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ORIGINAL

IN THE SUPREME COURT OF MISSISSIPPI

STATE OF MISSISSIPPI, et al.,

Defendants – Appellants,

v.

QUITMAN COUNTY, MISSISSIPPI,

Plaintiff – Appellee.

No. 2000-IA-01477

On Appeal from the Circuit Court of Quitman County, Mississippi

BRIEF OF *AMICI CURIAE* J.B. VAN SLYKE AND THE MISSISSIPPI PUBLIC DEFENDERS ASSOCIATION IN SUPPORT OF APPELLEE QUITMAN COUNTY

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INTRODUCTION

Mississippi's county-funded system of indigent defense fails to ensure that indigent defendants receive the effective assistance of counsel to which they are entitled under Article 3, Section 26 (1890) of the Mississippi Constitution. Defense counsel must be able to investigate the charges against their clients, secure necessary experts, meaningfully consult with their clients, and diligently prepare for trial. Inadequate resources and extreme caseloads of more than six hundred (600) felony cases per year, however, are preventing the part-time Forrest County public defender from being able to provide this effective assistance of counsel. Because of these systemic defects, the part-time Forrest County public defender is unable to meaningfully confer with his clients, conduct pre-trial investigations, secure the presence of witnesses, present and pursue motions, evaluate sentencing options, and prepare for trial. As a result, indigent defendants in Forrest County are receiving the assistance of counsel that is grossly deficient and of the type that seriously jeopardizes the adversarial nature of their legal proceedings.

A plaintiff may prospectively raise a claim of ineffective assistance wherever the right to counsel has been deprived through systemic error rather than the performance of individual counsel. Courts throughout the country have held that a plaintiff may bring such a claim when a state fails to provide adequate indigent defense resources. A contrary conclusion would be illogical. If the State were to provide only one lawyer to represent thousands of indigent defendants, this Court clearly would not require each indigent defendant to seek relief separately through an appeal or a post-conviction petition for writ of habeas corpus.

ARGUMENT

I. THE SYSTEM OF INDIGENT DEFENSE DESIGNED BY THE STATE AND IMPLEMENTED BY FORREST COUNTY SYSTEMICALLY FAILS TO PROVIDE THE EFFECTIVE ASSISTANCE OF COUNSEL

In non-capital cases, the State of Mississippi provides no funds for, and is otherwise involved with, the system of indigent defense. Instead, each county is responsible for establishing a system of indigent defense within its borders, and the State relies on the counties to provide indigent defendants with adequate representation. *See* Miss. Code Ann. § 25-32-1, *et seq.*

For its system of indigent defense, the Forrest County Board of Supervisors retained Mr. J. B. Van Slyke to serve part-time as the Forrest County public defender. Each year, hundreds of indigent persons rely on Mr. Van Slyke to represent them in felony criminal proceedings. Despite the important consequences of such proceedings, Mr. Van Slyke has an extreme caseload and inadequate resources and is ill-equipped to deliver the legal representation to which his clients are constitutionally entitled. Even the most diligent and knowledgeable public defender – one with an "S" painted on his chest – could not surmount these systemic deficiencies.

A. Mr. Van Slyke Lacks Indigent Defense Resources

To complete the tasks necessary to provide indigent defendants with constitutionally adequate representation, a public defender requires adequate office space, furniture, equipment, supplies and resources, including clerical support staff, and funding for experts and investigators. Mr. Van Slyke, however, does not have available such resources.

Mr. Van Slyke has limited equipment and does not have enough clerical personnel to timely prepare motions and other documents. Instead, Mr. Van Slyke has only a minimal expense allowance that is insufficient to support a full-time secretary.

Mr. Van Slyke does not have the resources to hire paralegals to assist with conducting legal research, marshaling facts, drafting pleadings, preparing for trial, or other essential functions. As a result, Mr. Van Slyke performed these tasks without the assistance of a paralegal.

