

No. 1190043

IN THE SUPREME COURT OF ALABAMA

ALABAMA DIRECTOR OF FINANCE KELLY BUTLER
AND ALABAMA OFFICE OF INDIGENT DEFENSE SERVICES
DIRECTOR CHRIS ROBERTS,
Defendants-Appellants,

v.

WILL J. PARKS, III AND
C. CLAIRE PORTER,
Plaintiffs-Appellees.

On Appeal From the
Montgomery County Circuit Court
(CV-2018-901008)

APPELLANTS' OPENING BRIEF

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February 03, 2020

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ORAL ARGUMENT REQUESTED

STATEMENT REGARDING ORAL ARGUMENT

This case involves important issues regarding the State's right to assert sovereign immunity. The State maintains that the Court can resolve this appeal in the State's favor on several straightforward grounds. But to the extent the Court seeks to resolve any tensions in its sovereign immunity jurisprudence, the State believes that oral argument would assist the Court in addressing those matters.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal under Ala. Code §6-5-642. That section allows immediate appeal from “[a] court’s order certifying a class or refusing to certify a class action.” Ala. Code §6-5-642; see *Barnhart v. Ingalls*, 275 So. 3d 1112, 1120 (Ala. 2018) (“§6-5-642 governs [challenges to a trial court’s class certification] and provides that an appeal is the appropriate vehicle by which to bring that issue before this Court.”). On September 18, 2019, the Montgomery County Circuit Court certified two classes in this case. C.315-16. On October 17, 2019, the State filed this appeal challenging the trial court’s class certification. C.324. The appeal was thus timely filed as it was within the 42 days allowed to file an appeal from an order certifying a class. Ala. Code §6-5-642.

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STATEMENT OF THE CASE

Alabama Code §15-12-21 governs compensation of counsel appointed to represent indigent criminal defendants in state court. That statute has long included a cap of the total fee an attorney can receive from the State for most types of criminal cases. Before 2011, the statute also included a provision allowing the State to provide payment above the fee cap if the attorney could demonstrate good cause for the fee. In 2011, the Legislature increased the hourly rate and the fee cap for appointed attorneys, but removed the provision that had allowed the State to pay more than the fee cap. Appointed attorneys seeking fees in excess of the cap by regulation can petition the Board of Adjustment for additional fees.

Five years later, Plaintiffs sued, seeking a declaration that §15-12-21 either (1) still allows for payments above the fee cap, or (2) is unconstitutional if it does not allow for those payments. Plaintiffs also seek prospective injunctive relief requiring the defendants – the State Director of Finance and the Director of the Alabama Office of Indigent Services – to pay attorneys any fee amount that a judge certifies they had “good cause” to incur. Finally, Plaintiffs

seek retrospective monetary relief for any attorney who was not previously paid an above-cap fee that a judge certified he had "good cause" to incur.

Plaintiffs filed a motion for class certification, asking the trial court to certify three separate classes. C.90-207. The State responded by filing a motion to dismiss Plaintiffs' claims that sought damages on sovereign immunity grounds, C.213-217, and by opposing class certification because sovereign immunity removed the trial court's subject matter jurisdiction over any of the claims raised by the class seeking retrospective monetary relief, C.225-231. The trial court denied the State's motion to dismiss, C.279, and granted-in-part and denied-in-part Plaintiffs' motion for class certification, C.315-16. Relevant here, the trial court held that the State was not entitled to sovereign immunity and certified the retrospective-relief class. C.296, 315-16. The State appeals that certification.

STATEMENT OF THE ISSUES

1. In 2011 the Alabama Legislature enacted §15-12-21, which modified the compensation scheme for appointed criminal defense attorneys. Section 15-12-21 increased the statutory maximums that could be paid and removed the previous law's good-cause exception to those fee caps. Section 15-12-21 also created the Office of Indigent Defense Services (OIDS) to review fee-submissions and granted OIDS discretion to determine the appropriate payment amount for each submission. Since the law changed, OIDS has applied the law as written and not allowed a good-cause exception to the fee caps. Does sovereign immunity bar claims for, and thus certification of a class seeking, retroactive monetary relief against the State for its reasonable implementation of the plain meaning of a statute?

2. If the Legislature removed the good-cause exception to the fee cap in 2011, and a court later deemed that change unconstitutional, could a court order the State to make back payments of attorney's fees even though the State had no authority to make such payments, or would sovereign immunity bar retrospective monetary relief?

3. Plaintiffs argue that §15-12-21 is unconstitutional because, among other things, it violates an indigent defendant's right to a fair trial and effective assistance of counsel. Do Plaintiffs have third-party standing to bring claims asserting that hypothetical future clients' rights may be violated, especially when those hypothetical future clients would have sufficient avenues to vindicate their own rights?

STATEMENT OF THE FACTS

A. The Statutory Change

On June 14, 2011, the Alabama Legislature significantly reformed Alabama's indigent-defense-service system. One reform updated the payment scheme for court-appointed attorneys. The previous payment scheme had compensated appointed indigent defense attorneys at \$60 an hour for in-court proceedings and \$40 an hour for out-of-court proceedings and had set different fee-caps for different classes of felony charged, though there was no fee cap for offenses with potential penalties of life-without-parole or death. Act of June 10, 1999, No. 427, § 1, 1999 Ala. Laws 759, 766-68 (codified as amended at Ala. Code §15-12-21 (2011)). Also, under the previous law, a court could approve

amounts over the fee caps for good cause shown. *Id.* The 2011 Act updated the hourly rate to \$70 per-hour regardless of where the work was done. Ala. Code §15-12-21(d). It also increased all of the statutory maximum payments, retaining the no-cap policy for life-without-parole-eligible and death-eligible offenses. *Id.* The new law also removed a court's ability to approve an amount over the increased fee-caps, for good cause or otherwise. *Id.*

Additionally, the 2011 Act created the Office of Indigent Defense Services (OIDS), which is responsible for administering all the indigent defense systems in Alabama. *Id.* at §41-4-321 to 323; Ala. Admin. Code r. 355-9-1-.01. OIDS sets the standards for "fiscal responsibility and accountability in indigent defense preparation." Ala. Code §41-4-322(c). It prescribes experience, training, and qualification requirements, manages caseloads, sets performance standards, provides and compensates experts, and establishes procedures for "recoupment of fees, expenses, and salaries." *Id.* Importantly, the 2011 Act vested OIDS with the power to "allocate and disburse funds appropriated for legal representation" and gave OIDS the discretion to "for any reason determine[]" that a bill submitted for indigent

defense services does not comply." *Id.* at §41-4-323(c)(3)-(4). Under the 2011 Act, the trial court still has to certify that the appointed attorney provided defense to an indigent defendant and that to the best of the trial court's knowledge the bill is reasonable. *Id.* at §15-12-21 (e). But OIDS is not bound by that determination. OIDS subsequently reviews, potentially investigates, and ultimately approves the submitted bill. *Id.* And the Act places the ultimate decision about the appropriate payment amount within the discretion of OIDS. *Id.*

