

CRIMINAL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA
SECTION K

STATE OF LOUISIANA

VERSUS

ALEX BERNARD
HENRY CAMPBELL
DONALD D. GAMBLE
DARRIAN FRANKLIN
MALCOLM SMITH
JOSHUA VAUGH
BENNY WALKER

CASE NO. 528-021
CASE NO. 526-311; 515-409; 525-904
CASE NO. 524-409; 527-270
CASE NO. 523-095
CASE NO. 524-004
CASE NO. 526-187
CASE NO. 523-135

RULING

Tina Peng, an attorney with the Orleans Public Defenders, penned an opinion article in The Washington Post that detailed the travails representing her clients.¹ The court has included Ms. Peng's article in its entirety:

"The Orleans Public Defenders are facing a million-dollar deficit as a result of statewide budget cuts. For a small office like ours, that's devastating. To avoid layoffs, the entire staff will see the equivalent of four unpaid weeks per year in furloughs, increased caseloads and a hiring freeze — and the submission to the Louisiana Public Defender Board of a plan to cut services to the people of New Orleans. We are already stretched thin: Our office represents 85 percent of the people charged with crimes in Orleans Parish but has an annual budget about a third the size of the district attorney's. The American Bar Association recommends that public defenders not work on more than 150 felony cases a year. In 2014, I handled double that.

The United States accounts for less than 5 percent of the world's population but almost 25 percent of the global prison population. The vast majority of people in prison are indigent. The Justice Department has estimated that 60 to 90 percent of criminal defendants nationwide cannot afford their own attorneys and that in 2007, U.S. public defender offices received more than 5.5 million cases.

Public defenders are the only ones who stand up for the vast majority of people charged with crimes in America, and we try to help our clients achieve justice in an often unfeeling legal system that disproportionately ensnares poor people and minorities. But the constitutional

¹ Tina Peng, *I'm a public defender. It's impossible for me to do a good job representing my clients*, *The Washington Post*, September 3, 2015.

guarantee of effective representation for all has fallen short. The funding crisis is nationwide, and it is dire. When people ask how to push back against police misconduct, how to decrease the costs of mass incarceration and how to ensure fairer treatment of our nation's most disenfranchised citizens, part of the answer lies in fully funding public defender's offices and enabling us to represent our clients in a meaningful manner.

I went to law school to be a public defender. My frustration with our office's persistent underfunding is not that it forces me to work long hours, represent numerous clients or make far less money than I would at a private law firm. It is that when we are constantly required to do more with less, our clients suffer.

Because we don't have enough lawyers on staff, the week I passed the bar in 2013, I began representing people facing mandatory life sentences on felony charges. In Louisiana, people with as few as two prior nonviolent felony convictions can face mandatory life imprisonment on charges as minor as possession of a syringe containing heroin residue or, until recently, possession of a single joint. Defendants who cannot afford to make bond can sit in jail for 60 days while the district attorney decides whether to arraign them. An unconstitutionally high caseload means that I often see my new clients only once in those two months. It means that I miss filing important motions, that I am unable to properly prepare for every trial, that I have serious conversations about plea bargains with my clients in open court because I did not spend enough time conducting confidential visits with them in jail. I plead some of my clients to felony convictions on the day I meet them. If I don't follow up to make sure clients are released when they should be, they can sit in jail for unnecessary weeks and months.

Local constraints exacerbate these problems. Saying it lacks resources to provide adequate mental health treatment in its jails, the Orleans Parish Sheriff's Office has moved our clients with high mental health needs to a prison more than an hour away. Limited visitation hours make it almost impossible to see clients there on days we need to be in court. And recent attrition, coupled with the hiring freeze, has rendered many lawyers overwhelmed by cases transferred to them on top of their existing ones. One attorney whose transferred client was jailed on a bail-jumping charge did not have a chance to look at the file for close to a month, when the client's next court date approached. At that point, he realized that the client had never been served to appear for the court date on which he allegedly jumped bail. The attorney immediately and successfully moved

for the judge to release the client. By then, though, “he had a newborn baby he didn’t see, because I didn’t look at the case for a month,” the attorney said.

