No. 43922

IN THE SUPREME COURT OF THE STATE OF IDAHO

TRACY TUCKER, *et al.*,

Plaintiffs-Appellants,

v.

STATE OF IDAHO, *et al.*,

Defendants-Appellees.

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND IDAHO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PLAINTIFFS-APPELLANTS

Appeal from the District Court of the Fourth Judicial District for Ada County
Case No. CV-OC-2015-10240
The Honorable Samuel A. Hoagland, District Judge, presiding

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

National Association of Criminal Defense Lawyers

The National Association of Criminal Defense Lawyers ("NACDL") is a not-for-profit professional organization that represents the nation's criminal defense attorneys. NACDL is the preeminent organization advancing the institutional mission of the nation's criminal defense bar to ensure the proper and fair administration of justice, and justice and due process for all persons accused of crime. Founded in 1958, NACDL has a membership of approximately 9,000 direct members and an additional up to 40,000 affiliate members in all fifty states and twenty-eight nations. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and accords it representation in the House of Delegates.

In furtherance of its mission to safeguard the rights of the accused and to champion fundamental constitutional rights, NACDL frequently appears as *amicus curiae* before the United States Supreme Court, the federal courts of appeal, and the highest courts of numerous states. In recent years, NACDL's briefs have been

[1] No counsel to a party in this case authored this brief in whole or in part. No party or party's counsel made any monetary contribution that was intended to or did fund the preparation or submission of this brief. No person or entity, other than the *amici* and their counsel, made any monetary contribution that was intended to or did fund the preparation or submission of this brief.

cited on numerous occasions by the Supreme Court in some of its most important criminal law decisions. *See, e.g.*, *Kennedy v. Louisiana*, 554 U.S. 407 (2008); *Rothgery v. Gillespie County, Texas*, 554 U.S. 191 (2008); *Blakely v. Washington*, 542 U.S. 296 (2004). NACDL also filed amicus briefs in landmark state cases involving indigent defense issues, including in New York in *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010), and in Maryland in *DeWolfe v. Richmond*, 76 A.3d 1019 (Md. 2013). NACDL has a specific and demonstrated interest in ensuring that accused persons have access to qualified counsel at every stage of a criminal proceeding. NACDL recently supported this principle in *Rothgery*, where NACDL successfully urged the Supreme Court to find that the right to counsel unequivocally attaches at arraignment, the first formal proceeding at which an individual is accused.

NACDL, informed by the experience of its membership, is uniquely well positioned to inform this Court of the consequences that are visited upon criminal defendants when they are subjected to representation by overburdened and under-resourced counsel, and to explain why post-conviction remedies are inadequate to redress this deficiency. Recognizing the vital role that counsel plays in every criminal prosecution, NACDL's official policy is that all accused persons have the right to counsel before a judicial officer at which liberty is at stake or at which a plea of guilty to any criminal charge may be entered.

Furthermore, NACDL commits significant resources to ensuring that indigent accused persons have access to meaningful and effective representation. NACDL maintains a full-time Indigent Defense Counsel whose sole responsibility is to support indigent defense reform efforts throughout the country. Pursuant to a grant from the Justice Department's Bureau of Justice Assistance ("BJA"), NACDL along with the American Bar Association Standing Committee on Legal Aid and Indigent Defendants ("SCLAID"), serving as a consultant, is currently involved in two workload studies with the goal of improving excessive workloads through the use of evidence-based data to make public defender organizations more efficient, reliable, and most importantly, capable of providing effective assistance of counsel.

The Association is currently pursuing training and reform initiatives in at least half a dozen states. In addition, NACDL devotes considerable resources to providing back-up support to both public defenders and private counsel who handle assigned cases, and funds a full time Resource Counsel to perform that function. NACDL also sponsors scholarships to provide access to training programs for those engaged in public defense. The Association recognizes that a system of criminal justice that provides inferior justice to those whose poverty prevents them from hiring private counsel is inconsistent with fundamental

American values, including, most significantly, the right to counsel as guaranteed by the Sixth and Fourteenth Amendments and the constitutions of the states.

