment—create a Constitutional standard for conduct of counsel without regard to the specific facts of the case. This runs contrary to *Strickland*, and Michigan Supreme Court precedent, and, therefore, Plaintiffs have failed to state a claim upon which relief may be granted and their Complaint should be dismissed pursuant to MCR 2.116(C)(8).

Although it is clear based on Michigan Supreme Court and United States Supreme Court precedent that Plaintiffs have failed to state a claim based on ineffective assistance of counsel because they have not made out a proper showing under *Strickland*, it is likely that they may point to the Eleventh Circuit Court of Appeals decision in *Luckey v Harris* to support their claim that a court may grant the type of prospective relief they have requested under the Sixth Amendment.³⁴ There are many reasons, however, why *Luckey* does not support Plaintiffs in the present case.

In *Luckey*, a bilateral class of indigent defendants in the courts of Georgia and all attorneys who represent indigent defendants in the Georgia courts brought an action under 42 USC §1983 against the Governor of Georgia and all Georgia judges who preside over criminal trials of indigent defendants in the Georgia Courts. The plaintiffs alleged that systematic deficiencies, including inadequate resources, delays in the appointment of counsel, pressure on

³⁴ *Luckey v Harris*, 860 F2d 1012 (CA 11, 1988).

attorneys to hurry their clients' cases to trial or to enter a guilty plea, and inadequate supervision in the Georgia indigent criminal system deny indigent criminal defendants their Sixth Amendment right to counsel and their due process rights under the Fourteenth Amendment.³⁵ The district court dismissed plaintiffs' complaint on the basis that it failed to state a claim for which relief could be granted "in that they seek an across-the-board ruling that the Georgia criminal defense scheme systematically denies or *will deny in the future* effective assistance of counsel to the indigent accused The Supreme Court, however, has explained that an evaluation of effective assistance is inextricably bound up with the particular facts of a case."³⁶

The Eleventh Circuit reversed the district court's decision and held that the plaintiffs' complaint did state a claim upon which relief could be granted.³⁷ The Eleventh Circuit subsequently denied a motion to rehear the case, and denied a motion to hear the case *en banc*. The majority did not issue an opinion.³⁸ Four Judges, however, dissented in an opinion that correctly analyzed the claim under *Strickland*—and by extension, Michigan Supreme Court precedent.

The dissenting Judges noted that the majority's decision—reversing the district court—provided no citation of authority for the following statements:

The Sixth Amendment protects rights that do not affect the outcome of trial. Thus, deficiencies that do not meet the 'ineffectiveness' standard may nonetheless violate a defendant's rights under the Sixth Amendment.³⁹

³⁵ *Luckey*, 860 F2d at 1013.

³⁶ *Luckey*, 860 F2d at 1016.

³⁷ *Luckey*, 860 F2d at 1017.

³⁸ *Luckey v Harris*, 896 F2d 479 (CA 11, 1989) (*Luckey II*).

³⁹ *Luckey*, 896 F2d at 480 quoting *Luckey*, 860 F2d at 1017.

The dissent went on to state that "this view of the Sixth Amendment is inconsistent with the language and rationale of both *Strickland v Washington* . . . and *United States v Cronin*."⁴⁰ After discussing *Strickland* and *Cronin*, the four dissenting Judges stated 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. Because prejudice is an essential element of any Sixth Amendment violation, Sixth Amendment claims cannot be adjudicated apart from the circumstances of a particular case."⁴¹

The Eleventh Circuit eventually dismissed the plaintiffs' complaint based on abstention grounds.⁴² In dismissing the case on abstention grounds, the Eleventh Circuit stated it is "clear that plaintiffs intend to restrain every indigent prosecution and contest every indigent conviction until the systematic improvements they seek are in place."⁴³

Although the Eleventh Circuit's decision is not binding on this Court, the Eleventh Circuit's apprehension in permitting plaintiffs to potentially interfere with every indigent criminal prosecution is equally applicable in this case. Allowing Plaintiffs to go forward in this case—in direct conflict with *Strickland* and Michigan Supreme Court precedent—could result in challenges to every indigent criminal prosecution and every indigent criminal conviction.

