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2. *Hurrell-Harring v. State*

Like *Luckey*, *Hurrell-Harring v. State* dealt with a putative class action by individual criminal defendants seeking prospective injunctive relief for

the conflict was prejudicial.[83] The court held that under the statute, the prejudice required for withdrawal in a case involving excessive caseloads was a showing of a "substantial risk that [the] representation of one or more clients will be materially limited by the lawyer's responsibilities to another client," citing the Florida Rule identical to ABA Model Rule 1.7(a)(2).[84] The Florida standard is very similar to the risk-based standard for systemic Sixth Amendment violations that I argue for in this article.[85]

The Florida Supreme Court drew on *Luckey* and carefully distinguished the performance-based claim that *Luckey* rejected and the risk-based claim for systemic Sixth Amendment violations that *Luckey* presaged.[86] The court also opined that the case before it had "very similar circumstances" to those presented in the *Hurrell-Harring* case[87] and concluded that "the circumstances presented here involve some measure of non-representation and therefore a denial of the actual assistance of counsel guaranteed by *Gideon* and the Sixth Amendment."[88]

5. *Wilbur v. City of Mount Vernon*

Commission enacted the maximum caseload rule.[109] The court found that no infirmity with the rule had been established under state law, and thus the trial judge exceeded his authority by appointing the public defender in violation of that rule.[110]

No claim of constructive denial of counsel was assert Tws0.4(e13aj5(L)Tj -0.e>>BDCdhaTj ET E.5>B

Amendment.[120] Prospective injunctive relief for such a claim is viable, and the DOJ argued:

> (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 staffing of public defender offices—cause that absence or limitation on representation.[121] en-2(e)oler ac18.367-3(ro)-3owc 0 T.2396Tdgier

The DOJ argued that "when the totality of the circumstances indicate[s] . . . a system-wide problem of nonrepresentation," i.e., the appointment of counsel is merely cosmetic and the defendant has a lawyer in name only, prospective relief must be available.[122]

The Pennsylvania Supreme Court relied upon and extensively analyzed *Luckey*, *Duncan*, and *Hurrell-Harring*, finding all three cases to be "persuasive, indeed, compelling."[123] The court held that "there is a cognizable cause of action whereby a class of indigent defendants may seek relief for a widespread, systematic and constructive denial of counsel when alleged deficiencies in funding and resources provided by the county deny indigent defendants their constitutional right to counsel."[124]

Importantly, the court adopted the *O'Shea v. Littleton* test for prospectivt5.6(er)l

Luckey

complaint, ten of the twenty plaintiffs were "altogether without representation at [the] arraignments" (nonrepresentation or actual denial of counsel).[135] Moreover, the plaintiffs had alleged that such actual denial of counsel was "illustrative of what is a fairly common practice" that included defendants being "unrepresented in subsequent proceedings where pleas are taken and other critically important legal transactions take place."[136]

In addition to those allegations of outright *nonrepresentation*, the complaint alleged that "although lawyers were eventually *nominally* appointed for plaintiffs, they were unavailable to their clients"[137] in that,

- "they conferred with them little, if at all";
- they "were often completely unresponsive to their [clients'] urgent inquiries and requests from jail, sometimes for months on end";
- they "waived important rights without consulting them";
- they "ultimately appeared to do little more on [behalf of their clients] than act as conduits for plea offers, some of which purportedly were highly unfavorable";
- they "missed court appearances";
- "when they did appear they were not prepared to proceed, often because they were entirely new to the case, the matters having previously been handled by other similarly unprepared counsel"; and
- "the counsel [so] appointed . . . was seriously conflicted and . . . unqualified."[138]

Given these allegations in the complaint, the court found that "[t]he questions properly raised in this Sixth Amendment-grounded action, we think, go not to whether ineffectiveness has assumed systemic dimensions, but rather to whether the State has met its foundational obligation under *Gideon* to provide legal representation."[139] "These allegations," the court found, "state a claim, not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*."[140]