NACDL has long conducted and sponsored pioneering investigations, research, and reporting on indigent defense issues. In recent years, NACDL has published groundbreaking reports chronicling the deficiencies in indigent defense, including: *Summary Injustice: A Look at Constitutional Deficiencies in South Carolina's Summary Courts; Three Minute Justice: Haste and Waste in Florida's Misdemeanor Courts*; *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*; *Criminal Justice in the 21st Century: Eliminating Racial and Ethnic Disparities in the Criminal Justice System*; *National Indigent Defense Reform: The Solution Is Multifaceted*; *Gideon at 50 Part I – Rationing Justice: The Underfunding of Assigned Counsel Systems*; and *Gideon at 50 Part II – Redefining Indigence: Financial Eligibility Guidelines for Assigned Counsel*.[2]

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

Idaho Association of Criminal Defense Lawyers

The Idaho Association of Criminal Defense Lawyers ("IACDL") is also a

[2] For copies of these and other NACDL reports, visit www.nacdl.org/reports.

non-profit voluntary organization of lawyers. It is the only organization of lawyers in the State of Idaho whose members work exclusively on the criminal defense side of the justice system. In fact, in order to become a member, individual attorneys must affirm that they do not represent the state or any other governmental entity in criminal prosecutions. The organization's statement of purpose, posted on its web site, is as follows:

> The objective and purpose of the Idaho Association of Criminal Defense Lawyers is to promote study and research in the field of criminal law and related subjects; to disseminate by lecture, seminars, and publications the knowledge of the law relating to criminal defense practice and procedure; to promote the proper administration of justice, to foster, maintain, and encourage the integrity and independence of the judicial system and the expertise of the defense lawyer in criminal cases; to hold periodic meetings of defense lawyers and to provide a forum for the exchange of information regarding the administration of criminal justice, and thereby to protect individual rights and improve the criminal law, its practices and procedures.

Membership in the IACDL includes public defenders from around the state, as well as private counsel, Federal Public Defenders, and defense investigators. The IACDL was first incorporated in 1989. Of the original eight incorporators, three were the primary public defenders for their counties and at least four of the remaining incorporators accepted appointments in federal court to represent indigent defendants. The organization's focus continues to be the advancement of the practice of criminal defense, especially as it relates to indigent defendants. For all of the above reasons, the IACDL has a particular interest in the outcome of the subject litigation.

ARGUMENT

I. INTRODUCTION

The plaintiffs in this case, a class of indigent criminal defendants in Idaho, bring claims for denial of their fundamental right, under the Sixth and Fourteenth Amendments to the United States Constitution, to the assistance of counsel in their defense. They allege egregious violations of that right, including the absence of counsel at their initial appearances, leading to unnecessary detention, and the inability of counsel to communicate with them to prepare their defenses. The plaintiffs seek declaratory and injunctive relief to prevent these systematic constitutional violations from continuing. All of these claims are cognizable, and in similar cases, plaintiffs have been allowed to pursue such claims in both federal and state courts.

Nonetheless, the District Court here dismissed the plaintiffs' claims on the pleadings, reasoning erroneously that the plaintiffs failed to allege justiciable harm. The District Court ignored the very real and ongoing harms caused by the kinds of constitutional violations alleged by the plaintiffs. Moreover, the District Court's opinion displays a fundamental misunderstanding of the requirements of the Sixth Amendment, as interpreted by the United States Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963), and a host of other cases over decades of jurisprudence. The plaintiffs have stated proper claims under the Sixth Amendment, and their lawsuit should be permitted to proceed.

II. THE VIOLATIONS ALLEGED BY THE PLAINTIFFS CAUSE ONGOING AND COGNIZABLE HARM

The plaintiffs here allege that indigent defendants across Idaho "have been denied their right to effective counsel as a result of the State's failure to provide the necessary resources, robust oversight, and specialized training required to ensure that all public defenders can handle all of their cases effectively and in compliance with state and federal law." (Complaint at ¶ 8.) They allege, *inter alia,* that indigent defendants across Idaho are unrepresented by counsel at their initial appearances, contributing to unnecessary detention; that indigent defendants lack access to their lawyers, and are often unable to meet with them to help prepare their defense; and that counsel's caseloads are significantly higher than national standards, making it impossible for them to provide meaningful assistance. (Complaint at ¶¶ 9-21.) The plaintiffs seek various forms of declaratory and injunctive relief. (Complaint at 53.)

