STATE OF MICHIGAN
IN THE SUPREME COURT

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 other similarly situated,

PLAINTIFFS-APPELLEES

v.

STATE OF MICHIGAN AND **JENNIFER M. GRANHOLM,** GOVERNOR OF THE STATE OF MICHIGAN, sued in her official capacity.

DEFENDANTS-APPELLANTS.

SUPREME COURT #: 139345, 139346, AND 139347

COURT OF APPEALS #: 278652, 278858, AND 178860

INGHAM COUNTY CIRCUIT COURT CASE #:. 07-242-CZ

BRIEF OF AMICUS CURIAE CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN

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INTEREST OF THE AMICUS

Criminal Defense Attorneys of Michigan (CDAM) was founded in 1976 and is a statewide association of criminal defense lawyers practicing in the trial and appellate courts in Michigan. CDAM represents the interests of the state's criminal defense bar in a wide array of matters. CDAM has a strong and direct institutional interest in this litigation because of the implications of this case on the constitutional rights of all Michigan criminal defendants to the effective assistance of counsel for their defense.

By its by-laws, CDAM exists to, *inter alia*, "promote expertise in the area of criminal law, constitutional law and procedure and to improve trial, administrative and appellate advocacy", "provide superior training for persons engaged in criminal defense", "educate the bench, bar and public of the need for quality and integrity in defense services and representation", and "guard against erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws". To further its goals, CDAM conducts two different 2½ day training conferences a year for criminal defense attorneys, conducts a 5-day Trial College in partnership with the Thomas M. Cooley Law School, provides information to the Michigan legislature regarding contemplated changes of laws, and participates as an *amicus curiae* in litigation relevant to CDAM's interests.

As in this case, CDAM is often invited to file briefs *amicus curiae* by the Michigan appellate courts. The Michigan Supreme Court has given CDAM permission to file as *amicus curiae* without seeking leave of that Court. MCL 7.306(D)(2).

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Amicus Criminal Defense Attorneys of Michigan defers to the parties' statements of the questions involved in this appeal.

STATEMENT OF FACTS

Amicus Criminal Defense Attorneys of Michigan defers to the parties for a statement of facts and proceedings below.

INTRODUCTION

The issues before this Court are threshold issues of the justiciability of this critical question: Has the State of Michigan directly denied the Plaintiffs, present and future indigent felony defendants prosecuted in Berrien, Genesee and Muskegon Counties, of their state and federal right to the effective assistance of counsel? CDAM, as *amicus*, argues that the allegations raised by Plaintiffs have been found to exist, in fact, in ten other Michigan counties.

The trial court determined the threshold justiciability issues in favor of the Plaintiffs. The majority of the Court of Appeals determined the threshold justiciability issues in favor of the Plaintiffs. CDAM urges this Court to find that Plaintiff's claims are justiciable in the trial court and asks this Court to remand this case to the trial court for further proceedings on the merits.

CDAM, as *amicus*, adopts the arguments submitted by Plaintiffs and adopts the arguments submitted by *amici* Criminal Law Section of the State Bar of Michigan and *amici* National Association of Criminal Defense Attorneys (NACDL).

ARGUMENT

A. UNDERLYING CONSTITUTIONAL PRINCIPLES

Plaintiffs assert that the class of persons who are indigent felony defendants in Berrien, Genesee, and Muskegon counties have been, and will continue to be, deprived of their constitutional right to the effective assistance of counsel because the State of Michigan has failed to ensure they receive such assistance. Plaintiffs alleged that the failings in the defendant Counties and the harms suffered by the Plaintiffs are not limited or unique to the defendant Counties but similarly exist throughout the State. (Complaint, ¶11). While Plaintiffs alleged this when they filed their Complaint in February 2007, there is now compelling proof that similar

failings and harms do exist throughout the State. The core legal principles underlying Plaintiffs' claims are not disputed.

