19-1778

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

FEDERAL DEFENDERS OF NEW YORK, INC., on behalf of itself and its clients detained at the Metropolitan Detention Center-Brooklyn,

Plaintiff-Appellant,

—against—

FEDERAL BUREAU OF PRISONS, WARDEN HERMAN QUAY, in his official capacity,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PLAINTIFF-APPELLANT

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* hereby certifies that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 including affiliate members. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(e), *amicus* certifies that this brief was not written in whole or in part by counsel for any party, and no person or entity other than *amicus* and its counsel has made a monetary contribution to the preparation and submission of this brief. All parties have consented to the filing of this *amicus* brief. *See* Fed. R. App. 29(a)(2).

INTRODUCTION AND SUMMARY OF ARGUMENT

This should have been an easy case. The District Court was not asked to imagine the parade of horribles that might come to pass if the Federal Defenders were denied the ability to bring suit. It was squarely presented by the events of February 2019. For two weeks, the Federal Bureau of Prisons ("BOP") and Warden Herman Quay denied inmates at the Metropolitan Detention Center in Brooklyn ("MDC") access to counsel and confined them to their cells with no light, little to no heat in the dead of winter, and no access to essential medical treatments. The inmates, many of whom were awaiting trial and remained innocent in the eyes of the law, were effectively cut-off from the world and living in unbearable conditions. BOP officials claimed nothing was wrong until the story broke in the national news, and only then did Defendants acknowledge the sub-standard living conditions of MDC's more than 1,600 inmates.[2] And it was only when the Federal Defenders brought suit and obtained a temporary restraining order that the inmates obtained some relief. By any measure, the inmates awaiting trial—nearly half of whom were the Federal Defenders' clients—were denied their right to counsel during this two-week incommunicado period. Yet the District

[2] Annie Correal, *No Heat For Days at a Jail in Brooklyn Where Hundreds of Inmates are Sick and 'Frantic'*, N.Y. Times (Feb. 1, 2019), *available at* https://www.nytimes.com/2019/02/01/nyregion/mdc-brooklyn-jail-heat.html.

Court held that only the inmates themselves could bring suit to remedy the situation.

The decision below is wrong as a matter of law and policy. There is no question that the Federal Defenders have Article III standing to sue. The only question is whether this Court should restrict them from doing so as a prudential matter. Whatever legal framework the Court applies, the answer should be the same: the Federal Defenders have the right to challenge Defendants' denial of attorney-client access.

The attorney-client relationship is a core component of the right to counsel, and it cannot be established and cultivated when attorneys are barred from meeting with their clients. The Federal Defenders have constitutional, statutory, and ethical obligations to provide meaningful legal services to their clients, and their clients have the right to receive the same. As attorneys, and particularly as attorneys uniquely situated to bring special litigation to obtain systemic relief, the Federal Defenders are ideally suited to enforce the right to counsel and should be allowed to do so. The alternative, as the facts of this case show, is untenable. The right to effective assistance of counsel would be a nullity if it could not be enforced under the extreme circumstances presented here, and it would have been a nullity here had the District Court not initially granted relief and ordered Defendants to change

course—on the theory that the Federal Defenders *could* bring suit. *Amicus* respectfully submits that the decision below should be vacated.

ARGUMENT

I. THIS CASE PRESENTS A QUESTION OF PRUDENCE, NOT STANDING

The Federal Defenders commenced the instant action for violations of the Sixth Amendment right to counsel and the Administrative Procedure Act, 5 U.S.C. § 706(2) ("APA"), based on Defendants' restrictions on attorney-client access over a two-week period. The District Court initially granted the Federal Defenders' application for a temporary restraining order and required Defendants to reinstitute legal visitation on the standard schedule. J.A. 158. However, the court subsequently denied the Federal Defenders' motion for a preliminary injunction, finding that only the inmates could bring suit. J.A. 329.