Despite these allegations, the District Court ruled that the plaintiffs did not state justiciable claims for relief because the plaintiffs have not been convicted or sentenced yet and therefore have not suffered "any ascertainable injury." (Order at 22.) Citing *Strickland v. Washington*, 466 U.S. 668 (1984), the court held that the plaintiffs had not shown prejudice, essentially opining that the plaintiffs will have to wait until they are convicted and then make use of the *Strickland* post-conviction procedure to challenge their convictions. (Order at 24-25.)

In so holding, the District Court ignored the very real harms that are being suffered, on an ongoing basis, by indigent defendants across Idaho whose counsel are being appointed under the kinds of circumstances alleged in the Complaint – that is, where their lawyers cannot accompany them to their initial appearances, cannot meet with them to discuss their cases, and lack the time and resources necessary to prepare their defenses. Abundant research establishes that the constitutional violations asserted by these plaintiffs are not mere abstractions, nor are they limited to instances of wrongful outcomes such as convictions or guilty pleas. To the contrary, the systemic violations alleged here breed systemic injury – to the plaintiffs, their families, and society as a whole.

As a threshold matter, research has established that defendants who are not represented at their bail hearings end up being incarcerated for longer periods than represented defendants – incarceration that is either not necessary at all, or is longer than appropriate. One study in Maryland found that defendants charged with nonviolent crimes were 2.5 times more likely to be released on their own recognizance, and 2.5 times more likely to receive affordable bail, if they were represented by counsel. Douglas L. Colbert, Ray Paternoster and Shawn Bushway, *Do Attorneys Really Matter? The Empirical and Legal Case for the Right of Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1720 (May 2002). At the same time, "[a]bsent counsel, an accused is likely to receive an excessive or unreasonable bail.

Those who cannot afford bail, including many charged with nonviolent crimes, will remain in jail between two and 70 days, waiting for their assigned lawyer's advocacy before a judicial officer." Douglas L. Colbert, *When the Cheering (for Gideon) Stops: The Defense Bar and Representation at Initial Bail Hearings*, CHAMPION, June 2012.

Such unnecessary detention, in itself, constitutes serious injury. Even apart from the deprivation of liberty, pretrial detention for even short periods can have significant harmful effects on defendants and their families. Those who are detained in jail while waiting for the assistance of their lawyers are separated from their families, may lose their jobs or homes, interrupt their educations, and even lose custody of their children. *See* JUSTICE POLICY INSTITUTE, SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 19 (July 2011).

> For people who have jobs when they are arrested, being held in jail can jeopardize their employment – not only affecting their own lives, but the financial stability of their families. . . . [S]pending time in jail can push people already on the economic margins further into poverty. Incarceration can have a ripple effect on families and communities that is difficult to measure, but extremely significant – all before a person has even been convicted of an offense.

Id. Even the prospect of an ultimately favorable outcome does not address these harms, which may be irreversible.

Moreover, defendants who face the threat or reality of prolonged pretrial detention may feel pressure to plead guilty in the hope of getting out of jail more

quickly, even if they are innocent, and thereby jeopardize their futures due to the "collateral consequences" that accompany a criminal conviction. *See id.* at 20; *see also* THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 72 (April 2009) ("Collateral consequences can result in more severe sanctions for a defendant than the actual criminal sentence, including the loss of legal immigration status, public benefits, housing, a driver's license, and employment.").

