

SUPREME COURT

STATE OF MICHIGAN

APR

2010

IN THE SUPREME COURT

TERM

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 Nos. 139345, 139346,  
139347

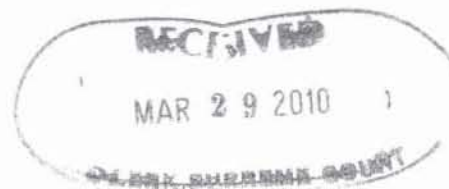
Court of Appeals Nos. 278652, 278858,  
278860

Ingham County Circuit Court Case No.  
07-242-CZ

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**BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE  
LAWYERS, BRENNAN CENTER FOR JUSTICE, NAACP LEGAL DEFENSE &  
EDUCATIONAL FUND, AND THE CONSTITUTION PROJECT**

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## **STATEMENT OF BASIS FOR JURISDICTION**

*Amici* defer to the parties' statements regarding the basis for this Court's jurisdiction over this appeal.

## **STATEMENT REGARDING STANDARDS OF REVIEW**

*Amici* defer to the parties' statements regarding the proper standard of review in this matter.

## **STATEMENT OF QUESTIONS INVOLVED**

*Amici* defer to the parties' statements of the questions involved in this appeal.

## **STATEMENT OF FACTS**

*Amici* defer to the parties for a statement of facts and proceedings below.

## INTEREST OF AMICI CURIAE

*Amici* share a distinguished heritage of advancing their missions to ensure the fair administration of justice and as advocates for the right to counsel for indigent persons charged with crimes.

*Amici* recognize that the right to counsel at each critical stage of the adversary process is fundamental to justice and fairness.

For these reasons, and to secure the integrity of the criminal justice system, *amici* urge this Court not to bar the Plaintiffs' claims for prospective relief. Indeed, it is the fundamental professional duty of all attorneys to ensure that the right to counsel is fully protected:

A lawyer is . . . *an officer of the legal system and a public citizen having special responsibility for the quality of justice. . . .* As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. . . . A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance, and should therefore devote professional time and civic influence in their behalf. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest. [MRPC Preamble: A Lawyer's Responsibilities (emphasis added).<sup>1</sup>]

*Amici* provide further information about each of their organizations' missions below.

### **National Association of Criminal Defense Lawyers**

The National Association of Criminal Defense Lawyers (NACDL) is a not-for-profit professional organization that represents the nation's criminal defense attorneys. NACDL is the

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



preeminent organization advancing the institutional mission of the nation's criminal defense bar to ensure the proper and fair administration of justice, and justice and due process for all persons accused of crime. Founded in 1958, NACDL has a membership of more than 11,000 direct members and an additional 35,000 affiliate members in all 50 states and 30 nations. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and accords it representation in the House of Delegates.

In furtherance of its mission to safeguard the rights of the accused and champion fundamental constitutional rights, NACDL frequently appears as *amicus curiae* before the United States Supreme Court, the federal courts of appeal and the highest courts of numerous states. In recent years, NACDL's briefs have been cited on numerous occasions by the Supreme Court in some of the most important criminal law decisions. *See, e.g., Kennedy v Louisiana*, \_\_ US \_\_; 128 S Ct 2641, 2663; 171 L Ed 2d 525 (2008); *Rothgery v Gillespie County*, \_\_ US \_\_; 128 S Ct 2578, 2587; 171 L Ed 2d 366; *Blakely v Washington*, 542 US 296, 312; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

NACDL has a specific and demonstrated interest in ensuring that accused persons have access to qualified counsel at every stage of a criminal proceeding. NACDL most recently supported this principle in *Rothgery v Gillespie County*, where NACDL successfully urged the Supreme Court to find that the right to counsel unequivocally attaches at arraignment, the first formal proceeding at which an individual is accused. Access to counsel at that point is critical – often the determinative factor between freedom and confinement. Indeed, the allegations in this case, if true, will establish that this fundamental right is systematically violated in Michigan.

NACDL, informed by the experience of its membership, is uniquely well positioned to inform this Court of the consequences that are visited upon criminal defendants when they are subjected to representation by overburdened and under-resourced counsel, and why post-conviction remedies are inadequate to redress this deficiency.

