

Systemic Indigent Defense Litigation: A 2010 Update

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ESSAY

**SYSTEMIC INDIGENT DEFENSE LITIGATION: A
2010 UPDATE**

Cara H. Drinan*

Introduction

At the American Bar Association’s National Public Defense Symposium in May, 2010, I delivered a talk on systemic indigent defense litigation.¹ I spoke about this kind of litigation with measured optimism. Specifically, I described two pending suits of this kind – one in Michigan and one in New York – as successful models of modern litigation in this arena. In May, both suits had just survived motions to dismiss before their respective state supreme courts. I discussed the future trials in these suits and the

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¹ This essay is a by-product of the talk that I delivered at the 2010 American Bar Association (“ABA”) National Public Defense Symposium on May 21, 2010. The full transcript of those proceedings appears in the same volume of the Tennessee Journal of Law & Policy as this essay and may be relevant to readers who are confronting excessive workloads or other aspects of a public defense system in need of reform. A full discussion of systemic indigent defense litigation—its history, trajectory and the current model for it—are outside the scope of this Essay. In previous works I have discussed this kind of litigation in depth. *See generally* Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427 (2009) [hereinafter *Indigent Defense Litigation*]; Cara H. Drinan, *Toward a Federal Forum for Systemic Sixth Amendment Claims*, WASH U. L.R. (Oct. 22, 2008) [hereinafter *Systemic Sixth Amendment Claims*], available at <http://lawreview.wustl.edu/slip-opinions/toward-a-federal-forum-for-systemic-sixth-amendment-claims/>.

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potential for litigants to replicate the success of these suits in other jurisdictions.

Shortly after the Symposium, those who were following the progress of the Michigan and New York suits were stunned when the Michigan Supreme Court reversed itself in the same case and granted the defendants' motion for summary disposition. Not only is the decision disappointing to the defense community, but also, litigators in these kinds of suits are left wondering what impact the decision will have on future systemic indigent defense claims.

In Part I of this Essay I will describe the systemic indigent defense suits in Michigan and New York, noting their similar but ultimately divergent paths. Having done so, in Part II, I will address the question of how systemic litigation in the indigent defense arena is faring in the wake of the Michigan suit. Despite the Michigan setback, this kind of litigation may still be a powerful reform tool in certain jurisdictions. Moreover, in some jurisdictions there will always be the need for litigation simply because it is the only path to reform. I note three jurisdictions where litigation is either already happening in some fashion and/or where systemic litigation may be on the horizon. Finally, I conclude with the notion that the federal government needs to play a more active role in indigent defense reform, whether or not systemic lawsuits enjoy success in state courts.

Part I: The Michigan and New York Suits

Duncan v. State of Michigan and *Hurrell-Harring v. State of New York* were both filed in 2007,² and in many

² Complaint, *Duncan v. State* (Mich. Cir. Ct. Feb. 22, 2007) [hereinafter *Duncan Complaint*]; Class Action Complaint, *Hurrell-Harring v. State*, No. 8866-07 (N.Y. Sup. Ct. Nov. 8, 2007) [hereinafter *Hurrell-Harring Complaint*].

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ways both suits reflect the model for successful systemic indigent defense litigation.³ In both cases plaintiffs argued that the state had abdicated its constitutional responsibility under *Gideon v. Wainwright*⁴ by delegating the provision, financing, and oversight of public defense services to the state's counties.⁵ Defendants in the New York suit filed a motion to dismiss in April, 2008, making three central arguments: that the named plaintiffs could only seek redress in the appellate process; that the named plaintiffs lacked standing to raise a claim of systemic deficiencies; and that the legislature was the proper forum for the plaintiffs' requested relief.⁶ Albany Supreme Court Justice Eugene Devine rejected all three arguments, writing: "The action primarily seeks a declaration that the State has failed in its constitutional duty to provide meaningful and effective assistance of counsel to indigent criminal