Excessive caseloads, as alleged in the Complaint, can also contribute to the harms associated with wrongful convictions. *See* JUSTICE POLICY INSTITUTE, *supra*, at 21. Although there can be many causes of wrongful convictions, "inadequate representation often is cited as a significant contributing factor." AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 3 (Dec. 2004). "For persons wrongfully convicted, the cost of inadequate defense representation is reflected in countless wasted years spent in prison, the deprivation of cherished rights, adverse immigration consequences, and quite possibly the loss of life." *Id.* at 4. Surely there can be no worse violation of the principles of *Gideon* and its progeny than to send an innocent person to jail because their lawyer was too overworked or lacked sufficient resources to test the strength of the prosecution's case. *Cf. United States v. Cronic*, 466 U.S. 648, 659

(1984) ("if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable").[3]

One noted expert has summed up the harms caused by the types of constitutional violations alleged by the plaintiffs here:

> The cost of this one-sided system is enormous. Innocent people are convicted and sent to prison while the perpetrators remain at large. Important issues, such as the system's pervasive racism . . . are ignored. People are sentenced without consideration of their individual characteristics, allowing race, politics, and other improper factors to influence sentences. Over 2.2 million people – a grossly disproportionate number of them African Americans and Latinos – are in prisons and jails . . . . Even those who have completed their sentences may be deported, denied the right to vote, dishonorably discharged from the armed forces, denied public benefits, and denied business or professional licenses. Reentry into society is extremely difficult, extending the costs to the families and communities of those who have been imprisoned.

Stephen B. Bright and Sia M. Sanneh, *Fifty Years of Defiance and Resistance After Gideon v. Wainwright*, 122 YALE L.J. 2150, 2154-55 (June 2013) (citations

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[3] Research has also made clear that many of these harms fall disproportionately on people of color:

> Because of the higher rates of minority poverty and the higher rates at which minorities are arrested, public defenders and court-appointed counsel have a disproportionate number of minority clients. As a result, the crisis in America's public defense system has a much more acute impact on communities of color. ***The dramatic under-funding and lack of oversight of America's indigent defense services . . . has placed people of color in a second class status in the American criminal justice system.***

ROBERT C. BORUCHOWITZ, MALIA N. BRINK, AND MAUREEN DIMINO, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, MINOR CRIMES, MASSIVE WASTE – THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 47 (April 2009) (emphasis added).

omitted).

The injuries alleged in the Complaint do not affect only those indigent defendants who may be unnecessarily detained or wrongfully convicted, or their families – they have a pervasive and disturbing impact on our criminal justice system and our society as a whole. The public's trust in our justice system is eroded. Americans – particularly people of color, but anyone who is or might be subject to the vagaries of the system, and anyone who has seen a friend, co-worker, or family member unfairly treated – lose confidence that they will be treated fairly or that the system will produce just results. The resulting cynicism cannot but be harmful to the fabric of our society. *See* Bright and Sanneh, 122 YALE L.J. at 2155 ("The system lacks legitimacy and credibility and is undeserving of respect."); JUSTICE POLICY INSTITUTE, *supra*, at 23 ("An eroded trust in the justice system can negatively impact public safety and community well-being.").

All of these elements of harm, which flow from the allegations in the Complaint, were ignored by the District Court in its order dismissing the plaintiffs' claims. The failings alleged by the plaintiffs "matter not only because they permanently damage lives, families, and communities, but also because they leave the criminal courts without credibility or legitimacy." Bright and Sanneh, 122 YALE L.J. at 2172. The District Court's disregard of these injuries, and its refusal to permit the plaintiffs to proceed on their claims, only compounds the problem.

Accordingly, *amici curiae* respectfully urge this Court to reverse the District Court's holding that the plaintiffs have not alleged any ascertainable injury.

III. THE DISTRICT COURT APPLIED THE WRONG LEGAL FRAMEWORK TO THE PLAINTIFFS' CLAIMS

The District Court's order also displays a fundamental misunderstanding of the United States Supreme Court's jurisprudence regarding indigent criminal defendants' constitutional right to the assistance of counsel. As discussed below, the Sixth Amendment right to counsel is not limited to representation at trial, and it does not depend on the outcome of a trial. Rather, the Supreme Court has made clear, in a series of rulings extending back decades, that our system of criminal justice does not function, and the rights of criminal defendants are not protected, unless all defendants – including indigents – are afforded meaningful representation not just at trial, but at all critical stages of the proceedings against them. If that right is being systematically denied, then prospective relief may be appropriate without a showing of individual prejudice – that is, without waiting for any particular individual defendant to be wrongfully convicted or sentenced.

