No. 09-10715

In The Supreme Court of the United States

JAMIE RYAN WEIS,

Petitioner,

vs.

STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

BRIEF OF AMICI NORMAN S. FLETCHER, CHARLES R. MORGAN, EMMET J. BONDURANT, C. WILSON DUBOSE, DONALD FREDERICK OLIVER, E. WYCLIFFE ORR, SR. & EDWARD HINE, JR. IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

CONSTITUTION, STATUTES AND RULES

MISCELLANEOUS

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF AMICI[1]

Amici are distinguished members of the Georgia bar, some of whom have held high positions in the state judiciary and others of whom have served in the Georgia Legislature. All have long participated in efforts to ensure that Georgia complies with its obligations to make available the right to counsel as required by *Gideon v. Wainwright,* 373 U.S. 1 (1963). Having participated in both the creation and implementation of Georgia's current system for the provision of indigent defense services to defendants such as Petitioner Weis, the amici feel particularly well-suited to comment on the competing views arising from the lower court opinions here in assigning fault for the dual issues of counsel-choice and pre-trial delay. The majority and dissenting opinions in the Georgia Supreme Court present drastically different perspectives on these questions. The amici have direct, and ongoing participation in the very system at the heart of this dispute; we feel compelled to set the record straight.

[1] Pursuant to Rule 37.2 of the Rules of this Court, the parties were timely notified and have consented to the filing of this brief. The letters granting consent are filed herein. This brief was not written in whole or in part by counsel for any party, and no person or entity other than Amici Curiae and their counsel has made a monetary contribution to the preparation and submission of this brief.

AMICI CURIAE

Norman S. Fletcher served as Chief Justice of the Georgia Supreme Court from 2001 to 2005, and as associate justice from 1989. As Chief Justice, he received the report of a commission created by his predecessor regarding indigent defense in Georgia and called upon the legislature to adopt its recommendations in order to improve a clearly recognized problem. The Georgia Indigent Defense Act of 2003 sought such an overhaul of the state's indigent defense system.

Charles R. Morgan is former general counsel of BellSouth Corporation and currently Special Counsel at FTI Consulting. Mr. Morgan served as chair of the Chief Justice's Commission on Indigent Defense, appointed by Georgia Chief Justice Robert Benham in 2000. After holding hearings, and commissioning a report on the state of indigent defense in Georgia, the Commission, made up of lawyers, judges, legislators, business people and law professors, made its final recommendations in 2002. Many of its major recommendations were enacted as part of the Indigent Defense Act of 2003.

Emmet J. Bondurant is an attorney and principal partner in the firm of Bondurant, Mixson & Elmore LLP. Until 2007, Mr. Bondurant served as the first chair of the Georgia Public Defender Standards Council, an entity created by the Indigent Defense Act of 2003. Ever since *Gideon v. Wainwright* was announced, Mr. Bondurant has worked on a number

of State Bar of Georgia initiatives to improve indigent defense.

C. Wilson DuBose is an attorney and principal partner in the firm of DuBose Massey Bair & Evans LLC. Mr. DuBose served as vice chair of the Georgia Public Defender Standards Council from 2003 to 2007, and was its chair from 2007 to 2009. He also served on the Chief Justice's Commission on Indigent Defense, and was chair of the State Bar of Georgia's Indigent Defense Committee from 1997 to 2008.

Donald Frederick Oliver is the county attorney of Walker County, Georgia, and current member of the Georgia Public Defender Standards Council. He has been on the Council since 2007 and is a former Georgia legislator.

E. Wycliffe Orr, Sr. is an attorney and principal partner in the firm of Orr Brown Johnson LLP, a former member of the Georgia legislature, and current member of the Georgia Public Defender Standards Council. He has served on the Council since its creation in 2003.

Edward Hine Jr. is an attorney, a former Georgia legislator, and former member of the Georgia Public Defender Standards Council, serving from 2003 to 2007.

STATEMENT OF THE CASE

This case presents profoundly important questions that reach to the core of a state's obligation to first provide for, and then not interfere with, an indigent accused's right to counsel where the stakes could not be higher – when the State has announced it will seek the death penalty. A deeply divided Georgia Supreme Court disregarded compelling evidence that the very long pretrial delay in this case was caused by a breakdown in Georgia's public defender system, and instead held that Petitioner, an indigent, and his appointed counsel, were responsible for that delay. The three-justice dissent concluded that the state's "unwillingness to meet its constitutional obligation to provide Weis with legal counsel and the funds necessary for a full investigation," was the chief cause of the delay. *Weis v. State*, ___ S.E.2d ___, 2010 WL 1077418 at * 12 (Ga. Mar. 25, 2010) (Thompson, J., dissenting) (opinion originally issued Mar. 25, 2010, revised Apr. 12, 2010).