³ For example, the suits were filed as a measure of last resort; they demonstrated system-wide proof of harm to clients; they reflected strategic decisions on a wide array of procedural issues; they made reference to accepted professional standards; and they relied upon a wide network of professional allies. *See generally* Drinan, *Indigent Defense Litigation*, *supra* note 1 (discussing the model for this type of litigation and the New York and Michigan examples). The following suits also reflect, in part or in whole, the model of modern indigent defense litigation: Class Action Complaint, *Rivera v. Rowland*, No. CV 95-0545629S, 1998 WL 96407, at *1 (Conn. Super. Ct. Feb. 20, 1998); *Lavallee v. Justices in the Hampden Super. Ct.*, 812 N.E.2d 895 (Mass. 2004); Amended Complaint, *White v. Martz*, No. C DV-2002-133 (Mont. Jud. Dist. Ct. April 1, 2002); Third Amended Class Action Complaint, *Doyle v. Allegheny County Salary Bd.*, No. GD-96-13606 (Pa. Ct. C. P, Nov. 21, 1997); Complaint, *Best v. Grant County*, No. 04-2-00189-0 (Wash. Sup. Ct. 2004).

⁴ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

⁵ *See generally* Duncan Complaint, *supra* note 2; Hurrell-Harring Complaint, *supra* note 2.

⁶ *See generally* Memorandum of Law in Support of Defendant's Motion to Dismiss, *Hurrell-Harring v. State*, No. 8866-07, 2008 WL 7801294, at *1 (N.Y. Sup. Ct. Apr. 4, 2008).

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defendants... It would not require the judiciary to manage discretionary aspects of an essentially executive function of government. Rather it seeks a determination that the State has or is likely to violate the plaintiffs' constitutional rights."⁷ One year later, an intermediate appellate court overruled Justice Devine, finding that the plaintiffs' claim was not a justiciable legal claim, but instead was "simply a general complaint as to the quality of legal services offered to indigent criminal defendants in this state."⁸ In March, 2010, the New York Court of Appeals heard oral arguments regarding the state's motion to dismiss.⁹

The Michigan suit followed a similar path. Defendants in the suit filed a motion to dismiss, arguing that the government was immune from suit and that the case was non-justiciable on several theories.¹⁰ The trial court denied the motion to dismiss, and the Court of Appeals affirmed, holding that:

[T]he role of the judiciary in our tripartite system of government entails, in part, interpreting constitutional language, applying constitutional requirements to the given facts in a case, safeguarding constitutional rights, and halting unconstitutional conduct. For state and federal constitutional provisions to have any meaning, we may and must engage in this role even where litigation encompasses

⁷ Joel Stashenko, *Suit Proceeds over Providing Criminal Defense to Poor*, 240 N.Y.L.J. 1 (2008) (quoting Justice Devine).

⁸ *Hurrell-Harring v. State*, 883 N.Y.S.2d 349, 351 (N.Y. App. Div. 2009).

⁹ The oral argument may be viewed at: http://www.courts.state.ny.us/CTAPPS/arguments/2010/Mar10/Mar10_OA.htm.

¹⁰ *Duncan v. State*, 774 N.W.2d 89, 97 (Mich. Ct. App. 2009).

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conduct by the executive and legislative branches.¹¹

The Michigan Supreme Court heard oral arguments regarding the state's motion to dismiss in April, 2010.¹²

In both the Michigan and New York suits, oral argument before the high courts in each state focused on justiciability issues. At bottom, defendants in both suits made two arguments: 1) that the plaintiffs' claims were only appropriately addressed in a post-conviction proceeding and 2) that public defense reform was a legislative function.¹³ On April 30, 2010, the Michigan Supreme Court issued a unanimous order ("*Duncan I*") stating that: "[t]his case is at its earliest stages and, based solely on the plaintiffs' pleadings in this case, it is premature to make a decision on the substantive issues. Accordingly, the defendants are not entitled to summary disposition at this time."¹⁴ One week later, the New York Court of Appeals followed suit and denied the defendants' motion to dismiss in *Hurrell-Harring v. State*.¹⁵

¹¹ *Id.* at 98.

