

FILED
SUPREME COURT
STATE OF WASHINGTON
1/16/2024 11:31 AM
BY ERIN L. LENNON
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IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

No. 102534-3

Christopher Gates,)
Petitioner)
vs.)
State of Washington,)
Respondent)

ON PETITION FOR REVIEW FROM DIVISION ONE
OF THE COURT OF APPEALS No. 83243-3-I

MEMORANDUM OF AMICI CURIAE THE DEFENDER
INITIATIVE and WASHINGTON DEFENDER
ASSOCIATION

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I. INTEREST OF AMICI

The amici incorporate by reference the full statement of interest in the Motion to File an Amicus Memorandum herein.

II. INTRODUCTION

Mr. Gates' appointed counsel were unable to work on his case for more than 18 months. The Deputy Director of the King County Department of Public Defense (DPD) told the court that Mr. Gates had gone "essentially a year and a half ... with no representation, with no work done in this case."¹ In effect, Mr. Gates was deprived of counsel during that critical time.

The U.S Supreme Court held 92 years ago that the Sixth Amendment "provides that in all criminal prosecutions the accused shall enjoy the right 'to have the Assistance of Counsel for his defence.'" *Powell v. State of Ala.*, 287 U.S. 45, 66 (1932).

¹ 1 RP 347.

This Court wrote that without an attorney, the fundamental rights in the Bill of Rights “are often just words on paper.” *State v. A.N.J.*, 168 Wn.2d 91, 97, (2010) [citation omitted].

The violation of Mr. Gates’ right to counsel damaged not only him but also the community’s faith in an impartial and just legal system. Judge Lasnik, finding two cities had systemically denied the right to counsel, wrote:

A system that makes it impossible for appointed counsel to provide the sort of assistance required by the Sixth Amendment works irreparable harm: the lack of an actual representational relationship and/or adversarial testing injures both the indigent defendant and the criminal justice system as a whole.

Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1133 (W.D. Wash. 2013).

In Washington, counties provide appointed counsel to eligible accused persons. In Mr. Gates’ case, the county’s system failed, and he had no advocate for 18 months. The trial court should have dismissed the prosecution under CrR 8.3(b)

because the county's failure was government mismanagement that violated Mr. Gates's rights to counsel and due process.

This is not the only case in which accused persons have gone unrepresented for long periods of time.² This Court should accept review because a significant question of law under the state and federal Constitutions is involved and there is an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4.

III. STATEMENT OF THE CASE

Amici accept the Petitioner's Statement of the Case. The key fact is that Mr. Gates was constructively denied counsel for

² See, e.g., "Attorney shortage continues in courts around WA, with new proposals on the table", Yakima Herald, December 27, 2023, at https://www.yakimaherald.com/news/local/crime_and_courts/attorney-shortage-continues-in-courts-around-wa-with-new-proposals-on-the-table/article_4ad167de-a427-11ee-8d03-73932a2af9b7.amp.html.

at least 18 months when his appointed lawyers were so overworked that they were unable to work on his case.

It was not just the deputy director of the County DPD who averred Mr. Gates was constructively without counsel for at least a year and a half. The assigned lawyers themselves stated, “we are the second team of lawyers appointed to represent Mr. Gates. Prior to our appointment, little work had been done in preparation. Since our appointment, [we] have been in trial on other cases.” CP 708.

Despite these admissions, the trial court disregarded Mr. Gates’s multiple requests for the appointment of available counsel. CP 9, 634-60, 685, 688; 1RP 23, 27-30, 49, 51, 56, 81-88, 114-17, 125-26, 145-46, 170.

IV. ARGUMENT

A. The Government Denied Mr. Gates’ Right to Counsel.

The constructive denial of counsel violated Mr. Gates’ Sixth Amendment and Fourteenth Amendment and Washington Article 1 Section 22 protections.

Recently, the Oregon Federal District Court ordered that accused persons detained more than seven days without counsel must be released:

...the Sixth Amendment entitles the accused to adequate representation at all critical stages of trial, irrespective of a showing of prejudice. *See United States v. Gonzalez-Lopez*, 548 U.S. 140, 148, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (denial of counsel at any critical stage is a structural error because it “affec[ts] the framework within which the trial proceeds.”). Similarly, the Fourteenth Amendment ensures that severe deprivations of liberty, such as incarceration, are not carried out without due process.

Betschart v. Garrett, 3:23-CV-01097-CL, 2023 WL 7220562, at *4 (D. Or. Nov. 2, 2023), amended, 3:23-CV-01097-CL, 2023 WL 7621969 (D. Or. Nov. 14, 2023).

The Court emphasized the importance of early appointment of counsel to argue bail and because “preparation requires a long list of activities: investigation, retaining experts, serving witnesses, reviewing discovery, ... negotiations with the opposing party, ... motions,... and objections to exhibits.”

Id., at 9. The prejudice arises because the accused was denied the ability to raise issues:

... prejudice to the defendant is not that the defendant is assured success at a hearing they would otherwise not enjoy; rather, it is the fact that they were denied the ability to access the court with counsel in a critical proceeding. Indeed, denial of counsel at any critical stage is a structural error because it “affec[ts] the framework within which the trial proceeds.”