We have elected to file this brief in support of Petitioner because we know from our collective work during the past decade that it was the Legislature's deliberate choice to not adequately fund indigent defense, and not the actions of either Weis or his counsel, that led directly to the delays in this case. Petitioner Weis can no more be faulted either for the trial court's abrupt, prosecutor-driven removal of his longstanding appointed counsel, nor for the delay occasioned by a complete lack of funding for defense services in his case for over two years, than can the

hundreds of indigent defendants across the State of Georgia who are facing the effects of a systemic crisis, which has left scores of persons completely without counsel for months or years while facing serious felony and even capital charges.

ARGUMENT

I. A Brief History of Indigent Defense in Georgia

On December 27, 2000, Georgia Supreme Court Chief Justice Robert Benham established the Chief Justice's Commission on Indigent Defense to "study the status of indigent defense in Georgia, to develop a strategic plan and to set a timetable for its implementation."[2]

At the time, Georgia relied upon each of its 159 counties to provide legal representation to poor people accused of crimes. Results varied greatly from county to county. Some counties relied primarily on low-bid contract attorneys; others appointed willing lawyers from the local bar, and paid them far below prevailing rates.[3] In still other counties, lawyers were

[2] Executive Summary, Report of Chief Justice's Commission on Indigent Defense, at 1 (Dec. 2002), *available at* http://www.georgiacourts.org/aoc/press/idc/idc.html (citing Georgia Supreme Court order of December 27, 2000).

[3] The Spangenberg Group, Status of Indigent Defense in Georgia: A Study for the Chief Justice's Commission on Indigent

(Continued on following page)

conscripted to handle criminal cases through a system of mandatory appointments: every member of the bar, even a tax lawyer or a real estate lawyer, was compelled to accept an indigent criminal case when his or her turn came.[4] Some lawyers resisted. A real estate lawyer in Dahlonega, Georgia filed a motion to prevent his being assigned to such cases, noting that his practice was limited to title searches and real estate closings and that he was not competent to represent people in criminal cases.[5] Only 21 counties employed public defender offices composed of full-time, salaried attorneys.[6]

In 2002, the Spangenberg Group, a nationally-reputed consulting agency on the subject of indigent defense systems, concluded in a report requested by the Chief Justice's Commission on Indigent Defense that the primary problems underlying Georgia's troubled system were "insufficient funding," "lack of program oversight" and a "a complete absence of

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Defense ("Spangenberg Group Report"), at 35-37 (Dec. 12, 2002), *available at* http://www.georgiacourts.org/index.php?option=com_content&view=article&id=144&Itemid=28; *see also* Michael B. Shapiro, Indigent Defense in Georgia: A Report to the Blue Ribbon Commission on Indigent Defense, at 35 (Sept. 19, 2001).

[4] Spangenberg Group Report, at 31-32.

[5] Bill Rankin, *Legal 'Russian roulette': Attorney feels he's out of his element in indigent defense*, ATLANTA J.-CONST., Jul. 13, 2002, at A6.

[6] Shapiro, Indigent Defense in Georgia, *supra* note 3, at 35.

uniformity in the administration of and quality of indigent defense services" in many Georgia counties.[7]

Based on these findings, the Commission recommended that Georgia implement a state-wide public defender system organized by judicial circuit rather than by county, with funding for the system to be appropriated by the state legislature. In 2003, Georgia took a major step when the legislature passed a bill to create such a system; that system began operation on January 1, 2005.[8]

The new legislation – the Georgia Indigent Defense Act of 2003[9] – provided for the creation of an independent state agency, the Georgia Public Defender Standards Council ("the Council") that would be "responsible for assuring that adequate and effective legal representation is provided, independently of political considerations or private interests, to indigent persons who are entitled to representation under this chapter."[10] Except in cases where a conflict arises and except for those counties that have opted out of the statewide system, the administration of actual indigent defense services is now carried out by public defender offices, organized by judicial circuit, and, for all death penalty cases, by the Georgia

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[7] Spangenberg Group Report at ii.

