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Supreme Court of Texas.
Kerry Heckman, Monica Maisenbacher, Sylvia Peterson, Tammy Newberry, Elveda Vieira and Jessica Stempko, On Behalf of Themselves and All Other Persons Similarly Situated
v.
Williamson County, Honorable Dan A. Gattis, Honorable Suzanne Brooks, Honorable Tim Wright, Honorable Doug Arnold and Honorable William Thomas Eastes.
No. 10-0671.

November 9, 2011.

Appearances:

Harry Williams IV of Keller Rohrback, LLP, for Petitioners.

C. Robert Heath of Bickerstaff Heath Delgado Acosta, LLP, for Respondents. Henry W. Prejean of Wil liamson County Attorney's Office, for Respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court's ready to hear argument in the first case, Kerry Heckman v. Williamson County.

MARSHAL: May it please the Court, Mr. Williams will present argument for the Petitioners. Petitioners have reserved five minutes for rebuttal.

ORAL ARGUMENT OF HARRY WILLIAMS IV ON BEHALF OF THE PETITIONER

ATTORNEY HARRY WILLIAMS: May it please the Court, Petitioners present three claims, each of which was live at the time of filing. Because they present three live constitutional violations at the time of filing, they have standing to pursue this action. The first claim that they make is a right to counsel claim and we know that this claim was live because Petitioners, such as Mr. Heckman, had to go to court in Williamson County and was asked to make decisions such as whether to plead guilty or not guilty -

JUSTICE DON R. WILLETT: Can I ask you a question real quick? Have we ever decided whether this Court, as a threshold matter, has jurisdiction in a 1983 claim based on actions that allegedly happened in a criminal

proceeding?

ATTORNEY HARRY WILLIAMS: I am not aware of this Court making that determination, but this Court is the only appellate court or is the court in Texas that hears 1983 appeals. The Court of Criminal Appeals never has done so although this Court has heard several 1983 appeals. Similarly, the Court of Criminal Appeals has never heard an appeal of a class action. This is a class action so -

JUSTICE DON R. WILLETT: But you said they've never even heard a 1983 case.

ATTORNEY HARRY WILLIAMS: They never even heard a 1983 case and that is because under 1983, you cannot challenge a petitioner's guilt, innocence or the term of confinement and so it's not a criminal law matter. It's a civil law matter. On the, again, back to the right to counsel claim, Petitioner Heckman and others were forced to go to court and they were asked whether they would plead guilty or not guilty to a crime for which they might be imprisoned without the assistance of counsel. That is clear constitutional harm and it's also clear that they had standing at the time of filing and we know this because the pleadings in the docket are quite clear. This action was filed on June 12 of 2006 and Mr. Heckman and the others were not appointed counsel until after June 12, 2006. So, clearly, at the time of filing, they had a live right to counsel claim. Similarly, on, for instance, the right to a public trial claim. That claim was ongoing throughout the period of this case and that is because Williamson County had a written policy that said we close our courts to everyone but criminal defendants. That's a clear violation of constitutional law and because that violation was ongoing at the time of filing and at the time that the class certification motion was filed -

JUSTICE DEBRA H. LEHRMANN: But how do you address the issue that today the issues have been resolved? How do you address that mootness issue?

ATTORNEY HARRY WILLIAMS: The mootness issue is addressed through the relation back doctrine and that's a well-established doctrine and in our pleadings, we refer repeatedly the two U.S. Supreme Court cases that are very clearly on point and that's the Gerstein v. Pugh case and the County of Riverside v. McLaughlin case and in both of those cases, we had pretrial criminal defendants, which is what we have here and we have inherently transitory claims, which is what we have here and claims for perspective relief by criminal defendants are inherently transitory because they can be mooted out in a matter of minutes or hours.

JUSTICE EVA GUZMAN: Does that apply even though no class has yet been certified?

ATTORNEY HARRY WILLIAMS: It does and I can't remember at this moment whether it's in Gerstein or Riverside, I believe it's in Gerstein, footnote 11, the court says because these are inherently transitory, a class might not be, it can't be certified before the claim becomes moot and so the fact that we filed our class certification motion the same day that we filed our original petition means that we have standing to pursue that claim and the class action and, indeed, the class certification hearing was ongoing at the time that the Respondents made their appeal so we'd begun the class certification hearing at that time so those claims are live and, again, that's because those two Supreme Court cases, Gerstein and Riverside, are so clearly on point and the arguments that the government defendants made in those cases are clearly on point and they echo the arguments that we're hearing from Respondents here.

JUSTICE PAUL W. GREEN: So if they were constitutional violations and they have been resolved, then the relief is just simply don't do it again. Is that, does that work in this case?