The District Court did not question that the Federal Defenders have Article III standing: they have suffered an injury in fact that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable decision. Rather, the court held that the Federal Defenders lack so-called "prudential standing" under *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 125 (2014). J.A. 329-30. As to the Sixth Amendment claim, the court reasoned that the "right to counsel is personal to the accused and there is no indication that Congress has ever intended to authorize attorneys to bring suit under the right to

counsel clause." J.A. 330-31 & n.3. As to the APA claim, it reasoned that the Federal Defenders had not identified any provision of law (constitutional or statutory) aimed at protecting their interest in access to their clients. J.A. 332-33.

As set forth in the Federal Defenders' brief, the District Court fundamentally erred in its analysis. *Lexmark*'s statutory zone-of-interests test does not apply to the Federal Defenders' Sixth Amendment claim because it is not based on a statute. *See Lexmark*, 572 U.S. at 128; *see also Bank of Am. Corp. v. City of Miami*, 137 S. Ct. 1296, 1302-03 (2017). Rather, it is based on the court's equitable power to enjoin governmental conduct in violation of the Constitution, "subject to express or implied statutory limitations." Br. at 12-29 (citing *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015)). Defendants have not pointed to any provision of law that restricts the courts "virtually unflagging" obligation to hear and decide this case. *Lexmark*, 572 U.S. at 126.[3] To the contrary, constitutional, statutory, and ethical provisions all

[3] The District Court relied on decisions recognizing that only the accused may demand his or her *Miranda* rights, J.A. 331, yet those decisions are based on the fact that "*Miranda* warnings are not themselves rights protected by the Constitution but are instead measures to insure that the suspect's right against compulsory self-incrimination is protected," and there is no basis in *Miranda* to "focus[] on how the police treat an attorney," *Moran v. Burbine*, 475 U.S. 412, 424 (1986). Indeed, the other decision the court cited observed that "the conclusion that the rights guaranteed by the Sixth Amendment are 'personal' to an accused reflects nothing more than the obvious fact that it is he who is on trial and therefore has need of a defense." J.A. 331 (quoting *Faretta v. California*, 422 U.S. 806, 837 (1975) (Burger, J. dissenting)).

support the conclusion that attorneys, like clients, should have the power to enforce the protections afforded to the attorney-client relationship. *See infra* Part II.B.

For that same reason, even if the Court were to conclude that the zone-of-interests test applies to the Sixth Amendment claim, it should conclude that the Federal Defenders are proper plaintiffs. The zone-of-interests test is, like any other non-Article III standing question, ultimately about "prudential limitations" on the exercise of jurisdiction. *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *see also Lexmark*, 572 U.S. at 126 (identifying three "prudential" limitations on the exercise of jurisdiction). As a matter of policy, attorneys, and especially institutional attorney organizations like the Federal Defenders, ought to be able to sue to enjoin systemic and pervasive violations of the right to counsel. The Federal Defenders' interests are closely aligned with those of the inmates, and in particular the pretrial detainees at MDC. The Federal Defenders also have ample incentive and ability to forcefully advocate for the right to counsel.[4]

II. THE FEDERAL DEFENDERS SHOULD HAVE THE ABILITY TO ENFORCE THE RIGHT TO COUNSEL

A. The Effective Assistance of Counsel is Central to the Functioning of Our Adversarial System

The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his

[4] The Federal Defenders fall within the zone of interests for purposes of the APA claim for the same reasons.

defense." U.S. Const. amend. VI. The right to effective assistance of counsel is so firmly established that "no one doubts [its] fundamental character." *Luis v. United States*, 136 S. Ct. 1083, 1088 (2016). Indeed, the accused's right to counsel "is a bedrock principle in our justice system," *Martinez v. Ryan*, 566 U.S. 1, 12 (2012), and "stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.'" *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938). Fundamentally, our adversarial system cannot exist without it. *See id.* at 462-63 (right to counsel "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel"); *see also* Michael J. Howe, *Tomorrow's Massiah: Toward a 'Prosecution Specific' Understanding of the Sixth Amendment Right to Counsel*, 104 Colo. L. Rev. 134, 152 (2004) (right to counsel "has always been understood as . . . the central feature of the American adversarial system, without which the system would be unacceptably skewed in favor of the state").

