*Ingham County Circuit Court*
***30th Judicial Circuit***
P.O. BOX 40771
313 W. KALAMAZOO STREET
LANSING, MI 48901-7971
TELEPHONE: (517) 483-6500
FAX: (517) 483-6501

WILLIAM E. COLLETTE
Chief Circuit Judge

DAVID L. EASTERDAY
Circuit Court Administrator

NERVY OLIVER
Deputy Court Administrator /
Juvenile Division

DONALD L. REISIG
Deputy Court Administrator /
Friend of the Court

RHONDA K. SWAYZE
Deputy Court Administrator /
General Trial Division

## FACSIMILE TELECOMMUNICATION COVER SHEET

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**Sent By:** Jody A. Larsen

**Date:** 5/27/07

**Message:**

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE 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 situated,
Plaintiffs,
-v- File No. 07-242-CZ

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

MOTION FOR SUMMARY DISPOSITION
AND
MOTION FOR CLASS CERTIFICATION

BEFORE THE HONORABLE LAURA BAIRD, CIRCUIT COURT JUDGE

LANSING, MICHIGAN - WEDNESDAY, MAY 15, 2007

APPEARANCES:

For the Plaintiffs: MICHAEL J. STEINBERG (P-43085)
60 West Hancock
Detroit, MI 48201

FRANK D. EAMAN (P-13070)
Penobscot Building, Sutie 3060
645 Griswold Street
Detroit, MI 48226

Also appearing for the Plaintiffs: JULIE NORTH
EMILY CHIANG
ELIZABETH KENNEDY

For the Defendants: JOSEPH E. POTCHEN (P-49501)
DENISE C. BARTON (P-41535)
JASON E. EVANS (P-61567)
Assistant Attorneys General
PO Box 30736
Lansing, MI 48909

Reported by: Jody A. Larsen, CSR-4224
Official Court Reporter

## EXAMINATION INDEX

NONE

* * *

## EXHIBIT INDEX

NONE

* * *

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE 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 situated,
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* * *

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NONE

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Lansing, Michigan
Wednesday, May 15, 2007
10:51 a.m., approximately

RECORD

THE COURT: This is Duncan, et al, versus State of Michigan and Granholm, file 07-242-cz. Your appearances please.

MR. STEINBERG: Michael J. Steinberg on behalf of plaintiffs.

MR. EAMAN: Good morning, your Honor. Frank Eaman on behalf of the plaintiffs.

MS. NORTH: Good morning, your Honor. Julie North, from Cravath, Swaine and Moore, on behalf of plaintiffs.

MS. CHIANG: Good morning, your Honor. Emily Chiang, from the American Civil Liberties Union, on behalf of the plaintiff.

MS. KENNEDY: Elizabeth Kennedy, from Cravath, Swaine and Moore, on behalf of the plaintiff.

MR. POTCHEN: Good morning, your Honor. Joseph Potchen, assistant attorney general, on behalf of the defendants.

MR. EVANS: Good morning, your Honor. Jason Evans, assistant attorney general, on behalf of defendant.

MS. BARTON: Good morning, your Honor. Denise



Barton, assistant attorney general, here on behalf of the defendants.

THE COURT: All right. And I'm giving you an hour for everything, so we'll begin with the pro hac vice motion. You can go ahead.

MR. STEINBERG: Good morning, your Honor. My name is Michael J. Steinberg. I'm the legal director for for the American Civil Liberties Union.

And it is my honor and pleasure to move this Court for permission for four outstanding attorneys to appear before this Court for this important case to reform the indigent defense system in the State of Michigan. The attorneys are Emily Chiang, Elizabeth Kennedy, Julie North, and Robin Dahlberg.

All have outstanding academic credentials, graduating from such schools as Harvard and Stanford. Three of the four have worked on the Montana case that successfully reformed the indigent defense system there. One of the attorneys, Robin Dahlberg, was the lead attorney in a similar case in both Pennsylvania and Connecticut.

I've had the pleasure of working with them for the past two years preparing this case. And I can personally vouch that they have the highest ethical standards. They're all admitted in the State of New York.

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And, most importantly, I'm sure your Honor will be happy to know that none of them have New York accents.

I believe that this is an unopposed motion. And should this Court grant the motion, we have prepared orders.

THE COURT: And Mr. Potchen.

MR. POTCHEN: We're not opposing the motion.

THE COURT: All right. Motion granted. All right. Thank you.

MR. STEINBERG: That was -- you just signed one. I don't know if you want to sign all four.

THE COURT: Are they all different or are they the same?

MR. STEINBERG: There's an order for each attorney. I'm sorry.

THE COURT: I guess I should have looked. And is Robin Dahlberg here?

MR. STEINBERG: No. She's not. Thank you, your Honor.

THE COURT: You're welcome. Next on the summary disposition motion. Mr. Potchen, you can go ahead.

MR. POTCHEN: Good morning, your Honor.

THE COURT: Good morning.

MR. POTCHEN: We realize that you have been inundated with much paperwork and much briefing in this

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case. And I really want to put this lawsuit and our motion in its simplest forms.

The plaintiffs in this case want this Court to order Governor Granholm to centralize county public defense systems, because they claim the counties aren't doing their job. They seek to turn the constitutional right to counsel on its head in an attempt to force Governor Granholm to act.

No longer is there a right to protection against improper governmental action. Rather, according to the plaintiffs, Governor Granholm is somehow required to fund and oversee public defense systems in these three counties. They want this Court to recognize a duty that has never been recognized in the State of Michigan. We completely recognize this is a pre-conviction claim. It's our position that they cannot force Governor Granholm to increase funding or oversee public defenders in their criminal cases.

At issue in our motion is the relief that they're seeking against the governor and the state generally. While they may not agree with Michigan's system, this does not entitle them to the relief that they're seeking.

I want to also be clear that this motion is not a review of the public defense systems in these three

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counties. We are not saying that the public defense systems can't be improved. We acknowledge that many groups have done studies of the public defense systems throughout the State of Michigan and in these counties. And we don't question that other states have different public service defense systems.

But in Michigan the statute allocates money to the counties through the Court Equity Fund. This is overseen by the judiciary branch and specifically the county treasurer, not Governor Granholm.

Plaintiffs claim this amount is grossly insufficient at paragraph 89 of their complaint. If they want an increase of this amount, then the legislature needs to do it, not Governor Granholm.