Id.

The due process violation is compounded when the accused is incarcerated pretrial:

[N]o reliable process guaranteed by the Fourteenth Amendment is present when an indigent defendant is required to proceed against the power of the state without counsel while incarcerated. They are unable to adequately argue for conditional release, secure witnesses, review discovery, challenge the charging instrument, ... negotiate with the prosecution in an arms-length fashion, request the preservation of evidence, or challenge the length of their confinement through speedy trial statutes. Because the Fourteenth Amendment guarantees minimum protections when individuals face that most severe form of liberty restrictions, it bars indefinite detention without counsel.

Id. at 11.

In CrR 3.1 Stds., this Court requires that public defenders “[b]e familiar with the Performance Guidelines for Criminal

Defense Representation approved by the Washington State Bar Association” which require prompt and continued communication with the client, prompt investigation, timely pretrial motions, and evaluation of mitigation evidence to determine possible defenses and for possible sentencing, among other tasks.

The same rule limits defender attorneys to 150 felony cases per year. The rule states: “The increased complexity of practice in many areas will require lower caseload limits.”

Mr. Gates’s assigned attorneys could not comply with CrR 3.1 Stds. because they exceeded caseload limits and could not work on his case. Mr. Gates was constructively deprived of counsel for at least 18 months.

B. Violations of the Right to Counsel Harm the Public as well as Defendant

The *Betschart* Court emphasized the public harm of the violation of the right to counsel:

This ruling also weighs in favor of the public interest because the deprivation of class members’ constitutional

rights threatens the rights of all. ...The public's interest in the rule of law and the protection of our fundamental rights is at the heart of our democracy. ...

Betschart, supra at 12.

In *Strickland v. Washington*, 466 U.S. 668, 688 (1984), the Supreme Court made clear that in determining what are prevailing professional norms, the Court will rely on bar association standards and guidelines. This Court concluded similarly in *State v. A.N.J.*, supra.

Then Chief Justice Madsen wrote about the adoption of the Standards for Indigent Defense:

...we have learned that in areas of our state, the promise of access to effective assistance of counsel promised by our constitution has not been met and that we needed to take new measures to fully enact the rights and protections due to those who enter the criminal justice system.³

This Court adopted court rules requiring standards to be met and certificates of compliance to be filed. *Davison v. State*,

³ Chief Justice Barbara Madsen, “Enacting standards for public defenders is a difficult but necessary balancing act,” Full Court Press, July 2012.

196 Wn.2d 285, 298–99, as amended on denial of reconsideration (Oct. 20, 2020).

This Court should again respond to the systemic shortages in public defense when an incarcerated accused is effectively denied access to counsel for 18 months. The deprivation is such that subsequent appointment of qualified counsel cannot remedy the prior violation of the accused’s rights.

C. The Government’s Failure to Provide a Qualified Lawyer for 18 Months Was Outrageous Misconduct Violating Due Process.

The 18-month pretrial detention and deprivation of counsel was outrageous conduct that deprived Mr. Gates of the substantive due process right to fundamental fairness guaranteed by the Fourteenth Amendment and Article 1, Section 3. *State v. Solomon*, 3 Wn. App. 2d 895, 908-9 (2018).

The concept of outrageous government misconduct is predicated on a violation of the right to fundamental fairness. *State v. Lively*, 130 Wn.2d 1, 19 (1973). The *Lively*

Court recognized that the Fourteenth Amendment due process clause protects against conduct by state actors “so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.” *Id.* [citation omitted]. The misconduct may be so extensive that due process requires dismissal. *Solomon*, 3 Wn. App. 2d at 903, citation omitted.

This Court in *Lively* found that “[t]o condone the police conduct in this case is contrary to public policy and to basic principles of human decency.” *Lively*, 130 Wn.2d at 27. It violated public policy and human decency to condone the denial of counsel to Mr. Gates for 18 months.

The Court of Appeals recently affirmed a multi-part inquiry on CrR 8.3(b) motions reviewing claims of deprivation of right to counsel, including whether the state infringed on a Sixth Amendment right, whether the State failed to overcome the presumption of prejudice arising from the infringement by not proving the absence of prejudice beyond a reasonable

doubt, and the appropriate remedy. *State v. Myers*, 533 P.3d 451, 456 (Wash. Ct. App. 2023), *review denied*, 539 P.3d 8 (Wash. 2023). Simple mismanagement is enough for dismissal under CrR 8.3(b). *Id.*, 455. The Court added:

Once it is established that the State has violated the defendant's Sixth Amendment right, there is a presumption of prejudice to the defendant that can be rebutted only if the State proves beyond a reasonable doubt that the defendant suffered no prejudice.

Id., 458.

This is because “[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.” *Id.* at 459. The court cited other cases in writing that it:

is also obvious that an attorney cannot make a “full and complete investigation of both the facts and the law” unless [they] ha[ve] the full and complete confidence of [their] client, and such confidence cannot exist if the client cannot have the assurance that [their] disclosures to [their] counsel are strictly confidential.

