IN THE SUPREME COURT OF THE STATE OF IDAHO

TRACY TUCKER, *et al.*

Plaintiffs-Appellants

v.

STATE OF IDAHO, *et al.*

Defendants-Respondents

ON APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA, Case No. CV-2015-10240

Honorable Samuel A. Hoagland, District Judge, Presiding

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS

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INTRODUCTION

More than 50 years ago, the United States Supreme Court held in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), that the Sixth Amendment guarantees the assistance of counsel for all those charged with a felony in state court. The Court later made clear that the guarantee of counsel's assistance extends to all criminal defendants faced with incarceration, including those charged with misdemeanors, see *Alabama* v. *Shelton*, 535 U.S. 654, 661-662 (2002), as well as to juveniles in delinquency proceedings, *In re Gault*, 387 U.S. 1, 34-42 (1967).[1] Under *Gideon* and its progeny, it is the State's responsibility to ensure that "any person haled into court, who is too poor to hire a lawyer," be provided counsel to assist in his defense. *Gideon*, 372 U.S. at 344.

This case asks how indigent criminal defendants may vindicate that Sixth Amendment right when systemic, structural deficiencies in a State's public defender system result in counsel being assigned in name only. In ruling plaintiffs' claims nonjusticiable, the district court effectively held that the sole recourse

[1] For simplicity, this brief uses "*Gideon*" as shorthand for the Court's recognition of the right to counsel in felony, misdemeanor, and juvenile contexts.

plaintiffs have to redress the systemic deficiencies in Idaho's public defense system is through piecemeal, post-conviction litigation of individual ineffective-assistance-of-counsel claims under *Strickland* v. *Washington*, 466 U.S. 668 (1984). That was error. Rather, as the Court of Appeals of New York correctly recognized in *Hurrell-Harring* v. *State*, 930 N.E.2d 217 (N.Y. 2010), indigent criminal defendants may challenge systemic *Gideon* violations through pre-conviction, civil constructive-denial-of-counsel claims seeking prospective injunctive relief.

The availability of pre-conviction civil actions for systemic denials of counsel, whether actual or constructive, is critical to protecting the fundamental right that *Gideon* recognized. In ruling that courts are powerless to hear such claims, the district court has deprived indigent defendants in Idaho of this essential tool, well-grounded in the law, for enforcing their constitutional right to counsel. This Court should correct that error.

INTEREST OF THE UNITED STATES

The United States has a strong interest in ensuring that all jurisdictions—federal, state, and local—fulfill their constitutional obligation to provide counsel to criminal defendants and juveniles facing incarceration who cannot afford an attorney, as required by *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), and *In re*

Gault, 387 U.S. 1 (1967). In March 2010, the Department of Justice (the Department) established the Office for Access to Justice (the Office) to address the crisis in indigent defense services. The Office coordinates the Department's efforts to improve indigent defense.[2] Attorney General Loretta Lynch has emphasized the importance of fulfilling *Gideon*'s promise, stating "that this Department of Justice and this entire administration will continue to * * * do everything in our power to further th[e] important mission" of "ensuring that in the United States there is indeed no price tag on justice."[3]

The Department of Justice enforces the right to counsel in juvenile delinquency proceedings under the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. 14141. For example, in December 2012, the Department entered into a comprehensive memorandum of agreement with Shelby County, Tennessee, that requires the county, among other things, to appoint counsel for

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[2] *Office for Access to Justice*, http://www.justice.gov/atj (last visited Apr. 26, 2016).

[3] *Attorney General Loretta E. Lynch Delivers Remarks at White House Convening on Incarceration and Poverty* (Dec. 3, 2015), http://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-remarks-white-house-convening-incarceration-and.

children in delinquency proceedings, and to establish a juvenile defender unit within the public defender's office.[4] And in July 2015, the Department found that the St. Louis County Family Court failed to provide adequate representation to children in delinquency hearings.[5]

In September 2015, the Department of Justice filed an *amicus* brief in the Supreme Court of Pennsylvania setting forth the United States' view that civil claims seeking prospective, systemic relief for constructive denial of counsel under the Sixth Amendment are cognizable. U.S. Br. as *Amicus Curiae* in Support of Appellants, *Kuren* v. *Luzerne Cnty.*, Nos. 57 MAP 2015, 58 MAP 2015 (Pa. Sept.