From the inception of the 2011 Act, OIDS interpreted the text strictly and thus denied claims for any amount over the statutory fee-cap. OIDS's second-in-command, Ellen Eggers, explained, "We would pay the claim for the statutory limit." C.133. Chris Roberts, the director of OIDS, denied requests to reconsider because "Section 15-12-21 contains no statutory authority for [OIDS] to exceed the fee caps." C.47. And when he was asked: OIDS is not "trying to be mean about it, [OIDS is] just saying the statute says what it says, and we don't have the authority to pay above the limit; is that correct?" C.175, he replied, "Yes. [15-12-21] doesn't have an exception for it." *Id.*

The Act, however, does allow attorneys to receive payment above the fee-caps if warranted. If there is any dispute over the compensation approved by OIDS, the attorney can file a claim for the disputed amount with the State Board of Adjustment. Ala. Admin. Code r. 355-9-1-.05. And the Board of Adjustment has approved fee petitions for amounts over the fee caps. C.17. From January 1, 2018, to June 29, 2018, (the day of Director Roberts's affidavit) the Board of Adjustment approved payment on half of the claims submitted to it. *Id.* All of those approved claims were for amounts above the fee caps. *Id.* And within 30 days of the Board of Adjustment's directive, OIDS pays any fee petitions in excess of the caps. *Id.*

B. The Current Case

That version of the Act passed in 2011. Then nearly five years after the 2011 Act had been passed, the fee-cap exception had been removed, OIDS had been established, and it had been interpreting the text to preclude payment on any fee submissions over the statutory caps, Plaintiffs William J. Parks III and C. Claire Porter, with (at least) constructive knowledge of the fee-caps and the process by which they would be paid, accepted an appointment to represent an indigent

defendant who had been charged with murder, a Class A felony. Ultimately the indigent defendant pleaded guilty to manslaughter. C.284. Both Plaintiffs were paid \$4,000 on interim bills, which was the maximum allowed by the statute. *Id.* They then each submitted an additional bill, one for \$17,731 and the other for \$6,398. C.18, 21. The trial court certified both of those fee-submissions as reasonable to the best of the court's knowledge. C.19, 22. However, the trial court clarified in its certification that "this certification is not an approval of the amount submitted by the attorney." *Id.* OIDS denied both additional fee-submissions because both attorneys had already been paid the statutory maximum, C.62-63, though Plaintiff Parks's could have also been reduced because it sought compensation for time he had previously submitted and for which he had already been paid, C.36. Neither Plaintiff submitted a claim to the Board of Adjustment. R.16.

Plaintiffs instead filed this action seeking declaratory, injunctive, and monetary relief, arguing that the Legislature's omission of the good-cause exception was a drafting error, or if it was intentional, that the statute is unconstitutional. C.8-13.

Plaintiffs then sought certification of three classes, two of which were certified. One of those certified classes, not challenged here, sought only prospective relief. C.290. The other certified class, however, consisted of attorneys seeking only retrospective relief, specifically, attorneys who, after the law changed in 2011, submitted fee-declarations requesting payment over the statutory fee-cap and who OIDS denied payment over that mandatory fee-cap. C.289. Plaintiffs seek that relief even though they agree that the "law does not give [OIDS] a ministerial duty to do what [Plaintiffs] [a]re asking ... because there's nothing in the new statute that gives the court good cause," R.49-50, and they recognize that both "OIDS procedure and the statute sa[y] [attorneys] cannot get a fee exceeding the cap," C.143. The State opposed certification of that class because sovereign immunity bars relief in the form of retrospective payments and thus the trial court has no jurisdiction over any of the claims represented in the retrospective-relief class. This appeal arises from the certification of the retrospective-relief class.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews de novo arguments challenging the subject-matter jurisdiction of the trial court, like the State's sovereign-immunity and standing arguments. *Barnhart v. Ingalls*, 275 So.3d 1112, 1121 (Ala. 2018). Such arguments may be raised at any time, *Poiroux v. Rich*, 150 So.3d 1027, 1038 (Ala. 2014), and must be addressed before considering whether the elements for class certification under Rule 23 have been met, *Barnhart*, 275 So.3d at 1121; see also *Wyeth, Inc. v. Blue Cross & Blue Shield of Ala.*, 42 So.3d 1216, 1219 n.5 (Ala. 2010) ("Because standing does implicate subject-matter jurisdiction, we address it before considering whether [the appellees] ha[ve] demonstrated the elements necessary for class certification under Rule 23."). Subject-matter jurisdiction issues can be raised at any point during the litigation, whether or not they have been presented to the court below. *Id.* at 1121; *Horn v. Dunn Bros., Inc.*, 79 So. 2d 11, 15 (Ala. 1955) ("Our Court has consistently held that it will take notice of the question of jurisdiction at any time.").

SUMMARY OF THE ARGUMENT

This Court must consider all arguments relating to sovereign immunity before turning to other questions. Two bars to the trial court's subject matter jurisdiction arise here: sovereign immunity and (for at least one of Plaintiffs' claims) standing. If the State is immune from suit, or if Plaintiffs lack standing, this Court has no jurisdiction, and the only action it can take is to dismiss the infirm claims. See *Ala. State Univ. v. Danley*, 212 So. 3d 112, 127-28 (Ala. 2016).

Article I, §14 of the Alabama Constitution states that "the State of Alabama shall never be made a defendant in any court of law or equity." And the "wall of immunity erected by §14 is nearly impregnable." *Ala. State Univ. v. Danley*, 212 So. 3d 112, 127 (Ala. 2016). That wall, however, can be breached. For instance, if a court grants prospective relief ordering the State to comply with a specific, predetermined legal duty such that fulfilling that duty would be only a ministerial act, sovereign immunity does not bar retrospective payment. See *Barnhart v. Ingalls*, 275 So. 3d 1112, 1125 (Ala. 2018); *Ex parte Bessemer Bd. of Educ.*, 68 So. 3d 782, 790-91 (Ala. 2011). A legal duty can be

predetermined either by clear, undisputed statutory language or by a previous judicial opinion interpreting the statute. However, if a court interprets a legitimately disputed statute for the first time, retrospective payments are barred by sovereign immunity. See *Woodfin v. Bender*, 238 So. 3d 24, 32-33 (Ala. 2017); *Williams v. Hank's Ambulance Serv., Inc.*, 699 So. 2d 1230, 1237-38 (Ala. 1997).