For this reason, the Supreme Court has recognized that "[o]f all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." *United States v. Cronic*, 466 U.S. 648, 654 (1984) (internal quotations omitted). And, it is

for the same reason that the Supreme Court held in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that indigent criminal defendants are entitled to court-appointed counsel, paid for by the public, giving rise to the Criminal Justice Act of 1964 and the establishment of the Federal Defenders.[5]

It is axiomatic that the right to counsel does not wait to attach until trial. Rather, criminal defendants are entitled to the assistance of counsel from the initiation of adverse criminal proceedings through acquittal or conviction. *Maine v. Moulton*, 474 U.S. 159, 170 (1985); *see also Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (the accused has the right to "the guiding hand of counsel at every step in the proceedings"). In fact, the period from arraignment to trial is "perhaps the most critical period" of criminal proceedings. *United States v. Wade*, 388 U.S. 218, 225 (1967). "[T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *Id.* at 224. After arraignment and before trial, a case is researched, plea negotiations are considered, pretrial motions are filed, and a trial strategy is developed. These stages are so critical that "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the

[5] *See* United States Courts, Defender Services, https://www.uscourts.gov/services-forms/defender-services; Federal Defenders of New York, About Us, https://federaldefendersny.org/about-us/.

trial itself." *Moulton*, 474 U.S. at 170. Recognizing the need for defense counsel at all important junctures of the process, the Supreme Court "has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Cronic*, 466 U.S. at 659 n.25; *see also Luis*, 136 S. Ct. at 1089 (deprivation of the right to counsel is a "structural error" that "so affects the framework within which the trial proceeds that courts may not even ask whether the error harmed the defendant"). Moreover, "[i]n certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance." *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

B. Assistance of Counsel is Impossible Without Attorney-Client Access

Pivotal to the right to counsel is the attorney-client relationship, which is itself constitutionally protected. "Once an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." *Patterson v. Illinois*, 487 U.S. 285, 290 n.3 (1988) (citing *Maine v. Moulton*, 474 U.S. 159, 176 (1985)). Thus, the Supreme Court has held that "there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding

process." *Herring v. New York*, 422 U.S. 853, 857 (1975); *see Geders v. United States*, 425 U.S. 80, 88 (1976) (court's prevention of defendant and attorney from communicating for 17 hours during an overnight recess at trial violated Sixth Amendment). The Circuit has likewise recognized that "the government violates the Sixth Amendment when it intrudes on the attorney-client relationship, preventing defense counsel from participat[ing] fully and fairly in the adversary factfinding process." *United States v. Stein*, 541 F.3d 130, 154 (2d Cir. 2008); *see also Benjamin v. Fraser*, 264 F.3d 175, 185 (2d Cir. 2001) ("unreasonable interference with the accused person's ability to consult counsel is itself an impairment of the right [to counsel]").

Impeding the cultivation of the attorney-client relationship can have severe adverse consequences for the accused. The Supreme Court has referred to the working relationship between lawyer and client as "necessarily close" and has stressed the need for a defendant's confidence in the attorney and the critical importance of trust. *Luis*, 136 S. Ct. at 1089. A similar sentiment has been expressed by the Circuit, which has stressed the need to safeguard the relationship: "The relationship between the attorney and the client is of the utmost importance, and the attorney's representation of the client ought to be protected from undue and improper interference." *Engel v. CBS*, 145 F.3d 499, 504 (2d Cir. 1998), *see also Covino v. Vermont Dep't of Corr.*, 933 F.2d 128, 130 (2d Cir. 1991) (remand to

determine whether detainee's transfer to a more distant jail impaired his Sixth Amendment right to counsel).