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

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

**Brennan Center for Justice**

The Brennan Center for Justice at New York University School of Law (“Brennan Center”) is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. An important part of the Brennan Center's work is its effort to close the

“justice gap” by strengthening public defender services and working to secure the promise of *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

The Brennan Center’s Access to Justice Project is dedicated to ensuring that low-income individuals, families, and communities in this country are able to obtain effective legal representation. The Brennan Center has filed a number of amicus briefs in support of the rights of the indigent accused, including briefs before the United States Supreme Court, federal courts of appeal, and state high courts. *See, e.g., Rothgery v Gillespie County* (amicus brief filed on behalf of the Brennan Center, NLADA, and the NAACP Legal Defense & Educational Fund); *Hurrell-Harring v State of New York*, No. 8866-07 (pending before the New York Court of Appeals) (amicus brief filed on behalf of former prosecutors).

Through its work to close the “justice gap,” the Brennan Center has gained an in-depth understanding of the burdens that inadequate defense services for the poor place on the least advantaged, on the prosecution, on the courts, and on our society. The Brennan Center’s experiences provide it with a unique perspective on the issues raised in this lawsuit, and a firm belief that this case should be permitted to proceed.

#### **NAACP Legal Defense & Educational Fund**

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”) is the nation’s oldest civil rights law firm. Founded as an arm of the NAACP in 1939 by Charles Hamilton Houston and Thurgood Marshall to redress injustice caused by racial discrimination and to assist African Americans in securing their constitutional and statutory rights, LDF has operated independently since 1957. Through litigation, advocacy, public education, and outreach, LDF works to secure

equal justice under law for all Americans, and to break down the barriers that prevent minority groups from realizing their basic civil and human rights.

LDF has a longstanding commitment to ensuring adequate representation to the poor. The issue of adequate indigent defense, and specifically the Court's approach to the right to counsel, has a particularly significant impact upon the African Americans who are disproportionately represented at every stage of the criminal justice system. For over six decades, LDF attorneys have represented parties and participated as *amicus curiae* in litigation before federal and state courts asserting the right to counsel in criminal proceedings, including most recently in *Rothgery v Gillespie County*, and in state court in *Richmond v District Court of Maryland*, \_\_ A2d \_\_; 2010 WL 744210 (Md 2010).

### **The Constitution Project**

The Constitution Project ("The Project") is an independent think tank that promotes and defends constitutional safeguards. The Project seeks to achieve this goal through constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. The Project has earned wide-ranging respect for its expertise and reports, including practical material designed to make constitutional issues a part of ordinary political debate. The Project frequently appears as *amicus curiae* before the United States Supreme Court, the federal courts of appeal, and highest state courts, in support of the protection of constitutional rights.

The Project's National Right to Counsel Committee is a bipartisan committee of independent experts representing all segments of America's justice system. Established in 2004, the Committee spent several years examining the ability of state courts to provide adequate counsel, as required by the United States Constitution, to individuals charged in criminal and

juvenile delinquency cases who are unable to afford lawyers. In 2009, the Committee issued its seminal report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, which included the Committee's findings on the right to counsel nationwide, and based on those findings, made 22 substantive recommendations for reform. The Committee's recommendations urged states to provide sufficient funding and oversight to comply with constitutional requirements and endorsed litigation seeking prospective relief on behalf of a class of indigent defendants when states fail to comply with those requirements.

## INTRODUCTION

The systemic deficiencies in Michigan's indigent defense system violate criminal defendants' right to counsel under both the United States and Michigan constitutions and create an imminent and irreparable risk that the indigent accused will be denied their right to effective representation. These constitutional harms, borne disproportionately by communities of color, cannot be remedied after-the-fact by post-conviction proceedings. For these reasons, Plaintiffs have established a cause of action for declaratory and injunctive relief.

According to the Complaint, because of systemic defects, including inadequate funding, supervision, and guidelines for the assignment of attorneys, criminal defendants in three Michigan counties routinely lack representation that meets even the basic standards of the legal profession. This lack of meaningful representation causes Plaintiffs to be routinely harmed throughout the course of their criminal proceedings – resulting in excessive bail or the unnecessary denial of bail, overcharging, wrongful convictions, guilty pleas that are not knowing and voluntary, and excessive sentences. Because the United States and Michigan constitutions ensure the right to counsel at all critical stages of a criminal proceeding, these harms, including harms arising from pre-trial representation such as the unnecessary denial of bail, violate the Plaintiffs' constitutional rights.