[8] *See* GA. CODE ANN. §§ 17-12-1 to 17-12-13, and §§ 17-12-20 to 17-12-37 (West 2010).

[9] GA. CODE ANN. § 17-12-1 (West 2010).

[10] *Id.*

Capital Defender Office, which was also created by the 2003 Act.[11]

Unfortunately, the promise of the 2003 legislation has never been fulfilled. The State has never adequately funded the state-wide system, and two of the main problems identified in 2002 – lack of oversight and insufficient funding – still prevent indigent defendants from receiving the representation the Constitution requires. In its 2004 session, the legislature adopted various court fees to raise revenue to pay for the public defender system.[12] Although the sole stated purpose of this legislation was to fund indigent defense, the legislature has repeatedly diverted collected funds away from indigent defense to other state programs.[13] In the past four years, the fund has generated more than $23 million in court filing fees and fines that have not been appropriated to indigent defense.[14]

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[11] *See* GA. CODE ANN. §§ 17-12-22, 17-12-23, 17-12-36 (West 2010).

[12] *See* H.B. 1EX, 2004 Gen. Assem. Extra. Sess. (2004).

[13] *See* Order at 35, n. 38, *Flournoy v. State*, No. 2009CV178947, Fulton County (Ga. Sup. Ct. Feb. 23, 2010) ("Flournoy Order").

[14] *Id.*; *see also* State Bar of Georgia, Indigent Defense Principles Revisited, at 3, *available at* http://gabar.org/public/pdf/LEG/Revised%20Principles%20Indigent%20Defense.pdf; C. Wilson DuBose and E. Wycliffe Orr, *Indigent Defense: System is unfairly under attack*, ATLANTA J.-CONST., Jun. 16, 2008, at A9.

Georgia's indigent defense system has been crippled by this refusal to fund the system appropriately. That story has been well documented through the state in media accounts, legislative reports, correspondence between coordinate branches of government, civil lawsuits, and pre-trial and trial records in criminal cases of every variety and magnitude.

II. The Impact of Recent Funding Cuts on Georgia's Indigent Defendants

This lack of sufficient funding for the proper defense of indigents has exacerbated the flaws in a system that has been failing poor people in Georgia for decades. We provide below an overview of specific ways in which the Georgia legislature's stubborn refusal to provide adequate funding for indigent defense has manifested itself since passage of the 2003 Act.

A. The Denial of the Right to Counsel

i. The Denial of Necessary Resources in Capital Cases

In the years leading up to enactment of the Indigent Defense Act of 2003, Georgia was notorious for the deficient representation it provided to indigent capital defendants. Examples included: co-counsel presenting conflicting defenses for the same client, lawyers referring to their own clients by racial slurs, counsel distancing themselves from their clients by

making it clear to the jury they were court-appointed and representing the client only because they had to, and counsel cross-examining a witness whose direct testimony counsel had missed because he was parking his car.[15] In far too many cases, lawyers representing capital defendants failed to conduct any investigation into their cases and lacked basic knowledge and experience in criminal law.[16]

The Indigent Defense Act of 2003 wisely created a capital defender office to correct and prevent such egregious conduct. The Georgia Capital Defender Office ("GCD") started with a budget of nearly $7.5 million and a staff that included a mix of experienced death penalty attorneys and outstanding young lawyers, as well as investigators and mitigation specialists.[17] Unfortunately, the highly publicized Brian Nichols case, which required enormous expenditures from both the prosecution and defense, and arose less than three months after the system commenced operation, immediately began draining a large and disproportionate amount of funds from the GCD's budget.[18] Instead of providing additional funds

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[15] Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not For the Worst Crime But For the Worst Lawyer*, 103 YALE L. J. 1835, 1843, 1841 n.45 (1994).

[16] *See id.* at 1839, 1841 n.45.

[17] Reply Brief for Appellant at 7 n.9, *Weis v. State*, No. S09A1951 (Ga. Oct. 20, 2009) ("Weis Reply Brief").