Plaintiffs make two mutually exclusive arguments: either (1) OIDS misinterpreted §15-12-21 because the Legislature unintentionally removed the good-cause exception to the fee caps; or (2) the Legislature intentionally removed the fee-cap exception and by doing so rendered §15-12-21 unconstitutional. Under either theory, sovereign immunity bars Plaintiffs' claims for damages against the State.

On the statutory argument, even if Plaintiffs prevail on the ground that OIDS should have interpreted §15-12-21 as if it contained the good-cause provision that the Legislature removed,¹ sovereign immunity bars retrospective relief for three reasons. One, even with a good cause exception, OIDS had no "legal ... duty to pay Plaintiffs' fees in the amounts

¹ A discussion of the merits is premature at this stage — however, the State does not agree that the statute should be interpreted to mean what it does not say.

certified as reasonable by the trial court," as Plaintiffs claim. C.11. Although §15-12-21 does require trial courts to certify that the bill is reasonable, they are explicitly not approving the amount of the bill or the items in it. §15-12-21(e); see also C.19, 22. And, even if they were, nowhere in §15-12-21 does it require OIDS to accept the trial court's certification as binding on the amount it should pay.

In fact, §15-12-21 grants vast discretion to OIDS to determine the appropriate payment amount, which proves the second reason sovereign immunity bars retrospective relief: There is also no "ministerial duty to pay Plaintiffs' fees in the amounts certified as reasonable by the trial court." C.11.

Third, even assuming a trial court were to hold that Plaintiffs' interpretation is the correct one, OIDS was at the very least reasonable to interpret §15-12-21 to mean what it says and to implement it as written. Because OIDS's interpretation was reasonable and its implementation was in good faith, sovereign immunity bars the relief that Plaintiffs' retrospective-relief class seeks. See *Woodfin*, 238 So. 3d at 33 (plurality op.); *Williams*, 699 So. 2d at 1237-38. Therefore, the lower court's certification of that

class should be reversed, and those claims should be dismissed.

For Plaintiffs to prevail on their constitutional argument, they must admit that §15-12-21 does *not* contain a ministerial duty to pay any specific amount, and certainly not a ministerial duty to pay amounts above the fee caps. And Plaintiffs make that admission. R.49-50 ("THE COURT: And that law does not give [OIDS] a ministerial duty to do what you're asking. [Plaintiffs:] Absolutely. ... THE COURT: - because there's nothing in the new statute that gives the court good cause. [Plaintiffs:] Right.").

But in admitting that the statute the Legislature intended to (and did) pass does not contain the ministerial duty Plaintiffs are asking the trial court to compel, Plaintiffs establish why sovereign immunity applies. Section 15-12-21 does not contain the ministerial duty. And a finding of unconstitutionality would not retroactively write a previously non-existent duty into the statute. Indeed, a finding of unconstitutionality would not create anything. It would simply proclaim that part of the existing statute is no longer enforceable. And if there was no ministerial duty to compel before the statute was found unconstitutional, there

is no duty to retrospectively compel after it is found unconstitutional, and sovereign immunity precludes retrospective relief. See, e.g., *Patterson v. Gladwin Corp.*, 835 So. 2d 137, 154 (Ala. 2002) (finding the State's tax scheme unconstitutional and then holding that "the Taxpayers' class action seeking a refund of franchise taxes paid pursuant to Alabama's invalid statutory scheme is an action against the State as that concept is expressed in §14. ... Because the circuit court was without jurisdiction to entertain this action, we vacate the trial court's class-certification order and dismiss the action.").

Therefore, even if Plaintiffs won on both of their arguments (which is impossible), retrospective relief would be unavailable. The trial court thus lacks jurisdiction over the retrospective relief claims. This Court should dismiss those claims and reverse the trial court's certification of the retrospective-relief class.

The trial court also lacks jurisdiction over some of Plaintiffs' claims for prospective relief because Plaintiffs lack third-party standing to bring claims asserting that hypothetical future indigent defendants' constitutional rights will be violated. See *Kowalski v. Tesmer*, 543 U.S.

125, 134 (2004). This Court should thus also dismiss claims that are based on the theory that §15-12-21 violates an indigent defendant's right to a fair trial or right to effective assistance of counsel.

ARGUMENT

This Court must consider all arguments addressing subject-matter jurisdiction before turning to any other questions. Such issues should be addressed at the earliest possible point in the litigation. See *Barnhart*, 275 So. 3d at 1121 n.6 (“[C]laims of immunity should generally be addressed at the earliest possible stage of litigation.”). If the State is immune from suit as to a specific claim, or if Plaintiffs lack standing to bring a certain claim, this Court has no jurisdiction to hear that claim, and the only action it can take is to dismiss the claim. See *Ala. State Univ. v. Danley*, 212 So. 3d 112, 127-28 (Ala. 2016).

Here, State sovereign immunity as codified in §14 of the Alabama Constitution bars Plaintiffs' claims seeking retrospective monetary relief. No court has jurisdiction over those claims, and they should thus be dismissed.

Likewise, Plaintiffs lack third-party standing to challenge §15-12-21 as a violation of an indigent defendant's

right to a fair trial or right to effective counsel. Claims of unconstitutionality resting on that reasoning are therefore also beyond the jurisdictional reach of the trial court and should be dismissed.

I. Sovereign immunity bars Plaintiffs' claims for retrospective monetary payments; thus, the retrospective-relief class should not be certified.

