STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER LEE DUNCAN, BILLY JOE BURR, JR., STEVEN CONNOR, ANTONIO TAYLOR, JOSE DAVILA, JENNIFER O'SULLIVAN, CHRISTOPHER MANIES, and BRIAN SECREST,

Plaintiffs-Appellees,

v

STATE OF MICHIGAN and GOVERNOR OF MICHIGAN,

Defendants-Appellants.

FOR PUBLICATION
June 11, 2009

No. 278652
Ingham Circuit Court
LC No. 07-000242-CZ

CHRISTOPHER LEE DUNCAN, BILLY JOE BURR, JR., STEVEN CONNOR, ANTONIO TAYLOR, JOSE DAVILA, JENNIFER O'SULLIVAN, CHRISTOPHER MANIES, and BRIAN SECREST,

Plaintiffs-Appellees,

v

STATE OF MICHIGAN and GOVERNOR OF MICHIGAN,

Defendants-Appellants.

No. 278858
Ingham Circuit Court
LC No. 07-000242-CZ

CHRISTOPHER LEE DUNCAN, BILLY JOE BURR, JR., STEVEN CONNOR, ANTONIO TAYLOR, JOSE DAVILA, JENNIFER O'SULLIVAN, CHRISTOPHER MANIES, and BRIAN SECREST,

Plaintiffs-Appellees,

v

STATE OF MICHIGAN and GOVERNOR OF MICHIGAN,

Defendants-Appellants.

No. 278860
Ingham Circuit Court
LC No. 07-000242-CZ

Advance Sheets Version

Before: Murphy, P.J., and Sawyer and Whitbeck, JJ.

WHITBECK, J. (*dissenting*).

This case involves a sweeping and fundamental challenge to Michigan's system for operating and funding legal services for indigent criminal defendants. For decades, this system has, by statute, operated at the local level. But the indigent criminal defendants who are the plaintiffs here (the Duncan plaintiffs) seek to change that. They seek judicial intervention to require the state of Michigan and the Governor to override that statute and to both operate and fund legal services for indigent criminal defendants in Berrien, Genesee, and Muskegon counties, at the expense of state taxpayers and in violation of basic principles of separation of powers.

It is reasonably foreseeable that the final result of such judicial intervention inevitably will be state operation and funding of such legal services throughout Michigan. Indeed, the Duncan plaintiffs give us a preview of things to come when, in their complaint, they assert that the problems they describe "are by no means limited or unique to the three Counties." The Duncan plaintiffs go on to state that the alleged failures of the state and the Governor "have caused similar problems throughout the State." Rather obviously, then, the Duncan plaintiffs regard Berrien, Genesee, and Muskegon counties as simply staging areas in their overall effort to superimpose a centralized statewide state-funded[1] regime of legal services for indigent criminal defendants upon the existing statutorily created and locally funded and operated system.

[1] See, for example, Complaint, ¶ 10 ("Defendants' failure to take any steps to ensure that the indigent defense services in the Counties are *adequately funded* and administered, and that as a result, indigent defense providers have the resources and tools necessary to do their jobs, is an abdication of Defendants' constitutional obligations, and the result is the denial of constitutionally adequate defense to indigent criminal defendants.") (emphasis added); Complaint, ¶ 11 ("This Complaint focuses on how the Defendants failures to provide *funding* and fiscal and administrative oversight have created a broken indigent defense system in Berrien, Genesee, and Muskegon Counties; but the failings in those counties, and the types of harms suffered by these Plaintiffs, are by no means limited or unique to the three Counties. Defendants failure to provide *funding* or oversight to any of the State's counties have caused similar problems throughout the State.") (emphasis added); Complaint, ¶ 88 ("Michigan provides no *funding* specifically for the provision of indigent defense services in felony criminal actions at the trial stage in the three Counties or any other county in the State. To the extent that state *funding* is used by the Counties to pay for indigent defense services, Defendants do not ensure

(continued…)

Moreover, the Duncan plaintiffs seek this relief *preconviction*: that is, at the time they filed their complaint, none of the Duncan plaintiffs had gone to trial or otherwise had their cases adjudicated. This peculiar procedural posture invites the judiciary to gaze into a preconviction crystal ball that the Duncan plaintiffs have devised and to speculate on the effect of events that have yet to occur. Unfortunately, the gift of clairvoyance is not one that routinely accompanies our judicial commissions, and I would decline the invitation.

The majority, however, is not deterred. It finds the Duncan plaintiffs' claims to be justiciable, and it gives the Ingham Circuit Court the widest latitude in granting both declaratory and injunctive relief. As the majority's opinion candidly admits, such relief could potentially entail a cessation of criminal prosecutions against indigent defendants in Berrien, Genesee, and Muskegon counties, absent constitutional compliance with the right to counsel.[2]

Obviously, such an approach implicates public policy and fiscal matters of the highest jurisprudential and fiscal importance. Because I believe that under basic separation of powers principles—and under the proper application of the concept of judicial modesty—the executive and legislative branches can and should address such matters, I respectfully dissent from the majority's holdings with respect to the justiciability of the Duncan plaintiffs' claims, the appropriateness of the relief that the Duncan plaintiffs have sought, and the necessity of certifying this matter as a class action.

(…continued)

that such *funding* is spent appropriately. And to the extent that the Counties provide *funding* of their own, Defendants do not provide the Counties with any oversight or guidance to ensure that such *funding* produces an indigent defense system capable of providing constitutionally adequate indigent defense services.") (emphasis added); Complaint, ¶ 89 ("On an annual basis, Michigan allocates monies to a Court Equity Fund, administered by the State Court Administrative Office [SCAO], to help the Counties, and the other counties in Michigan, pay for trial court operations expenses [which include indigent defense expenses.] *The amount allocated is grossly insufficient*.") (emphasis added); Complaint, ¶ 103 ("[A]s a result of Defendants' failure to provide *funding* and to exercise fiscal and administrative oversight, the provision of indigent defense services at the trial court level in the three Counties is *inadequately funded* . . . .") (emphasis added); Complaint, ¶ 104 ("Because of Defendants' failure to ensure that indigent defense providers have the tools necessary to provide constitutionally adequate indigent defense, defense services in each of the three Counties *are not adequately financed*.") (emphasis added); Complaint, ¶ 141 ("Plaintiffs suffer irreparable harm or are at imminent and serious risk of suffering such harm because of Defendants' failure *to adequately fund* and oversee the Michigan's [sic] indigent defense system.") (emphasis added); see also similar allegations in the Complaint, ¶¶ 156, 157, 160, 163, 164, 167, 170, 171, 174, 177, 178, and 181.

[2] *Ante* at 13.

I. Introduction

A. The Michigan Approach to Operating and Funding an Indigent Criminal Defense System at the Local Level

The Michigan system for providing counsel for indigent criminal defendants has been in effect for some time and, from its inception, it has been local in nature. Indeed, the Michigan Supreme Court over 100 years ago recognized that the procedure for compensating such counsel under a statute reasonably similar to the one currently in effect was "competent" under then-existing precedent.[3] The current statute (the indigent criminal defense act), as did its predecessor versions, divides the system for providing counsel to indigent criminal defendants who are unable to procure counsel into two categories:

> Upon proper showing [of indigency], the chief judge [of the circuit court] shall appoint . . . an attorney to conduct the accused's examination and to conduct the accused's defense. The attorney appointed by the court shall be entitled to receive from the county treasurer, on the certificate of the chief judge that services have been rendered, the amount which the chief judge considers to be reasonable compensation for the services performed.[4]

Thus, the duty to appoint counsel and to determine reasonable compensation for defense of the indigent at the local level rests with the judicial branch, in the person of the chief judge of the circuit court. The duty to fund such counsel, by way of reasonable compensation, rests with the executive branch, in the person of the county treasurer. And the responsibility of providing such funding lies with the legislative branch, usually the county board of commissioners.

Effective January 1, 2004, the Michigan Supreme Court established the procedure and record-keeping requirements at the local level for selecting, appointing, and compensating counsel who represent indigent parties in all trial courts (the indigent criminal defense court rule).[5] Section B of the indigent criminal defense court rule provides that each such trial court must adopt a local administrative order that describes its procedure for such selection, appointment, and compensation. Section C requires each such trial court to submit the local administrative order for review to the State Court Administrator who "shall approve a plan if its provisions will protect the integrity of the judiciary." Thus, the court rule adds a level of state judicial branch responsibility by requiring the State Court Administrator to approve local plans if they will "protect the integrity of the judiciary."

But even when taking the indigent criminal defense court rule into account, there is no question that the primary responsibility for both operating and funding indigent criminal defense in Michigan remains local. The seminal case in this area is *In re Recorder's Court Bar Ass'n v*

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[3] *Withey v Osceola Circuit Judge*, 108 Mich 168, 169; 65 NW 668 (1895).

[4] MCL 775.16.

[5] MCR 8.123.

Wayne Circuit Court.[6] In that case, the plaintiff challenged the "fixed fee" system for indigent defense in place in Wayne County.[7] There, the Michigan Supreme Court held that the Wayne County fixed fee system systematically failed to provide "'reasonable compensation'" within the meaning of the indigent criminal defense act.[8] The Court, however, declined to direct the implementation of any specific system or method of compensating counsel.[9] The Court elected instead "to leave that determination to the sound discretion of the chief judges of the respective courts."[10] The Court went on to observe that, at the time of its decision in 1993, there were

> fifty-six circuits plus the Detroit Recorder's Court in our state spread throughout eighty-three counties of varying financial means. Attorney population likewise varies from county to county. Indeed, there is a potential myriad of local considerations that will necessarily enter into the chief judge's determination of "reasonable compensation." Thus, what constitutes reasonable compensation may necessarily vary among circuits.[11]

The decision in *Recorder's Court Bar Ass'n* dealt primarily with the *operation* of the fixed fee system for indigent defense in Wayne County. The Court, both in its direction to the affected chief judges to develop and file with the Court a plan for a payment system "that reasonably compensates assigned counsel for services performed consistent with this opinion"[12] and its declination to adopt any specific system or method, recognized the local, and varying, character of such payment systems.

The Supreme Court revisited this subject in 2003 in *Wayne Co Criminal Defense Bar Ass'n v Chief Judges of Wayne Circuit Court*.[13] In summary fashion, the Court declared:

> We are not persuaded by plaintiffs' complaints and supporting papers that the Chief Judges of the Wayne Circuit Court have adopted a fee schedule which,

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[6] *In re Recorder's Court Bar Ass'n v Wayne Circuit Court*, 443 Mich 110; 503 NW2d 885 (1993).

