

STATE OF MICHIGAN  
SUPREME COURT

IN THE SUPREME COURT  
APR 2010

ON APPEAL FROM THE MICHIGAN COURT OF APPEALS  
TERM

CHRISTOPHER LEE DUNCAN, BILLY JOE  
BURR, JR., STEVEN CONNOR, ANTONIO TAYLOR,  
JOSE DAVILA, JENNIFER O’SULLIVAN,  
CHRISTOPHER MANIES and BRIAN SECREST,  
on behalf of themselves and all others similarly  
situated,

Plaintiffs-Appellees,

Supreme Court No. 139345

-vs-

Court of Appeals Nos. 278652,  
278858, 278860

STATE OF MICHIGAN and JENNIFER M.  
GRANHOLM, Governor of the State of Michigan,  
sued in her official capacity,

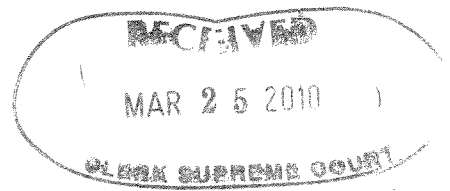
Ingham County Circuit Court  
No. 07-242-CZ

Defendants-Appellants,

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BRIEF OF AMICUS CURIAE -- RETIRED JUDGES GIOVAN, O’HAIR, AND  
BURRESS

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## INTEREST OF AMICUS

**William J. Giovan** is a retired judge of the Third Judicial Circuit, in Wayne County. He was a judge of that circuit for 33 years, retiring in 2008. He was chief judge of that circuit in 2008. Before serving as a circuit judge, he was a judge of the Common Pleas Court in Detroit for three years, and served as a visiting judge in the former Recorder's Court of the City of Detroit for three years, after being elected to a short term to that court.

**John D. O'Hair** is a retired judge of the Third Judicial Circuit, and also the former elected prosecutor of Wayne County. He was a judge of The Common Pleas Court and the Third Circuit for 18 years, leaving the bench to become Wayne County Corporation Counsel, and then Wayne County Prosecutor, in 1983. He served as the Wayne County Prosecutor from 1983 to 2000.

**Daniel A. Burress** is a retired judge of the 44th Circuit Court in Livingston County. He was a judge of that court for approximately 18 years, from 1986 to 2005. During his term as judge of the court, he was chief judge at various times. He also tried cases as assigned counsel before he became a judge, including a homicide case before Judge O'Hair.

As retired judges (one of us is also a former elected prosecutor) we have an abiding interest in the provision of public defense in the criminal courts in Michigan. We have presided over thousands of criminal cases in the trial courts and have seen firsthand the limited public defense that is available for the citizens of Michigan.

## ARGUMENT

### **I. Michigan's County-By-County System For Public Defense Is Woefully Inadequate.**

Michigan's system for public defense is near the very bottom of all the states. According to a recent report by the National Legal Aid and Defender Association (NLADA),<sup>1</sup> there are only six states in the union that spend less per capita on the defense of the indigent accused. The NLADA report concluded that Michigan fails all of its residents by failing to provide any public defense services, leaving those services to the counties. The state does nothing to monitor the defense now provided on a county-by-county basis.<sup>2</sup>

Those who can afford their own counsel are not restricted in any way in the presentation of their defense. "Equal Justice Under Law" must mean that a person who cannot afford an attorney is entitled to counsel that has the training to be effective, and the tools to mount an adequate defense that tests the strength and validity of the prosecution's case. "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v Cronin* 466 US 648, 656; 104 S Ct 2039; 80 L Ed 2d 657 (1984). "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." *Id.*, 466 US at 657, quoting from Judge Wyzanski of the Seventh Circuit. Indeed, the Sixth Circuit recently recognized that the system in Wayne County often falls

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<sup>1</sup> See, National Legal Aid and Defender Association, "A Race to the Bottom: Speed and Savings Over Due Process: A Constitutional Crisis" (2008).

<sup>2</sup> MCR 8.123 provides that the State Court Administrator shall gather data on counsel appointed and systems in place in the various courts, but there is no authority granted by the rule for the Administrator to take any action. The rule specifically permits a different system by "[e]ach trial court." MCR 8.123(B).

woefully short of providing effective assistance of counsel at critical stages of the prosecution. *See, United States v Morris*, 470 F3d 596 (CA 6, 2007) (affirming the dismissal of a federal prosecution, where the federal case had been commenced because of the erroneous advice by an unprepared lawyer in the Wayne County Circuit Court).

We know from our experience that: lawyers overburdened with unmanageable caseloads often meet their clients just a few minutes before court hearings; there is no ongoing communication with clients or even any confidential meeting place in the courthouses; and, there is little or no funding for experts and investigators necessary to build an effective defense. Training resources may exist in some counties, but are totally absent in others. There are no uniform written eligibility standards, no merit-based attorney hiring and retention programs, no standards to evaluate performance, no systems of attorney supervision and monitoring, no workload standards, and, as especially criticized by the NLADA in its report, no independence from the judiciary. Chief Judges are often forced to choose between continuing a public defense program at existing funding levels or cutting court staff.

Presently, the defense a person receives from an appointed lawyer or a public defender depends on which side of a county line the charges are brought. The current system is a patchwork of justice riddled with inefficiencies. Taxpayer dollars are wasted with 83 counties delivering public defense in 83 different ways, with different levels of funding. Mistakes and long sentences lead to millions in unnecessary corrections costs, appeals, conviction of innocent people, and lawsuits that could have been avoided with effective public defense.