B. Plaintiffs fail to show that they lack an adequate remedy at law.

Although Plaintiffs have failed to state a claim for a violation of their Federal or State Constitutional rights based on alleged failure to provide effective assistance of counsel, even if

⁴⁰ *Luckey*, 896 F2d at 480.

⁴¹ *Luckey*, 896 F2d at 480.

⁴² *Luckey v Miller*, 976 F2d 673 (CA 11, 1992) (*Luckey IV*).

they had established such a claim, they have not made the required showing that they have no other remedy at law. Plaintiffs have adequate remedies at law for any ineffective assistance they actually receive. They can present objections to Sixth Amendment and State Constitutional violations at their criminal trials and in their appeals. Plaintiffs can also challenge the legality of their custody in a federal habeas corpus action. Further, these Plaintiffs can seek to have their appointed attorneys replaced. "An indigent defendant, entitled to the appointment of a lawyer at public expense, is not entitled to choose his lawyer. He may, however, become entitled to have his assigned lawyer replaced upon a showing of adequate cause for a change in lawyers."⁴⁴

C. Plaintiffs fail to allege facts establishing a viable due process claim.

Plaintiffs allege that the State's failure to provide them with adequate legal representation also violates their rights to due process under the Fourteenth Amendment. Plaintiffs' complaint, however, fails to make out a claim establishing either a procedural or substantive due process claim.

As to substantive due process, the Sixth Amendment of the United States Constitution provides the Plaintiffs with explicit textual sources of constitutional protection against the alleged deficiencies in the indigent counsel system. The Plaintiffs' complaint does not allege that the State deprives them of any fundamental rights and liberty which are, objectively, "deeply rooted in this Nation's history and tradition."⁴⁵ In fact, no court has held that the "liberty" interest protected by substantive due process includes the right to any particular level of funding and services associated with indigent defense programs.

⁴³ *Luckey*, 976 F2d at 677.

⁴⁴ *People v Blassingame*, 59 Mich App 327, 331; 229 NW2d 438 (1975) quoting *People v Ginther*, 390 Mich 441; 212 NW2d 922 (1973).

⁴⁵ *Moore v City of East Cleveland*, 431 US 494, 503; 97 S Ct 1932; 52 LEd2d 531 (1977).

As to procedural due process, Plaintiffs fail to allege that the indigent defense services offered in the three counties prevents individuals accused of a crime from receiving notice or an opportunity to be heard. Rather, their allegations sound more in the nature of violations of the right to counsel under the Sixth Amendment than due process violations under the Fourteenth Amendment.

Accordingly, Plaintiffs fail to state a claim upon which relief may be granted since their pleadings fail to establish the requisite elements for the injunctive relief they are seeking. Therefore, their lawsuit should be dismissed in its entirety pursuant to MCR 2.116(C)(8).

4. Plaintiffs have sued the wrong parties.

In Michigan, counties fully finance and control indigent defense at the trial level. In fact, over 100 years ago, the Michigan Supreme Court recognized the constitutionality of a statute which vests a county board of supervisors the exclusive power to prescribe and fix the compensation for all services rendered to indigent defendants.⁴⁶ Today, MCL 775.16 requires a county treasurer to compensate an attorney for his or her services in representing an indigent criminal defendant. It states that when an accused is unable to procure counsel⁴⁷:

[u]pon proper showing, the chief judge shall appoint . . . an attorney to conduct the accused's examination and to conduct the accused's defense. The attorney appointed by the court shall be *entitled to receive from the county treasurer . . . reasonable compensation for the services performed.* [Emphasis added].

This statute imposes an obligation on the trial court to determine and award reasonable compensation for the appointed attorney.⁴⁸ Thus, pursuant to State statute, the counties, through

⁴⁶ *Withey v Osceola Circuit Judge*, 108 Mich 168, 65 NW 668 (1895).

⁴⁷ MCL 775.16.