ATTORNEY HARRY WILLIAMS: In this case?

JUSTICE PAUL W. GREEN: Right.

ATTORNEY HARRY WILLIAMS: Yes, the relief here it will be prospective relief saying that Williamson

County procedures, must adhere to the constitution.

JUSTICE DON R. WILLETT: That's the question I have too because you look at the injunctive and declaratory relief that you request in your second amended petition and it looks like nearly all the relief you're asking for is forward looking to help future people, other people, not your clients, but folks who would be arrested and magistrated in the future and are you seeking relief here that could actually be granted for your clients?

ATTORNEY HARRY WILLIAMS: Well, again, that that involves this relation back doctrine and because the Petitioners here, their claims are inherently transitory and because under Section 1983, we're not challenging their convictions. We're not challenging their sentences. We're only seeking prospective relief and, again, the U.S. Supreme Court has been emphatic that because constitutional rights are enforceable in the first instance. They're not enforceable at the whim of government when it's convenient for the government to decide, oh, now we'll give you your right to counsel.

CHIEF JUSTICE WALLACE B. JEFFERSON: But your answer to Justice Willet's question is no, isn't that correct that there is no relief that is going to pertain to your claims.

ATTORNEY HARRY WILLIAMS: Well, one form of relief that would pertain to the claims is their ability to pursue the class action and to vindicate the rights of the class, but, no, there would be no relief in terms of their individual criminal case. In --

JUSTICE DALE WAINWRIGHT: So let -- on the same issue, assume you win, okay. The criminal cases for the main plaintiffs have been finally resolved. They're over and done with. Williamson County argues that it's addressed the policies and procedures that your clients complained about. So assume you win the case, win the class action, what's the remedy that the trial court order should include? What can your clients obtain in this case?

ATTORNEY HARRY WILLIAMS: We can obtain an injunction that says that they must follow the constitution and that is -

JUSTICE DALE WAINWRIGHT: Don't do it again.

ATTORNEY HARRY WILLIAMS: What?

JUSTICE DALE WAINWRIGHT: Don't do it again.

ATTORNEY HARRY WILLIAMS: Don't do it again and a declaration that their practices, such as they are, are illegal and those are important because thousands of individuals go through the Williamson County Courts at Law every year and so that relief is vital to their constitutional rights and so that prospective relief is critical to those individuals and whatever assertions that have been made through, by the Respondents here, that evidence is, well I put evidence in quotes. It's not in the record. You can't introduce evidence on appeal, but just as importantly, there is well-established doctrine in the Laidlaw case from the U.S. Supreme Court, in Aladdin's Castle from the U.S. Supreme Court that voluntary cessation of violations of constitutional rights does not moot a case out. We are still entitled to get that court ruling that those procedures are illegal because it would be very -

JUSTICE DAVID M. MEDINA: What would be the effect of that ruling? What would be the practical effect to these individuals, these juveniles who were perhaps coerced to cop a plea, for lack of better words, because they didn't have counsel or weren't aware of counsel? What's going to be the result?

ATTORNEY HARRY WILLIAMS: The results for individual defendants are all prospective. It's not going to affect individuals that have made a plea, but what it will do is if there's an injunction in this case, then future individuals could move to enforce that injunction, move for contempt if the -

JUSTICE DON R. WILLETT: But how is this case any different from Los Angeles v. Lyons back in '83. There was a guy who sued, he wanted to enjoin LAPD from ever using a chokehold that they had used on him and the Supreme Court said they denied the injunction because he couldn't prove that he was likely to be subjected to the illegal chokehold again. No reason to suspect he would be arrested again in the future. And my question is about standing here when there's no reason to think the requested relief would actually remedy the current Plaintiffs. See my point?

ATTORNEY HARRY WILLIAMS: I do see your point and, again, County of Riverside is directly on point. The County in Riverside said exactly that. They said, well here individuals, pretrial criminal defendants who, in that case, they were looking to get a prompt probable cause determination and the County said, well, all of these people by the time it had gotten to the Supreme Court had had their probable cause determination so they weren't going to be subjected to that again. Lyons blocks their claim. The reason that we have relation back doctrine is so that individuals can vindicate their rights and what the Supreme Court said in Riverside is that Lyons isn't a problem because we're not arguing th these individuals are going to violate the law again or that these individuals need to violate the law in order to vindicate their rights. The reason the claim relates back is so that they can vindicate that right without having to run into the problem of possibly doing it. Graphically, you might think of it also this way. Lions had a completed harm. He had already been through that chokehold and he filed after the chokehold had been made. Here, essentially, Petitioners filed while the chokehold was ongoing and so they had a claim at that time that could have been cured. At the time Mr. Heckman filed his claim, his right to counsel claim, he didn't have counsel so if we'd have been able to get relief that day, he would have had relief.

