SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

KIMBERLY HURRELL-HARRING, et al.

Plaintiffs,

-against-

THE STATE OF NEW YORK,

Defendant.

Albany Co.
Index No. 8866-07

REPLY MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANT'S
MOTION TO DISMISS

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Dated: May 9, 2008

Preliminary Statement

Defendant State of New York submits this reply memorandum of law in response to plaintiffs' memorandum of law in opposition to defendant's motion to dismiss ("Pl. Mem.").

ARGUMENT

Point I

This civil action may not be maintained because it will interfere with plaintiffs' ongoing criminal proceedings

The heart of plaintiffs' case is their detailed factual allegations that they are receiving ineffective assistance from their assigned counsel (see, e.g., complaint, ¶¶ 46, 62-63, 75-76). If this civil action were permitted to proceed, defendant would be entitled to comprehensively explore through discovery the truth of these factual claims -- claims that could and should be litigated in the criminal proceedings themselves. Because this action would interfere with the criminal proceedings and remedies exist in those proceedings to cure any alleged violation of the right to counsel, this civil action should be dismissed.

Attempting to establish otherwise, plaintiffs argue that they do not allege, nor are they required to prove, that "they have been individually denied effective assistance of counsel requiring reversal of any conviction" (Pl. Mem. at 1). According to plaintiffs, while criminal defendants must show both deficient performance and prejudice when they seek to overturn their convictions, the elements of a violation of the constitutional right to the effective assistance counsel are somehow different

when, as here, the criminal defendants seek instead a court-ordered overhaul of the indigent defense system. When systemic reform is sought, plaintiffs argue, they need only show deficient attorney performance, traceable to the indigent defense system itself, that creates an unacceptably high "risk" that they will be denied their right to counsel (Pl. Mem. at 1-2, 20).

Plaintiffs' theory of the case is wrong (see Point II, infra.), but even if it were valid, this action would still unduly interfere with their pending criminal proceedings. Plaintiffs would still have to establish the truth of their factual allegations about the deficient performance of their counsel in each of their separate pending criminal proceedings. The State would be forced to depose plaintiffs and their counsel about the pending criminal cases, including counsel's strategic decisions, defenses, and the strength and weakness of the cases. For example, defense counsel may have advised a client to plead guilty, or may have taken some other action for sound strategic reasons. Without such discovery, the State would not be able to adequately defend itself, and this Court could not properly evaluate whether and to what extent the plaintiffs are at risk of being deprived of their right to counsel.

Plaintiffs' arguments, thus, all but prove defendant's point. They maintain that the complaint's detailed allegations about the allegedly deficient performance of their attorneys are "simply illustrative" of the systemic deficiencies (Pl. Mem. at 5). They claim that the factual issues relating to the

performance of their attorneys "are not being adjudicated in plaintiffs' criminal proceedings" and that, therefore, adjudication of this case will not interfere with their ongoing proceedings (Pl. Mem. at 21).

Even if plaintiffs' allegations about their individual cases are mere "illustrations," to defend itself defendant obviously would have to fully explore whether they are true. This could not be done without delving into the ongoing criminal proceedings. Even if plaintiffs' assertion that their ineffective assistance claims "are not being adjudicated in plaintiffs' criminal proceedings" is true, it would be so only because plaintiffs have chosen to litigate those claims in this civil action. Plaintiffs do not, and cannot, deny that their ineffective counsel claim could be litigated in their criminal cases.

Indeed, plaintiffs concede that a determination in this action about counsel's poor performance might "one day be useful in a collateral, post-conviction challenge to a criminal conviction" (Pl. Mem. at 21). That is reason enough to dismiss this action.

Nor is there any merit to plaintiffs' suggestion that the answer to the problem of interference with the pending criminal proceedings is "to place reasonable limitations on discovery so as to avoid unnecessary delay in any pending criminal action" (Pl. Mem. at 21). Plaintiffs do not suggest any specific limitations that would not hamstring the State's defense.

Moreover, what this Court might deem reasonable may very well seem unreasonable to the justices presiding over the plaintiffs' criminal proceedings or to the district attorneys. Coordinating discovery among twenty or more criminal proceedings and this action would be an unmanageable nightmare.

Plaintiffs' attempt to distinguish controlling authority is unpersuasive. See Matter of Veloz v. Rothwax, 65 N.Y.2d 902, 904 (1985); Morgenthau v. Erlbaum, 59 N.Y.2d 143, 149-152 (1983); Kelly's Rental, Inc. v. City of New York, 44 N.Y.2d 700, 702 (1978); Matter of Beneke v. Town of Santa Clara, 9 A.D.3d 820, 821 (3d Dep't 2004); Island Swimming Sales, Inc. v. County of Nassau, 88 A.D.2d 990 (2d Dep't 1982). They argue, incorrectly, that these cases merely "stand for the proposition that courts cannot enjoin enforcement of criminal statutes through declaratory judgment or Article 78 proceedings" (P. Mem. at 19). First, plaintiffs overlook that the rationale for these cases is that permitting a criminal defendant to litigate factual questions resolvable in a pending criminal proceeding would interfere with the executive's administration of the criminal law and delay the criminal proceeding itself. As demonstrated, that rationale applies with equal force here. Second, contrary to plaintiffs' assertions, Veloz and the other cases cited above are not limited to challenges to the constitutionality of penal statutes, but include attempts by criminal defendants to collaterally attack rulings in pending criminal cases. See Veloz, 65 N.Y.2d at 904. Criminal cases can, and often do,

result in rulings as to whether counsel was ineffective.

Point II

Plaintiffs' systemic claim is not justiciable

Defendant's opening memorandum (pp. 15-16) establishes that the individual plaintiffs lack standing to litigate whether other individuals in other or future criminal cases might be denied the effective assistance of counsel. See Veloz, 65 N.Y.2d at 904. Plaintiffs do not dispute this assertion, but argue that they have standing to litigate whether they personally face an "unacceptable risk that they are being or will be denied their right to counsel" (Pl. Mem. at 25 n.8).

Plaintiffs ignore, however, that whether they are being denied the right to counsel is an issue that they can and should litigate in their pending criminal cases. If this case goes forward, it is highly likely that the named plaintiffs' criminal proceedings will conclude before any relief could be implemented that would benefit them personally. Thus, the plaintiffs are actually attempting to institute court-ordered reforms on behalf of other, future criminal defendants, on the theory that future defendants face a "unacceptable risk" that their right to counsel might be violated.

It is well established that "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . [but rather] to ensure that criminal defendants receive a fair trial." Strickland v. Washington, 466 U.S. 668, 689 (1984). Yet, improving the overall

quality of the indigent defense system, rather than litigating whether any particular individual's constitutional rights have been violated, is exactly what the plaintiffs are trying to do here under the guise of litigating whether there is a "risk" that the rights of future criminal defendants might be violated.

The problem with plaintiffs' "unacceptable risk" theory is that the risk never materializes, but always fades into the future, just out of reach. According to plaintiffs, New York's decentralized indigent defense system has been dysfunctional and on the verge of collapse for more than forty years (see complaint, ¶ 10) ("Since 1965, the State has abdicated its responsibility to guarantee the right to counsel for indigent persons . . ."). If this were so, plaintiffs presumably could point to an alarmingly high or steadily increasing reversal rate based on denials of the right to counsel. The complaint, however, makes no such allegations. Because this action, at bottom, is a generalized grievance about the overall quality of the indigent defense system, it should be dismissed.

CONCLUSION

The Court should grant defendant's motion to dismiss the complaint.

Dated: May 9, 2008

Respectfully submitted,

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