Id. at 461.

While not involving attorney-client correspondence, this case does involve destroying any confidence Mr. Gates had in his counsel or the Court. As in *Myers*, there was “utter mishandling of the incident by almost every State actor involved.” *Id.* at 463–64.

In addressing the remedy, the Court wrote that the concern was not simply whether the prosecutor had reviewed confidential communications,

but rather the broader impact of the government intrusion into a protected relationship, how that constitutional violation may have deprived Myers of his right to a fair trial, and how to disincentivize such governmental violations going forward.

Id. at 465.

For 18 months, Mr. Gates sat in jail accused of the most serious offense without an advocate. The court conducted no fewer than 12 hearings to determine whether to appoint new counsel, and two additional hearings on whether Mr. Gates could proceed without counsel after his motions for new counsel were denied. Mr. Gates cited his attorneys’ workload,

the lack of communication and contact, the lack of access to discovery, the inability to prepare for hearings and prepare a defense and reminded the court he was “constructively ... without counsel.”⁴ His lawyers repeatedly, in writing and orally, concurred that their workload prevented them from preparing Mr. Gates’ case, including not interviewing witnesses or preparing for hearing.⁵ The lawyers failed to argue his motions, including bail, and occasionally argued against them. The failure to provide counsel was so pervasive that the DPD Director appeared in court to attest to DPD’s inability to provide effective counsel for Mr. Gates. She noted that the deprivation in Mr. Gates’ case was unique in her professional experience.⁶

The court played a role in the outrageous deprivation of the right to counsel. Mr. Gates repeatedly begged the court for new

⁴ 1 RP 115.

⁵ 1 RP 119; Defense Motion to Continue Trial, Declaration of Victoria Freer, Defense Counsel, November 15, 2019.

⁶ 1 RP 342.

counsel based on his assigned lawyers' inability to work on his case. Repeatedly, the court perceived Mr. Gates as lacking compassion for his lawyers' busy schedule and being overly demanding, saying that Mr. Gates "constantly complains about the lack of visits, lack of phone calls, lack of follow-through on his ideas for his case preparation."⁷ In fact, Mr. Gates' expectations were reasonable and consistent with RPC 1.3, 1.4, 1.16 and the *ABA Eight Guidelines of Public Defense Related to Excessive Caseloads*. Yet the Court repeatedly minimized the problem and failed to provide Mr. Gates with an advocate to oppose the power of the state.

When the court and DPD deprived Mr. Gates of his right to counsel, it so damaged the relationship between client and attorney(s) that it impacted Mr. Gates' perception of the court's commitment to fairness. When a defendant lacks an advocate and perceives an unbalanced legal system, their ability to trust

⁷ 1 RP 362.

any player in that system, including future appointed counsel, is impaired to the point of disrepair. Public defenders play a critical role in balancing the scales of justice, assisting clients in having a voice, improving clients' perceptions of fairness.⁸

Procedural fairness has been shown to increase client satisfaction and trust in the legal system, as well as the willingness to accept court rulings regardless of the case outcome.⁹ From Mr. Gates' perspective, there was no fair solution short of dismissal for such persistent outrageous conduct. Fairness to the defendant underlies the purpose of 8.3

(b). *City of Kent v. Sandhu*, 159 Wn. App. 836, 841 (2011), citation omitted.

This Court held: "We have established that we will not and cannot tolerate any actions that do not comply with

⁸ See Nourit Zimmerman & Tom R. Tyler, *Between Access to Counsel and Access to Justice: A Psychological Perspective*, 37 *Fordham Urban L.J.* 473, 478–492, 502 (2010).

⁹ See, e.g., Tom R. Tyler, *Procedural Justice and the Courts*, 44 *CT. REV.* 26, 27–28 (2007) at 28.

fundamental principles of due process.” *In re Michels*, 150 Wn. 2d 159, 166-67 (2003).

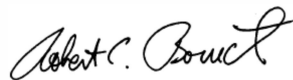
The constructive denial of counsel for Mr. Gates was a denial of the fundamental principles of due process.

V. CONCLUSION

Outrageous government mismanagement deprived Mr. Gates of his constitutional rights to counsel and due process for at least 18 months. Dismissal is the only meaningful remedy for the violation of these rights. This Court should grant review.

Respectfully submitted,

January 16, 2023



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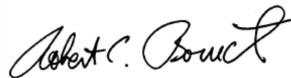
**CERTIFICATE OF COMPLIANCE WITH RAP 18.17
AND CERTIFICATE OF SERVICE**

On January 16, 2023, I hereby certify that the word count for this motion, as determined by the word count function of Microsoft Word, and pursuant to Rule of Appellate Procedure 18.17, excluding title page, tables, certificates, appendices, signature blocks and pictorial images is 2489 words.

I further certify that on January 16, 2023, I served one copy of the following documents: Memorandum of Amici Curiae and Motion to Leave to File Memorandum of Amici Curiae via the Washington Courts E-Portal on the following:

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