Article I, §14 of the Alabama Constitution states that "the State of Alabama shall never be made a defendant in any court of law or equity." Thus, "[u]nder Ala. Const. §14, the State of Alabama has absolute immunity from lawsuits. This absolute immunity extends to arms or agencies of the state." *Ex parte Tuscaloosa Cty.*, 796 So. 2d 1100, 1103 (Ala. 2000). State officers or agencies therefore cannot be sued in their official capacities if a plaintiff-victory would "directly affect the financial status of the State treasury[,] ... or [a] property right of the State." *Ala. Agric. & Mech. Univ. v. Jones*, 895 So. 2d 867, 872-73 (Ala. 2004). That "wall of immunity erected by §14 is nearly impregnable." *Ala. State Univ. v. Danley*, 212 So. 3d 112, 127 (Ala. 2016). And "Section 14 immunity is more than a defense; when applicable, it divests the trial courts of this State of subject-matter jurisdiction." *Id.* Without subject-matter jurisdiction over

a claim, a trial court's only option is to dismiss that claim; any other action would be void. *Harris v. Owens*, 105 So. 3d 430, 435 (Ala. 2012).

The sovereign-immunity wall, however, can be breached. For instance, the State is generally not immune from a suit seeking prospective relief in the form of an injunction or a declaratory judgment. See *Ex parte Bessemer Bd. of Educ.*, 68 So. 3d 782, 989-90 (Ala. 2011). Similarly, §14 does not bar actions brought to compel State officials to perform legal duties or ministerial tasks, even if that compulsion touches the State treasury. *Bessemer Bd.*, 68 So. 3d at 789-90. Retrospective relief, however, only avoids sovereign immunity if a plaintiff seeks to compel a specific, already determined (by clear statutory language or a judicial decision) legal duty such that fulfillment of that predetermined legal duty is a ministerial act. See *Woodfin*, 238 So. 3d at 32 (plurality op.); *Bessemer Bd.*, 68 So. 3d at 790-91.²

² Sovereign immunity also does not apply if there are claims for money damages made against State officials sued in their individual capacities for acting "in a mistaken interpretation of law." *Ex parte Hampton*, 189 So. 3d 14, 17-18 (Ala. 2015); see also *Danley*, 212 So. 2d at 127 ("[Plaintiffs can seek] monetary damages only against State officials in their *individual* capacities." (emphasis in original)). Here, however, the officials are sued only in their official capacities. The retrospective monetary relief

In this case, Plaintiffs bring both prospective and retrospective relief claims and seek to certify a prospective-relief class and a retrospective-relief class. As to Plaintiffs' claims seeking only prospective relief, the State agrees that sovereign immunity does not bar those claims.

However, a favorable outcome for Plaintiffs on their retrospective relief claims would "require the state to pay millions of dollars to qualified members of the plaintiff class in the form of [payment] for services[;] ... [t]herefore, applying well-established principles of state sovereign immunity [establishes] that the judgment would 'directly [affect] a ... property right of the State.'" *Williams v. Hank's Ambulance Serv., Inc.*, 699 So. 2d 1230, 1232 (Ala. 1997). Thus, to proceed to the merits, the retrospective-relief class's claims must fit into one of the categories this Court has recognized as beyond §14's reach. They do not.

Plaintiffs' arguments revolve around the Legislature's 2011 removal of the "good cause" provision, which had allowed trial courts to approve a payment over the statutory limit

sought here is sought only as incidental to the injunctive and declaratory relief.

that the State Comptroller would then have to approve. *Compare* Act of June 10, 1999, No. 427, § 1, 1999 Ala. Laws 759, 767-68 (codified as amended at Ala. Code §15-12-21 (e) (2011)), *with* Ala. Code §15-12-21 (e). Plaintiffs make two arguments, each of which has different implications for the sovereign-immunity analysis. First, they argue that though §15-12-21 no longer contains a good cause exception, the Legislature removed it by accident. Therefore, they continue, the "correct" interpretation of the statute would be to read it as if the Legislature had *not* removed a good cause exception. Second, Plaintiffs assert that if the removal of the good cause exception was intentional, then the statute is unconstitutional. But even if Plaintiffs prevail on either of these (tenuous) theories, sovereign immunity precludes them from obtaining damages from the State. The claims for retrospective relief, therefore, should be dismissed.

A. Even if OIDS misinterpreted §15-12-21 when it implemented the statute as written, sovereign immunity bars retrospective monetary relief.

First, as to the misinterpretation argument, even if the statute means what it does not say, sovereign immunity still applies because (1) the State officers had no legal duty to approve the amount certified by the trial-court judges, (2)

thus by exercising their statutorily authorized discretion and not approving those amounts, they did not fail to perform a ministerial act, and (3) even if Plaintiffs somehow prevail on the argument that the 2011 statute still contains the deleted good cause exception, OIDS officers were at least reasonable to interpret the statute to mean what it says and to implement it as it was written.

1. Defendants have no legal duty to pay any specific amount.

No one in OIDS has a legal duty to pay any attorney any specified amount, regardless of whether the fee-submission was certified by a judge and regardless of whether the fee-submission requests an amount greater than the statute's fee-cap. "[T]he 'legal-duty' exception applies only where a law, a regulation, or a validly enacted internal rule commands a specific course of conduct." *Ex parte Ret. Sys. of Ala.*, 182 So. 3d 527, 534 (Ala. 2015) (citation omitted). And neither §15-12-21 nor any other statute, regulation, or internal rule mandates that OIDS approve or pay the exact amount the trial judge certified. Plaintiffs' claim that "the Defendants have a legal ... duty to pay Plaintiffs' fees in the amounts certified as reasonable by the trial court" is thus wrong, and their case for retrospective payment fails.

Instead of "command[ing] a specific course of conduct," §15-12-21 grants discretion to OIDS to determine the appropriate compensation for the attorneys filing fee-submissions. Before attorneys can file fee-submissions, the trial court does have to certify that "counsel provided representation to the indigent defendant, that the matter has been concluded, and that to the best of his or her knowledge the bill is reasonable based on the defense provided." Ala. Code §15-12-21 (e). However, "[t]he trial court need not approve the items included on the bill or the amount of the bill." *Id.* Indeed, in this case, the trial court explicitly included in its certification that "this certification is not an approval of the amount submitted by the attorney." C.19, 22.

After receiving the fee-submission, OIDS reviews the bills, can request additional information from the trial court to help with its assessment, and can ask another State entity for review and comment before approving the bill for what OIDS believes to be the appropriate amount. Ala. Code §15-12-21 (e). OIDS may reduce the amount certified by the trial court for myriad reasons, such as to make payment for similar work consistent across the state or because of

duplicate entries. C.144.³ In fact, §15-12-21 only specifically binds OIDS in one respect: the fee-caps. Thus, if there is any ministerial duty imposed by the statute, it is one to *deny* a petition for more than the fee cap. Because the statute does not tether OIDS to the trial court's certification, there is no legal duty for OIDS to rubberstamp that certification and pay attorneys that amount.