1. THE RIGHT TO COUNSEL GENERALLY

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defence." US Const. Amend VI. The right to counsel under the Sixth Amendment is applicable to the states as a matter of due process. *Gideon v. Wainwright*, 372 US 335 (1963); *People v. Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004). Under the Michigan Constitution, "[i]n every criminal prosecution, the accused shall have the right to . . . have the assistance of counsel for his or her defense." Const 1963, Art 1, §20. Since its inception as a state, Michigan has entitled its citizens to counsel in felony criminal prosecutions. *People v. Pickens*, 446 Mich 298, 311; 521 NW2d 797 (1994).

The holding in *Gideon v. Wainwright* clearly states that the right to counsel applies to those who lack the financial resources to hire private counsel and the state is obliged to provide them with counsel.

> . . . in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread believe that lawyers in criminal courts are necessities, not luxuries.

2. THE RIGHT TO COUNSEL IS THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The constitutional right to counsel is more than just the requirement of a person with a card issued by the State Bar of Michigan. It is the right to the *effective assistance* of counsel. *Strickland v. Washington*, 466 US 668, 686 (1984); *People v. Pickens*, 446 Mich 298, 318-319 (1994).

In *United States v. Cronic*, 466 US 648, 654-656 (1984), the Supreme Court explained:

> The special value of the right to the assistance of counsel explains why "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." The text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of counsel to the accused, but "Assistance," which is to be "for his defence." Thus, "the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." If no actual "Assistance" "for" the accused's "defence" is provided, then the constitutional guarantee has been violated. To hold otherwise "could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment."
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> "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." It is that "very premise" that underlies and gives meaning to the Sixth Amendment. It "is meant to assure fairness in the adversary criminal process." Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself."

Cronic, 466 US at 654-656.

3. THE RIGHT TO COUNSEL EXISTS AT ALL CRITICAL STAGES OF THE PROCEEDINGS INCLUDING PRETRIAL STAGES.

The Sixth Amendment guarantees the right to counsel beginning at the initiation of adversarial criminal proceedings, i.e., the initial appearance of a defendant in court. *Rothgery v. Gillespie County, Texas*, 554 US__, 128 S Ct 2578, 2583; 171 LEd 2d 366 (2008). The right to counsel applies to all critical stages of the criminal process for a defendant who faces incarceration. *People v. Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004), citing *Maine v. Moulton*, 474 US 159, 170 (1985). A critical stage of the proceedings is any stage where the absence of counsel may harm a defendant's right to a fair trial and includes those preliminary proceedings where rights, like bail, are at issue. In *Moulton, Id.*, the United States Supreme Court observed:

> [T]he Court has . . . recognized that the assistance of counsel cannot be limited to participation in a trial; *to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself.* Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, "critical" stages in the criminal justice process "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." And, "[w]hatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . ." This is because, after the initiation of adversary criminal proceedings, "'the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'". [Citations omitted; emphasis and initial ellipsis added.]

Clearly, representation by counsel, i.e., effective representation by counsel, is critical to protect Sixth Amendment rights during trial and during pretrial proceedings.

4. THE TEST FOR EFFECTIVE ASSISTANCE OF COUNSEL

In *People v. Carbin*, the Michigan Supreme Court stated the familiar standards for a claim of ineffective assistance of counsel:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v. Washington*, 466 US 668; 104 S Ct 2052; 80 LEd 2d 674 (1984). See *People v. Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim.

Carbin, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Thus, counsel's performance is deemed deficient or ineffective when the "representation [falls] below an objective standard of reasonableness" and a defendant can demonstrate a reasonable probability of a different result. *Strickland*, *supra* at 687-688; *People v. Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

B. THE STATE OF MICHIGAN HAS FAILED TO ENSURE EFFECTIVE ASSISTANCE OF COUNSEL IN AT LEAST TEN OTHER COUNTIES.

The National Legal Aid & Defender Association (NLADA) spent a year evaluating criminal defense services in ten other Michigan counties. In June 2008, the NLADA announced

its conclusion:

> The National Legal Aid & Defender Association (NLADA) finds that the State of Michigan fails to provide competent representation to those who cannot afford counsel in its criminal courts.

A RACE TO THE BOTTOM, Evaluation of Trial Level Indigent Defense Systems in Michigan by NLADA, Executive Summary, p. i, June 2008.