[4] See Press Release, Department of Justice, *Department of Justice Enters into Agreement to Reform the Juvenile Court of Memphis and Shelby County, Tennessee* (Dec. 18, 2012), available at http://www.justice.gov/opa/pr/department-justice-enters-agreement-reform-juvenile-court-memphis-and-shelby-county-tennessee.

[5] See Press Release, Department of Justice, *Justice Department Releases Findings of Constitutional Violations in Juvenile Delinquency Matters by St. Louis County Family Court* (July 31, 2015), available at https://www.justice.gov/opa/pr/justice-department-releases-findings-constitutional-violations-juvenile-delinquency-matters.

10, 2015).[6] The Department has also filed statements of interest (SOIs) at the trial court level in cases involving constructive-denial-of-counsel claims under the Sixth and Fourteenth Amendments. See U.S. SOI, *Hurrell-Harring* v. *State*, No. 8866-07 (N.Y. Sup. Ct. Sept. 25, 2014);[7] U.S. SOI, *Wilbur* v. *City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013) (No. 2:11-CV-1100);[8] see also U.S. SOI, *N.P.* v. *State*, No. 2014-CV-241025 (Ga. Super. Ct. Mar. 13, 2015) (addressing juveniles' right to counsel).[9] These SOIs have addressed the scope of the right to counsel, the appropriate remedy for systemic deprivations of that right, or both.

The Department of Justice also has sought to address the crisis in indigent defense services through a number of grant programs as well as support for state policy reform. For example, the Department has identified indigent defense as a

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[6] Available at http://www.justice.gov/opa/file/769806/download.

[7] http://www.justice.gov/sites/default/files/crt/legacy/2014/09/25/hurrell_soi_9-25-14.pdf

[8] http://www.justice.gov/sites/default/files/crt/legacy/2013/08/15/wilbursoi8-14-13.pdf

[9] http://www.justice.gov/sites/default/files/crt/legacy/2015/03/13/np_soi_3-13-15.pdf

priority area for Byrne Justice Assistance Grant funds, the leading source of Department of Justice funding to state and local jurisdictions.[10] In 2013, at a government-wide event hosted by the Department, the Department's Office of Justice Programs announced a collection of grants totaling $6.7 million to improve legal defense services for the poor.[11] These grants were preceded in 2012 by a $1.2 million grant program, *Answering Gideon's Call: Strengthening Indigent Defense through Implementing the ABA Ten Principles of a Public Defense Delivery System*, administered by the Bureau of Justice Assistance.[12] The

[10] See Government Accountability Office, GAO-12-569, *Indigent Defense: DOJ Could Increase Awareness of Eligible Funding and Better Determine the Extent to Which Funds Help Support this Purpose* 11-14 (May 2012), http://www.gao.gov/assets/600/590736.pdf.

[11] Press Release, Department of Justice, *Attorney General Holder Announces $6.7 Million to Improve Legal Defense Services for the Poor* (Oct. 30, 2013), http://www.justice.gov/opa/pr/2013/october/13-ag-1156.html; see also Office for Access to Justice, *50 Years Later: The Legacy of* Gideon v. Wainwright (last updated Oct. 2, 2014), https://www.justice.gov/opa/gallery/50-years-laterthe-legacy-ofgideon-v-wainwright.

[12] See Department of Justice, *Indigent Defense Grants, Training, and Technical Assistance* (last updated Mar. 21, 2016), https://www.justice.gov/atj/indigent-defense-grants-training-and-technical-assistance.

Department's efforts to address the crisis in indigent defense with grants and other initiatives are ongoing.[13]

ISSUE PRESENTED ON APPEAL

The United States will address the following question:

Whether indigent criminal defendants may bring a civil, pre-conviction claim for declaratory and injunctive relief based on constructive denial of counsel under the Sixth Amendment and *Gideon* v. *Wainwright*, 372 U.S. 335 (1963).[14]

STATEMENT OF THE CASE

This is a class action lawsuit alleging that systemic failings in Idaho's public defender system have resulted, and will continue to result, in the constructive denial of counsel for indigent criminal defendants in violation of the Sixth and Fourteenth Amendments. (R., pp. 26, 56-57). The named plaintiffs are four criminal defendants awaiting trial or sentencing who are unable to afford counsel

[13] See generally Office for Access to Justice, *Accomplishments* (last updated Apr. 6, 2016), http://www.justice.gov/atj/accomplishments.