Without access to their attorneys, incarcerated defendants are severely handicapped. "[A]ccess to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275 (1942)). In the period following arraignment, a defense attorney needs not only to gather information from the client to develop a coherent and compelling defense at trial, but also to advise the client regarding plea bargaining and to discuss pre-trial motions, all of which necessitates a nuanced understanding of the client's goals and situation. The same is true for the period before sentencing, where zealous representation frequently requires the attorney to delve into the client's past and contact his or her friends and family members to build a mitigation argument. *See, e.g.*, James E. Boren and Alyson Lang, *Using Lessons from the Capital Arena for Sentencing Advocacy in All Cases*, The Champion 42, 43(July 2018) ("Mitigation is telling the story of the client's life so the sentencer can understand how he wound up where he is. The defense attorney cannot tell the client's story until she understands it, which she cannot do until she has taken an adequate social history that goes back at least three generations.").

This is particularly true within the client-centered lawyering model employed by the Federal Defenders that has risen to prominence over the past decades. With its emphasis on paying close attention to the client's concerns and desires, and understanding the context in which the criminal charges arose, it is more important than ever for a defense attorney to build a relationship with the client. *See* Katherine R. Kruse, *Engaged Client-Centered Representation and the Moral Foundations of the Lawyer-Client Relationship*, 39 Hofstra L. Rev. 577 (2011); Monroe H. Freedman, *Client-Centered Lawyering-What it Isn't*, 40 Hofstra L. Rev. 349 (2011); Cynthia G. Lee, Brian J. Ostrom & Matthew Kleiman, *The Measure of Good Lawyering: Evaluating Holistic Defense in Practice*, 78 Albany L. Rev. 1215, 1216 (2014/2015).

A defendant in pretrial detention is especially vulnerable to deprivations that jeopardize the attorney-client relationship. It has long been recognized that pre-trial incarceration in itself, even under the best of circumstances, can hamper the defendant's pre-trial preparation. *Stack v. Boyle*, 342 U.S. 1, 4 (1951). Studies have shown that defendants detained for the entire pretrial period are three times more likely to be incarcerated, and receive longer sentences, as compared to similar defendants who spent at least a portion of the pretrial period outside of jail. Christopher Lowenkamp, Marie VonNostrand & Alexander Holsinger, *Investigating the Impact of Pretrial Detention on Sentencing Outcomes*, Laura and

John Arnold Foundation (November 2013); *see also* Emily Leslie and Nolan Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, Journal of Law and Economics, vol. 60, 529, 530 (August 2017) (pretrial detention increases the probability a felony defendant will be convicted by more than 13 percentage points). As such, "one of the most serious deprivations suffered by a pretrial detainee is the curtailment of his ability to assist in his own defense." *Wolfish v. Levi*, 573 F.2d 118, 133 (2d Cir. 1978). Since "inmates must have a reasonable opportunity to seek and receive the assistance of attorneys," it follows that "[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts [to inmates] are invalid." *Procunier v. Martinez*, 416 U.S. 396, 419 (1974).

C. The Federal Defenders Have Strong Incentives to Protect the Right to Counsel

The accused's constitutional right to effective assistance of counsel imposes a comparable obligation on attorneys, including the Federal Defenders, to provide effective assistance. In *Strickland v. Washington*, the Court held that the Sixth Amendment guarantees effective assistance, which entails the provision of legal services "within the range of competence demanded of attorneys in criminal cases." 466 U.S. 668, 687 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). An attorney who fails to provide effective assistance to his or her

client has failed to discharge his or her constitutional duties. *See, e.g.*, *Buck v. Davis*, 137 S. Ct. 759, 775 (2017); *see also Strickland*, 466 U.S. at 686 ("Counsel . . . can also deprive a defendant of the right to effective assistance, simply by failing to render adequate legal assistance.") (citation and internal quotations omitted).