Mr. Van Slyke does not have the resources necessary to utilize expert witnesses or hire investigators. As a result, Mr. Van Slyke does not have the assistance necessary to investigate charges and obtain witness statements. In addition, Mr. Van Slyke frequently is unable to engage expert witnesses or to procure necessary psychiatric evaluations and scientific tests.

B. Mr. Van Slyke Has an Excessive Caseload

A public defender cannot provide indigent defendants the effective assistance of counsel if burdened by an excessive caseload. In Forrest County, however, there are an insufficient number of attorneys to meet the constitutional mandate.

For several years, national legal organizations have adopted national standards recommending that full-time public defenders not be assigned more than 150 felonies per year, or 400 misdemeanors per year, or 200 juvenile cases per year, or 25 appeals per year. *See* American Bar Association, Criminal Justice in Crisis at 43 (Nov. 1988); National Legal Aid and Defender Association Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services, Guideline III-6 (comment) (1984); National Advisory Commission on Criminal Justice Standards and Goals: Courts,

Standard 13/12, "Workload of Public Defenders" at 276 (1973). Overburdened public defenders are advised to refuse cases or take steps to reduce excessive caseloads.

In contravention of these national standards, in Forrest County only one part-time public defender – Mr. Van Slyke – represents all indigent felony defendants. Consequently, during calendar year 2000, Mr. Van Slyke handled more than six hundred (600) felony dispositions. Mr. Van Slyke's part-time public defender caseload was more than four times greater than the recommended maximum level for a full-time public defender. This caseload so overwhelmed Mr. Van Slyke that he did not have the time to practice law in a manner consistent with constitutional mandates.

C. The Forrest County System of Inadequate Resources and Extreme Caseloads Undermines the Adequacy of the Adversarial Process and Results in the Systemic Denial of the Effective Assistance of Counsel

An overwhelming caseload, a lack of resources, and an inability to refuse to accept new clients under Mississippi law prevents Mr. Van Slyke from meaningfully and adequately undertaking the tasks necessary to provide the effective assistance of counsel. Mr. Van Slyke lacks the time and resources necessary to meaningfully confer with his clients, conduct pretrial investigations, secure the presence of witnesses, present and pursue motions, evaluate sentencing options, and prepare for trial. Mr. Van Slyke ultimately is required to sacrifice the demands of one client for another, so that Mr. Van Slyke often is constructively absent from representation.

Because of systemic defects, Mr. Van Slyke does not meet and confer with his clients in a meaningful manner prior to, and in between, each critical stage of their criminal proceedings. He typically meets his clients for a few minutes on the day of the preliminary hearing, and often does not talk to them again until the next court hearing.

Mr. Van Slyke lacks investigators and frequently is unable to conduct pre-trial investigations. Because of his excessive caseload, Mr. Van Slyke rarely initiates an investigation until the eve of trial, and he frequently lacks the time to meet with or subpoena witnesses, visit the scene of the crime, or examine evidence. In addition, Mr. Van Slyke lacks the funds to employ necessary and appropriate expert witnesses.

Mr. Van Slyke also frequently lacks the time and resources to research relevant legal issues, present pre-trial motions, or conduct appropriate discovery. An excessive caseload forces Mr. Van Slyke to ration his time, which inevitably compromises his ability to prepare thoroughly for each case. Overwhelmed by an excessive caseload and a lack of support, Mr. Van Slyke often is unable to seek bond reductions, explore pre-trial alternatives to incarceration, prepare for trial, and prosecute appeals and motions for post-conviction relief. Some clients remain incarcerated for protracted periods prior to the disposition of their cases; others waived their right to a speedy trial.

Mr. Van Slyke's inability to meaningfully confer with his clients, conduct pre-trial investigations, utilize expert witnesses, and file motions has far-reaching consequences. Mr. Van Slyke does not obtain important information, including the names of valuable witnesses, possible alibis, defenses or mitigating circumstances, and the availability of relevant evidence. Without such information, he cannot advocate effectively against detention or the imposition of bail, participate effectively in plea negotiations, or prepare for trial. In addition, he jeopardizes his clients' ability to make informed decisions, including the advisability of pleading guilty or proceeding to trial.

As a result of these systemic deficiencies, a significant number of indigent defendants are likely to be receiving assistance of counsel that is grossly deficient and of

the type that seriously jeopardizes the adversarial nature of their legal proceedings. Some indigent criminal defendants who have meritorious defenses are persuaded to plead guilty, while others receive harsher sentences than the facts of their case may warrant. The likelihood that any one Forrest County indigent defendant will be deprived of constitutionally adequate representation is real and immediate.

D. Mississippi's System of Indigent Defense is Constitutionally Inadequate

Mississippi public defender caseloads are unacceptably high, and the amount of money Mississippi spends per case on public defender services is unacceptably low. Experts such as Mr. Robert Spangenberg, President of The Spangenberg Group, a nationally recognized private firm that has conducted studies of indigent defense systems in several states, concluded that even the most well-intended Mississippi attorney could not provide the effective assistance of counsel if burdened by such an excessive caseload and lack of resources. *See* The Spangenberg Group, Indigent Defense in Mississippi, Prepared for the Mississippi Bar Association Criminal Justice Task Force (January 1995) (updated in 1997 and 1998). Mr. Spangenberg determined that funding for indigent defense in Mississippi "is totally inadequate," that Mississippi is one of only a few states that does not provide state funds for indigent defense, and that Mississippi had one of the lowest rate of expenditures on indigent defense. *Id.* at 51. Moreover, Mississippi public defenders have "unacceptable caseload levels." *Id.* at 59. Mr. Spangenberg concluded that the lack of adequate resources for indigent defense services in Mississippi results in poor quality services and representation. *Id.* at 51.

II. INFRINGEMENTS UPON THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL MAY BE CHALLENGED PROSPECTIVELY

The Attorney General argues that a systemic claim for ineffective assistance simply may not be raised in a civil proceeding, by anyone. *See* AG Brief at 33 (right to counsel is an individual right that must be "challenged in proper criminal proceedings" on appeal). The Supreme Court of Mississippi never has considered whether systemic conditions that pervade and undermine the trial process can deprive indigent defendants of their right to counsel.[1] The Attorney General asks this Court to conclude, however, that if Mississippi retained only one lawyer to represent thousands of indigent defendants, each indigent defendant's sole recourse would be through a direct appeal or a post-conviction petition for writ of habeas corpus. This position is illogical and refuted by established case law.

A. Plaintiffs May Prospectively Raise Systemic Sixth Amendment Claims

This Court has ordered prospective relief to ensure that the State's system of indigent defense does not deprive indigent defendants the effective assistance of counsel. *See Jackson v. State*, 732 So. 2d 187 (Miss. 1999) (holding that indigent defendants on death row are "entitled to appointed and compensated counsel" in state post-conviction proceedings). In *Jackson*, this Court concluded that the indigent defense system "is

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[1] The Attorney General throws this Court a red herring when he suggests that this issue was resolved in *Wilson v. State*, 574 So.2d 1338 (Miss. 1990). *See* AG Brief at 34-35. The Court in *Wilson* concluded that it could appoint attorneys to indigent defense cases so long as the Court refunded counsel their actual expenses. *Id.* at 1341. In *Wilson* the Court presumed that such an attorney would possess the necessary time and resources to devote to the indigent defendant's case. Proceeding under this presumption about the indigent defense system, the Court resolved to determine the attorney ineffective assistance claim on a case by case basis. The Court did not address the type of claim presented here: a system ineffectiveness claim raised prospectively.

flawed," and noted that it could "no longer sit idly by" while the State refused to establish a system that provides the effective assistance of counsel. *Id.* at 188, 191. The Court established a per se rule without requiring individual defendants to demonstrate prejudice.

Except for cases involving attorney ineffectiveness, every right to counsel case decided by the United States Supreme Court since *Gideon v. Wainwright*, 372 U.S. 335 (1963), also has rejected a case-by-case analysis in favor of a per se rule. In these cases, the Court acknowledged that when the government is responsible for the defect, prejudice need not be shown; the Court analyzed the state's conduct without examining the performance of individual counsel. According to the Court, where the quality of the accused's representation is compromised by incompetency, bias, or conflict of interest, he is entitled to relief remedying these conditions.

The Court applied a per se rule rather than a case-by-case analysis, for example, in *Powell v. Alabama*, 287 U.S. 45 (1932) and *Gideon*, where the defect was the state's actual denial of counsel. In *United States v. Wade*, 388 U.S. 218 (1967), automatic reversal was appropriate because the state denied counsel at a critical stage of the proceedings. In *Herring v. New York*, 422 U.S. 853 (1975) and *Geders v. United States*, 425 U.S. 80 (1976), the Court applied a prophylactic rule because the state's intrusion into the attorney-client relationship impeded counsel's ability to subject the state's case to adversarial testing. *See Herring*, 422 U.S. at 858 (trial judge's refusal to hear closing arguments); *Geders*, 425 U.S. at 85 (trial judge's refusal to allow defense counsel to meet with his client during an overnight recess). Similarly, in *Holloway v. Arkansas*, 435 U.S. 475, 484 (1978), the Supreme Court held that the trial court abused its discretion by failing to investigate defense counsel's pre-trial claim that a conflict of interest prevented

him from providing effective assistance of counsel. In each case the condition which undermined the adequacy of the process operated apart from the performance of individual counsel. The Court emphasized the legitimacy of the trial process and viewed the reliability of the result not as an end in itself but as a desirable consequence of vigorous advocacy. *See, e.g., Gideon*, 372 U.S. at 335; *Holloway*, 435 U.S. at 488.

When the right to counsel has been deprived through systemic error, relief is prophylactic in the form of a per se rule mandating the removal of the condition threatening to undermine the adequacy of the adversarial process. Since the system has broken down, there can be no presumption of legitimacy in the outcome and there can be no requirement that a defendant demonstrate prejudice in the result. *See Perry v. Leek*, 488 U.S. 272, 280 (1989) (system cases are not "subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective"); *Satterwhite v. Texas*, 486 U.S. 249, 257 (1988) (automatic reversal is appropriate when "the deprivation of the right to counsel affected-and contaminated-the entire criminal proceeding").

This rule should apply to cases involving the state's failure to provide adequate indigent defense resources. Such failures are rooted not in the lack of diligence or competence of the individual attorney, but in systemic conditions that pervade and undermine the trial process. Since ineffective assistance more often results from an attorney's errors of omission, the record is likely to conceal the information defense counsel should have discovered. The court can have no confidence in any given outcome, and post-conviction review does not guarantee that indigent defendants will receive adequate assistance.

B. Courts Around the Country Have Recognized Prospective Claims of Ineffective Assistance of Counsel

Courts around the country have concluded that plaintiffs may raise prospective (pre-trial) claims of ineffective assistance attributable to systemic resource deprivation. These courts permitted plaintiffs to use statistical evidence to establish that the public defenders' ability to provide effective assistance has been severely jeopardized. The plaintiffs were not required to prove the likelihood of harm on a "case by case" basis.

In *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), for example, the Eleventh Circuit found that a class of indigent defendants awaiting trial stated a claim by alleging that systemic deficiencies prevented counsel from providing constitutionally adequate representation. They claimed that high caseloads and a lack of experts prevented attorneys from interviewing, investigating, researching, engaging in motion practice, providing advice and preparing properly for trial. The court concluded that the requirement in an attorney ineffectiveness case that the plaintiff demonstrate prejudice is "inappropriate for a civil suit seeking prospective relief." *Id.* at 1016-17.

In *Wallace v. Kern*, a class of incarcerated indigent felony defendants brought a pre-trial systemic challenge to the delivery of legal services. 392 F.Supp. 834 (E.D.N.Y.), *rev'd on abstention grounds*, 482 F.2d 621 (2d Cir. 1973). The court found a pattern of failing to adequately prepare, investigate and confer with clients, primarily because of excessive caseloads. *Id.* In concluding that grounds existed to issue a class-wide injunction limiting attorney caseloads, the Court stated:

> None of the reasons which support the imposition of strict standards in post-conviction cases is applicable in th[is] posture... The hesitancy to indulge in second-guessing previously made decisions is not an obstacle. What is at issue is not how to investigate, what plea to accept. which

> witness to call, what defenses to put forward, how to examine and cross-examine, but whether the Legal Aid attorneys are so overburdened that they cannot even make the necessary decisions.

Id. at 845-846. The critical inquiry in *Wallace* was not the performance of Legal Aid attorneys in individual cases, but the excessive caseloads and lack of support routinely preventing attorneys from performing the tasks needed to prepare an adequate defense. *Id.* at 863-847. The Court found that the plaintiffs established a likelihood of harm based on the caseload size and lack of resources of the public defender system, and the public defenders' inability to adhere to the ABA Standards on Criminal Justice. *See id.* at 847.

The Arizona Supreme Court found that systemic deficiencies in the Mohave County public defender system created a presumption that indigent defendants were not receiving effective assistance of counsel. *State v. Smith*, 681 P.2d 1374, 1381 (Ariz. 1984). In *Smith*, public defenders were not reimbursed for costs of investigators, paralegals or secretaries, caseloads were excessive, and cases were assigned without regard to an attorney's competency or the complexity of the case. *Id.* at 1378, 1380. The Court noted that "[t]he insidiousness of overburdening defense counsel is that it can result in concealing from the courts, and particularly the appellate courts, the nature and extent of damage that is done to defendants by their attorneys' excessive caseloads." *Id.* at 1381. An attorney working under such conditions, the court concluded, could not "adequately represent all his clients properly and be reasonably effective." *Id.*

Similarly, in *State v. Peart*, the Supreme Court of Louisiana held that the operation of the New Orleans public defender system created a presumption of ineffective assistance. 621 So.2d 780 (La. 1993). Peart's public defender filed a pre-trial motion claiming that his caseload prevented him from providing effective assistance. *Id.* at 784.

The trial court found that while Peart was receiving effective assistance, excessive caseloads and insufficient support prevented his attorney and other public defenders from providing all clients with such assistance. *Id.* at 785 n.4, 790. The Supreme Court affirmed, concluding that counsel for many indigent defendants are "so overburdened as to be effectively unqualified." *Id.* at 789. The Court found that the integrity of the adversarial process required the Court to consider these claims pre-trial:

> If the trial court has sufficient information before trial, the judge can most efficiently inquire into any inadequacy and attempt to remedy it. Thus, treating ineffective assistance claims before trial where possible will further the interests of judicial economy. [citation omitted] It will also protect defendants' constitutional rights, and preserve the integrity of the trial process.

Id. at 787.

C. The Attorney General's Position is Illogical: Prospective, Prophylactic Relief is Necessary to Remedy Mississippi's Systemically Deficient Indigent Defense System

A prospective claim of ineffective assistance alleges that counsel is unable to subject the state's case to meaningful adversarial testing. Because such a claim calls into question the integrity of the adversarial process itself, it may be raised prospectively. When the defects undermine the adequacy or integrity of the adversarial process, the harm stems from the state's action (or inaction) and not the performance of individual counsel. Therefore, the relief must be systemic and prophylactic.

As courts around the country have recognized, an ongoing, system-wide threat to the proceedings of thousands of indigent defendants cannot be addressed or corrected within the framework of individual post-trial petitions. The suggestion that an indigent defendant must wait until after he has been harmed and then request the court to eliminate

the cause of the harm years after the defendant is confined to a prison cell cannot reasonably be said to be adequate. A plaintiff is not required to wait until his constitutional rights are violated before seeking relief, and an indigent person does not have to wait until he is wrongly convicted to claim ineffective assistance of counsel. *See, e.g., Holloway*, 435 U.S. at 488-90.

Moreover, the remedy in a system ineffectiveness claim is fundamentally different than an attorney ineffectiveness claim. In the Quitman County Board's challenge to the State's indigent defense system, for example, if the court ultimately finds that the State's system undermines the adversarial process and deprives indigent defendants of their right to effective assistance, the Court would identify, and require the State to correct, the systemic deficiencies. Like in *Gideon*, *Herring*, and the other system ineffectiveness cases, the Court would award relief in the form of a per se rule, without regard to the facts in a particular case and without any analysis of prejudice. Most importantly, the Court would not be required to rule on the merits of, or enjoin, any pending proceeding. Instead, relief would include a requirement that the State provide public defenders with adequate investigative, expert and support services.

This remedy is consistent with the Court's proper role. The judiciary is responsible for ensuring that indigent persons receive effective assistance of counsel. *See, e.g., Powell*, 287 U.S. at 71, 73. Other courts have held that when systemic deficiencies deprive indigent persons of effective assistance, and thereby adversely affect the court's ability to satisfy its constitutional mandates, the court has the inherent authority, and in fact, the duty, "to fashion a remedy which will promote the orderly and expeditious administration of justice." *State v. Peart*, 621 So.2d at 791.

This Court similarly has declared that it has the inherent authority to safeguard the court's operation if the Legislature should fail to do so. *See Wilson v. State*, 574 So.2d 1338 (Miss. 1990) (citing *Hosford v. State*, 525 So.2d 789 (Miss. 1988)).

> ... If [the Legislature] fails to fulfill a constitutional obligation to enable the judicial branch to operate independently and effectively, then it has violated its Constitutional mandate, and the judicial branch has the authority as well as the duty to see that the courts do not atrophy. No court created by the Constitution is required to accept conditions which prevent it operating independently and effectively. Such court also has the duty under our governmental system to protect its own integrity. It likewise has the inherent authority as part of a separate and co-equal branch to make such orders to insure that independence and integrity.

See Hosford, 525 So.2d at 797-98 (emphasis added).

Here the State is failing to fulfill a constitutional obligation. This Court must act to remedy the State's systemically deficient indigent defense system.[2]

CONCLUSION

The State of Mississippi's failure to provide the personnel and resources necessary to secure indigent defendants adequate legal representation violates the effective assistance of counsel required under Article 3, Section 26 (1890) of the Mississippi Constitution. As a result of the systemic deficiencies and the consequent ineffective

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[2] The Attorney General disputes Quitman County's standing to raise a systemic challenge to the State's system of indigent defense. See AG Brief at 28-36. Under Mississippi's liberal standing rules, however, both Quitman County and Mr. Van Slyke have standing to raise such a claim. In Mississippi, individuals have standing to sue "when they assert a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant, or as otherwise provided by law." *Fordice v. Bryan*, 651 So. 2d 998, 1003 (Miss. 1995). Here the State has obligated both Quitman County and Mr. Van Slyke to participate in an indigent defense system which fails to ensure that indigent defendants receive the effective assistance of counsel to which they are constitutionally entitled. Therefore both Quitman County and Mr. Van Slyke, on behalf of himself as the part-time public defender and on behalf of all indigent defendants in Forrest County, have a colorable interest in the subject of indigent defense and are adversely affected by the State's unconstitutional system.

representation provided to indigent defendants, Mississippi's courts are unable to operate independently and effectively, and have been reduced to a supplicant of the Mississippi legislature, in violation of the constitutional mandate for a separation of powers and the independence of the state judiciary guaranteed by Article 1, Section 1 (1890) of the Mississippi Constitution.

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CERTIFICATE OF SERVICE

This is to certify that I, Leo G. Rydzewski, have caused to be mailed on this eighteenth day of April, 2001 via first-class postage prepaid, a true and correct copy of the following Motion for Leave to File Brief of *Amici Curiae* J.B. Van Slyke and the Mississippi Public Defenders Association in Support of Appellee Quitman County and Brief of *Amici Curiae* J.B. Van Slyke and the Mississippi Public Defenders Association in Support of Appellee Quitman County to the following:

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