JUSTICE EVA M. GUZMAN: Did they have to have standing though on the full claims of the putative class? There's an assertion I suppose that at the time of filing, there wasn't standing on all of the claims and, therefore, their relation back doctrine is not applicable in this context.

ATTORNEY HARRY WILLIAMS: Well, the Petitioners, there are three claims and all of the Petitioners, except for Ms. Stempko, had standing on all of those claims at the time of filing so they did have the full claims. Ms. Stempko's situation is slightly different because she was a member of the public with a relative going to Williamson County Court at Law and so her claim is slightly different and what will happen when we go back to continue the class certification hearing is that there will be subclass of people from the public who have standing and we know that they have standing under U.S. Supreme Court cases and Texas cases like Taminan. So there are subclasses and that in Rule 42D is how we deal with individuals that have related but somewhat different -

JUSTICE DON R. WILLETT: Do any of the named Plaintiffs have standing for each and every one of the claims?

ATTORNEY HARRY WILLIAMS: Yes, Plaintiff Heckman had standing for each and every one of the claims. Plaintiff Newberry did and Plaintiff Peterson did.

JUSTICE DEBRA H. LEHRMANN: Let me just ask just to clarify a little bit about the relief. You mentioned vindication, but also injunctive relief and is it your position that Williamson County has, at this point, corrected their policies as they alleged? And if you agree with that, then is the concern that in the future they may not continue that policy? In other words, they could revert back to a prior policy or is it more to vindicate your clients at this point in time or is it both?

ATTORNEY HARRY WILLIAMS: We do not agree that they have [inaudible] in the constitutional violations, but I'm not here to give evidence and there's no evidence in the record about that so the proper proceeding would be to remand this back for the class certification hearing and see have things changed. So there's just no reason to assume that things have changed just because there's been some assertion in the briefing.

JUSTICE DEBRA H. LEHRMANN: And so whether it did or not, it's really for the future so to make sure that if they, even if they did, that [inaudible] go back to that correct.

ATTORNEY HARRY WILLIAMS: And the relief is important both for the declaration of what is constitutional and what is not constitutional and because it allows individuals an easier avenue to vindicate their rights in the future because there would have been [inaudible].

CHIEF JUSTICE WALLACE B. JEFFERSON: The part of your complaint that goes to self-representation, is that really the forest? Which of these class or putative class plaintiffs affirmatively seek to self-represent?

ATTORNEY HARRY WILLIAMS: The self-representation claim isn't that they affirmatively sought self-representation. It's that they were forced without adequate and accurate informative to represent themselves. So that when Mr. Heckman appeared in the Williamson County Courts at Law and was asked do you plead guilty or not guilty, he didn't have information that's required under the case law, such as the length of sentence, the aspects of the claim that had to be proved and so his right to self-representation was being violated because he wasn't given adequate information about it and he wasn't given adequate information about his right to counsel in the first place so he couldn't knowingly and voluntarily wait for that counsel such that he could invoke the right to self-representation. Again, I think that this case -

JUSTICE NATHAN L. HECHT: So your brief is very detailed and what happened to the named plaintiffs, but it does not mention Judge Brooks or Judge Wright, certainly not Judge Arnold. He wasn't even there or Judge Higginbotham, his predecessor, I guess, by name. These are serious charges. How are they involved in any of the claims that you made other than who can be in the courtroom?

ATTORNEY HARRY WILLIAMS: Certainly and I think that there are two answers to that. First of all, by law, state law requires that judges trying criminal cases in each county adopt and they must by state law, adopt procedures that apply to each appointment process in a criminal case and those procedures apply to either a judge or the judges designee, including a visiting judge and so by state law and that's in Article 2604, they are responsible for what the visiting judge did. In addition, what the judges haven't said is that that visiting judge was doing anything different than what the Williamson County Court at Law judges do regularly.

JUSTICE NATHAN L. HECHT: They don't have to do that. Surely, the burden's on them.

ATTORNEY HARRY WILLIAMS: I'm sorry, I didn't hear that.

JUSTICE NATHAN L. HECHT: The burden's on them you think to -

ATTORNEY HARRY WILLIAMS: No, but our allegations and, again, if you look at the second amended petition, which is the live pleading here, in, for instance, paragraphs 92 through 106, there are lots of allegations against the names judges. I'm out of time so I will sit down for now if there are no more questions.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions? Thank you, Counsel. The Court is now ready to hear argument from the Respondent.