Moreover, the prospective relief sought in the Complaint is the only way to address such constitutional injuries. First, post-conviction review can do nothing to redress the many harms caused by the absence of counsel or ineffective assistance of counsel during pre-trial and pre-convictions proceedings, such as the wrongful denial of bail or unnecessary incarceration due to attorney delay. Post-conviction review pursuant to *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), focuses on whether attorney error led to a wrongful conviction

and, thus, it cannot redress deprivations of liberty or other harms resulting from ineffective representation in pre-trial proceedings. Second, post-conviction review cannot identify all of the cases in which a conviction was in fact caused by ineffective representation. In some cases, errors by trial counsel may make it impossible to establish that effective representation would have altered the outcome of the proceeding, as required under *Strickland*. For example, an attorney's failure to promptly and comprehensively confer with a client may result in the permanent loss of witnesses and evidence that cannot later be recreated to demonstrate prejudice under *Strickland*. Third, even when a defendant is successful in overturning a conviction due to ineffective assistance of counsel, this post-conviction relief cannot fully remedy the harm to the individual from a wrongful conviction – particularly if that conviction led to incarceration. Finally, any post-conviction relief awarded under *Strickland* would generally apply only to an individual case or defendant, while the underlying systemic deficiencies remain intact.

Such limitations on the effectiveness of post-conviction remedies are exactly why Michigan law grants the judicial branch equitable power to issue prospective relief in response to imminent and irreparable constitutional injuries caused by systemic deficiencies. Declaratory and injunctive relief is both necessary and appropriate in light of the nature of the harms alleged in the Complaint. For all of these reasons, this Court should find that the Plaintiffs have adequately alleged a claim for relief and allow this case to go forward.

## ARGUMENT

- I. **The systemic deficiencies in indigent defense services described in the Complaint create an imminent risk that the Plaintiffs' right to counsel will be violated in ways that cannot be cured by post-conviction review, making this suit both necessary and appropriate.**

The deficiencies in indigent defense representation described in the Complaint constitute violations of the Plaintiffs' right to counsel under the United States and Michigan constitutions, and the resulting injuries cannot be fully remedied by post-conviction review pursuant to *Strickland*. Because Plaintiffs allege that they face imminent and irreparable constitutional injury, they have stated a claim for relief and this case should be permitted to go forward.

**A. The Complaint describes systemic violations of the Plaintiffs' right to counsel under the United States and Michigan constitutions.**

The systemic deficiencies described in the Complaint, which produce inadequate representation of the indigent, violate the right to counsel under both the Sixth Amendment to the United States Constitution and Article I, § 20 of the Michigan Constitution. While the State tries to dismiss the Plaintiffs' claims as mere "public policy concerns," *see* Defendants' Brief 19, the Complaint details concrete constitutional injuries to criminal defendants in three Michigan counties which result from Michigan's failure to provide an effective system of defense services.

As described in the Complaint, there are serious, systemic defects in how Michigan provides defense services to the poor that lead to the regular denial of the Plaintiffs' right to effective counsel. Three Michigan counties fail to provide even basic resources and safeguards to provide criminal defendants with competent representation – for example, attorneys lack supervision and training, there are no performance or eligibility standards to monitor their work, and there are no standards for attorney workload to ensure that attorneys have adequate time and resources to properly represent their clients. Complaint ¶¶ 6, 7.

The result is systemic deficiencies in the provision of defense services for the poor. Thus, eligible defendants are regularly denied counsel altogether. Complaint ¶ 109. Moreover, even when defendants are granted representation, defense counsel regularly do not meet the basic



standards of the profession, failing, among other things, to meet with clients prior to critical stages of their proceedings, adequately investigate charges or hire investigators, file necessary motions, prepare properly for court appearances, provide meaningful representation at sentencings, or employ and consult with experts when necessary. Complaint ¶ 8. This pattern of ineffective assistance harms defendants at every stage of their criminal proceedings. The injuries to defendants are manifold, and include unnecessary or prolonged pretrial detention, excessive charges, guilty pleas that were not knowing and voluntary, wrongful convictions, and excessive sentences. Complaint ¶ 9.