"The basic, unadorned question presented" by these claims, the court said, was "whether the State has met its obligation to provide counsel, not whether under all the circumstances counsel's performance was inadequate or

135. *Hurrell-Harring*, 930 N.E.2d at 220.
136. *Id.*
137. *Id.*

prejudicial," noting that *Strickland* had held that in the former cases prejudice was presumed.[141]

The court no doubt thought that once it had found a constructive denial claim in the plaintiffs' complaint that did not require a showing of prejudice, it had solved the problem presented by the performance-based *Strickland* claim of actual ineffectiveness that it thought plaintiffs had pled in their pre-trial systemic challenge to an indigent defense system.

The indigent defense litigation that has been conducted since the *Hurrell-Harring*

of Professional Conduct claim, but not a risk-based Sixth Amendment

relief in systemic Sixth Amendment challenges to state indigent defense systems.[153]

III. CLASS CERTIFICATION CONCERNS AFTER *WAL-MART V. DUKES*

Hurrell-Harring was an appeal from an order denying a motion to dismiss.[154] In this opinion the court did not consider the question of whether or not the case could be certified as a class action, but rather simply referred to the plaintiffs' allegations of "broad systemic deficiencies."[155] The case was subsequently brought as a class action, and in a subsequent opinion, an intermediate appellate court reversed a trial court ruling and allowed class certification in this case.[156] The court found the criteria in New York for class action status "must be liberally construed and 'any error, if there is to be one, should be . . . in favor of allowing the class action.'"[157] The court further noted that in order to prove their claim, the plaintiffs would now be "saddled with the *enormous task* of establishing that deprivations of counsel to indigent defendants are not simply isolated occurrences in the case of these 20 plaintiffs, but are a common or routine happenstance in the [five upstate New York] counties."[158]

This favorable class certification ruling was issued on January 6, 2011.[159] A little more than five months later, on June 20, 2011, the United States Supreme Court decided *Wal-Mart v. Dukes*.[160] The days of "liberal construction" of the class action rule, if they ever existed, were coming to an abrupt end. In *Wal-Mart*, the Supreme Court addressed the rigorous analysis required to meet the commands of Rule 23(a)(2) of the Federal Rules of Civil Procedure.[161] "The crux of this case," Justice Scalia wrote for the *Wal-Mart* majority, "is commonality—the rule requiring a plaintiff to show that 'there are questions of law or fact common to the class.'"[162]

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Under *Wal-Mart*, "[c]ommonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'"[163] Their claims must depend on a "common contention" and that common contention "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."[164] The Court emphasized that what matters in class certification is not just a common issue, but "the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation."[165]

The issues in the kind of "systemic" constructive denial claim created by the *Hurrell-Harring* court, we are told by that court, include:

- whether counsel were communicative with their clients;
- whether any such attorney-client relationship may really be said to have existed between many (not all) of the plaintiffs and the putative attorneys;
- whether counsel made virtually no efforts on their nominal clients' behalf; and
- whether counsel waived important rights without authorization from the clients.[166]

It is difficult to conceive of a claim that is more deeply "rooted in the particular circumstances of an individualized case,"[167] and that will inevitably involve a "highly context sensitive inquiry into the adequacy and particular effect of counsel's performance."[168] But that kind of individualized and

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> limitations—such as a severe lack of resources . . . —cause that absence or limitation on representation.[177]

Again, it is difficult to conceive of a test more deeply rooted in the particular circumstances of individual cases. It is extremely unlikely that such a claim could ever meet the "common contention" command of Rule 23(a)(2) in a post-*Wal-Mart* world. Plaintiffs manifestly have not suffered the same injury, their claims do not depend upon a common contention capable of class-wide resolution, the determination of their claims' truth or falsity will not resolve an issue central to the validity of each one of their claims in a single stroke, and their case will not generate common answers apt to drive the resolution of the litigation. Unfortunately, the claim in any constructive denial case, no matter how well formulated, is essentially a "totality of the circumstances" claim, which is simply no longer the stuff of class action litigation after *Wal-Mart*.

