

---

---

**Court of Appeals**

**STATE OF NEW YORK**

---

KIMBERLY HURRELL-HARRING, et al.  
On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs-Appellants,

-against-

THE STATE OF NEW YORK, *et al.*

Defendants-Respondents.

---

**BRIEF FOR AMICUS CURIAE  
DISTRICT ATTORNEYS ASSOCIATION  
OF THE STATE OF NEW YORK**

---

KATHLEEN B. HOGAN  
Warren County District Attorney  
President, District Attorneys  
Association of the State of New York  
3 Columbia Place  
Albany, New York 12210  
(518) 447-2496

MORRIE I. KLEINBART  
ASSISTANT DISTRICT ATTORNEY  
*Of Counsel*

*December, 2009*

---

---

Table of Contents

TABLE OF AUTHORITIES ..... ii

PRELIMINARY STATEMENT..... 1

STATEMENT OF AMICUS CURIAE..... 1

THE RELEVANT FACTUAL BACKGROUND..... 4

POINT

THERE IS NO BASIS TO FIND ANY VIOLATION  
OF A COUNSEL RELATED RIGHT REMEDIABLE  
IN A CIVIL ACTION. FINDING SUCH A  
VIOLATION WOULD DO INCALCULABLE  
DAMAGE TO THE ABILITY TO EFFECTIVELY  
LITIGATE SUCH CLAIMS IN CRIMINAL  
PROCEEDINGS..... 9

CONCLUSION ..... 18

## TABLE OF AUTHORITIES

### Cases

<u>Gideon v. Wainright</u> , 372 U.S. 335 (1963) .....	9
<u>Hurrell-Harring v. State of New York</u> , 2008 N.Y. Misc. LEXIS 5479 (Sup. Ct., Albany Co. 2008) .....	5
<u>Hurrell-Harring v. State of New York</u> , 66 A.D.3d 84 (3d Dept. 2009).....	6, 7, 12n, 15, 16
<u>Kelly’s Rental v. City of New York</u> , 44 N.Y.2d 700 (1978) .....	17
<u>Kimmelman v. Morrison</u> , 477 U.S. 365 (1986).....	13
<u>Matter of Morgenthau v. Erlbaum</u> , 59 N.Y.2d 143 (1983) .....	17
<u>Nix v. Whiteside</u> , 475 U.S. 157 (1986).....	15
<u>People v. Baldi</u> , 54 N.Y.2d 137 (1981).....	10, 11, 14
<u>People v. Benevento</u> , 91 N.Y.2d 708 (1998) .....	12
<u>People v. Caban</u> , 5 N.Y. 3d 143 (2005) .....	11, 15
<u>People v. Claudio</u> , 83 N.Y.2d 76 (1993) .....	13
<u>People v. Moskowicz</u> , 192 A.D.2d 317 (1 <sup>st</sup> Dept. 1993) .....	16
<u>People v. Turner</u> , 5 N.Y.3d 476 (2005).....	10
<u>People v. Wiggins</u> , 89 N.Y.2d 872 (1996).....	14n
<u>Stream v. Beisheim</u> , 34 A.D.2d 329 (2d Dept. 1970).....	9

Strickland v. Washington, 466 U.S. 668 (1984) ..... 9, 10,  
15

Statutes

CPL §190.50(5)(c)..... 16

CPL §440.30(6) ..... 18

CPLR 5601(a)..... 7

CPLR 5601(b) ..... 7

County Law §722..... 9

County Law Articles 18-A ..... 9

County Law Articles 18-B ..... 9

COURT OF APPEALS  
STATE OF NEW YORK

KIMBERLY HURRELL-HARRING, et al.  
On Behalf of Themselves and All Others Similarly  
Situating,

Appellants,

-against-

THE STATE OF NEW YORK,

Respondent.