MARSHAL: May it please the Court, Mr. Heath and Mr. Prejean will present argument for the Respondents. Mr. Heath will open with the first 10 minutes.

ORAL ARGUMENT OF C. ROBERT HEATH ON BEHALF OF THE RESPONDENT

ATTORNEY C. ROBERT HEATH: Mr. Chief Justice, may it please the Court. I am here representing the Respondent county court of law judges, Judge Brooks, Wright and Arnold. Mr. Prejean represents all the other defendants. While I'm certainly willing and hopefully able to answer any questions and pursue any issues the

Court wants to pursue, I thought it would be helpful to indicate what I expect to cover and what Mr. Prejean expects to cover. What I expect to talk about first is the unique issue involving my clients, the three county court law judges. Second, the issue of the absence of Supreme Court jurisdiction over criminal law matters, which we believe this is, and, third, to talk generally about the plaintiffs lack of standing. Mr. Prejean will also address the standing issue and the issue of whether remand is appropriate or required. But as I said, I will certainly do my best to answer any questions and pursue any issues that the Court wants -

JUSTICE DON R. WILLETT: Going to the second one first.

ATTORNEY C. ROBERT HEATH: Yes, sir.

JUSTICE DON R. WILLETT: About jurisdiction about whether this really involves a criminal law matter, nobody's trying to attack a conviction here. Nobody's even trying to attack a statute whether it's constitutional or the manner of how it's enforced and so why doesn't this case fall within our civil jurisdiction?

ATTORNEY C. ROBERT HEATH: You're correct, Justice Willet. It doesn't. We're not attacking or they are not attacking a conviction. However, it is dealing with the actions of conducting criminal law proceedings in the court. What the relief they seek is to take the county court at law judges and by this Court have an injunction saying here's how you need to conduct criminal law proceedings in the future. Here's how you need to try criminal law cases and I think that if you look at a recent case from the Court of Criminal Appeals, Armstrong v. State, it's one that was decided on June 22 of this year. It's not cited in any of the briefs because it was after all that, but it's 340 SW3rd 759 and that was a challenge to a bill of costs in a criminal case and interestingly, it involved a cost to repay the cost of -

JUSTICE DON R. WILLETT: But it wasn't [inaudible] as a 1983 action?

ATTORNEY C. ROBERT HEATH: It was not a 1983 action.

JUSTICE DON R. WILLETT: Do you disagree that that our sister high court across the hall has never taken up a 1983 claim?

ATTORNEY C. ROBERT HEATH: I do not believe that they have.

JUSTICE DON R. WILLETT: What significance do you attach to that?

ATTORNEY C. ROBERT HEATH: The significance is that the Plaintiffs when they chose the 1983 action to challenge a criminal matter, had they been in Montana or some other state and they cited cases from many other states, they may not have had a problem. Had they been in the federal system, they may not have had a problem. But in Texas, we have a bifurcated court system and they realize or should have realized from Article 5, Section 3 of the Constitution that this Court has no appellate jurisdiction over a 1983 action or any other action that deals with a criminal law matter because the constitution precludes that jurisdiction from this Court and assigns it across the hall and so they knew that the end of the appellate line in that case -

CHIEF JUSTICE WALLACE B. JEFFERSON: So the Court of Criminal Appeals has jurisdiction over this, over these claims?

ATTORNEY C. ROBERT HEATH: They have jurisdiction, they may not. Let me go back just a second and correct something I said and I believe I'm correct here. I'd have to go back and double check. I think there may have been a 1983 action that went up to the Court of Criminal Appeals, but it wasn't decided there and I don't think they actually either, I don't think there was any decision on it, but I would have to double check that, but I think that, I do not believe that the Court of Criminal Appeals has jurisdiction. There are some things where the appellate jurisdiction is going to stop before it gets to this Court.

CHIEF JUSTICE WALLACE B. JEFFERSON: Which would mean if all their allegations are true that there's a constitutional violation that is occurring widespread or has occurred, may be occurring widespread in Williamson County and there is no relief for violation of constitution. Is that correct?

ATTORNEY C. ROBERT HEATH: Not at all, Your Honor. They have -

CHIEF JUSTICE WALLACE B. JEFFERSON: Where would the relief be?

ATTORNEY C. ROBERT HEATH: They could have, for example, in the criminal matter, they could take an appeal, a direct appeal of any conviction and raise the denial of counsel as an element of direct appeal. They could have brought a writ of mandamus and the Court of Criminal Appeals has authority to hear that. They could have brought a writ of habeas corpus. There are vehicles for doing that. 1983 may not be the appropriate one or at least in this jurisdiction at least if they want to get to the Texas Supreme Court. And by the way, I'm not saying that the court of appeals, which has both civil and criminal jurisdiction, they certainly had jurisdiction to take this case and they did.