⁴⁸ *In re Attorney Fees of Mullkoff*, 176 Mich App 82, 438 NW2d 878 (1989), *lv den* 433 Mich 869 (1989).

their county treasurers, pay a court-appointed attorney the amount which the county's chief judge considers reasonable compensation for the services performed.⁴⁹

In 1993, the Michigan Supreme Court, explicitly announcing the counties' duty to finance the local courts, recognized that "a potential myriad of local considerations" might contribute to the determination of what compensation is reasonable, and that this determination might vary from one circuit to another.⁵⁰ Subsequently, in 1996 the Legislature established the Court Equity Fund which provides limited funding for trial court operations.⁵¹ The Court Equity Fund is disbursed quarterly with the State fiscal year to county governments based on a statutory formula that establishes each county's share of the fund. The formula includes two factors: the caseload activity of the circuit and probate courts and the number of judgeships in each county. More recently, in 2002, the Michigan Supreme Court adopted MCR 8.123 which requires individual trial courts to standardize and make public their processes for appointing and compensating counsel for the indigent.⁵²

In stating that the counties are responsible for compensating private attorneys assigned to represent indigent defendants in appealing their convictions, the Supreme Court in *Frederick v Presque Isle Co Circuit Judge*⁵³, explained:

Traditionally, the county has been the primary unit in directing Michigan's criminal justice system.

⁴⁹ *In re Jacobs*, 185 Mich App 642, 463 NW2d 171 (1990), *lv den* 444 Mich 863 (1993). See also, *Ottawa County Controller v Ottawa Probate Judge*, 156 Mich App 594; 401 NW2d 869 (1986), *lv den* 428 Mich 874 (1987)(County board required to appropriate money for probate court operations).

⁵⁰ *Recorder's Court Bar Association v Wayne Circuit Court*, 443 Mich 110, 129; 503 NW2d 885 (1993).

⁵¹ MCL 600.151b.

⁵² MCR 8.123.

⁵³ *Frederick v Presque Isle Co Circuit Judge*, 439 Mich 1, 6; 476 NW2d 142 (1991).

"Judicial circuits are drawn along county lines and counties are required by statute to bear the expenses of certain courtroom facilities [MCL 600.551], [repealed] circuit court commissioner salaries [MCL 600.1067], stenographer's salaries [MCL 600.1114], juror's compensation [MCL 600.1231], and fees for attorneys appointed by the court to defend persons who cannot procure counsel for themselves [MCL 775.16]."

Moreover, under MCL 600.8103(1), the county is responsible for "maintaining, financing and operating the district court . . . except as otherwise provided in this act." The plain language of this statutory provision dictates that the county is responsible for all expenses of maintaining, financing, and operating the district court, unless otherwise specified.⁵⁴ In *Cameron v Monroe County Probate Court*, the Supreme Court held that the county was responsible for paying a judgment entered against the probate court in a discrimination suit brought against a probate court judge.⁵⁵ The Court recognized that the court system in Michigan has historically operated on local funds and resources⁵⁶:

It is well established that "Despite the fact that the courts have always been regarded as part of state government, they have operated historically on local funds and resources." *Grand Traverse Co*, supra 450 Mich. at 473-474. Although the expenses of justice are incurred for the benefit of the state, they are charged against the counties in accordance with old usage, as a proper method of distributing the burden. *Id.*, citing *People ex rel Schmittziel v Wayne Co Bd of Auditors*, 13 Mich 233 (1865).

As the Michigan Supreme Court pointed out in *Grand Traverse*, "[w]hile strong arguments can be made that state funding would be a more desirable system of court financing, it is for the Legislature to determine whether to adopt such a system."⁵⁷ The Supreme Court

⁵⁴ *Cameron v Monroe County Probate Court*, 457 Mich 423, 426; 579 NW2d 859 (1998).

⁵⁵ *Cameron v Monroe County Probate Court*, 457 Mich at 427.

⁵⁶ *Cameron v Monroe County Probate Court*, 457 Mich at 427.

⁵⁷ *Grand Traverse County v State of Michigan*, 450 Mich 457, 472; 538 NW2d 1 (1995).

outlined the "unbroken line of cases stretching back 130 years" which recognized the practice of imposing the costs of operating the courts on local funding units.⁵⁸

Here, Plaintiffs are suing the State of Michigan and its Governor essentially asserting a pre-conviction ineffective assistance of counsel claim. The county, however, is responsible for maintaining, financing and operating its courts as evidenced by statute and case law. The Counties, not the State, are the proper parties and, as such, the State of Michigan and Governor Granholm should be dismissed pursuant to MCR 2.116 (C)(8).

