

JOSEPH ALLEN, STEVEN AYRES, ASHLEY HURLBURT, RORY KEVIN GATES, JAMES HOWARD, DEMARCUS MORROW, RODNEY WALLER, KEITH ARCEMENT, FREDERICK BELL, GENARO CRUZ GOMEZ, SAM YBARRA, MICHAEL CARTER, AND JAMES PARK, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

VS.

JOHN BEL EDWARDS IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF LOUISIANA, ZITA JACKSON ANDRUS, CHRIS L. BOWMAN, FLOZELL DANIELS, JR., THOMAS D. DAVENPORT, JR., PATRICK J. FANNING, W. ROSS FOOTE, KATHERINE E. GILMER, MICHAEL C. GINART, JR., FRANK HOLTHAUS, DONALD W. NORTH, AND MOSES JUNIOR WILLIAMS, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE LOUISIANA PUBLIC DEFENDER BOARD; AND JAMES T. DIXON, JR., IN HIS OFFICIAL CAPACITY AS THE LOUISIANA STATE PUBLIC DEFENDER,

Defendants.

FILED: _____
DEPUTY CLERK

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION
TO CERTIFY A CLASS ACTION PURSUANT TO ARTICLE 591**

Plaintiffs Steven Ayres, Ashley Hurlburt, Demarcus Morrow, Keith Arcement, Frederick Bell, Michael Carter and James Park submit this memorandum in support of their Motion to Certify a Class Action pursuant to Article 591. At a hearing, in addition to this supporting memorandum and attached expert report and affidavits, Plaintiffs will offer and introduce the Verified Petition with the documents included in the Appendix to the Petition. Plaintiffs also intend to call witnesses to testify at the hearing of this matter, including one or more of the Defendants, staff from the Louisiana Public Defenders Board, and District Public Defenders. Plaintiffs further reserve the right to introduce deposition transcripts, records from Defendants, and all other relevant evidence at the hearing and to supplement the record as permitted by the Code of Civil Procedure.

INTRODUCTION

This action for class-wide declaratory and injunctive relief arises from the statewide and systemic failure of Defendants to establish and maintain a constitutionally acceptable public defense system in Louisiana. It does not seek to upset or undo

shown below, Louisiana courts and federal courts have recognized that cases that seek to enjoin common policies and procedures with class-wide effect, but do not seek damages, are exactly the types of cases for which Article 591(B)(2) and Article 591(B)(1)(a) (and their federal analogs) are intended. Accordingly, Plaintiffs respectfully request that this Court certify the proposed Class, appoint the proposed Class representatives, and appoint the proposed Class counsel.

FACTUAL BACKGROUND

The United States and Louisiana Constitutions both require the State of Louisiana to provide counsel to poor people accused of crimes. See U.S. Const. amends. VI & XIV; La. Const. § 13; see, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 341-42 (1963). In 2007, the Louisiana Legislature passed the Louisiana Public Defender Act, and expressly delegated to the Louisiana Public Defender Board (“LPDB” or the “Board”) the State’s constitutional obligation to establish a statewide public defense system that provides meaningful and effective representation to indigent defendants. See LA-RS § 15:141 et seq Pursuant to that delegation, the Board—an executive agency for which the Governor has statutory and constitutional responsibility—bears the obligation for establishing and supervising a constitutionally sufficient statewide public defender system, including promulgating and enforcing performance standards that ensure meaningful and effective representation. See, e.g., *State v. Pearl*, 2011 So. 2d 780, 789 (La. 1993) (“We take reasonably effective assistance of counsel to mean that the lawyer not only possesses adequate skill and knowledge, but also that he has the time and resources to apply his skill and knowledge to the task of defending each of his individual clients.”).

Despite these well-established constitutional commands, the State’s public defense system is, by Defendants’ own admission, in a state of “crisis.” App. 30.² Throughout the State, the traditional markers of effective representation, such as meaningful adversarial testing of the prosecution’s case, timely and confidential consultation with clients, and appropriate case investigation, are largely absent from public defender services or significantly compromised.