[14] The United States takes no position on the merits of this particular case or on any issues of state law.

and who allege to have experienced numerous deficiencies in their appointed representation, including but not limited to:

- the wholesale absence of counsel at initial appearances, resulting in plaintiffs' inability to argue for reduced bail and, consequently, unnecessary or extended pretrial detention;[15]
- the inability to meet or communicate with their assigned lawyer to keep apprised of their case's progress and participate in the development of their defense;
- the lack of meaningful investigation into their cases;
- the failure to file substantive motions on their behalf; and
- the lack of funds to retain necessary experts to challenge the prosecution's allegations.

(R., pp. 8-12, 27-33). Plaintiff Tracy Tucker, for example, alleges that his appointed attorney did not attend his initial appearance, at which the court set a $40,000 bail; that during Tucker's three months in jail, he met with his attorney

[15] Unlike in the federal system, Idaho Criminal Rule 44(a) entitles indigent defendants to appointed counsel at their initial appearance.

only three times—two of which occurred during court appearances—for a total of 20 minutes; that while in custody he made more than 50 unsuccessful attempts to reach his attorney by telephone; and that, as of ten days before Tucker's trial date, his attorney had not conducted any meaningful investigation into his case nor discussed relevant discovery materials or trial strategy with Tucker. (R., pp. 8-9). The other named plaintiffs allege similar experiences. (R., pp. 9-12).

Plaintiffs allege that these circumstances "exemplify the experiences of thousands of indigent defendants across the State." (R., p. 12). They also allege that these deficiencies are the result of systemic, structural problems in the State's indigent defense system, including but not limited to:

- caseloads that far exceed national standards;
- insufficient funding;
- lack of meaningful oversight, training, performance standards, supervision, or evaluation by the State of county-provided public defense services;[16]

[16] By statute, Idaho has delegated responsibility for providing indigent criminal defense to its 44 counties. Idaho Code Ann. § 19-859 (2015).

- lack of independence from local boards of commissioners, which control public defender hiring and firing, funding, and resources for investigators and experts; and
- the continued use in many areas of "fixed-fee contracts," which create incentives for appointed attorneys to spend as little money and time as possible on indigent clients' cases, despite the fact that such contracts are prohibited by Idaho Code § 19-859(4).

(R., pp. 22-26, 42-52, 55).

Plaintiffs, on behalf of themselves and those similarly situated, sued the Governor of Idaho and the seven members of the Idaho Public Defense Commission (PDC),[17] all in their official capacities, seeking declaratory and

[17] The PDC is an executive agency established by statute in 2014. Idaho Code Ann. § 19-849 (2015). The PDC is responsible for promulgating rules for training, continuing legal education, and data-reporting requirements for public defenders. *Id.* § 19-850(1)(a). It is also required by statute to hold quarterly meetings and to make yearly recommendations to the Idaho legislature regarding legislation to improve the public defense system. *Id.* § 19-850(1)(b)-(c). Although the statute required the PDC to submit its first recommendations by January 20, 2015, plaintiffs allege that the PDC had failed to make any such recommendations by the time they filed their complaint in June 2015. (R., p. 24).

injunctive relief under 42 U.S.C. 1983 and state law.[18] (R., pp. 33-34, 56-58). Among other relief requested, plaintiffs asked the court to enter an injunction "requiring the State to propose, for th[e] Court's approval and monitoring," both a general "plan to develop and implement a statewide system of public defense that" complies with the Constitution and, more specifically, "uniform workload, performance, and training standards for attorneys representing indigent criminal defendants in the State of Idaho in order to ensure accountability and monitor effectiveness." (R., p. 58). Plaintiffs also asked the court to enforce the Idaho statute "barring the use of fixed-fee contracts in the delivery of indigent-defense services." (R., p. 58).

Defendants moved to dismiss the complaint. On January 20, 2016, the District Court of the Fourth Judicial District of the State of Idaho granted defendants' motion to dismiss. (R., pp. 468-501). The court rejected defendants' argument that the Governor and PDC members are not proper parties to the Section

[18] Although the complaint also named the State of Idaho as a defendant, the district court dismissed the federal claims against the State upon plaintiffs' concession that a State is not a "person" for purposes of 42 U.S.C. 1983. (R., p. 481).

1983 suit, holding that they "have a more than sufficiently close connection" to the "enforcement of public defense in Idaho." (R., p. 485). The court held, however, that plaintiffs' claims are not justiciable for three interrelated reasons: that plaintiffs lack standing, the case is not ripe, and the relief plaintiffs request would require the court to invade the province of the legislature.