5. This Court lacks jurisdiction to issue injunctive relief against the Governor.

It is well-recognized that "a court at all times is required to question *sua sponte* its own jurisdiction (whether over a person, the subject matter of an actions, or the limits on the relief it may afford)."⁵⁹ The Michigan Supreme Court has recognized that there are limits on the relief that can be awarded against the Governor⁶⁰:

It is clear that separation of powers principles, Const 1963, art 3, §2, preclude mandatory injunctive relief, mandamus, against the Governor. *People ex rel Sutherland v Governor*, 29 Mich. 320; 18 Am. Rep. 89 (1874). Whether similar reasoning also puts prohibitory injunctive relief beyond the competence of the judiciary appears to be an open question that need not be resolved in this case. We do note that the Supreme Court has recently recognized that declaratory relief normally will suffice to induce the legislative and executive branches, the principal members of which have taken oaths of fealty to the constitution identical to that taken by the judiciary, Const 1963, art 11, §1, to conform their actions to constitutional requirements or confine them within constitutional limits. *Durant v Michigan*, 456 Mich. 175, 205; 566 NW 2d 272 (1997). Only when declaratory relief has failed should the courts even begin to consider additional forms of relief in these situations.

⁵⁸ *Grand Traverse*, 450 Mich at 473-474; See also *Judicial Attorneys Association v State of Michigan*, 460 Mich 590; 597 NW2d 113 (1999).

⁵⁹ *Straus v Governor*, 459 Mich 526, 532; 592 NW2d 53 (1999)(citations omitted).

⁶⁰ *Straus*, 459 Mich at 532.

In this case, the Plaintiffs' claim for injunctive relief against the Governor is barred and summary disposition should be granted pursuant to MCR 2.116 (C)(4).

6. Governmental immunity bars the relief sought against the Governor as to Plaintiffs' State Constitutional claims.

In Counts III and IV of their Complaint, Plaintiffs claim that Defendants, the State of Michigan and Governor Jennifer M. Granholm, violated their constitutional rights under Mich Const 1963, art 1, §20, the effective assistance of counsel clause, and §17, the due process clause.⁶¹

The pertinent law, MCL 691.1407(5), provides as follows:

"[a] judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority."

Plaintiff has named the Governor as a Defendant because of her constitutional duty to faithfully execute the laws⁶² and to submit to the Legislature a budget for all operating funds, including proposed expenditures, and estimated revenue of the State for the ensuing fiscal year.⁶³ Any constitutional torts that Plaintiffs claim may have occurred because of any inaction or action by the Governor are barred absolutely by governmental immunity under MCL 691.1407(5). As such, Plaintiffs' claims against the Governor must be dismissed pursuant to MCR 2.116(C)(7).

⁶¹ Mich Const, art 1, §20 provides: "In every criminal prosecution, the accused shall have the right * * * to have an appeal as a matter of right." Mich Const, art 1, §17 provides: "No person shall be . . . deprived of life . . . without due process of law and "The right of all individuals . . . to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed."

⁶² Mich Const 1963, art 5, §8.

⁶³ Mich Const 1963, art 5, §18. Plaintiff also reference Mich Const 1963, art 5, §1 which states "the executive power is vested in the governor."

7. Governmental immunity bars the claims brought against the State of Michigan.

The Government Liability Act, 1961 PA 170, MCL 691.1401, *et seq*, establishes the scope of governmental liability for tort damages. Specifically, Section 7 of this Act dictates that government agencies engaged in governmental functions are generally immune from all tort liability unless the Act expressly creates an exception to that immunity. In pertinent part, Section 7 states:

Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise of discharge of a governmental function. [MCL 691.1407 (1)].

Thus, if a claim for tort damages is not expressly authorized within a stated exception in the Government Liability Act, *supra*, then the government is immune under the blanket immunity set forth in MCL 691.1407(1).