Defendants have created this crisis by failing to remedy systemic and interrelated defects in the public defense system, including: requiring public defenders to carry excessive caseloads; failing to provide public defender offices with necessary support from investigators, experts, social workers, and support staff; failing to train and supervise public defenders to ensure their adherence to basic performance standards; failing to monitor public defenders’ performance and

² All “App.” cites refer to the Appendix of exhibits attached to Plaintiffs’ Original Verified Petition, filed February 6, 2017.

compliance with ethical requirements; failing to discipline or otherwise hold public defenders accountable when they fail to refuse appointment or seek to withdraw from cases when they cannot comply with the Louisiana Rules of Professional Conduct due to lack of time, independence, and resources; permitting districts to enter into flat-fee contracts with public defenders while fully aware that such contracts provide the public defenders with insufficient time, independence, and resources to mount an effective defense; and an unstable and unreliable funding source. In their totality, these pervasive failings detrimentally impact the delivery of public defense services, and impose on all indigent defendants the constitutionally intolerable risk of being denied meaningful and effective representation.

A. Excessive Caseloads

statutory and constitutional responsibility and which has been delegated to the Board—would require Defendants to provide adequate training and supervision to all public defenders, and to enforce performance standards and compliance with ethical obligations. Defendants have systematically failed to do so.

There are well-established national standards, as well as standards promulgated by LPDB, regarding the supervision and training of public defenders. These standards include:

Moreover, LPDB has altogether failed to ensure that the State's public defenders comply with the Louisiana Rules of Professional Conduct. Lack of time, independence, and resources prevent public defenders throughout the State from complying with their obligations under Rules 1.1 (competence), 1.3 (diligence), 1.4 (communications), or 1.7 (conflicts) of the Louisiana Rules of Professional Conduct in their representation of the putative Class members. Throughout the State, public defenders routinely permit direct communications between their

in most districts in Louisiana also raises serious ethical conflicts for these contract defenders that put clients at substantial risk of insufficient representation, particularly because those contracts permit contract defenders to maintain a private practice.

As the National Legal Aid and Defender Association has explained, a flat-fee contract that pays a lawyer a single lump sum to handle an unlimited number of cases creates a direct financial conflict of interest between the attorney and each client. Because the lawyer will be paid the same amount, no matter how much or little he works on each case, it is in the lawyer's personal interest to devote as little time as possible to each appointed case, leaving more time for the lawyer to do other more lucrative work

Boruchowitz Aff. ¶ 135. Washington State banned flat-fee contracts in 2009 because they create an "inherent conflict of interest" between a client's right to adequate counsel and the attorney's personal financial interest. App. 32. When salaried lawyers are free to represent private clients, they have a financial incentive to devote more time to those clients than to their indigent clients. In practice, the public defense contracts are largely unsupervised, and the arrangement commonly results in contract lawyers underserving their indigent clients.

C. Inadequate Support Staff

Investigators, expert witnesses and social workers are essential to ensuring that public defenders have the time and resources to adequately represent their clients. See Boruchowitz Aff. ¶172, Points XII, XIV, XVI. Defendants maintain an indigent defense system in which the State's public defenders lack such necessary support.

Because investigators are necessary components of an effective criminal defense, the National Study Commission on Defense Services prescribes that defender offices should hire experienced and trained investigators and recommends the hiring of one investigator for every three attorneys. *Id.* at Point XII. Colorado, Connecticut, New Hampshire, New Jersey, Vermont, and Washington State maintain or prescribe ratios of at least one investigator for every four attorneys; Indiana requires indigent defense providers to fill three support staff positions for every four staff attorneys, at least one of whom should be an investigator; Delaware, Iowa, Minnesota, Rhode Island, Virginia, and Washington D.C. maintain or prescribe a ratio of at least one investigator for every six attorneys; and Kentucky, Mas-6(r)3I-10(55 14.16a-2(o of)3(a)4C4(s)-1()-1,-)-17(y

defenders from pursuing timely and diligent investigations in most of their clients' cases. See Boruchowitz Aff. ¶¶ 177-186. Few, if any, district offices for public defender services in Louisiana come close to meeting recommended ratios, and none of them meet those ratios once they are adjusted to account for Louisiana's excessive caseloads. See id.¶ 180.