¹² The oral argument may be viewed at the following site: <http://www.michbar.org/courts/virtualcourt.cfm>.

¹³ See Appellants' Brief, *Duncan v. State*, Nos. 139345, 139346, 139347 (Mich. Feb. 8, 2010), available at <http://www.courts.michigan.gov/supremecourt/Clerk/04-10/139345/139345-7-AppellantBrief.pdf>; Brief for Plaintiffs-Appellants, *Hurrell-Harring v. State*, No. 8866-07 (N.Y. Sept. 28, 2009) (on file with author). The oral arguments in the two cases may be viewed at the following sites:

<http://www.michbar.org/courts/virtualcourt.cfm> (*Duncan*),

http://www.courts.state.ny.us/CTAPPS/arguments/2010/Mar10/Mar10_OA.htm (*Hurrell-Harring*).

¹⁴ *Duncan v. State*, Mich. Sup. Ct., Nos. 139345, 139346, 139347 (Mich. Apr. 30, 2010), available at

http://coa.courts.mi.gov/documents/sct/public/orders/20100430_s139345_106_139345_2010-04-30_or.pdf [hereinafter *Duncan I*].

¹⁵ *Hurrell-Harring v. State*, No. 66, slip op. at 21 (N.Y. May 6, 2010), available at

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While the April Order from the Michigan Supreme Court denied defendants' motion to dismiss, the Court declined to issue an opinion. On the other hand, the New York Court of Appeals opinion created very good law for future public defense reform suits. Despite the defendants' claim that plaintiffs had an adequate remedy in the criminal appellate and habeas process, the Court found that avenue insufficient to address the systemic claims presented in the Complaint. As the Court explained, the post-conviction approach "is expressly premised on the supposition that the fundamental underlying right to representation under *Gideon* has been enabled by the State."¹⁶ Where plaintiffs allege, as they did in the New York Complaint, that there has been a total breakdown of the defense system, the Court held that the post-conviction approach is not appropriate.¹⁷ Moreover, the Court held that what plaintiffs alleged in the Complaint was not a "mere lumping together of 20 generic ineffective assistance of counsel claims"¹⁸ but rather "a claim for constructive denial of the right to counsel" on a systemic basis.¹⁹ Finally, the Court rejected the separation of powers argument with the following: "It is, of course, possible that a remedy in this action would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities. But this does not amount to an argument upon which a court might be relieved of its essential obligation to provide a remedy for violation of a fundamental constitutional right."²⁰ In sum, the New York Court of Appeals opinion provides powerful precedent for any state court considering the justiciability of these suits

<http://www.courts.state.ny.us/CTAPPS/decisions/2010/may10/66opn10.pdf>.

¹⁶ Hurrell-Harring v. State, No. 66, slip op. at 7.

¹⁷ *Id.*

¹⁸ *Id.* (Pigott, J., dissenting at 6).

¹⁹ Hurrell-Harring v. State, No. 66, slip op. at 14-15.

²⁰ *Id.* at 20 (citation omitted).

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going forward. In particular, it alters the perception that public defense reform is a purely legislative task, and it rejects the notion that habeas review is the appropriate, let alone exclusive, avenue for systemic public defense cases.