In Michigan by statute the counties control indigent defense systems. It has historically been a decentralized system. If the counties are not providing adequate indigent defense services, then they need to sue those local counties, not the state or the governor.

Now, I want to address their specific relief that they're asking for. As to the declaratory relief that they seek, the plaintiffs here have failed to show an actual injury in fact. Their claims are based on a conjecturally hypothetical injury. They simply presume they are going to be convicted. And they presume that

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everyone who has a public defender is going to receive poor counsel, inadequate counsel.

Also their claims are speculative. There's no showing that they're alleged injury is going to be redressed by a unfavorable decision. The plaintiffs here could be represented by the best trained, most highly paid attorneys in the state and still be convicted. Or they could be represented by the public defenders and not be convicted.

They haven't even alleged that they have sought a new counsel or the Court has denied them new counsel. This is why the courts in Minnesota and Indiana have thrown out such cases. And I'm specifically referring to the cases cited in our reply brief, that's the Kennedy case that was brought by the public defender in Minnesota and the Platt case brought by the criminal defendants in Indiana. Those are attached to our brief, your Honor.

In both of those cases --

THE COURT: At which tab?

MR. POTCHEN: Pardon?

THE COURT: At which tab?

MR. POTCHEN: It would be tabs 2 and 3 in our -- tab 2 is the Minnesota case --

THE COURT: I've got it.

MR. POTCHEN: -- and tab 3 is the Platt case.

THE COURT: Yes.

MR. POTCHEN: Both of those cases, your Honor, recognized that ineffective counsel claims arise only after the defendant has shown some prejudice. This is a showing that the proceeding was somehow unreliable. That is the Strickland test. And that's what applies here, even in pre-conviction claims.

Here the plaintiffs are attempting to do what courts have repeatedly said is not the purpose of the sixth amendment. They're asking this Court to recognize a general constitutional standard for attorneys' conduct without regard to the specific facts of an individual case.

Now, they are calling it systemic equitable relief. No U.S. Supreme Court case or Michigan case has ever set such a standard. The cases actually have warned against setting such a standard.

And quoting from Strickland at page 689, the purpose of the effective assistance guarantee of the sixth amendment is not to improve legal representation. To have a viable ineffective assistance of counsel claim the plaintiffs must show that counsel's performance fell below an objective standard of reasonableness and this deficient performance resulted in prejucide.

That is the same test followed in Michigan.



They must show some individual prejudice. So the declaratory relief is improper.

As to the injunctive relief, they have simply sued the wrong parties. The counties finance and control indigent defense at the trial level through statute. And this is recognized in the Grand Traverse case. It is up to the legislature to change the system. If the counties are not getting enough money, the judiciary can use its inherent power to get it. That's the 46th Circuit Trial Court decision.

They continually claim in their response and in other pleadings that they are not seeking monetary relief. You only need to look at the complaint to see that they are seeking monetary relief. That's what they want.

And I'm going to quote from -- or just identify specific portions of their complaint where it's clearly monetary relief. They want -- these are the tools they say that are needed. They want the same or similar training as prosecuting attorneys at paragraph 91. They want access to the Michigan State Police Forensic Science Division at paragraph 92.

They want reimbursement of collect calls to counsel at paragraph 134. They want the ability to hire investigators at paragraph 135. They apparently want money for copying court files and police records at



paragraph 136. They want motion fees at paragraph 137. They want training to provide better representation at paragraph 130 through 140.

They want increased oversight, which would include statewide standards for eligibility, attorney training, access to resources, at paragraph 94. And they presumably want the governor to oversee the SCAO at paragraphs 95 and 96.

These again are the tools they claim are necessary to ensure adequate counsel for indigent defendants. All of these tools require money. These tools are not free. Clearly the relief they're seeking involves an appropriation from the state treasury. And pursuant to article 9, section 17 only the legislature can appropriate the money.

Additionally, as our brief makes clear, since their claim is a constitutionally based claim seeking monetary relief, it belongs in the Court of Claims.

Additionally, it's our position that this Court cannot issue mandatory injunctive relief against the governor in the manner requested by the plaintiffs. That's the Straus case. It would violate the separation of powers.

Even if plaintiffs got through all these procedural steps, they have failed to allege a viable



claim. The purpose, as I've said earlier, of the constitutional right to counsel is to protect against improper government action.

If a criminal defendant is not provided counsel in accord with the constitution, they may petition the Court for counsel, if one's not given, or they can petition for new counsel if their present counsel is not properly assisting them during critical phases. That is their precondition -- pre-conviction remedy. Or if they do get convicted, the recourse is to appeal the conviction, or they can file a habeas action. That is their post-conviction remedy. So the plaintiffs have an adequate remedy at law.

Now, we fully expect, as they did in their briefs, to rely -- plaintiffs to rely on the Luckey decision. The Luckey decision is simply a wrong decision. This Court should be aware that there were five different opinions issued in the Luckey line of cases. The one that they are relying on is generally referred to as Luckey I.

In Luckey II, which is cited in our brief, that was a request for a rehearing of Luckey I. In Luckey II the dissent noted that Luckey I was inconsistent with Strickland and Cronic and should be reviewed. They also noted in Luckey II that there was no abstract right to a particular level of representation.

And this is a quote taken directly from Luckey II at page 480. Because prejudice is an essential element of any sixth amendment violation, the sixth amendment claims cannot be adjudicated apart from the circumstances of a particular case.

Put differently, no claim for relief can be stated in general terms, as was attempted here. That means, your Honor, that you must look at the individual cases. And that shows why they haven't stated a viable claim.

But there's an additional problem with Luckey. That case, in Luckey V, was vacated on abstention grounds. The Court never addressed the issues raised in the case technically. They got over the motion, but they never addressed the actual viable cause of action.

So it's our position that Luckey I is bad law and should not be followed by this Court. We believe this Court should follow the Minnesota case, Kennedy, and the Indiana Platt case, again attached to our briefs. Their reasoning in our opinion is more consistent with the U.S. Supreme Court and the Michigan Supreme Court precedent.

Again, on the other aspects of our motion, the procedural due process claim, they are not claiming they've been denied counsel. In fact they've been assigned counsel. They haven't made the claim they have



not been assigned counsel. So they've had the notice and the opportunity to be heard.

It's their claim they just want to be heard better by having the governor oversee indigent defense services. Michigan has never recognized such a procedural due process claim.