In light of these allegations, the Plaintiffs have clearly stated a claim that they have suffered – and are at imminent risk of continuing to suffer – violations of their right to counsel. Indeed, as the Plaintiffs detail in their merits brief, the right to counsel under the United States and Michigan constitutions protects the right to meaningful and effective assistance of counsel at all critical stages of a criminal prosecution. This is the case even when the ineffective assistance does not ultimately lead to a wrongful conviction but rather injures defendants in other ways, such as the wrongful denial of bail or the failure to negotiate a favorable plea agreement. *See* Plaintiffs’ Brief 22, 26-29. The injuries described in the Complaint fall squarely within these constitutional protections.

The State has urged this Court to narrow the constitutional protections afforded to criminal defendants, suggesting that a right to counsel claim exists only when a defendant has been wrongly convicted. But this argument defies both Supreme Court precedent and common sense. In *Rothgery v Gillespie County*, the Supreme Court recently reaffirmed that the Sixth Amendment right to counsel applies during all critical stages of a criminal prosecution,

protecting defendants from a broad set of injuries of which wrongful conviction is only one.<sup>2</sup> In that case, Walter Rothgery sought damages pursuant to 42 USC § 1983, alleging that his right to counsel was violated when Gillespie County failed to provide him with an attorney within a reasonable time after his initial appearance, leading him to be incarcerated for three weeks when bail was set too high for him to afford.

Rothgery was never convicted of the crime for which he was charged (that he was a felon in possession of a firearm); in fact, when he was finally appointed counsel, his attorney compiled paperwork that established that he had never been convicted of a felony and his indictment was therefore dismissed. But Rothgery nevertheless sought damages for the harm that the denial of counsel had caused him, claiming that “if the County had provided a lawyer within a reasonable time . . . he would not have been indicted, rearrested, or jailed for three weeks.” *Id.* at 2582-83.

The Supreme Court held that Rothgery’s right to counsel attached at his initial appearance before a judicial officer, regardless of whether the prosecutor was aware of or involved in that appearance, vacating a Fifth Circuit opinion that held to the contrary.<sup>3</sup> Although the Court did not reach the question of whether the delay in appointing counsel resulted in prejudice to Rothgery’s Sixth Amendment rights, it expressly rejected the County’s argument that “prejudice to a defendant’s pretrial liberty” is not a cognizable harm under the Sixth

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<sup>2</sup> The State also points to *Strickland* in support of its claim that a defendant must suffer a wrongful conviction to state a claim for ineffective assistance of counsel. *Amici* refer the Court to the Plaintiffs’ merits brief for a full discussion as to why *Strickland*’s “prejudice” standard is directly related to the relief sought in that case – the overturning of a criminal conviction – and is inapplicable to the kind of prospective relief that the Plaintiffs seek in this case. See Plaintiffs’ Brief 26-29.

<sup>3</sup> Although Michigan provides for the prompt appointment of counsel by statute, the Plaintiffs allege that most indigent defense counsel do not speak with their clients until after arraignment. Complaint ¶¶ 131-32. This is insufficient to meet the requirements of the Sixth Amendment because, as *Rothgery* observes, the attachment of the right to counsel at the initiation of adverse judicial criminal proceedings “is not ‘mere formalism.’” *Rothgery*, 128 S Ct at 2583. In other words, “[a]ssistance begins with the appointment of counsel, it does not end there.” *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *United States v Decoster*, 199 US App D C 359, 382 (MacKinnon, J., concurring), cert. denied 444 US 944 (1979).

Amendment.<sup>4</sup> The Court dismissed this argument as “mistaken,” and its analysis emphasized not only Rothgery’s incarceration but also the impact of the later-dismissed charge on his employment prospects. *Id.* at 2589.

*Rothgery* follows an extensive history of United States Supreme Court precedent recognizing “that a person accused of a crime ‘requires the guiding hand of counsel at every step in the proceedings against him’ and that that constitutional principle is not limited to the presence of counsel at trial.” *Coleman v Alabama*, 399 US 1, 9; 90 S Ct 1999; 26 L Ed 2d 387 (1970) (plurality) (citing *Powell v Alabama*, 287 US 45, 69 (1932)). *See also, e.g., Estelle v Smith*, 451 US 454, 470-71; 101 S Ct 1866; 68 L Ed 2d 359 (1981) (finding pre-trial psychiatric evaluation “critical stage” and failure to involve defense counsel violates Sixth Amendment); *United States v Wade*, 388 US 218, 236-67; 87 S Ct 1926; 18 L Ed 2d 1149 (1967) (finding lineup identification procedure was “critical stage” such that counsel’s presence was necessary to assure meaningful defense); *White v Maryland*, 373 US 59, 60; 83 S Ct 1050; 10 L Ed 2d 193 (1963) (finding preliminary hearing where defendants enter guilty pleas “critical stage”).