JUSTICE DON R. WILLETT: Why don't you get on to your other two issues real quickly?

ATTORNEY C. ROBERT HEATH: Right, in regard to the three county court at law judges, those individuals have had no contact with these individual Plaintiffs on the cases that are at issue here. Now there are some instances where Judge Higginbotham, Judge Arnold's predecessor, had some of these individuals come before him and the appointed counsel for them, but there were cases that were earlier in the system, not the ones that are at issue. Similarly, Judge Brooks faced two of the Plaintiffs after the visiting judge had denied counsel. They came back, brought additional information and she granted counsel and appointed counsel for both of them. One of them, shortly before the lawsuit was filed, it was like an hour and a half before the lawsuit was filed. The other the next day before she realized the lawsuit had filed and none of the judges had any contact with the others because once they were sued, once they were defendants of these Plaintiffs, they recused themselves from any further contact with them so they didn't do anything and one of the elements of standing and this is in Lujan is that you have to have or be able to show the causal relationship between the claimed injury and the named defendant.

JUSTICE NATHAN L. HECHT: And alleged unconstitutional restrictions on access to the courtroom.

ATTORNEY C. ROBERT HEATH: Yes, Your Honor. And those, I think, are all speculative. They didn't say that anyone was denied. None of them were denied access to the court except -

JUSTICE EVA M. GUZMAN: Was there a rule though that governed who could come into the court and why would you assume that you can come in in violation of a court ruling?

ATTORNEY C. ROBERT HEATH: Sure. There was apparently on the county attorney's website something that said, while we're going these arraignments, it's just the individuals because there wasn't room in the courtroom for all the other people, they had so many people. I understand that has changed at this time, that they have made different arrangements to address that, but no one, there's no indication and Ms. Stempko, the elder Ms. Stempko because there are I think that's the name said she was afraid she wouldn't get in, but there's no indication that she was denied access.

JUSTICE EVA M. GUZMAN: There's a rule that prohibits entry. The family members facing conviction and eventually punishment possibly and somehow this rule you think didn't have the effect of keeping out [inaudible] parties.

ATTORNEY C. ROBERT HEATH: I think if there was room in the courtroom, people could go in is my un-

derstanding.

JUSTICE DALE WAINWRIGHT: Was Kelsey a minor at the time?

ATTORNEY C. ROBERT HEATH: Yes, the younger one was a minor at the time and she has subsequently nonsuited her suit and she was appointed counsel. In fact, every single one of these individuals was appointed counsel and I think that's the other thing and I will say just briefly in the remainder of my time.

JUSTICE DALE WAINWRIGHT: One final question about -

ATTORNEY C. ROBERT HEATH: Yes, sir.

JUSTICE DALE WAINWRIGHT: Kelsey, when the proceedings were pending against her, she's a 17-year-old girl. Her mother wanted to attend those proceedings and it sounds like you're saying there was a rule that said no, but no one really precluded her that day from going into the proceedings.

ATTORNEY C. ROBERT HEATH: In the second amended petition, she said she was afraid she would not be able to get in and there is no indication that she was ever denied entry.

JUSTICE DON R. WILLETT: Mr. Williams says there are at least three named plaintiffs who have standing on all three of the claims and assuming that's true if they have standing on each of the individual claims, why wouldn't the relation back doctrine allow them to sue notwithstanding the subsequent mootness of those claims?

ATTORNEY C. ROBERT HEATH: I think there are a couple of things. One is and I think Mr. Williams indicated that in Riverside, it indicated that you could use the relation back doctrine. There is a case in this Court that says, from this Court, Williams v. Lara that says on capable repetition yet evading review, you may not assume that for criminal defendants. You can't assume that they're going to be recidivists. I think that this Court could take a different view than the U.S. Supreme Court did on that action if it chooses to, but the main thing is I don't believe these individuals had standing period. They all had counsel. They all were appointed counsel. None of them sought to represent themselves. None of these defendants with possible exception of Ms. Stempko and she didn't allege it actually happened were denied access to the court. Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel.