[7] *Id*. at 112-113.

[8] *Id*. at 116. See also *id*. at 131 ("We simply hold that, whatever the system or method of compensation utilized, the compensation *actually* paid must be reasonably related to the representational services that the individual attorneys *actually* perform.") (Emphasis in original.)

[9] *Id*. at 116.

[10] *Id*.

[11] *Id*. at 129.

[12] *Id*. at 136.

[13] *Wayne Co Criminal Defense Bar Ass'n v Chief Judges of Wayne Circuit Court*, 468 Mich 1244 (2003).

> at this time, fails to provide assigned counsel reasonable compensation within the meaning of [the Indigent Criminal Defense Act].[14]

Then-Chief Justice Corrigan concurred in the denial order, commenting:

> There have been increased efficiencies and new cost-saving technologies over the years, as well as increases in costs; and the overhead costs for attorneys assigned to indigent criminal defendants are sometimes lower than similar costs for attorneys performing other types of work. Nor have plaintiffs shown that the fees paid for an entire case or fees that an attorney receives over time are generally so low as to be unreasonable. Although plaintiffs have shown that fees paid under the Wayne Circuit Court fee schedule are frequently low, plaintiffs have not shown that the fee schedule generally results in unreasonable compensation. According to national compensation figures prepared by the Spangenberg Group for the American Bar Association Standing Committee on Legal Aid and Indigent Defendants, the average compensation paid to plaintiffs falls near the middle of the range of compensation nationwide.[15]

It is true that the state is involved in the funding of trial court operations to some extent. In 1996, for example, the Legislature established the Court Equity Fund, which provides limited funding for trial court operations.[16] But both the operational responsibility and the funding responsibility for providing for the defense of indigent criminal defendants remain primarily local. As the Michigan Supreme Court explained in *Frederick v Presque Isle Co Circuit Judge*:[17]

> Traditionally, the county has been the primary unit in directing Michigan's criminal justice system.
>
> "[J]udicial circuits are drawn along county lines and counties are required by statute to bear the expenses of certain courtroom facilities, circuit court commissioner salaries, stenographer's salaries, juror's compensation, and *fees for attorneys appointed by the court to defend persons who cannot procure counsel for themselves*."

The Court in *Frederick* went on to find that, although all courts in the state are part of Michigan's one court of justice,[18] the "Legislature retains power over the county and may

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[14] *Id*.

[15] *Id*. (Corrigan, J. concurring) (citations omitted).

[16] See MCL 600.151b.

[17] *Frederick v Presque Isle Co Circuit Judge*, 439 Mich 1, 6; 476 NW2d 142 (1991), quoting OAG, 1967-1968, No 4,588, pp 49, 50 (June 12, 1967) (emphasis added; citations omitted).

[18] Const 1963, art 6, § 1.

delegate to the local governments certain powers."[19] The Court held that in the indigent criminal defense act, the Legislature "did just that": "[i]t directed the chief judge of the circuit court to appoint an attorney to represent an indigent defendant's defense, and directed the county to pay for such services."[20] This is the system that remains in effect today. And this is the system that the Duncan plaintiffs challenge in this case.

B. Right To Counsel

As the majority correctly notes, the Sixth Amendment of the United States Constitution provides that, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[21] The Michigan Constitution articulates the same right.[22] In its landmark decision in *Gideon v Wainwright*,[23] the United States Supreme Court held that the Sixth Amendment right to counsel was "obligatory" with regard to the states through the operation of the Fourteenth Amendment. In that case, Gideon was charged in a Florida state court with breaking and entering a poolroom with intent to commit a misdemeanor.[24] This offense was a felony under Florida law.[25] Appearing in the trial court without funds and without a lawyer, Gideon asked the court to appoint counsel for him.[26] The trial court refused that request, and Gideon was ultimately convicted.[27] The Florida Supreme Court denied habeas corpus relief.[28] The United States Supreme Court then granted certiorari and overturned the Florida Supreme Court decision.

In rendering its decision in *Gideon*, the United States Supreme Court explained the importance of providing counsel for indigent defendants:

> [A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to 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

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[19] *Frederick*, *supra* at 15.

[20] *Id*.

[21] US Const, Am VI.

[22] Const 1963, art 1, § 20.

[23] *Gideon v Wainwright*, 372 US 335, 342; 83 S Ct 792; 9 L Ed 2d 799 (1963).

[24] *Id*. at 336.

[25] *Id*. at 336-337.

[26] *Id*. at 337.

[27] *Id*.

[28] *Id*.

> 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 belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.[29]

Thus, in our country and in our state, we deem the right to counsel as being both fundamental and necessary to a fair trial. And we accept the proposition that, just as the public pays for prosecutors to prosecute criminal defendants, the public should also pay for counsel to represent such defendants who are too poor to "hire the best lawyers they can get to prepare and present their defenses."[30] But *Gideon* did not address, or even allude to, the question of the *effectiveness* of counsel who represent criminal defendants. The United States Supreme Court did not directly address that question until 20 years later, in *Strickland v Washington*.[31]

C. Effectiveness of Counsel

In *Strickland*, the United States Supreme Court determined that it was not enough that a person accused of a crime have a lawyer standing by his or her side.[32] Rather, the Court said that the accused is entitled to a lawyer who "plays the role necessary to ensure that the trial is fair":[33]

> That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.[34]

The facts of the *Strickland* case were particularly egregious. As the Court indicated, during a 10-day period in 1976, Strickland planned and committed three sets of crimes, which included three brutal stabbing murders, torture, kidnapping, severe assaults, attempted murders,

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[29] *Id*. at 344.

[30] *Id*.

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

[32] *Id*. at 684.

[33] *Id*. at 685.

[34] *Id*.

attempted extortion, and theft.[35] At trial, Strickland waived his right to a jury trial, against his counsel's advice, and pleaded guilty to all charges, including the three capital murder charges.[36] Thus, the case revolved around the performance of Strickland's counsel at the sentencing phase of the case, a phase that culminated in the trial court's imposition of the death penalty. The Florida Supreme Court upheld the convictions.[37] Strickland sought postjudgment collateral relief on the basis, among other things, that his counsel had rendered ineffective assistance at the sentencing proceeding.[38] The trial court denied relief,[39] and the Florida Supreme Court affirmed the denial.[40] The case reached the United States Supreme Court through the habeas corpus process.[41]

The United States Supreme Court initially determined that, although Strickland challenged the effectiveness of counsel at the sentencing phase, in a capital case the sentencing phase was "sufficiently like a trial in its adversarial format and in the existence of standards for decision, that counsel's role in the proceeding is comparable to counsel's role at trial . . . ."[42] Making it doubly sure that there would be no misunderstanding, the Court said that "[f]or purposes of describing counsel's duties, . . . Florida's capital sentencing proceeding need not be distinguished from an ordinary trial."[43]

The Court went on to state that the "proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[44] It enunciated a two-part standard for assessing counsel's assistance to a convicted defendant who claims that such assistance was "so defective as to require reversal of a conviction or death sentence . . . ."[45] The first component required a showing that counsel's performance was "deficient"; that is, that counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[46] The second component required a showing that the deficient performance prejudiced the defense; that is, that counsel's errors "were so serious as to

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[35] *Id*. at 671-672.

[36] *Id*. at 672.

[37] *Id*. at 675.

[38] *Id*.

[39] *Id*. at 676.

[40] *Id*. at 678.

[41] *Id*. at 678-683.

[42] *Id*. at 686-687 (citation omitted).

[43] *Id*. at 687.

[44] *Id*. at 688.

[45] *Id*. at 687.

[46] *Id*.

deprive the defendant of a fair trial, a trial whose result is reliable."[47] Applying these standards to the performance of Strickland's counsel, the Court held:

> Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure. More generally, [Strickland] has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. [Strickland's] sentencing proceeding was not fundamentally unfair.[48]

Of considerable importance, when dealing with the prejudice component, the Court set out several situations in which to presume prejudice. Those situations are "[a]ctual or constructive denial of the assistance of counsel altogether" and "various kinds of state interference with counsel's assistance."[49] In such circumstances, "[p]rejudice . . . is so likely that case-by-case inquiry into prejudice is not worth the cost."[50] Other decisions have delineated those contexts in which prejudice can be presumed, including the right to have counsel present for a pretrial lineup,[51] the right to a pretrial hearing,[52] and the right of those who do not require appointed counsel to secure counsel of their own choice.[53]

In *People v Pickens*,[54] the Michigan Supreme Court adopted the ineffective assistance standards that *Strickland* articulated. The Court held that the Michigan Constitution offers the same level of protection as the United States Constitution.[55] The United States Supreme Court has recognized that the right to counsel encompasses "'every step in the proceeding against [a defendant].'"[56] That Court has also acknowledged that "to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution," the accused must be guaranteed the presence of counsel at all "critical confrontations."[57]

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[47] *Id*.

[48] *Id*. at 700.

[49] *Id*. at 692.

[50] *Id*.

[51] *Coleman v Alabama*, 399 US 1, 7; 90 S Ct 1999; 26 L Ed 2d 387 (1970).

[52] See *Pugh v Rainwater*, 483 F2d 778, 787 (CA 5, 1973), aff'd in part, rev'd in part, and remanded on other grounds sub nom *Gerstein v Pugh*, 420 US 103 (1975).

[53] *Moss v United States*, 323 F3d 445, 456 (CA 6, 2003).

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

[55] *Id*. at 302.

[56] *Coleman*, *supra* at (citation omitted).

[57] *United States v Wade*, 388 US 218, 227; 87 S Ct 1926; 18 L Ed 2d 1149 (1967). See also *Rothgery v Gillespie Co, Texas*, ___US ___, ___; 128 S Ct 2578, 2592; 171 L Ed 2d 366, 383 (2008) ("[A] criminal defendant's initial appearance before a judicial officer, where he learns the

(continued…)

D. The Duncan Plaintiffs' Claims and the Requested Relief

Neither the United States Supreme Court nor the Michigan Supreme Court has addressed the threshold question of how courts should approach a Sixth Amendment right to the effective assistance of counsel claim for declaratory and prospective injunctive relief concerning claimed *preconviction* systemic injuries resulting from the representation that indigent criminal defendants are receiving, or would receive, from their court-appointed attorneys. The United States Supreme Court in *Gideon* and *Strickland* was concerned with results, not process. It did not presume to tell the states *how* to assure that indigent criminal defendants receive effective assistance of counsel.