2. Defendants did not fail to perform any ministerial act.

Because there is no legal duty to pay a specified amount, there is no ministerial duty for Plaintiffs to compel. Although a general legal duty can exist without an attaching ministerial obligation, there cannot be a compellable ministerial act without an underlying, specific legal duty. See *Woodfin*, 238 So. 3d at 32 (explaining that when there is a legal duty to pay a sum-certain amount, then payment of that amount is a ministerial act); *Bessemer Bd.*, 68 So. 3d at 790-91 (explaining that State officials had a legal duty to pay a salary and because determining the amount of salary

³ In this case, named-Plaintiff Parks's second fee-submission was rejected because he had already been paid the maximum amount allowed by statute. However, if additional payment were allowed, the amount of his second submission would have been reduced for duplicate entries. C.36.

owed involved no discretion, paying that salary was a ministerial act). Even assuming OIDS has some legal duty to pay appointed attorneys what it deems is an appropriate amount, payment of that amount is not a ministerial act because OIDS has statutorily allocated discretion to determine the appropriate payment amount.

OIDS did not fail to perform a ministerial act in denying fee-submissions because §15-12-21 does not mandate that OIDS pay any attorney a sum-certain amount or that OIDS accept any facts as designated. A "duty is ministerial, when the law, exacting its discharge, prescribes and defines the time, mode and occasion of its performance, with such certainty that nothing remains for judgment or discretion," and the "certain and specific duty aris[es] from fixed and designated facts." *Patterson v. Gladwin Corp.*, 835 So. 2d 137, 151 (Ala. 2002) (citation omitted). But OIDS has discretion to accept or reject the trial court's determination. Ala. Code §15-12-21. It has the statutory authority to assess the fee-submission that the trial court certified as reasonable. *Id.* at §15-12-21(e). It can ask for additional information from the trial court or investigate the submission on its own. *Id.* And it can ultimately exercise its discretion either to approve the

entire amount the trial court certified as reasonable or to adjust the fee down to reflect its judgment about a reasonable fee for the work done by the appointed attorney. *Id.*⁴

Because of that discretion, neither §15-12-21 nor any other statute, regulation, or internal rule requires OIDS to pay any attorney any sum-certain amount. Ms. Eggers, OIDS's accounting manager and second-in-command, C.128, explained that if the Court ordered backpay, OIDS would have to go back and re-review the claims at issue, and potentially reinvestigate those claims, before ultimately determining the appropriate amount to pay on those claims. C.144. Because the statutorily required payments are not sum-certain, there is no ministerial obligation which Plaintiffs can compel to avoid sovereign immunity.

Nor does the law require OIDS to accept the facts or conclusions in the trial court's certification. In fact, the

⁴ See also C.144 ("What we do is we go in and do an audit on a claim. ... We would go through and do a line by line for each timesheet entry. We would review. ... [The claim] could be [reduced for multiple reasons], it could be duplicate entries or over the standardize[d] billing or reasons like that."); C.145 (explaining that even the standardized billing amounts OIDS established were "[Mr. Douglas:] not mandatory binding number[s]" but were "guideline[s]" and that OIDS officers would "question" fee-submissions inconsistent with those guidelines but had the discretion to approve them).

trial court is not approving any particular item included in the fee-submission. §15-12-21 (e) ("The trial court need not approve the items included on the bill or the amount of the bill."). Many of the facts, therefore, that OIDS needs to assess the fee-submissions are not even included in the trial court's certification. It cannot thus be said that in assessing and approving fee-submissions, OIDS is only performing "a certain and specific duty arising from fixed and designated facts" or "that nothing remains for judgment or discretion." *Patterson*, 835 So. 2d at 151.

The statute's grant of discretion to OIDS – which would be granted with or without a "good-cause" provision – precludes a finding of any ministerial duty, much less a "ministerial duty to pay Plaintiffs' fees in the amounts certified as reasonable by the trial court." C.11. Because there is no legal or ministerial duty to compel, sovereign immunity bars retrospective-payment relief, and the court does not have jurisdiction over any of the retrospective-relief class's claims. The certification of that class should thus be reversed, and those claims should be dismissed.

3. Legitimate dispute over what the statute requires precludes recovery of retrospective payments as incidental to an injunction or declaratory judgment.

Moreover, even continuing the fiction that Plaintiffs win on the argument that the statute means what it does not say and should be interpreted to contain a good cause provision that the Legislature deleted,⁵ sovereign immunity bars retrospective relief for a third reason: OIDS's interpretation of §15-12-21 to mean what it says and implementation of it as written was at the very least reasonable and all parties agree it was in good faith.

Much of this Court's jurisprudence about whether a statute contains a compellable legal or ministerial duty, such that retrospective relief would not be barred by sovereign immunity, turns on whether there is an alternative, reasonable interpretation to the one the plaintiff advocates which has been implemented in good faith or whether the statutory language is so clear and specific as to only allow

⁵ Though it should be noted that Plaintiffs argue that they are not asking the court to interpret the statute as if it had a good cause exception. See R.51 ("[Y]ou're trying to get me to put a good cause clause in the statute. [A:] No, Your Honor.").

the plaintiff's proposed interpretation. In the former case, sovereign immunity bars retrospective relief; in the latter, retrospective relief is allowed. This case is one of the former.

The Court in *Williams v. Hank's Ambulance Service, Inc.*, 699 So. 2d 1230, 1237 (Ala. 1997), explained that "[t]he common thread running through" its §14 cases regarding damages "is the unfairness that would have occurred from allowing the State to arbitrarily avoid its financial obligations." And whether a denial of payment is "unfair" turns on whether there was good reason for denying it. Thus, "[t]here was, and is, no legitimate reason to allow State department heads to avoid their clear contractual or ministerial obligations (once those obligations are determined), even if the performance of those obligations ultimately touches the State treasury." *Id.* By the same token, both §14 and the separation of powers dictate that "there was, and is, no legitimate reason (or constitutional authority) for this Court to interfere in the legislative appropriation process, as long as that process passes constitutional muster." *Id.* Thus, if a statutory question is close, and "[t]here [i]s no apparent bad faith or other

improper motivation underlying" the state official's interpretation and implementation of the statute, "requiring disbursement from the State treasury" is not "constitutionally allowable under § 14." *Id.* at 1238.