For other clients, my office considers how serious their cases are before deciding how many resources to devote to them. We have only nine investigators to handle more than 18,000 felony and misdemeanor cases each year. One investigator describes being so overwhelmed that he is often unable to canvass for relevant surveillance footage until it has already been deleted. Another investigator said that recently, in a span of a week and a half, she was assigned three cases carrying sentences of mandatory life without parole. A year ago, she would have received one such assignment a month. Those cases all had preliminary examinations — the only pre-indictment hearing at which the client’s attorney can cross-examine police officers — in the same week. Working around the clock, the investigator completed full investigations for two of those cases. For the third, she was able only to knock on one witness’s door twice.

We similarly have to ration our social work and client welfare services. Cutbacks mean we are limited in our ability to gather detailed information about our clients’ personal circumstances and histories to present to prosecutors, which could lead to more individualized plea agreements. We are also hobbled in our capacity to make sure critical services are delivered to our clients in jail.

Unfortunately, budget cuts and a spiraling workload are not unique to Orleans Parish. Funding problems threaten poor people’s right to counsel across America. In June, the American Civil Liberties Union sued Idaho, claiming that the state has failed to fund or improve its broken public defense system and has deprived indigent residents of their Sixth Amendment right to adequate legal representation. Indigent defendants in most counties there have no lawyers at their first court appearances, where bail is set and pleas of guilty or not guilty are entered, according to the lawsuit. Many counties also pay attorneys who accept public defense contracts a flat fee, regardless of the number or seriousness of the cases each lawyer handles. Some public defenders in Idaho carry caseloads that are double national standards. And because public defenders are often allowed to continue their own private practices, there is little incentive for them to spend much time on their appointed clients, or to pay for investigations or expert witnesses in those cases, a common problem everywhere.

None of that is constitutionally adequate, says Jason Williamson, one of the ACLU's lead attorneys in the Idaho lawsuit. "You need to do more than have a pulse," he says. "You need to actually litigate these cases."

Some public defender's offices have contemplated the drastic option of turning down appointments. In Louisiana, for example, offices may start putting lower-priority clients — people who are out of jail or have less-complicated cases — on a waiting list for representation, says James Dixon, the state public defender. That would mean defendants would have to come to court without lawyers to argue, file motions, or conduct hearings or trials for them, effectively bringing their cases to a halt.

Courts have mostly supported this option. In 2013, the Florida Supreme Court ruled that public defender's offices can apply to turn down future appointments when their caseloads rise so high that they cannot constitutionally represent all their clients. At the time, public defenders in Miami were handling 400 felony cases each, and some often had up to 50 cases set for trial in a week. Missouri's Supreme Court in 2012 also upheld the ability of public defenders in that state to decline appointments if they were too far over capacity. A few months later, most Missouri public defender's offices stopped accepting cases for one to two months, according to State Public Defender Michael Barrett. If the courts did not appoint private lawyers to take on cases for free, overflow defendants had no representation at all until the public defenders were able to start accepting appointments again.

In Louisiana, one of our biggest problems is unstable funding: This is the only state in America that tries to fund most public defense services with fees associated with traffic tickets, parish by parish. But other states with steadier funding are seeing even the status quo come under attack. Since 1992, Tennessee counties have been required to raise public defenders' budgets by 75 percent of any increase in prosecutors' budgets. This year, a bill requested by the state's district attorneys would repeal that law. "It's an issue of fairness," says Mark Stephens, the Knox County district public defender. "It frustrates me that they can't understand that they need money and we need money."

Ultimately, it's easy to forget what we're talking about when we talk about the criminal justice system. I've been asked by my family members, my friends and my hairdresser why I represent criminals. The answer is that I, and other public defenders, don't represent criminals. We represent poor people who are facing criminal charges — charges on which they are presumed

innocent until proven guilty in court. We represent members of our communities who have a right to real and meaningful legal representation, even if they are poor. My clients, like the millions of other people in the United States who are currently represented by public defenders, deserve better.”

In response to this article, the court examined its docket and ascertained Ms. Peng represented four (4) defendants in Section K. Thereafter, the court summoned Derwyn Bunton, Chief Public Defender of Orleans Parish and hearings were held November 20, 2015, and November 23, 2015. The Orleans Public Defenders filed pleadings requesting the court to “stop appointing and assigning cases to the Orleans Public Defenders.”