In mid-June, public defense reform advocates cited both the Michigan and New York suits as success stories – two examples where state supreme courts seemed to recognize the crucial role that they had to play in indigent defense reform. Accordingly, court watchers were stunned in July 2010, when the Michigan Supreme Court reversed itself in the *Duncan* suit and issued an order (“*Duncan II*”) granting the defendants’ motion for summary disposition – only two and a half months after the same Court had paved the way for a trial on the merits.²¹

In stark contrast to the New York Court of Appeals’ opinion in *Hurrell-Harring*, the Michigan Supreme Court’s opinion in *Duncan II*, vacating its earlier Order and granting the defendants’ motion to dismiss, creates additional negative case law with which future plaintiffs in similar suits must contend. The majority in *Duncan II* simply stated that: “The defendants are entitled to summary disposition because, as the Court of Appeals dissenting opinion recognized, the plaintiffs’ claims are not justiciable.”²² Justice Markman, concurring in the opinion, wrote separately and explained that the Court’s earlier

²¹ *Duncan v. State*, Mich. Sup. Ct., Nos. 139345, 139346, 139347 (Mich. July 16, 2010) [hereinafter *Duncan II*], available at <http://www.courts.michigan.gov/supremecourt/Clerk/04-10/139345/139345-7-Order.pdf>; see also David Carroll, *Mich. Supreme Court Reverses Course in ACLU Class Action Indigent Defense Lawsuit*, ACSBlog, July 19, 2010 (calling the decision “stunning”), available at <http://www.acslaw.org/node/16537>; *Court Rules in Favor of Unequal Justice for Poor Defendants*, DETROIT FREE PRESS, July 20, 2010, available at <http://www.freep.com/article/20100720/OPINION01/7200318/Court-rules-in-favor-of-unequal-justice-for-poor-defendants>.

²² *Duncan II* at 2.

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Order had been in error for two reasons: 1) it had failed to articulate any governing standards and 2) it had incorrectly held that summary disposition was premature when, in fact, summary disposition was appropriate based on the Complaint itself.²³ Justice Markman then cited ten reasons why the defendants were entitled to summary disposition, including the following: that the Supreme Court in *Gideon v. Wainwright* was concerned with “results, not process;”²⁴ that plaintiffs’ claims are non-justiciable;²⁵ that there is no constitutional right to a “meaningful relationship with counsel;”²⁶ and that plaintiffs were asking the Michigan courts to violate the separation of powers doctrine by seizing traditionally legislative tasks from state lawmakers.²⁷ In short, Justice Markman’s opinion adopted wholesale the Court of Appeals dissenting opinion from June, 2009.²⁸

The *Duncan II* decision is flawed for several reasons.²⁹ First, in order for the Court to vacate its original order and reverse its decision regarding the defendants’ motion to dismiss, the Court needed to find that its “previous ruling rested on a ‘palpable error.’”³⁰ It strains credulity to imagine what that error was since the Court’s new order comes only two and a half months after its original order and is based exclusively upon the dissenting opinion from the appellate court decision -- an opinion that was before the Court when it originally ruled unanimously

²³ *Id.*

²⁴ *Id.* (citation omitted).

²⁵ *Id.* at 2-3.

²⁶ *Id.* at 3 (citation omitted).

²⁷ *Id.*

²⁸ *Id.*

²⁹ The *Duncan II* opinion, its legal underpinnings, and its implications will undoubtedly be the subject of future scholarship. My goal in discussing the opinion in this essay is to offer a preliminary response.

³⁰ *Duncan II* at 5 (Kelly, C.J. dissenting).

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in favor of the plaintiffs.³¹ As the dissenting opinion in *Duncan II* correctly notes: “we were certainly aware when we issued our previous order that, by affirming only the result reached by the Court of Appeals, we were remanding the case without a controlling standard.”³² Moreover, as the dissent states: “plaintiffs correctly note that defendants’ motion [for reconsideration] merely repeats the arguments it made earlier and that defendants are effectively asking this Court to issue an advisory opinion.”³³ As a procedural matter, the opinion in *Duncan II* was inappropriate.