Accordingly, in cases where statutory language requiring payment is so clear and specific that there could be no legitimate dispute as to its meaning or the amount to be paid, the Court has held that suits for retrospective payments are not barred by sovereign immunity. This Court recently explained that "*Ex parte Bessemer Board* stands for the proposition that a claim for backpay will be allowed where it is undisputed that sum-certain statutorily required payments should have been made." *Barnhart*, 272 So. 3d at 1123. The Court also emphasized "that in *Ex parte Bessemer Board* there was no dispute that the plaintiff should have been paid the funds she claimed were owed her." *Id.* at 1124. In other words, "[t]he issue in *Ex parte Bessemer Board* was not whether [the plaintiff] was entitled to a salary increase; rather the issue was simply whether the salary increase had been calculated correctly. Thus, [the plaintiff's] action ... was an action to compel the performance of a ministerial act" because "her action essentially was nothing more than a plea to the trial

court to order the board to perform correct mathematical computations." *Ala. State Univ. v. Danley*, 212 So. 3d 112, 126 (Ala. 2016). *Barnhart* followed that reasoning, allowing retrospective payment because the plaintiffs' interpretation of the benefit statutes under which they should have been paid was undisputed and the amount the plaintiffs should have been paid under those statutes was exact and certain. *Id.* at 1116-17.

On the other hand, when there is a reasonable alternative interpretation to the one proffered by the plaintiff and the State has interpreted and implemented the statute in good faith, retrospective payments are barred by sovereign immunity. Like in *Williams*, the Court in *Woodfin v. Bender*, 238 So. 3d 24 (Ala. 2017), recently explained that the question in a case involving a disputed statutory interpretation is "whether the defendants acted arbitrarily in interpretati[on] and implement[ation]" because "[i]f they did not act arbitrarily, they are entitled to §14 immunity." *Woodfin*, 238 So. 3d at 32 (plurality op.). The important question is thus "whether the language in the [statute] unambiguously create[s] a legal duty for the defendants to" perform an act that requires the State to pay a sum-certain

amount such that "the payment of the claimed backpay and benefits would be a ministerial act the defendants had no discretion to avoid." *Id.* Explaining the difference between cases involving disputed statutes and those involving undisputed statutes, *Woodfin* emphasized that cases such as *Bessemer Board* "contemplate a lack of discretion by State officials when there is *no dispute* that a particular payment is required." *Id.* (emphasis in original). However, when there is a "legitimate dispute" as to what the statute or policy requires, the *Woodfin* plurality explained that the reasoning in *Bessemer Board* does not apply, and "defendants [are] entitled to §14 immunity" as long as their interpretation of the statute was reasonable and in good faith. *Id.* at 33. As Justice Shaw put it in his concurrence, "when a plaintiff seeks payment of money from the State, the 'limited circumstances' in which [sovereign immunity does not bar payment] depends on whether the amount sought is 'certain' and the State's obligation to pay is 'undisputed.'" *Woodfin*, 238 So. 3d at 34 (Shaw, J., concurring in the result).

Here, there is a reasonable alternative interpretation to the one that Plaintiffs propose – indeed the alternative interpretation is the only reasonable interpretation. Thus the meaning of the payment-authorizing statute is legitimately disputed and the amounts sought are not certain. When a State official reasonably interprets a legitimately disputed statute and then implements that statute in good faith, sovereign immunity bars claims for retrospective payments under that statute, even if the official's interpretation is later judicially determined to be incorrect.⁶ Both parties in this case agree that OIDS interpreted and implemented the statute in good faith.⁷ And why OIDS's interpretation is a reasonable one (in fact the only reasonable one) needs little explanation. Plaintiffs

⁶ See *Woodfin v. Bender*, 238 So. 3d 24, 32-33 (Ala. 2017) (plurality op.) (“[Because] there is a legitimate dispute ... [and] [t]he defendants' interpretation and implementation ... was not arbitrary, ... the defendants were entitled to \$14 immunity, and the trial court was divested of subject-matter jurisdiction over the case.”); *Williams*, 699 So. 2d at 1237-38.

⁷ See C.175 (“[Mr. Douglas:] OIDS—you’re not trying to be mean about it, you’re just saying that the statute says what it says, and we don’t have any authority to pay above the limit; is that correct? [Mr. Roberts:] Yes. [§ 15-12-21] doesn’t have exception for it.”); R.62 (“Mr. Douglas: ... Nobody’s saying that the people over at OIDS did anything bad. We’re just saying, if their law had been what it should be, they would have paid the additional.”)

claim that §15-12-21 means that appointed attorneys should be paid above the fee-caps "for good cause," even though they concede that the Legislature removed the good-cause exception in 2011. C.7; Appellees' Motion to Dismiss Appeal at 7. Plaintiffs concede that as written §15-12-21 does not contain a good cause exception, R.50 (THE COURT: -- because there's nothing in the new statute that gives the court good cause. [Plaintiffs:] Right."), or require that OIDS perform the ministerial act that Plaintiffs would like OIDS to perform, R.49 (conceding that the "law does not give [OIDS] a ministerial duty to do what [Plaintiffs] [a]re asking."). On the other hand, Defendants argue that the statute means what it says: Appointed attorneys cannot be paid above the fee-cap, full stop. Interpreting a statute as barring payment over a certain amount without exception when its text sets fee-caps that bar payment over a certain amount and provides no exception is at the very least reasonable. And that is enough. The court need not determine which interpretation is correct. A holding of legitimate dispute and reasonable, good-faith implementation is enough to take the possibility of retrospective payments off the table. See *Woodfin*, 238 So. 3d at 32-33 (holding that the defendants' reasonable

interpretation and implementation entitled them to \$14 immunity without weighing in on the correct interpretation).

However, even if the State's interpretation is incorrect and its implementation is deemed unconstitutional, because of OIDS's reasonable, good-faith interpretation and implementation, retrospective monetary relief is still barred by sovereign immunity. The Court applied that principle in *Williams v. Hank's Ambulance Service, Inc.*, 699 So. 2d 1230 (Ala. 1997), when State officials interpreted a statute to allow a certain method of reimbursing health-care providers under Medicare and Medicaid. *Id.* at 1237. That interpretation was later found to be mistaken, and the reimbursement scheme deemed unconstitutional. *Id.* But when the health-care providers sought the payments they had been denied under the State officials' prior interpretation, this Court explained that it "appreciate[d], and regret[ed], the fact that the plaintiff class, as a whole, was denied full payment for certain services ... based on what has now been judicially determined ... to be a mistaken interpretation of the [statute]." *Id.* The Court nonetheless held that because the State's interpretation and implementation of the statute was reasonable and "[t]here was no apparent bad faith or other

improper motivation underlying [that] implementation," this situation could not be "pigeonhole[d]" into the "clear ... ministerial-duty categor[y]," which would exempt it from the sovereign-immunity bar. *Id.* at 1237-38.