And finally, your Honor, as to the immunity, since the plaintiffs' claim clearly is sounded in constitutional tort, and this case necessarily involves monetary relief and some money from the state treasury, both the governor and state are immune. The governor acting within the scope of her authority as to the federal claims and being sued in her official capacity is not recognized as a person for the section 1983 claim. It appears the 11th amendment may also preclude those claims.

As to the state claims, the plaintiffs have not shown they fit into any of the exceptions outlined for blanket governmental immunity. There is no case for damages against the state or its governor.

Your Honor, therefore, for the variety of reasons outlined here and in our briefs, we request this Court to grant our motion.

THE COURT: And are you asking for rebuttal too on this motion?

MR. POTCHEN: Yes, your Honor.



THE COURT: All right. Thank you. Who's responding?

MR. EAMAN: Good morning, your Honor. My name is Frank Eaman. I'm one of the plaintiffs' counsel of record on the complaint. With the permission of the Court I'm going to make some brief introductory remarks, as my opponent suggested addressing this complaint in its simplest form, then Emily Chiang will address the arguments of the defendants more particularly.

Your Honor, I'm a criminal defense lawyer. I've been a criminal defense lawyer for 35 years. As the Court can see from some of the exhibits that we filed I've been deeply involved in indigent defense reform through the State Bar, through the committee on assigned counsel standards, through articles that have been written about the necessity to reform the criminal justice system.

And as our exhibits suggest, this starts way back when now federal Judge Paul Borman was the chairperson of the indigent defense committee of the State Bar.

Four of our presidents -- one of those articles we have attached as an exhibit -- have written editorials in the bar journal that say that the systems in Michigan do not meet constitutional muster and change has to happen.



So it's no secret, no secret to me as a criminal defense lawyer what I see in court every day, and it's no secret to those involved in the legal system that the indigent defense system in Michigan falls far short of the Gideon standards and the sixth amendment standard we seek to enforce in this complaint.

And why is this? The reason is that this state, unlike most other states in this country, did not react to Gideon by doing anything. The system we have in place, the county system that the defense refers to, was created in the 19th century before Gideon existed. After Gideon was decided in 1963 the state did nothing, did nothing to provide indigent defense.

I find it interesting that in the remarks of counsel this morning and in all the pleadings they filed nowhere do they ever suggest that the systems in place do meet constitutional muster, that these systems do comply with the sixth amendment. They're doing what we as criminal defense attorneys often get accused of all the time. They are using technicalities to try to avoid, in this case, the application of the constitution.

As lawyers we all take an oath to be faithful. All elected officials all take oaths to be faithful and to defend the constitution. I would suggest if anybody came into the court and opposed our complaint and did suggest

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that these systems complied with the constitution, they may be violating their oath as well as stating something we can easily disprove.

But this is not about proof. And opposing counsel said we must show this or we must show that. At this point it's about whether we've pled adequately for this case to go forward, and we believe we have.

And an example I hope can demonstrate that. And that is surely if these plaintiffs had no appointed counsel, and there was no system in place in any of these counties, the Court would have an opportunity and an obligation and a duty to step up and order that defense be provided in accordance with Gideon.

And I might say we are here not to enforce strict language. We are here to enforce Gideon. And if there were no system, the Court would under Gideon order that appointed counsel be provided.

But what we are alleging in the complaint is there is next to no system. There is a system, and in the words of -- of the Supreme Court in Avery versus Alabama, which we cite in Exhibit E, which is cited by the trial judge in Stinson versus Fulton County, where the request for such a motion as the Court is hearing today was denied, that the denial of the opportunity to confer with counsel, to consult with counsel, to prepare turns the

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appointment system into a sham.

And that's what our complaint alleges. And we believe it is sufficient to get constitutional relief under Gideon.

And now I ask Ms. Chiang to address directly the arguments of the defense.

MS. CHIANG: Bless you.

THE COURT: Allergy season.

MS. CHIANG: The worse. Good morning, your Honor. Emily Chiang from the ACLU. As Mr. Eaman indicated, I will address the substantive arguments defendants raised.

I want to make it clear at the outset, the proceeding here today isn't about what the applicable remedy is should this Court find that defendants are ultimately liable for implementing a constitutionally inadequate system. In other words, it's not about whether the remedy is a statewide public defender office or increased funding or increased expert investigators or training.

The question before this Court is a simple one. It's a (C)(8) motion which should only be granted if plaintiffs have failed to allege a claim. So it's not about the remedy. It's merely about whether plaintiffs have sufficiently alleged facts to state a claim.

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That is plainly not the case here, and defendants' motion should be denied. Defendants' motion is just another effort by the state to avoid constitutional responsibilities in an effort to distract the Court from the fact that the state is sending indigent persons to jail without an adequate opportunity to be heard or effective assistance of counsel. Defendants cited to legal standards that do not apply and alluded to remedies that plaintiffs do not seek. I'm going to focus on four items I think this Court should pay particular attention to.

The first one is that cases like this are routinely brought and permitted to proceed to discovery, which is all we ask that the Court do today. The second is that the Strickland standard is inapplicable. It's pre-conviction cases for systemic relief. The third is that because Strickland does not apply, plaintiffs do have standing, and our claims are ripe. And finally, fourth, that our claims are not for money damages, and so jurisdiction before this Court isn't proper.

So turning to the first issue, which is whether we have asserted a claim upon which relief can be granted, I would like to note for this Court that, you know, defendants imply that the only case we have to support -- to support our claim is Luckey versus Harris. That's

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simply not the case.

As we pointed out in four pages of our opposition brief, litigants in at least 11 other jurisdictions raised claims almost exactly like the ones asserted here. In every one of those cases defendants moved to dismiss, just as they have here. And in every case but one the courts denied those motions finding that plaintiffs had asserted a viable cause of action.

Defendants talk a lot about the two decisions in Platt and Kennedy versus Carlson. I would note that Kennedy is distinguishable on its facts, because if you take a look at that case, the Court found -- first of all, Kennedy was permitted to proceed to discovery. Secondly, it's distinguishable on its facts, because after discovery the Court held that plaintiffs had failed to make any allegations of injury to indigent defendants. Whereas here in contrast plaintiffs have made ample allegations of such injuries.

I would also like to note for the Court that Platt is the only case to have a dismissed claim like plaintiffs at the summary disposition stage. No other court before or after has followed its reasoning, and numerous courts have explicitly rejected that reasoning.

To the extent that defendants rely on a dissent in Luckey, I would argue that that's simply unpersuasive

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as no other Court has adopted the Luckey dissent reasoning other than the Platt court back in 1996.