Second, to the extent that the Court’s decision rests upon adoption of the appellate court’s dissent, the decision rests on misguided legal foundations. For example, it is simply not the case that the Sixth Amendment right to counsel is “concerned with results, not process.”³⁴ In fact, the contrary is true -- no defendant has the right to an *outcome* of a certain verdict or sentence; but every defendant has the right to certain *procedural safeguards*, including zealous defense representation, throughout the entire adversarial process.³⁵

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 2; U.S. CONST. amend. VI.

³⁵ See *Rothgery v. Gillespie County*, 554 U.S. 191 (2008) (reaffirming that Sixth Amendment right to counsel attaches at the initiation of adversarial proceedings in order to protect the defendant’s rights as the state moves forward with its case). There are other ways in which the *Duncan II* opinion rests on flawed legal analysis. A full discussion of those issues is outside the scope of this essay, but for example, the Court’s reference to *Strickland v. Washington*, 466 U.S. 668 (1984) and its prejudice prong is completely inapposite in a case like *Duncan* where plaintiffs seek prospective relief. See Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation’s Indigent Defense Crisis*, 47 HARV. J. ON LEGIS. 487 (2010), SSRN draft at 22-23, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1448058.

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Third, the decision errs in its assessment that the court cannot be involved in a suit of this kind without stepping on the toes of the state's executive and judicial branches. It is the province of the courts to identify constitutional violations and to order parties to cure such violations.³⁶ If, as a result of a court doing so, a state legislature ultimately has to expend funds, so be it. That outcome in no way undermines the Court's authority to identify a constitutional defect in the first instance.

Finally, the Court's decision in *Duncan II* was premature, as the Court recognized in its own initial order allowing the case to move forward.³⁷ In order to survive a motion to dismiss, plaintiffs needed to state a legal claim on which relief could be granted.³⁸ This they did, as the Michigan Supreme Court implicitly recognized when it originally rejected the defendants motion for summary disposition in its April Order. At this stage of litigation, plaintiffs did not need to address the question of appropriate remedies, the issue of funding for indigent defense representation, or the extent to which future potential injunctive relief would interfere with ongoing criminal proceedings. All of these issues appear to have been of newfound great concern to the *Duncan II* Court,³⁹ and they are entirely outside the realm of a motion for summary disposition. This reversal is stunning, and it raises doubts about the ability of elected judges to

³⁶ Hurrell-Harring v. State, No. 66, slip op. at 20 (citing *Marbury v. Madison*, 1 Cranch 137, 147 (1803)).

³⁷ *Duncan I*, *supra* note 14 ("This case is at its earliest stages and, based solely on the plaintiffs' pleadings in this case, it is premature to make a decision on the substantive issues. Accordingly, the defendants are not entitled to summary disposition at this time.").

³⁸ MICH. CT. R. § 2.116(C)(8) (West 2010).

³⁹ *Duncan II* at 2-3.

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impartially rule on questions that implicate the operation of a criminal justice system which the bench itself oversees.⁴⁰

Part II: Systemic Indigent Defense Litigation in the Wake of the *Duncan* Suit

The picture of public defense litigation may not be as bright as it was even two months ago when both the New York and Michigan suits appeared to be moving toward trial. However, there is still much to be said for systemic litigation as a tool for defense reform advocates. First, as the New York suit demonstrates, these cases can make it out of the gates – something many reformers did not think was possible even ten years ago.⁴¹ The lesson of the Michigan and New York comparison may be that parties bringing these types of suits need to be very thoughtful about the states in which they choose to seek judicial reform. Second, the Michigan experience may indicate that systemic litigation can be effective, but that now, more than ever, litigants need a federal forum in which to bring these types of suits.⁴² Third, defense reformers may need to

⁴⁰ See STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, AM. BAR ASS'N, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 20-21 (2004) (discussing the problem of defense functions that do not have independence from judicial influence and citing examples in Michigan), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>; See also Amanda Frost and Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 731-40 (2010) (discussing the evidence that suggests elected judges are, in fact, influenced by majority preferences, especially in comparison to appointed judges).