Under *Strickland*, attorneys' constitutional obligations are defined by reference to their ethical ones. Ineffective assistance is that which falls short of a "reasonable" attorney, based on "[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . ." *Id.* at 688 (citing ABA Standards for Criminal Justice); *see also Rompilla v. Beard*, 545 U.S. 374, 387 (2005) ("We long have referred to these ABA Standards as guides to determining what is reasonable." (brackets and quotations omitted)); *Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (citing ABA standards when evaluating reasonableness of criminal defense counsel's investigation).[6]

[6] *Accord, e.g.*, *Schulz v. Marshal*, 345 F. App'x 627, 628–29 (2d Cir. 2009) (citing ABA Standards for Criminal Justice for the relevant standard of reasonableness for defense counsel's investigation); *Gersten v. Senkowski*, 426 F.3d 588, 609 (2d Cir. 2005) (same); *Roccisano v. Menifee*, 293 F.3d 51, 60 (2d Cir. 2002) (citing *ABA Standards for Criminal Justice Prosecution Function and Defense Function* for the proposition that effective assistance requires advice on "the merits of the government's case, of what plea counsel recommends, and of the likely results of a trial.").

Relevant here, the ABA Criminal Justice Standards for the Defense Function state that "[c]ounsel should interview the client as many times as necessary for effective representation," and that "[d]efense counsel should make every reasonable effort to meet in person with the client." *ABA Standards for the Criminal Defense Function*, Interviewing the Client § 4-3.3(b) (4th ed. 2015). The Standards further advise that "[i]mmediately upon appointment or retention, defense counsel should work to establish a relationship of trust and confidence with each client," and that establishing such a relationship requires defense counsel to "ensure that space is available and adequate for confidential client consultations." *Id.*, Lawyer-Client Relationship § 4-3.1(a) & (e). This obligation is "not diminished by the fact that the client is in custody." *Id.* § 4-3.1(f).[7] Counsel is also required to act with reasonable diligence. *See, e.g.*, Model Rules of Professional Conduct Rule 1.3 (Am. Bar Ass'n 2002) ("A lawyer shall act with reasonable diligence and promptness in representing a client."); Restatement (Third) of the Law Governing Lawyers § 16(2).[8]

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[7] Although the ABA Standards for the Defense Function "are intended to provide guidance for the professional conduct and performance of defense counsel," *see id.*, General Standards § 4-1.1(b), they nevertheless recognize the government's crucial role in facilitating the provision of counsel to detained defendants: "All detention or imprisonment institutions should provide adequate facilities for private, unmonitored meetings between defense counsel and an accused." *Id.*, Access to Defense Counsel § 4-2.2(c).

[8] *Accord, e.g.*, Am. Bar Ass'n, *Variations of the ABA Model Rules of Professional*

Given the ABA Standards' clear mandate that defense attorneys meet with incarcerated clients, it is unsurprising that state courts regularly find the failure to meet the client evidences an attorney's failure to act with reasonable diligence as required by ethical rules. *See, e.g.*, *Bd. of Prof'l Responsibility v. Crawford-Fink*, 430 P.3d 323, 332 (Wyo. 2018) (approving Report and Recommendation of the Board of Professional Responsibility finding that attorney "failed to comply with her duty to exercise reasonable diligence" under Wyoming Rule of Professional Conduct 1.3 in part because she "failed to meet with Client in advance of the default hearing in order to inform her of what information would be required for the hearing"); *Atty. Griev. Comm'n v. Smith*, 177 A.3d 640, 662 (Md. Ct. App. 2018) (finding attorney violated Maryland Rule of Professional Conduct 1.3, stating "Although Respondent, as counsel, has the right to determine how to accomplish the goal of obtaining post-conviction relief, he still has an obligation to meet with his client . . ."); *In re Member of the Bar of the Supreme Court of Del.*, 999 A.2d 853, 854 (Del. 2010) (Board of Professional Responsibility held after hearing that attorney violated Delaware Lawyers Rules of Professional Conduct

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Conduct, Rule 1.3: Diligence, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_3.pdf (last visited Aug. 15, 2019) (showing each state's ethical rule imposing a duty of diligence on attorneys).

requiring "reasonable diligence" by, *inter alia*, "failing to . . . meet with" client).[9] Attorneys thus have compelling constitutional and ethical incentives to protect the right to counsel and, specifically, develop the attorney-client relationship.