[18] Brian Nichols was charged with capital murder for killing a judge, deputy, court reporter, and federal agent in 2005. The

(Continued on following page)

for the costs generated by this extraordinary case, the legislature cut the GCD's budget substantially.[19]

Today, grossly inadequate state funding is undermining the representation of capital defendants who depend upon appointed private counsel as well as those represented by the GCD. Twelve defendants currently facing the death penalty in Georgia are represented by private lawyers. The budget allowed for those cases falls far short of what will likely be necessary to provide minimally adequate representation.[20] The remaining defendants are represented by GCD itself, where mounting caseloads and insufficient resources fundamentally compromise capital defendants' right to a fair trial. There is currently only one attorney charged with handling all of the capital appeals across the State.

This Court recognized long ago that the most critical time in a criminal case is "from the time of arraignment until the beginning of . . . trial, when consultation, thorough-going investigation and

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Council paid $2.3 million of the cost for Nichols' defense, which sapped its ability to fund other programs. Bill Rankin, *Reversal on new legal aid system? Responsibility for some indigent defense could return to counties*, ATLANTA J.-CONST., Apr. 6, 2010, at A1.

[19] Bill Rankin and Cameron McWhirter, *Nichols trial leaves deep footprint on state courts*, ATLANTA J.-CONST., Dec. 12, 2008, at A8.

[20] Weis Brief at 45 n.53, *Weis v. State*, No. S09A1951 (Ga. Sept. 2, 2009) ("Weis Brief") (citing testimony of Mack Crawford at Ex Parte Hearing in Pike County Superior Court, July 8, 2009, Tr. 13-19).

preparation [are] vitally important."[21] Yet in Georgia, several capital defendants, including Petitioner, have been deprived of funds for counsel, investigative assistance and expert assistance for years prior to their capital murder trials.

One of those defendants is Khanh Dinh Phan. Following his arrest on a murder charge in March 2005, GCD appointed two attorneys to represent him in his capital murder trial in Gwinnett County.[22] Five years later, Mr. Phan has yet to proceed to trial because "the cash-strapped state public defender system has been unable to pay for attorneys fees, investigators or expert witnesses."[23] The District Attorney prosecuting the case has acknowledged that funding had not been provided, that there may not be a "realistic possibility" that such funding will be provided, and that the state's indigent defense system is "fatally flawed."[24]

Another similarly-situated defendant, Stacey Sims, was arrested in 2005 in Tift County, and the District Attorney announced his intention to seek the

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[21] *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

[22] Bill Rankin, *5-year delay kills case, suspect's lawyers argue: No money, no trial; high court asked to toss murder charge*, ATLANTA J.-CONST, Mar. 9, 2010, at B8.

[23] *Id.*

[24] *Id.*

death penalty.[25] Two lawyers were appointed to represent Mr. Sims at trial but moved to withdraw a year and a half later because they had not been paid.[26] They were allowed to withdraw and two new lawyers were appointed to represent Mr. Sims. But after another eighteen months had passed, the replacement attorneys moved to withdraw because they also had not been paid.[27] They, too, were allowed to withdraw. For all practical purposes, Mr. Sims has been without counsel for years while he has been facing the death penalty.

Finally there is Petitioner Weis himself, who was accused of capital murder in February 2006 in Pike County.[28] For more than two years, the state provided literally no funding for his defense.[29] Mr. Weis is

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[25] Bill Rankin, *Can Georgia afford the death penalty? State public defender system's lack of funds held up trial for 2 years*, ATLANTA J.-CONST., Nov. 11, 2009, at A1.

[26] Weis Brief at 45 n.54 (citing Hearing in *Sims v. State*, No. 2006-CR-91, Tift County (Ga. Sup. Ct. Dec. 22, 2008)).

[27] *Id.*

[28] Bill Rankin, *Can Georgia afford the death penalty?, supra,* note 25.

[29] Weis was arrested on February 2, 2006. However, "[t]he prosecution took an inordinate amount of time to decide whether to seek the death penalty." *Weis v. State*, ___ S.E.2d ___, 2010 WL 1077418, at *9 (Ga. Mar. 25, 2010) (Thompson, J., dissenting). It did not file its notice of intent to seek death until August 2006, and death-qualified counsel did not enter their appearance until October 12, 2006. *Id.* at *1, *7 (Thompson, J., dissenting). Funding ran out the following March and Weis was without funds for his representation until July 2009. *Id.* at *2.

mentally ill. He has been prescribed high doses of antipsychotic medications and has tried to commit suicide three times. If there were ever a person desperately in need of counsel as contemplated by *Powell v. Alabama*, it would be Mr. Weis. Yet, the state has denied him legal representation during much of the critical pre-trial period.[30]