⁴¹ See, e.g., *Webb v. Commonwealth*, 528 S.E.2d 138 (Va. Ct. App. 2000) (rejecting challenge to statutorily-capped court-appointed attorney fee system and determining reform was legislative concern).

⁴² I have written on the need for a federal forum for these types of claims in prior works. See also Drinan, *Indigent Defense Litigation*,

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think about a two-tiered approach to litigation where systemic suits and individual suits, challenging, for example, excessive caseloads, are brought simultaneously. In this way, when and if a systemic suit makes its way to a state Supreme Court, that court has a body of individual challenges before it that substantiate the breadth of the systemic challenge. Finally, it is important to note that, in some jurisdictions, litigation – regardless of its risks and costs – may be the only available path to meaningful indigent defense reform.⁴³ For example, Texas, Georgia, and Utah are states where the indigent defense crisis is acute. If the legislative and executive bodies in these states cannot reform the systems sufficiently, systemic litigation may be necessary,

. Texas is notorious for its public defense shortcomings. Before its passage of the Texas Fair Defense Act in 2001,⁴⁴ the county-run system was referred to as a “national embarrassment.”⁴⁵ This reputation was due to several factors: a lack of independence in the appointment of defense counsel; a lack of state financing for public defense; and a lack of statewide standards for the

supra note 1, at 467-75. See generally Drinan, *Systemic Sixth Amendment Claims*, *supra* note 1.

⁴³ NAT’L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 210-211(2009) (discussing need for litigation when other options have been exhausted), available at <http://www.constitutionproject.org/manage/file/139.pdf>.

⁴⁴ See Diana Jennings, *Legal Defense for Poor Is Looking Better: Agencies Taking Steps Required by New Law, but the Jury Is Out*, DALLAS MORNING NEWS, Jan. 13, 2002, at 39A (describing components of the law).

⁴⁵ Fox Butterfield, *Texas Nears Creation of State Public Defender System*, N.Y. TIMES, April 6, 2001, at A14 (quoting state bar association report).

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appointment and performance of defense counsel.⁴⁶ Unfortunately, today, almost a decade after the state's enactment of public defense reform legislation, "Texas is reaching a crisis point, putting itself at risk of a civil rights lawsuit."⁴⁷ In particular, the state has failed to contribute meaningfully to public defense financing, and because the overall costs of public defense in Texas have nearly doubled since 2001, the counties are struggling to close a huge fiscal gap.⁴⁸ In 2009, statewide public defense services cost \$186.3 million dollars, but the state contributed only 15% of that amount.⁴⁹ The persistent lack of independence in the appointment of defense counsel in Texas⁵⁰ and the chronic under-funding of defense services by the state, coupled with the state's tough-on-crime reputation, make it a jurisdiction ripe for litigated reform, as local experts have already noted.⁵¹

Like Texas, Georgia has a long-standing reputation for failing its indigent defense clients, and it also has attempted to improve its defense services through legislative reform. In 2003, responding to years of

⁴⁶ *Id.*; see also TEXAS APPLESEED FAIR DEFENSE PROJECT, THE FAIR DEFENSE REPORT: FINDINGS AND RECOMMENDATIONS OF INDIGENT DEFENSE PRACTICES IN TEXAS, (2000)

http://texasappleseed.net/pdf/projects_fairDefense_fairreport.pdf.

⁴⁷ Brandi Grissom, *Defenseless*, THE TEXAS TRIBUNE, May 19, 2010, available at

<http://www.texastribune.org/stories/2010/may/19/defenseless/>.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Editorial, *Fix the System: A Public Defender Office Would Improve the Quality of Justice Here While Saving Taxpayer Dollars*, HOUSTON CHRON., March 20, 2008, at B8 ("Although judges are supposed to use an impartial rotating list of available attorneys, in practice the system is easy to manipulate in favor of particular lawyers who might be friends or political contributors. An attorney who displeases a judge can be removed from the appointment list.").

⁵¹ Grissom, *supra* note 47 (quoting the Texas Fair Defense Project's Executive Director as saying "The situation in Texas is not that different from the situation in states that have seen litigation.").

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criticism of its county-run system, Georgia enacted legislation that established a public defender within each judicial circuit, and in 2004 state funding for the system was enacted.⁵² At the time, the state's reform efforts were cited as a model for other jurisdictions to follow.⁵³

Unfortunately, the state has not maintained its exemplary status. Facing rising public defense costs, especially related to conflict cases, state legislators have considered returning thousands of indigent defense cases to county control – the very type of control that the 2003 legislation was designed to change.⁵⁴ Jamie Weis's case illustrates well the extent of the state's public defense crisis. In February, 2006, Mr. Weis was arrested and charged with a capital crime.⁵⁵ More than three years later, his case was finally placed on a trial calendar.⁵⁶ Despite Mr. Weis's claim that a lack of state funding for his defense counsel hampered his case and deprived him of his right to a speedy trial,⁵⁷ the Georgia Supreme Court ruled that the state may move forward with its case against Mr. Weis.⁵⁸ Moreover, as a result of the Court's ruling, Mr. Weis will need to work with replacement counsel, despite the fact that those public defenders are already overworked and lack the

⁵² GIDEON'S BROKEN PROMISE, *supra* note 40, at 30.

⁵³ *Id.*

⁵⁴ See also Bill Rankin, *Indigent Defense Legislation Delayed Until Next Year*, THE ATLANTA JOURNAL CONSTITUTION, Apr. 22, 2010, available at

<http://www.ajc.com/news/georgia-politics-elections/indigent-defense-legislation-delayed-484553.html>. See generally Bill Rankin, *Proposal Would Split Public Defender System*, THE ATLANTA JOURNAL CONSTITUTION, Feb. 24, 2010, available at

<http://www.ajc.com/news/georgia-politics-elections/proposal-would-split-public-326988.html>.

⁵⁵ Weis v. State, 2010 WL 1077418 at *1 (Ga. Mar. 25, 2010).

⁵⁶ *Id.* at *3.

⁵⁷ *Id.* at *3-7.

⁵⁸ *Id.* at *7; see also John Schwartz, *Murder Case May Proceed in Georgia*, N.Y. TIMES, Mar. 26, 2010, at A13.

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investigative and expert resources necessary to defend him.⁵⁹ The Southern Center for Human Rights has filed a petition for certiorari with the United States Supreme Court on Mr. Weis's behalf, arguing that Mr. Weis has a right to continuity of counsel and that Georgia's failure to provide funding for Mr. Weis's lawyers for over two years constitutes a "systemic breakdown in the public defender system" which "should be charged to the State for speedy trial purposes."⁶⁰

Even though Georgia has had experience with systemic public defense reform litigation in the past,⁶¹ its current state of affairs begs the question whether the jurisdiction may be ripe for litigated reform again. Indeed, if the state's public defense funding crisis can bring most of its capital cases to a "standstill,"⁶² leaving defendants like Mr. Weis with no representation for years, the reform efforts of 2003 have not cured the state's fundamental defense problems, and a new round of systemic litigation may be on the horizon.

Utah remains only one of two states nationally that provides no state funding toward public defense services,⁶³ and it ranks forty-eighth in the nation for per capita spending on indigent defense.⁶⁴ Further, the state provides no oversight, training or quality standards for the various counties that provide representation to indigent

⁵⁹ See Petition for Writ of Certiorari, *Weis v. State*, (No. 09-10715), 7-8, 23-24, (May 10, 2010), <http://www.abajournal.com/files/WeisCertPetition.pdf>.

⁶⁰ *Id.* at 26 (citation omitted).