Upon conclusion of the hearings, the court found the testimony persuasive and compelling. Nevertheless, the court did not grant the relief sought.

Subsequently, the Orleans Public Defenders instituted restriction of services,² refusal of cases,³ and withdrawal from cases.⁴

As a result, the court appointed attorneys to represent the defendants. These defendants are now asserting violations of the United States and Louisiana Constitutions and requesting funding for their legal defense, and if funding is unavailable, a halt to the proceedings and finally, habeas corpus relief.

The transcripts of State v. Wrotin (Case No. 520-385) and State v. Gamble (Case No. 524-409; 527-270) have been incorporated and consolidated with the captioned cases.

ISSUE

The issue before the court is: How long can a person who cannot afford to hire an attorney remain in jail without a date certain for proceedings to begin and funding from the legislature made available for constitutionally mandated legal representation?

LAW

The Sixth Amendment to the United States Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in

² Orleans Public Defenders, Restriction of Services Letter, June 18, 2015.

³ Orleans Public Defenders, Refusal of Cases Letter, December 16, 2015.

⁴ Orleans Public Defenders, Cessation of Conflict Representation Letter, March 1, 2016.

his favor, and to have the Assistance of Counsel for his defence.”⁵

The Fourteenth Amendment to the United States Constitution guarantees that no State shall “deprive any person of life, liberty, or property, without due process of law.”⁶

In Gideon v. Wainwright, the United States Supreme Court held the Sixth Amendment’s guarantee of counsel is made obligatory upon the states by the Fourteenth Amendment, thus the state has a duty to provide counsel to an indigent defendant who is charged with a felony in state court.⁷

In Argersinger v. Hamlin, the United States Supreme Court extended that obligation to provide attorneys to accused persons charged with misdemeanors, when imprisonment is a real responsibility.⁸

In Kimmelman v. Morrison, the United States Supreme Court held the right to counsel means the right to effective assistance of counsel.⁹

In Strickland v. Washington, the United States Supreme Court held an accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.¹⁰

Louisiana Constitution Article I § 13 provides that “When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of the reason for his arrest or detention, his right to remain silent, his right against self incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel. In a criminal prosecution, an accused shall be informed of the nature and cause of the accusation against him. At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment. The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents.”¹¹

In State v. Peart, the Louisiana Supreme Court held “reasonably effective assistance of counsel” means a lawyer not only possess adequate skill and knowledge, but also the time and resources to apply his skill and knowledge to defend each of his individual clients.¹² Further, “if

⁵ USCS Const. Amend. 6

⁶ USCS Const. Amend. 14, § 1.

⁷ Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).

⁸ Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972).

⁹ Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986).

¹⁰ Strickland v. Washington, 466 U.S. 668, 685 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1989).

¹¹ La. Const. Art. I § 13.

¹² State v. Peart, 621 So. 2d 780.

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.”

In State v. Citizen, the Louisiana Supreme Court ruled that the Louisiana Constitution explicitly places the duty of providing a working system for securing the representation of indigent defendants squarely on the shoulders of the legislature.¹³

In State v. Wigley, the Louisiana Supreme Court held that the appointment of attorneys without reimbursement for expenses constituted an unreasonable extension of attorneys’ professional obligations.¹⁴ The Court also found that when appointed attorneys were not assured reimbursement nor been reimbursed for their properly incurred expenses, including costs and overhead, those appointments were unreasonable and oppressive.

DISCUSSION

Defendant Alex Bernard is charged with First Degree Robbery, Simple Battery, and two counts of Aggravated Assault. Mr. Bernard has been incarcerated and without the assistance of counsel for 105 days.

Defendant Henry Campbell is charged with First Degree Rape, Obscenity, and Battery on a Correctional Facility Employee. Mr. Campbell has been incarcerated for 234 days on the Battery charge, for 290 days on the Obscenity charge, and for 1120 days on the Rape charge.

Defendant Darrian D. Franklin is charged with Second Degree Murder. Mr. Franklin has been incarcerated for 561 days. Of those 561 days, Mr. Franklin has been without the assistance of counsel for 138 days.

