SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

KIMBERLY HURRELL-HARRING; JAMES ADAMS; JOSEPH BRIGGS; RICKY LEE GLOVER; RICHARD LOVE; JACQUELINE WINBRONE; LANE LOYZELLE; TOSHA STEELE; BRUCE WASHINGTON; SHAWN CHASE; JEMAR JOHNSON; ROBERT TOMBERELLI; CHRISTOPHER YAW; LUTHER WOODROW OF BOOKER, JR.; JOY METZLER; VICTOR TURNER; EDWARD KAMINSKI; CANDACE BROOKINS; RANDY HABSHI; and RONALD McINTYRE, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

THE STATE OF NEW YORK, GOVERNOR ANDREW M. CUOMO, in his official capacity, THE COUNTY OF ONONDAGA, NEW YORK, THE COUNTY OF ONTARIO, NEW YORK, THE COUNTY OF SCHUYLER, NEW YORK, THE COUNTY OF SUFFOLK, NEW YORK and THE COUNTY OF WASHINGTON, NEW YORK,

Defendants.

Index No 8866-07

Devine, J.

MEMORANDUM OF LAW IN REPLY TO PLAINTIFFS' OPPOSITION TO THE STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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This memorandum of law is submitted in reply to plaintiffs' opposition to the motion for summary judgment made on behalf of defendants State of New York and Governor Andrew M. Cuomo ("State defendants").

PRELIMINARY STATEMENT

In allowing this case to proceed past the pleading stage, the Court of Appeals emphasized its reliance on Plaintiffs' "detailed, multi-tiered complaint meticulously setting forth the factual bases of the individual claims and the manner in which they are linked to and illustrative of broad systemic deficiencies . . . ." Hurrell-Harring v. State of New York, 15 N.Y.3d 8, 23 (2010). Those alleged deficiencies, the Court noted, described system-wide inadequacies so severe that the complaint can be read to allege that indigent defendants in the Five Counties were regularly provided with counsel that "were incommunicative, made virtually no efforts on the their nominal clients' behalf during the very critical period subsequent to arraignment, and, indeed, waived important rights without authorization from their clients. . . . ." These allegations, the Court concluded, were sufficient to state a claim of "nonrepresentation" or constructive denial of counsel. Id. at 22. Indeed, in soaring rhetoric, the complaint paints a picture of a "broken public defense system" in New York "that is both severely dysfunctional and structurally incapable" of providing defendants the legal representation guaranteed them by the state and federal constitutions. See 8/22/13 Kerwin aff.[1] at Exh. A, ¶¶ 4, 7. But, while that rhetoric -- which plaintiffs continue to employ in their opposition papers -- may be impressive, the record upon which it is based is far from it.

Plaintiffs' submissions create a dichotomy between the factual record/reality and statistics/opinions. The statistics and "expert" opinions upon which plaintiffs rely utterly fail to

[1] "8/22/13 Kerwin aff." refers to the August 22, 2013 affidavit of Adrienne J. Kerwin filed in support of the State defendants' motion for summary judgment.

meet their burden of creating an issue of fact as to whether indigent criminal defendants in the Five Counties are at risk of being denied the right to counsel as a result of systemic constitutional deficiencies. Plaintiffs' reliance on such evidence is, however, understandable since the abundant proof before the Court concerning the actual delivery of indigent defense services, plainly demonstrates that the plaintiffs' case is not rooted in reality. That evidence – including deposition testimony and affidavits from individuals with first-hand knowledge of delivery of indigent defense services in the Five Counties -- completely undercuts the plaintiffs' case and reveals the complaint to be largely a work of fiction.

In addition to establishing that plaintiffs' constructive denial claim lacked any basis at the time the complaint was filed, the record shows that in the six years since that filing there have been significant advancements in the delivery of defense services to indigent New Yorkers. It is little wonder, then, that the plaintiffs fail to offer any proof from attorneys currently providing indigent criminal defense representation in New York State.

Notwithstanding plaintiffs' accusation that the State has shown a callous disregard for rights of indigent defendants, the record before the Court demonstrates that the State and the Five Counties have made continuing efforts to improve the delivery of indigent defense services – including the creation of the New York State Office of Indigent Defense Legal Services ("OILS).[2] Those efforts do not, as plaintiffs bizarrely suggest, evidence the constitutional shortcomings of indigent defense services in New York. Instead, initiatives such as OILS reflect the State's continuing efforts to enhance a system that already passes constitutional muster.

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[2] In their memorandum of law, the plaintiffs assert that the State defendants cannot be trusted to continue to improve indigent criminal services. Specifically, plaintiffs state, ". . . the State's tenacious resistance, over the course of seven years of litigation, indicates that absent a finding of liability and an injunction there is every reason to believe that violations will once again reoccur." See Plaintiffs' Memorandum of Law at p. 92. It is both absurd and insulting for plaintiffs to equate the defendants' steadfast defense of this case with the State's willingness to insure that indigent defendants receive the representation guaranteed by the state and federal constitutions.

When viewed in the light most favorable to the plaintiffs, the fact-based record before the Court falls woefully short of that necessary to sustain a systemic constructive denial of counsel claim. Accordingly, since the State defendants have met their burden on their motion for summary judgment and established that the plaintiffs cannot, and have not, raised any issues of fact to support a finding that indigent criminal defendants are at risk of being denied the right to counsel as a result of systemic failings, the defendants are entitled to summary judgment.

INTRODUCTION

As presaged three and one-half years ago by the Court of Appeals, "it may turn out after further factual development that what is really at issue is whether the representation afforded [the plaintiffs] was effective – a subject not properly litigated in this civil action..." Hurrell-Harring, 15 NY3d at 23. The evidence offered by the plaintiffs in opposition to the State defendants' motion for summary judgment demonstrates that, despite what the Court of Appeals characterized as a "multi-tiered complaint meticulously setting forth the factual bases of the individual claims and the manner in which they are linked to and illustrative of broad systemic deficiencies," id., the plaintiffs can only, at best, prove isolated instances of ineffective assistance of counsel. The massive failure of plaintiffs' proof, consistently and thoroughly unraveling since the Court of Appeals ruling, is perhaps best illustrated by a comparison of the allegations in the complaint and the affidavits of alleged "class members" submitted in opposition to this motion.

The Court of Appeals read allegations that

> [A]lthough lawyers were nominally appointed for plaintiffs, they were unavailable to their clients – that they conferred with them little, if at all, were often completely unresponsive to their urgent inquiries and requests from jail, sometimes for months on end, waived important rights without consulting them, and ultimately appeared to do little more on their behalf than act as conduits for plea offers, some of which purportedly were highly unfavorable. It is repeatedly alleged that counsel missed court appearances, and

> that when they did appear they were not prepared to proceed, often because they were new to the case, the matters having previously been handled by similarly unprepared counsel. There are also allegations that the counsel appointed for at least one of the plaintiffs was seriously conflicted and thus unqualified to undertake the representation.

Hurrell-Harring, 15 NY3d at 19-20. The proof before the Court, however, demonstrates that (1) bail applications, discovery demands and motions were made on behalf of the plaintiffs, see e.g. Munkwitz aff.[3] at Exh. B, ¶5, 10/23/13 Kerwin aff.[4] at Exh. P, p. 64; Muse aff.[5] at Exh. F, p. 47; McGowan aff.[6] at Exh. K, pp. 115, 124, 125, Exh. Q, p. 64, Exh. R, p. 71, Exh. J, pp. 88-89, Exh. P, pp. 29-30; (2) hearings and trials were held, see e.g. Rutnik aff.[7] at Exh. L, ¶6; McGowan aff. at Exh. K, pp. 124, 125, Exh. Q, 65-66, 87, Exh. R, pp. 72-73; (3) attorneys met with clients in jail and at attorney's offices, see e.g., Munkwitz aff. at Exh. B, ¶¶10, 17, Exh. V, pp. 60-61; 10/23/13 Kerwin aff. at Exh. P. p. 67; Dvorin aff.[8] at Exh. B, ¶8, Exh. I, p. 76, Exh. R, p. 62; Rutnik aff. at Exh. L, ¶6, Exh. W, p. 44, Exh. Y, pp. 33; 10/23/13 Kerwin aff. at Exh. O, pp. 84, 88; 8/22/13 Kerwin aff. at Exh. A, ¶47; Muse aff. at Exh. F, pp. 38-40; McGowan aff. at Exh. Q, pp. 51-52, 55, 61, 85-86, 87-90, Exh. K, pp. 110-11, 127, Exh. S, pp. 49, 63, Exh. L, p. 55; (4) favorable plea offers were negotiated and reached, see e.g. Munkwitz aff. at Exh. B, ¶19; Dvorin aff. at Exh. B, pp. 5-9 of Exhibit A thereto; and (5) in certain instances, the denial of bail was

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[3] "Munkwitz aff." refers to the August 22, 2013 affirmation of Kelly Munkwitz filed in support of the State defendants' motion for summary judgment.
[4] "10/23/13 Kerwin aff." refers to the October 23, 2013 affirmation of Adrienne J. Kerwin filed herewith in reply to plaintiffs' opposition to the State defendants' motion for summary judgment.
[5] "Muse aff." refers to the August 22, 2013 affirmation of Keith Muse filed in support of the State defendants' motion for summary judgment.
[6] "McGowan aff." refers to the August 22, 2013 affirmation of James McGowan filed in support of the State defendants' motion for summary judgment.
[7] "Rutnik aff." refers to the August 22, 2013 affirmation of Tiffinay Rutnik filed in support of the State defendants' motion for summary judgment.
[8] "Dvorin aff." refers to the August 22, 2013 affirmation of Jeffrey Dvorin filed in support of the State defendants' motion for summary judgment.

required by statute. See e.g. Munkwitz at Exh. C, ¶4, Exh. V, p. 25; McGowan aff. at Exh. Q, p. 62; Exh. L, p. 66; 10/23/13 Kerwin aff. at Exh. B, pp. 4-5.

Instead of submitting the proof anticipated by the Court of Appeals in light of the promised assertions in the complaint that

> the experience of these plaintiffs is illustrative of what is a fairly common practice in the [Five] counties of arraigning defendants without counsel and leaving them, particularly when accused of relatively low level offenses, unrepresented in subsequent proceedings where pleas are taken and other critically important legal transactions take place,

Hurrell-Harring, 15 NY3d at 19, the plaintiffs resorted to submitting irrelevant anecdotal suggestions (1) that two Onondaga County Assigned Counsel Plan ("ACP") attorneys could not make a living representing ACP clients, see Blase aff.[9] at Exhs. 69, 70, (2) from a former Suffolk County Legal Aid Society ("LAS") attorney who worked for LAS from 2004-2007, see Blase aff. at Exh. 107, (3) from an alleged class member who received a sentence of probation instead of "weekend jail," see Blase aff. at Exh. 231, ¶28, (4) a defendant who had to kick his attorney in the shins to get him to ask the victim of his crime if she got violent when she did not take her psychiatric medication, see Blase aff. at Exh. 269, ¶40, and (5) a defendant whose lawyer has visited him in jail three times in four months. See Blase aff. at Exh. 211, ¶¶14-15. At a time when the plaintiffs are required to lay bare their proof and objectively demonstrate that they can meet their burden as required by law, the plaintiffs instead submitted affidavits relying on subjective emotions and assessments pronouncing that they were unhappy with their attorneys, that their attorneys did not seem to care about them and that they felt that their attorneys did bad jobs. This is not the case envisioned by the Court of Appeals as promised in the complaint, but instead the failure of evidence that the Court of Appeals cautioned against. Plaintiffs' "proof" is,

[9] "Blase aff." refers to the October 8, 2013 affirmation of Kristie M. Blase filed in opposition to the State defendants' motion for summary judgment.

at best, a case involving anecdotal claims of ineffective assistance of counsel, devoid of evidence demonstrating the systemic failures advertised in the complaint.