The Federal Defenders, in particular, have strong incentives to do so. In addition to their constitutional and ethical obligations, the Federal Defenders have a statutory mandate under the Criminal Justice Act to provide adequate representation of indigent defendants. *See* 18 U.S.C. § 3006A. As noted, the Federal Defenders would not even exist absent the right to counsel for indigent defendants recognized in *Gideon*. Indeed, today nearly 90% of federal criminal defendants are aided by lawyers, like the Federal Defenders, paid under the Criminal Justice Act.[10] As such, the Federal Defenders as a public-defender

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[9] *See also In re Pattison*, 159 P.3d 185, 188 (Kan. 2007) (upholding disciplinary panel finding attorney "failed to provide diligent representation to [client]" under Kansas Rule of Professional Conduct 1.3 when, *inter alia*, "he failed to timely meet with and prepare for trial."); *In re Kremkoski*, 715 N.W.2d 594, 597 (Wis. 2006) (state Office of Lawyer Regulation instituted misconduct proceedings for, *inter alia*, "failing to meet with his client to prepare for trial," which contributed to a "fail[ure] to act with reasonable diligence" in violation of Wisconsin Rule of Professional Conduct 1.3); *In re Berry*, 50 P.3d 20, 29 (Kan. 2002) (finding attorney "failed to act with reasonable diligence" under Kansas Rule of Professional Conduct 1.3 when, *inter alia*, "he failed to meet with his client"); *Atty. Griev. Comm'n v. Monfried*, 794 A.2d 92, 99 (Md. Ct. App. 2002) (Affirming finding that attorney violated Maryland Rule of Professional Conduct 1.3 requiring reasonable diligence when he "failed to 1) meet with his client . . .").

[10] Criminal Justice Act: At 50 Years, a Landmark in the Right to Counsel (Aug. 20, 2014), *available at* https://www.uscourts.gov/news/2014/08/20/criminal-justice-act-50-years-landmark-right-counsel.

institution have an interest in ensuring that the right to counsel is protected. *See, e.g.*, Ozan O. Varol, *Structural Rights*, 105 Geo. L.J. 1001, 1027, 1031 (2017) (arguing that institutions built on individual constitutional rights, including public defenders, have "strong incentives to reinforce the right").

D. The Federal Defenders Are an Ideal Candidate for Enforcing the Right to Counsel

In addition to their incentives to protect the right to counsel, the Federal Defenders are well situated to act—and to do so by seeking systemic relief. Organizations like the Federal Defenders have been a consistent and effective protector of the right to counsel, using their institutional knowledge and resources as a powerful weapon to level the playing field against government.

In *Hurrell-Harring v. State of New York*, for instance, the New York Civil Liberties Union assisted individual criminal defendants in obtaining a settlement that provided for sweeping reforms to New York's public defender system across five counties, requiring among other things that counsel be present at every defendant's arraignment or initial appearance, setting workload standards to ensure counsel have the time and resources to provide effective representation, and requiring New York to substantially increase its expenditures. *See*, NACDL Criminal Defense Issues, *New York State Settles Public Defense Challenge*

(2018).[11] In reinstating the plaintiffs' complaint, the New York Court of Appeals observed that these types of "[c]ollateral preconviction claims seeking prospective relief for absolute, core denials of the right to the assistance of counsel cannot be understood to be incompatible with *Strickland*. These are not the sort of contextually sensitive claims that are typically involved when ineffectiveness is alleged." *Hurrell-Harring v State of New York*, 15 N.Y.3d 8, 23 (2010). The Court noted that the Sixth Amendment challenge did not concern "the personal faillings and poor professional decisions of individual attorneys," but that "the basic constitutional mandate for the provision of counsel to indigent defendants at all critical stages [was] at risk of being left unmet because of systemic conditions." *Id.* at 25.