We have 11 other jurisdictions that have let these cases proceed. Why did they let them go forward? Because they understood that the appropriate standard for this Court today is whether we've adequately pled to show that we are deserving of equitable relief.

And the standard for equitable relief set out by the U.S. Supreme Court in O'Shea versus Littleton is simply that we have shown the likelihood of substantial and immediate irreparable injury with inadequate remedies at law. We have properly alleged both.

Defendants claim we haven't made any showing of harm, that our claims are hypothetical, speculative, no one suffered anything yet because no one's been convicted. That's simply not the case. As we alleged in our complaint, plaintiffs have made ample allegations of harm, both that plaintiffs have already suffered and that plaintiffs will -- are at immediate risk of suffering should relief not be granted.

I'll give the Court the example of one of our named plaintiffs, Jennifer O'Sullivan. This is a woman who has a claim coming out of Genesee County. She has been sitting in jail, county detention facility, since September. She did not hear any word from her attorney

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until sometime in January. That's four months that she sat in county detention facility.

She has three young children at home, ages two, four and six, who were separated from one another, one of whom was actually placed into foster care. She hasn't seen her kids since she's been in county detention facility. And it wasn't until May that she was able to receive a preliminary examination. I would argue, and I hope this Court would agree, that that constitutes irreparable harm.

We have also adequately alleged that we have no adequate remedy at law. Defendants suggests that, well, defendants -- plaintiffs should make motions for substitution of counsel, or they can wait until they've been convicted and bring a direct appeal or bring a habeas petition. None of these remedies is an adequate remedy at law. The rule is that jurisdiction depends, not upon the absence of a legal remedy, but upon its inadequacies. Those remedies are plainly inadequate.

If a plaintiff makes a motion for substitution of counsel, that plaintiff is simply going to be getting an attorney who has to function within the same systemically inadequate system and will still be at risk of harm.

Direct appeals and habeas claims means that the

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plaintiff has to wait until they've actually been convicted. I would also note those types of appeals don't provide systemic equitable relief against the defendants, which we seek here today.

So what else did those 11 other jurisdictions do that this Court should do? They recognized that the Strickland standard does not apply to systemic, pre-conviction challenges.

Defendants argue that Strickland applies everywhere, that any time you bring any case under the sixth amendment you have to show the prejudice required by the Strickland court. But if you take a look at the Strickland decision itself, it explicitly states it only applies to claims for post-conviction, individual, ineffective assistance of counsel claims.

I can quote from the case directly, when it lays it out right -- before it lays out the two-part test we're all familiar with. The Court says, a convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. And the opinion also makes it very clear that it's setting out a really stringent standard, because the standard only applies after you've been convicted.

Post-conviction relief raises unique concerns

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that aren't before this Court today because plaintiffs only raised pre-conviction claims. When you already have a conviction before you, you have concerns of finality. You have concerns of not second-guessing defense counsel. You don't want to end up conducting a mini trial on what defense counsel did do and didn't do.

And the Court even noted in Strickland you don't want to discourage people from actually becoming defense counsel. None of those concerns are relevant here, and the Strickland standard is inapplicable.

Defendant suggests that all pre-conviction claims have to be brought on a case-by-case basis. This is simply not true, as evidenced by the many other courts that have recognized these type of claims. Because the Strickland standard doesn't apply, plaintiffs don't have to allege or prove individual harm on a case-by-case basis. What we do have to allege, and what we have alleged, is actual or imminent injury that is concrete and particularized.

Because we have made those allegations, we do have standing. There is actual injury that is going on and that will not end until this Court grants the equitable relief that plaintiffs seek. Because we have alleged to have ongoing harm and immiment risk of further injury, plaintiffs claims are ripe. Essentially

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defendants have created a system or allowed to pre-exist a system that is so systemically inadequate that all plaintiffs, all class members, are at imminent risk of harm. Therefore, their claims are justiciable by this Court.

Incidentally, I'd like to note for this Court that no court in the United States has ever held that plaintiffs have to wait until each and every one of their constitutional rights are actually violated to bring suit.

So, for example, if we would have brought a systemic claim on the behalf of foster children challenging the state's failure to provide an adequate child welfare system, no one would say, well, each and every one of those kids has to show that they were actually physically abused by their foster parents before a court can find that the state is liable for a constitutionally defective system.

That's exactly what happens here. The reliability of a trial system as a whole can be challenged prior to conviction. And plaintiffs do not have to show that each one of them has actually suffered some sort of constitutional harm before they can bring suit. It is sufficient to allege that they are at imminent risk of such harm.

Defendants also raise a number of -- of

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permutations I guess for this Court to consider, different types of cases that could be brought, you know, suggesting that we could have sued the counties or maybe the judges could have done something or maybe the legislature should be doing something.

I would note that plaintiffs have sued the defendants, these particular defendants, namely the governor and the state, because the responsibility for indigent defense in Michigan begins and ends with those defendants.

Defendant suggests that, well, this is the way it's always been in Michigan. The governor has never done anything to fund or otherwise oversee indigent defense systems.

That doesn't mean that the governor doesn't have ultimate responsibility under the constitution, both state and federal, under the case of Gideon, which we should all remember today to ultimately ensure that whatever it is the counties are doing, they have to be doing it in compliance with the constitution.

To take another example, the state could delegate any number of constitutional responsibilities if it wanted to. It could, for example, delegate its responsibility to run the prison system to a private company, contract that out.

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That doesn't mean that the state isn't still ultimately responsible if that prison company has created unconstitutional conditions of confinement. The state can't simply say, well, I delegated it. It's not my problem any more. It is the state's problem, and the constitution says it is.

The existence of other possible lawsuits or means of fixing a system doesn't preclude plaintiffs from bringing the claims we have brought. We could have sued the counties, but we chose not to, and they are not a necessary party. Frankly, if the defendants wish to implead the counties, they are free to do so.

They cite a number of cases that they've pointed this Court to, showing that this is the way things have always been done in Michigan, cases like Grand Traverse County or cases involving suits brought, you know, by public defenders trying to seek more money for their systems. Not a single one of those cases was brought on behalf of indigent defendants who were alleging a violation of their constitutional rights. That is the case that is before the Court today.

I would also argue that this Court should reject defendant's attempts to characterize the suit as being about money damages. Plaintiffs seek only equitable relief.