This Court clarified that the State cannot avoid clear ministerial obligations "once those obligations are determined."⁸ *Id.* at 1237. However, if those obligations have not yet been judicially determined and are not clear from the statutory language, reasonable, good-faith implementation brings any claim for retrospective monetary relief within the realm of sovereign immunity. *Id.* at 1237-38. Therefore, this Court concluded that "although [the State action] has now been judicially determined to have been inconsistent with federal law, we are not persuaded that the pecuniary remedy sought by the plaintiff class (requiring disbursement from the State treasury), is constitutionally allowable under §14." *Id.* at 1238. Therefore, *Williams* makes clear that in the present case, even if OIDS's interpretation of the statute is later judicially found to be mistaken, its reasonable, good-faith interpretation and implementation justifies

⁸ Before they are determined, they are not ministerial obligations.

applying sovereign immunity to Plaintiffs' claims for retrospective relief.

To be sure, there is some tension between *Williams's* refusal to relax §14's protections because a State official had acted based on a reasonable interpretation of a "torturous" statute, 699 So. 2d at 1237, and *Barnhart's* statement that an official's "confusion ... regarding the interpretation of the benefit statutes, however reasonable, ... cannot serve as the basis for avoiding a statutory requirement" or avoiding a suit for retrospective relief, 275 So.3d at 1125. But even the plaintiffs in *Barnhart* argued that they could obtain money because they were entitled to it "by the *clear* terms of the benefits statutes." *Id.* at 1122 (emphasis added). Thus, perhaps the best way to harmonize *Barnhart* and *Williams* is by reading *Barnhart* to clarify that in cases where the statutory language is clear and the amount owed sum-certain, sovereign immunity will not bar retrospective relief. And the Court's unanimous *Williams* decision continues to stand for the principle that when dealing with a legitimately disputed statute, a reasonable interpretation and good-faith implementation protects the State from claims for retrospective relief.

In any event, there are no "clear terms" in §15-12-21 that would entitle Plaintiffs to the money they seek. *Barnhart*, 275 So. 3d at 1122. If Plaintiffs somehow succeed in rewriting the statute to create a new monetary obligation for the State, §14 would not allow a court to further "interfere in the legislative appropriation process" by applying that new provision retroactively. *Williams*, 699 So. 2d. at 1237. Thus, sovereign immunity would bar retrospective relief, the trial court's certification of the retrospective-relief class should be reversed, and the retrospective-relief claims should be dismissed.

B. Finding §15-12-21 unconstitutional would not provide any avenue to escape sovereign immunity as to Plaintiffs' retrospective-relief claims.

The argument that a finding of unconstitutionality would allow retrospective payments is more easily dismissed. Plaintiffs admit that, as written, §15-12-21 does not contain a ministerial obligation for OIDS to do what Plaintiffs would like them to do. R.49 (conceding that the "law does not give [OIDS] a ministerial duty to do what [Plaintiffs] [a]re asking."). And a finding of unconstitutionality does not create a previously non-existent, now-retroactively applicable ministerial obligation. Nor has any case of this

Court that the State could find allowed such reasoning. Instead, if the fee-caps were found unconstitutional without the good cause exception, the fee-caps would no longer be enforceable, and OIDS would have more discretion in approving fee-submissions. The unconstitutionality argument leaves no escape valve for retrospective relief. All claims the retrospective-relief class raises should thus be dismissed, and the lower court's class certification of the retrospective-relief class should be reversed.

Under Plaintiffs' unconstitutionality argument, *Barnhart*, *Bessemer Board*, and *Woodfin* (the interpretation cases) provide no guidance as to whether sovereign immunity applies because those cases involve how sovereign immunity applies when interpreting a statute all parties agree is valid, not how sovereign immunity applies after a statute or its implementation have been found unconstitutional.

That distinction matters. In the interpretation cases, the plaintiffs are arguing that they should have been paid according to the statute in place when they performed their services for the State. In the unconstitutionality argument, Plaintiffs argue that the statute in place when they performed their services was unconstitutional. They then argue not that

the State should pay under the enacted statute (as argued in the interpretation cases) but that they would have been paid more if the statute had not been changed, C.295; Appellees' Motion to Dismiss Appeal at 7 ("[T]he Plaintiffs here seek recovery of compensation which they say should have been paid all along *but for* Act 2011-678's omission of the 'good cause' exception.") (emphasis added), and that they should have been paid based on what they believe the statute should have said, i.e., what they would have liked it to say, R.15 ("[THE COURT:] [OIDS] did what the legislature told them to do. [PLAINTIFFS:] Well, there are—Sure, they did. And if the law is what it ought to be, they will pay everybody as they should have been paid.").

But in arguing unconstitutionality Plaintiffs prove the State's point: The clear statutory text does not mandate a sum-certain payment above the caps; indeed, it mandates no payment above the fee-caps. And Plaintiffs agree that "the statute said you cannot get a fee exceeding the cap." C.143. Plaintiffs thus ask this Court not to compel a State officer to obey a statutory requirement that was in place when Plaintiffs performed their work but to compel a State officer

to disobey one. Such cases do not fall outside of sovereign immunity realm. Therefore §14 bars retrospective relief.

Moreover, Plaintiffs' own argument highlights its logical invalidity. Their argument goes, if (A) §15-12-21 does not have a provision allowing payment above the fee caps, then (B) §15-12-21 is unconstitutional. C.9. And if (B) §15-12-21 is unconstitutional, then (C) the State has a legal and ministerial duty to pay the amounts above the fee caps. C.11. They then assert that (A) §15-12-21 does not have a provision allowing payment above the fee caps. And from that fact conclude first that (B) §15-12-21 is unconstitutional, and second that (C) the State has a legal and ministerial duty to pay the amounts above the fee caps.

But if their premises were sound, then it must follow that "If (A) §15-12-21 does not have a provision allowing payment above the fee caps, then (C) the State has a legal and ministerial duty to pay the amounts above the fee caps." But that conclusion is nonsensical. Therefore, either premise (B) or (C) must be flawed. And while the State contends that they are both flawed, premise (C) assuredly is: A finding of unconstitutionality would not create a new duty. And there is no caselaw from this Court holding that finding a statute

unconstitutional can cause a previously non-existent, but now-retroactively applicable legal or ministerial duty to materialize.