1. THE NLADA'S EVALUATION IN A NUTSHELL

The NLADA evaluation was conducted at the request of the Michigan Legislature through a concurrent resolution, SCR 39 of 2006. The resolution stated that whereas the People of Michigan:

> expect the government to administer a system of justice that is just, swift, accountable, and frugal and whereas there is no accounting of total indigent defense cases nor complete accounting of expenditures dedicated to public defense services, the Michigan Legislature requests the NLADA, in cooperation with the State Bar of Michigan, to issue a report respecting the fairness, cost and accountability of the various indigent defense systems throughout the state.

The National Legal Aid & Defender Association (NLADA) was selected because it is a national, non-profit association which focuses on providing quality legal representation to people of insufficient means. Established in 1911, NLADA is a leader in the development of national standards for indigent defense functions and systems. The American Bar Association's Ten Principles of a Public Defense Delivery System were authored by NLADA officials. The Ten Principles are quality standards which ensure the delivery of adequate criminal defense legal services to the poor and allow assessment of efforts to deliver those legal services.

The NLADA uses the ABA's Ten Principles of a Public Defense Delivery System as its benchmark for "effective and efficient, high quality, ethical, conflict-free representation of

accused persons who cannot afford to hire an attorney."[1] The ABA recommends that jurisdictions use the Ten Principles to assess the needs of their public defense delivery systems and communicate those needs to policymakers:

> The Principles were created as a practical guide for governmental officials, policymakers, and other parties who are charged with creating and funding new, or improving existing, public defense delivery systems.

Id.

The United States Department of Justice has affirmed the importance of standards as essential to the delivery of indigent defense:

> Standards are the key to uniform quality in all essential governmental functions. In the indigent defense area, uniform application of standards at the state or national level is an important means of limiting arbitrary disparities in the quality of representation based solely on the location in which a prosecution is brought. The quality of justice that an innocent person receives should not vary unpredictably among neighboring counties. If two people are charged with identical offenses in adjoining jurisdictions, one should not get a public defender with an annual caseload of 700 while the other's has 150; one should not get an appointed private lawyer who is paid a quarter of what the other's lawyer is paid; one should not be denied resources for a DNA test, or an expert or an investigator, while the other gets them; one should not get a lawyer who is properly trained, experienced, and supervised, while the other gets a neophyte.

U.S. Department of Justice, Report of the National Symposium on Indigent Defense, 2000.

At the NLADA's request, an advisory panel was created by Senator Alan Cropsey, a sponsor of SCR 39, to select the representative Michigan counties to be evaluated. The advisory panel included representatives of the State Court Administrator's Office, the Prosecuting

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[1] American Bar Association, Ten Principles of A Public Defense Delivery System, February 2002, Introduction.

Attorneys Association of Michigan, the State Bar of Michigan, the State Appellate Defender Office, Criminal Defense Attorneys of Michigan, and trial court judges. The advisory panel selected ten counties which reflected a broad geographic, population, economic, and defense delivery system sampling. No one criteria predominated. The ten counties chosen for the evaluation were Alpena, Bay, Chippewa, Grand Traverse, Jackson, Marquette, Oakland, Ottawa, Shiawassee and Wayne. After their year long evaluation, the NLADA Report bluntly concluded:

> NLADA finds that none of the public defender services in the sample counties are constitutionally adequate.

A RACE TO THE BOTTOM: TRIAL LEVEL INDIGENT DEFENSE SYSTEMS IN MICHIGAN, June 2008, Executive Summary, page i.

2. THE NLADA REPORT'S FINDINGS MIRRORS THE ALLEGATIONS IN THE INSTANT COMPLAINT.

Plaintiffs allege the indigent defense systems in Berrien, Genesee and Muskegon counties have the following deficiencies:

(a) no written client eligibility standards,

(b) no merit-based attorney hiring and retention programs,

(c) no written attorney performance standards or meaningful system of attorney supervision or monitoring,

(d) no guidelines for identifying conflicts of interest,

(e) no attorney workload standards,

(f) no adequate attorney training, and

(g) no independence from the judiciary or the prosecutor.

(Complaint, pp. 3-4, ¶¶6-8).

The NLADA Report identified almost identical defects and deficiencies in the delivery of the right to counsel in many or all of the ten counties studied. The Report identified:

(a) Lack of independence of service providers from the judiciary, lack of workload controls, and lack of attorney qualifications

(b) lack of continuous representation and confidential client communication

(c) lack of training and advanced training required by the increasing complexity of criminal law and forensic science and lack of a training requirement

(d) lack of supervision over attorney performance

(e) failure to ensure prosecution and defense parity

A review of the existence of the same or similar deficiencies throughout the ten other counties in this Amicus Brief should lead this Court to conclude that the State's failures are dismal, widespread and pervasive. CDAM cites only some of the NLADA Report in support of this review.

3. THE NLADA REPORT FINDS DEFENSE SERVICES ARE NOT INDEPENDENT OF THE JUDICIARY.

The ABA First Principle States:

> The public defense function, including the selection, funding, and payment of defense counsel, is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense. The selection of the chief defender and staff should be made on the basis of merit, and recruitment of attorneys should involve special efforts aimed at achieving diversity in attorney staff.

There is a simple reason why defense services must be free of control by judges who now distribute assignments of counsel, set fee schedules, and scrutinize billings and requests for services. As the Report explains:

> Having judges maintain a role in the supervision of indigent defense services can create the appearance of partiality – thereby undermining confidence in the bedrock principle that every judge be a scrupulously fair arbitrator. Policy-makers should guarantee to the public that critical decisions regarding whether a case should go to trial, whether motions should be filed on a defendant's behalf, or whether certain witnesses should be cross-examined are based solely on the factual merits of the case and *not* on a public defender's desire to please the judge in order to maintain his job.
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> For these reasons and others, all national standards call for the removal of all undue judicial influence in a right to counsel delivery system. . .

NLADA Report, pp. 35, 38.

None of the ten counties studied by NLADA have a defense function independent of the judiciary:

NLADA Report, p. 57 (Bay County):

> [T]he independence of the public defender offices in Bay County is continually compromised.

NLADA Report, p. 60 (Alpena County):

> Alpena County entered into a flat fee contract with . . .[a law firm]. There is no longer any semblance of independence.

NLADA Report, p. 61 (Grand Traverse County):

> The lack of independence is a significant defect in Grand Traverse County as well. The delivery systems in both the Circuit Court and the district court are administered by the judges.

NLADA Report, p. 62 (Oakland County):

> Funding of the defense function in Oakland County is a line item in the judicial budget. Since payment [of defense services] is event based and any increase to the amount paid would require an increase in the defense line item in the court's budget, payment of defense counsel is not independent of the judiciary.

NLADA Report, p. 63 (Shiawassee County):

> A lack of independence also defines Shiawassee County. Lawyers there are appointed directly by the judge before whom they will appear on each assigned case. Their bills are scrutinized, approved, modified, or disapproved in whole or in part by each judge personally.

NLADA Report, p. 64 (Wayne County):

> Independence of the indigent defense function in Wayne County district courts and the Third Circuit Court is also problematic.

NLADA Report, pp. 65, 68 (Ottawa County):

> Ottawa's assigned counsel program is still controlled completely by the judiciary. . . The Ottawa County court culture leads to a lack of meaningful advocacy. . . [W]e conclude that in Ottawa County you need to play by the judges' rules in order to stay in the game . . . Perhaps the most shocking revelation . . . was that when additional investigation is needed, the common practice is for defense attorneys *to call the prosecuting attorney and ask him to have law enforcement do it or in some cases they will call the sheriff directly.*

NLADA Report, pp. 68-69 (Marquette County):

> The assigned counsel program in Marquette is not independent. . . the judges can and, especially in the district court, do reduce bills submitted by counsel. An attorney's admission to or removal from the [indigent defense] panel is entirely within the judge's discretion.

NLADA Report, p. 69 (Chippewa County):

> The Public Defender Office in Chippewa suffers a lack of independence of a different variety . . . It is well understood that some [Chippewa County] commissioners wish to dissolve the [Public Defender] office entirely . . .[T]he chief public defender. . . does not ask for any budget increases or fees for investigators and would not think of declaring caseload overload. In return she is rewarded by being able to keep her job.

4. THE NLADA REPORT FINDS THERE ARE NO WRITTEN ATTORNEY PERFORMANCE STANDARDS OR MEANINGFUL SYSTEMS OF ATTORNEY SUPERVISION OR MONITORING.

The ABA Tenth Principle states:

> Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards. The defender office (both professional and support staff) should be supervised and periodically evaluated for competence and efficiency.

The NLADA Report states at pp. 80-81:

> An assessment of attorney supervision against national standards serves as an appropriate conclusion of this chapter since, for the most part, what little supervision is occurring is being conducted by judges in violation (again) of ABA *Principle 1*. For example, there are no national or local performance standards adopted by Grand Traverse County under which assigned counsel are evaluated. Supervision of assigned counsel is limited to the court's exercise of its supervisory authority over these attorneys as members of the bar or to monitoring compliance with the provisions of the district court contract or in the handling of individual cases. Systematic review for quality and efficiency does not take place. Review of attorney performance is done on an ad hoc basis by the judges to ensure that the attorneys are meeting the judges' expectations.
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> Defense counsel in Oakland County are not "supervised" in any formal sense. Some of the circuit court judges who make appointments informally assess the ability and experience of the lawyers they appoint, but there is no formal mechanism for such

> evaluation. A similar informal judicial assessment is done in Shiawassee County.
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> The Third Circuit Administrative Order in Wayne County governing the appointment and removal of assigned counsel establishes an Attorney Review Committee, including the presiding judge of the Criminal Division, the executive court administrator and two Criminal Division judges. This committee reviews referrals made by judges regarding attorneys whom they believe should be considered for removal from the appointment list. The chief judge said it is unusual for an attorney to be removed from the appointment list, unless it is something of a "grievable nature." . . .
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> While some appointed attorneys attempt to and do provide quality representation to their clients in Wayne County, there is a disturbing lack of competence and diligence in too many cases – not all of which can be attributed to lack of resources, excessive caseloads, and the 91-day rule. . .

These ad hoc judicial monitoring systems have a "fox guarding the henhouse" quality to them and do nothing to ensure any level of quality indigent services. Evaluating attorney performance means ensuring that an attorney is capable, competent, and appropriately zealous in her advocacy. A review by a judge to determine whether an attorney is "meeting the judge's expectations" may well mean nothing more than that the attorney's billing is low enough to be approved. A lack of zealous advocacy, i.e., not investigating a case or accepting excessive caseloads or pandering to the judge rather than advocating for the client, will not be addressed. Attorney performance must have a higher criteria than "not grievable" conduct. Otherwise, the public perception of court-appointed counsel as hacks and slackers persists. See: NLADA Report, Bay County, pp. 59-60; Grand Traverse County, pp. 61-62; Oakland County, pp. 62-63; Ottawa County, p. 68.

5. THE NLADA REPORT FINDS THERE IS LITTLE OR NO PROVISION FOR ADEQUATE ATTORNEY TRAINING.

The ABA Ninth Principle states:

> Defense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.

The NLADA Report states at p. 78:

> It is difficult, at best, to construct an in-depth analysis of the lack of training in Michigan when the bottom line is that there is no training requirement in virtually every county-based indigent defense system outside of the largest urban centers. And, even those are inadequate. . .

The NLADA Report acknowledges that some training is provided by the State Appellate Defender Office (SADO) and its Criminal Defense Resource Center (CDRC), in partnership with the *amicus* Criminal Defense Attorneys of Michigan and the Wayne County Circuit Court Criminal Advocacy Program. (NLADA Report, pp. 78-79). However, the Report notes there is little or no funding available for assigned counsel to attend this training and such training is almost always at the individual attorney's expense. (NLADA Report, p. 79). In most counties, training is not mandatory and is left to the interest or lack of interest of the individual attorney. Because of this, there is no way to assess, let alone ensure, that assigned counsel is trained or is up-to-date on the law or the sciences underlying forensic evidence.

6. THE NLADA REPORT FINDS THERE IS NO MONITORING OF WORKLOADS AND NO GUARANTEE OF CONFLICT-FREE REPRESENTATION.

The ABA Fifth Principle states:

> Defense counsel's workload is controlled to permit the rendering of quality representation. Counsel's workload, including

> appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorneys nonrepresentational duties) is a more accurate measurement.

The NLADA study noted the difficulty in assessing "caseloads" because of the inconsistent methods of defining a "case" throughout the ten counties studied. (NLADA Report, p. 58). Nonetheless, the Report concluded the number of cases handled by the Bay County Public Defender Offices exceeded the national caseload standard for felony representation by 12 percent, even without considering the misdemeanor, traffic, and probation violation hearings also handled by the attorneys in the Bay County Offices. (NLADA Report, p. 59).

The Report also noted the difficulty in measuring caseloads in Alpena County which, like Muskegon and Berrien counties, awards contracts for defender services. These contracts are awarded to private firms or attorneys for which the criminal defense work is only part of their practice. The Report noted: "[n]o conclusion can be reached about the reasonableness of their appointed caseloads without more information about the percentage of their total time that is spent on court-appointed cases and the nature and extent of the private practices." Report, p. 61.

Oakland County presents a similar situation. All of the assigned counsel attorneys in Oakland County are in private practice. In the opinion of one Oakland County judge, the attorneys assigned to felony cases are overworked and spread too thin as evidenced by their frequent unavailability for scheduled preliminary examinations.[2] (NLADA Report, p. 62). In

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[2] This unavailability and resulting delay due to rescheduling has significant consequences for a defendant who cannot post his initial bond. A bond review hearing

Shiawassee County, there is also no way to determine the workload of assigned counsel or how much time an assigned attorney has available for proper representation of an indigent client. (NLADA Report, p. 64).

In Wayne County, "there is no limit on how many cases overall an attorney may be appointed to in a given year, nor is there any examination of the attorney's entire workload/caseload" of other appointments from other courts and the attorney's private retained criminal and civil representation. (NLADA Report, p.64). In Wayne County:

> Judges, appointed attorneys, and the prosecutor all reported that defense workloads are very high. Most of those interviewed attributed the workload to the fact that many attorneys try to be appointed to as many cases as possible because the fees on each case are so low. Some lawyers reported that other attorneys are accepting too many murder assignments to be able to represent each defendant properly. The heavy workload means that attorneys frequently have scheduling conflicts, resulting in continuances, use of stand-in attorneys, and – in some instances – removal of the attorney and replacement with another appointed attorney.

NLADA Report, p. 65.

In Chippewa County, attorney overload is an issue at the two member public defender office. (NLADA Report, p. 69). The NLADA study found the offices' caseload was 48% above the national standard for misdemeanors alone. (NLADA Report, p. 69).

The connection between workloads and quality representation is an obvious one. An attorney only has so much time to divide between all of her cases. Some cases require more time. Some cases require much more time. All cases require enough time for proper review and

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frequently occurs at a preliminary examination and often results in a bond modification allowing release. The jailed inmate waits a few extra days or an extra week or two for this review if a preliminary examination must be adjourned because his assigned counsel is unavailable.

assessment. Some attorneys will take all cases available to them for assignment in the hope that the volume will make up for low pay. Indigent defendants are entitled to the same level of representation as retained clients. The State must ensure their attorneys are not overloaded – even if the attorneys will not make that decision themselves.

One judge in Bay County stated prosecutors and defenders were unwilling to take cases to trial and he believed defendants would receive better plea offers from the prosecutors if the defenders prepared the cases for trial and were ready for trial. (NLADA Report, pp. 59-60). Bay County was found to have excessive caseloads by every measure. (NLADA Report, pp. 58-59). Excessive workloads prevent attorneys for preparing a case for trial, even as a strategy for eliciting fairer plea offers based on investigated facts and research on the law.

7. THE NLADA REPORTS FIND A LACK OF CONFIDENTIAL COMMUNICATION AND LACK OF OPPORTUNITY FOR CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION.

The ABA Seventh Principle states

> The same attorney continuously represents the client until completion of the case. Often referred to as "vertical representation," the same attorney should continuously represent the client from initial assignment through trial and sentencing. The attorney assigned for the direct appeal should represent the client throughout the direct appeal.

The ABA Fourth Principle states:

> Defense counsel is provided sufficient time and confidential space within which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendant must confer with counsel.

The NLADA Report at pp. 70-71 states:

> If there is a set of standards that is more frequently met throughout the State of Michigan, it is the standards relating to building an attorney-client representation. Most counties we visited try to maintain the same attorney from assignment to disposition and provide the defendants sufficient space to meet with attorneys. However, . . . undue interference [with attorney-client communication], high workloads, and the fast pace of dispositions combine to leave little time for informed discussions to take place.

"Vertical representation" leads to meaningful attorney-client representation, an element of effective assistance. CDAM notes the impact on indigent defense services of this Court's Caseflow Management Guidelines, which require trial courts to have plans to adjudicate 90% of misdemeanor cases within 63 days of a defendant's first appearance and 90% of all felony cases to be adjudicated within 91 days of the bindover from district court. (Administrative Order 2003-7). Although captioned as "Guidelines," the trial courts treat this Order as a mandate. Thus, judges focus on "moving the docket" and attorneys are expected to resolve their cases or case issues at every court appearance. For this reason, a court appearance for counsel and a defendant must allow for continued vertical representation and confidential attorney-client communication in the courthouse to maximize the effectiveness of the court appearance in ensuring that a case is within the Caseflow Management Guidelines.

The NLADA Report notes problems created by judicial acceptance of "stand-in" and substitute counsel. (NLADA Report, p. 72). A "stand-in" attorney is not the attorney of record and usually acts as a placeholder for the assigned attorney. Problems arise when a particular court appearance becomes substantive and the stand-in is expected to make decisions without knowledge of the case or the client. The use of "stand-in" counsel largely results from excessive caseloads – an attorney can only be in one courtroom at a time and must choose which of several

scheduled appearances is that day's priority. The failure of an overloaded attorney to be at a scheduled court date often triggers the *sua sponte* appointment by the judge of "substitute" counsel, often an attorney present in the courtroom with their own client. Substitute counsel does not know the case, the case history, or the defendant. These appointments of substitute counsel are made without consultation with the defendant and, if substitute counsel is expected to act that day, are nothing more than a docket management decision.

The NLADA Report describes the ability to have confidential discussions with clients at many courthouses as almost impossible. Because of a lack of availability of places where confidential discussions can occur for clients on bond, these discussions occur in the courtroom, in the public hallways, or outside of the courthouse in full hearing of court personnel, other lawyers, other defendants (including co-defendants) and the general public. (NLADA Report: Wayne County, p. 72; Oakland County, p. 75; Chippewa County, p. 77). For clients in custody, the lack of facilities and opportunities for confidential discussions in the courthouse are even more onerous and means discussions of plea offers with a defendant who is "in the box", i.e., seated in the jury box and chained to 6-7 other defendants and well within the hearing of deputies and other inmates, or held in the "bullpen"[3], a holding cell behind the courtroom. (NLADA Report: Wayne County, p. 72; Grand Traverse County, p. 74; Oakland County, p. 75). For all defendants, the Caseflow Management Guidelines mean decisions are made quickly and

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[3] The Wayne County bullpen has been described as "usually crowded with detainees and requires attorneys and clients to shout the communication. Attorneys, court personnel, and officers often walk the corridor where the bullpen is located, further diminishing attorney-client communication." Such speech as occurs between the attorney and the client is exchanged through a small mesh screen in an otherwise solid door and is heard by anyone else in the bullpen. *United States v. Morris*, 377 F Supp 2d 630, 632, fn. 2 (ED MI, 2005).

with little reflection by a defendant. The result is, in many cases, injustice.

CONCLUSION

The NLADA Report establishes that Michigan's delivery of indigent defense services is as unconstitutional as Plaintiffs allege and more widespread than feared. For the reasons stated above, this Court should hold that systemic deficiencies exist and their prevalence creates the unacceptable risk, and probably the actuality, that indigent defendants throughout Michigan are being and will be deprived of their constitutional right to effective assistance of counsel. This Court should then allow Plaintiffs cause of action for declaratory and injunctive relief to proceed.

Respectfully Submitted,

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