Similarly, in *Wilbur v. City of Mt. Vernon*, the federal court found, at the urging of individuals represented by the American Civil Liberties Union, that the public defense systems of Mt. Vernon and Burlington, Washington deprived indigent persons facing misdemeanor charges of the right to counsel. 989 F. Supp. 2d 1122 (W.D. Wash. 2013). More recently, in a suit prosecuted by the ACLU of Pennsylvania, the Pennsylvania Supreme Court likewise recognized a right of indigent defendants to seek prospective relief when insufficient county funding of

[11] *Available at* https://www.nacdl.org/criminaldefense.aspx?id=20192&terms=hurrell-harring

public defense services leads to systemic denial of counsel. *Kuren v. Luzerne Cty.*, 637 Pa. 33 (2016). *Amicus* has likewise participated in litigation to enforce the right to counsel. *See, e.g.*, *Turner v. United States*, No. 15-6060 (6th Cir. 2017) (in support of defendant's claim for ineffective assistance of counsel);[12] *Luis v. United States*, No. 14-419 (U.S. Sup. Ct.) (2015) (in support of right to counsel of choice).

The District Court's alternative—that only the accused may seek to vindicate the right to counsel—is not workable. Ineffective assistance of counsel claims are post-conviction and individual in nature, making them incapable of providing systemic relief, even if the defendant can meet the high standard for proving after-the-fact that counsel failed in his or her constitutional duties. *See Strickland*, 466 U.S. at 710 (Marshall, J. dissenting); *see also Faretta v. California*, 422 U.S. 806, 812 n.8 (1975) (representation must be deficient as to render trial "a farce or sham"). *Contra Luckey v. Harris*, 860 F.2d 1012, 1016-17 (11th Cir. 1988) (recognizing presumptions in attorneys' favor on post-conviction ineffective assistance claims do not apply to claims seeking prospective relief). More deeply, effective challenges to systemic issues—like the denial of attorney-client access—will be seriously hindered if the only possible plaintiffs are indigent criminal defendants who will typically lack the legal knowledge necessary to bring suit themselves and, by definition, lack the financial resources to hire effective counsel.

[12] *Available at* https://www.nacdl.org/Turner_Overton/.

Moreover, criminal defendants may be limited from vindicating the right to counsel because they are deprived of access to counsel and living in conditions that make the idea of researching and filing legal claims impractical if not impossible. As this case shows, it would be nonsensical to say that only the criminal defendants who themselves have been denied effective advice of counsel can bring suit to enforce the right to counsel. That is the motivating principle behind right-to-counsel jurisprudence: the typical person, faced with the overwhelming power of the state, and lacking in legal acumen, is in no position to single-handedly fight back.

Indeed, it was not until the Federal Defenders were able to sue—on a standing theory the District Court subsequently *repudiated*—that the inmates at MDC obtained some form of relief. Unsurprisingly, no criminal defendant detained at MDC, confined to their cells and without light, heat, and medication on some of the coldest days of the year, had come forward to litigate over their conditions. Had the District Court found in the first instance that only the inmates could sue and denied the Federal Defendants' application for a temporary restraining order, there is no way of knowing how long the inmates at MDC would have been in their deplorable and isolated situation. That cannot be the law, and there is no reason for it to be. Nothing in our laws says that a lawyer is only a passive bystander to his or her client's being rendered incommunicado for weeks

on end. As a matter of law and policy, this Court should hold that the Federal Defenders have the right to bring suit to enforce the Sixth Amendment right to counsel and related provisions under the APA.

CONCLUSION

For the foregoing reasons, *amicus* respectfully urge the Court to reverse the decision below.

Respectfully submitted,

Dated: August 21, 2019

By: */s/ Harry Sandick*

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