Indeed, the plaintiffs' proof fails to make any causal connection between the allegedly inadequate representation provided by indigent defense attorneys in the Five Counties and alleged systemic deficiencies. Instead, the plaintiffs essentially ask the court to ignore the actual representation provided to the representative plaintiffs, and other indigent defendants in the Five Counties, and to extrapolate from incomplete statistics and unnecessary, biased and anecdotal "expert" testimony, that indigent criminal defendants in the Five Counties are "at risk" of being denied the right to counsel – without proving that any systemic deficiencies actually exist.

Plaintiffs assert that the State defendants wasted seventy pages of their moving memorandum of law describing the adequacy of the representation provided to the representative plaintiffs. Rather than facing the actual facts underlying the "multi-tiered complaint meticulously setting forth the factual basis of the individual claims" noted by the Court of Appeals, Hurrell-Harring, 15 NY3d at 23, and addressed in detail by the State defendants, plaintiffs flee from the representative plaintiffs' actual experiences with the criminal defense systems in each County. It was those imagined experiences that plaintiffs set forth and the Court of Appeals relied upon in reaching its conclusion that, with appropriate facts, the representatives of the purported class could state a claim. The Court of Appeals upheld the complaint in this case because it found that the pleading alleged the "factual bases of the individual claims and the manner in which they are linked to and illustrative of broad systemic deficiencies." It was necessary and appropriate for the State defendants to show the court that (1) the proof regarding the representation afforded the plaintiffs does not resemble the allegations contained in plaintiffs' "meticulous," multi-tiered complaint and (2) if the plaintiffs are representative of anything, they are representative of

indigent criminal defendants who were not constructively denied the right to counsel. This discussion of the plaintiffs' actual experiences was particularly necessary because the complaint in this case contained 44 pages of 197 paragraphs specifically about the plaintiffs' alleged experiences in the public defense systems in the Five Counties – experiences that plaintiffs now conveniently and necessarily assert are irrelevant if their complaint is to survive. It was plaintiffs' own description, albeit unhinged from reality, of their experiences that kept this case alive at the pleading stage. Their resistance to the relevance of the proof -- or lack thereof – of their own experiences as indigent criminal defendants in the Five Counties underscores the fact that they have pled a claim that they cannot prove.

While the plaintiffs repeatedly assert that the State defendants lack the wherewithal to comprehend and apply the Court of the Appeals decision, it is the plaintiffs who fail to grasp the fact that the Court of Appeals **did not make any factual findings**. The Court of Appeals did all that it had the authority to do -- it read the allegations in an unsupported and hyperbolic complaint and determined that those allegations, if true, could establish a violation of the right to counsel. It did not conclude that what was stated in the complaint actually occurred, or continues to occur. While the plaintiffs wish to, and continuously do, point to the Court of Appeals' analysis of a proofless complaint, as groundbreaking, authoritative and binding on issues that the Court did not even have the opportunity to address, the language in the Court of Appeals decision does nothing more than describe a cognizable claim. It made no findings about the Five Counties or the State. The State defendants need no convincing that a case proving, at best, only issues of ineffective assistance of counsel is not justiciable. The Court of Appeals made that plain some years ago. Unfortunately for plaintiffs, those are the only issues for which they may

arguably have raised issues of fact – the promised evidence of systemic deficiencies wholly evading them on this record.

ARGUMENT

POINT I

PLAINTIFFS' EXPERT AFFIDAVITS ARE INSUFFICIENT TO DEFEAT THE STATE DEFENDANTS' ENTITLEMENT TO SUMMARY JUDGMENT[10]

"The admission of expert testimony rests within the sound discretion of the trial court." People v. Nickel, 14 AD3d 869, 871 (3d Dep't 2005); accord Dufel v. Green, 84 NY2d 795, 798 (1995). Expert testimony may be permitted for issues that involve "professional or scientific knowledge or skill not within the range of ordinary training or intelligence." Dougherty v. Milliken, 163 NY 527, 533 (1900); Dufel, 84 NY2d at 798. "The test is one of need as applied to the unique circumstances of each case." Dufel, 84 NY2d at 798. Expert testimony is not necessary when the subject testimony is "within the ken of the factfinder." People v. Nickel, 14 A.D.3d at 871. Even if permitted, expert opinion is not sufficient to defeat summary judgment if it is based on hearsay, lacks an evidentiary foundation and/or is not relevant to the issues in question.

Plaintiffs offer the affidavits of three "experts" in opposition to the State's motion for summary judgment: 1) Norman Lefstein, a law school professor who purports to be an expert in the area "of professional responsibility, competence of representation, and the duties of defense counsel in criminal cases"; 2) Robert C. Boruchowitz, a law school professor who purports to be

[10] As the Court is aware, the State of New York currently has pending a motion for preclusion of plaintiffs' experts based upon plaintiffs' inexcusable delay in providing expert disclosure. The State maintains its position that plaintiffs' late disclosure is severely prejudicial and should be precluded.

an expert in the area of effective assistance of counsel; and 3) Gary King, Ph.D, who purports to be an expert in empirical and statistical methods in social science research.

As an initial matter, expert testimony is not necessary here because the subject matter at issue is "within the ken of the factfinder". Nickel, 14 AD3d at 871. It cannot be disputed that criminal defense representation is plainly within the scope of this Court's professional knowledge, skill and training. Accordingly, the Lefstein and Boruchowitz opinions are "unnecessary and improper." Id.

Moreover, the Lefstein and Boruchowitz affidavits are laden with inadmissible hearsay and lack an evidentiary foundation. Their affidavits further fail to address issues relevant to this litigation as narrowed by the Court of Appeals. Finally, Professor King's report entitled A Preliminary Study of Criminal Cases and Indigent Defense in Five New York Counties, is not admissible because he fails to demonstrate the requisite training, skill, knowledge or experience to opine on criminal cases and indigent defense. Thus, plaintiffs' expert opinions are not sufficient to rebut the State's entitlement to summary judgment.

A. Hearsay

In preparing their affidavits, Professors Boruchowitz and Lefstein assert that they relied upon deposition transcripts, documents disclosed in the course of this litigation, the State's summary judgment motion papers, interviews with various individuals, several e-mails, several articles and reports submitted by a law student interning with the NYCLU. See Boruchowitz aff.[11] at ¶¶ 28-31; Appendix B; Lefstein aff.[12] at ¶¶ 13-15, Appendix B. The e-mails, articles, reports from the law student and the information gleaned from interviews are out of court

[11] "Boruchowitz aff." refers to the October 8, 2013 affidavit of Robert C. Boruchowitz filed by the plaintiffs in opposition to the State defendants' motion for summary judgment.
[12] "Lefstein aff." refers to the October 8, 2013 affidavit of Norman Lefstein filed by the plaintiffs in opposition to the State defendants' motion for summary judgment.

statements offered for the truth of the matter asserted. Because they do not fall under an exception to the hearsay doctrine, they are inadmissible. See People v Rosario, 17 NY3d 501, 518 (2011) (J. Smith, concurring and dissenting) ("In general, the hearsay rule prohibits the admission into evidence of out-of-court statements to prove the truth of the matter stated.").

Generally, under the professional reliability exception to the hearsay rule, an expert may rely upon "otherwise inadmissible hearsay, provided it is demonstrated to be the type of material commonly relied on in the profession." Hinlicky v Dreyfuss, 6 NY3d 636, (2006). However, where there is no evidence that the hearsay material relied upon is professionally accepted in the relevant field, it must be rejected. See, e.g., Matter of Dakota F. (Angela F.), 2013 NY App. Div. LEXIS 6699 (3d Dept. Oct. 17, 2013); Reis v Volvo Cars of N. Am., 105 AD3d 663, 665 (1st Dep't 2013).

Professor Boruchowitz's opinion is heavily dependent upon hearsay. See, e.g., Boruchowitz aff. at ¶¶ 52 (relying upon a conversation with Sabato Caponi[13]), 54 (relying upon e-mail from Laurette Mulry), 57-63 (relying upon report from NYCLU intern), 74 (quoting comment from a judge), 76 (quoting American Council of Chief Defenders Statement on Caseloads and Workloads), 80(c) (relying upon conversation with Sabato Caponi), 83-85 (relying upon e-mail exchange between Sabato Caponi and Mr. Mazzola), 88 (citing Washington Post article), 93 (quoting American Council of Chief Defenders Statement on Caseloads and Workloads), 119 (quoting a report by The Sentencing Project), 120 (quoting the National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representation), 122 (relying upon Mr. Caponi's opinion), 131 (relying upon a chart from Kings County, Washington), 141-42, 145-49 (relying upon purported conversations between LAS attorneys and

[13] Mr. Caponi is employed by LAS, which is not a party to this action. Accordingly, plaintiffs cannot assert that statements by him are a party admission.

their clients), 151 (relying upon a statement by Mr. Caponi), 159 (citing a 2009 letter from Washington State District and Municipal Court Judges Association), 161-62 (citing NACDL articles), 168 (relying upon e-mail from Defender Association), 170 (citing to law review article), 171-72 (citing to Washington State Bar Association standards), 203 (relying upon MapQuest calculation) 210 (quoting Eight Guidelines of Public Defense Related to Excessive Workloads), 216 (quoting resolution of the American Council of Chief Defenders), 232, 235 (quoting Post Star newspaper), 241 (citing National Study Commission on Defense Services Guideline), 246 (citing to document prepared by the Defender Association in King County, Washington), 252 (conversation with Pelayo Rodriguez), 255-56 (citing New York Times article), 262 (relying upon unattributed numbers purportedly from Washington state), 263 (quoting OILS which cites to 2 articles). Professor Boruchowitz fails to assert that the hearsay material that he relied upon is commonly relied upon by professionals in his field. He further fails to demonstrate the reliability of the material relied upon.

Professor Lefstein fails to cite to the source of many of his purported factual statements. See generally Lefstein aff. Moreover, the few citations he uses demonstrate that, similar to Professor Boruchowitz, he relies upon hearsay material. See, e.g., Lefstein aff., ¶¶ 15 (citing standards from various professional organizations), 27 (relying upon opinion by Director Leahy), 30 (quoting National Right to Council Committee), 32, n1 (quoting The Constitution Project), 34 (citing to testimony before the Kaye Commission), 43 (citing to Report of National Symposium on Indigent Defense), 74 (quoting commentary on ABA standard), 75, n.5 (citing a California study), 75, n.6 (citing a University of Michigan Law School publication), 77 (citing report of National Advisory Commission on Criminal Justice Standards and Goals Task Force), 77, n.8 (citing to his own ABA articles), 147 (citing to NLADA Performance Guidelines), 175 (relying

upon his conversations with private lawyers), 204 (citing Brennan Center for Justice). Also similar to Professor Boruchowitz, he fails to assert that such material is commonly relied upon by professionals in his field.