⁶¹ See GIDEON'S BROKEN PROMISE, *supra* note 40, at 30 (citing lawsuits by the Southern Center for Human Rights and the NAACP designed to improve the state system prior to the 2003 legislative overhaul).

⁶² Brenda Goodman, *Georgia Murder Case's Cost Saps Public Defense System*, N.Y. TIMES, Mar. 22, 2007, at A16.

⁶³ JUSTICE DENIED, *supra* note 43, at 54.

⁶⁴ Tim Gurrister, *Ethridge Keeps Defenders, Waits for Dentist*, STANDARD-EXAMINER, May 8, 2010, 2010 WLNR 9568022.

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defendants.⁶⁵ Counties are free to choose their own systems for the delivery of public defense services, and historically, most counties have chosen a contract or assigned counsel system.⁶⁶ Recently, one of the two Utah counties that had been operating a public defender office closed that office and moved to a flat-fee contract system as a cost-saving measure.⁶⁷

The American Civil Liberties Union (the “ACLU”) recently intervened in a Utah capital case where the state has tried to remove the defendants’ two lawyers, both of whom were previously employed by the now-defunct public defender office.⁶⁸ The ACLU and the public defense attorneys in the case argue that their client is constitutionally entitled to continuity in his representation, similar to the claim asserted in the *Weis* case in Georgia.⁶⁹ Further, the ACLU brief raises systemic concerns, in particular the fact that the state fails to fully comply with *any* of the Ten Principles that the ABA uses to measure the efficacy of a public defense delivery system.⁷⁰ The state’s persistent absence from the public defense function, excessive caseloads, and a high-profile capital case that drives home the cost of a broken system, make Utah a jurisdiction that may see systemic litigation in the near future.

⁶⁵ David Carroll, *Gideon Alert: Right to Counsel Threatened After Utah Public Defender Office Closes*, Apr. 22, 2010, available at http://www.nlada.net/www.nlada.net/library/article/ut_righttocounselanddp04-22-2010_gideonalert.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Tim Gurrister, *ACLU Accuses Weber of Cost-Cutting in Double-Murder Defense*, STANDARD-EXAMINER, April 23, 2010, 2010 WLNR 8442940.

⁶⁹ Request for Leave to File Brief of Amicus Curiae in Opposition to Motion for Substitution of Counsel, *State v. Ethridge*, No. 018901539 (Sec. Jud. Dist. Ct. Weber County April 20, 2010), http://www.acluutah.org/Ethridge_042010_motion_amicus.pdf.

⁷⁰ *Id.* at 3.

Part III: Conclusion

Even in the wake of the Michigan Supreme Court's *Duncan II* decision, there is a role for systemic indigent defense litigation to play. Litigation can be an impetus for legislative action; it can generate media attention that informs the public; and it may, as the New York suit demonstrates, even make it to trial. Going forward, litigants need to be thoughtful about selecting jurisdictions where they seek judicial reform. At the same time, they need to continue to press for a federal forum for these types of claims in order to minimize the majoritarian pressure to be tough on crime that may weigh on elected state judges. Finally, the federal government needs to be at the forefront of nationwide indigent defense reform. It can do this in a number of ways, as scholars have discussed and as the newly created Access to Justice Initiative within the Department of Justice has explained.⁷¹ For example, the federal government can file amicus briefs in ongoing state litigation like the New York suit; it can generate critical data that enables states to measure systemic defense shortcomings; and it can use its bully pulpit to inform the public as to why access to counsel is so vital to all citizens. Whatever priorities it chooses to set in this realm, it is clear that going forward, when state judicial and legislative bodies turn a blind eye to indigent defense crises, the federal government cannot stand on the sidelines.

⁷¹ On June 19, 2010, at the American Constitution Society National Convention, a panel of experts discussed the "federal role in improving indigent criminal defense." Many proposals, including some mentioned here, like the filing of amicus briefs, were discussed by panelists. The panel may be viewed here: <http://www.acslaw.org/node/16402>.