Why does Michigan rank so low in protecting one of the most valuable of constitutional rights – the right to counsel when accused of a crime?<sup>3</sup> One of the primary reasons must be that Michigan is one of only seven states that impose the entire burden of trial-level indigent defense services on the counties. Individual counties have limited resources, and their limitations are aggravated in economically tough times. The defense of persons accused of crime is not a politically attractive objective, moreover, and the end result is that the counties have been miserly when it comes to providing public defense.<sup>4</sup>

As judge, chief judge, or prosecutor, we have had first hand experience with county fiscal constraints that adversely affect the quality of public defense. The level of fees paid to attorneys who represent the indigent accused has not been significantly raised in decades. Lawyers who provide public defense are being paid at the same rates that were in existence when judges' salaries were \$30,000 in this state. Our salaries rose with inflation, but there has been no such increase for public defense. Lawyers who provide public defense often work at effective hourly rates that would not appeal to tradesmen. With scarce resources their job becomes increasingly impossible.

It is time for the state to step up to assume its legal obligation. *Gideon v Wainwright* found that it was the state's obligation to provide public defense. In *Bounds v Smith*, 430 US 817, 824-825; 97 S Ct 1491; 52 L Ed 2d 72 (1977), the court, relying on *Gideon*, noted that "State expenditures are necessary to pay lawyers for indigent defendants at trial." In the 47 years since *Gideon* was decided, the State of Michigan has done nothing to assume the obligation of public defense. Instead, the state left in place a

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<sup>3</sup> In *Gideon v Wainwright*, 372 US 335, 344; 83 SCt 2364; 9 LEd2d 799 (1963), the court found that "The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."

<sup>4</sup> Wayne County's level of funding public defense has stayed virtually the same for twenty years; for a time, it was reduced by 10%.

century-old system that was designed to provide counsel at the court's discretion before the inception of the Constitutional obligation to provide counsel.<sup>5</sup>

Michigan, while being embarrassed for being at the bottom of the public defense list, is just as much embarrassed for being at the top of another list. Michigan is one of only four states that spends more on prisons than higher education. While no one suggests that the citizens of Michigan are inherently more wicked than those of any other state, we incarcerate our citizens at a rate that is nearly 50% higher than that of neighboring states, with the result that 20% of the entire state budget is spent on corrections, choking off Michigan's ability to provide many essential services to the citizenry.

## **II. The Courts Have A Duty To See That Michigan's Public Defense System Complies With The Sixth Amendment Of The United States Constitution.**

Now is the time for the courts to protect the rights of Michigan's citizens and act so that the basic rights of our citizens to due process of the law and assistance of counsel are protected. It seems obvious at long last that the Michigan Legislature will not respond to this ongoing constitutional violation unless and until the courts exercise their authority to order what *Gideon* commands.

Beginning with *Marbury v Madison*, 1 Cranch 137, 177; 2 L Ed 60 (1803), and recently followed in *Boumediene v Bush*, 553 US 723; 128 S Ct 2229, 2259; 171 L Ed 2d

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<sup>5</sup> MCL 775.16, which provides that the court may appoint and then may order the county to pay "reasonable fees" historically dates to the 19th century. The import of the statute is simply that it creates a means by which judges can order payment of a specified amount for appointed counsel. *See, Withey v Osceola Circuit Judge*, 108 Mich 168; 65 NW 668 (1895), and cases discussed therein. The statute does not "pass on" any constitutional obligation to the counties. As noted correctly by the majority in *Duncan*: "Thus, the counties do not have any independent constitutional obligation, apart from the state, to pay for the representation of indigent defendants. Rather, their obligations arise solely out of state statute and, as indicated in *In re Recorder's Court, supra* [443 Mich 110] at 123-124, 503 NW2d 885 [1993], the purpose of the statute was not to secure the constitutional right to counsel." *Duncan v State*, 284 Mich App 246, 288; 774 NW2d 89 (2009).

41 (2008), the United States Supreme Court has fulfilled the court's obligation to direct that the other branches of government comply with the Constitution.

Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is."

*Boumediene v Bush.*

In the case at bar, it is necessary for this Court to exercise its authority to compel constitutional compliance.

The majority decision in the court of appeals in this case relied on Justice Markman's opinion in *National Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 614; 684 NW2d 800 (2004). Justice Markman correctly noted that "Given the final authority of the judicial branch to accord meaning to the language of the constitution," the courts have a duty to act where the government's behavior contravenes a constitutional mandate and, while the court should respect the Legislature's decisions, its deference "must first be to the Constitution, and only then to the coordinate branches of our state government."


### **III. A Class Action Challenging The Public Defense System In Three Counties Is An Appropriate Method To Ensure Constitutional Compliance By The State And The Governor.**

We believe that a class action is the most efficient way to establish the systemic violations that are alleged here. Trial judges presiding over criminal cases are limited to correcting Sixth Amendment violations in the individual cases before them when those violations are presented to the court. Systemic problems, such as Michigan now has,

cannot be adequately addressed in each individual criminal case. A class action challenge to the systems in Genesee, Muskegon, and Berrien counties is a preferable vehicle to seek constitutional compliance by the state. Class certification is appropriate where, as here, there is a challenge to the system unaccompanied by claims for damages. The trial judge in this case found that sufficient facts were shown to the court to justify the certification of a class. We urge the court to remember that trial judges are in a unique position to determine the adequacy of pleadings in the context of the case before them. As Justice Weaver noted in *Henry v Dow Chemical*, 484 Mich 483, 503-504; 772 NW2d 301 (2009), "Similar to the federal district courts, state courts also have broad discretion to determine whether a class will be certified." (footnote deleted)

**RELIEF REQUESTED**

We urge the court to allow this action to proceed in the trial court.

  
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