Professors Boruchowitz's and Lefstein's affidavits suffer the same infirmity as the expert report in Matter of Dakota F., 2013 N.Y. App. Div. LEXIS 6699. In that recent case, the petitioner hired a psychologist to opine on the respondent's mental health. Id. at *3. In the course of his examination, the psychologist interviewed counselors, caseworkers and others. Id. The trial court allowed the expert opinion over the respondent's objection. Id. The Third Department held the trial court erred in admitting the report because there was no evidence "as to whether the information he gleaned from the interviews with individuals who did not testify was professionally accepted as reliable in performing mental health evaluations." Id. at *4. Because Professors Boruchowitz and Lefstein failed to assert that the hearsay that they relied upon was professionally accepted in their field, their affidavits must be rejected as inadmissible hearsay. Id.

B. No Evidentiary Foundation

In order to defeat summary judgment, an expert's opinion must be based on "facts contained in the record or within his personal knowledge." Bacani v. Rosenberg, 74 AD3d 500, 502 (1st Dept. 2010) "Where the expert's ultimate assertions are speculative or unsupported by any evidentiary foundation . . . the opinion should be given no probative force and is insufficient to withstand summary judgment." Buchholz v. Trump 767 Fifth Ave., LLC, 5 NY3d 1, 9 (2005), quoting, Diaz v New York Downtown Hosp., 99 NY2d 542, 544 (2002); Cassidy v. Highrise Hoisting & Scaffolding, Inc., 89 AD3d 510 (1st Dept. 2011) (quoting Buchholz). "An expert may not reach a conclusion by assuming material facts not supported by the evidence, and

may not guess or speculate in drawing a conclusion." Quinn v Artcraft Const., Inc., 203 AD2d 444, 445 (2d Dept. 1994). Because the opinions proffered by Professors Lefstein and Boruchowitz lack evidentiary support in the record, they should be rejected.

Professor Lefstein's affidavit is patently insufficient to withstand summary judgment. Indeed, several times he candidly acknowledges that he lacks sufficient facts to render an opinion then proceeds to do so, regardless. See, e.g., Lefstein aff., ¶¶ 108-110 (caseloads in Ontario county), 128 (insufficient facts to opine on APD Cioffi's caseload); 138 (caseloads in Schuyler county). At other times, he falls short of actually rendering an opinion and instead prevaricates. See, e.g., id. at ¶¶ 80 ("it *appears* that defense lawyers . . .:), 116 ("The evidence *suggests* . . . ."), 117 ("Such reality *suggests* . . . .")118 ("percentages strongly *suggest*), 121 ("These data strongly *suggest* to me . . . ."), 131("the caseloads referenced in paragraphs 129 and 130 *are in all likelihood* higher"), 132 ("the rate of expert use *appears to be* far too low"), 134 ("This testimony *supports my impression* . . . ."), 150 ("the fact that it occurs at all is very troublesome and *suggests* that clients *probably* are pleading guilty without much communication with their lawyers"), 206 ("the examples cited below *suggest* . . . .") (emphasis supplied).

The opinions actually asserted by Professor Lefstein are speculative and lack any evidentiary support. Rather, he relies upon statistics he did not prepare and anecdotal evidence See, e.g., ¶¶ 35-38, 88, 94-98, 107, 141, 168, 180. Notably, Professor Lefstein's conclusions often contradict the actual proof in this matter. For example, he incorrectly cites to Washington County First APD Morris' "frank testimony about putting paying clients before his defender clients." Id. at ¶ 130. APD Morris did not make any such statement. Expert opinion that is at odds with admissible record evidence is not sufficient to defeat a motion for summary judgment. Bacani v. Rosenberg, 74 A.D.3d 500, 502-03 (1st Dept. 2010).

Professor Boruchowitz's affidavit is similarly infirm. For example, his opinion that Suffolk County LAS attorneys carry excessive caseloads that undercut their ability to provide effective representation is based solely upon Mr. Mitchell's testimony that he would like more attorneys, his testimony that he does not turn clients down and Mr. Caponi's hearsay statements. Boruchowitz Aff. ¶¶72-120. Professor Boruchowitz' opinion that Washington County's caseloads are excessive has even less evidentiary support. Id. at ¶¶ 203-18. Because Professor Boruchowitz' opinions are not supported by the evidence, they are not sufficient to raise and issue of fact to defeat summary judgment. See Fenty v Seven Meadows Farms, Inc., 108 AD3d 588, 589 (2d Dept. 2013).

C. Failure to Use the Relevant Standard

Rather than rely upon record evidence, Professors Boruchowitz and Lefstein rely heavily upon standards that are not relevant to the issues before the court as framed by the Court of Appeals. Both cite to various ABA standards as well as NLDA standards, among others. Boruchowitz aff. at ¶ 25; Lefstein aff. at ¶ 15. However, neither addresses the applicability of the cited standards to the question of constructive denial of counsel. See generally Boruchowitz aff.; Lefstein aff. Indeed, they cannot do so as the United States Supreme Court has already held that such rules "are guides to determining what is reasonable, but they are only guides." Strickland v. Washington, 466 US 668, 688 (1984).

At issue before this Court is whether plaintiffs were constructively denied their right to counsel by virtue of systemic deficiencies in the Five Counties. Hurrell-Harring, 15 NY3d at 23. The issue of whether plaintiffs received effective counsel is not justiciable and is not properly before this Court. Id. Indeed, the Court of Appeals expressly cautioned that its decision "should not be viewed as a back door for what would be nonjusticiable assertions of ineffective

assistance seeking remedies specifically addressed to attorney performance, such as uniform hiring, training and practice standards." Id. at 24-25. Nonetheless, Professors Lefstein's and Boruchowitz's affidavits are replete with opinions that the indigent defense systems in the counties in question do not meet the best practice goals of ABA or the NLDA. See generally Boruchowitz aff.; Lefstein aff.

As Professors Boruchowitz's and Lefstein's opinions are based on inapplicable standards, their affidavits are insufficient to overcome defendants' entitlement to summary judgment. See Cietek v Bountiful Bread of Stuyvesant Plaza, Inc., 74 AD3d 1628, 1629-30 (3d Dept. 2010) (holding injured plaintiffs' expert's reliance upon OSHA standards not sufficient to defeat summary judgment).

D. Professor King's Report

It has long been held that in order for his or her opinion to be admitted, an "expert should be possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable." Matott v. Ward, 48 N.Y.2d 455, 459 (1979); People v. Burt, 270 AD2d 516, 518 (3d Dep't 2000). An expert's skill, training, education, knowledge or experience must be in the same area of his or her proffered opinion. See Burt, 270 AD2d at 518 (finding putative expert not qualified where his computer training and experience was unrelated to the value of computers); see also Stanley v. Ramono, 90 NY2d 444, 452 (1997) (finding clinical forensic psychologist not qualified to render an opinion on how decedent would have presented based upon blood and urine alcohol levels at time of death).

According to his affidavit, Professor King has a Ph.D. in political science and is the Director of the Institute for Quantitative Social Science at Harvard University. See King aff.[14] at ¶¶ 2-3. He spent the last "several decades" developing and applying "statistical methods and software for use in academia, government, consulting, and private industry." See id. at ¶4. He was elected a fellow of the American Statistical Association, National Academy of Sciences, American Association for the Advancement of Science, American Academy of Arts and Sciences, Society for Political Methodology, and American Academy of Political and Social Science. See id. Professor King fails to assert that he has any skill, training, education, knowledge or experience in criminal cases and/or indigent defense.

Notwithstanding Professor King's lack of experience in the area of criminal cases and indigent defense, plaintiffs ask this Court to accept A Preliminary Study of Criminal Cases and Indigent Defense in Five New York Counties as expert opinion. However, Professor King's lack of credentials in the area of criminal law and/or indigent defense renders him incompetent to render an opinion. Stanley, 90 NY2d at 452; Burt, 270 AD2d at 518. His lack of expertise is evident in his report. For example, when comparing the percentage of privately represented criminal defendants who are released on bail to those represented by LAS, 18-B attorneys or appearing *pro se*, his analysis fails to evaluate the nature of the crimes, the defendants' criminal histories and/or the defendants' ties to the community. See King aff. at pp. 22-31, Similarly, when analyzing the use of experts, he relies solely upon the level of crime and ignores facts such as whether the District Attorney had an expert and whether an expert would have actually added value to the cases in question. See King aff. at pp. 32-36, 67-70, 99. Most significantly, as

[14] "King aff." refers to the October 1, 2013 affidavit of Dr. Gary King filed by the plaintiffs in opposition to the State defendants' motion for summary judgment.

discussed in Point III-A, the vouchers-derived statistics, which form the centerpiece of Professor King's analysis, are incomplete, unreliable and irrelevant to the issues in this case.

Simply stated, Professor King's lack of skill, training, education, knowledge or experience in the areas of criminal defense and/or indigent defense render him incompetent to proffer an expert opinion on criminal cases and indigent defense. Accordingly, his report is not sufficient to overcome the State's entitlement to summary judgment. See Stanley, 90 NY2d at 452; Burt, 270 AD2d at 518.

POINT II

THE STATE SHOULD BE GRANTED SUMMARY JUDGMENT BECAUSE THE REPRESENTATIVE PLAINTIFFS FAIL TO ESTABLISH STANDING

"Standing is, of course, a threshold requirement for a plaintiff seeking to challenge governmental action." New York State Assn. of Nurse Anesthetists v. Novello, 2 NY3d 207, 211 (2004)). The burden to establish standing rests squarely with the plaintiffs. Society of the Plastics Industry, Inc. v. County of Suffolk, 77 NY2d 761, 769 (1991). Standing may be conferred by statute or established under the common law. Id. at 769-72. "Common law standing requires a showing of 'an injury in fact, distinct from that of the general public,' that falls within the zone of interests promoted or protected by the pertinent regulation or statute." Diederich v. St. Lawrence, 78 AD3d 1290 (3d Dept. 2010). The requirement that a litigant have standing prevents courts from issuing advisory opinions and prevents litigants from "misusing [a] statute to delay or defeat governmental action, and thereby advance ends outside the legislative purview." Society of the Plastics Industry, Inc., 77 NY2d at 778.

In their opposition to the State defendants' motion for summary judgment, plaintiffs largely ignore the representative plaintiffs, relying instead upon their "expert" submissions. See

generally Plaintiffs' Memorandum of Law. Indeed, they chastise the State for devoting 70 pages to address the claims of the representative plaintiffs. See id. at p. 34. In fact, the evidence discussed in those 70 pages provides overwhelming proof that plaintiffs cannot establish that a single representative plaintiff was denied or constructively denied representation.[15]

Plaintiffs' failure to articulate a single concrete constitutional injury suffered by the representative plaintiffs deprives them of standing. In order to establish standing, plaintiffs "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." Warth v. Seldin, 422 US 490, 502 (1975); Simon v. East Ky. Welfare Rights Org., 426 US 26, 40 (1976) (quoting Warth); Lewis v. Casey, 518 US 343, 357 (1996) (quoting Simon). Contrary to plaintiffs' suggestion, "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the [State], none may seek relief on behalf of himself or any other member of the class." O'Shea v. Littleton, 414 US 488, 494 (1974). Plaintiffs' failure to demonstrate that a single representative plaintiff suffered a constitutional violation deprives plaintiffs of standing.