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Everyone recognizes in this room that Michigan is in the middle of a serious financial crisis, but the defendants are trying to distract this Court from the real issue of whether they're ultimately responsible for a broken defense system by focusing on how much it would cost to fix that broken defense system.

If we want to enter into a stipulation as to the system's inadequacies, plaintiffs would be more than happy to move directly to a remedy phase to talk about things like how much would it cost, what sort of system should be implemented. But if defendants aren't willing to concede those constitutional inadequacies, their arguments are irrelevant. This Court has to rule on who is even responsible.

I would also note defendants contend this has to be a case about money because, look, all of the things that you ask for are going to be really expensive. You want investigators. You want experts. You want access to training. You want standards. Well, isn't that going to cost money?

Absolutely. But that's not the issue. The fact that injunctive relief may result in the expenditure of some money at some future date doesn't deprive this Court of jurisdiction or make this Court a case about money damages. In fact pretty much any time plaintiffs seek

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injunctive relief, to the extent that they prevail, someone somewhere is going to have to spend some amount of money.

To take a classic example of the school desegregation cases, you have a class action in Brown versus Board of Ed. The Court orders injunctive relief, the Supreme Court ordered injunctive relief finding defendants were in violation of their constitutional responsibilities. And it said defendants had to do what it took to desegregate the schools.

That cost a lot of money. It required bussing. It was socially disruptive. I'm sure it wasn't cheap. It doesn't mean that the Court didn't have jurisdiction to grant that sort of equitable relief. And it didn't make that case about damages.

Similarly, the relief that we request here may ultimately result in the expenditure of some amount of moneys from the state. But that doesn't mean that we've made a damages claim, and it doesn't mean that jurisdiction properly belongs in the circuit court -- I'm sorry, in the Court of Claims, I misspoke.

The Court of Claims was created to handle suits for money damages against the state --

THE COURT: You're running out of time.

MS. CHIANG: Pardon?

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THE COURT: You're running out of time --

MS. CHIANG: I will --

THE COURT: -- I do know what the Court of CLaims is.

MS. CHIANG: Pardon?

THE COURT: I know what the Court of Claims is.

MS. CHIANG: That's great. I'll move on to the next point, immunity.

Defendants argue that both the governor and the state are immune. I will note quickly for the Court that even if you can't grant injunctive relief on our state claims, which we concede, defendants don't dispute that you can grant as much relief on our federal claims under Felder, F-e-l-d-e-r. Federal rules would apply to our federal claims.

The defendants' arguments about immunity are also unavailing, because as they note, the immunity statute covers tort liability. This case does not sound in tort. It is not a claim of private injury that can be addressed by damages. Rather, it is a claim for systemic relief on behalf of a class of plaintiffs for whom the only sufficient relief would be equitable relief.

And finally, I would note that the state also doesn't have immunity under 691.1407, because it is clear under state law that that provision doesn't apply when the

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state is being sued for a violation of its own constitution.

So in closing, to wrap things up, when making a systemic challenge such as ours, it's very clear from a variety of cases, both in the indigent defense reform context and class actions for injunctive relief more generally, that we don't have to show that each and every person has been harmed. All we have to show is that the system is so broken because of defendants' failures that everyone is at risk of harm.

We have properly alleged those claims and, therefore, defendants' motion should be denied.

THE COURT: Thank you. Mr. Potchen, anything else you'd like to add?

MR. POTCHEN: Just a couple points very quickly. They claim the state hasn't acted on indigent defense cases. Really the judiciary oversees the state's activity on indigent defense cases. That's the SCAO and the Court Equity Fund referenced in our brief, and in particular MCR -- the court rule, 8.123, that's cited in our brief.

They claim that the Court does not have to enforce the Strickland standard because Gideon applies in this case. But as our reply brief makes clear, the test is set forth in Strickland. The Gideon case set forth the rights, but the test was set forth in Strickland. We

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believe that completely applies.

Not to reiterate again, but I guess I will, they are still attempting to establish there is a sixth amendment violation, and that is completely improper. We disagree on what they're attempting.

We want to make sure you are aware that this proceeding is about the remedy. It is not just a (C)(8) motion. We are also bringing this under (C)(4) and (C)(7). We have relied on the allegations in their complaint.

And that's about it, your Honor.

THE COURT: Okay. Thank you. Defendants, State of Michigan and Jennifer Granholm, move for summary disposition pursuant to MCR 2.116 (C)(4), (7) and (8).

Defendants first argue that plaintiffs lack standing and that their claim is not ripe pursuant to 2.116 (C)(4). The Court disagrees.

A motion under this subrule asserts that the Court lacks jurisdiction of the subject matter. Whether subject matter jurisdiction exists is a question of law for the court. The Court must consider pleadings, affidavits, depositions, admissions and documentary evidence submitted by the parties.

The Court finds the plaintiffs do have standing and their claims are ripe. The plaintiffs must not have

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been convicted nor must they allege a denial of any request for new counsel for standing or ripeness purposes as the defendants claims.

Defendants next argue that the Court lacks jurisdiction because the legislature is the proper entity to appropriate funds from the state treasury. The plaintiffs are not seeking monetary relief from the state to fund an indigent defense program. They are seeking injunctive and declaratory relief. Therefore, that argument fails.

Defendants also argue that the case belongs in the Court of Claims, because the Court of Claims has jurisdiction over ex delicto claims. Defendants contend that constitutional claims arising out of civil rights violations have been regarded as a species of tort liability. All of the cases cited by the defendants involve claims for money damages, an attribute of tort claims.

However, the plaintiffs seek prospective relief, which is purely equitable. Therefore, the case does not belong in the Court of Claims.

Defendants next claim that the plaintiffs failed to state a claim upon which relief may be granted pursuant to MCR 2.116(C)(8). The Court also disagrees with that.

A motion under that subrule is a motion on the

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pleadings, which tests the legal sufficiency of the pleadings alone. All factual allegations supporting the claim are accepted as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. The motion should only be granted when the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.

Defendants have argued that the Strickland standards should apply to the case at hand. Strickland states that a convicted defendant's claim of ineffective assistance of counsel must show that counsel's performance was deficient, and that the deficient performance did prejudice the defense.

It's not clear to the Court if the Strickland standard applies to the plaintiffs' pre-conviction claims of inadequate representation, but the Court does -- the Court does not believe that it would have to delve into the circumstances of each particular case as the defendant claims.

Therefore, the Court finds that the plaintiffs' sixth amendment claims state a claim upon which prospective relief can be granted.