To limit defendants’ right to counsel solely to cases where deficient representation led to a wrongful conviction not only contravenes established precedent, but reflects an impoverished view of the role of defense counsel in the adversarial criminal justice system. Individuals charged with crimes rely on effective counsel to protect their rights and interests in myriad ways and at every stage of their criminal proceedings. As the American Bar Association has recognized, “[m]any important rights of the accused can be protected and preserved only by prompt legal action. Defense counsel should inform the accused of his or her rights at the

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<sup>4</sup> *Amici* have ascertained the outcome of the case following the Supreme Court’s remand. Not surprisingly, the County reached a settlement with Mr. Rothgery, compensating him \$40,000 for his three weeks of unnecessary confinement. Zeke MacCormack, *Gillespie County Paying for Legal Mistake*, San Antonio Express-News, Apr. 30, 2009, at 3B.

earliest opportunity and take all necessary action to vindicate such rights.” *Standard 4-3-6: Prompt Action to Protect the Accused*; see also *Wiggins v Smith*, 539 US 510, 524; 123 S Ct 2527; 156 L Ed 2d 471 (2003) (citing the ABA standards as “standards to which we long have referred as ‘guides to determining what is reasonable.’”). To conclude that criminal defendants’ rights are violated only if ineffective counsel leads to a wrongful conviction would be to carve out from judicial oversight much of the critical role that lawyers play in ensuring that defendants are treated fairly in criminal proceedings. The right to counsel is not, and should not, be limited in such a fashion.

**B. Such constitutional violations of the right to counsel cannot be remedied by post-conviction review, making Plaintiffs’ suit for prospective relief both necessary and appropriate.**

The Complaint demonstrates that the Plaintiffs face a high risk of imminent and irreparable harm, making a suit for declaratory and injunctive relief urgent and necessary. See Complaint ¶ 141; see also *Higgins Lake Property Owners Ass’n v Gerrish Twp*, 255 Mich App 83, 105-06; 662 NW2d 387 (2003) (“Injunctive relief is an extraordinary remedy that courts normally grant only when (1) justice requires it, (2) there is no adequate remedy at law, and (3) there exists a real and imminent danger of irreparable injury.”) (internal citations omitted).

Critically, post-conviction review cannot remedy the injuries that the Plaintiffs argue they suffer based on Michigan’s deficient provision of indigent defense services. First, as asserted in the Complaint, much of the harm caused to criminal defendants by the absence of counsel or by ineffective assistance of counsel occurs at the pre-trial and pre-conviction stages of their criminal proceedings. Post-conviction review affords no relief whatsoever to such injuries because, pursuant to *Strickland*, a defendant seeking to reverse a conviction must establish both that an

attorney's performance was inadequate *and* that there is a "reasonable probability that, but for counsel's [] errors, the result of the proceeding would have been different." 466 US at 694.

For example, post-conviction review cannot remedy the harm to defendants who have experienced prolonged pre-trial delay or pre-trial detention, the denial of bail or bail review, and other pretrial injuries due to ineffective assistance or the denial of counsel.<sup>5</sup> A lawyer's advocacy is a critical factor in determining whether arrestees are released shortly after their arrest or whether they spend substantial periods of time in pretrial incarceration. *See*, Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 *Cardozo L Rev* 1719, 1763 (2002). In fact, researchers in a Baltimore City study found that indigent arrestees represented by counsel were over two-and-a-half times as likely to be released on their own recognizance and spent less time in jail. *Id.* at 1755. Such injuries are particularly pronounced for defendants who are ultimately acquitted or whose cases are dismissed, but who nevertheless lose licenses, homes, jobs, education, time, opportunity, and income as a result of the denial of prompt, effective assistance of counsel. Such injuries are not regrettable collateral side effects of every criminal prosecution, but instead stem directly from the deficiencies detailed in the complaint: inadequate investigation, a lack of prompt communication, and overall ineffective representation.