But that is exactly what the indigent criminal defendants who are the plaintiffs in this case seek to have the judiciary do. In their complaint, the Duncan plaintiffs asserted that under *Gideon* and the Michigan Constitution the named defendants, the state of Michigan and the Governor, have a duty to ensure that indigent defense counsel have the tools necessary to mount a proper defense and to ensure that indigent defendants are not deprived of their right to constitutionally adequate representation. The Duncan plaintiffs further asserted that the defendants "have done essentially nothing to address the problems [of the current system of county responsibility for providing counsel to indigent criminal defendants] or their constitutional obligations."

Notably, at the time of the complaint, appointed attorneys represented each of the Duncan plaintiffs and criminal charges were pending. As the state and the Governor point out, at the time of the complaint none of the Duncan plaintiffs had gone to trial or otherwise had their cases adjudicated. Further, the state and the Governor assert that at the time of the complaint, none of the Duncan plaintiffs had attempted to have their assigned attorneys replaced. Finally, according to the state and the Governor, since the filing of the complaint, seven of the eight Duncan plaintiffs have been sentenced. (The record is silent regarding whether any of these individuals have made postconviction claims of ineffective assistance of counsel.)

Despite the fact that none of the Duncan plaintiffs had been convicted of anything at the time they filed their complaint, in their prayer for relief, as the majority notes, the Duncan plaintiffs sought a court declaration that the defendants' conduct, failure to act, and practices are unconstitutional and unlawful and sought to enjoin the defendants from subjecting class members to continuing unconstitutional practices.[58] As the majority states, the Duncan plaintiffs requested an order requiring the defendants "'to provide indigent defense programs and representation consistent with the requirements of the United States and Michigan Constitutions.'"[59]

(…continued)

charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.").

[58] *Ante* at 4.

[59] *Ante* at 4.

In essence, then, the Duncan plaintiffs sought in their complaint to have the judiciary override the Michigan system of local control and funding of legal services for indigent criminal defendants. Clearly, if the judiciary orders the state and the Governor to provide for "indigent defense programs and representation," then the provisions of the indigent criminal defense act will, for all intents and purposes, become a dead letter. Without even the predicate of finding the indigent criminal defense act unconstitutional under *Gideon* and *Strickland*, the judiciary will, if it grants the relief that the Duncan plaintiffs sought in their complaint, inevitably superimpose a statewide and state-funded system for legal services to indigent criminal defendants upon the provisions of that statute. And the people of the state of Michigan will, of course, be called upon the fund such a statewide system.

Of necessity, the judiciary will therefore have substituted its view of proper public policy for that of the Legislature in enacting and amending the indigent criminal defense act. While the majority consistently refuses to directly address the issue of the relief that the Duncan plaintiffs sought in this case,[60] in my view this issue cannot be ignored, and I will return to it again later in this opinion.

II. *Claims* Upon Which *Relief* Can be Granted

A. Overview

On appeal, the state and the Governor defend against the Duncan plaintiffs' claims on a number of grounds, including three that are closely related. First, they assert that the Duncan plaintiffs do not have *standing.* Second, they assert that the Duncan plaintiffs' claims are not *ripe for adjudication* because these claims are too remote and abstract to warrant the issuance of declaratory and injunctive relief. Third, and more generally, they assert that the Duncan plaintiffs fail to state a claim on which relief can be granted because *declaratory judgment and injunctive relief* are inappropriate in this matter. The trial court rejected the standing and ripeness arguments of the state and the Governor, finding that the Duncan plaintiffs did not first have to be convicted or have a request for new counsel denied for standing and ripeness purposes. With respect to *Strickland* and its standards for assessing ineffective performance of counsel, the trial court made the following statement:

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[60] See, for example, *ante* at 2 ("We affirm, holding that . . . the trial court has jurisdiction and authority to order declaratory relief, prohibitory injunctive relief, *and some level of mandatory injunctive relief, the full extent of which we need not presently define*."); *ante* at 17 ("We can only speculate at this time regarding the measures ultimately needed to be taken in order to come into compliance with the state and federal constitutions, assuming plaintiffs establish their case. Only when all other possibilities are exhausted and explored, as already discussed, does there arise issues regarding appropriations and legislation, the separation of powers, and the full extent of court jurisdiction and authority. *Therefore, we find no need at this time for this Court to conclusively address the questions posed*."); *ante* at 19 ("In sum, we reiterate that *we decline at this time to define the full extent of the trial court's equitable authority and jurisdiction* beyond that recognized and accepted earlier in this opinion.") (emphasis added).

> 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 plaintiff's [sic] 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.

Here, the trial court was wrestling with a conceptual problem that plagues this case and others like it throughout the country. Rather obviously, this case differs from *Strickland* in two important respects. First, it is an appeal involving a civil case, not a criminal one, as was the case in *Strickland.* Second, *Strickland* involved a *post*-conviction appeal, while the Duncan plaintiffs filed their complaint in this matter *pre*-conviction. The trial court here dealt with this problem by indicating that it was not clear whether *Strickland* applied but, in any event, it did not believe it would have to go into the circumstances of each particular case.

In my view, without explicitly saying so, the trial court here was making a determination that the Duncan plaintiffs' allegations were sufficient to warrant a *presumption* of prejudice. Under such circumstances, according to *Strickland* and its progeny, prejudice is so likely that case-by-case inquiry is not worth the cost.[61]

Rather neatly, then, the trial court's approach avoids the conceptually impossible process in a preconviction case of assessing the performance of the indigent criminal defendant's counsel when, for the most part, that performance has yet to occur. And making something like a finding of prejudice per se and thereby forgoing a case-by-case inquiry would mean, in this case, that if the Duncan plaintiffs could substantiate their claims, then the sweeping declaratory and injunctive relief that they seek would be appropriate under the circumstances.

Thus, the trial court, if somewhat elliptically, but in essence, first found that the Duncan plaintiffs' *claims* were sufficient to create a presumption of prejudice. Then it found that those claims, if proved, would warrant both declaratory and injunctive *relief.* Of course, these are the exact elements with which MCR 2.116(C)(8) deals. That court rule succinctly states that a trial court may grant summary disposition if, "[t]he opposing party has failed to state a *claim* on which *relief* can be granted." [62]

On appeal here, the majority cites[63] the patron saint of constitutional interpretation, Chief Justice John Marshall, writing for the Court in *Marbury v Madison.*[64] But Chief Justice Marshall

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[61] *Strickland, supra* at 692.

[62] Emphasis added.

[63] *Ante* at 50-52.

[64] *Marbury v Madison*, 5 US (1 Cranch) 137; 2 L Ed 60 (1803).

never conceived of the idea of a mandatory injunction to compel legislative appropriation of funds. *Marbury v Madison* involved the constitutionality of executive branch *action*. Here, under the approach the Duncan plaintiffs assert and the majority implicitly accepts, the challenge is to legislative and executive branch *inaction*, through the alleged failure to properly fund and administer the system for providing legal services to indigent criminal defendants.

So, within what framework are we to analyze the Duncan plaintiffs' challenge? My basic premise is that we must first determine whether the Duncan plaintiffs' *claims* amount to a violation per se of the Sixth Amendment right to counsel. If so, we must then determine whether the judiciary can grant the *relief* they seek within existing standards for declaratory and injunctive relief. And we must make these determinations with a proper regard for the basic concept of separation of powers.

B. Standard of Review Under MCR 2.116(C)(8)

Under MCR 2.116(C)(8), the legal basis of the complaint is tested by the pleadings alone.[65] All factual allegations are taken as true and any reasonable inferences or conclusions that can be drawn from the acts are construed in the light most favorable to the nonmoving party.[66] The motion should be denied unless the claims are so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recover.[67] This Court reviews de novo a trial court's ruling on a motion for summary disposition.[68] This Court also reviews de novo constitutional issues such as standing and ripeness.[69]

Accordingly, under the standard of review for a motion under MCR 2.116(C)(8), this Court must take all the Duncan plaintiffs' allegations as true and this Court must construe any reasonable inferences and conclusions that this Court can draw from the acts in a light most favorable to the Duncan plaintiffs. The state, however, in something of an understatement, has conceded both at the trial level and the appellate level that the public defense systems in Michigan can be "improved." Therefore, as required, I accept the Duncan plaintiffs' allegations as true. The question, again, is twofold: did the Duncan plaintiffs assert justiciable *claims* and, if so, are they claims upon which *relief* can be granted? These inquiries, of necessity, require a consideration of standing, ripeness, and the appropriateness of declaratory and injunctive relief.

C. Standing

To have standing, a plaintiff must first have suffered an injury in fact, which is an invasion of a legally protected interest that is concrete and particularized, and actual or

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[65] *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999)..

[66] *Id*. at 119.

[67] *Id*.

[68] *Id*. at 118.

[69] *Michigan Chiropractic Council v Comm'r of the Office of Financial and Ins Services*, 475 Mich 363, 369; 716 NW2d 561 (2006).

imminent, rather than conjectural or hypothetical.[70] Second, there must be a causal connection between the injury and the complained of conduct.[71] And third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[72]

D. Ripeness

> The doctrine of ripeness is closely related to the doctrine of standing, as both justiciability doctrines assess pending claims for the presence of an actual or imminent injury in fact. However, standing and ripeness address different underlying concerns. The doctrine of standing is designed to determine whether a particular party may properly litigate the asserted claim for relief. The doctrine of ripeness, on the other hand, does not focus on the suitability of the party; rather, ripeness focuses on the *timing* of the action.[73]

A claim is not ripe, and there is no justiciable controversy, if "'the harm asserted has [not] matured sufficiently to warrant judicial intervention,'" for instance, where the claim rests on contingent future events that may not occur.[74] A constitutional issue is not ripe for adjudication unless and until there is an encroachment upon a constitutional right.[75]

E. MCR 2.605

By requiring that there be "a case of actual controversy" and that a party seeking a declaratory judgment be an "interested party," MCR 2.605, the court rule addressing declaratory judgments, incorporates traditional restrictions on justiciability, such as standing, ripeness, and mootness.[76] "The existence of an actual controversy is a condition precedent to invocation of declaratory relief and this requirement prevents a court from deciding hypothetical issues."[77]

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[70] *Lee v Macomb Co Bd of Comm'rs*, 464 Mich 726, 739; 629 NW2d 900 (2001).

[71] *Id*.

[72] *Id*.

[73] *Michigan Chiropractic Council*, *supra* at 378-379 (emphasis in original).

[74] *Id*. at 371 n 14, 381, quoting *Warth v Seldin*, 422 US 490, 499 n 10; 95 S Ct 2197; 45 L Ed 2d 343 (1975).