A. A Criminal Defendant Has a Fundamental Constitutional Right to Counsel at Any "Critical Stage" of the Proceedings Against Him.

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This is a fundamental right, guaranteed by the Sixth and Fourteenth Amendments. *Gideon v. Wainwright*, 372

U.S. 335, 342 (1963). The United States Supreme Court has held that the right to counsel "is indispensable to the fair administration of our adversary system of criminal justice." *Brewer v. Williams*, 430 U.S. 387, 398 (1977). Accordingly, an indigent defendant who cannot afford a lawyer has a fundamental constitutional right to have a lawyer appointed for him. *Gideon, supra; see also Powell v. Alabama*, 287 U.S. 45, 69 (1932) (a criminal defendant requires the "guiding hand of counsel" at every stage of the proceedings). "[T]he right to be represented by counsel is among the most fundamental of rights. . . . [because] it is through counsel that all other rights of the accused are protected." *Penson v. Ohio*, 488 U.S. 75, 84 (1988).

Because of the essential part that lawyers play in the fair administration of justice, the right to counsel attaches as soon as judicial proceedings are initiated. *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 212 (2008). Once the right to counsel attaches, the defendant is entitled to the presence of counsel at any "critical stage" of the proceedings. *Id.* The right to have counsel present applies whenever counsel can provide assistance by acting "as a spokesman for, or advisor to, the accused." *United States v. Ash*, 413 U.S. 300, 312 (1973). As is apparent from this test, the right to counsel does not apply only at trial: "The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to

make critical decisions without counsel's advice." *Lafler v. Cooper*, 132 S. Ct. 1376, 1385 (2012).[4]

Most obviously, the Sixth Amendment is breached when a criminal defendant is not provided with counsel at all at one of these critical stages. In such cases, the constitutional violation consists of the most basic failure to appoint counsel for those defendants who cannot afford to provide it for themselves. *See Gideon*, 372 U.S. at 344 ("in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him"); *see also Cronic*, 466 U.S. at 659 ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial.").[5]

But the Sixth Amendment can also be violated where counsel is appointed under circumstances that make it impossible for counsel to provide the "Assistance" required by the language of the amendment. As the Supreme Court

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[4] Critical stages include, for example, proceedings where the defendant must enter a plea, *Ash*, 413 U.S. at 312; where a lineup is being conducted, *United States v. Wade*, 388 U.S. 218, 236-37 (1967); and where the defendant is being questioned, *Massiah v. United States*, 377 U.S. 201, 206 (1964).

[5] For example, the Georgia Supreme Court has held that failure to appoint counsel for an indigent defendant moving to withdraw a guilty plea violates the Sixth Amendment. *Fortson v. State*, 532 S.E.2d 102 (Ga. 2000). The Hawaii Supreme Court has held that the post-trial motion stage is a critical stage requiring the appointment of counsel. *State v. Pitts*, 319 P.3d 456 (Haw. 2014). The Alabama Supreme Court has held that an initial appearance in Alabama criminal courts is a critical stage because the criminal defendant is informed of the charges against him and the conditions of release are determined. *Ex parte Cooper*, 43 So. 3d 547 (Ala. 2009).

has said:

> The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment. . . . ***[T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel.***

Avery v. Alabama, 308 U.S. 444, 446 (1940) (emphasis added); *see Strickland*, 466 U.S. at 685 ("That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command."); *Cronic*, 466 U.S. at 654 ("If no actual 'Assistance' 'for' the accused's 'defense' is provided, then the constitutional guarantee has been violated."); *Powell*, 287 U.S. at 57-58 (Sixth Amendment was violated where there was a *pro forma* appointment of counsel, but "the defendants did not have the aid of counsel in any real sense", reasoning that "[t]o decide otherwise, would simply be to ignore actualities"). Those are exactly the types of circumstances alleged here.