BRIEF FOR AMICUS CURIAE  
DISTRICT ATTORNEYS ASSOCIATION OF THE STATE OF NEW YORK

PRELIMINARY STATEMENT

The District Attorneys Association of the State of New York (“DAASNY”) submits this brief as amicus curiae in the above captioned appeal. The underlying action seeks a declaration that indigent criminal defendants receive constitutionally ineffective assistance of counsel and demands injunctive relief requiring the state to provide a system of public defense that cures this inadequacy.

STATEMENT OF AMICUS CURIAE

The District Attorneys Association of the State of New York (DAASNY) is a state-wide organization composed of elected District Attorneys from throughout New York State, the Special Narcotics Prosecutor of the City of New York, and their nearly 2900 assistants. Members of the Association are responsible not merely for the

investigation and prosecution of crimes committed in their respective jurisdictions, but are charged as well with defending convictions against attack, whether by direct appeal or by collateral attack. This responsibility places DAASNY in a unique position to brief the Court as to those specific statewide concerns that would be implicated by a civil action that could result from an ultimate finding that those criminal defendants across the state who were defended by attorneys appointed pursuant to an indigent criminal defense plan, received constitutionally inadequate assistance.

It cannot be overemphasized that DAASNY embraces the imperative that all criminal defendants be represented by competent counsel and receive the effective assistance at the hands of such attorneys. Indeed, the District Attorneys Association supported an increase in the rates paid to counsel appointed pursuant to County Law 18-B, an increase in fact enacted in May 2003, effective January 1, 2004. S1406-B/A2106B (Chapter 62 of the Laws of 2003). But success in any civil action that seeks to compel the legislature to allocate more funding to indigent criminal defense would necessarily require that the court conclude that indigent defendants receive constitutionally inadequate counsel. As the majority at the Appellate Division concluded, such a conclusion would have a devastating impact on litigation of such claims in criminal proceedings, would likely increase the numbers of challenges to convictions, and most significantly, would upset the long settled understanding of the nature of such claims.

## THE RELEVANT FACTUAL BACKGROUND

In a complaint and subsequent amended complaint, plaintiffs, 20 indigent criminal defendants with cases pending in various counties of the state, alleged specific deficiencies in their representation including counsel's failing to appear at arraignment in local criminal court (e.g., R214-15 [Hurrell-Harring]; R219 [Briggs]; R225 [Love]; R230 [Loyzelle]; R233 [Washington]; R237 [Johnson]; R239 [Tomberelli]); to meet with his or her client during the pendency of the criminal action (e.g., R216-17 [Adams]; R219-20 [Briggs]; R222-23 [Glover]; R228 [Winbrone]; R237 [Johnson]); to consult with his or her client before waiving a preliminary hearing (e.g., R222 [Glover]; R228 [Winbrone]; R231 [Steele]); to advise of the right to testify before the grand jury, to arrange for such testimony or to move to dismiss for a violation of the right to testify before the grand jury (e.g., R216-17 [Adams]; R220 [Briggs]; to perform an "independent" investigation (e.g., R221 [Briggs]; R222 [Glover]; R230 [Loyzelle]; R234 [Washington]); R238 [Johnson]); to prepare plaintiff for testimony at a trial (R236 [Chase]); and to seek a bail reduction (R222: [Glover]; R228 [Winbrone]). A number of plaintiffs also alleged that counsel had engaged in only brief meetings with plaintiff, and had inadequately consulted with them (R230-31 [Loyzelle]; R234 [Washington]; R243-44 [Booker]; R246 [Kaminski]; R249 [Metzler]; R251 [Turner]. The complaint characterized the purported deficiencies thusly: failure to provide representation to indigent defendants at all "critical" stages (R270);

excessively restrictive financial eligibility standards and delays in the appointment of counsel (R274); and lack of attorney-client contact and communication (R278). Apart from these specific deficiencies in particular cases, plaintiffs also alleged a lack of attorney hiring criteria, performance standards and supervisory standards (R282); lack of training (R285); excessive caseloads (R289); lack of vertical representation (R291); lack of political and professional independence (R293); and inadequate compensation and lack of parity with prosecutorial counterparts (R286).