Next the defendants argue plaintiffs have sued the wrong parties, also a (C)(8) motion. Defendants claim that since the counties fully finance and control indigent

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defense programs at the county level that the counties are proper parties to the suit and that the State of Michigan and the governor should be dismissed.

While it's true the defendants have delegated the responsibility for funding and administering the indigent defense programs to the counties, it does not mean defendants are off the hook. It's alleged that the defendants abdicated their duties in violation of the constitution. Therefore, the Court finds the plaintiffs have sued the proper parties.

Defendants also argue that the Court lacks jurisdiction to issue injunctive relief against the governor and that governmental immunity bars the claim against the governor pursuant to MCR 2.116(C)(4) and (7). The Court disagrees.

A (C)(7) motion asserts that the claim is barred because of immunity granted by law. A party may support a (C)(7) motion by affidavits, depositions, admissions and other documentary evidence. If such material is submitted, it must be considered. Moreover, the substance or content of the supporting proofs must be admissible into evidence. The contents of the complaint are accepted.

Michigan law cannot immunize the governor from federal claims due to preemption. The governor is also

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not immunized from the state law claims as the governor's not being sued for tort liability. The suit is for equitable relief. Therefore, the governor is not immune from liability.

Defendants lastly argue that governmental immunity bars relief against the State of Michigan. The Court in Smith noted that governmental immunity is not available in a state court action where it's alleged that the state has violated a right conferred by Michigan Constitution.

Plaintiffs' claims allege that the defendants violated plaintiffs' due process rights under the Michigan Constitution. Plaintiffs have stated a prima facie claim and, therefore, governmental immunity does not bar suit against the State of Michigan. Therefore, the entire motion is denied.

And now on the next motion for certification.

MR. POTCHEN: Your Honor, staying on this motion, we'd like to move to stay this case in light of the governmental immunity grounds. The stay is automatic as to our other claim. It is our position that the Court of Appeals should address this issue before we proceed with the other action.

THE COURT: Anything you'd like to say?

MR. STEINBERG: We'd like to go forward with

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discovery, if we could. You know, there's -- we're not asking -- there's no major court ruling changing anything right now. All the Court has held is we have properly pled a claim. And this is going to be a lengthy proceeding. We'd like to get going on this as soon as we can on discovery.

THE COURT: Anything else, Mr. Potchen?

MR. POTCHEN: Your Honor, we believe that you've made some significant rulings here that should be reviewed by the Court of Appeals.

THE COURT: I think I'll stay it. It doesn't change the nature of the harm, so we'll go ahead and do that.

How long do you think that's going to take? They just dropped their expedited docket at the Court of Appeals, so any idea? Does anybody have any idea?

MR. EAMAN: Six to twelve months, your Honor.

MR. POTCHEN: So we have an order.

THE COURT: Six to twelve months, that's going to make my docket look real bad.

MR. STEINBERG: We have people suffering irreparable harm --

THE COURT: I understand.

MR. STEINBERG: -- and it's going to be another year.

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THE COURT: Go ahead on your motion for class certification.

MR. POTCHEN: I believe -- your Honor, if we're going to stay this, are you still going to go forward with the class certification?

THE COURT: Let's go ahead and do that too. You can appeal that too.

MR. POTCHEN: Do I even need to argue?

MS. KENNEDY: Good morning, your Honor.

THE COURT: Good morning.

MR. EAMAN: My name is Elizabeth Kennedy, and I'm an attorney with the firm of Cravath, Swaine and Moore. I'm going to discuss today why the Court should grant plaintiffs' motion for class certification pursuant to Michigan Court Rule 3.501.

I note at the outset that two of the elements of MCR 3.501 are not in dispute. These are the numerosity requirement and the requirement that the named plaintiffs adequacy -- are adequate as class representatives. I will focus, therefore, on three subsections of the rule that are in dispute, commonality, typicality and superiority.

Moving first to commonality, the plaintiffs have alleged in the complaint and we argue in our motion how our claims meet the commonality requirements. The defendants have made essentially one argument in response,

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and it is an argument that drives not only their commonality argument, but also the typicality and superiority, and that's their contention that Strickland applies to the claims in the complaint.

That is wrong, as my co-counsel argued and as the Court agreed, because the plaintiffs are not bringing individual effective inassistance of counsel claims. The success of this case does not rise or fall on the outcome of criminal proceedings of each of the class members.

Rather, the case rests on several common issues of law and fact that predominate over individual issues of these plaintiffs, which is whether the defendants are violating their funtional obligation, whether the violations create systemic deficiencies in the indigent defense system, whether the deficiences have resulted in inadequate legal representation and harm, and whether those deficiency claims are all common.

These are the issues that constitute the common core in this case. They have affected all class members in the same way, so the claims we plead in the complaint depend on these questions.

Plaintiffs claims of systemic deficiencies and imminent risk of harm to their constitutional rights don't depend on a showing of actual injury to all members of the class. Just to be clear, the plaintiffs aren't pleading

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that they face imminent risk of harm from these systemic deficiencies.

The proof in this case, therefore, will not focus on the results of individual proceedings. As the Court just noted, the Court will not have to delve into the circumstances of each criminal case to grant the relief. The Court will not be required to conduct mini trials to make any legal ruling or finding of fact as to the circumstance of each class member.

Courts routinely certify classes seeking systemic equitable relief. We mentioned some of these cases in our motion and our reply brief. These courts recognize that such cases are not focused on individual harms but on systemic harms.

So systemic class actions in federal courts have held that cases seeking only equitable relief typically present common questions satisfying Federal Rule of Civil Procedure 23(b)(2). We have discussed some of these cases in our motion cases.

One point I need to clarify is that in our brief we suggested that the commonality requirement under the federal rule is the same as the commonality requirement under Michigan law, and that is not quite accurate.

While there are differences in the way the two commonality rules are phrased, we believe analogies to

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these class actions in federal courts are helpful here because, as in those cases, this Court should look to the allegations that the defendants have acted in ways that affect classes members similarly or identically and the fact that the relief we seek is not determined by individual determination of causation and harm.

Defendants point to a number of cases in which the Court declined to certify classes. Unlike this case, virtually all those claims involve damages claims, damages cases, individual relief.

And in many such cases the courts had to be concerned with cases of individual harm and causation and applying different legal standards to the claims of different plaintiffs. And these individuals' specific inquiries are necessary to ensure that each member of the class merits his or her portion of claimed damages.