Viewed against this backdrop of overall crisis in indigent defense funding, Mr. Weis's arguments that his speedy trial and right to counsel rights have been violated are demonstrably accurate. The bare majority's holding below, blaming Mr. Weis and his counsel for the long delay, flies in the face of reality. Under the majority's reasoning, the fault lay with Mr. Weis because he "refused the assistance of substitute counsel who were appointed to solve the State's budget impasse."[31] But this conclusion fails to take into account that: (1) Mr. Weis had already developed a relationship of trust and confidence with his original appointed counsel; (2) those counsel were removed at the request of the District Attorney, who proposed, by name, the public defenders who should represent Mr. Weis instead; and (3) those public defenders, by their own account, lacked the resources, time and expertise necessary to handle a capital case. When the Council ultimately promised to provide

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[30] Rankin, *Can Georgia afford the death penalty?*, *supra* note 25.

[31] *Weis*, 2010 WL 1077418, at *10 (Thompson, J., dissenting).

funds to reinstate Mr. Weis's original trial counsel, "it did so on the eve of trial and at a steep discount, leaving Weis with little time and no real ability to mount a defense."[32] Mr. Weis's case exemplifies a "breakdown in the public defender system" as contemplated by this Court's speedy trial analysis.[33]

To place blame, as the majority of the Georgia Supreme Court did, on Petitioner Weis for his efforts to retain his longstanding appointed counsel and ensure that such counsel are provided basic and necessary resources, rather than on the system that placed him in this intolerable position, is to ignore the truth. It is this systemic backdrop against which we urge the Court to review Mr. Weis's case.

For amici, it is extremely disturbing to witness what has happened to the capital defense system in Georgia. Under current practices, it is perfectly acceptable to deny funding for a capital defendant's representation for a substantial period of time, often years. During these delays, when the prosecution steadily builds its case for conviction and death, no defense attorney is regularly consulting with the accused, talking to witnesses, investigating guilt and mitigation issues, consulting with experts, or conducting the myriad tasks required in such complex and difficult cases. In the absence of a timely-appointed and adequately-resourced defense

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[32] *Id.* at *11 (Thompson, J., dissenting).

[33] *See Vermont v. Brillon*, 129 S.Ct. 1283, 1292 (2009).

lawyer, witnesses may move or pass away and leads may go cold, making it impossible for later-appointed or later-funded counsel to recoup lost time and opportunities. Even though some funds, usually not nearly enough, may eventually be found as the date of trial approaches, the damage from lost time and opportunity has already been done, often making a fair trial impossible.

ii. Non-Capital Defendants Are Being Harmed as Well

The grossly inadequate funding for indigent defense in Georgia is not limited to capital cases. The impact of drastic cuts made to the budget for conflict cases was witnessed recently in the Northern Judicial Circuit, a five-county region in northeast Georgia. In this circuit, as throughout most of the state, indigent defense is provided by a circuit public defender office. In multiple-defendant conflict cases, the public defender requests that a separate conflict attorney be appointed to represent each additional defendant. In July 2008, however, the contracts securing conflict attorneys to take on such cases were not renewed and the Council slashed the budget for conflicts in the Northern Circuit by over two thirds, from nearly $130,000 to approximately $37,000 for the 2009 fiscal year.[34]

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[34] Bill Rankin, *Lawyerless defendants file lawsuit: Funds or freedom*, ATLANTA J.-CONST., Apr. 7, 2009, at B1.

In the wake of these cuts, two of the three conflict attorneys in the Circuit successfully moved to withdraw.[35] The third attorney did not withdraw but was not paid and thereafter stopped working on his appointed cases.[36] Consequently, hundreds of people with pending felony charges in conflict cases pre-trial were left without lawyers.[37] For many of these defendants, their incarceration while awaiting the assignment of lawyers caused the loss of a job or a home, or the inability to attend the funeral of a loved one, to pursue needed follow-up on previously administered medical tests, or to receive necessary medications.[38]

Although hundreds of felony defendants were left without legal representation, three Superior Court judges, with the acquiescence of the circuit District Attorney, processed the cases of people who were without lawyers, detaining some in jail and calling upon many of them to enter pleas, in clear violation of the right to counsel.[39] It eventually required a class-action lawsuit filed on behalf of the hundreds of unrepresented defendants to force the Council to procure additional conflict lawyers in the circuit who

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[35] Complaint at 15-16, *Cantwell v. Crawford*, No. 09EV275M, Elbert County (Ga.) Sup. Ct., filed Apr. 7, 2009 ("Cantwell Complaint").