ORAL ARGUMENT OF HENRY W. PREJEAN ON BEHALF OF THE RESPONDENT

ATTORNEY HENRY W. PREJEAN: May it please the Court, the focus of my argument would be on whether the Petitioners had individual standing for injunctive and declaratory relief at the beginning of the suit. It's the Respondents' position that none of the Petitioners had standing for injunctive relief and prospective relief at the beginning of the suit and on this particular point, I would ask the Court to look at the nature of the six amendment claims and the relief requested by the Petitioners in their petition. They were complaining about misinformation or lack of information by the county court at law judges during either the magistrate's hearing or at first appearance. They sought injunctive relief to either compel the county court at law judges to provide more information or to discontinue allegedly acts of misinformation. This all had to do with conduct at either the magistrate's hearing or at first appearance. At the time suit was filed, all of these events had already occurred with respect to the Plaintiffs. They had no right to prospective declaratory injunctive relief as to those stages of the criminal process and an important case in this Court is -

JUSTICE DAVID M. MEDINA: Help me understand this, please. I understand your argument about no standing and that there's nobody there that can be the beneficiary of whatever relief this Court may grant. What about the problem that allegedly, as you said, exists? How is that ever going to get corrected other than someone's word that there's not a problem anymore? So what's the resolution to the problem or maybe you don't think

there is one.

ATTORNEY HENRY W. PREJEAN: Well, Your Honor, the Plaintiffs have pled this case as though the lack of information or misinformation is a violation of the sixth amendment right in and of itself. That's the way they pled it and the relief that they've asked for is enjoining these judges to provide more information or the correct information or pass out the right forms during these stages. These particular Plaintiffs will not face that again unless they are rearrested and recidivism was rejected in Williams v. Lara.

JUSTICE DAVID M. MEDINA: I understand that, but that's not answering my question.

ATTORNEY HENRY W. PREJEAN: Once their right to counsel was actually denied, they could seek relief through that through mandamus.

JUSTICE DAVID M. MEDINA: So this is not the proper vehicle is what you're saying, Section 1983 is not the proper vehicle for them to pursue this remedy.

ATTORNEY HENRY W. PREJEAN: Yes, Your Honor, that is what I'm saying. I'm not saying that they're, I'm sorry.

JUSTICE EVA M. GUZMAN: I'm sorry. On that same point, the Amicus alleges that some Texas counties are still denying the indigent defendants their rights in pretrial proceedings and that, therefore, there is the potential that this type of challenge could have systemic effects on the systemic on what they claim are systemic deficiencies.

ATTORNEY HENRY W. PREJEAN: I think we need to look at the Rothgery decision. What the Rothgery decision says is that the Sixth Amendment right to counsel attaches at the magistrate's hearing. What the Rothgery decision does not say is how much time has to elapse between that attachment and when counsel has to be appointed. In this particular instance, no one was actually denied counsel except for a temporary period where a judge from another county temporarily denied counsel to three of the Petitioners.

JUSTICE EVA M. GUZMAN: By temporarily, do you mean one week, a month? Weren't there different degrees you're in jail without counsel? I think someone was in there for up to a month, right?

ATTORNEY HENRY W. PREJEAN: Well, there was a visiting judge from Travis County and between the time of first court appearance, for example, in Heckman and when counsel was appointed was a period of 19 days.

JUSTICE DALE WAINWRIGHT: For Tammy Newberry, the allegation is that there's 3- 1/2 months between the time she requested counsel and counsel was appointed. She tried to file the forms, at least the allegation is, to obtain the appointed counsel and was told that they didn't accept those forms in the jail. Now that may be subject to factual dispute, but that's the allegation.

ATTORNEY HENRY W. PREJEAN: Your Honor, my understanding of the facts was that she was at the magistrate's hearing on June 30th and she subsequently got counsel I think sometime in October, but at the time of filing suit, she had not been denied counsel, between June 30 and when she was joined in the suit on July 18. So at that point in time, the magistrate's hearing had already passed and she had not been denied counsel. She had no individual standing as standing the magistrate's hearing unless you assume she's going to be rearrested in the future.

JUSTICE DALE WAINWRIGHT: So if there is a problem in this regard, the defendant should pursue immediate emergency relief at the time. If they wait for 19 days or 3-1/2 months until counsel is obtained, then they don't have a beef. They don't have any injury to complain about because they have counsel at that time, is that

part of the argument?

ATTORNEY HENRY W. PREJEAN: That's correct, Your Honor. What Rothgery, as I understand, provides is that counsel be provided before a critical stage in the judicial process, a critical stage being where the adversary proceedings of the state are brought to bear on the defendant.

JUSTICE NATHAN L. HECHT: Do you agree that that's at magistration?

ATTORNEY HENRY W. PREJEAN: Magistration is where the attachment of the right occurs, but what Rothgery says to my understanding, Your Honor, is that from the time of attachment, counsel should be appointed within a reasonable time of that attachment.

JUSTICE NATHAN L. HECHT: And if, appointed counsel costs money and if a county wanted to avoid the cost, and if they had a policy that we're going to do what we can at magistration to discourage a request for counsel, if that happened, in your view, is there any systemic judicial remedy for that because as I take your argument, there just isn't. The individual defendant could appeal or seek relief, but if you were looking for some other relief in the state or federal court, there just wouldn't be any.