First, misconstruing plaintiffs' complaint as alleging a "violation of their right to effective assistance of counsel" under *Strickland* v. *Washington*, 466 U.S. 668 (1984), the court concluded that plaintiffs lack standing to bring such a challenge because they have not yet been convicted or sentenced and thus can show no injury in fact that could be redressed by a court. (R., pp. 487-492). The court also concluded that the deficiencies that plaintiffs allege are not "causally connected" to defendants' inaction because neither the Governor nor the PDC "has the power and authority to act alone to redress Plaintiffs' grievances"—a holding seemingly in tension with the court's conclusion that the Governor and PDC members are proper defendants to the Section 1983 action. (R., pp. 489-490).

Second, the court concluded that plaintiffs' claims are "not ripe for adjudication" for the same reason it held that they lack standing: namely, that they have not yet been convicted or sentenced. (R., pp. 493-494). The court noted that,

should plaintiffs ultimately be convicted, they could pursue post-conviction relief for ineffective assistance of counsel "[i]n each of their individual cases," and that if a court finds "that their constitutional rights have been violated," it could "order a specific remedy" such as "a new trial or dismissal of the case." (R., p. 494).

Finally, the court concluded that granting plaintiffs' requested relief would "invade the province of the legislature" because it would require the court both to "legislate specific standards" that the State must meet to comply with the Constitution and to order the Governor and PDC "to provide adequate funding" to meet those standards. (R., pp. 496-498). In the court's view, the proper role of the judiciary is to "find[] and redress violations of constitutional rights in individual cases," not to ensure that governmental institutions "comply with the laws and the Constitution" on a systemic basis. (R., p. 498).

Plaintiffs filed a timely notice of appeal on January 25, 2016, see I.A.R. 14(a), and filed their brief with this Court on April 29, 2016.

ARGUMENT

A PRE-CONVICTION CIVIL CLAIM FOR CONSTRUCTIVE DENIAL OF COUNSEL UNDER *GIDEON* IS COGNIZABLE AND CONCEPTUALLY DISTINCT FROM A POST-CONVICTION CLAIM FOR INEFFECTIVE ASSISTANCE OF COUNSEL UNDER *STRICKLAND*

A. A State Violates Gideon *If Systemic Structural Limitations Preclude Appointed Counsel From Providing Indigent Defendants The "Assistance" The Constitution Guarantees*

The Sixth Amendment to the Constitution provides that "[i]n all criminal prosecutions, the accused shall * * * have the Assistance of Counsel for his defense." U.S. Const. Amend. VI. In *Gideon* v. *Wainwright*, the United States Supreme Court held that this right requires States to appoint attorneys to defendants charged with felonies who cannot afford to retain counsel. 372 U.S. 335, 344 (1963). The Court explained that "lawyers in criminal courts are necessities, not luxuries." *Ibid.*; see also *Luis* v. *United States*, 136 S. Ct. 1083, 1088 (2016) ("No one doubts the fundamental character of a criminal defendant's Sixth Amendment right to the 'Assistance of Counsel.'"). This Court has echoed that principle. See, *e.g.*, *Stuart* v. *State*, 801 P.2d 1283, 1285 (Idaho 1990) (stating that "the constitutional right to assistance of counsel" is "fundamental and is not a luxury"), cert. denied, 517 U.S. 1234 (1996).

A State does not satisfy its obligation under *Gideon* simply by appointing lawyers to indigent defendants. See *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940) (the "mere formal appointment" of a lawyer does not satisfy the constitutional right to counsel). Rather, those lawyers must be appointed under circumstances that permit them to do their jobs. As the United States Supreme Court has explained, the Sixth Amendment "requires not merely the provision of counsel to the accused, but 'Assistance,' which is to be 'for his defen[s]e.'" *United States* v. *Cronic*, 466 U.S. 648, 654 (1984). That right would be "an empty formality" if appointed counsel is precluded from providing his or her client any meaningful representation. *Ungar* v. *Sarafite*, 376 U.S. 575, 589 (1964).