On the contrary, this Court has recognized that finding a statute or implementation unconstitutional does not create a legal or ministerial duty that would allow for retrospective relief. In *Patterson v. Gladwin Corp.*, 835 So. 2d 137 (Ala. 2002), this Court explained that even when a tax statute was later found unconstitutional, that finding did not create and impose a retroactive legal or ministerial duty on the State officials to have not applied the tax statute as it was written. 835 So. 2d at 151-52. A class action like the case at hand, this Court held, "the Taxpayers' class action seeking a refund of franchise taxes paid pursuant to Alabama's invalid statutory scheme is an action against the State as that concept is expressed in §14." *Id.* at 154. This Court continued that because the action did not fall into any of the categories not covered by §14, such as compelling State officials to perform a legal or ministerial duty, "the circuit court was without jurisdiction to entertain this action [and] we vacate the trial court's class-certification order and dismiss the action." *Id.*

Similarly, in *Poiroux v. Rich*, 150 So. 3d 1027 (Ala. 2014), unconstitutionality did not create legal or ministerial duties that would place the plaintiffs' claims outside of §14, and this Court thus held that their claims were "barred by the doctrine of sovereign immunity ... insofar as [they] sought monetary relief." 150 So. 3d 1037. And in *Williams* when the State had been unconstitutionally implementing a statute, this Court found that it could not "pigeonhole th[e] case into ... the clear ... ministerial duty categor[y]" and "although that plan has now been judicially determined to have been inconsistent with federal law, we are not persuaded that the pecuniary remedy sought by the plaintiff class (requiring disbursement from the State treasury), is constitutionally allowable under §14." 699 So. 2d at 1238. The idea that finding a law unconstitutional also writes into the law a legal or ministerial duty and that the retroactively conjured, never-enacted legal or ministerial duty can then be imagined to have existed from the time the statute was enacted and used to escape sovereign immunity has no place in law or logic.

C. Inability to sue the State for retrospective payment will not result in unfairness because there is another forum for Plaintiffs' claims.

As *Williams* explained, this Court "has tried to take a case-by-case commonsense approach to interpreting §14 and applying the State's sovereign immunity." 699 So. 2d at 1237. And the "common thread running through the [sovereign-immunity cases] is the unfairness that would have occurred from allowing the State to arbitrarily avoid its financial obligations." *Id.* But here the application was not arbitrary, as discussed above, and moreover, barring retrospective payment would not result in unfairness.

Under the current system, Plaintiffs can receive payment above the fee-caps imposed by §15-12-21. After OIDS denies payment that an attorney believes he should receive, that attorney can file a claim with the Board of Adjustment, which "has jurisdiction over claims against the state that are not justiciable in the courts because of the state's constitutional immunity from being made a defendant." *Ala. Agric. & Mech. Univ. v. Jones*, 895 So. 2d 867, 874 (Ala. 2004). The Board of Adjustment does not have any policy against granting attorneys' applications for payments above the fee-caps established in §15-12-21. C.37. Therefore,

contrary to Plaintiffs' assertion, C.8, appeal to the Board of Adjustment would not be futile. Indeed, the Board of Adjustment has granted half of the applications appealed to it between January 1, 2018, and June 29, 2018 (when Mr. Roberts gave his affidavit). C.37. And OIDS has paid amounts over the statutory caps on numerous occasions when ordered to by the Board of Adjustments. *Id.* Therefore, no unfairness flows from applying sovereign immunity to Plaintiffs' claims that seek retrospective payments.

II. Plaintiffs lack third-party standing to bring prospective or retrospective claims arguing that the statute violates indigent defendants' rights to a fair trial and effective counsel.

Similar to claims of sovereign immunity, claims relating to standing can be raised at any stage of the proceedings because they implicate a court's subject matter jurisdiction. See *Barnhart*, 275 So. 3d at 1121 (explaining that challenges to subject-matter jurisdiction may be raised at any time); *Wyeth, Inc. v. Blue Cross & Blue Shield of Ala.*, 42 So. 3d 1216, 1219 n.5 (Ala. 2010) ("Because standing does implicate subject-matter jurisdiction, we address it before considering whether [the appellee] has demonstrated the elements necessary for class certification under Rule 23, Ala. R. Civ.

P."). Here, Plaintiffs lack standing to raise several of their claims about constitutionality.

Plaintiffs lack third-party standing to argue that the Legislature's omission of the "good-cause" provision is unconstitutional because it violates an indigent defendant's right to a fair trial and because it violates an indigent defendant's right to effective assistance of counsel. C.10-11. Attorneys do not have third-party standing to assert the rights of hypothetical future clients. See *Kowalski v. Tesmer*, 543 U.S. 125, 134 (2004). Yet that is exactly what Plaintiffs here are trying to do. In claiming that the §15-12-21 fee-caps are unconstitutional because they violate the general indigent defendant's right to a fair trial and effective assistance of counsel, Plaintiffs argue that other people's rights are being violated. But to have standing to make such a claim, a party must make two additional showings. *Powell v. Ohio*, 499 U.S. 400, 411 (1991). They must show a "close relationship" to the party who possesses the right, and they must show that the possessor is "hinder[ed]" in his ability to protect that right. *Kowalski*, 543 U.S. at 130. Plaintiffs make neither showing here.

Plaintiffs do not have a "close relationship" to the future hypothetical clients whose rights they claim will be violated by the fee-caps; "indeed, they have no relationship at all." *Kowalski*, 543 U.S. at 131. And "it is uncontested that an indigent denied ... counsel has open avenues to argue that denial deprives him of his constitutional rights." *Id.* The indigent can appeal that denial through the state court system and then seek relief through both state and federal collateral review. *Id.* at 132. The same is true of an indigent's ability to protect his right to a fair trial. Because Plaintiffs do not have a close relationship with the hypothetical future indigent clients, and indigent defendants have sufficient ability to protect their rights to a fair trial and effective counsel, Plaintiffs lack third-party standing to bring those claims. Accordingly, Plaintiffs claims that §15-12-21 is unconstitutional because it violates an indigent defendant's right to a fair trial and right to effective assistance of counsel should be dismissed by this Court for lack of standing and thus lack of subject-matter jurisdiction.

CONCLUSION

This Court should reverse the lower court's certification of the retrospective-relief class and dismiss the claims seeking retrospective relief.

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CERTIFICATE OF SERVICE

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