The Legislature has created statutory exceptions to governmental immunity and has allowed actions against the State for failure to properly maintain highways (MCL 691.1402), for government agents' negligent operation of government-owned vehicles (MCL 691.1405), and for failure to properly repair and maintain public buildings (MCL 691.1406) or the operation of a proprietary function (MCL 691.1413). Plaintiffs do not state claims that come within any statutory exception to the State's governmental immunity bestowed by MCL 691.1407(1), *et seq*.

- A. The Due Process Clause is not a statutory exception to immunity. Plaintiffs do not state constitutional tort claims that fit within the narrow confines established by the Michigan Supreme Court and, thus, do not avoid the immunity accorded under MCL 691.1407(1).**

In addition to the requirement that a plaintiff must plead in avoidance of governmental immunity in order to successfully bring suit against an agency of the state, a plaintiff must also

prove an underlying cause of action.⁶⁴ The Michigan Supreme Court has examined the question of whether a private cause of action for money damages exists under the State Constitution in *Smith v Department of Public Health*⁶⁵, *Jones v Powell*⁶⁶, and *Lewis v State of Michigan*⁶⁷. As explained by the Court in *Jones* and *Lewis*, the *Smith* Court did not produce a consensus regarding the rationale behind its holdings.⁶⁸ The Court's holdings in *Smith*, as noted in *Jones*, included the following⁶⁹:

5) Where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the Michigan Constitution, governmental immunity is not available in a state court action.

6) A claim for damages against the state arising from violation by the state of the Michigan Constitution may be recognized in appropriate cases.

In subsequent cases, the Michigan Supreme Court clarified this area of law by articulating two threshold barriers that severely limit the recognition of constitutional torts. Specifically, the Court held that a constitutional tort claim does not exist when: 1) there is any other remedy available⁷⁰; and, 2) regardless whether any remedy is available, when the Constitution provision expressly delegates its implementation to the Legislature.⁷¹

As discussed below, Plaintiffs' due process and ineffective assistance of counsel tort claims fail as a matter of law upon application of the *Smith*, *Jones*, and *Lewis* factors.

⁶⁴ See *Canon v Thumudo*, 430 Mich 326; 422 NW2d 688 (1988).

⁶⁵ *Smith v Dep't of Public Health*, 428 Mich 540; 410 NW2d 749 (1987).

⁶⁶ *Jones v Powell*, 462 Mich 329; 612 NW2d 423 (2000).

⁶⁷ *Lewis v State of Michigan*, 464 Mich 781; 629 NW2d 868 (2001).

⁶⁸ *Lewis*, 464 Mich at 786.

⁶⁹ *Jones*, 462 Mich at 336 (quoting *Smith*, 428 Mich at 544) (emphasis omitted)].

⁷⁰ *Jones*, 462 Mich at 336-37.

⁷¹ *Lewis*, 464 Mich at 785-86.

B. Because there are other remedies available, Plaintiffs' constitutional tort claims under Const 1963, art 1, §§ 17 and 20 are foreclosed by *Jones*, and thus Plaintiffs have not stated actionable claims in avoidance of the State's governmental immunity.

In this case, Plaintiffs attempt to allege constitutional torts under Const 1963, art 1, §17, Due Process of Law, Fair Treatment at Investigations; and Const 1963, §20. Const 1963, art 1, §17, which provides⁷²:

No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive infestations and hearings shall not be infringed.

Plaintiffs also claim that they were denied the right to effective counsel under Const 1963, art 1, §20, which provides⁷³:

in every criminal prosecution, the accused shall have the right . . . to have the assistance of counsel for his defense

Plaintiffs' due process claim rests upon their premise that indigent defense counsel system is "under-funded, poorly administered, and does not provide mandated constitutional protections." (Complaint, ¶¶ 177, 178, 181). It is unclear if Plaintiffs are claiming a violation of procedural and/or substantive due process. In any event, under either theory, like *Jones*, it is clear that Plaintiffs have alternative remedies to redress the alleged violation of the rights protected by Const 1963, art 1, §§ 17 and 20. In fact, they have chosen an alternative remedy by filing this action under 42 USC § 1983.