The United States Supreme Court has thus long recognized that, even where a defendant has been formally appointed a lawyer, the right to counsel may be constructively denied. In *Powell* v. *Alabama*, for example, the Court held that the defendants "were not accorded the right of counsel in any substantial sense" where counsel was not assigned until the morning of trial. 287 U.S. 45, 58 (1932). Observing that it would be "vain" to give a defendant a lawyer "without giving the latter any opportunity to acquaint himself with the facts or law of the case," *id.* at 59 (citation omitted), the Court concluded that the duty to appoint counsel "is not

discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case," *id.* at 71. Similarly, in *Avery* v. *Alabama*, the Court recognized that "the Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." 308 U.S. at 446. If appointed counsel is denied the opportunity "to confer, to consult with the accused and to prepare his defense," the Court observed, then the appointment of counsel becomes "a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." *Ibid.* And in *United States* v. *Cronic*, the Court explained that there may be circumstances, such as in *Powell*, where "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." 466 U.S. at 659-660.[19]

[19] In *Cronic* and *Avery*, unlike in *Powell*, the Court ultimately concluded that the right to counsel was not violated, notwithstanding the late appointment of counsel. See *Cronic*, 466 U.S. at 665; *Avery*, 308 U.S. at 450-453. The Court determined that, in the particular circumstances of those cases, the appointed

(continued…)

A claim that a defendant has been *denied* the assistance of counsel in violation of the Sixth Amendment—whether actually or constructively—is conceptually distinct from a claim that his lawyer's performance was constitutionally *ineffective*. See *Strickland* v. *Washington*, 466 U.S. 668, 692 (1984) (distinguishing between ineffectiveness claims and claims of "[a]ctual or constructive denial of the assistance of counsel"). An ineffective-assistance-of-counsel claim—sometimes called a *Strickland* claim, for the landmark case that established the doctrine—focuses on the lawyer's handling of the individual defendant's case. To prevail on such a claim, the defendant must show both that his lawyer's performance "fell below an objective standard of reasonableness," *id.* at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

(…continued)
lawyers were able to subject the government's theory to adversarial testing and thus were not merely formal appointments. But in this case, as in other systemic constructive-denial-of-counsel claims, plaintiffs allege that the counsel assigned to indigent defendants are not subjecting the government's theories to meaningful adversarial testing nor providing other traditional markers of representation.

In a denial-of-counsel claim, by contrast, "the defendant alleges not that counsel made specific errors in the course of representation, but rather that during the judicial proceeding he was—either actually or constructively—denied the assistance of counsel altogether." *Roe* v. *Flores-Ortega*, 528 U.S. 470, 483 (2000). "This is quite different from a case in which it is claimed that counsel's performance was ineffective." *Penson* v. *Ohio*, 488 U.S. 75, 88 (1988). A denial-of-counsel claim is an assertion not of substandard representation but of *nonrepresentation*. As the cases demonstrate, moreover, the Court does not distinguish between *actual* and *constructive* denials of counsel. Having counsel that can provide no real "assistance" is tantamount to not having counsel at all. In a denial-of-counsel claim, no individualized showing of prejudice is required, as "[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." *Strickland*, 466 U.S. at 692; accord *Cronic*, 466 U.S. at 658-660.

It follows that, to comply with *Gideon*, the State must do more than simply appoint a member of the bar to stand alongside an indigent defendant at trial. If systemic, structural conditions are such that appointed counsel functions as counsel

in name only, the State has not provided the "assistance" of counsel that *Gideon* and the Sixth Amendment require.

B. Courts That Have Considered The Issue Have Recognized That A Pre-Conviction Civil Claim For Constructive Denial Of Counsel Is Cognizable

Plaintiffs allege that the failures in Idaho's indigent defense system have resulted, and will continue to result, in "the constructive denial of counsel" for them and those similarly situated. (R., p. 56). The question before this Court is whether plaintiffs can bring such a constructive-denial-of-counsel claim in a pre-conviction civil action seeking prospective injunctive relief, or whether, as the district court held, they must wait until they are convicted and sentenced (if they are) and raise their challenge in the form of separate, post-conviction ineffective-assistance claims seeking individual relief.

This Court should reverse the district court's ruling and hold that pre-conviction civil claims alleging systemic constructive denials of counsel are actionable. Plaintiffs' complaint is not with their individual lawyers' competence but with the State's alleged failure, on a system-wide level, to meet "its foundational obligation under *Gideon* to provide legal representation" to defendants who cannot afford it. *Hurrell-Harring* v. *State*, 930 N.E.2d 217, 222

(N.Y. 2010). There is no legal bar to bringing such a claim in a civil suit outside the context of a final conviction and sentence; indeed, a pre-trial civil action seeking prospective, injunctive relief is the only judicial mechanism by which a court can find and remedy a State's systemic noncompliance with *Gideon*.