Plaintiffs contended that these allegations reflected systemic violation of the right to the effective assistance of counsel. Consequently, they sought certification of the action as a class action, with the class being all indigent defendants in five specific names counties, a declaration that the right to the effective assistance of counsel is being violated, and an injunction directing that the state cure the deficiencies (R303-04).

Defendant moved to dismiss the complaint on the grounds that a declaratory judgment action may not be brought to challenge whether plaintiffs are receiving effective assistance of counsel in their criminal proceedings, in part because adequate remedies are available within the criminal proceedings and that discovery and trial in this action would prejudice and delay pending criminal matters, that plaintiffs lack standing to challenge the adequacy of representation provided or to be provided to other un-named criminal defendants, that the structure and funding of public defense systems is a legislative function and is not justiciable, and that the issue of the nature

of representation of unknown future criminal defendants is not ripe for adjudication Hurrell-Harring v. State of New York, 2008 N.Y. Misc. LEXIS 5479 at \*2 (Sup. Ct., Albany Co., 2008). That motion was denied Id. at \*16.<sup>1</sup>

On appeal to the Appellate Division, Third Department, a divided panel of that court reversed. As relevant here, the majority, in a writing by Justice E. Michael Kavanagh, noted that “plaintiffs’ claim is based on a fundamental misunderstanding of the constitutional dimensions of a defendant’s right to counsel in a criminal action.” The majority pointed out that, as interpreted by both the state and federal constitutions, the guarantee of “Assistance of Counsel for his [or her] defence,” U.S. Const. 6<sup>th</sup> Amend.; N.Y. Const. Art. I Sec. 6 is “synonymous with the right to the effective assistance of counsel and is violated not whenever there is a flaw or ‘deficiency’ in the quality of the legal representation provided indigent criminal defendants, but when that representation, taken as a whole, is so inadequate as to “undermine[] the proper functioning of the adversarial process [so] that the trial cannot be relied on as having produced a just result.” While the tests employed under both federal and state law to measure the effectiveness of counsel are to some extent

---

<sup>1</sup> In the original and amended complaints, plaintiffs named as defendants the State of New York and Governor David Paterson. When Supreme Court dismissed the amended complaint, it did so on condition that plaintiffs file a second amended complaint naming as defendants the counties of Onondaga, Ontario, Schuyler, Suffolk, and Washington. It appears that plaintiffs have done so. See Hurrell-Harring v. State, et al., Decision and Order of Justice Devine dated July 15, 2009, appended as addendum to Brief for Respondent (reflecting caption naming the five counties and appearances of counsel for the counties).

different, neither recognizes the right for its own sake but, rather, for the effect it has in ensuring that a defendant charged with a crime has been treated fairly and the criminal action has produced a fair result. Hurrell-Harring v. State of New York, 66 A.D.3d 84, 87 (3d Dept. 2009).

The majority went on to observe that the right to the effective assistance of counsel is not “a general right that can be asserted in a civil action to support a claim that seeks to compel other branches of government to allocate additional public resources and intensify administrative oversight of programs that provide indigent criminal defendants with legal assistance in their criminal prosecutions.” Id. at 88.

In the end, opined the majority, plaintiffs were seeking a judicial declaration on the funding and administration of such programs, and was thus nonjusticiable, inasmuch as it involved the “complex choices that entail selecting among competing priorities and allocating finite resources” better left to the executive and legislative branches of government. The majority also noted the “obvious and ominous implications” for the principle of separation of powers that would result from the grant of relief. Id. at 88, 89.

The majority also expressed concern that the action, if allowed to continue, would impact on the criminal proceedings pending against each of the named plaintiffs, inasmuch as the complaint raised claims identical to those which would support claims of ineffective assistance of counsel in each individual case. Id. at 90-91.