Defendant Donald D. Gamble, Jr. is charged with two (2) counts of Armed Robbery with a Firearm and one (1) count of Aggravated Assault with a Firearm. Mr. Gamble is also charged with Illegal Carrying of a Weapon and Introduction of Contraband. Mr. Gamble has been incarcerated for 409 days. Of those 409 days, Mr. Gamble has been without the assistance of counsel for 81 days.

Defendant Malcolm Smith is charged with Armed Robbery with a Firearm. Mr. Smith has been incarcerated for 390 days. Of those 390 days, Mr. Smith has been without the assistance of counsel for 109 days.

¹³ State v. Citizen, 898 So. 2d 325.

¹⁴ State v. Wigley, 624 So. 2d 425 (La. 1993).

Defendant Joshua Vaughn is charged with Armed Robbery, Armed Robbery with a Firearm, Possession of a Firearm or Weapon by a Felon, and Illegal Possession of a Stolen Automobile. Mr. Vaughn has been incarcerated for 263 days. Of those 263 days, Mr. Vaughn has been without the assistance of counsel for 109 days.

Defendant Benny T. Walker is charged with two counts of Attempted Armed Robbery with a Firearm, Aggravated Burglary, Illegal Possession of Stolen Firearms, and Possession of a Firearm by a Felon. Mr. Walker has been incarcerated for 491 days. Of those 491 days, Mr. Walker has been without the assistance of counsel for 109 days.

The United States Supreme Court in Gideon v. Wainwright, 372 U.S. 335, 334, 83, S. Ct. 792, 796-97 (1963), which was also cited by the Louisiana Supreme Court in State v. Citizen, 898 So. 2d 325, 330n.7 (2005) stated that “The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, [] it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him.”

The court will quote and paraphrase language from Lavallee v. Justices in the Hampden Superior Court, which outlines the importance of having an attorney represent a defendant in a criminal case.¹⁵

“There are a number of responsibilities an attorney may be required to undertake that must be completed long before trial if the defendant is to benefit meaningfully from right to counsel. These duties include interviewing the defendant and witnesses while events are fresh in their memories, preserving physical evidence important to the defense, and locating potential defense witnesses. The right to counsel also includes assistance in making decisions about specific defenses and trial strategies, which may rise to the level of a critical stage of the process. For example, whether the decision to undergo a psychiatric evaluation may be a critical stage. The failure of an attorney to investigate the possibility of an insanity defense may constitute ineffective assistance of counsel. Moreover, there are rules for pretrial preparation and pretrial motion procedure, which must be engaged within certain time limitations.

¹⁵ Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 812 N.E. 2d 895 (2004).

The importance of prompt pretrial investigation and preparation and the serious probability that without attorneys and pretrial decisions not being made, these defendants are currently being deprived attorneys to the extent that raises serious concerns whether they will ultimately receive effective assistance of counsel.

This is especially true for defendants in jail, who are virtually powerless to obtain a lawyer on their own or to begin working on their own defense. The harm from inaction over a period of time is cumulative.”¹⁶

The defendants’ attorneys have demonstrated that they cannot effectively represent their clients without adequate funding and resources.

The court has no difficulty concluding the defendants’ constitutional right to assistance of counsel is being violated.

APPOINTMENT OF ATTORNEYS

In Avery v. Alabama, the United States Supreme Court held the constitutional right of assistance of counsel “cannot be satisfied by mere formal appointment.”¹⁷

In State v. Wigley, the Louisiana Supreme Court ruled the appointment of private lawyers to defend indigent defendants must be reimbursed out of pocket expenses, overhead costs and a reasonable fee. Before appointing the lawyer, the court has the responsibility to determine if there are funds to reimburse the lawyer.¹⁸ If the court determines funds are not available for reimbursement, the court should not appoint members of the private bar to represent indigent defendants.

The Louisiana Supreme Court in Citizen, footnote 12, cited State v. Lynch, “applauding pro bono legal representation, court nevertheless holds that “voluntary services are insufficient to accommodate the rights of indigent citizens to the effective assistance of counsel.”¹⁹

Merely appointing a private attorney is not the solution. As a matter of fact, the appointment of private attorneys without adequate resources to represent their clients makes a mockery of the Sixth Amendment right to the effective assistance of counsel. It is self-evident that the appointment of private attorneys will present the court with the identical problem facing the public defenders office-inadequate funding.