Class certification cases decided since *Wal-Mart* make it clear that *Wal-Mart* is a watershed case in class certification law. For instance, in *M.D. ex rel Stukenberg v. Perry*, the Fifth Circuit rejected the district court's pre-*Wal-Mart* reasoning in certifying a class of children in foster care in Texas, finding that the district court did not conduct the "rigorous analysis" required by *Wal-Mart* to certify a class under Rule 23(a)(2),[178] and noting that *Wal-Mart* has "further *hAs(gor)3.4(o)11.4(us)2.6(a)0.*

proceeding.[190] There is no requirement to show actual prejudice.[191] This is what I call a risk-based claim asserting systemic Sixth Amendment violations, as opposed to the performance-based claim of actual ineffectiveness asserted by the plaintiffs in *Luckey* and appropriately rejected by that court.

Stated more succinctly, I argue that the appropriate test for a class action systemic challenge to an indigent defense system is simply this: a significant risk of prejudice due to systemic inability to perform. The *Luckey* court rejected performance-based claims of actual ineffectiveness for pre-trial class

inmate by failing to take reasonable measures to abate the risk.[196] In *Gates*, we amply met our burden of proving deliberate indifference by showing that the risk to health from excessive heat was so obvious that prison officials must have been actually aware of the risks, yet failed to take reasonable measures in response.[197]

The state argued that we had not and could not show a substantial risk of serious harm because there was no proof that any death row inmate at Parchman had ever died or suffered serious injury from excessive heat.[198] And indeed, the record supported that contention. But our medical expert persuasively testified that it was "very likely" that, under the conditions then existing on Death Row, an inmate would die or suffer serious injury from heat stroke or some other heat related illness due to excessive heat in the cells.[199]

Importantly for our purposes here, the Fifth Circuit held that an inmate need not show that death or serious illness from heat exposure has occurred in order to prevail.[200] "It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them."[201] All that the inmates need to show is that the conditions pose a substantial risk of serious harm.[202]

Similarly, here, in order to prevail in a class action case asserting a systemic risk-based Sixth Amendment claim and seeking prospective injunctive relief, plaintiffs need only prove that there is a likelihood (or risk) of substantial and immediate injury to the class. In this risk-based claim, that risk is prejudice due to systematic inability to provide reasonably effective assistance of counsel pursuant to prevailing professional norms to the class. There is no requirement to show actual prejudice.

But will the kind of risk-based claim that I argue for here stand up under critical analysis? We return to Missouri to begin that analysis. As noted above, in *Waters*, the Missouri Supreme Court sustained the public defender's claim for denial of reasonably effective assistance of counsel, but did not adopt the

196. *Id.* at 333 (citing Farmer v. Brennan, 511 U.S. 825, 833–34 (1994)).

197. *Id.* at 335.Id.

risk-based *Luckey* analysis that the public defender urged.[203] The court also sustained the public defender's risk-based Rules of Professional Conduct claim that excessive caseloads produced concurrent conflict under Rule 1.7 ("a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client").[204] The court also found no infirmity in the public defender's duly promulgated rule and protocol for case refusal.[205]

The *Waters* decision was issued on July 31, 2012.[206] The Missouri Public Defender immediately began to refuse additional appointments pursuant to its duly promulgated rule.[207] However, in October 2012, Missouri State Auditor Thomas A. Schweich, in a routine audit of the Missouri Public Defender, rejected the public defender's caseload protocol which had been upheld in *Waters* as part of a presumptively valid rule.[208] The Missouri State Auditor held the rule did not have sufficient support since the rule was based substantially on caseload numbers recommended by the 1973 National Advisory Commission that were not evidence based.[209] The Missouri Public Defender then stopped implementing its case refusal rule and protocol.[210]

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demonstrates some of the most notable findings from the Missouri Project Report[219]:

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professional norms in Louisiana to meet the annual public defense workloads for these Case Types. As of October 31, 2016, the Louisiana public defense system employed approximately 363 FTE public defenders. Therefore, the Delphi method's process indicates the Louisiana public defense system is currently deficient 1,406 FTE attorneys. Alternatively, based on the Delphi