[75] *Straus v Governor*, 459 Mich 526, 544; 592 NW2d 53 (1999).

[76] *Associated Builders & Contractors v Dep't of Consumer & Industry Services Director*, 472 Mich 117, 125; 693 NW2d 374 (2005); *Moses, Inc v Southeast Michigan Council of Governments*, 270 Mich App 401, 416; 716 NW2d 278 (2006).

[77] *Huntington Woods v Detroit*, 279 Mich App 603, 616; 761 NW2d 127 (2008) (quotation marks and citation omitted).

F. Injunctive Relief

"Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury."[78] It is a longstanding principle that "'a particularized showing of irreparable harm . . . is . . . an indispensable requirement to obtain a preliminary injunction.'"[79] "The mere apprehension of future injury or damage cannot be the basis for injunctive relief."[80]

G. The Duncan Plaintiffs' *Claims*

(1) Standing and Ripeness

The majority discusses standing principles to some extent.[81] And toward the end of its opinion it holds, "[O]n the basis of the pleadings and at this juncture in the lawsuit, plaintiffs have sufficiently alleged facts that, if true, establish standing . . . ."[82] In the body of its opinion and apparently in support of this and other determinations relating to justiciability, the majority engages in an extended discussion[83] of *Lewis v Casey*.[84] Ironically, *Lewis* was a case in which the United States Supreme Court found that the prison inmate plaintiffs *lacked* standing, although it did so not in the context of the federal counterpart to a MCR 2.116(C)(8) (failure to state a claim upon which relief can be granted) motion, but rather in the context of a MCR 2.116(C)(10) (no genuine issue of material fact and the moving party is entitled to judgment as a matter of law) motion.[85] In the course of its discussion, the majority makes the following statement:

> By analogy, here criminal defendants do not sustain harm, for purposes of justiciability analysis and the constitutional right to the effective assistance of counsel, simply because of their status as indigent defendants with court-appointed counsel subject to prosecutorial proceedings in a system with presumed existing deficiencies. *There needs to be an instance of deficient performance or inadequate representation, i.e., "representation [falling] below an objective*

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[78] *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008) (quotation marks and citations omitted).

[79] *Id*. at 9, quoting *Michigan Coalition of State Employees Unions v Civil Service Comm*, 465 Mich 212, 225-226; 634 NW2d 692 (2001).

[80] *Pontiac Fire Fighters*, *supra* at 9.

[81] *Ante* at 24.

[82] *Ante*. at 45.

[83] *Ante*. at 25-29.

[84] *Lewis v Casey*, 518 US 343; 116 S Ct 2174; 135 L Ed 2d 606 (1996).

[85] *Lewis*, *supra* at 357-358.

> *standard of reasonableness." Strickland*, *supra* at 688; [*People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000)].[86]

Here, the majority appears to accept the proposition that *Strickland* applies in this matter, at least to an extent that there must be "an instance of deficient performance or inadequate representation." Elsewhere it its opinion, the majority elaborates on this concept:

> We hold that, in the context of this class action civil suit seeking *prospective relief* for alleged widespread constitutional violations, injury or harm is shown when court-appointed counsel's representation *falls below an objective standard of reasonableness (deficient performance)* and *results in an unreliable verdict or unfair trial*, when a criminal defendant is *actually or constructively denied the assistance of counsel altogether at a critical stage in the proceedings*, or when *counsel's performance is deficient under circumstances in which prejudice would be presumed in a typical criminal case*. We further hold that injury or harm is shown when court-appointed counsel's performance or representation is *deficient relative to a critical stage in the proceedings and, absent a showing that if affected the reliability of a verdict, the deficient performance results in a detriment to a criminal defendant that is relevant or meaningful in some fashion, e.g., unwarranted pretrial detention*. Finally, we hold that, when it is shown that court-appointed counsel's representation falls below an *objective standard of reasonableness with respect to a critical stage in the proceedings, there has been an invasion of a legally protected interest and harm occurs*. Plaintiffs must *additionally* show that instances of *deficient performance* and denial of counsel are *widespread and systemic* and that they are caused by weaknesses and problems in the court-appointed, indigent defense systems employed by the three counties, which are attributable to and ultimately caused by defendants' constitutional failures."[87]

This paragraph is more than a little impenetrable but, breaking it down, there are several remarkable things about it. First, it is clearly a *Strickland* analysis in its reference to both deficient performance and prejudice:[88] these are the two prongs that *Strickland* articulates. I grant that the majority, in this passage, does not explicitly refer to *Strickland*. And elsewhere in the opinion, the majority either completely or partially disavows the applicability of *Strickland*.[89]

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[86] *Ante* at 26-27 (emphasis added).

[87] *Ante* at 30 (emphasis added).

[88] See *ante* at 41 ("[The Duncan p]laintiffs do allege that wrongful convictions have occurred, which suggests satisfaction of the *Strickland* prejudice requirement typically applicable in criminal appeals.").

[89] See *ante* at 8 ("In our justiciability analysis, we will also explore the circumstances in which the prejudice prong of the *Strickland* test is inapplicable."); *ante* at 31 ("We reject the argument that the need to show that this case is justiciable necessarily and solely equates to showing

(continued…)

But even when viewed in the most forgiving light, there is no discernable difference between the majority's formulation, requiring a showing of "representation [that] falls below an objective standard of reasonableness," and the *Strickland* standard, requiring a showing that counsel's performance was "deficient[;]" that is, that counsel made errors "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[,]"[90] particularly when "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[91] Nor is there any discernable difference between the majority's formulation of a showing of "a detriment to a criminal that is relevant and meaningful in some fashion," and the *Strickland* standard, which requires a showing that the deficient performance prejudiced the defense; that is, that counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."[92] Much as the majority may disavow it elsewhere, in its central holding it is applying a *Strickland* analysis. Simply using different words, with essentially the same meaning, does not change the structure underlying the analysis.

But the majority's analysis is *Strickland* with a twist. Even though its entire analysis of justiciability relates to the Duncan plaintiffs' *claims*, the majority takes *Strickland* and applies it to those things that the Duncan plaintiffs must show *at a proceeding on the merits*, presumably before the trial court. Thus, the majority artfully avoids articulating a standard, whether it be *Strickland* or otherwise, by which this Court can evaluate the Duncan plaintiffs' *claims* in this case. Rather, it simply finds that, "the allegations in [the Duncan] plaintiffs' complaint are sufficient to establish the existence of a genuine case or controversy between the parties, reflecting a dispute that is real, not hypothetical."[93] This, apparently, is a reference to the requirement that to have standing, a plaintiff must have suffered an injury in fact, which is an invasion of a legally protected interest that is concrete and particularized, and actual or imminent, rather than conjectural or hypothetical.[94]

(…continued)

widespread instances of deficient performance accompanied by resulting prejudice in the form of an unreliable verdict that compromises the right to a fair trial."); *ante* 32 ("Applying the two-part test from *Strickland* here as an absolute requirement defies logic, where the allegations concern widespread, systemic instances of constitutionally inadequate representation, and where the requested remedy in the form of prospective relief seeks to curb and halt continuing acts of deficient performance."); *ante* 34 ("Our conclusion that the two-part test in *Strickland* should not control this litigation is generally consistent with caselaw from other jurisdictions addressing comparable suits.").

[90] *Strickland*, *supra* at 687.

[91] *Id*. at 688.

[92] *Id*. at 687.

[93] *Ante* at 31.

[94] *Lee*, *supra* at 739.

The majority does outline the Duncan plaintiffs' claims,[95] and I contend that any fair and objective review of these claims requires the conclusion that the vast majority of those that involve a concrete, particularized interest can, and should, be resolved in *post-* rather than *pre-*conviction proceedings. For these claims to be resolved *pre-* conviction requires at least four basic assumptions:

- That the Duncan plaintiffs, and the class members they purport to represent, will in fact be convicted of the crimes with which they are charged or of some lesser offense;

- That inactions of the state and the Governor will have caused such convictions; that is, these inactions will have so prejudiced the defense that the Duncan plaintiffs and the class they purport to represent will have been denied their Sixth Amendment right to a fair trial;

- That the trial courts in the three named counties will be unable or unwilling to correct such results by ordering new trials on the basis of a finding of deficient performance and prejudice to the individual defendants; and

- That it is likely that if the Duncan plaintiffs are granted the preconviction declaratory and injunctive relief they seek, this will redress the situation for them and for the class they purport to represent.

The majority is obviously willing to make each of these assumptions, *preconviction*, in order to find a justiciable controversy in this case. I am not. Clearly, these assumptions are conjectural and hypothetical in nature. The Duncan plaintiffs' claims do not, and cannot, show that the inactions of the state and the Governor have caused or will cause a denial of their Sixth Amendment rights. They have not, and cannot, make a showing that the trial courts in the named counties are unwilling or unable to act upon postconviction claims of ineffective assistance of counsel. And, while the relief that the Duncan plaintiffs seek would certainly change, and perhaps even improve, the current system of providing legal services to indigent criminal defendants, they have not, and cannot, show that such relief, even if it were to be granted in its entirety, will bring that system to the level of constitutional adequacy that they deem necessary.

Equally clearly, there is no binding precedent that guarantees an indigent defendant a particular attorney, an attorney of a particular level of skill, or that a predetermined amount of outside resources be available to an attorney. Likewise, there is no Sixth Amendment right to a meaningful relationship with counsel.[96] Absent certain blatant instances amounting to the denial of counsel, appointed counsel is presumed competent unless a defendant can meet his or her burden to demonstrate a constitutional violation.[97]

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[95] *Ante* at 3-4.

[96] *Morris v Slappy*, 461 US 1, 13; 103 S Ct 1610; 75 L Ed 2d 610 (1983).

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

In this regard, I note that "[c]laims of ineffective assistance are generally to be resolved through an inquiry into the fairness of a particular prosecution, and not by per se rulemaking."[98] But in effect that is what the majority grants in this matter: a holding per se that, standing alone, the Duncan plaintiffs' claims—despite their conjectural and hypothetical nature, despite their lack of a showing of causation, despite their failure to show that a favorable decision will redress the situation they describe—are sufficient to establish standing and, therefore, justiciability. By contrast, I would find that the Duncan plaintiffs, because of the peculiar preconviction posture of this case, lack standing.