Similarly, a defendant may suffer if an attorney fails to negotiate a plea agreement and is later convicted and sentenced more harshly than he should or would have been subject to a negotiated plea. Once again, *Strickland* offers no remedy to this very real harm. Indeed, because

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<sup>5</sup> To give one example of how ineffective representation may result in unnecessary incarceration, if a Michigan lawyer waives a client's MCL 766.4 right to have the preliminary examination conducted within 14 days of arraignment without the client's knowledge or input, a defendant can be held in jail unnecessarily. The 14-day rule protects against unwarranted pre-trial detention. *See People v Weston*, 413 Mich 371, 376; 319 NW2d 537(1982) (A "preliminary examination functions, in part, as a screening device to insure that there is a basis for holding a defendant to face a criminal charge. A defendant against whom there is insufficient evidence to proceed should be cleared and released as soon as possible.").

the *Strickland* standard was designed to ensure “confidence in the outcome” of a criminal proceeding, 466 US at 694, there are numerous injuries and prejudices suffered as a result of the denial of effective counsel that the *Strickland* formula can never, and indeed was never designed to, address.

A second context in which post-conviction review under *Strickland* is inadequate occurs when a defendant was convicted because his or her lawyer fails to conduct a timely investigation and, as a result, critical evidence is permanently lost. Under these circumstances, it is impossible to later establish that the outcome of the proceeding would have been different with effective representation. For example, failure to promptly and comprehensively confer with a client may result in the permanent loss of evidence that, if it still existed, could have demonstrated prejudice under *Strickland*. Crime scenes change, wounds heal, memories fade, and witnesses – particularly witnesses within a transient, indigent community – quite often disappear, and once gone, no amount of post-conviction review can ever restore them. Indeed, the ABA has recognized that one of counsel’s most important duties is to establish early and regular contact with a criminally accused client so that vital evidence is not lost. *See ABA Defense Attorneys Function Standard 4-3.2: Interviewing the Client* (“As soon as practicable, defense counsel should seek to determine all relevant facts known to the accused.”).

Thus, an attorney’s failure to investigate a case or to develop mitigating evidence commonly results in an inadequate record to establish a nexus between counsel’s deficient representation and the outcome of the case – as required under *Strickland* – leaving convicted defendants with no opportunity to challenge the denial of their right to effective counsel.<sup>6</sup> In fact, just in the universe of cases in which wrongful conviction has been established by DNA

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<sup>6</sup> Moreover, if competent counsel is lacking at the outset, arguments in support of pre-trial release will never be marshaled on a defendant’s behalf, which can result in a plethora of collateral consequences to the individual, as well as hamper preparation of a defense.

evidence, there is growing evidence that ineffective representation not only leads to erroneous conviction, but also forecloses meaningful appellate review. *See Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, Report of the National Right to Counsel Committee of the Constitution Project,<sup>7</sup> at 44-47 (April 2009) (Recounting studies showing that innocent appellants rarely succeeded in challenging the false evidence supporting their wrongful convictions); *see also* Brandon L. Garrett, *Judging Innocence*, 108 *Columbia L Rev* 55 (2008).

Finally, even when a defendant successfully overturns a conviction due to ineffective assistance of counsel, this post-conviction relief can never fully remedy the harm to the individual from a wrongful conviction – particularly a conviction involving years of incarceration. A wrongful conviction can hurt a defendant, as well as his or her family, friends, employers, and the larger community, in ways that post-conviction relief can never begin to address. *See, e.g.,* The Innocence Project, *Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, 7-11, available at [http://www.innocenceproject.org/docs/Innocence\\_Project\\_Compensation\\_Report.pdf](http://www.innocenceproject.org/docs/Innocence_Project_Compensation_Report.pdf) (discussing the psychological, physical, and financial obstacles that exonerated defendants face). Moreover, a decision overturning a conviction in an individual case does nothing to address the systemic deficiencies that put the defendant at risk of a wrongful conviction in the first place, or that place all criminal defendants in the Plaintiff class at imminent risk of being denied their right to effective counsel in their criminal proceedings.

These limitations on the effectiveness of post-conviction remedies are precisely why the judicial branch has equitable power to issue declaratory and injunctive relief in response to imminent and irreparable constitutional injuries caused by systemic deficiencies. *See Higgins*

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<sup>7</sup> A complete copy of the Report is available at <http://tcpjusticedenied.org> (last visited on Mar. 26, 2010).