Hurrell-Harring is the leading case recognizing a civil constructive-denial-of-counsel claim, and it is correctly reasoned. The court in that case recognized a constructive denial-of-counsel claim under *Gideon* that is distinct from an ineffective-assistance claim under *Strickland*. The court determined that, "[g]iven the simplicity and autonomy of a claim for nonrepresentation, as opposed to one truly involving the adequacy of an attorney's performance, there is no reason * * * why such a claim cannot or should not be brought without the context of a completed prosecution." 930 N.E.2d at 225-226. The court recognized that limiting this type of claim to an action for post-conviction relief would prevent courts from effectively remedying systemic *Gideon* violations. The court explained that "the fairly minimal risks involved in sustaining the closely defined claim of nonrepresentation we have recognized must be weighed [against] the very serious dangers that the alleged denial of counsel entails." *Id.* at 226.

The court in *Wilbur* v. *City of Mount Vernon*, No. 2:11-CV-1100, 2012 WL 600727 (W.D. Wash. Feb. 23, 2012) (*Wilbur I*), followed a similar analysis. Like the *Hurrell-Harring* court, it recognized that plaintiffs' suit did not allege ineffective assistance of counsel under *Strickland*, but rather asserted a systemic deprivation of the right to counsel promised in *Gideon*. *Id.* at *2. The *Wilbur* court found that the facts that plaintiffs asserted could support a finding "that the assignment of public defenders is little more than a sham," *ibid.*, and concluded that a civil action seeking a systemic remedy was appropriate for such allegations, explaining that "[w]here official government policies trample rights guaranteed by the Constitution, the courts have not hesitated to use their equitable powers to correct the underlying policies or systems," *id.* at *3. See also *Duncan* v. *State*, 774 N.W.2d 89, 127-128 (Mich. Ct. App. 2009) (concluding that plaintiffs state a valid civil claim where they allege an actual denial of counsel, a constructive denial of counsel, or conflicted counsel); *Luckey* v. *Harris*, 860 F.2d 1012, 1018 (11th Cir. 1988) (concluding that a civil Sixth Amendment claim was cognizable where plaintiffs asserted, among other things, "systemic delays in the appointment of counsel," that their attorneys are denied the resources necessary to investigate

their cases, and that attorneys are pressured to hurry cases to trial and to enter guilty pleas).[20]

In ruling plaintiffs' claims nonjusticiable in this case, the district court misapprehended the conceptual distinction between pre-conviction, systemic constructive-denial-of-counsel claims under *Gideon* and post-conviction, individual ineffective-assistance-of-counsel claims under *Strickland*. The court concluded that plaintiffs' complaint neither presents a live case or controversy nor is ripe for adjudication because "none of the Plaintiffs ha[s] either been convicted or sentenced" (R., p. 489) and thus none can show the actual prejudice necessary to make out an ineffective-assistance claim under *Strickland* (R., p. 492). Plaintiffs' claim, however, is not that their appointed lawyers have provided constitutionally ineffective assistance in their individual cases. Rather, their claim is that structural, systemic deficiencies in Idaho's indigent defense system have, for them and others similarly situated, resulted in "the constructive denial of counsel" in violation of the Sixth Amendment and *Gideon* v. *Wainwright*. (R., p. 56). As the

[20] This case was dismissed on remand based on abstention grounds under *Younger* v. *Harris*, 401 U.S. 37 (1971). See *Luckey* v. *Miller*, 976 F.2d 673, 675 (11th Cir. 1992). But the Eleventh Circuit's initial opinion remains good law.

courts in *Hurrell-Harring* and *Wilbur I* correctly recognized, such pre-conviction *Gideon* claims are not only cognizable but provide a crucial vehicle for rectifying systemic right-to-counsel violations in a way that individual, post-conviction *Strickland* claims cannot.

The district court was also incorrect to conclude that granting systemic, declaratory and injunctive relief of the sort plaintiffs request would violate separation-of-powers principles. Courts are not powerless to compel action by other branches of government in order to remedy a constitutional violation. To the contrary, courts have long recognized the necessity of systemic equitable relief to correct unconstitutional conduct. See, *e.g.*, *Brown* v. *Plata*, 563 U.S. 493 (2011). As the *Hurrell-Harring* court observed, "enforcement of a clear constitutional or statutory mandate is the proper work of the courts." 930 N.E.2d at 227. Thus, the possibility "that a remedy in this action would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities" does not relieve the court "of its essential obligation to provide a remedy for violation of a fundamental constitutional right." *Ibid.* (citing *Marbury* v. *Madison*, 5 U.S. 137, 147 (1803)).