POINT III

PLAINTIFFS FAIL TO RAISE ISSUES OF MATERIAL FACT TO SUPPORT THEIR CLAIMS OF SYSTEMIC CONSTRUCTIVE DENIALS OF COUNSEL

One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the claim rests, or must demonstrate an acceptable excuse for the failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or

[15] It is noteworthy that three of the representative plaintiffs deny the allegations in the complaint and acknowledged under oath that they received adequate representation. See McGowan aff. at Exh. Q, p. 71; Rutnik aff. at Exh. Y, pp. 66-68; Dvorin aff. at Exh. R, pp. 52-55.

assertions are insufficient. See e.g. Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). The factual record in this case does not support a finding that able attorneys are unable to provide constitutionally-acceptable representation to indigent criminal defendants in the Five Counties because of systemic deficiencies. United States v. Cronic, 466 US 648, 659-62 (1984). Plaintiff's own expert, Robert C. Boruchowitz, states that he bases his opinions on the Supreme Court's following language in Cronic:

> Similarly, if counsel entirely fails to subject the prosecution's case to meaningful and adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable...
>
> **Circumstances of that magnitude may be present on some occasions when**, although counsel is available to assist the accused during trial, **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.

See Boruchowitz aff. at ¶24 (emphasis added). However, unsubstantiated assertions and wild speculation do not meet plaintiffs' burden on this motion for summary judgment. Alvarez v. Prospect Hosp., 68 NY2d 320, 327 (1986). Because, as discussed below, plaintiffs fail to establish an issue of material fact as to the threshold question of whether there is a likelihood that indigent defendants will be constructively denied counsel in the Five Counties, the court need not reach the systemic issue. But even if the court were to reach the question, the proof offered by the plaintiffs falls far short of that necessary to withstand a summary judgment motion.

The plaintiffs endeavor to establish that a "defense culture of nonrepresentation" exists in the Five Counties such that there is a substantial risk that competent lawyers will be unable to provide constitutionally-acceptable representation to indigent criminal defendants in those Counties. Like it or not, this is the burden that plaintiffs' lofty and "meticulously" crafted

complaint led the Court of Appeals to set, and they cannot not carry it, as a matter of law, on the actual evidence in this case.

Although the plaintiffs continually accuse the State defendants of arguing the merits of this case under an ineffective assistance of counsel theory, all of the alleged "evidence" submitted by the plaintiffs from alleged class members does nothing more than allege sporadic and anecdotal instances of possible ineffective assistance of counsel. The plaintiffs attempt to follow the standard articulated by the Court of Appeals and the cases that it cites – including Cronic[16] – as demonstrated by the table of contents of their opposing memorandum of law. Specifically, the plaintiffs purport to present evidence that "The Plaintiff Class Faces a Constitutionally Unacceptable Risk of Constructive Denials of Counsel," see Plaintiffs' Memorandum of Law at p. i., **because** "The Five Counties' Public Defense Systems Suffer from Systemic Deficiencies" such as (1) "Lack of Necessary Resources and Political Pressures to Prioritize Cost Savings Over Client Representation," (2) "Excessive workloads, Insufficient Staffing, and the Absence of Support Services," and (3) "Lack of Necessary Attorney Qualification Systems, Hiring Requirements, Training and Supervision," that "Prevent Attorneys from Meeting their Constitutional Obligations to their Clients." See id. at p. ii. Put another way, the plaintiffs claim that they can (1) demonstrate systemic conditions that (2) "create a constitutionally unacceptable risk of violations of the right to counsel." See id. at p. 30. However, despite the outline presented in their table of contents, and acknowledgement of their burden, the plaintiffs fail to ever connect the dots between what they characterize as "a constitutionally unacceptable risk of constructive denials of counsel" to any systemic cause.

[16] The fact that the plaintiffs allege that Cronic is "an ineffective assistance case," see Plaintiffs' Memorandum of Law at p. 32, illustrates plaintiff's misunderstanding of the Court of Appeals decision in this case. Cronic is the landmark Supreme Court case that outlines the type of case that the Court of Appeals opined that the plaintiffs are trying to prove here – one for the denial – not ineffective assistance – of counsel.

Plaintiffs fail to identify any actual facts – as opposed to conclusory opinions of public defense advocates unsupported by admissible evidence – of a systemic cause to alleged attorney failings. Simply put, the plaintiffs have done nothing more than, at best, raise speculation on issues of ineffective assistance of counsel. As a result, the state defendants are entitled to summary judgment on plaintiffs' constructive denial of the right to counsel claims. Alvarez, 68 NY2d at 327; Zuckerman, 49 NY2d at 562.

Plaintiffs are correct that the State defendants utilized cases brought within criminal or habeas proceedings in support of their motion. However, such cases were used to identify the types of situations in which representation was found to be non-existent, as opposed to ineffective. Resort to these cases – regardless of the relief sought in them – was necessary as a result of the scarcity of case law dealing specifically with civil challenges to the right to counsel. This scarcity is perhaps illustrated by the plaintiffs' inclusion of virtually no cases -- other than Gideon, of course -- to support their claims.

A. Plaintiffs Fail to Raise Any Issues of Material Fact to Support a Finding of Constructive Denials of the Right to Counsel

The plaintiffs argue that indigent criminal defendants are at significant risk of being denied the right to counsel by attorneys (1) failing to use investigators, experts or interpreters enough, (2) failing to advocate adequately, and (3) failing to communicate enough with clients. However, for the reasons discussed below, the plaintiffs fail to produce evidence capable of even raising an issue of material fact as to these claims.

Instead of using the evidence gathered in this case or citing to the countless and costly depositions that the plaintiffs demanded on the eve of the discovery deadline in this case, the plaintiffs rely largely on numbers gathered from vouchers for payment. The use of these numbers does not establish any kind of constructive denial of counsel. First, as plaintiffs' own

expert acknowledges, the data analyzed is woefully incomplete. See King aff. at Exh. A, pp. 3-8. Second, vouchers for payment of attorneys are not used to pay attorneys in Public Defender ("PD") Offices like Ontario County, Schuyler County and Washington County, or a Legal Aid Society as in Suffolk County. While attorneys providing conflict representation in these counties must submit vouchers for payment, data relating to such attorneys are not only relatively small in number, but also completely irrelevant to what is done by the primary public defense provider in those counties. For example, Ontario County Public Defender Leanne Lapp testified that, as of October 2012, only eleven percent of the County's indigent criminal cases were handled by conflict counsel that year. See Munkwitz aff. at Exh. F, pp. 194. Therefore, plaintiffs' statement that vouchers showed that 98 percent of Ontario County's ACP cases did not include billing for "any investigator services at all," see Plaintiffs' Memorandum of Law at p. 43, is completely misleading. If the 98 percent figure is even accurate, the number of total cases that allegedly did not use investigators is 98 percent of 11 percent of Ontario County's indigent criminal defense cases. Such does not demonstrate admissible evidence of a systemic failure; it demonstrates an inadequate and ill-considered assessment of the existing evidence by the plaintiffs.

Third, two of the Five Counties – Ontario and Suffolk – have investigators on staff and therefore do not need to submit vouchers for investigators to be paid. See Munkwitz aff. at Exh. G, pp. 63-64; Dvorin aff. at Exh. H, p. 71, Exh. G, p. 143, Exh. N, pp. 202-03. Vouchers are thus completely irrelevant as to how often investigators are used in these Counties.

Fourth, the number of vouchers seeking payment for investigators, experts or interpreters – or the number of attorney vouchers that contain, or do not contain, entries related to investigating charges or defenses or communicating with clients – are in and of themselves

irrelevant and cannot be analyzed in a vacuum since they fail to provide any information about why investigators or experts were not used.

Fifth, plaintiffs' data relating to communications with clients contained in attorney vouchers does not appear to include time spent at court appearances. Since client communication at court satisfies Gideon's mandate, Ping v. Willingham, 746 FSupp2d 496, 500 (SDNY 2010); U.S. v. Nuclovic, 2006 US Dist. LEXIS 90113, **25-26 (SDNY 2006), plaintiffs' failure to include data relating to court appearances in their discussion about attorney-client communication completely undermines plaintiffs' argument and misrepresents what the vouchers really show.

Sixth, the plaintiffs want the Court to make a giant inferential leap from bare, unreliable numbers that could have resulted from any number of factors, to find that indigent criminal defendants in the Five Counties are at risk of being denied their constitutional right to counsel because investigators and experts are not used enough, and attorneys do not document enough instances of client communication.

Finally, the plaintiffs use this data to distract the court from the fact that alleged failures to use investigators or experts, communicate enough with clients, or advocate for clients at court appearances and through court submissions, are issues related to the effectiveness of individual lawyers – not to constructive denials of counsel. Plaintiffs' ad hoc, informal, anecdotal and sporadic surveys do not supply evidence of the constructive denial of counsel as a result of some systemic deficiency. Indeed, the inability to point to systemic deficiencies is best evidenced by the inconsistent and inadequate presentation of plaintiffs' "evidence" in response to the State defendants' motion.

1. *Failure to Investigate or Use Experts and Interpreters*

The undisputed evidence in this case is that the indigent criminal defense attorneys in the Five Counties have access to investigators and are not typically denied the use of investigators, experts or interpreters except, on anecdotal occasions from time to time, by the court in Onondaga and Suffolk Counties. In fact, in their memorandum of law, the plaintiffs concede that "[p]ublic defense providers in Schuyler County do not take advantage of the resources that are available to them." See Plaintiffs' Memorandum of Law at p. 19. Plaintiffs' argument, then, is that the attorneys are not using the available investigators, experts and interpreters enough, or well enough. This is clearly an issue of attorney performance, and therefore an ineffective assistance of counsel argument. Such evidence dispels their claims of systemic deficiencies raised in their complaint. As mentioned above, the data relating to attorney vouchers for payment, and vouchers for the payment of investigators and experts (collectively "voucher data"), is not relevant at all, or in only a limited way, to the primary providers of indigent criminal defense providers in the Counties.

While plaintiffs' experts may feel that indigent defense attorneys in the Five Counties do not use investigators, experts or interpreters enough and, therefore, must be constructively denying counsel to indigent defendants, the attorneys providing the actual representation to the alleged class members have consistently testified that they have access to these services when, in their professional judgment, such services are required. If attorneys make "bad decisions" about whether or not to use an investigator or expert or interpreter or other service, as plaintiffs' evidence, at best, may suggest, such decisions relate to attorney performance and therefore are not justiciable issues in this case. Since the plaintiffs fail to set forth evidence sufficient to establish that indigent criminal defendants in the Five Counties are at significant risk of being

denied the right to counsel because the services of investigators, experts and interpreters are not available to them, the plaintiffs fail to establish a cognizable constructive denial of the right to counsel claim.