Justice Karen Peters, joined by Justice Leslie E. Stein, dissented. Characterizing the majority's view as "myopic," the dissenters noted the significance of counsel to a criminal defendant, pointing to the importance of counsel at every step of the proceedings, from arraignment forward. Because, in the view of the dissenters, the allegations in the complaint established that there were deficiencies in the representation each plaintiff received, the fiscal concerns cited by the majority bore not on the cause of action but on the remedy to be imposed. *Id.* at 92-93.

Finally, the dissenters concluded that the majority's concern about the impact an ultimate finding in favor of plaintiffs -- that the systemic deficiencies in this state's public defense system create a grave and unacceptably high risk that indigent defendants will not receive effective assistance -- could successfully be used by any of the plaintiffs in a collateral or appellate attack to his or her individual conviction" was misplaced. According to the dissenters, "[i]n order to so challenge their convictions, plaintiffs, like any criminal defendant, would have to demonstrate not only that counsels' performance was deficient, but also that the actual representation they received prejudiced their cases." This, of course, would not be established by such an ultimate finding. *Id.* at 97-98.

Plaintiffs have appealed as of right pursuant to CPLR 5601(a) and CPLR 5601(b).

## POINT

THERE IS NO BASIS TO FIND ANY VIOLATION OF A COUNSEL RELATED RIGHT REMEDIABLE IN A CIVIL ACTION. FINDING SUCH A VIOLATION WOULD DO INCALCULABLE DAMAGE TO THE ABILITY TO EFFECTIVELY LITIGATE SUCH CLAIMS IN CRIMINAL PROCEEDINGS

---

For plaintiffs to prevail in this action, they would have to establish either that New York has denied them the right to counsel or that the indigent defense representation provided in New York through County Law Articles 18-A and 18-B provides constitutionally ineffective assistance of counsel as a matter of law. Plaintiffs can establish neither. A contrary conclusion would undo the well settled rule that an attorney's competence must be presumed, implicating litigation of all ineffective assistance of counsel claims challenging the effectiveness of attorneys appointed pursuant to an indigent defense representation framework. As a result, it would wrongly place the burden upon the People to establish an attorney's effectiveness rather than assign that burden to the criminal defendant as has been the long settled understanding of challenges to judgments of conviction. Further, a conclusion that the indigent defense framework necessarily has provided ineffective lawyering could not help but impact on pending criminal actions. That being the case, the mechanism by which plaintiffs seek relief, declaratory judgment, is simply unavailable to them.

The mere existence of an indigent representation obligation alone belies any claim arising from a purported denial of counsel. Articles 18-A and 18-B of the County Law creates a framework by which the inherent power held by New York courts to insure that all criminal defendants were represented by counsel, see Stream v. Beisheim, 34 A.D.2d 329, 333 (2d Dep't 1970), would be enhanced by insuring that such counsel could receive compensation. This framework, of course, fulfills the promise of Gideon v. Wainright, 372 U.S. 335 (1963), which guaranteed that all criminal defendants had the right to be represented by “the guiding hand of counsel at every step in the proceedings against him,” id. at 345, by providing the individual counties with three options as to how to vindicate this right: representation by a public defender appointed pursuant to county law article eighteen-A, representation by counsel furnished by a private legal aid bureau or society designated by the county or city, organized and operating to give legal assistance and representation, or representation by counsel furnished pursuant to a plan coordinated by an administrator. County Law § 722. Such representation is provided throughout the state by one of these three methods and thus, it cannot be seriously contended that plaintiffs have been denied the right to counsel in violation of Gideon.