The majority takes much the same approach to the question of ripeness. After some discussion of the principles of ripeness,[99] toward the end of its opinion the majority holds that, "on the basis of the pleadings and at this juncture in the lawsuit, plaintiffs have sufficiently alleged facts that, if true, . . . establish that the case is ripe for adjudication . . . ."[100]

Again, the underlying premises for such a holding, of necessity, are that the Duncan plaintiffs will be convicted; that the inactions of the state and the Governor will have caused such convictions; that the trial courts in the affected counties will be unable or unwilling to correct such results by ordering new trials on the basis of a finding of deficient performance and prejudice to the individual defendants; and that it is likely that granting the Duncan plaintiffs the preconviction declaratory and injunctive relief they seek will redress the situation for them and for the class they purport to represent.

While each of these premises is important, the one concerning causation is critical. The majority states that throughout its opinion it has indicated that the Duncan plaintiffs will have to establish a "causal connection between the deficient performance and the indigent defense systems being employed."[101] That is simply not the causal connection that is relevant in this case. The Duncan plaintiffs have sued the state and the Governor. Therefore, the relevant causal connection must be between the alleged inaction of the state and the Governor and the alleged deficient performance at the local level.

Now, as if repeating a mantra, the Duncan plaintiffs repeatedly aver that there is such a causal connection.[102] But there is not a single fact that they allege in their complaint that

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[98] *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F2d 637, 647 (CA 4, 1988).

[99] *Ante* at 24.

[100] *Ante* at 45.

[101] *Ante* at 30 n 13.

[102] See, for example, Complaint, ¶ 11 ("This Complaint focuses on how the Defendants' failures to provide funding and fiscal and administrative oversight have *created* a broken indigent defense system in Berrien, Genesee, and Muskegon Counties . . . . Defendants' failure to provide funding or oversight to any of the State's counties have *caused* similar problems throughout the State.") (emphasis added); Complaint, ¶ 28 ("As a *result* of Defendants' failures, [plaintiff Billy Joe Burr's] attorney is unable to put the prosecution's case to the crucible of meaningful adversarial testing.") (emphasis added); see also similar generalized allegations in

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supports their generalized assertions that the alleged inaction of the state and the Governor has *caused* the deficient performance that the Duncan plaintiffs outline. Moreover, simply repeating the same words again and again does not change their character.

Undoubtedly, the complaint alleges causation. But it does not allege the *necessary* causation. Unsupported generalized allegations are just that, unsupported and generalized. With all due respect to the Duncan plaintiffs and the majority, there is no way it can possibly be proven that the failure of the state and the Governor to do an undefined something specifically *caused* the deficiencies they allege. Intuitively, one might guess that the something is correlated with the alleged deficiencies, even though that something remains undefined beyond mere generalized assertions of inaction. But correlation is not causation, and a hunch is not a basis upon which a court can grant declaratory or injunctive relief.

Indeed, in this regard, the recent opinion of the United States Supreme Court in *Ashcroft v Iqbal*[103] has considerable applicability. That case involved a *Bivens*[104] action that Javaid Iqbal, a Pakistani Muslim arrested on criminal charges and detained by federal officials following the September 11, 2001, terrorist attacks, brought against former United States Attorney General John Ashcroft and Federal Bureau of Investigation Director Robert Mueller.[105] In *Ashcroft*, the majority of the Court held that, under the federal rules of pleading, "the tenet that a court must

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Complaint, ¶¶ 35, 44, 51, 56, 63, and 67; Complaint, ¶ 99 ("As a direct *result* of Defendants' failure to ensure that indigent defense providers have the tools necessary to provide constitutionally adequate indigent defense in the three Counties, indigent defense services in the Counties, and elsewhere in the State, are operated at the lowest cost possible and without regard to the constitutional adequacy of the services provided.") (emphasis added); see also similar generalized allegations in Complaint, ¶¶ 103, 104, 109, 113, 118, 120, 123, 125, 126, 130, and 141; Complaint, ¶ 156 ("As set forth herein, Defendant Granholm *fails* to provide funding and oversight to the County programs, and therefore *does nothing* to ensure that the State provides the necessary tools to indigent defense counsel in the Counties.") (emphasis added); Complaint, ¶ 157 ("*As a result* of Defendant's [the Governor's] *failures* to provide funding and exercise guidance, Michigan's indigent defense system is under funded, poorly administered, and does not provide mandated constitutional protections.") (emphasis added); Complaint, ¶ 160 ("Defendant's [the Governor's] *failure* to provide the funding and to exercise the oversight necessary for constitutionally adequate indigent defense during trial court felony criminal proceedings violates Plaintiffs' rights under the Sixth Amendment to the United States Constitution, including, but not limited to, their right to effect assistance of counsel.") (emphasis added); see also similar generalized allegations in Complaint, ¶¶ 163, 164, 167, 170, 171, 174, 177, 178, and 181.

[103] *Ashcroft v Iqbal*, ___ US ___; 129 S Ct 1937; 173 L Ed 2d 868 (2009).

[104] See *Bivens v Six Unknown Named Agents of Fed Bureau of Narcotics*, 403 US 388; 91 S Ct 1999; 29 L Ed 2d 619 (1971), in which the United States Supreme Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." *Correctional Services Corp v Malesko*, 534 US 61, 66; 122 S Ct 515; 151 L Ed 2d 456 (2001).

[105] *Ashcroft*, ___ US at ___; 129 S Ct at 1942; 173 L Ed 2d at 876.

accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."[106] The majority also held that "only a complaint that states a *plausible* claim for relief survives a motion to dismiss."[107]

Admittedly, *Ashcroft* is different from this case in a number of significant respects. First, the aspect of Iqbal's complaint that the United States Supreme Court reviewed was his claim for damages, not declaratory or injunctive relief. Second, there is no precise analog in the Michigan Court Rules to FR Civ P 8(a)(2), which requires that a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief[.]"[108] Thirdly, the decision in *Ashcroft* was supported only by a bare majority of the Court.

Nevertheless, it is instructive to consider the element of causation within the framework of the *Ashcroft* analysis. Consider the allegation in ¶ 160 of the Complaint that "[d]efendant's failure to provide the funding and to exercise the oversight necessary for constitutionally adequate indigent defense during trial court felony criminal proceedings violates Plaintiffs' rights under the Sixth Amendment to the United States Constitution, including, but not limited to, their right to effective assistance of counsel." Rather obviously, this is a legal conclusion wrapped within a factual allegation. As such, under *Ashcroft*, the requirement that a court must accept this allegation as true would be inapplicable.[109] This is not to say that the assertion of causation is fanciful. Rather, "[i]t is the conclusory nature of [the] allegations . . . that disentitles them to the presumption of truth."[110]

And, secondly, if such allegations regarding causation were not entitled to the presumption of truth, then, under *Ashcroft*, we would examine them for plausibility. And it is here that the Duncan plaintiffs run into an absolute dead end. They cannot plausibly assert that the alleged failures by the state and the Governor have *caused* the alleged deficient performance at the local level for the simple reason, among others, that there is no way they can possibly *prove* such causation. It is conceivable that increased oversight and funding at the state level might improve the current system for providing legal services to indigent criminal defendants. But then again, it is equally conceivable that it might not. And just as I can conjure up no way by which the Duncan plaintiffs can prove their assertion that *inaction* by the state and the Governor has caused the current situation, neither can I conceive of a way by which these

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[106] *Id.*, ___ US at ___; 129 S Ct at 1949; 173 L Ed 2d at 884.

[107] *Id.*, ___ US at ___; 129 S Ct at 1950; 173 L Ed 2d at 884. (emphasis added).

[108] But see MCR 2.111(A)(1), which requires that a pleading must be "clear, concise, and direct"; MCR 2.111(B)(1), which requires a "statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend"; and MCR 2.111(B)(2), which requires "[a] demand for judgment for the relief that the pleaders seeks" and that the "pleading must include allegations that show that the claim is within the jurisdiction of the court."

[109] *Ashcroft*, ___ US at ___; 129 S Ct at 1949; 173 L Ed 2d at 884.

[110] *Id.*, ___ US at ___; 129 S Ct at 1951; 173 L Ed 2d at 886.

defendants can *disprove* that assertion. Thus, we are left with legal conclusions that do not carry the presumption of truth and that are incapable of being proved or disproved. As in *Ashcroft*, there is nothing that nudges the Duncan plaintiffs' complaint "'across the line from conceivable to plausible.'"[111]

In addition, all the allegations regarding causation in the Duncan plaintiffs' complaint are contingent on future events that may not occur.[112] And, given their contingent nature, I contend that the harm asserted has not matured sufficiently to warrant judicial intervention.[113] I would therefore find that the Duncan plaintiffs' claims are not ripe for adjudication.

(2) The *Luckey* Cases

The majority, in its justiciability discussion, refers to and relies on one of a series of cases familiarly known as the *Luckey* cases.[114] In *Luckey v Harris*,[115] the plaintiffs, preconviction indigent defendants, alleged deficiencies in the Georgia indigent defense system and sought an order requiring the state defendants to meet minimum constitutional standards in the provision of criminal defense services. As the state notes, but the majority fails to recognize, the underlying controversy in *Luckey* actually spawned five different appellate opinions.

In *Luckey I*, the plaintiffs' claimed deficiencies that included inadequate resources, delays in the appointment of counsel, pressure on attorneys to hurry their clients to trial or to enter a guilty plea, and inadequate supervision.[116] The district court dismissed the suit, stating that the plaintiffs were inappropriately seeking an across-the-board ruling that the Georgia criminal defense scheme systematically denied or would inevitably deny effective assistance of counsel to the indigent accused, and holding that the plaintiffs' allegations were insufficient to meet the *Strickland* standard.[117]

But the United States Court of Appeals for the Eleventh Circuit reversed, holding that the plaintiffs' pretrial Sixth Amendment claims did state claims upon which systematic prospective relief could be granted.[118] According to the Eleventh Circuit, the *Strickland* standard was inapplicable to a civil suit seeking prospective relief, observing that "[p]rospective relief is designed to avoid future harm," and concluding that such relief "can protect constitutional rights,

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[111] *Id.*, ___ US at ___; 129 S Ct at 1951; 173 L Ed 2d at 885, quoting *Bell Atlantic Corp v Twombly*, 550 US 544, 570; 127 S Ct 1955; 167 L Ed 2d 929 (2007).

[112] *Michigan Chiropractic Council*, *supra* at 371 n 14, 381.

[113] *Id*.

[114] *Ante* at 35-36.

[115] *Luckey v Harris*, 860 F2d 1012, 1013 (CA 11, 1988 (*Luckey I*).

[116] *Luckey I*, *supra*.

[117] *Id*. at 1016.