*Lake Property Owners Ass'n*, 255 Mich App at 105-06. Indeed, courts in other jurisdictions have allowed right to counsel cases seeking prospective relief to go forward when systemic defects allegedly caused ongoing injury. See, e.g., *Lavallee v Justices In Hampden Superior Court*, 442 Mass 228, 238; 812 NE2d 895 (2004) (“Because the petitioners are seeking redress for the ongoing violation of their fundamental constitutional right that affects the manner in which the criminal case against them will be prosecuted and defended, it is enough that they have shown a violation of that right that may likely result in irremediable harm if not corrected.”); *Luckey v Harris*, 860 F2d 1012, 1017 (CA 11, 1988), *rev'd on other grounds*, *Luckey v Miller*, 976 F2d 673 (CA 11, 1992) (“Prospective relief is designed to avoid future harm. Therefore, it can protect constitutional rights, even if the violation of these rights would not affect the outcome of a trial.”); *NYCLA v State*, 192 Misc 2d 424, 431; 745 NYS2d 376 (Sup Ct NY Cty 2002) (“[B]ecause the right to effective assistance of counsel in New York is much more than just the right to an outcome, threatened injury is enough to satisfy the prejudice element and obtain prospective injunctive relief to prevent further harm.”); *State v Quitman County*, 807 So 2d 401, 410 (Miss 2001) ([T]aking as true the well-pled allegations of the County’s complaint, such systemic constitutional deficiencies would entitle the County to relief.”).

It is for exactly these reasons that the Court of Appeals correctly recognized that the Plaintiffs’ suit was justiciable. As the Court of Appeals explained, if the Plaintiffs “show that instances of deficient performance and denial of counsel are widespread and systemic and . . . are caused by weaknesses and problems in the court-appointed, indigent defense systems,” and “[i]f the aggregate of harm reaches such a level as to be pervasive and persistent (widespread and systemic), the case is justiciable and declaratory relief is appropriate, as well as injunctive relief



to preclude future harm and constitutional violations that can reasonably be deemed imminent in light of the existing aggregate of harm.” *Duncan v State*, 284 Mich App 246, 303; 774 NW2d 89 (2009).

The Sixth Amendment right protects the accused regardless of guilt or innocence, race, or economic status. Paradoxically, it is the countless innocent and wrongly accused persons, now and in the future, who will suffer the greatest harm if this court forecloses a cause of action for prospective relief. Surely, the people of Michigan deserve better.

## **II. The failure to provide adequate indigent defense services disproportionately burdens communities of color.**

Michigan’s failure to provide adequate indigent defense services has a particularly significant impact upon the African-American community. African Americans are more likely to live in poverty and, thus, are more likely to depend on appointed counsel. African Americans are almost five times more likely to rely on representation from appointed counsel than whites and two times more likely than Latinos.<sup>8</sup> As a result, African Americans bear a disproportionate burden of the failure to provide adequate indigent defense services.<sup>9</sup>

The consequences of the failure to provide adequate indigent defense services, and its broad and disproportionate impact on communities of color, are well-documented and dramatic. A disproportionate number of people who are arrested – and particularly those in custody – are African American. Nationally, African Americans comprise 13% of the population but 28% of

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<sup>8</sup> Christopher Hartney & Linh Vuong, *Created Equal: Racial and Ethnic Disparities in the U.S. Criminal Justice System*, National Council on Crime and Delinquency, Mar. 2009, at 14, available at <http://www.nccd-crc.org/nccd/pdf/CreatedEqualReport2009.pdf>.

<sup>9</sup> See U.S. Dep’t of Justice: Bureau of Justice Statistics, *Defense Counsel in Criminal Cases* (Nov. 2000) available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf> (last visited Mar. 11, 2010) (reporting that nationally, seventy-seven percent of African Americans and seventy-three percent of Latinos in state prisons were represented by public defense attorneys).

those arrested and 40% of those incarcerated.<sup>10</sup> The imbalance is even more dramatic in Michigan. In 2007, people of color comprised 19% of Michigan's population, but accounted for 55% of the state prison population.<sup>11</sup> Not surprisingly, the disparity also extends to Michigan's youth. Of the 2,760 youths in residential placement in Michigan in 2006, 47.1% were African American; 4% were Latino, and 43.8% were white.<sup>12</sup> This disturbingly high rate of African-American incarceration, which is partially due to a failure to provide adequate representation to the indigent, is an epidemic that violates constitutional safeguards and demands attention.