B. The Sixth Amendment Can Also Be Violated if the Attorney's Performance Fails to Meet Constitutional Standards.

In a related line of cases, the Supreme Court has held that deficient performance by an attorney can also rise to the level of a constitutional violation where the attorney's performance affected the ultimate outcome of a case. The Court held in *Strickland* that a criminal defendant who has already been convicted can claim that his attorney's performance was so deficient as to require reversal of

the conviction. *Strickland*, 466 U.S. at 687. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. This requires proof of two elements: (1) the lawyer's performance was defective, that is, "counsel's representation fell below an objective standard of reasonableness"; and (2) this deficient performance prejudiced the defense, that is, "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687-88. Thus, the success of a *Strickland* claim turns on the performance of the individual attorney. Did the attorney make errors so egregious, so unreasonable, that we cannot rely on the defendant's having received a fair trial?[6]

It is obvious from the nature of the *Strickland* analysis that ineffective assistance of counsel claims are backward-looking. Courts are cautioned not to judge counsel's performance in light of the "distorting effects of hindsight," *Strickland,* 466 U.S. at 689; but it is the attorney's actual performance at the time

[6] For example, defense counsel was incompetent where he failed to conduct any pretrial discovery because he mistakenly believed the state was obligated to turn over all evidence of its own accord, and therefore failed to file what would have been a meritorious motion to suppress. *Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986). Defense counsel was incompetent where he failed to advise his client that a guilty plea to a drug charge would result in his deportation, and in fact assured him wrongly that there would be no immigration consequences to his guilty plea. *Padilla v. Kentucky*, 559 U.S. 356, 368 (2010). Defense counsel was incompetent where he slept through significant portions of his client's trial. *Burdine v. Johnson*, 262 F.3d 336, 347 (5th Cir. 2001) (en banc), *cert. denied*, 535 U.S. 1120 (2002).

that is at issue, rather than the conditions of representation. *See Kimmelman*, 477 U.S. at 384 (defendant must rebut presumption of counsel's competence "by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy" given all of the circumstances at the time); *Strickland*, 466 U.S. at 690 (court addressing ineffective assistance claim must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct"). Thus, "The *Strickland* analysis looks to the past, and generally precludes prospective claims of relief." Robin Adler, *Enforcing the Right to Counsel: Can the Courts Do It? The Failure of Systemic Reform Litigation*, 2007 J. INST. JUST. INT'L STUD. 59, 61 (2007).

There are cases, however, where the attorney's performance is not at issue. That is, there are circumstances where, even if counsel is appointed and available to assist the defendant, "the likelihood that any lawyer, *even a fully competent one*, could provide effective assistance is so small that a *presumption of prejudice* is appropriate without inquiry into the actual conduct of the trial." *Cronic*, 466 U.S. at 659-60 (citing *Powell, supra*) (emphasis added). In such cases, "when surrounding circumstances justify a presumption of ineffectiveness . . . a Sixth Amendment claim [can] be sufficient without inquiry into counsel's actual performance at trial." *Id.* at 662; *see also Strickland*, 466 U.S. at 692 ("Actual ***or***

constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. . . . Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost.") (emphasis added).

Thus, there is a distinction between *Gideon* claims that are based on the circumstances of representation and therefore do not require a showing of prejudice, and *Strickland* claims that are based on the attorney's performance and do require proof that the defendant was prejudiced. In cases like this one, where the plaintiffs claim violation of their Sixth Amendment rights because counsel are appointed in circumstances that make it impossible for them to provide effective assistance (claims challenging not the attorneys' performance, but the conditions in which counsel are expected to function), and where plaintiffs are demanding prospective relief rather than reversal of a conviction or sentence, courts have analyzed the plaintiffs' claims under *Gideon*, not under *Strickland*. Some of these cases are discussed below.

C. Federal and State Courts Addressing Claims for Prospective Relief, Like the Plaintiffs' Claims Here, Have Rejected Application of the *Strickland* Standard.