Defendants' state-wide failure to provide investigatory resources has far-reaching consequences for criminal defendants. The 8th District Defender, in his Restriction of Services Protocol for Fiscal Year 2015, described the problem and its dire consequences succinctly:

Investigators are essential to criminal defense. They locate the witnesses and get the statements from people who are indispensable to a case. We will no longer be able to afford a full time or part-time investigator due to the fact that we did not receive adequate state funding. This takes time away from our clients and now that we have greater numbers of clients due to a reduction in [work] force, it is virtually impossible to find the time to adequately investigate the cases. In addition, we are not trained, licensed investigators. People facing the most serious crimes cannot get adequate representation because there are no investigators to flush out their witnesses, get statements from witnesses, review the crime scene, and talk to those eyewitnesses that the police never interviewed.

See Boruchowitz Aff. ¶ 79.

Defendants have failed to provide public defenders with access to experts. LPDB's own performance standards emphasize the importance of retaining experts where "necessary or appropriate" for preparation of the defense or for adequate understanding of the prosecution's case and rebutting that case. See Boruchowitz Aff. ¶ 190; see also id. ¶ 91 ("It is critical for defenders to be able to use expert witnesses both to challenge the prosecution's case and to be able to present affirmative defenses."). Yet analysis of district defenders' budgets reveals that many of them report not having spent any funds on expert witnesses. See id.¶ 201.

Defendants have likewise failed to ensure that the State's public defenders have access to the critical support of social workers. See Boruchowitz Aff. ¶¶ 52, 218 ("Although social workers have become an important and widely recognized component of effective representation, in Louisiana social workers are rarely employed to assist indigent defendants."). A significant number of the people charged with crimes suffer from mental health and substance abuse problems.⁹ In order to communicate with and advocate effectively on behalf of their clients, public defenders often require assistance from trained professionals, who are widely used in many other states' defender offices. App. 70; see Boruchowitz Aff. ¶¶ 52, 218. For example, client and family interviews conducted by an experienced social worker can, among other things,

⁹ See e.g., Doris J. James & Lauren E. Glaze, U.S. Dep't of Justice Bureau of Justice Statistics, NCJ 213600, *Mental Health Problems of Prison and Jail Inmates* (Sept. 2006).

Members of the judiciary have likewise observed that the public defense system maintained by Defendants is plagued with unstable and inadequate funding. In her 2016 State of the Judiciary Speech to the Louisiana Legislature, Chief Justice Bernette Joshua Johnson stated:

Our indigent defender system is funded through a combination of state appropriations (\$33 million last year), proceeds from traffic tickets, and local funds and court fees. Unfortunately, revenues from traffic tickets have decreased dramatically; and we know state appropriations have been slashed. As a result, 33 of the state's 42 judicial district public defender offices are presently operating under a Restriction of Services, and they foresee that half the public defender offices in the state will be insolvent within months.¹¹

Further, in a January 2017 ruling, United States District Court Judge James J. Brady concluded that “

wide declaratory and injunctive relief, federal law construing Rule 23 of the Federal Rules of Civil Procedure is especially instructive here.

As shown below, each of Article 591(A)'s five requirements is satisfied.

1. Numerosity Is Satisfied

It is well established that “[w]here the exact size of the class is unknown but general knowledge and common sense indicates that it is large, the numerosity requirement is satisfied.” 1 Robert Newberg, *Newberg on Class Actions* §3.3^{4d} (4d. 2002). Here, the Class comprises the tens of thousands of criminal defendants in Louisiana state courts, other than capital defendants, who are constitutionally eligible for the appointment of counsel. App. 1-3. Louisiana courts regularly certify classes consisting of a mere fraction of that number. See e.g., *Davis v. Jazz Casino Co.*, 864 So.2d 880, 888 (La. Ct. App. 4th Cir. 2004) (affirming certification of a class of 148 class members).

2. Commonality Is Satisfied

“The test for commonality requires only that there be at least one issue the resolution of which will affect all or a significant number of putative class members.” *Claborne v. Hous. Auth. of New Orleans*, 65 So.3d 268 (La. App. 4th Cir. 2015) (quotation omitted); see also e.g., *Price*, 79 So. 3d at 969 (“The commonality prerequisite requires a party seeking class certification to show that “[t]here are questions of law or fact common to the class.””).