[36] *Id.* at 16.

[37] *Id.*

[38] *Id.* at 16-17.

[39] *Id.* at 18; *White v. Maryland*, 373 U.S. 59, 59 (1963).

agreed to handle a fixed number of cases for a flat fee.[40] Related litigation is ongoing and the problems in the Northern Circuit have yet to reach resolution.

These same problems exist elsewhere. In Tift County, the Council sharply reduced the budget allowed for contract attorneys from $66,000 to $22,050 in fiscal year 2009,[41] causing lawyers to withdraw from their assigned cases and defendants to go without counsel for almost a year.

Similarly, nearly 200 individuals across the state of Georgia have recently filed suit, *Flournoy v. State of Georgia*, and alleged they have been denied their fundamental constitutional right to the assistance of conflict-free counsel on their motions for new trial and on appeal.[42] The Council's Appellate Division is the entity responsible for providing representation to all such individuals throughout the State.[43] However, as of December 2008, that Division had been assigned

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[40] *See* Merritt Melancon, *Northern Judicial Circuit legal battle not over*, ATHENS BANNER-HERALD, Sept. 4, 2009, *available at* http://www.onlineathens.com/stories/090409/new_489483886.shtml.

[41] Comparing contract attorneys' contracts executed for the Tifton Judicial Circuit in fiscal year 2008 with the conflict budget allowed for fiscal year 2009 (all documents received from an Open Records Act request served on the Georgia Public Defender Standards Council in October 2008).

[42] Complaint, *Flournoy v. State*, No. 2009CV178947, Fulton County (Ga.) Super. Ct., filed Dec. 15, 2009 ("Flournoy Complaint").

[43] *See Bynum v. State*, 658 S.E.2d 196, 197-98 (Ga. Ct. App. 2008); *see also* GA. CODE ANN. § 17-12-1 et seq. (West 2010).

249 cases and was unable to find lawyers to represent 75 indigent defendants who had been seeking to file motions for new trial and appeals. This situation arose in part because, as the result of gross under-funding, the Division has been staffed by only two full-time attorneys and one part-time attorney.

In November 2009, just before the complaint in *Flournoy* was filed, the Appellate Division reported a total number of 476 cases on its docket and was unable to assign counsel to 187 persons. Some of these clients, most of whom are incarcerated, had been waiting for counsel more than three years, and many more had been waiting at least a year.[44] By January of 2010, the Appellate Division's overall caseload had reached 515, with 191 individuals left unrepresented.[45]

B. Excessive Cost Cutting Trumps Necessary Fairness Standards

i. Use of Unfair Flat-Fee Contracts Is Rising

Although Georgia's indigent defense fund has continually collected far more revenue than the legislature has appropriated to the Council, the

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[44] Flournoy Complaint at 33; Bill Rankin, *Funding short, felons wait years for justice: Suit challenges lack of money for appeals*, ATLANTA J.-CONST., Dec. 16, 2009, at B4.

[45] Flournoy Order at 7-8.

Council has been forced by decreased revenue allotments to use flat-fee representation contracts to provide legal representation to indigent defendants in conflict cases. The consequences have been dire.

Such contracts typically allow the lawyers to maintain private caseloads. Thus, lawyers have an incentive to dispose of their indigent clients' cases as quickly as possible, since they will be paid the same amount regardless of the time spent and quality of representation provided. Moreover, most contracts require that the flat sum cover not only the attorney's time, but also all necessary investigators, expert witnesses, overhead, and other incidental expenses. Such arrangements create clear disincentives for the lawyer to spend resources on investigation and expert assistance. Under the pre-2005 system, many jurisdictions in Georgia contracted with just one or two lawyers to handle all indigent criminal cases for a lump sum. Today, numerous jurisdictions use contracts to provide lawyers in cases where the circuit public defender office has a conflict of interest.