[118] *Id*. at 1017-1018.

even if the violation of these rights would not affect the outcome of a trial."[119] The Eleventh Circuit stated that plaintiffs bringing such prospective claims satisfy their pleading burden when they show "'the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.'"[120] The Eleventh Circuit concluded that "the sixth amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the 'ineffectiveness' standard may nonetheless violate a defendant's rights under the sixth amendment."[121]

It is upon this holding that the majority here relies, stating that the opinion of the Eleventh Circuit in *Luckey I* "mirror[s] our thoughts."[122]

However, in the denial of the defendants' petition for rehearing en banc, several judges dissented.[123] According to the dissent, the original *Luckey I* panel's view of the Sixth Amendment was completely inconsistent with the language and rationale of *Strickland*.[124] Quoting *Strickland* and *Cronic*,[125] the dissent in *Luckey II* explained:

> The sixth amendment is inextricably bound up with the fairness of a defendant's trial: "The right to the effective assistance of counsel is recognized *not for its own sake*, but because of the effect it has on the ability of the accused to receive a *fair trial*." "The Sixth Amendment[']s purpose] is not to improve the quality of legal representation . . . ." "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, *any deficiencies* in counsel's performance *must be prejudicial* to the defense in order *to constitute ineffective assistance* under the Constitution." Thus, the sixth amendment right to counsel is not an abstract right to a particular level of representation; it is the right to the representation necessary for a fair trial. There can be no sixth amendment violation in the absence of prejudice at a particular trial. Put differently, if there is no prejudice, the alleged sixth amendment violation is not merely harmless; there is no violation at all.
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> Because prejudice is an essential element of any sixth amendment violation, sixth amendment claims cannot be adjudicated apart from the

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[119] *Id*. at 1017.

[120] *Id*., quoting *O'Shea v Littleton*, 414 US 488, 502; 94 S Ct 669; 38 L Ed 2d 674 (1974).

[121] *Luckey I*, *supra* at 1017.

[122] *Ante* at 35.

[123] *Luckey v Harris*, 896 F2d 479 (CA 11, 1989) (*Luckey II*).

[124] *Id*. at 480.

[125] *United States v Cronic*, *supra*.

> circumstances of a particular case. Put differently, no claim for relief can be stated in general terms as was attempted here.[126]

On remand from the decision in *Luckey II*, the federal district court determined that, but for its belief that the law of the case bound the court, abstention would be appropriate.[127] (Under the abstention doctrine, "courts of equity should not act, and particularly should not act to restrain a criminal prosecution, when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."[128] Abstention from interference in state criminal proceedings serves the vital consideration of comity between the state and national governments.[129]) The district court certified the question for appellate review and in *Luckey III*,[130] the Eleventh Circuit granted the defendants' petition for permission to appeal. In *Luckey IV*,[131] the Eleventh Circuit held that the law of the case did not preclude the district court on remand from dismissing the complaint on the basis of the abstention doctrine. Finally, in *Luckey V*,[132] the Eleventh Circuit affirmed the district court's order, which granted dismissal on abstention grounds and cited with approval the dissent in *Luckey II*. In dismissing the case on abstention grounds, the district court stated that, "plaintiff's [sic] intend to restrain every indigent prosecution and contest every indigent conviction until the systematic improvements they seek are in place."[133]

The majority basically ignores the dissent in *Luckey II*. But I find that dissent to be both persuasive and applicable here. As in *Luckey*, absent a showing here that their attorneys' claimed deficiencies prejudicially affected their right to receive a fair trial as opposed to merely claiming violation of an abstract right to a particular level of representation, the Duncan plaintiffs cannot show that the state has violated their Sixth Amendment right to a fair trial.[134] In my view and using the language of *Luckey II*, there can be no Sixth Amendment violation in the absence of prejudice at a particular trial. And because prejudice is an essential element of any Sixth Amendment violation, Sixth Amendment claims cannot be adjudicated apart from the circumstances of a particular case. In a nutshell, the Duncan plaintiffs have not stated justiciable claims and neither the trial court nor this Court can appropriately make a finding of prejudice per se. For this reason, as I elaborated earlier in this opinion, the Duncan plaintiffs' Sixth Amendment claims should fail because they are not justiciable as a matter of law.

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[126] *Luckey II*, *supra* at 480 (citations omitted; emphasis added by *Luckey II*).

[127] See *Harris v Luckey*, 918 F2d 888, 891 (CA 11, 1990) (*Luckey III*).

[128] *Younger v Harris*, 401 US 37, 43-44; 91 S Ct 746; 27 L Ed 2d 669 (1971); see 28 USC 2283.

[129] *Younger*, *supra* at 44.

[130] *Luckey III*, *supra* at 894.

[131] *Luckey v Miller*, 929 F2d 618, 622 (CA 11, 1991) (*Luckey IV*).

[132] *Luckey v Miller*, 976 F2d 673, 678-679 (CA 11, 1992) (*Luckey V*).

[133] *Id*. at 677.

[134] See *Luckey II*, *supra* at 480 (Edmondson, J., dissenting).

H. The *Relief* that the Duncan Plaintiffs Seek

As I have already noted, the Duncan plaintiffs' complaint sought extensive declaratory and injunctive relief in this case. But, again as I have noted, the majority ostensibly declines throughout its opinion to address the issue of that relief. Rather, the majority holds that "on the basis of the pleadings and at this juncture in the lawsuit, plaintiffs have sufficiently alleged facts that, if true, . . . establish that the case . . . state[s] clams upon which declaratory and injunctive relief can be awarded."[135] Beyond that, the majority simply leaves it—perhaps a better phraseology would be, issues an open invitation—to the trial court to "determine the parameters of what constitutes 'widespread', 'systematic', or 'pervasive' constitutional violations or harm [actual or imminent][.]"[136]

This is not to say, however, that the majority does not give some very overt indications of the type of relief that might be appropriate. Early in its opinion, noting that the Duncan plaintiffs seek prohibitory injunctive relief, the majority observes, "Such a remedy could potentially entail a cessation of criminal prosecutions against indigent defendants absent constitutional compliance with the right to counsel."[137] Having dropped this bombshell, the majority later states:

> We acknowledge that [the Duncan] plaintiffs allege that the systemic constitutional deficiencies have been caused by inadequate state funding and the lack of fiscal and administrative oversight. We further recognize that, should plaintiffs prevail, funding and legislation would seemingly appear to be the measures needed to be taken to correct constitutional violations. However, we are not prepared to rule on the issue whether the trial court has the authority to order appropriations, legislation, or comparable steps. It is unnecessary to do so at this juncture in the proceedings.[138]

But the majority then begins to disclaim its disclaimers. It states:

> We can only speculate at this time regarding the measures ultimately needed to be taken in order to come into compliance with the state and federal constitutions, assuming [the Duncan] plaintiffs establish their case. Only when all other possibilities are exhausted and explored, as already discussed, does there arise issues regarding appropriations and legislation, the separation of powers, and the full extent of court jurisdiction and authority. Therefore, we find no need at this time for this Court to conclusively address the questions posed. *That being said, we wish to make clear that nothing in this opinion should be read as*

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[135] *Ante* at 2.

[136] *Ante* at 31.

[137] *Ante* at 13.

[138] *Ante* at 16.

> *foreclosing entry of an order granting the type of relief so vigorously challenged by defendants*.[139]

The majority then elaborates. First, in the context of federal law and an action under 42 USC 1983, it observes[140] that under *Edelman v Jordan*:

> But the fiscal consequences to state treasuries in these cases [in which officials were enjoined from under circumstances that might lead to impacts on such state treasuries] the necessary result of compliance with decrees which by their terms were prospective in nature. State officials, in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*, *supra*.[141]

And, as if that were not sufficient, the majority goes on to discuss *46th Circuit Trial Court v Crawford Co*[142] and concludes:

> If indeed there exist systemic constitutional deficiencies in regard to the right to counsel and the right to the effective assistance of counsel, it is certainly arguable that *46th Circuit Trial Court* lends authority for a court to order defendants to provide funding at a level that is constitutionally satisfactory. The state of Michigan has the obligation under *Gideon* to provide indigent defendants with court-appointed counsel, and the "state" is comprised of three branches, including the judiciary. Const 1963, art 3, § 2. Ultimately, it is the judiciary, on a daily basis, that is integrally involved with ensuring that, before prosecutions go forward, indigent defendants are provided counsel, without which the court could not carry out its constitutional responsibilities. *Musselman*[143] did not entail the constitutional implications that arise here, which include the ability of the judicial branch to carry out its functions in a constitutionally sound manner.[144]

And there, at the risk of being colloquial, you have it. In the starkest terms possible, the majority has issued an open invitation to the trial court to assume ongoing operational control over the systems for providing defense counsel to indigent criminal defendants in Berrien, Genesee, and Muskegon counties. And with that invitation comes a blank check, to force

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[139] *Ante* at 17 (emphasis added).

[140] *Ante* at 17.

[141] *Edelman v Jordan*, 415 US 651, 667-668; 94 S Ct 1347; 39 L Ed 2d 662 (1974).

[142] *46th Circuit Trial Court v Crawford Co*, 476 Mich 131; 719 NW2d 553 (2006).

[143] *Musselman v Governor*, 448 Mich 503; 533 NW2d 237 (1995).

[144] *Ante* at 19.

sufficient state level legislative appropriations and executive branch acquiescence to bring those operations to a point—if such a point could ever be achieved—that satisfies the trial court's determination of the judiciary's responsibilities to carry out its functions in a "constitutionally sound manner."

The policy implications of such an approach are staggering. First, such operational control would override the explicit provisions of the indigent criminal defense act. Second, such operational control would give the trial court the opportunity, and perhaps even the obligation, to nullify the provisions of the indigent criminal defense court rule, thereby superseding the authority of the Supreme Court and the State Court Administrator. Third, vesting such operational control in one circuit court creates the anomaly of giving that circuit court the power to direct some of the operations of three other, theoretically coequal, circuit courts. Fourth, the record of judicial operational control of executive branch operations, such as prisons[145] and schools,[146] has been, to be charitable, decidedly mixed. Fifth, and finally, such operational control is in direct contravention of the basic concept of separation of powers.

Moreover, as I have noted earlier in this opinion, injunctive relief may issue only when there is no adequate remedy at law. In their complaint, the Duncan plaintiffs baldly asserted that no such remedy exists[147] and the majority scarcely touches upon the adequacy of existing legal remedies other than to disclaim the effectiveness of postconviction review. But, self-evidently, such a remedy does exist. Under *Strickland*, a criminal defendant whose counsel's performance at critical stages of the proceeding was so deficient as to cause prejudice to that criminal defendant can, postconviction, seek judicial intervention and, upon a proper showing, redress. The Duncan plaintiffs, however, seek preconviction intervention and redress without a particularized showing of irreparable harm, based upon the apprehension of future injury or damage. Under such circumstances, declaratory and injunctive relief is not only unwise as a policy matter, it is inappropriate as a matter of law. Thus, the Duncan plaintiffs' claims are not justiciable, and the judiciary cannot and should not grant the relief they seek.

III. Separation Of Powers

The majority invokes a sweeping judicial power to intervene in and determine matters of public policy.[148] It asserts that, lacking such intervention, the Legislature and the Governor

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[145] *Cain v Dep't of Corrections No 1*, 468 Mich 866 (2003); *Cain v Dep't of Corrections*, 254 Mich App 600; 657 NW2d 799 (2002).

[146] *Milliken v Bradley*, 433 US 267; 97 S Ct 2749; 53 L Ed 2d 745 (1977); *Milliken v Bradley*, 418 US 717; 94 S Ct 3112; 41 L Ed 2d 1069 (1974).

[147] See Complaint, ¶ 153 ("Plaintiffs have no adequate remedy at law.").

[148] *Ante* at 2-3.

would have the power to switch the constitution on and off at will[149] and that this would usher in a regime in which the Legislature and the Governor, not the judiciary, say "what the law is."[150]

There is no question that under separation of powers principles, it is the ultimate responsibility of the judiciary to "say what the law is."[151] But first, those seeking judicial intervention must establish that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable.[152] As Chief Justice Rehnquist said in *Raines v Byrd*:

> In the light of th[e] overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere, we must put aside the natural urge to proceed directly to the merits of this important dispute and to "settle" it for the sake of convenience and efficiency. Instead, we must carefully inquire as to whether appellees have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable.[153]

Here, the Duncan plaintiffs would have the judiciary rush in and "settle" their claims using the swift swords of declaratory and injunctive relief, without a particularized showing of irreparable harm and without *any* showing that there is no adequate remedy at law. And they would have the judiciary grant such relief despite their failure to show that they have standing. In *Lee v Macomb Co Bd of Comm'rs*,[154] the Michigan Supreme Court discussed at length the magnitude of the relationship between the standing doctrine and the separation of powers principles:

> [I]n Michigan, as in the federal system, standing is of great consequence so that neglect of it would imperil the constitutional architecture whereby governmental powers are divided between the three branches of government.
>
> Standing, as a requirement to enter the courts, is a venerable doctrine in the federal system that derives from US Const, art III, § 1, which confers only "judicial power" on the courts and from US Const, art III, § 2's limitation of the judicial power to "Cases" and "Controversies." In several recent cases, the United States Supreme Court has discussed the close relationship between standing and separation of powers. In *Lewis v Casey*, 518 US 343, 349; 116 S Ct 2174; 135 L Ed 2d 606 (1996), Justice Scalia, writing for the majority, said:

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[149] *Ante* at 2-3, citing *Boumediene v Bush*, 553 US___; 128 S Ct 2229, 2259; 171 L Ed 2d 41, 77 (2008).

[150] *Ante* at 3.

[151] *Marbury*, *supra* at 177.

[152] *Raines v Byrd*, 521 US 811, 820; 117 S Ct 2312; 138 L Ed 2d 849 (1997).

[153] *Id*.

[154] *Lee*, *supra* at 735-741.

> "The doctrine of standing [is] a constitutional principle that prevents courts of law from undertaking tasks assigned to the political branches. It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; *it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution*." [Citations omitted.][155]

The indigent criminal defense act indisputably "shape[s] the institutions of government." But the Duncan plaintiffs do not challenge the constitutionality of that act, either facially or "as applied."[156] Rather, they simply seek to override it, to "switch it off" as it were. The Duncan plaintiffs do not ask the judiciary to "say what the law is" with respect to the indigent criminal defense act. Nor do they challenge the Legislature's enactment of that statute. Rather, they seek to reshape the indigent criminal defense act in a way that they find more desirable. In essence, they seek to have the judiciary *make* the law rather than say what the law is.

It is precisely to such an approach that the doctrine of separation of powers directly applies. Early on, the great constitutional scholar Justice Thomas M. Cooley discussed the concept of separation of powers in the context of declining to issue a mandamus against the Governor:

> Our government is one whose powers have been carefully apportioned between three distinct departments, which emanate alike from the people, have their powers alike limited and defined by the constitution, are of equal dignity, and within their respective spheres of action equally independent. One makes the laws, another applies the laws in contested cases, while the third must see that the laws are executed. This division is accepted as a necessity in all free governments, and the very apportionment of power to one department is understood to be a prohibition of its exercise by either of the others.[157]

Thus, it is the Legislature—where matters of public policy are openly debated and openly decided—whose responsibility it is to make the law. And, by enactment of the indigent criminal defense act, the Legislature has done just that, it has made the law. It may now be advisable to change the law. Indeed, the majority recognizes that there are efforts underway to do so.[158] But, to date, those efforts—whether for good reasons or bad—have been unsuccessful. The Duncan plaintiffs invite the judiciary to impose changes that, to date, their advocates have been unable to secure through the legislative process. Again, I would decline the invitation.

But does this mean that there is no role for the judiciary within the framework of the indigent criminal defense act? Of course not. The Michigan Supreme Court has set out that role

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[155] *Lee*, *supra* at 735-736 (emphasis added).

[156] See *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11 n 20; 740 NW2d 444 (2007).

[157] *Sutherland v Governor*, 29 Mich 320, 324 (1874).

[158] *Ante* at 17 n 7.

in the indigent criminal defense court rule: the State Court Administrator is to review local plans to provide legal services to indigent criminal defendants. That review is to "protect the integrity of the judiciary." I grant that such a role is clearly less glamorous, considerably more circumspect, certainly more modest, and conceivably less noble in expression than the role the majority espouses. But within the context of the indigent criminal defense act and applying the principle of separation of powers, it is the judiciary's proper role nonetheless.

IV. Class Certification

I also disagree with the majority's conclusion that the Duncan plaintiffs have properly pleaded a class action suit.

A member of a class may maintain a suit as a representative of all purported members of the class only if each of the following five requirements is met:

> (a) the class is so numerous that joinder of all members is impracticable;
>
> (b) there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members;
>
> (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (d) the representative parties will fairly and adequately assert and protect the interests of the class; and
>
> (e) the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice.[159]

The party requesting class certification bears the initial burden of demonstrating that the criteria for certifying a class action is satisfied.[160]

A. Numerosity

The numerosity factor—that the class is so numerous that joinder of all members is impracticable—does not require a specific minimum number of members, "and the exact number of members need not be known as long as general knowledge and common sense indicate that

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[159] MCR 3.501(A)(1); see *Hill v City of Warren*, 276 Mich App 299, 310; 740 NW2d 706 (2007); *Zine v Chrysler Corp*, 236 Mich App 261, 286-287; 600 NW2d 384 (1999).

[160] *Tinman v Blue Cross & Blue Shield*, 264 Mich App 546, 562; 692 NW2d 58 (2004); *Zine*, *supra* at 287 n 12.

the class is large."[161] But the plaintiff must at least "present some evidence of the number of class members or otherwise establish by reasonable estimate the number of class members."[162]

In *Zine v Chrysler Corp*, the plaintiffs, purchasers of new Chrysler vehicles, filed proposed class action suits, alleging that Chrysler violated the Michigan Consumer Protection Act (MCPA)[163] by providing "misleading" information regarding Michigan vehicle purchasers' rights under the state's lemon laws.[164] In analyzing whether the plaintiffs met the class action certification requirements, this Court noted that, while not identifying a specific number of class members, the plaintiffs indicated that the class potentially included "all 522,658 purchasers of new Chrysler products from February 1, 1990, onward."[165] Although seemingly sufficient to satisfy the minimal requirement of "present[ing] some evidence of the number of class members or otherwise establish[ing] by reasonable estimate the number of class members[,]" this Court held that the plaintiffs failed to satisfy the numerosity requirement because in order to be a class member, the new car buyers must have suffered actual injury to have standing to sue.[166] Accordingly, the plaintiffs were required, but failed, to show that "there [was] a sizable number of new car buyers who had seriously defective vehicles and lost their right to recovery under Michigan's lemon law because they were misled by the documents supplied by Chrysler."[167]

Here, as stated by the majority, the Duncan plaintiffs allege that the purported class that they seek to represent is

> all indigent adult persons who have been charged with or will be charged with felonies in the District and Circuit Courts of Berrien, Genesee, and Muskegon Counties and who rely or will rely on the Counties to provide them with defense services. The Class includes all indigent adults against whom felony criminal charges will be brought in Berrien, Genesee, and Muskegon Counties during the pendency of this action.[168]

The majority summarily concludes that this purported class "is sufficiently numerous so as to make joinder of each class member impractical."[169] But, in keeping with the *Zine* analysis, I disagree. As I have concluded earlier in this opinion, the Duncan plaintiffs have failed to show that they themselves have suffered or imminently will suffer an actual injury, by failing to show

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[161] *Zine*, *supra* at 287-288.

[162] *Id*. at 288.

[163] MCL 445.901 *et seq*.

[164] *Zine*, *supra* at 263, 265.

[165] *Id*. at 288.

[166] *Id*.

[167] *Id*. at 288-289.

[168] *Ante* at 46.

[169] *Ante* at 46.

that the actions or inactions of the state and the Governor have caused or will cause a denial of their Sixth Amendment rights. Therefore, concomitantly, the purported class that they seek to represent—all indigent adult persons who rely or will rely on the counties to provide them with defense services in felony cases—also fails to adequately identify a sufficiently numerous class, by failing to identify class members who have suffered actual injury and therefore have standing to sue. Accordingly, I would conclude that the trial court erred in granting the Duncan plaintiffs' motion for class certification.

B. Commonality and Superiority

Because a plaintiff must satisfy each factor of the class action certification analysis, and failure on one factor mandates overall failure of certification, I need not continue to address the remaining factors. However, I comment on these factors to stress the impropriety and impracticality of allowing a class action for the claims alleged.