2. *Lack of Meaningful Advocacy*

Perhaps the wildest inferential leap that the plaintiffs urge the Court to make is their assertion that data on attorney vouchers (which are only applicable to the limited use of conflict counsel in all defendant Counties except Onondaga) and unadorned statistics provided by OCA records can establish that indigent criminal defense attorneys in the Five Counties are not providing their clients with meaningful advocacy. For instance, the plaintiffs contend that the voucher and OCA data shows that "attorneys frequently do nothing for their clients in the plea-bargaining stage." See Plaintiffs' Memorandum of Law at p. 53. The reality is that such data in no way demonstrates the actual advocacy attorneys provide to their clients. The mere absurdity of this contention reflects the desperate measures to which the plaintiffs resort in attempting to create cognizable claims even remotely similar to the unsupportable ones contained in their complaint.

For instance, the plaintiffs allege that the voucher data and OCA data is sufficient to prove that indigent criminal defendants in the Five Counties fail to prepare for court proceedings or provide advocacy at sentencing. Additionally, the plaintiffs assert that data showing how often motions are made or not made and how often cases are tried instead of plea bargained is sufficient to establish that indigent criminal defendants in the Five Counties are being constructively denied the right to counsel. Plaintiffs' working assumption seems to be that an early guilty plea is proof of inadequate representation. Such an assumption ignores the reality that an early plea often results in the best possible disposition and/or result in the earliest possible

release of an incarcerated client. As much as plaintiffs' vision of an ideal criminal justice system might have every defendant's attorney test the prosecution at trial, such an approach may not be ideal for the defendant who is actually facing trial and is disengaged from individual criminal defendants' best interests.

Moreover, similar to the use of investigators, experts, interpreters discussed above, decisions relating to advocacy such as making motions, accepting or rejecting a plea and going to trial are necessarily strategic decisions relating to the effectiveness of attorney performance – issues that the Court of Appeals has rejected as forming any basis for a viable claim of constructive denial.

To highlight plaintiffs' claims of unconstitutional advocacy, one of their experts points to the experiences of lead plaintiff Kimberly Hurrell-Harring. In fact, Robert C. Boruchowitz found that the case of plaintiff Hurrell-Harring is "emblematic of deficiencies" in defender offices. See Boruchowitz aff. at ¶254. In holding plaintiff Hurrell-Harring's case up as the best illustration of systemic constructive denials of counsel, see Boruchowitz aff. at ¶¶256-57, Mr. Boruchowitz attacks the failure of plaintiff Hurrell-Harring's assigned attorney to prophesize whether the Court of Appeals would change the law and cause the offense charged against plaintiff Hurrell-Harring to be downgraded from a felony to a violation. In fact, the attorney determined that it would be prudent for plaintiff Hurrell-Harring to accept a favorable plea bargain – for smuggling drugs into a prison – rather than await a potentially unhelpful Court of Appeals decision while remaining incarcerated. Indeed, the state of the law at the time of the plea was such that plaintiff's offense constituted a felony.[17] People v. Hurrell-Harring, 66 AD3d 1126, 1127 (3d

[17] Mr. Boruchowitz states that the Appellate Division vacated plaintiff Hurrell-Harring's conviction because the offense with which she was charged no longer constituted a crime at the time that plaintiff Hurrell-Harring's appeal was decided. See Boruchowitz aff. at ¶257. However, the holding of the Third Department in that appeal was overruled by the Court of Appeals in two subsequent joined appeals. People v. Finley, 10 NY3d 647, 654 (2008).

Dept 2009) ("After defendant pleaded guilty and during the pendency of this appeal," the Court of Appeals held the offense with which Hurell-Harring was charged was no longer a crime). Plaintiffs' reliance on the quality of representation afforded to plaintiff Hurrell-Harring vividly illustrates that -- as the Court of Appeals anticipated – plaintiffs' case reduces to no more than a string of ineffective assistance of counsel claims. That said, the professional judgment exercised by plaintiff Hurrell-Harring's attorney hardly forms the basis for even an ineffective assistance of counsel claim. Worse still for the plaintiffs, the unique experience of plaintiff Hurrell-Harring has not been demonstrated to represent systemic issues within the Five Counties at issue or elsewhere. There was admittedly no constructive denial of counsel here – there was post-resolution speculation by plaintiffs' counsel as to possible better outcomes.

3. *Failure to Communicate*

Finally, the voucher data provided, and relied upon, by the plaintiffs to establish that attorneys do not communicate with their clients enough is incomplete and unreliable since (1) the attorneys vouchers only apply to one County's primary public defense providers – Onondaga's ACP; (2) there is no evidence that vouchers are intended to include each and every communication with clients and (3) the plaintiffs fail to include data about in-court communications. The plaintiffs and attorneys practicing indigent criminal defense in the Five Counties testified about attorney-client communications. In fact, the State defendants took great care to describe the plaintiffs' experiences – including communications with their attorneys – in the light most favorable to the plaintiffs and, therefore, analyzed this claim based on the amount of communications that the plaintiffs contend occurred. See State Defendants' Memorandum of Law at pp. 32-114. Plaintiffs' experts' ill-considered speculation about the type and duration of attorney-client communications is completely irrelevant in light of the evidence in this case –

provided by the plaintiffs' own testimony -- about the attorney-client communications that were and are actually made. To the extent that an attorney is found to not have communicated with his or her attorneys as constitutionally required, such a finding is one of a personal failing of an attorney properly analyzed under the Strickland ineffective assistance of counsel standard, and not one of a constructive denial of the right to counsel. The record, and the individual plaintiffs' sworn admissions about counsel communications fully belie the complaint in this regard.

Since the plaintiffs have not submitted admissible evidence from which the court could find that indigent criminal defendants face a "constitutionally unacceptable risk of constructive denials of counsel," the defendants are entitled to summary judgment. However, even if, arguendo, the court finds an issue of fact as to whether such an unconstitutional risk exists, the plaintiffs have wholly failed to set forth evidence that any alleged unconstitutional risk is a result of systemic deficiencies in the Five Counties.

B. Plaintiffs Fail to Set Forth Proof that Any Alleged Deficiencies in the Provision of Indigent Criminal Defense Services in the Five Counties are Caused by Alleged Systemic Conditions

The plaintiffs throw a lot of allegations, numbers, theories and anecdotal "evidence" at the Court in an attempt to distract it from the fact that there is no actual evidence linking an alleged hodge-podge of failures by public defense attorneys to a systemic cause. A major flaw in plaintiffs' proof is that they proclaim national performance standards as the benchmark for providing constitutionally effective representation. However, performance standards, such as those relied upon by the plaintiffs and their experts, are "best practices" that should be strived toward in providing criminal defense representation, not constitutional requirements under Gideon. Strickland, 466 US at 688-89. If the performance hallmarks to which national experts point articulated the standard of representation required to ensure that defendants have the right

to counsel, then every breach of such a standard could result in a finding of the constitutional denial of a criminal defendant's right to counsel in criminal cases. However, in reality, courts deny relief to criminal defendants claiming the ineffective assistance of counsel in situations where the representation provided is far below the performance standards relied upon by the plaintiffs. If a failure to provide representation in accordance with performance standards can be effective within the meaning of Strickland, it certainly cannot constitute non-representation. Therefore, the opinions of plaintiffs' experts, and plaintiffs' arguments, are fundamentally flawed and fail to demonstrate that the public defense systems in the Five Counties are such that indigent criminal defendants are at risk of being denied the right to counsel, systemically or otherwise. As a result, the plaintiffs' complete failure to produce any evidence that any of the alleged deficiencies described above are a product of systemic constitutional deficiencies, requires that the State defendants be granted summary judgment.

1. Lack of Funding

Plaintiffs repeatedly allege that the indigent criminal defense providers in the Five Counties are unconstitutionally underfunded because they do not all, always, get the amount of funding that they request in their County budget proposals. Again, the plaintiffs envision a world with limitless resources in which fiscal responsibility and budgeting issues do not exist. However, as repeatedly mentioned herein, plaintiffs completely ignore reality. It is only common sense that Counties, and their agencies, would push for additional funds; not to fulfill constitutional obligations, but to meet aspirational goals or enhance already-constitutional programs.

Additionally, the plaintiffs allege that a County requiring that attorneys bill appropriately – and not abusively - using a particular process causes the constructive denial of counsel to

indigent criminal defendants. Plaintiffs claim that the "cutting" of vouchers by Onondaga County[18] creates a world in which attorneys will not provide constitutionally-acceptable representation. However, the uncontroverted testimony in this case establishes that vouchers are only reviewed when they contain a red flag – such as repeated entries for the same task or spending excessive time on minor tasks. See McGowan aff. at Exh. K, pp. 21-23. Such vouchers are then reviewed by the Onondaga County ACP voucher review committee. See id. at pp. 15-16. Members of the voucher review committee make recommendations to the court if they feel that a task, or time spent on a task, is "not necessary and reasonable" in the context of a complete representation of a client on a matter. See id. at pp. 26, 42. Voucher review is done in an attempt to conform ACP billing to private counsel billing, see id. at p. 29, and prevent ACP attorneys from creating unnecessary work to increase their fees. See id. at p. 43. Donald Kelly, a member of Onondaga County ACP Board and voucher committee, testified that things such as excessive correspondence, see id. at p. 23, court appearances for purposes of having a case adjourned (when the adjournment could have been done by phone, fax or letter), see id. at pp. 27-28, excessive research on basic issues, see id. at pp. 31, 37-38, and taking more than six minutes to read a simple letter are examples of the types of things that have been recommended not to be paid because they were indicative of an effort to increase an attorney's fees. Moreover, the voucher review process dispels claims that there is a systemic denial at the expense of the indigent. The testimony in this record establishes that reviews are conducted to ensure justified expenditures to preserve funds for the indigent.

The plaintiffs point to the recommendation of cutting payment for excessive correspondence as proof that indigent criminal attorneys in Onondaga County are encouraged to

[18] The ACP only recommends that certain time be cut from a voucher. The court makes the final determination. See N.Y. County Law §722-c.

not to communicate with clients. The Counties have a responsibility to ensure that funds are being used appropriately, and it would therefore be irresponsible for them to pay every single voucher without review. The testimony of Donald Kelly establishes that review is done to conform to private billing and prevent abuse of the voucher system. See id. at pp. 29, 43. In any event, Onondaga County ACP policies permit an attorney whose voucher is recommended to be cut by the ACP to provide an explanation for flagged entries. See id. at p. 20. The plaintiffs have provided no evidence that vouchers for which the amount of correspondence was questioned and disallowed was explained by an attorney as necessary client communication for purposes of that client's representation. Instead, the plaintiffs ask the Court to find that the fact that cuts are made to such entries on vouchers is evidence that indigent criminal defendants in Onondaga County are at risk of being denied the right to counsel. Such a leap is unnecessary and unwarranted given the actual evidence about voucher review. Such a leap is also demonstrative of the rank speculation plaintiffs supply in lieu of admissible evidence supporting their claims.

ACP attorneys are expected to treat their assigned clients as clients of their own private practices. As a result, it is not unreasonable for the ACP to not reimburse ACP attorneys for things such as basic office expenses, legal research subscriptions and postage, which are basic expenses for a law business and not billed to paying clients. See id. at pp. 54, 58, 98. Providing ACP representation is not meant to be a windfall for attorneys. The fact that Onondaga County ACP attorneys Jeffrey Parry and Christina Cagina had to discontinue providing ACP representation because they could not make a living doing so, see Blase aff. at Exhs. 69, 70, hardly creates an unconstitutional denial of counsel for indigent criminal defendants.