In *Cantwell* – the case litigated in the Northern Judicial Circuit – contract attorneys signed contracts for $50,000 a year in exchange for handling 175 cases – i.e., at an average rate of approximately $285 per case. One of the contracting attorneys not only maintains a private practice, but also serves as an appointed public defender in seven municipal courts

and as a circuit juvenile court judge.[46] At a March 2010 hearing, he testified that when he signed the contract to take on 175 cases, the Council did not even inquire as to his existing workload.[47]

In *Flournoy*, in an attempt to moot the case, the Council executed contracts with ten different attorneys just prior to the hearing. Each provided that the attorneys take on a certain number of cases for a fixed fee – in this instance, $1,200 to $1,500 per case.[48] Prior to executing the contracts, the Council did not inform the lawyers of the identity of their clients or of the nature and complexity of their cases.

At the *Flournoy* hearing, the Council's Appellate Division Director estimated that a motion for new trial and direct appeal in a typical case required approximately 140 hours of attorney time, excluding travel.[49] At the contracted rate, the attorneys in such a case would effectively be working for $8.57 to $10.71 per hour, depending on whether they were

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[46] Transcript of Class Certification Hearing, *Cantwell v. Crawford*, No. 09EV275M, Elbert County (Ga.) Super. Ct. (Mar. 3-4, 2010), pp. 117-18.

[47] *Id.* at 118-19.

[48] Flournoy Order at 33.

[49] Unlike lawyers in other states, appellate counsel in Georgia must research, investigate, and litigate motions for new trial because Georgia law requires that a defendant raise (or waive) ineffective assistance claims in the defendant's motion for new trial. *See Adams v. State*, 405 S.E.2d 537 (Ga. Ct. App. 1991).

being paid $1,200 or $1,500 per case.[50] Attorneys accepting 15 cases under contract would therefore earn at most $22,500 for an estimated 2,100 hours, or one year of legal work. Moreover, the contracts at issue in *Flournoy* offered no additional funding to cover overhead or other related expenses.

Some state courts have held there is a point at which an under-funded attorney can be presumed ineffective.[51] In *New York County Lawyers Association v. State*,[52] a New York court found that the "removal of the caps on total per case compensation is necessary to assure meaningful and effective representation" and that, based on existing rates of compensation, the plaintiff had established a prospective claim of ineffective assistance of counsel.[53] Similarly, the New Mexico Supreme Court concluded in *State v. Young*[54] that the inadequacy of compensation in the capital case before the court made it "unlikely that any lawyer could provide effective assistance."[55] In Massachusetts, the Supreme Judicial Court held in 2004 that indigent defendants who were without counsel as a result of attorney shortages stemming

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[50] Flournoy Order at 33.

[51] *See* Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1733, 1735-41 (2005).

[52] 763 N.Y.S.2d 397 (N.Y. Sup. Ct. 2003).

[53] *Id.* at 409, 411-12.

[54] 172 P.3d 138 (N.M. 2007).

[55] *Id.* at 141.

from the low rate of compensation provided for court-appointed counsel were being deprived of their right to counsel.[56] Other courts have not only found a constitutional violation where a lack of funding has led to the wholesale denial of counsel to indigent defendants,[57] but also where the terms of employment create disincentives for the attorneys to perform effectively,[58] or force attorneys to use personal funds in order to provide an effective defense.[59]

Undoubtedly, the low compensation rates provided to Georgia contract attorneys have created the same dilemma. Under current circumstances in Georgia, lawyers are forced to choose between sacrificing their own financial stability in order to provide the representation required by the Constitution or providing reduced levels of representation for their non-paying clients. Indigent defendants should not be required to bear adverse consequences of that dilemma.

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[56] *Lavallee v. Justices in Hampden Superior Court,* 812 N.E.2d 895 (Mass. 2004).

[57] *See, e.g., New York County Lawyers Assoc.,* 763 N.Y.S.2d 397.

[58] *See New York County Lawyers Assoc. v. State of New York,* 745 N.Y.S.2d 376, 387 (N.Y. Sup. Ct. 2002).

[59] *See State of Kansas v. Smith,* 747 P.2d 816, 842 (Kan. 1987).

ii. Unreasonable Fiscal Demands Increasingly Trump Important Ethical and Professional Standards

When a state deprives its indigent defense system of the resources it requires to perform properly, the ensuing danger is that ethical and professional standards will give way. Too little funding in Georgia has led to unacceptable approaches in conflict of interest situations. Multiple defendants are too often represented by the same public defender office because it is the cheapest solution. The grossly inadequate funding is also manifested in overwhelming caseloads for public defenders and a failure to compensate private counsel for work they have already performed.