The commonality factor—that there are questions of law or fact common to the members of the class that predominate over questions affecting only individual members—"requires that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof.'"[170] Notably, the commonality factor ties in with the superiority factor—the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice—"in that if individual questions of fact predominate over common questions, the case will be unmanageable as a class action."[171]

In *Zine*, the common question was whether Chrysler's new car documents violated the MCPA.[172] However, this Court explained that, even assuming that the plaintiffs prevailed on that question, "the trial court would have to determine for each class member who had purchased a new vehicle whether the vehicle was bought primarily for personal, family, or household use[;] whether the plaintiff had a defective vehicle and reported the defect to the manufacturer or dealer, had the vehicle in for a reasonable number or repairs, was unaware of Michigan's lemon law, read the documents supplied by Chrysler, and was led to believe that Michigan did not have a lemon law, and chose not to pursue a remedy under the lemon law because of that belief."[173] According to the *Zine* panel, "[t]hese factual inquiries, all of which were subject to only

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[170] *Zine*, *supra* at 289, quoting *Kerr v West Palm Beach*, 875 F2d 1546, 1557-1558 (CA 11, 1989).

[171] *Zine*, *supra* at 289 n 14, citing MCR 3.501(A)(2)(c) (stating that to determine whether the maintenance of the action as a class action will be superior to other available methods of adjudication in promoting the convenient administration of justice, the court must consider "whether the action will be manageable as a class action").

[172] *Zine*, *supra* at 289.

[173] *Id*. at 290 (citations omitted).

individualized proof, predominate over the one common question and would render the case unmanageable as a class action."[174]

Here, as the majority presents it, the common questions are "whether there have been widespread and systemic constitutional violations, whether the violations were and are being caused by deficiencies in the county indigent defense systems, and whether the system deficiencies were and are attributable to or resulted from the action or inaction of defendants."[175] And the majority concedes that "this action will require contemplation of specific instances of deficient performance and instances of the actual or constructive denial of counsel . . . ."[176] The majority then inexplicably goes on to conclude that "[a]ny evidence concerning individual prosecutions has no bearing on those particular criminal cases and the available appellate remedies, except to the extent of any effect on a pending case caused by a system-wide remedy resulting from an order or judgment rendered in this action. The evidence pertaining to individual prosecutions merely constitutes a piece in the larger puzzle relative to establishing a basis for prospective, system-wide relief."[177] Candidly, I do not follow this line of logic.

Nevertheless, in attempting to understand the majority's reasoning, I note that I agree the common question here is "whether the system deficiencies were and are attributable to or resulted from the action or inaction of defendants." However, unlike the majority, I do not see the question "whether there have been widespread and systemic constitutional violations" as being a "broad factual question[] common to all members in the class."[178] To the contrary, the determination whether there have been such widespread and systematic constitutional violations will necessarily require the trial court to look at countless cases from each of the three counties to examine whether and how individual indigent defendants have suffered violations of their constitutional rights. Likewise, determining "whether the violations were and are being caused by deficiencies in the county indigent defense systems," will require the trial court to look at untold numbers of individual cases to examine the cause for the purported violations. Unlike the majority, I am unwilling to presume that every alleged deficiency in every indigent criminal defendant's case is the result of the alleged deficiencies in the county indigent defense systems. Indeed, it is conceivable that even attorneys with the best available resources could, for a myriad of reasons, fail to provide adequate representation. Moreover, unlike the majority, I cannot overlook the significance of the fact that this action will require consideration of potentially

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[174] *Id.*

[175] *Ante* at 47.

[176] *Ante* at 47.

[177] *Ante* at 47.

[178] *Ante* at 47.

thousands of specific instances of deficient performance and actual or constructive denial of counsel.[179]

In sum, as in *Zine*, the potentially necessary individual factual inquiries here predominate over the common question and render the case unmanageable as a class action. And, as in *Neal*, the Duncan plaintiffs have not shown, and cannot conceivably show, a "*specific*" policy or practice that the state and the Governor follow in order to satisfy the commonality requirement. Again, this is so because the Duncan plaintiffs based their entire case against the state and the Governor on generalized assertions of *inaction*. By definition, such inaction cannot be an actionable, specific policy or practice. I would therefore conclude that the trial court erred in determining that the Duncan plaintiffs satisfied the requirements of MCR 3.501 for the certification of a class action.

V. Conclusion

I fundamentally disagree with the majority's conclusions, and the rationale supporting those conclusions, with respect to the justiciability of the Duncan plaintiffs' claims and the appropriateness of the declaratory and injunctive relief that the Duncan plaintiffs seek. I further disagree with the majority's conclusions, and the rationale supporting those conclusions, concerning class action certification.

The majority concludes that the Duncan plaintiffs' claims are justiciable. To reach that conclusion, the majority, while ostensibly disavowing *Strickland*, implicitly adopts the square peg of the *Strickland* postconviction analytical framework and then twists it sufficiently to force it into the round hole of the Duncan plaintiffs' preconviction claims of ineffective assistance of counsel. In essence, and without using the word, the majority renders a holding that, standing alone, the Duncan plaintiffs' claims—despite their conjectural and hypothetical nature, despite their lack of a showing that the inaction of the state and the Governor has caused the situation they describe, and despite their failure to show that a favorable decision will redress that situation—are sufficient per se to establish standing, ripeness, and, therefore, justiciability. I disagree. As I noted earlier in this opinion, the Duncan plaintiffs cannot plausibly assert that the alleged failures by the state and the Governor have *caused* the alleged deficient performance at

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[179] See, also, for example, *Neal v James*, 252 Mich App 12, 20; 651 NW2d 181 (2002):

> In reviewing the claims of each of the class representatives in the present case, it is apparent that the only common question presented is whether the individuals involved were discriminated against because of their race. How these individuals may have been discriminated against does not involve common issues of fact or law, but highly individualized questions. The individual factual circumstances pertinent to each plaintiff will need to be reviewed, and individual, fact-specific inquires will need to be made in evaluating why certain individuals were not hired or promoted, or why other individuals were discharged or not retained. Plaintiffs have simply not shown that there was any specific policy or practice followed by defendants to satisfy the "commonality" requirement under MCR 3.501.

the local level because there is no way they can possibly *prove* such causation. In sum, we are left solely with generalized legal conclusions regarding causation that should not carry the presumption of truth and that are incapable of being proved or disproved.

And, as the *Luckey II* dissent stated, there can be no Sixth Amendment violation in the absence of prejudice at a particular trial. And because prejudice is an essential element of any Sixth Amendment violation, Sixth Amendment claims cannot be adjudicated apart from the circumstances of a particular case. Here, the Duncan plaintiffs have not stated justiciable claims and neither the trial court nor this Court can appropriately make a finding of prejudice per se.

With respect to the relief that the Duncan plaintiffs seek, the majority repeatedly declines to address this issue directly. But the broad implications of the majority's opinion are clear. The majority's opinion admits that such relief could potentially entail a cessation of criminal prosecutions against indigent defendants in Berrien, Genesee, and Muskegon counties, absent constitutional compliance with the right to counsel. The majority's opinion invites the trial court to assume ongoing operational control over the current systems for providing counsel to indigent criminal defendants in Berrien, Genesee, and Muskegon counties and, if necessary, to force sufficient state level legislative appropriations and executive branch acquiescence to bring those operations to a point—if such a point could ever be achieved—that satisfies the trial court's determination of the judiciary's responsibilities to carry out its functions in a "constitutionally sound manner."

And we should not be deceived. State operation and funding of legal services in Berrien, Genesee, and Muskegon counties will inevitably lead to the operation and funding of such services throughout the state, overriding the provisions of the indigent criminal defense act and the indigent criminal defense court rule. Indeed, this is the ultimate relief that the Duncan plaintiffs seek.

Not only are the policy and fiscal implications of such a situation staggering, it is black-letter law that injunctive relief may issue only when there is no adequate remedy at law. Self-evidently, such a remedy exists here. Under *Strickland*, if the Duncan plaintiffs can show, postconviction, that their counsel's performance at critical stages of the proceeding was so deficient as to cause prejudice to them, they can seek judicial intervention and redress. The sweeping preconviction declaratory and injunctive relief that the Duncan plaintiffs seek is simply inappropriate and a proper respect for the basic concept of separation of powers requires that the judiciary decline to issue such relief.

I should note that were I a member of the Legislature, I might well vote for a system that would have the state assume some or all of the expense of defending poor persons accused of crimes. I would do so because I am well aware of the constitutional right to counsel that *Gideon* enunciated in 1963 and the constitutional right to effective counsel that *Strickland* enunciated in

1984. There is little question in my mind that our state has not fully met its obligations under these landmark decisions. I have so stated publicly, as have other members of the judiciary.[180]

But I am not a member of the Legislature. I am a member of an intermediate error-correcting court, not a policy-setting one. And I firmly believe that the reach of the judiciary should not exceed its grasp; that is, the concept of judicial modesty requires us to refrain from assuming functions that the legislative and executive branches are best equipped, and constitutionally required, to undertake. I conclude that—even though the state and the Governor virtually concede the inadequacies of the current Michigan system for indigent criminal defense—the trial court erred when it denied the state and the Governor's motion for summary disposition under MCR 2.116(C)(8) and, consequently, when it granted the Duncan plaintiffs' motion for class certification. I would therefore reverse and remand for the entry of summary disposition in favor of the state and the Governor.

/s/ William C. Whitbeck

[180] In 1986, Chief Justice G. Mennen Williams, in his State of the Judiciary speech, called for a statewide system of equal justice, saying that such a system "remains to be fully implemented . . . and it only can be fully implemented through state financing." National Legal Aid & Defender Association, Evaluation of Trial Level Indigent Defense Systems in Michigan: A Race to the Bottom: Speed and Savings Over Due Process: A Constitutional Crisis (June 2008), p 11. Similarly, Chief Justice Dorothy Comstock Riley urged the state to "step in and relieve the counties of a burden they could not afford to meet," a point she made again in her 1988 and 1990 State of the Judiciary speeches. *Id*. In 1992, Chief Justice Michael Cavanagh in his forward to the Michigan Bar Journal's edition on the Michigan's indigent defense system, stated, "[I]t is unfortunate that as we mark the 200th Anniversary of the *Bill of Rights* and extol its important guarantees, we at the same time witness the failure to secure those guarantees, adequately or at all, to significant segments of society." *Id*. at 12. And in 1995, Chief Justice James Brickley released the Supreme Court's report entitled *Justice in Michigan: A Report to the People of Michigan from the Justices of the Michigan Supreme Court*, in which the Court declared, among other things: "The state should assume the core costs of the court system, including judicial salaries and benefits, the salaries and benefits of court staff, due process costs *including the cost of indigent representation*, and the cost of statewide information technology." *Id*. at 11-12 (emphasis added).