The plaintiffs in *Hurrell-Harring v. State*, 930 N.E.2d 217 (N.Y. 2010), like those here, alleged that the system of indigent defense in certain counties in New York violated their constitutional right to representation, and sought declaratory and injunctive relief. Their complaint was dismissed as nonjusticiable and the Court of Appeals (New York's highest court) reversed. The court noted that the

Strickland approach was "expressly premised on the supposition that the fundamental underlying right to representation under *Gideon* has been enabled by the State in a manner that would justify the presumption that the standard of objective reasonableness will ordinarily be satisfied"; whereas in the instant action, the question was whether the state "met its foundational obligation under *Gideon* to provide legal representation." *Id.* at 221-22. The court observed that the plaintiffs' claims were not performance-based; rather, the plaintiffs alleged the fundamental absence of any real representational relationship. *Id.* at 224. The court concluded, "These allegations state a claim, not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*." *Id.*

Similarly, in *Duncan v. State*, 774 N.W.2d 89 (Mich. App. 2009), the plaintiff class members claimed denial of their right to counsel based on allegations that the indigent defense systems in certain counties in Michigan were underfunded and did not provide defense attorneys with the "necessary tools [and] time" adequately to represent their clients. *Id.* at 99. The plaintiffs sought declaratory and injunctive relief. *Id.* at 123. The defendants' motion for summary disposition on the pleadings was denied and on appeal, they argued – as the lower court held here – that the plaintiffs' claims were not justiciable and that the plaintiffs needed to satisfy the two-part test of *Strickland*. *Id.* at 116-17. The Court of Appeals firmly rejected the defendants' position, observing that "harm,"

in this context, can take many forms in addition to a wrongful result in a criminal proceeding: "***[S]imply being deprived of the constitutional right to effective representation at a critical stage in the proceeding, in and of itself, gives rise to harm.***" *Id.* at 127 (emphasis added). In words completely applicable to these proceedings, the court rejected the notion that the plaintiffs' claims had to be subjected to *Strickland* analysis:

> 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. What is essentially harmless-error analysis is being confused with justiciability analysis in a case involving an altogether different remedy. ***The right to counsel must mean more than just the right to an outcome.***

Id. at 125-26 (emphasis added); *see also Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988), *cert. denied,* 495 U.S. 957 (1990) ("This [*Strickland*] standard is inappropriate for a civil suit seeking prospective relief. 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."); *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1127 (W.D. Wash. 2013) (finding that plaintiffs proved systematic violation of indigent defendants' right to counsel under *Gideon* and noting if plaintiffs had alleged "that counsel had affirmatively erred and obtained a

deleterious result," the challenge would have been brought under *Strickland*, not *Gideon*).

Most recently, the California Superior Court overruled the state's demurrer to plaintiffs' claims of systemic deprivation of indigent criminal defendants' right to counsel. The court held, "[P]laintiffs need not plead and prove the elements of ineffective assistance as to specific individuals in order to state a cause of action." *Phillips v. State of California*, Cal. Sup. Ct., County of Fresno, Case No. 15CECG02201, Law and Motion Minute Order dated April 12, 2016 (attached as an exhibit to the Appellants' Brief). The court agreed with *Luckey* that since the plaintiffs were not challenging individual convictions and were seeking only prospective relief, *Strickland* did not apply. *Id.*

The holdings of these cases are persuasive here. These plaintiffs do not allege inadequate performance or wrongful outcomes; they allege pervasive systemic problems in the provision of indigent defense services, and ask for the court's intervention to vindicate their constitutional right to the assistance of counsel in their defense. They seek prospective protection of their right to counsel so that the proceedings against them will be fair, rather than having to wait for an unfair result. Indeed, it might be that the ultimate outcomes of their cases would look reasonable, or even favorable; but there is no way of knowing what an alternative outcome might have looked like if the plaintiffs had benefitted from the

true assistance of counsel throughout, as promised by *Gideon*. *Strickland* simply is not designed to apply to such claims, and the District Court's application of *Strickland* to dismiss the plaintiffs' claims should therefore be reversed.

These plaintiffs' claims do not require a showing of error or prejudice in particular cases. Rather, they require proof that, due to the conditions under which criminal defense attorneys are being appointed and providing representation, the basic constitutional mandate set forth in the Sixth Amendment is not being met. These claims are justiciable, and *amici curiae* respectfully urge this Court to reverse the District Court's holding and allow them to proceed.

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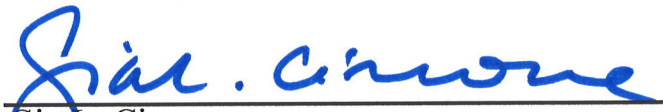
Respectfully submitted,



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