Plaintiffs fare no better if their cause of action sounds in a violation of the right to the effective assistance of counsel. As a general matter, such claims raised under the federal constitution, are judged under the familiar rubric of Strickland v. Washington, 466 U.S. 668 (1984). Those raised under the state constitution are

resolved under the framework announced in People v. Baldi, 54 N.Y.2d 137, 147 (1981). The former is a two pronged test; first, the proponent of the claim must demonstrate that counsel's performance was deficient; that is, that counsel was not performing as the counsel guaranteed by the Sixth Amendment. With respect to this prong of the test, the Supreme Court made clear that a defendant "must overcome the strong presumption that counsel's performance constituted sound trial strategy." This alone, however, will not entitle a defendant to relief. Under the federal test, the defendant must show a reasonable probability that the result of the proceeding would have differed had counsel not committed the complained-of error or errors. Strickland v. Washington, 466 U.S. at 694.

New York's test looks not at outcome; instead, the New York cases

have departed from the second ("but for") prong of *Strickland*, adopting a rule somewhat more favorable to defendants. [New York]'s cases, however, agree with *Strickland* on the first prong. [The Court of Appeals has] said that "counsel's efforts should not be second-guessed with the clarity of hindsight" and that our Constitution "guarantees the accused a fair trial, not necessarily a perfect one." [It has] also held that, in general, the issue is whether counsel's performance "viewed in totality" amounts to "meaningful representation."

People v. Turner, 5 N.Y.3d 476, 480 (2005) (citations omitted).

As the Baldi court explained, "[s]o long as the evidence, the law, and the circumstances of a particular case, viewed in totality and as of the time of the representation, reveal that the attorney provided meaningful representation, the

constitutional requirement will have been met.” People v. Baldi, 54 N.Y.2d at 147. Of course, in contrast to the Strickland standard, New York’s standard of meaningful representation, by contrast, does not require a defendant to “fully satisfy the prejudice test of Strickland, although New York continues to regard a defendant's showing of prejudice as a significant but not indispensable element in assessing meaningful representation. In New York, the prejudice component focuses on the fairness of the process as a whole rather than its particular impact on the outcome of the case. Thus, under the State Constitution, even in the absence of a reasonable probability of a different outcome, inadequacy of counsel will still warrant reversal whenever a defendant is deprived of a fair trial.” People v. Caban, 5 N.Y.3d 143, 156 (2005) (internal quotation marks omitted).

Certainly, to establish a violation which would justify relief in this case, plaintiffs would, at the very least, have to establish that their rights to the effective assistance of counsel has been violated under one of these tests. It is, of course, difficult to see how plaintiffs can establish this. The problem with establishing a violation under the federal standard is obvious; because prejudice is a necessary element of a claim of ineffectiveness of counsel, individual cases must be examined and considered on their individual merits, with close attention paid to the outcome of the supposedly deficient representation.

Plaintiffs obviously cannot establish a federal constitutional violation of their right to the effective assistance of counsel; each alleges that his or her criminal action

remains pending. As noted, the federal test for ineffective assistance of counsel requires a showing of prejudice and absent resolution of the criminal case, the prejudice element of ineffective assistance of counsel cannot be established.<sup>2</sup>

Nor could plaintiffs succeed under a theory that their state constitutional right to the effective assistance of counsel has been violated. True it is that prejudice need not be established. People v. Benevento, 91 N.Y.2d 708, 714 (1998) (“whether defendant would have been acquitted of the charges but for counsel’s errors is relevant, but not dispositive under the State constitutional guarantee of effective assistance of counsel”). But it is difficult to see how plaintiffs can demonstrate that they were denied meaningful representation until the criminal action is resolved. Whether a defendant received meaningful representation, the state test for the effectiveness of counsel, can be determined only at the conclusion of the proceeding. After all, any judgment about the nature of representation a criminal defendant has received necessarily implicates the result of that representation and not individual errors or missteps that counsel may have taken along the way.