Jones definitively held that "*Smith* only recognized a narrow remedy against the State on the basis of the unavailability of any other remedy."⁷⁴ Both the majority and concurring

⁷² Mich Const 1963, art 1, §17.

⁷³ Mich Const 1963, art 1, §20.

opinions in *Jones* cite to the plaintiffs' alternative remedies under 42 USC §1983 and common-law tort theories as providing adequate redress for the alleged violations of the plaintiffs' State Constitutional rights.⁷⁵ 42 USC §1983 provides a vehicle for redressing violations of the United States Constitution and federal law. Thus, the Court's decision in *Jones* reveals that it is not the source of a right that controls the question of whether there are alternative remedies available. In other words, *Jones* stands for the proposition that if the claimed injury can be remedied by an action alleging a violation of the federal statute or constitution, then the lack of a remedy under state law is insufficient to compel recognition of a money damages remedy under the State Constitution.

First, the Plaintiffs have alternative remedies under 42 USC §1983. If, as Plaintiffs claim, they are denied due process of law or are not provided the "effective" assistance of counsel, their recourse is to appeal or otherwise challenge any subsequent conviction. Plaintiffs can also challenge the legality of their custody in a federal habeas corpus action. Further, these Plaintiffs can seek to have their appointed attorneys replaced.

More importantly, it is the available remedy, not whether a plaintiff is successful in pursuing that remedy, which is determinative of this factor. Consequently, pursuant to *Jones*, because Plaintiffs have other available remedies for the alleged conduct, a judicially created remedy is not appropriate.

⁷⁴ *Jones*, 462 Mich at 337 (emphasis added).

⁷⁵ *Jones*, 462 Mich at 337, 339.

- C. Under the remaining *Smith* factors, Plaintiffs otherwise failed to state actionable constitutional tort claims under Const 1963, art 1, §§ 17 and 20. The text, history, and previous interpretations of these provisions do not support recognizing a private cause of action of money damages.**

It is clear there is no private cause of action for money damages under Const 1963, art 1, §§ 17 and 20. As indicated above, the first step in evaluating whether to infer a constitutional tort cause of action is determining whether a constitutional violation has been established.

Plaintiffs have not alleged that they have been denied a fair trial. Instead, they are asserting a generic claim that there are deficiencies in the indigent legal defense services provided to adults charges with felonies at the trial court level in Berrien, Genesee, and Muskegon counties due to under-funding, lack of oversight, and training for the defender programs in these counties. Because Plaintiffs have failed to prove that they have been prejudiced by counsel's performance or that counsel has performed in a deficient manner, they also have failed to establish a constitutional violation of the effective assistance of counsel. Under these circumstances, the Plaintiffs have failed to plead in avoidance of governmental immunity and summary disposition is warranted under MCR 2.116 (C)(7).

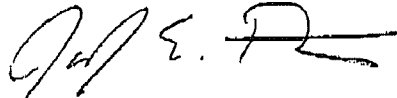
CONCLUSION

Plaintiffs' complaint should be dismissed for numerous reasons. First, Plaintiffs lack standing and their claims are not ripe. Second, this Court lacks jurisdiction to issue the relief sought, since only the Legislature can appropriate moneys from the state treasury and the Court of Claims, rather than the Circuit Court, has exclusive jurisdiction over such matters. Third, Plaintiffs fail to state a claim for prospective injunctive relief. Fourth, Plaintiffs have sued the wrong parties. Fifth, this Court lacks jurisdiction to issue the injunctive relief sought against the Governor. Finally, Plaintiffs' claims are barred by immunity.

WHEREFORE, for the above reasons, Defendants respectfully request this Honorable Court to grant its Motion for Summary Disposition, dismiss Plaintiffs' Complaint with prejudice, and award such further relief this Court deems just and reasonable, including costs and attorneys fees.

Respectfully submitted,

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Dated: April 5, 2007
2007005640A/brief

PROOF OF SERVICE

Lisa S. Albro certifies that on the 5th day of April, 2007, she served a copy of the above document in this matter on all counsel of record and parties *in pro per* at their last known addresses via first class mail by depositing same in a United States Post Office depository in Lansing, Michigan with first class postage fully paid.



Lisa S. Albro