A 2005 study by the Sentencing Project found that not only were African Americans and Latinos more likely to rely on appointed counsel, but that the hiring of a private attorney tended to result in less severe sentences.<sup>13</sup> A 2010 study of capital cases in Harris County, Texas, found that the District Attorney was substantially more likely to seek the death penalty against defendants with appointed counsel as compared to defendants who hired private counsel, and that for cases in which the death penalty was pursued, a capital sentence was imposed in over 80% of the cases where defendants had appointed counsel and not once imposed in cases where defendants had private counsel.<sup>14</sup>

Possibly the most stark and direct example of how the failure to provide the poor with adequate defense counsel has real and disproportionate consequences on African Americans is

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<sup>10</sup> Hartney & Vuong, at 11, 14.

<sup>11</sup> U.S. Census Bureau, 2007 American Community Survey; Michigan Department of Corrections, 2007 Annual Report.

<sup>12</sup> Children's Defense Fund, "Cradle to Prison Pipeline – Michigan Fact Sheet" 2009. *See also*, Michigan State University, *DMC Assessment Project, Measuring Disproportionate Minority Contact in the Juvenile Justice System: An Examination of the Michigan Relative Rate Index* (Mar. 2005), available at [http://www.michigan.gov/documents/DHS-dmc-mich-06\\_142983\\_7.pdf](http://www.michigan.gov/documents/DHS-dmc-mich-06_142983_7.pdf) (finding that African-American youth were 88% more likely than white youth to be arrested; 50% more likely to be petitioned to the juvenile court; 97% less likely to be placed in a diversion program; and 4.2 times more likely than white youth to be confined in a correctional facility).

<sup>13</sup> The Sentencing Project, *Racial Disparity in Sentencing: A Review of the Literature*, Jan. 2005, citing Holmes, Malcolm D., Harmon M. Hosch, Howard C. Daudistel, Dolores A. Perez, and Joseph B. Graves, "Ethnicity, Legal Resources, and Felony Dispositions in Two Southwestern Jurisdictions." *JUSTICE QUARTERLY*, Vol. 13, 1996: 11-30.

<sup>14</sup> Scott Phillips, *Hire a Lawyer, Escape the Death Penalty?* American Constitution Society Issue Brief, Feb. 2010.

obtained by reviewing exonerations. A 2004 study by the Innocence Project identified 328 exonerations nationwide between 1989 and 2004. Of these persons, 55% were African American and 13% were Hispanic. For exonerations on rape charges, 64% of those wrongfully convicted were African-American. Many of these wrongful convictions are directly attributable to failures of indigent defense systems.

These failures, and particularly the disproportionate burden of the failures borne by communities of color, harm not only the individual defendants, but also the community-at-large. Incarceration plays a role in constructing the meaning of race by defining race and crime in terms of each other – the disproportionate rates of incarceration have made the image of black criminality a social reality.<sup>15</sup> Study after study supports the notion that “[w]hen citizens perceive the state to be furthering injustice . . . they are less likely to obey the law, assist law enforcement, or enforce the law themselves.”<sup>16</sup> This cycle of distrust and hostility is fueled by communities’ perception of two systems of justice, one for people with means and an inferior system for the disproportionately minority poor. This community impression is reinforced by defense attorneys ill-equipped to assist their clients properly, and, once again, African Americans disproportionately suffer the consequences. Indeed, the evidence of pervasive and systematic harms further demonstrates that the case-by-case, post-conviction standard of *Strickland* is inappropriate to address the systematic deprivation of the right to counsel that particularly affects communities of color.

## CONCLUSION

Accordingly, for the reasons set forth above, this Court should hold that where systemic deficiencies create an imminent and irreparable risk that indigent defendants will be deprived of

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<sup>15</sup> R. Richard Banks, *Beyond Profiling: Race, Policing, and the Drug War*, 56 Stan L Rev 571, 598 (2003).

<sup>16</sup> Donald Braman, *Punishment and Accountability: Understanding and Reforming Criminal Sanctions in America*, 53 UCLA L Rev 1143, 1165 (2006).

the constitutional right to effective assistance of counsel, a cause of action for declaratory and injunctive relief may proceed.

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