Moreover, contrary to the trial court's assertion, plaintiffs' request for relief does not ask the court to enact legislation or otherwise "shape the institutions of government" to bring them into compliance with the Constitution. (R., p. 498). Rather, plaintiffs seek injunctions "requiring *the State* to propose" a plan for reforming its public defense system. (R., p. 58 (emphasis added)). Under plaintiffs' proposal, the court's role would be to approve and monitor the State's plan to ensure that it meets constitutional standards. (R., p. 58); see *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."); see also *Wilbur* v. *City of Mount Vernon*, 989 F. Supp. 2d 1122, 1133-1137 (W.D. Wash. 2013) (*Wilbur II*) (entering continuing injunction against municipalities for systemic deprivations of the constitutional right to counsel). In any event, any concerns regarding the court's role vis-à-vis the legislature at most go to the scope of relief the court might fashion; they do not render the claim nonjusticiable, as the court ruled here.

C. Constructive Denial Of Counsel Violating Gideon *Occurs Where The Traditional Markers Of Representation Are Frequently Absent Or Significantly Compromised As A Result Of Systemic, Structural Limitations*

A civil claim for prospective, systemic relief based on constructive denial of counsel is viable: (1) when, on a system-wide basis, the traditional markers of representation—such as timely and confidential consultation with clients, appropriate investigation, and meaningful adversarial testing of the prosecution's case—are absent or significantly compromised; and (2) when substantial structural limitations—such as a severe lack of resources, unreasonably high workloads, or critical understaffing of public defender offices—cause that absence or limitation on representation. When the totality of the circumstances indicates that structural limitations are causing a system-wide problem of nonrepresentation, indigent criminal defendants may seek prospective, systemic relief in a civil suit to protect the constitutional right to counsel of the class that they represent.

Courts assessing a constructive-denial-of-counsel claim should, therefore, first consider whether traditional markers of representation are typically present for clients of publicly appointed attorneys. These include the attorneys' availability to engage in meaningful attorney-client contact to learn from and advise their clients; the attorneys' ability to investigate the allegations and the clients' circumstances

that may inform strategy; and the attorneys' ability to advocate for clients either through plea negotiation, at trial, or post-trial. When these markers of representation are absent, there is a serious question whether the assigned counsel is merely a lawyer in name only. Indeed, "[*a*]*ctual* representation assumes a certain basic representational relationship." *Hurrell-Harring*, 930 N.E.2d at 224 (emphasis added); see also *Wilbur II*, 989 F. Supp. 2d at 1124 (finding that, where clients met their attorneys for the first time in court and immediately accepted a plea bargain without discussing their cases in a confidential setting, the system "amounted to little more than a 'meet and plead' system," and that the resulting lack of representational relationship violated the Sixth Amendment); *Public Defender, Eleventh Jud. Cir. of Fla.* v. *State*, 115 So. 3d 261, 278 (Fla. 2013) (finding denial of counsel where attorneys were "mere conduits for plea offers," did not communicate with clients, were unable to investigate the allegations, and were unprepared for trial).

If such markers of traditional representation are typically absent or significantly compromised, courts should determine whether such absence is caused by systemic structural limitations. Factors to consider include insufficient funding, insufficient staffing, excessive workloads, lack of training and

supervision, lack of independence, and lack of resources. In *Wilbur II*, for example, the court noted the structural limitations—insufficient staffing, excessive caseloads, and almost nonexistent supervision—that resulted in a system "broken to such an extent that confidential attorney/client communications are rare, the individual defendant is not represented in any meaningful way, and actual innocence could conceivably go unnoticed and unchampioned." 989 F. Supp. 2d at 1127. Similarly, the court in *Public Defender* held that the public defender's office could withdraw from representation of indigent defendants because of structural limitations. 115 So. 3d at 282. Insufficient funds and the resultant understaffing and excessive caseloads created a situation where indigent defendants did not receive assistance of counsel as required by the Sixth Amendment. *Id.* at 278. Other courts have also concluded that severe structural limitations result in a denial of the right to counsel. See, *e.g.*, *New York Cnty. Lawyers' Ass'n* v. *State*, 196 Misc. 2d 761, 790 (N.Y. Sup. Ct. 2003) (holding statutory rates for assigned counsel unconstitutional as they resulted in denial of counsel and excessive caseloads, among other issues); *State* v. *Young*, 172 P.3d 138, 144 (N.M. 2007) (holding that inadequate compensation of defense attorneys deprived capital defendants of their Sixth Amendment right to counsel); cf. *Luis*, 136 S. Ct. at 1095

(observing that increasing the workload of already "overworked and underpaid public defenders" risks "render[ing] less effective the basic right the Sixth Amendment seeks to protect").