Indeed, this Court has explicitly tied consideration of claims of effective assistance of counsel to examination of the entirety of proceedings, that is, only after

---

<sup>2</sup> Remarkably, the dissenters acknowledge this, rejecting the notion that plaintiffs, all of whom had cases pending at the time the complaint was filed, had adequate remedies in the context of individual challenges to the inadequacies to which each pointed because the criminal cases could result in acquittal or dismissal. Hurrell-Harring v. v. State of New York, 66 A.D.3d at 98. But absent a constitutional injury – a conviction whose proximate cause was the ineffective assistance of counsel – it is difficult to see that there would be any remedy to which such defendants would be entitled.

the matter has been resolved. In People v. Claudio, 83 N.Y.2d 76 (1993), there was no question that an attorney had committed gross professional misconduct at the pre-accusatory stage of the proceedings. In rejecting a claim that this evinced the ineffective assistance of counsel, this Court held that

the basic purposes and constitutional interests at stake under both constitutional guarantees (the right to counsel and the right to the effective assistance of same) of an adequate legal defense in a criminal case are the same: (1) the preservation of our unique adversarial system of criminal justice, the underlying presupposition of which is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free; and (2) the correlative necessity to provide a defendant with an advocate sufficiently competent to insure "fairness in the adversary criminal process. The right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. These concerns are subsumed in our adoption of the standard of meaningful representation for the fulfillment of the State's own constitutional responsibility to insure effective assistance of counsel to the criminally.

People v. Claudio, 83 N.Y.2d 76, 80 (1993) (citations and internal quotation marks omitted).

In other words, because the right to effective assistance is intimately bound up with its effect on the nature of the trial (or other disposition) obtained on a criminal defendant's behalf, it cannot be seriously maintained that such a cause of action lies before resolution of the criminal case. See also Kimmelman v. Morrison, 477 U.S. 365, 375 (1986) ("The essence of an ineffective-assistance claim is that counsel's

unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect”).

More fundamentally, under the meaningful representation test, whether a defendant was denied the effective assistance of counsel is determined only on a case by case basis. “What constitutes effective assistance is not and cannot be fixed with yardstick precision, but varies according to the unique circumstances of each representation.” People v. Baldi, 54 N.Y.2d 137, 146 (1981). Any declaration that indigent defendants necessarily receive constitutionally ineffective assistance ignores this obligatory case by case analysis.<sup>3</sup>

More important, however, is the impact that such conclusion would have on litigation of claims of ineffective assistance claims on the criminal side of the ledger. If relief of any sort is granted, it necessarily means that there has been some deficiency in the representation of all indigent criminal defendants across the state. What follows from this, as three of the five judges at the Appellate Division explicitly recognized, is that as far as the Strickland test is concerned, its first prong would have been met. Indeed, the dissenters in the Appellate Division can fairly be said to have acknowledged this as well:

“[W]e are unpersuaded by defendants' argument and the majority's position that an ultimate finding in

---

<sup>3</sup> It is worthy of note that at least two plaintiffs assign ineffectiveness to counsel's failure to arrange for their testimony before a grand jury. This Court has expressly rejected that as a basis for a finding of ineffectiveness. People v. Wiggins, 89 N.Y.2d 872 (1996).

favor of plaintiffs -- that the systemic deficiencies in this state's public defense system create a grave and unacceptably high risk that indigent defendants will not receive effective assistance -- could successfully be used by any of the plaintiffs in a collateral or appellate attack to his or her individual conviction. In order to so challenge their convictions, plaintiffs, like any criminal defendant, would have to demonstrate not only that counsels' performance was deficient, but also that the actual representation they received prejudiced their cases such that they were deprived of meaningful representation.

Hurrell-Harring v. State of New York, 66 A.D.3d at 97-98.

But there are two significant flaws with the dissenters' rejection of the concerns about the impact on litigation of ineffective assistance of counsel claims on the criminal side. First, if the dissenters' view is adopted, it would undo the well settled rule that a defense attorney's performance must be presumed effective and it is the proponent of the position that such counsel was ineffective who would carry the burden of showing to the contrary. Strickland at 689; Nix v. Whiteside, 475 U.S. 157, 165 (1986).