That's not an issue here where the relief sought is conjunctive and declaratory relief. In Michigan and elsewhere courts have found commonality where the key question relates to a policy or practice that affects all class members in the same way.

We discussed many of these cases in our papers. That's exactly what we alleged here with respect to the systemic deficiencies resulting from defendants' abdication of their constitutional responsibilities.

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Turning to the typicality requirement just briefly, the named plaintiffs have claimed that they are typical of the class members who they seek to represent. Their claims arise from the same course of conduct that gives rise to the claims of other class members.

They also claim -- we also allege that they are -- the same legal standard and the same legal theory applies to their claims. Again, the defendants' argument in response is simply that Strickland applies and that you must look at the individual cases, the individual facts of the named plaintiffs' cases which vary from the rest of the class.

Again, because this case revolves around defendants' actions and the inadequate defense system and the systemic deficiencies and class-wide risk of harm, we claim that's simply not correct. For that reason the plaintiffs satisfy the typicality requirement.

Finally, the proposed class satisfies the Supreme Court requirement. Our papers outline the ways in which the case fulfills the factors listed in rule 3.501(A)(2). Defendants don't dispute the application of any of those factors in their opposition. I'll focus on the arguments they do make.

In response to something defendants offer a parade of horribles. They argue if the Court certifies this class, pending prosecutions will stop and convicted criminals will seek to overturn their convictions.

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There are a number of problems with that argument. First, a ruling by this Court in plaintiffs' favor on the merits of this case would not automatically apply to individuals who have already been convicted. Those individuals would still have to meet the Strickland standard.

Now, plaintiffs do agree that a ruling in our favor would apply to members of the class -- people who are members of the class as of the time of the ruling. And that could be a substantial number of people, but size alone does not make a class unmanageable.

This Court has the power to fashion a suitable remedy when the time for fashioning a remedy arrives. But because such a remedy would be focused on systemic issues, it would not create manageability problems with respect to manageability concerns generally related to the applicability of different legal standards and the requirement of mini trials on individuals. Neither of those circumstances would arise here.

And defendants argument, if given credence, would have foreclosed several class actions that sought systemic redress of violations of constitutional rights, such as the prison reform litigation. But courts in those cases did not prevent groups of plaintiffs from vindicating their constitutional rights on the grounds that any potential remedy could have been brought, nor would the gates of the prison swing open when courts found that conditions of confinement were unconstitutional.

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Rather, the courts and the parties often find a way in these cases to fashion the relief requested in a manner that is not disruptive to the existing system.

Finally, defendants say that maintaining this action is inappropriate as a class action because there are other more suitable vehicles for adjudicating plaintiffs' claim. We explain in our papers why the alternative remedies defendants propose are inadequate. My co-counsel also discussed that. And we believe it fully applies here.

In conclusion, your Honor, plaintiffs have satisfied every prerequiste of MCR 3.501. We also believe this case exemplifies why we have class actions, which is to provide a sufficient avenue for obtaining justice for many people suffering the same wrong. We may have the ability to validate the wrong independently.

One last point I'd like to make involves the notice requirement. We did not address that in our papers. But we are aware of other cases that are similar to this one where the plaintiffs and defendants were able

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to work out a viable method of notifying members of the class. And should the Court grant our motion, we would be happy to work with the defendants and work with the Court to come up with the proper language for the notice and find the best way of publicizing the notice to the members of the class.

Thank you.

THE COURT: Thank you. Mr. Potchen.

MR. POTCHEN: Your Honor, they have not shown any reason why class action is a superior form to adjudicate this action. If, as they claim and as this Court has already ruled, it is not an issue of damages and they are only seeking prospective injunctive relief, there is no reason to maintain this case as a class action. The prospective relief they're seeking would be the same if it was one person or 100 people or 1,000 people.

This -- as they claim this is a systemic claim. Therefore, there is no showing that a class action is the most convenient way to decide the legal issues that they are presenting. It would actually create larger problems.

Not every proposed class member will have an ineffective public defender representing them. Also not every class member will have an ineffective assistance of counsel claim. The class action would actually provide a whole host of problems that are not necessary in this

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case.

How -- they've even raised, how are we going to give notice to the class members? How are we going to determine who actually the class members are? And then how are we going to ensure they are made members of the class throughout the time a decision in this case is rendered?

In fact one of the plaintiffs already, Mr. Secrest, is no longer a class member. He's hired his own attorney. They have not shown that this is a superior form to adjudicate this action. They fail that aspect of it.

Another aspect which we found out this morning, it does not appear that these plaintiffs will adequately represent the members of the class. Almost every one of them have already been sentenced. Mr. Secrest has -- who has hired his own attorney.

We found out -- and they're not telling us this, but Anthony Taylor has actually been sentenced on February 27th, '07. This information is taken off the Department of Corrections web site which we pulled up this morning, your Honor, so it's public knowledge.

Christopher Lee Duncan is now a prisoner. And he was sentenced on March 12th, 2007. Mr. Billy Joe Burr was sentenced on March 12th, 2007 (sic). He's the Berrien

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County person. Mr. Jose Davila, he was sentenced on April 12th, 2007. Mr. Steven Ray Connor who was sentenced, it looks likes he's on parole right now. He's a parolee. Heath Undercutty, on 1/27/07 -- I'm not sure if there's a decision against him.

There might be a couple other defendants, but most don't fall within the case. So it's our position they cannot adequately represent the class. They fail the adequacy prong.

Also the class action lacks the typicality and commonality needed for a class action. Their attempt to certify the class is misleading. The class is not just indigent criminal defendants who have or may have public defenders. But they must also show that these people will have their constitutional rights violated.

This generalized constitutional standard without regard to this particular case is not the purpose of the sixth amendment, as we've said before. And also there's a difference in the county public defense systems as referenced in their complaint. Berrian and Muskegon Counties have accounts with local attorneys. Genesee County counsel has an assigned system.

Plaintiffs' complaint also recognizes differences in the situations involving judges who won't grant counsel to defendent, in fact in paragraph 110, if

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the defendant makes bail.

All of those elements fail to show the typicality and commonality requirement. Therefore, we request the Court to deny the motion.

Thank you.

THE COURT: Thank you. Any rebuttal?

MS. KENNEDY: Yes. Thank you. Your Honor, I won't respond to most of Mr. Potchen's points, because I think they're well covered in what I said before and in our papers. But I do want to respond to the point about the adequacy of our named plaintiffs.