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jail, sometimes for months on end," two of the most egregious of the parade of horribles detailed by the court in *Hurrell-Harring*.[248]

The American Bar Association filed an amicus brief in *Luzerne County* asking the court to recognize a cause of action where public defender workloads and lack of funding prevent indigent defendants from receiving the "actual, non-trivial representation that *Gideon* demands."[249] Actual, non-trivial representation is a long way from reasonably effective assistance of counsel under prevailing professional norms. While this brief may have more accurately described the constructive denial standard than anyone else, that is not the standard that anyone, particularly this class of exclusively poor, primarily black and brown people, deserves.

Let me put it another way. If "ideal" is one hundred and "reasonably effective" is sixty and "constructive denial" is ten and "actual denial" is zero, why would we ever say that our clients are not entitled to any judicial relief until and unless we can prove that the system has deteriorated all the way down to ten? Why wouldn't we say that our clients are entitled to judicial relief once the system dips below sixty? And if we give the courts the choice, which number do you think they will pick?

V. DISMISS AND RELEASE: THE *B*

competently and effectively.[262] When that occurs, the court noted, trial judges should prioritize cases on their dockets in the interest of public safety, so that

Standards for a factual predicate and no principled analytical legal standard. If we are honest with ourselves, we will acknowledge that these claims have been structured by the judiciary, and not by us.

I argue in this article that we now have three viable jurisprudential predicates: a risk-based systemic professional ethics claim, a risk-based systemic conflict-free counsel claim, and a risk-based systemic Sixth Amendment claim. Moreover, we now have a viable factual predicate—reliable data and analytics to analyze the workload of a public defender organization. We can now establish both constitutional and professional ethics systemic indigent defense claims with principled analytic standards that can be met with a focused evidentiary showing using reliable data and analytics.

We might look to the death penalty community of lawyers for guidance. This community of lawyers has produced a remarkable reduction in the number of death penalties actually meted out since the terrible loss in *Gregg v. Georgia*.[270] Indeed, many now believe that the end of this ignominious institution is in sight and that a turning point in those efforts occurred during the period 2000 to 2005 with the Supreme Court victories in *Rompilla v. Beard*,[271] *Wiggins v. Smith*,[272] and *Williams v. Taylor*.[273]

All three cases relied on the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* and the CJS *Standards for the Defense Function*.[274] All three cases imposed heavy financial burdens on the state to adequately fund mitigation investigation and litigation.[275] The result was twofold: first, it would cost the state a great deal more money to litigate death penalty cases; second, once they were adequately funded with the enormous investigation and litigation resources required for adequate mitigation in each and every one of these cases, the death penalty lawyers were successful in a much greater percentage of these cases. It turns out that if we are adequately funded, we can mitigate almost anyone. Prosecutors hate to lose cases. Cities and counties hate to spend huge sums of

270. 428 U.S. 153, 207 (1976).

271. 545 U.S. 374, 390, 393 (2005) (holding failure to examine file on defendant's prior conviction at sentencing phase of capital trial was ineffective assistance of counsel).

272. 539 U.S. 510, 534, 537–38 (2003) (holding inadequate investigation for mitigating evidence constituted ineffective assistance of counsel).

273. 529 U.S. 362, 399 (2000) (holding failure to present mitigating evidence during sentencing constituted ineffective assistance).

274. *Rompilla*, 545 U.S. at 387, n. 7; *Wiggins*, 539 U.S. at 522; *Williams*, 529 U.S. at 396.

275. *See Rompilla*, 545 U.S. at 404 (Kennedy, J., dissenting) (arguing the majority's holding will "saddle States with . . . considerable costs").

money on risky death penalty litigation. We are killing a lot fewer people than we used to.[276]

The litigation strategy that I propose here is similar in many respects to that death penalty litigation strategy. It is based on the remarkable work done by Norman Lefstein[277]