Structural limitations can lead to a situation where even a well-intentioned and competent lawyer is merely nominal counsel because the lawyer is unable to fulfill the basic obligation of preparing a defense, including conferring with the defendant, investigating the facts of the case, interviewing witnesses, securing discovery, engaging in motions practice, identifying and hiring experts when necessary, and subjecting the evidence to adversarial testing. As the Supreme Court of Louisiana stated, "[w]e know from experience that no attorney can prepare for one felony trial per day, especially if he has little or no investigative, paralegal, or clerical assistance." *State* v. *Peart*, 621 So. 2d 780, 789 (La. 1993).

D. Civil Constructive-Denial-Of-Counsel Claims Provide An Important Tool For Remedying Systemic Violations Of The Constitutional Right To Counsel

A pre-conviction, civil constructive-denial-of-counsel claim is an effective way for indigent defendants to seek to effectuate the promise of *Gideon*. Individual post-conviction claims cannot provide systemic structural relief that will help fix the problem of under-funded and under-resourced public defenders.

Ineffective-assistance-of-counsel claims under *Strickland* are, by definition, backward-looking, limited to remedying injury caused by a single lawyer's performance in a single case. "[C]ase-by-case requests for new counsel, appeals, and/or malpractice actions would not resolve the systemic problems identified by plaintiffs, making a request for injunctive and declaratory relief necessary." *Wilbur I*, 2012 WL 600727, at *3.

Moreover, because *Strickland* claims require a defendant to show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694, they cannot prevent harms flowing from denials of counsel that do not ultimately lead to a conviction. See *Luckey*, 860 F.2d at 1017 (observing that the Sixth Amendment "protects rights that do not affect the outcome of a trial," and that prospective relief, because it is "designed to avoid future harm," can "protect constitutional rights, even if the violation of these rights would not affect the outcome of a trial"). For example, absence of counsel in the early critical stages of a criminal proceeding can result in unnecessary and prolonged pretrial detention. Such

deprivations of liberty not only risk directly impacting the outcome of a person's criminal case,[21] they can also have devastating collateral consequences. Unnecessary or prolonged pretrial detention can lead to the defendant losing his job or housing, leaving the most vulnerable among us in struggling communities trapped in a cycle of perpetual poverty and crisis.

The civil constructive-denial-of-counsel claim recognized in *Hurrell-Harring* and *Wilbur I* provides indigent defendants deprived of their constitutional right to counsel with a meaningful tool for pursuing systemic relief. The district court's failure to recognize the availability of such claims, as distinct from post-conviction *Strickland* claims, erects a roadblock that will impede indigent defendants' ability to vindicate their Sixth Amendment right to counsel and breathe life into the "noble ideal" that "every defendant stands equal before the law."

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[21] See *Barker* v. *Wingo*, 407 U.S. 514, 533 & n.35 (1972) (observing that "if a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense," and citing "statistical evidence that persons who are detained between arrest and trial are more likely to receive prison sentences than those who obtain pretrial release"); U.S. SOI at 12-13, *Varden* v. *City of Clanton*, No. 2:15-CV-34 (M.D. Ala. Feb. 13, 2015) (outlining ways pretrial detention can affect outcomes, including by impeding the preparation of the defense and increasing the likelihood that a defendant pleads guilty), available at http://www.justice.gov/file/340461/download.

Gideon, 372 U.S. at 344. This Court should remove that roadblock and rule that pre-conviction, civil constructive-denial-of-counsel claims seeking prospective relief are actionable.

CONCLUSION

The judgment of the district court should be reversed.

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CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2016, an original and seven copies (six bound and one unbound) of the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS were mailed to the Clerk of the Supreme Court of Idaho by certified priority U.S. mail, postage-prepaid.

I further certify that on May 12, 2016, two copies of the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS were served on the following by priority U.S. mail, postage-prepaid, which service satisfies the requirements of Idaho Appellate Rule 20:

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