ATTORNEY HENRY W. PREJEAN: I think there would be relief if they had standing for that at the time. If they had actually been denied counsel at the time they filed suit and they could show a causal relationship between the misinformation, yes, I think they could go forward with a Section 1983 suit. What I'm saying is these Plaintiffs did not have that type of standing in their suit.

JUSTICE NATHAN L. HECHT: Well some of them did not have counsel at the time they joined the suit, correct?

ATTORNEY HENRY W. PREJEAN: That's correct, Your Honor, but at least so far, the U.S. Supreme Court has not said this is the given amount of time from attachment to when counsel has to be appointed. That has not been laid out.

JUSTICE NATHAN L. HECHT: But that's not a standing question. That's a question whether you lose on the merits, right?

ATTORNEY HENRY W. PREJEAN: That's correct, Your Honor.

JUSTICE NATHAN L. HECHT: So in your view, they do have standing.

ATTORNEY HENRY W. PREJEAN: They don't have standing for the claims that were sought in this suit. In their claims, they're trying to restrain and enjoin the country court law judges' conduct at the magistrate's hearing or at first appearance. Those stages had already passed. The only way they would encounter those problems again is if they were rearrested. In Williams v. Lara, this Court rejected the idea of recidivism as affording standings. Your Honor, Justice Willet brought up a good point about the Lyons case. The plaintiffs in this case, once those stages have passed, have no greater likelihood of harm for misinformation or lack of information at these stages than anyone else that's out there because their chances of rearrest are equal with anyone else that's out there in the public and this was the holding in Lyons. The motorist that ha the chokehold applied to him, the court said past acts in and of itself is not enough to confer standing. You have to show a continuing, ongoing violation. And at this point, I want to join issue with the Petitioners and distinguish Gerstein and Pugh. In those cases, there was an ongoing pretrial detention with a lack of a probable cause hearing. That's to be clearly distinguished from the case that we have here.

JUSTICE EVA M. GUZMAN: Ongoing pretrial?

ATTORNEY HENRY W. PREJEAN: Ongoing pretrial detention. The plaintiffs in that case were clearly still incarcerated at the time so there was an ongoing violation. As opposed to here where the six-minute violations the Petitioners are claiming had already been completed at the magistrate and first appearance stage. Your Honor, on the remand issue, Justice Patterson at the court of appeals had recommended that the case be remanded to explore the intervening developments that had occurred during the penancy of the appeal and I would urge this Court there is no reason to remand. The points that were the basis for the court of appeals' decision involved application of law to undisputed facts, the undisputed facts being that the county did develop a new policy. It also has to do with an alternative argument that we really have not brought forward in our briefs here and that alternative argument -

CHIEF JUSTICE WALLACE B. JEFFERSON: Counsel, unless the Court has questions about that, your time has expired. Are there any further questions? Thank you, Counsel.

ATTORNEY HENRY W. PREJEAN: Thank you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: And the Court will hear rebuttal.

REBUTTAL ARGUMENT OF HARRY WILLIAMS IV ON BEHALF OF PETITIONER

ATTORNEY HARRY WILLIAMS: Thank you, I want to address two things. One is this question of appeal versus a 1983 case and it's simply not the law that an individual who is not represented by counsel must go through his or her criminal case possibly be convicted, possibly be jailed in these cases for up to a year, proceed pro se through the appellate process all to vindicate a right that they had in the first instance, which was their right to counsel. Constitutional rights are enforceable in the first instance. They are enumerated in our constitution because they are fundamental and individuals have those rights and the state -

CHIEF JUSTICE WALLACE B. JEFFERSON: Mr. Heath also mentioned mandamus, I thought.

ATTORNEY HARRY WILLIAMS: And mandamus, again, there's, these are pro se individuals by definition because they're seeking the right to counsel, that's assuming that these pro se individuals would (a) know about the mandamus proceeding would be able to get through those procedures and, again, they have that right in the first instance and it does not and even a successful mandamus on behalf of any individual wouldn't address the systemic problems that we've alleged here so that mandamus relief or appellate relief simply isn't sufficient here.

JUSTICE DEBRA H. LEHRMANN: How do you respond to the argument that says every Petitioner had appeared before a magistrate by the time your client sued and, therefore, your arguments don't fly. How do you respond to that?