¹⁶ Lavallee v. Justices in the Hampden Superior Court, 442 Mass. 228, 812 N.E. 2d 895 (2004).

¹⁷ Avery v. Alabama, 308 U.S. 444, 446, 60 S. Ct. 321, 84 L.Ed. 377 (1940).

¹⁸ State v. Wigley, 624 So. 2d 425 (La. 1993).

¹⁹ State v. Citizen, 898 So. 2d 325. Footnote 12.
State v. Lynch, 796 P. 2d 1150, (Okla. 1990).

This court applauds attorneys willing to donate time to represent indigent defendants. Nevertheless the responsibility to provide the Sixth amendment right to an attorney is the state's responsibility, which cannot be borne entirely by the private bar.

REMEDIES

The Louisiana Supreme Court in Citizen, cited the following court remedies when contemplating certain measures to protect the constitutional or statutory right of indigent defendants:²⁰ ordering the dismissal of charges against certain defendants if the state cannot make available funds for their defense²¹; when counsel is unavailable to represent indigent defendant despite good faith efforts, such defendants may not be held more than seven (7) days and the criminal case against such defendants may not continue beyond forty-five (45) days²²; holding a legislative body in contempt and/or releasing unrepresented persons.²³

This is particularly cogent and supported by the testimony of State Public Defender James Dixon and Chief Public Defender Derwyn Bunton depicting the alarming and serious budget shortfalls and forecasts of their respective offices.

The defendants' constitutional rights are not contingent upon budget demands, waiting lists, and the failure of the legislature to adequately fund indigent defense.

In this country, a person who cannot afford an attorney and who has not been convicted, should not remain in jail without a date certain when proceedings will begin and when funding will be made available by the legislature to exercise his constitutional rights to an attorney and effective assistance of counsel.

We are now faced with a fundamental question, not only in New Orleans, but across Louisiana: What kind of criminal justice system do we want? One based on fairness or injustice, equality or prejudice, efficiency or chaos, right or wrong?

The Louisiana Supreme Court realized that to make the legislature do what it is constitutionally required, which is to provide adequate funding for these indigent defendants' constitutionally protected right to counsel, other measures must be taken to protect the constitutional and statutory rights of the defendants.

²⁰ State v. Citizen, 898 So. 2d 325.

²¹ Stephan v. Smith, 242 Kan. 336, 747 P.2d 816, 848-850 (1987).

²² Lavelle v. Justices in the Hampden Superior Court, 442 Mass. 228, 812 N.E. 2d 895 (2004).

²³ Abbe Smith for Tom Joad and Tim Robinson: The Moral Obligation to Defend the Poor, 1997 Annual Survey of American Law 869, 887.

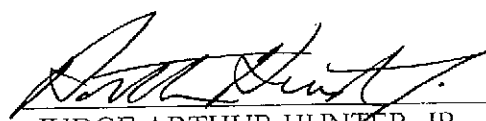
ORDER

The court finds the absence of a date certain when proceedings are to begin and when adequate funding will be made available by the legislature for constitutionally mandated representation of defendants who cannot afford an attorney violates the Sixth Amendment right to counsel and effective assistance of counsel and the Fourteenth Amendment Due Process Clause.

The court finds, based on the testimony of the State Public Defender and Chief Public Defender of Orleans Parish, the failure of the legislature to adequately fund indigent defense violates Louisiana Constitution Article I § 13²⁴ and such failure is applicable to La. C.C.r.P. Art. 362(2).²⁵

The relief sought by the defendants is GRANTED. The proceedings are halted. The defendants are released effective April 8, 2016. The defendants' charges are not dismissed. The court issues a Stay Order pending review by higher courts.

DATE: APRIL 8, 2016 °



JUDGE ARTHUR HUNTER, JR.

²⁴ In 1976, the Louisiana legislature enacted La. Const. Art. I § 13, which states that "at each stage of the proceedings, every person is entitled to assistance of counsel [...] appointed by the court if he is indigent and charged with an offense punishable by imprisonment. The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents."

²⁵ La. C.Cr.P. Art. 362 states that "If the person in custody is being held by virtue of a court order, relief shall be granted only on the following grounds:

(2) The original custody was lawful, but by some act, omission, or event which has since occurred, the custody has become unlawful;