Mr. Potchen points out that much of the named plaintiffs have been sentenced, and that's correct. However, we do have three plaintiffs who have not yet been sentenced, one from each county. We have Christopher Manies from Muskegon, Steven Connor from Berrien County, and Jennifer O'Sullivan from Genesee County.

But more importantly, your Honor, we believe that the time at which plaintiffs should be deemed to be adequate class representatives is the time that the complaint was filed. And at that time each of our named plaintiffs was in fact a member of the class.

The fact that plaintiffs cycle quickly through the system and their claims become moot quickly doesn't mean that these people don't exemplify the kind of harms

that are happening in the system and do not demonstrate the types of imminent harms to which other class members have been and will be exposed. So I do point out to you that we do have three plaintiffs who are still members of the class.

Thank you.

THE COURT: All right. Thank you. I'm going to certify the claim. Plaintiffs move for an order certifying the plaintiff class pursuant to MCR 3.501(B). Plaintiffs want the class defined as all indigent adults who have been charged or will be charged with felonies in the district and circuit courts of Berrien, Genessee and Muskegon Counties, and who rely or will rely on the state to provide them with counsel for their defense.

To evaluate a motion for class certification the trial court is required to accept the allegations made in support of the request for certification as true. The burden is on the plaintiff to show that the requirements for class certification exist.

The Court will only address the elements that are in controversy, commonality, typicality and superiority. Defendants essentially have made the same response to the commonality and typicality elements. Therefore, the Court will address them together.

For the commonality requirement to be met there



must be common questions of law or fact that predominate over individual questions. The claims of class representatives are said to be typical of the claims of class members if, by pursuing their own interest, the class representatives will advance the interest of the class members.

Defendants argue that factual variations in the proposed class members' individual criminal cases defeat plaintiffs' ability to meet the commonality and typicality requirements.

But, again, the plaintiffs are seeking injunctive and declaratory relief and the defendants are violating -- that the defendants are violating the plaintiffs' constitutional rights. The Court does not believe that it would have to explore the unique circumstances of each proposed class member to grant relief.

The Court finds that the plaintiffs' assertion that the defendants have abdicated their constitutional responsibilities by failing to provide adequate representation meets the commonality requirement. Since all the members of the proposed class challenge the same deficiencies in Michigan's indigent defense system, the typicality requirement has been met.

Lastly, the superiority requirement. There are



five factors the Court must consider in determining whether the maintenance of a class action will be superior to other available methods.

First, whether the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent adjudications and whether those adjudications would be dispositive of the interest of other members not parties to the adjudications. The Court finds that there is a possibility of inconsistent adjudications with respect to individual class members which would have a high likelihood in resulting in varying standards being placed on the defendants. Also these adjudications would likely impair the ability of other class members to protect their own interests.

The second factor is not relevant since the proposed class seeks equitable relief.

Third, whether the action will be manageable as a class action, I hope so. The Court finds the action will be manageable as there will be no need to determine individual damages.

Fourth, whether in view of the complexity of the issues or the expense of litigation the separate claims of individual class members are insufficient in amount to support separate actions. Since proving the claims will



be highly complex and require the investment of significant resources, the Court finds that a class action would be more appropriate.

The last factor's not relevant. There is no monetary value being sought by the proposed class.

Taking all the facts into consideration the Court finds the elements have all been met and the motion for class certification is granted.

As to the notification, the Court orders that plaintiff and defendant cooperate to develop a plan for notification.

Thank you.

MR. POTCHEN: Your Honor, we have an order regarding the stay, and we've included that last ruling on the order as well.

THE COURT: Okay. Do you want to hand it over to him to check and bring it up to me.

MR. STEINBERG: Your Honor, on the issue of the stay of all proceedings, if you don't have an objection, we may be filing -- researching the issue to determine whether it's mandatory for everything, including such things as third party discovery, and possibly submitting a Motion for Reconsideration. We just haven't had the time to research.

And if you just look at the bounds of harm, we

have people suffering irreparable harm versus proceeding with discovery.

THE COURT: I'm look forward to that motion.

MR. STEINBERG: Okay. Thank you.

MR. POTCHEN: And, your Honor, we also have a motion granting our motion to exceed the page limit.

THE COURT: No.

MR. POTCHEN: We would appreciate that.

THE COURT: I'll tell you, I got to page 20, and I start thinking you were both repetitive. That's not good, so no exceeding page limits.

MR. POTCHEN: Okay. This was what we were told to bring to the Court.

THE COURT: You mean -- I thought you were talking about future torture.

MR. STEINBERG: Your Honor, excuse me, your Honor.

THE COURT: Yes.

MR. STEINBERG: There's a question of whether there's a right to appeal the class certification order at this point --

THE COURT: Is there --

MR. STEINBERG: -- as opposed to seeking leave to appeal.

THE COURT: I don't know. Mr. Potchen.



MR. POTCHEN: Your Honor, we will research it. And if we have to seek leave, then we'll seek leave.

THE COURT: Okay. The question is whether this class certification is stayed, is that the question?

MR. STEINBERG: That's the question.

THE COURT: What difference does it make? Explain that to me.

MR. STEINBERG: It doesn't really make much difference.

THE COURT: No demonstrations in the courtroom. Yes, you.

MR. STEINBERG: Really it doesn't make a tremendous amount of difference in what's going on at this point.

THE COURT: Then I think you have time to present something to the Court.

MR. STEINBERG: I beg your pardon?

THE COURT: Then you have time to present your research to the Court on this.

MR. STEINBERG: Okay.

THE COURT: You just told me, didn't you, that you're doing a Motion for Reconsideration?

MR. STEINBERG: Most likely, yes.

THE COURT: Okay. So I'll hear more about it. Is there anything else you want signed before I leave the bench, which is going to happen?



MR. POTCHEN: Yes. We have the order on the stay.

MR. STEINBERG: We'll be filing probably a motion to address it with authority.

THE COURT: Okay. Thank you.

MR. POTCHEN: I'm handing the Court the order that's been looked at by counsel. Thank you, your Honor.

THE COURT: Thank you.

(Court recessed at approximately 12:01 p.m.)

* * *



STATE OF MICHIGAN)
)
COUNTY OF INGHAM)

I certify that this transcript, consisting of 56 pages, is a complete, true, and accurate transcript in the matter of 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 situated, vs State of Michigan and Jennifer M. Granholm, Governor of the State of Michigan, sued in her official capacity, Docket No. 07-242-cz, held on Wednesday, May 15, 2007.

Dated: 5/23/07