ATTORNEY HARRY WILLIAMS: Sure, I respond to that by looking at the Gerstein and Riverside cases again because in those cases, the question was how quickly do you get a probable cause hearing and the question was do you get that within 24 hours or a week, what is sufficient? All of those individuals had had their probable cause hearing well before the case got to the Supreme Court and so the question is at the time they filed, that's why we have the relation back doctrine, was the constitutional violation capable of being remedied by relief. Here, obviously, yes because they did not have counsel. The right to counsel is continuous and it's continuous for many reasons. It attaches, as counsel said, at the 1517 hearing at the magistrate hearing, but it continues and you have counsel for many different reasons. One of the reasons that you have counsel is so that you don't end up as Mr. Heckman did in front of a judge being asked do you plead guilty or not guilty without the advice of counsel. Also you have counsel throughout that entire period so that counsel can do things like investigate a case, interview witnesses while the witnesses' recollections are still fresh to determine whether the state has a case in the first instance. That right to counsel and Rothgery talks about this somewhat, but Michigan v. Jackson talks about this from the U.S. Supreme Court, [inaudible] talks about this from U.S. Supreme Court. That right

to counsel continues from magistration here in Texas through the conclusion of the case because the right, because counsel has a role throughout that proceeding, but regardless, we know that there were stages here where everyone on just even a common-sense view, much less the legal view, knows that you need counsel. None of us would want to face imprisonment without the assistance of experienced criminal counsel and that's -

JUSTICE PHIL JOHNSON: Let me ask you one question. The substance of this as pointed out by opposing counsel is that you're asking us, a civil court, to pass judgment on what inherently is a criminal matter and criminal procedure matter. Is there something that precluded after this went through the court of appeals, is there something that precluded you're appealing this to the Court of Criminal Appeals? They don't have jurisdiction.

ATTORNEY HARRY WILLIAMS: We appealed to this Court because, again, the Court of Criminal Appeals doesn't hear civil cases. It doesn't hear 1983 cases.

JUSTICE PHIL JOHNSON: My question was is there something that precluded you from filing this appeal in the Court of Criminal Appeals? They don't have jurisdiction.

ATTORNEY HARRY WILLIAMS: They do not have jurisdiction because it is not a criminal law matter. It is a civil matter. So the Court of Criminal Appeals would not have had jurisdiction.

JUSTICE PHIL JOHNSON: It's a civil law matter because you filed it over here and in a 1983 action, but what we are being asked to pass judgment on is certainly the criminal law procedure and process, the underlying nature of the case itself is a criminal law matter is it not?

ATTORNEY HARRY WILLIAMS: Well, what is before this Court today is the question of standing? Do Texans have the right to go to court to -

JUSTICE DON R. WILLETT: Standing to complain about what?

ATTORNEY HARRY WILLIAMS: To complain about the denial of their constitutional rights and those con stitutional -

JUSTICE DON R. WILLETT: In a criminal law proceeding?

ATTORNEY HARRY WILLIAMS: Yes, within the context of these are criminal proceedings. There's no doubt about that, but, again, this Court is not being asked today to rule on anything other than do Texans have the right to get into court and to seek to vindicate their rights prospectively, rights that they already have. That's the question before this Court and so respectfully, I'm out of time, so, respectfully, we would say that the Third Court was wrong, that these Plaintiffs do have standing and the Third Court should be [inaudible].

JUSTICE DALE WAINWRIGHT: Counsel, if your argument is accepted, what will preclude class defendants in criminal cases from being Section 1983 claims asserting that in their criminal trial their constitutional rights were violated on any number of substantive matters?

ATTORNEY HARRY WILLIAMS: Well, again, a 1983 action, by definition, can't challenge a sentence and can't challenge guilt or innocence.

JUSTICE DALE WAINWRIGHT: I understand that.

ATTORNEY HARRY WILLIAMS: So what would prevent them from intervening within an ongoing -

JUSTICE DALE WAINWRIGHT: Something happened in my trial that violates my constitutional rights and I want an injunction saying don't do it again. What precludes, pick a topic during a criminal trial, witherspooning

or double jeopardy or something else, what precludes a 1983 class action from a criminal proceeding claiming a violation of constitutional rights coming up to our Court on any number of matters if we accept your argument?

ATTORNEY HARRY WILLIAMS: What would preclude that, well, the question would always be prospective relief and so if this Court decides that there's standing and the case goes back and what the actual issue is in a future case deals with criminal procedure, it may be that the ultimate appeal on the merits would go to the Court of Criminal Appeals. What the issue really is is just deals with a criminal law matter. If it's dealing with guilt, innocence or a sentence, but otherwise this is the correct court to deal with a 1983 action. It has always dealt with 1983 actions and the Court of Criminal Appeals does not. It does not deal with class actions.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted and the Court will take a brief recess.

MARSHAL: All rise.

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