Second, it ignores that claims of ineffective assistance of counsel brought under state law do not require that defendant show that he was prejudiced. "[U]nder our State Constitution, even in the absence of a reasonable probability of a different outcome, inadequacy of counsel will still warrant reversal whenever a defendant is deprived of a fair trial." People v. Caban, 5 N.Y.3d at 156. This being the case, a judicial declaration that those represented by indigent defense providers throughout

the state would enable indigent criminal defendants – both defendants whose criminal actions have ended in conviction and defendants whose actions are pending – to raise ineffective assistance of counsel challenges to their judgments or detentions, respectively, without alleging specific facts arising in their individual cases that establish that each received the ineffective assistance of counsel.

An ultimate finding that those represented pursuant to an indigent defense program further risks interference with pending criminal actions. In People v. Moskowitz, 192 A.D.2d 317, 318 (1st Dep't 1993), the Appellate Division, First Department seized upon a finding of ineffective assistance of counsel in a pending case to affirm dismissal of a pending indictment on the ground that the criminal defendant had not been advised of his right to testify in the grand jury. The motion seeking such relief was untimely, see CPL §190.50(5)(c), and the motion court and the Appellate Division both agreed that first counsel's ineffectiveness justified forgiving the untimely nature of the motion.

What is evident from this ruling is that an ultimate finding of ineffective assistance of counsel for those receiving representation pursuant to an indigent defense program can impact pending criminal actions by affording immediate relief for such violations. But as the majority at the Appellate Division pointed out, “sound public policy requires that severe restrictions be placed upon the ability of criminal defendants to litigate claims in a civil action that can be, and ought to be, resolved in the criminal actions.” Hurrell-Harring v. State of New York, 66 A.D.3d at 91.

Indeed, this is the very reason why this Court has repeatedly recognized, a declaratory judgment action cannot be maintained by a party against whom a criminal proceeding is pending. Kelly's Rental v City of New York, 44 N.Y.2d 700 (1978); Matter of Morgenthau v Erlbaum, 59 N.Y.2d 143 (1983). The underlying action here, of course, has been brought on by way of declaratory judgment. Because of the likely impact on pending criminal cases of the ultimate findings of deficient representation sought by plaintiffs, it is plain that the action simply should not lie.

\* \* \* \* \*

In the end, plaintiffs are seeking civil relief – enhanced funding for indigent public defense services – to remedy specific instances of purportedly ineffective assistance of counsel. But because each of the named plaintiffs’ cases remained pending at the time the complaint was filed, the complaint suffers from a critical defect. Absent ultimate resolution of the criminal action, it cannot be determined whether they were prejudiced, a necessary element for relief of ineffective assistance of counsel claims under the federal constitution. Similarly, absent such resolution, it cannot be determined if the plaintiff in the particular case received the “meaningful representation” that is the *sine qua non* of effective assistance under the state constitution.

But perhaps most problematic is the impact on criminal actions, both pending and completed, an ultimate finding of ineffective assistance of counsel made in this proceeding would have. An ultimate finding of ineffectiveness in this proceeding

would flip the presumption of competent representation on its head and would presume that counsel appointed pursuant to an indigent defense representation plain was ineffective. This would not only result in a flood of post-judgment motions for vacatur from disgruntled criminal defendants under CPL Section 440.10, it would place the burden on the People to establish that there was no constitutional violation. The CPL Article 440 framework mandates precisely the contrary. CPL §440.30(6) (placing burden on defendant to prove each fact essential to support request for relief). Affirmance of the Appellate Division's order will insure that the presumption of competence and the burden of proving ineffectiveness remains where it belongs – with the moving party.

### **CONCLUSION**

The order of the Appellate Division should be affirmed.

Respectfully submitted,

KATHLEEN B. HOGAN  
Warren County District Attorney  
President, District Attorneys  
Association of the State of New York  
3 Columbia Place  
Albany, New York 12210  
(518) 447-2496

MORRIE I. KLEINBART  
Assistant District Attorney  
Of Counsel

December 2009