In this case, the C

5. Whether substantial structural

risk of harm arises from state actors' system-wide policy or practice of making caseworkers carry excessive caseloads.

The district court agreed.¹² See M.D. 294 F.R.D. at 38-39. The court found that excessive caseloads—as to which there was “considerable evidence in the record”—were “the product of deliberate choices made by State actors,” and that there was a “persuasive” relationship “between caseworkers’ workloads and class members’ safety.” *Id.* at 40-44. As the court reasoned:

To what extent caseworkers are overworked, whether this overwork is significant

other words, each of the Plaintiffs seeking to act as a Class representative is part of the Class and possesses the same interest and is threatened with the same injury as the other Class members.

Louisiana courts have consistently found typicality in such situations. See, e.g., *Baker v. PHC-Minden, L.P.*, 167 So.3d 528 (La. 2015) (finding typicality satisfied where hospital applied the challenged collection policy to all class members over a term of years); *Smith v. City of New Orleans*, 131 So.3d 511, 522 (La. Ct. App. 4th Cir. 2013) (finding typicality satisfied where “claims of Appellees all arise out of the issuance of parking citations that were unauthorized under the Municipal Code”); *Gudo v. Adm’rs of Tulane Educ. Fund*, 966 So.2d 1069, 1078 (La. Ct. App. 4th Cir. 2007) (finding typicality satisfied where class representatives and putative class members were all family members impacted 0dfami3Cth

representative must be able to demonstrate that he or she suffered an actual-

B. This Case Satisfies

or varying adjudications which would establish incompatible standards of conduct for the party opposing the class.” *Duckworth v. Louisiana Farm Bureau Mut. Ins. Co.*, 125 So. 3d 1057, 1067 n.6 (2012) (specifying the requirements); see also La. C.C.P. Article 591(B)(1)(a). Similar to a (B)(2) class action, a class action under Article 591(B)(1)(a) is also proper where plaintiffs seek injunctive or declaratory relief as opposed to monetary damages to remedy conduct that affects a broad class of individuals. See, e.g., *Robichaux*, 152 So.2d at 40.

Federal courts have certified classes under the analog to Article 591(B)(1)(a) in civil rights cases challenging systemic constitutional violations where, as here, the pursuit of individual lawsuits—as opposed to a class action—w

b

knowledgeable with regard to the applicable law. Finally, Plaintiffs' litigation team has committed and will continue to commit to the representation of this class action significant staffing and material resources, including the retention of highly qualified experts. Plaintiffs therefore respectfully request that the Court appoint them in its class certification order.

CONCLUSION

Plaintiffs respectfully request that the Court: (1) certify this case as a class action for "All persons who are indigent and facing charges in Louisiana of a non-capital criminal offense punishable by imprisonment, excluding criminal defendants represented by private counsel, criminal defendants who are voluntarily and knowingly representing themselves *pro se* and juveniles charged with criminal offenses but whose cases are assigned only to juvenile court"; and (2) appoint Jones Walker LLP, Southern Poverty Law Center, Davis Polk & Wardwell LLP

Respectfully submitted,

MEREDITH ANGELSON
Louisiana Bar No. 32995
JARED DAVIDSON
Louisiana Bar No. 37093
SOUTHERN POVERTY LAW CENTER
1055 St. Charles Avenue, Suite 505
New Orleans, Louisiana 70130
Telephone: 504-486-8962
Email: meredith.angelson@splcenter.org
jared.davidson@splcenter.org

MARK A. CUNNINGHAM
Louisiana Bar No. 24063
PETER J. KEE
Louisiana Bar. No. 34860
JASON CULOTTA
Louisiana Bar No. 35731
JONES WALKER LLP
201 St. Charles Avenue, 50th Floor
New Orleans, Louisiana 70170
Telephone: 504-582-8000
Fax: 504-589-8000
Email: mcunningham@joneswalker.com

JON GREENBAUM *
District of Columbia No. 489887
MATEYA KELLEY*
New York Reg. No. 5270400
LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW
1401 New York Avenue, NW
Suite 400
Washington, DC 20005
Email: jgr.ID 38 >> 9(YE)-1(R)-5(S)-6(1)0.11ail: