IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

HORACE LUCKEY, III, et al., Plaintiffs, v. JOE FRANK HARRIS, Governor, et al., Defendants.	Civil Action File No. C86-~~2586A~~ 297R

BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This lawsuit was originally filed in 1986, challenging the statewide deficiencies in indigent defense in Georgia. Since the filing of this lawsuit, an unprecedented wave of arrests and prosecutions has strained that system entirely beyond limit.

A prime example of the collapse of the nonsystem of indigent representation is Fulton County. Indigent defense for felony prosecutions in Fulton County is handled by a combination of salaried public defenders, and appointed private attorneys. Appointed counsel theoretically provide representation in cases which the defenders are precluded from handling by conflicts of interest or, on occasion, case overload. All county appropriations for the appointment of private attorneys during the year 1990 have been exhausted, however. In the meantime, expanding caseloads have pressed already strained public defender resources beyond the breaking point. A recent report of a national expert on defense services, "Overview of the Fulton County, Georgia

Indigent Defense System," prepared this month by the Spangenburg Group, concludes that the system is in "crisis."

The original Plaintiffs in this suit have now been joined by indigent accused from Fulton County, who show in the second amended complaint the inherent inability of the county's present system to cope. This preliminary injunction motion is filed to redress the inadequacies of Fulton County defense, pending final decision in this matter.

I. PLAINTIFFS SATISFY THE TEST FOR PRELIMINARY INJUNCTION.

Under the law of this Circuit, four factors must be balanced in deciding whether to grant a requested preliminary injunction: (1) whether the plaintiff will be irreparably harmed if the injunction does not issue, (2) whether that harm outweighs any the defendant will suffer if the injunction does issue, (3) whether the public interest will be disserved by the injunction, and (4) whether the plaintiff is likely to prevail on the merits. Canal Auth. v. Callaway, 489 F.2d 567 (5th Cir. 1974), cited with approval in University of Texas v. Camenisch, 451 U.S. 390 (1981); see also Johnson v. United States Department of Agric., 734 F.2d 774 (11th Cir. 1984).

Plaintiffs will demonstrate their satisfaction of each of these subtests.

II. PLAINTIFFS WILL SUFFER IRREPARABLE INJURY.

Indigent defense efforts in Fulton County are in a state of "near collapse." Spangenburg Group report at 41. This is demonstrated graphically by the "Motion to Limit Appointments" and supporting affidavit filed on October 2, 1990, by Ms. Lynne Y.

Borsuk, a Fulton County defender, on behalf of her existing felony-prosecution clients. Her affidavit established the following:

(a) Ms. Borsuk handled indigent defense in felonies in Judge Joel J. Fryer's division of Fulton County Superior Court.

(b) Ms. Borsuk's open caseload as of the date of the motion was 116 felony cases.

(c) For the nine months January-September 1990, Ms. Borsuk had closed another 476 felony cases.

(d) On a single day, September 19, 1990, Borsuk received appointment to represent 45 new clients charged with felonies.

(e) Borsuk sought to limit new appointments to six a week.[1]

All of this must be compared to the national standard of 150 new cases annually as the maximum for those handling felony charges, a limit established by the National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Standard 13.12 (1973). Ms. Borsuk's open caseload as of the date of her motion was nearly that large. With three months left to go in the year, she already had closed three times as many cases as the national standard would allot to her for the entire year. The 45 cases assigned to her in one week were nearly one-third of the annual maximum. If she accepted appointment to only six new cases per week, as the motion suggested, she would nevertheless undertake some three hundred new cases per year, or twice as many

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[1] Upon her office's offer of assistance from a defender from another division, Judge Fryer denied the motion. Borsuk has since been demoted from her Superior Court defender's position to an entry-level slot in the Fulton County Juvenile Court.

as the national standard would allow.[2] Her experience is not atypical for Fulton County defenders, as the Spangenburg report chronicles.

The perils of such incredible pressures are dramatized by visualizing the interview room on September 19, 1990, the day counsel was assigned 45 new cases. Assuming that the court and counsel worked a full eight-hour day, this schedule permits ten minutes for counsel to consult with and about each client. During this average ten minutes, counsel must (1) confer in a separate room with the prosecutor, to learn not only the charges, but also an outline of the State's evidence in support of those charges; (2) return to consult with the client, including informing the client generally of the nature of the process confronting him, discussing the information shared by the prosecutor, reviewing the client's side of the story, discussing development of any possible evidence, discussing the client's options, and coming to a decision on whether to plead guilty or not guilty; and (3) finally, returning to discuss with the prosecutor any plea bargain. In particular, it is obvious that this schedule permits no time at all for any investigation of the facts beyond consultation with the client.

Mere description of the scene leads to two companion conclusions. First, the physical and emotional demands of getting through such a schedule are inhuman. Second, the schedule permits no meaningful consultation.

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[2] Arraignment calendars are held each week in Borsuk's division.

But the 10-minute average theoretically available to devote to each case is not the only restraint upon effective representation. The layout of the consultation area is an important inhibition upon effective representation. Only one conference room was available to Borsuk for consultation. Because of the sheer number of accused to be transported and guarded, all of her clients were chained together and herded into the same small room, where they sat surrounding a central table.

This bizarre interview setting left counsel with a Hobson's choice. She could consult each client in this physical arrangement, trying as much as possible to reduce conversations to a whisper for the sake of preserving some modicum of confidentiality. Or she could demand release of the accused one by one for consultation elsewhere. But this second "solution" posed new problems of its own. Unlocking cuffs and moving individuals would eat still further into the already precious and limited time available. And the only other space available was nearly equally in the public domain, a standing area next to a public water cooler in an open hallway, between Borsuk's conference room and that of the prosecutor.

Counsel's meaningful response was still further inhibited by resource limitations other than her own. She and other defenders traditionally have no information to go on at arraignment other than what they are told by their clients that day. Although counsel are provided for many probable cause hearings, in Atlanta Municipal Court, essentially no information is forwarded from that stage to the defender who will handle pleas or even trial.

A handful of defenders are stationed in the county jail, but even if one of those defenders interviews an accused there, he or she will not appear in the courtroom; fur- thermore, files from those interviews or any followup are almost never forwarded to the courtroom defender. All of these coordi- nation problems too are discussed in the Spangenburg Group's report.

Even in cases where leads are available, the Fulton defender's task is almost impossible. The staff of over 20 lawyers is supported by not a single paralegal. The office has two investigators. Defenders spend their own valuable time on such unskilled but indispensable tasks as serving subpoenas on potential witnesses.

The Borsuk petition has created some helpful publicity around the Fulton County crisis, and has even prompted a few concrete results. The county commission has voted money to hire four new defenders. That number will help ease the most extreme pressure, but will not bring caseloads down to anything like a number appropriate for meaningful review and litigation.

With that sole exception, the county has shown no inclination to correct the deep-seated structural and resource problems facing the system. The county's last-minute attempt is insufficient to deal with even the short-term crisis, let alone those long-term problems.

In short, Plaintiffs will suffer irreparable harm absent this Court's preliminary injunction. Plaintiffs ask that this Court convene a hearing on Fulton County indigent defense, and after hearing order defendants to do the following:

(a) provide that defendants are brought before a judicial officer within 48 or 72 hours of their arrest;

(b) provide for the appointment of competent, effective counsel at each critical stage of the criminal prosecution, including at preliminary hearings, bond hearings, arraignment, and trial;

(c) provide that every defendant is represented by competent, effective counsel throughout the criminal proceedings;

(d) limit the number of cases to which an individual attorney is appointed to a number that the attorney can handle effectively and competently, but in no event to a number exceeding recognized minimum national standards;

(e) provide for a sufficient number of public defenders in Fulton County so that each defendant will have the effective assistance of counsel at each stage of the criminal prosecution;

(f) provide that court appointed attorneys are adequately compensated and that fees are based upon the time expended on the case rather than a flat fee regardless of the method by which the case is disposed of;

(g) provide attorneys representing indigent defendants with adequate support services, including investigators, secretaries and experts;

(h) refuse to accept pleas from defendants unless those defendants have received the effective assistance of

counsel and unless the pleas are knowingly and intelligently made;

(i) insure that arraignments and trials are not delayed and defendants incarcerated due to the absence of sufficient numbers of effective and competent public defenders or court appointed counsel.

(j) require the court to provide an interview setting consistent with confidential consultation with counsel.

III. PLAINTIFFS' INJURY WILL OUTWEIGH THAT OF DEFENDANTS.

Defendants will not suffer anywhere near the kind of injury from the entry of the requested injunction that Plaintiffs would suffer in its absence. The relief requested is nothing more nor less than the Constitution requires. Even though the county cannot undo the improvements this Court's order will require, nor obtain any refunds for its advances, those remote contingencies pale in significance compared to the constitutionally inadequate representation afforded Plaintiffs. The balance of harms clearly tips in Plaintiffs' favor.

IV. INJUNCTION WOULD NOT DISSERVE THE PUBLIC INTEREST.

The United States Supreme Court has declared the public interest in this matter:

> The substance of the Constitution's guarantee of the effective assistance of counsel is illuminated by reference to its underlying purpose. "[T]ruth," Lord Eldon said, "is best discovered by powerful statements on both sides of the question." This dictum describes the unique strength of our system of criminal justice. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be

convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975).

United States v. Cronic, 466 U.S. 648, 655 (1984). The right to counsel is therefore designed to guarantee a fair trial. Id. at 656. "[I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." Id. at 656-57. The facts of the Fulton County "system" show that its adversarial character is lost because of the severe handicaps imposed upon the defense, which frustrate minimally adequate representation. The public interest lies in requiring the county to do its constitutional duty.

V. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS.

The Eleventh Circuit has already passed upon the sufficiency of Plaintiffs' claims. "Without passing on the merits of these allegations, we conclude that they are sufficient to state a claim upon which relief could be granted." Luckey v. Harris, 860 F.2d 1012, 1018 (11th Cir. 1988), cert. denied, ___ U.S. ___ (1990). The facts recited in these motion papers are nothing short of compelling in support of Plaintiffs' complaints of systematic inadequacy of counsel.

In particular, this Circuit has condemned "assembly-line justice," involving no investigation and no interviewing of witnesses. Walker v. Caldwell, 476 F.2d 213, 221-24 (5th Cir. 1973). Although the Court stopped short of adopting a per se rule of ineffective counsel in cases where counsel spent a brief time with the accused, the Court held that inadequate time devoted to the case in addition to other crucial factors would demonstrate ineffective assistance. Here, the lack of any other prior

information about the case, and the inhibiting physical conditions of interview which all but preclude confidential and meaningful exchange between attorney and client, are precisely such additional factors. See also Smith v. Greek, 226 Ga. 312, 317, 175 S.E.2d 1 (1970); Tucker v. State, 136 Ga.App. 456, 457 , ___ S.E.2d ___ (1975).

In a recent decision, the Supreme Court of Arizona found that the result of an entire county system of defense was to overwork its lawyers to the point that they necessarily provided constitutionally inadequate defense. Arizona v. Smith, 140 Az. 355, ___ P.2d ___ (1984) (en banc).

Plaintiffs are likely to succeed on the merits.

CONCLUSION

The indigent defense efforts of Fulton County, Georgia are in crisis, with no solution in sight. Plaintiffs have met all of the requirements for the issuance of this Court's preliminary injunction. Plaintiffs request that this Court convene an appropriate evidentiary hearing, and enter its Order as requested herein.

This 30th day of October, 1990.

Respectfully submitted,

Neil Bradley (by MEJ w express permission)
Neil Bradley
Georgia Bar No. 107125

American Civil Liberties
Union Foundation, Inc.
Suite 202
44 Forsyth Street, N.W.
Atlanta, Georgia 30303
404/523-2721

[Signatures continued on next page.]

Robert B. Remar
Georgia State Bar No. 600575

Megan E. Gideon
Georgia State Bar No. 293227

Susan Garrett (by MEG with express permission)
Georgia State Bar No. 286546

David A. Webster (by MEG with express permission)
Georgia Bar No. 744975

Remar & Graettinger, P.C.
Suite 333
The Carnegie Building
133 Carnegie Way, N.W.
Atlanta, Georgia 30303
404/688-4000

Sumner & Hewes
50 Hurt Plaza, Suite 700
Atlanta, Georgia 30303
(404) 588-9000

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

This is to certify that I have this day served copies of the within and foregoing BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION on counsel for Defendants by depositing copies of same in the United States mail, with adequate postage affixed thereon, and properly addressed as follows:

Alfred L. Evans, Jr.
Senior Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

This 30th day of October, 1990.

Robert B. Remar
Georgia State Bar No. 600575

Remar & Graettinger, P.C.
Suite 333
The Carnegie Building
133 Carnegie Way, N.W.
Atlanta, Georgia 30303
404/688-4000