Funding comparisons between District Attorneys' Offices and public defense providers in the Five Counties are not only irrelevant to whether indigent criminal defendants in the Five Counties are denied their right to counsel, it demonstrates how disengaged plaintiffs' presentation on this motion is from the reality of the indigent criminal justice systems in the Five Counties. First, District Attorneys investigate and prosecute all potential crimes in the Counties – not just those committed by indigent individuals who are entitled to representation. District Attorneys have sweeping responsibilities to learn of and to serve the interests of the entire County and community, to assess the public interest, and to zealously prosecute both the well-heeled and indigent when justice requires. Second, District Attorneys have the burden of proof and prosecution. As a result, they require the resources to acquire the evidence necessary to do so and the obligation to assess all such evidence garnered to determine, with due diligence, what is appropriately addressed through the criminal justice system and what is not. While the plaintiffs would like the Court to ignore the actual functions of prosecution and defense offices, the reality is that providing more funding to District Attorneys' Offices than to indigent criminal defense providers – who defend only a portion of the defendants prosecuted by District Attorneys – is reasonable and, more significantly, constitutional.

Finally, the plaintiffs again mislead the court by accusing the State of "raiding," "robbing" and "stealing" from the Indigent Legal Services Fund ("ILSF"). See Plaintiffs' Memorandum of Law at pp. 13, 39. To support such an offensive allegation, the plaintiffs cite the language contained at §13 of the Public Protection and General Government Article VII Legislation contained in the 2012-13 New York State Executive Budget, which permits the State Comptroller to transfer, pursuant to New York State Finance Law §4, unencumbered balances of any special revenue fund or account to the general fund. See Blase aff. at Exh. 42. This

legislation does not affect only the ILSF, or only funds appropriated for indigent criminal defense services. See id. Instead, it authorizes the transfer of unused fund balances of all special revenue funds or accounts. See id. OILS Director Leahy testified that OILS did not distribute all of the funds appropriated to it in 2011, see Blase aff. at Exh. 34, pp. 50-51, and it is this type of unused funds that may be subject to a transfer. While Mr. Leahy testified that it is the position of the OILS Board that the ILSF should not be subject to this type of transfer, see id. at p. 37, the plaintiffs provide no support for such an idealistic position.

Notwithstanding, the plaintiffs wholly fail to connect their allegations of a lack of funding to the delivery of public defense representation in the Five Counties. The plaintiffs fail to connect any failures to (1) use investigators, experts or interpreters enough, (2) advocate adequately or (3) communicate with clients enough to a lack of funding. This failure demonstrates that these types of alleged deficiencies are ones related to attorney performance, and not caused by systemic conditions. Accordingly, as the Court of Appeals held, these claims are not justiciable in this action.

2. *Political Pressures to Prioritize Cost Savings Over Client Representation*

The plaintiffs allege that indigent criminal defendants are constructively denied the right to counsel because their attorneys must necessarily feel pressure to keep the costs of representation down. This unsupported inference – based on no actual evidence – is contradicted by the unrefuted testimony of attorneys who currently practice indigent defense in the defendant Counties. For instance, Donald Kelly testified that neither ACP nor County budgets or costs are considered when ACP vouchers are reviewed, see McGowan aff. at Exh. K, pp. 68-69, and that Onondaga County does not pressure the ACP to keep costs down. See id. at p. 69. Attorney Michael Roulan, who represented indigent criminal defendants through the Ontario County ACP

until 2010, testified that he was never pressured to defend a case in the cheapest way possible. See 10/23/13 Kerwin aff. at Exh. B, p. 74. Despite such testimony, the plaintiffs ask the court to consider the affirmations of attorneys who stopped providing indigent criminal defense representation because they could not make a living doing it, and the voucher review and payment process, as proof that there **must** be pressure to provide the cheapest possible criminal representation.

Specifically, the plaintiffs submit the affirmations of attorneys Jeffrey Parry and Christina Cagina, who removed themselves from the Onondaga ACP panel in 2007 and 2009, respectively. See Blase aff. at Exhs. 69, 70. These affirmations are irrelevant, and fail to raise a material issue of fact, in light of the testimony in this case about how the ACP is operating in 2013. Since the time that attorneys Parry and Cagina left the ACP panel, the ACP began using an electronic database to process both eligibility determinations and vouchers, see McGowan aff. at Exh. D, pp. 264-65, and the voucher committee reviews vouchers for the reasons discussed by Donald Kelly. ACP attorneys now provide representation at arraignments in City Court for both incarcerated and non-incarcerated defendants, see 9/30/13 Captor aff.[19] at ¶2, and recently received OILS funding to staff the 14 largest town and justice courts with ACP attorneys at arraignment toward a goal of covering all arraignments in the County. See id. at ¶3; McGowan aff. at Exh. V. Since the evidence of how the ACP is operating now is not consistent with the contents of Mr. Parry's and Ms. Cagina's affirmations, they must be disregarded. Recitations about anecdotal and subjective experiences that occurred more than four and six years ago cannot raise issues of fact about what is occurring now.

[19] "9/30/13 Captor aff." refers to the September 30, 13 affirmation of Renee Captor filed in opposition to plaintiffs' cross-motion for partial summary judgment.

In addition, as mentioned throughout this litigation, when an attorney is licensed it is expected that she or he will only accept the number of cases for which he or she feels that she or he can provide meaningful and effective representation in conformance with the ethical rules. Participation in the ACP is voluntary and every member of the Panel is aware of the ACP practices and policies. If an attorney does not wish to wait until the end of a case to get paid, or have her or his vouchers for payment revicwed for abuse, that attorney need not participate in the ACP panel. The fact that these two attorneys tried to make a living on ACP cases and were dissatisfied with their rewards, does not raise issues as to the constitutionality of the provision of indigent criminal representation in the Five Counties.

Plaintiffs' contention that politically driven cost concerns routinely cause attorneys in the Five Counties to provide sub-constitutional representation is tied to a very disturbing theme underlying their case. In essence, plaintiffs contend that attorneys representing indigent defendants in those Counties routinely ignore their ethical obligations by focusing on their paying clients at the expense of the indigent criminal defendants whom they represent, see Plaintiffs' Memorandum of Law at pp. 57-62; by declining to use appropriate experts and investigators, even though they have access to such services, see e.g. id. at p. 19; and by otherwise bowing to political and economic pressures to provide representation so deficient that it amounts to no counsel at all. Lacking any support in the record, plaintiffs essentially ask the court to assume that attorneys in the Five Counties have ignored, and will continue to ignore, their ethical obligations in representing indigent defendants. The court should decline to make any such assumption. Indeed, the reality is that attorneys generally act in accordance with their oath, and abide by ethical rules and obligations. Plaintiffs' presumptions of illegal and unethical conduct have no place in this record. It does a disservice to the many public servants dedicated to

representation of the indigent to suggest, as plaintiffs invite this court to do, that rank and file attorneys in the Five Counties systemically deny their clients constitutionally-sufficient representation. There is nothing in this record that comes close to supporting such a claim.

The plaintiffs wholly fail to connect their allegations of a cost-saving political pressure to the delivery of public defense representation in the Five Counties. The plaintiffs fail to connect any failures to (1) use investigators, experts or interpreters enough, (2) advocate adequately or (3) communicate with clients enough to political pressure to save the Counties money. This failure demonstrates that these types of alleged deficiencies are ones related to attorney performance, and not caused by systemic conditions. Accordingly, as the Court of Appeals held, these claims are not justiciable in this action.

3. Excessive Caseloads, Insufficient Staffing and Lack of Support Services

The statistics and expert opinions about caseloads offered by the plaintiffs again misuse performance standards as the constitutional standard, and also ignore the testimony in this case that contradicts the unsupported conclusions that the plaintiffs ask the Court to reach. For example, while plaintiffs' experts opine that caseloads are too high to permit attorneys to provide constitutionally-acceptable representation to indigent defendants, the actual defense attorneys in the Five Counties do not. In addition, plaintiffs have offered no evidence that the attorneys whom plaintiffs' experts deem carry excessive caseloads, are actually providing unconstitutional representation to their clients.

Instead, the record shows that, when asked about caseloads, the Onondaga County and Ontario County ACP attorneys testified that they either have, or would, refuse a case assignment from the ACP if he or she was unable to provide adequate representation to a client, see 10/23/13 Kerwin aff. at Exh. C, pp. 38, 40, Exh. B, p. 26, 35; McGowan aff. at Exh. J, p. 124 , and LAS

attorneys in Suffolk County – the attorneys with the largest caseloads in this case -- testified that caseloads do not prevent LAS attorneys from providing constitutionally-acceptable representation to their clients. See eg. Dvorin aff. at Exh. J, pp. 57-58, Exh. M, pp. 83, 85, Exh. L, pp. 43-44. The plaintiffs rely on the recent case of Public Defender v. State, 115 So3d 261 (FL Sup. Ct. 2013) to support their contention that excessive caseloads can deprive criminal defendants of their right to the meaningful and effective assistance of counsel. See Plaintiffs' Memorandum of Law at p. 63. However, in that case, the attorneys involved were representing 400 felony clients, and had 50 felony trials scheduled for the same week. Public Defender v. State, 115 So3d at 273-74. The caseloads in the Five Counties do not even approach such levels.

There is no testimony in this case that any of the Counties are unable to provide constitutionally-acceptable representation to indigent criminal defendants because of a lack of staff or support services. While some providers of public defense services testified that they do not have enough staff or support to do certain tasks to improve representation,[20] none have testified that the absence of staff or support makes it significantly likely that indigent criminal defendants will be denied their right to counsel. More specifically, there is no evidence in this case that indigent criminal attorneys cannot provide constitutionally-acceptable representation without the staff or services the Counties may wish to have. For example, Onondaga County ACP Executive Director, Renee Captor, testified that she does not have sufficient staff or funds to develop best practice performance measures, see 10/23/13 Kerwin aff. at Exh. E, p. 83-84, and has not developed a client satisfaction survey because of a lack of funds. See id. at p. 84. The

[20] In contrast, Ontario County PD, Leanne Lapp, testified that her Office's 2013 budget provides for all of her office's staffing needs, see 10/23/13 Kerwin aff. at Exh. F, p. 208, and Suffolk County LAS supervising attorney, Ed Vitale, testified that LAS does not need more attorneys. See Dvorin aff. at Exh. I, pp. 55-56.

plaintiffs cannot possibly argue that an inability of a public defense office to do these things puts indigent defendants at risk of being denied the right to counsel.

One of plaintiffs' experts claims -- based on statistical data and performance standards irrelevant to providing constitutionally-sufficient representation – that, because of funding, Suffolk County and Washington County do not have enough attorneys, investigators, social workers and paralegals to handle caseloads and meet performance standards, which is caused by inadequate funding. See Boruchowitz aff. at ¶¶35, 178. But, the standard in this case is not whether public defense attorneys provide **ideal representation** in accordance with professional standards of best practices. Plaintiffs' burden is to establish that those attorneys are at risk of not providing **constitutionally-acceptable representation**. The uncontroverted evidence provided by the providers of indigent criminal defense services in the Counties, themselves, proves that the requirements of Gideon are being met.