This Court has held that "the 'Assistance of Counsel' guaranteed by the Sixth Amendment requires that such assistance be untrammeled and unimpaired."[60] Georgia's Rules of Professional Conduct also prohibit lawyers from representing clients with conflicting interests.[61] Nevertheless, Circuit Public Defender offices in Georgia have – with the encouragement of the Council's director – continued to simultaneously represent defendants with conflicting interests as a cost-saving measure.[62] Many

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[60] *Glasser v. United States*, 315 U.S. 60, 70 (1942); *see also Holloway v. Arkansas*, 435 U.S. 475 (1978).

[61] *See* Georgia Rules of Professional Conduct 1.7(a).

[62] *See* Greg Land, *Bar opinion could cost PD agency: Formal Advisory Opinion states that conflicts exist when public*

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public defender offices are urged to "hold" conflict cases for as long as possible before declaring a conflict in the hope that cases will be resolved with plea bargains.

At one time, the Council maintained several fully-staffed regional conflict defender offices.[63] The Council has been forced to close some of those offices and to make substantial cutbacks in others due to lack of funding.[64] The only obstacle to these closings appears to be the existence or threat of litigation.[65]

Although public defender offices often struggle with overwhelming caseloads, the legislature's withholding of adequate funding has significantly exacerbated their situation. This problem is exemplified by the recent predicament of the Cordele Circuit Public Defender Office. In 2010, one attorney position was eliminated, leaving the office staffed by just three attorneys, one administrator and one investigator. By contrast, the local District Attorney's office

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defenders from the same circuit represent co-defendants, FULTON COUNTY DAILY REPORT, Apr. 28, 2010 at 1, 8.

[63] Georgia Public Defender Standards Council, GPDSC Spring Newsletter, April 2006, at 1 (referencing eight conflict defender offices), *available at* http://www.gpdsc.com/docs/aboutus-newsletter_april_06.pdf.

[64] *See* Mike King, *An indefensible move: Tight funds no excuse for reckless manipulation of office that represents poor in 'conflict cases,'* ATLANTA J.-CONST., Jun. 13, 2008, at A12.

[65] Bill Rankin, *Council discards defender contracts: Hiring of low-cost lawyers in Fulton County criticized*, ATLANTA J.-CONST., Jan. 17, 2009, at C1.

employs seven attorneys, three administrators, two investigators and two victims' assistance personnel. As a result, the public defenders in Cordele have many more cases than they can ethically handle. As of December 2009, one attorney in the office had 351 pending cases, including 264 pending felonies; he closed 522 additional felony cases in 2009.[66]

Another public defender – this one in Walton County, Georgia – resigned from her position in 2009 after she determined she was "not providing effective representation to [her] clients . . . due to overwhelming caseloads, being required to represent clients with conflicting interests, a woefully insufficient budget for experts, lack of adequate training and supervision and an insufficient investigative staff with little to no training."[67] In the 13 months that this attorney, Marie-Pierre Py, worked as a public defender, she closed approximately 900 cases and carried approximately 270 cases at any given time.[68] She found that the crushing caseloads forced attorneys "to approach each case with a cursory review aimed at identifying the few cases to which our meager resources would be directed."[69] The budgetary constraints placed on the office resulted in

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[66] Documents received in response to Open Records Act request on GPDSC on Dec. 8, 2009.

[67] Marie-Pierre Py, Letter: *Without funds, PD system will deteriorate further*, FULTON COUNTY DAILY REPORT, Mar. 19, 2009.

[68] *Id.*

[69] *Id.*

a troubling approach to conflicts as well. Excepting serious felony cases, attorneys were instructed not to withdraw from cases "even where an obvious conflict existed"; on numerous occasions, her office represented co-defendants with clearly conflicting interests at preliminary hearings.[70] With regard to funding for experts, it was made clear that only the exceptional case would be eligible for such funding.[71]

In short, the many problems discussed above, which are denying an increasing number of indigents meaningful access to Georgia courts and to effective legal representation therein are the direct result of the Legislature's decision to take funds away from the public defense. In our judgment, this is why Petitioner Weis was left without representation for years.

[70] *Id.* The reasoning for discouraging withdrawal in these cases was that certain cases were likely to result in guilty pleas. By delaying recognition of the conflict, the office could reserve funds for those cases most likely to proceed to trial. *Id.*

[71] *Id.*

CONCLUSION

We urge the Court to grant review in this case.

Respectfully submitted,

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