For instance, Suffolk County LAS attorneys testified that investigators are always available for their use. See Dvorin aff. at Exh. H, p. 72, Exh. G, p. 144, Exh. I, p. 55, Exh. M, p. 148. The Executive Director of the Onondaga County ACP, and ACP attorneys who practice in that County, testified that they are unaware of any requests to the court pursuant to New York County Law 722-c for experts, investigators and other services that have been denied. See e.g. McGowan aff. at Exh. D, p. 288, Exh. J, pp. 70-71, Exh. L, p. 94. The Washington County PD and Chief Assistant Public Defender ("APD") testified that his office has received funding from the County for investigative and expert services whenever requested. See Muse aff. at Exh. B, pp. 90-95, Exh. C, pp. 87, 95. The prior and present Schuyler County Public Defenders, as well as the Ontario County Public Defender, testified that their budgets sufficiently provide for their

Offices' investigatory and expert needs. See Rutnik aff. at Exh. B, pp. 125-126, Exh. A, at 16-17; Munkwitz aff. at Exh. F, at p. 223.

The plaintiffs try to convince the court that, because the defendants do not adhere to national standards and fail to meet aspirational goals such as: (1) one investigator for every three attorneys, see Boruchowitz aff. at ¶124, or (2) a state-wide uniform indigent defender system, see Lefstein aff. at ¶30, or (3) a system ensuring vertical representation, see id. at ¶145, or (4) one hour initial meetings with clients, see Plaintiffs' Memorandum ofLlaw at p. 50, there is a systemic risk of the denial of the right to counsel in the Five Counties. However, as the Supreme Court stated in Strickland,

> Prevailing norms of practice as reflected in American Bar Association standards and the like, *e. g.*, ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, **but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.** Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. [Citation omitted] Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. **Moreover, the purpose of the effective assistance guarantee of the *Sixth Amendment* is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.**

Strickland, 488 US at 688-89 (emphasis added). Citing this language, the Supreme Court subsequently chastised a United States Court of Appeals for "treat[ing] the ABA's 2003 Guidelines not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel 'must fully comply'." Bobby v.

VanHook, 588 US 4, 8 (2009). The Court reaffirmed **that national standards are "'only guides' to what reasonableness means.**" Id (emphasis added). In another case, the Supreme Court highlighted that "while States are free to impose whatever specific rules they see fit to ensure that criminal defendants are well represented, we have held that the Federal Constitution imposes only one general requirement: that counsel make objectively reasonable choices." Roe v. Flores-Ortega, 528 US 470, 479 (2000). Since the Supreme Court has held that standards of practice are merely guides as to what "reasonably diligent attorneys" should do, it necessarily follows that such standards are not "inexorable commands" that dictate what representation is constitutionally sufficient. Therefore, plaintiffs' experts' opinions that indigent criminal defendants in the Five Counties are at risk of being constructively denied the right to counsel because the public defense systems in the Five Counties, and the attorneys who provide representation therein, do not conform to various practice standards are completely irrelevant to this right to counsel – versus ineffective assistance of counsel – case.

The plaintiffs wholly fail to connect their allegations of excessive caseloads, insufficient staffing or lack of support services to the delivery of public defense representation in the Five Counties. Specifically, the plaintiffs fail to connect any failures to (1) use investigators, experts or interpreters enough, (2) advocate adequately or (3) communicate with clients enough to excessive caseloads, insufficient staffing or lack of support services. This failure demonstrates that these types of alleged deficiencies are ones related to attorney performance, and not caused by systemic conditions. Accordingly, as the Court of Appeals held, these claims are not justiciable in this action.

4. *Lack of Qualification and Hiring Standards, Training and Supervision*

First, plaintiffs ignore the fact that the Court of Appeals has already held that performance, training and hiring standards are not issues that the plaintiffs can pursue in this action. Hurrell-Harring, 15 NY3d at 24-25. Second, as with caseloads, staffing and support services discussed above, the statistics and expert opinions about qualifications, hiring, training and supervision misuse performance standards as the constitutional standard, and also ignore the testimony in this case that contradicts the unsupported conclusions that the plaintiffs ask the Court to reach.

Third, in perhaps plaintiffs' gravest misrepresentation, the plaintiffs submit the affirmation of a Suffolk County LAS attorney, Austin Manghan, who has not worked for LAS since 2007, and was hired in 2002, to attempt to raise issues of fact as to Suffolk County's training program. See Blase aff. at Exh. 177. In fact, the plaintiffs reference this irrelevant and worthless affirmation approximately 97 times in the affirmation of Erin Beth Harrist. As the State defendants outlined in detail in their moving papers, the Suffolk County LAS training program is, beyond question, comprehensive, progressive and includes classroom and in-courtroom training and the shadowing of more experienced attorneys. See State Defendants' Memorandum of Law at pp. 144-46. The plaintiffs' submission of a single affirmation that is completely irrelevant to the current delivery of indigent defense services in Suffolk County, and therefore not probative of any material fact, is indicative of their desperate effort to avoid summary judgment.

Fourth, the plaintiffs seem to allege that the absence of a "system" for checking conflicts is somehow a systemic constitutional deficiency. Providers of indigent defense services, like all attorneys, are obligated to comply with all applicable standards concerning conflicts of interest.

There is no basis for imposing special conflict protocols on the former. Indeed, Professor Lefstein cites no authorities to support his personal opinion that such protocols are constitutionally required. Notwithstanding, the plaintiffs allege that some providers in the Five Counties are in "considerable dysfunction" because they do not have conflict identification systems in place. See Lefstein aff. at pp. 71-72. However, the Ontario County and Schuyler County Public Defender Offices have Case Management System (CMS) software that assists in identifying conflicts and Suffolk County LAS also uses an electronic program, WebCrims, to assist in identifying conflicts. See Dvorin aff. at Exh. G, pp. 180-81. Finally, and most fundamentally, plaintiffs utterly fail to demonstrate any systemic problem in identifying conflicts -- relying solely on allegations concerning the experience of one plaintiff and conclusory expert assertions.

The plaintiffs wholly fail to connect their allegations of a lack of qualifications, hiring, training and supervision standards to the delivery of public defense representation in the Five Counties. The plaintiffs fail to connect any failures to (1) not using investigators, experts or interpreters enough, (2) not advocating adequately or (3) a lack of qualifications, hiring, training and supervision standards. This failure demonstrates that these types of alleged deficiencies are ones related to attorney performance, and not caused by systemic conditions. Accordingly, as the Court of Appeals held, these claims are not justiciable in this action.

POINT IV

THE REPRESENTATIVE PLAINTIFFS DO NOT ADEQUATELY REPRESENT THE CLASS

In their opposition to the State defendants' motion for summary judgment and motion to decertify the class, plaintiffs attempt to distance themselves from the class representatives, relying instead on expert testimony. See generally Plaintiffs' Memorandum of Law. However,

as explained in Point II above, plaintiffs' failure to demonstrate injury to a single plaintiff deprives the representative plaintiffs of standing. Plainly, plaintiffs who lack standing cannot adequately represent the class.

Plaintiffs also misconstrue the State's argument with respect to plaintiffs' lack of knowledge about this litigation. See Plaintiffs' Memorandum of Law, pp. 94-97. Contrary to plaintiffs' argument, the State defendants do not assert that the plaintiffs should have a sophisticated knowledge of the legal theories at issue here. See id. at p. 96. Rather, the State maintains and the case law demands that representative plaintiffs have more than simply a vague, general knowledge of the litigation. See Pruitt v. Rockefeller Center Properties, Inc., 167 AD2d 14, 24 (1st Dep't 1991); Borden v 400 E. 55th St. Assoc. L.P., 34 Misc3d 1202(A) (Sup. Ct. NY County 2011); Whalen v. Pfizer, 9 Misc3d 1124(A) (Sup. Ct. NY County 2005). As detailed in the State defendants' Memorandum of Law in support of their motion, plaintiffs fail to demonstrate more than a general knowledge of this litigation, including facts to support their own claims.

Plaintiffs are incorrect that decertification is not required in this matter. The cases relied upon by plaintiffs were in a different posture. For example, in Sirota v. Solitron Devices, Inc., the class plaintiffs actually received a jury verdict. 673 F2d 566, 572 (2d Cir. 1982). In Salim Shahriar v. Smith & Wollensky Rest. Group, Inc., the Court suggested that at least one class member would have standing. 659 F3d 234, 253 (2d Cir. 2011). Here, plaintiffs failed to make such a showing. As stated in another case cited by plaintiffs, "at summary judgment, [t]he time has come for plaintiffs to put up or shut up." Morangelli v. Chemed Corp., 922 FSupp2d 278, 315 (E.D.N.Y. 2013) (internal quotation marks omitted), quoting, Weinstock v. Columbia Univ., 224 F3d 33 (2d Cir. 2000). As plaintiffs fail to demonstrate that any class members have

standing, the class should be decertified and the claims dismissed. See id. (dismissing claims of "Discovery Plaintiffs" for failure to show injury).

POINT V

PLAINTIFFS' SUBMISSIONS CONTAIN MANY INACCURACIES AND MISCHARACTERIZATIONS AND LACK SUPPORTING CITATIONS

While the plaintiffs make grand proclamations that they claim are supported by the evidence in this case, it is important to look to the evidence claimed by the plaintiffs to support such declarations. Since it would be impossible to identify every mistake or inaccuracy in plaintiff's submissions, the State defendants bring some examples to the Court's attention. First, in an effort to give any substance, at all, to their claim of systemic conflict of interest, plaintiffs state that Washington County APD Christian Morris, who serves as the Town of Whitehall Town Attorney prosecutes cases for the Town of Whitehall against clients represented by other members of the Public Defender's Office. See Boruchowitz aff. at ¶¶222-223. There is no testimony or other proof that APD Morris prosecutes cases as Town Attorney,[21] and APD Morris, himself, testified that he does appear in the Town of Whitehall Court for "any criminal defense purposes." See 10/23/13 Kerwin aff. at Exh. F, p. 89.

The plaintiffs also claim that the State defendants are to blame for not being able to depose all of the representative plaintiffs because the State defendants would not agree to plaintiffs' proposed protective order. According to the plaintiffs, if the depositions had been held when scheduling was first attempted – in November 2010 – plaintiffs' counsel would have been able to produce all of the plaintiffs for depositions. This is untrue. Plaintiffs' counsel lost touch with plaintiff Johnson in 2009, plaintiff McIntyre in 2009 and plaintiff Turner in 2008. See Kerwin aff. at Exh. N. Further, plaintiffs argue that Washington County PD and his APDs do

[21] In fact, APD Morris testified that his duties as Town Attorney include advising the Town on any issues about which the Town requests guidance. See 10/23/13 Kerwin aff. at Exh. F, p. 89

not work full time. This is not true. While the PD and full time APDs also have private practice caseloads, the existence of such private cases that does not mean that the PD and APDs do not work a full time schedule for the PD Office. Plaintiffs confuse "full time" with "all the time." Further, the Washington Co. PD and APD did not testify that they have private practices in order to make a living. See Plaintiffs' Memorandum of Law at p. 60. As record support for this claim, plaintiffs' cite to paragraph 132 of the affirmation of Matthew Schmidt which states, "APDs are paid about $29.13 an hour and each of them also maintains a private practice in addition to their public defender caseload, including those that the PD's Office internally consider 'full-time' employees." This blatant mischaracterization and exaggeration is not uncommon within plaintiffs' submissions.

In addition, plaintiffs claim that none of the Five Counties track caseloads. See Plaintiffs' Memorandum of Law at p. 64. This is absolutely contradicted by the record. For instance, Ontario County PD Leanne Lapp testified at length about how she monitors caseloads and adjusts them if necessary. See Munkwitz aff. at Exh. F, pp. 110-12. Similarly, plaintiffs' contention that Ontario County has a hard time keeping caseloads under 400 misdemeanors, see Plaintiffs' Memorandum of Law at p. 66, is not at all supported by the record. See id. Also, the testimony of the supervisors at the Suffolk County LAS establishes that they, too, monitor caseloads. See Dvorin aff. at Exh. G, p. 60, Exh. I, pp. 40, 42-43.

Plaintiffs claim that the "record suggests" that "poor people get worse outcomes" for their clients than indigent criminal defense attorneys. See Plaintiffs' Memorandum of Law at p. 56. This bald assertion is not supported by the record. To support their contention, plaintiffs cite to pages 22 and 23 of Exhibit A to the affidavit of Gary King. See id. The statistics on these pages allegedly pertain to bail determinations, not "outcomes." Further, the plaintiffs cannot

possibly expect the court to extrapolate such a conclusion from numbers associated with bail determinations in absolutely no context. There is no indication on these pages what kind of charges were involved, whether the defendants had criminal records, whether the defendants were employed or had ties to the community, or any number of other factors that could influence a bail determination outcome.

In a glaring mischaracterization of the record, plaintiffs state that OILS "Director Leahy testified that public defender caseloads should never exceed the NAC limits of 150 felonies and 400 misdemeanors," citing Mr. Leahy's transcript at page 133, paragraph 24 to page 134, paragraph 3. See Plaintiffs' Memorandum of Law at p. 68 (emphasis in original). Not surprisingly, plaintiffs completely misrepresent Mr. Leahy's testimony. Following is Mr. Leahy's testimony, with the piece cited by plaintiffs in bold:

> Q. Does ILS have any caseload or workload standards for public defense attorneys?
>
> A. We have not set any, and I'll tell you from the perspective of the office we have not proposed any to the Board. I can tell you why. It's that we have, as you see in some of this data, wildly excessive caseloads in some of the upstate counties and very different funding adequacy from county to county and very little additional state money yet in the pool. New York City, which started out in 2009 when its funding stream was created to address or attack the problem of excessive caseloads, set a five-year plan to try to get to the so called national maximum standards. So by, I think, 2014, they're supposed to get there after the expenditure of what looks to me is going to be in excess of a hundred million dollars over the five-year period. It did not seem prudent to me to propose to the Board that we set caseload standards and flexible caseload standards applicable to all 57 upstate counties in the absence of even a dollar of additional funding to address that deficiency. So that's why we don't have them.
>
> Q. Does ILS have any plan to implement caseload or workload standards in the future?

A. Our plan is not necessarily caseload driven. It's compliance with good quality representation driven. That obviously means caseloads have to come down and come down dramatically in many counties. But I'm not a great fan of this 150 and 400 as though it were some magical or appropriate or final solution to the problem of public defender caseload. You can have 150 felony defendants on a certain type of felony and you can be almost guaranteed that you're not going to have enough time to provide adequate representation to those clients. So I have always believed and always experienced that pending caseloads are often a much stronger indicator of the kind of quality of representation, in other words, the number of cases, clients, an attorney has at any given time, as opposed to how much you might do over a year. And in any event, inflexible numbers are unintelligible numbers by definition. They don't take account of vastly different circumstances under which cases come up nor the efficiency of the local court system nor the plea bargaining practices of the local prosecutor nor a million other things. So that's not to duck your question; just to say that numbers are one component of many and quality representation is the holy grail.

Q. When you pick the numbers 150 misdemeanors --sorry -- 150 felonies and 400 misdemeanors, those are the NAC maximum standards that you referred to earlier?

A. Yeah. And I mean, if you read Norm Lefstein's book, Securing Reasonable Caseloads 2011, you know, he has a whole chapter in which he explains how they came into being, which was like at one meeting, what kind of research led to their production, which was none, and the fact that, you know, a few things have changed in the practice of criminal defense since 1973. And so he calls them the so called national standards. That's what I call them, too.

Q. And is that assessment based on a criticism that those standards may be too low?

A. They can be too low. They can -- you know, if -- I suppose they could be too low in certain circumstances. They can certainly be too high in **others, as I've already mentioned. The point is it's just a number. It's a guide. It's a – the most important part about the NAC and the part that you hear least often is that in no event shall they be exceeded. . .**

See 8/22/13 Kerwin aff. at Exh. P, pp. 130-34. Two lines above the language cited by the plaintiffs, Mr. Leahy testified that the NAS standards **could be too low in some circumstances,**

and in his previous answer, Mr. Leahy testified about the arbitrariness and irrelevance of the "so called national standards." See id. By creatively extracting a fragment of Mr. Leahy's testimony, plaintiffs twist the meaning of what he actually said.

Plaintiffs further allege that LAS attorney evaluations are based, in part, on how fast attorneys dispose of cases. See Plaintiffs' Memorandum of Law at p. 72. However, what the testimony says is that how attorneys "move" cases is considered when evaluations are conducted. See Blase aff. at Exh. 176, p. 231. Not surprisingly, because their arguments are rooted in theory and not in actual criminal practice, plaintiffs' counsel misrepresents what moving a case along means. To move a case along means to make progress in resolving the case and not let a case languish by requesting numerous adjournments and other unproductive things. In fact, in this case the plaintiffs complain that their attorneys allegedly let them languish in jail by requesting adjournments.

In addition, it is not surprising that the plaintiffs resist the fact that the State defendants' First Notice to Admit is deemed admitted as a matter of law because plaintiffs' responses were not verified. While plaintiffs claim that an attorney, as opposed to a party verification would have been sufficient, they never provided one. In fact, they could not have ethically provided one at the time of their November 15, 2011 response, or after, because they had already lost five of the plaintiffs on whose behalf they would have been verifying an important legal document. See 8/22/13 Kerwin aff. at Exh. N. While plaintiffs' counsel may be used to being excused from the requirements of the CPLR and establishing their burden in a "tenaciously resisted" litigation, they cannot be permitted to benefit from providing purported responses – which were court-ordered – that were not, and could not be, verified by the alleged plaintiffs in this case. As a result, the contents of the State defendants' First Notice to Admit should be deemed admitted as

a matter of law pursuant to CPLR 3123, and the plaintiffs should not be permitted to contest them.

Finally, the plaintiffs similarly attempt to avoid the application of the law in arguing that the State defendants' motion to strike the portions of the complaint relating to the plaintiffs that failed to attend their court-ordered depositions, and to reject any proof relating to those plaintiffs, should be denied pursuant to CPLR 3126 because the plaintiffs moved to withdraw the missing plaintiffs as representative plaintiffs. The plaintiffs confuse the sanction of CPLR 3126 with the benefit they sought by moving to withdraw plaintiffs after years of litigation, and years of having no contact with those plaintiffs. CPLR 3126 serves as a sanction against parties who fail to obey court orders and disrupt discovery in that it precludes the use of evidence or defenses, thereby making a party's ability to meet their burden of proof more difficult. The plaintiffs sought to withdraw plaintiffs so that their burden in this case would be eased. By seeking a sanction pursuant to CPLR 3126, the State defendants are not seeking "some sort of moral victory," see Plaintiffs' Memorandum of Law at p. 102, but to hold the plaintiffs to their burden in the case that they brought.

POINT VI

THE DEFENDANTS ARE ENTITLED TO A DECLARATORY JUDGMENT

Where, as here, the court reaches the merits of the claim and finds that plaintiffs cannot set forth facts sufficient to establish their burden in an action seeking declaratory relief, the "proper course is not to dismiss the complaint but rather issue a declaration in favor of the defendants." Maurizzo v. Lumbermens Mutual Cas. Co., 73 NY2d 951 (1989); Empire State Ch. of Associated Bldrs. & Contrs., Inc. v M. Patricia Smith, 98 AD3d 335, 339 (4th Dep't 2012). Therefore, once the court finds that the plaintiffs are not entitled to the requested

declaration that "the plaintiffs' [presumably the plaintiff class's] rights are being violated," the defendants are entitled to a declaration that the defendants are not violating the rights of the plaintiff class.

POINT VII

PLAINTIFFS' CROSS-MOTION TO STRIKE PORTIONS OF THE STATE DEFENDANTS' MOVING AFFIRMATIONS MUST BE DENIED

To avoid adding over one hundred more pages to an already 149 page memorandum of law, and to facilitate the identification of exhibits, counsel for the State defendants set forth the statement of facts, and the supporting exhibits, as to each of the Five Counties and the State in six separate affirmations. For instance, instead of attaching hundreds of exhibits to the moving affirmation of attorney Adrienne J. Kerwin, the State defendants organized the exhibits by County and attached them to the affirmations of five other Assistant Attorneys General. With the exhibits so organized, the statements of facts as to each County were then set forth in the same affirmation with citations to the appropriate portions of the record. These cited factual recitations could have been placed within the State defendants' memorandum of law, without paragraph numbers, as an appropriate statement of facts. However, to aid the reader and to avoid submitting a 250 page memorandum of law, the factual statements were kept with the record evidence to which they related.

Plaintiffs have spent a great deal of time and energy opposing this organizational decision and completely mischaracterize the affirmations of Jeffrey Dvorin, James McGowan, Kelly Munkwitz, Adrienne J. Kerwin, Tiffinay Rutnik and Keith Muse in an effort to distract the court from the actual, supported evidence of what is actually occurring in the Counties. Just as the State defendants do not expect that attorney Blase has personal knowledge of the facts that are

contained in the 294 exhibits attached to her affirmation submitted herein, the State defendants do not, and have not, insinuated or represented that the attorneys who submitted exhibits and recitations of cited, supported record evidence have "personal knowledge" of the facts stated in those exhibits. The presence of a citation to the record in every paragraph of these attorney affirmations clearly indicates that the statements contained therein are merely statements of the evidence – not personal knowledge of the affirmant. For the plaintiffs to characterize the record evidence as "hearsay" and attempt to "strike" the vehicles through which the State defendants organized and presented the proof further illustrates the plaintiffs' attempt to draw the Court's attention away from how criminal public defense services are actually being provided in the Five Counties.

CONCLUSION

Plaintiffs repeatedly state that their experiences in the Five Counties, and what is actually occurring in the Five Counties, is irrelevant because there is a possible "risk" that something else may, hypothetically, happen. Such a theory is not legally sound. Speculative conclusions based on alleged "evidence" completely devoid of admissible evidence of the indigent criminal defense services in the Five Counties cannot meet plaintiffs' burden to establish that indigent criminal defendants in the Five Counties are at risk of being denied the right to counsel as a result of systemic deficiencies. If held to their burden under the law, the plaintiffs cannot prove their case. To go to trial in this case with the irrelevant, incomplete, biased and mischaracterized evidence offered by the plaintiffs in opposition to the State defendants' motion in an attempt by the plaintiffs to prove something that may happen, would be a drastic waste of judicial and party resources. For all of the reasons discussed above, and those stated in the State defendants' moving papers, defendants' motion for summary judgment should be granted.

Dated: Albany, New York
October 23, 2013

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