

DUPLICATE

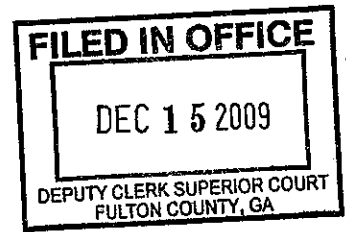
IN THE SUPERIOR COURT OF FULTON COUNTY  
STATE OF GEORGIA

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 MAURICE FLOURNOY, et al,  
 Plaintiffs, on behalf of  
 themselves and all persons  
 similarly situated.  
 v.  
 THE STATE OF GEORGIA, et al,  
 Defendants.  
 \_\_\_\_\_

CIVIL ACTION

No. 2009CV178947

CLASS ACTION



**PLAINTIFFS' EMERGENCY MOTION**  
**FOR RULING ON MANDAMUS NISI**

Plaintiffs respectfully request that mandamus nisi be granted and the Court hold a hearing, pursuant to O.C.G.A. § 9-6-27(b), requiring Defendants Perdue, Crawford, Berg, Stokes, and Rodgers to show cause why mandamus absolute should not issue.<sup>1</sup>

In support of this Motion, Plaintiffs rely on their accompanying brief and the following:

<sup>1</sup> Plaintiffs have moved, simultaneous with the filing of this Mandamus Nisi, to certify a class of "all indigent persons who have been or will be convicted of a criminal offense in a Georgia court and who do not, or in the future will not, have the assistance of conflict-free counsel to pursue a motion for new trial and/or first direct appeal." (See Pls.' Mot. for Class Cert.) Upon a hearing, Plaintiffs request that the Court grant class certification and issue a writ of mandamus absolute in favor of the plaintiff class.

1. Under the Georgia and U.S. Constitutions, Plaintiffs have a clear right the appointment of publicly-funded counsel to assist with their motions for new trial and first appeal. Both the Georgia Court of Appeals and Eleventh Circuit have held that indigent defendants have a right to counsel at the motion for new trial stage because it is a critical stage of the criminal trial proceeding. *Adams v. State*, 199 Ga. App. 541, 405 S.E.2d 537 (1991); *Williams v. Turpin*, 87 F.3d 1204, 1210 (11th Cir. 1996). Likewise, Plaintiffs have the right to counsel for their first direct appeal under the U.S. Supreme Court’s decision in *Douglas v. California*, 372 U.S. 353, 355 (1963). These rights are properly vindicated in an action brought pursuant to 42 U.S.C. § 1983. Thus, Plaintiffs have established a “clear right” to the remedy sought.

2. Defendants Perdue, Crawford, Berg, Stokes, and Rodgers have a non-discretionary duty to provide counsel to Plaintiffs under the U.S. Constitution, the Georgia Constitution, and the Indigent Defense Act of 2003. Defendant Perdue has the ultimate authority within the executive branch and the constitutional obligation to “take care that the laws are faithfully executed.” GA. CONST. Art. V, § II, ¶ II. Moreover, Defendant Perdue supervises, oversees, and controls the GPDSC, which has day-to-day operating and supervising responsibility for providing indigent defense services throughout the state. *See* O.C.G.A. § 17-12-5. Defendants Crawford, Berg, Stokes, and Rodgers are GPDSC officials charged

with the statutory legal duty to provide a legal defense to the indigent. Under Section 1 of the Indigent Defense Act of 2003 (“IDA”), the GPDSC and its officials “shall 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.” O.C.G.A. § 17-12-1. Likewise, Section 5(d) of the IDA mandates that the Director of the GPDSC “shall . . . [a]dminister and coordinate the operations of the council and supervise compliance with rules, policies, procedures, regulations, and standards adopted by the council.” O.C.G.A. § 17-12-5(d)(3). Defendants are also obligated under the IDA to provide counsel where a public defender’s office has withdrawn from a representation on the basis of a conflict of interest. *See* O.C.G.A. § 17-12-22(a) (GPDSC “shall establish a procedure for providing legal representation in cases where the circuit public defender office has a conflict of interest.”). Accordingly, Defendant Perdue, chief executive officer of the State of Georgia, and the GPDSC’s governing officials, including Defendants Crawford, Berg, Stokes, and Rodgers, have a clear and non-discretionary duty to provide counsel to Plaintiffs in this action. Furthermore, to the extent that these officials have any discretion in the discharge of that duty, they have grossly abused their discretion.

3. No alternative avenue of legal relief exists. Plaintiffs cannot seek the appointment of counsel in their underlying criminal proceedings because, as the Court of Appeals held last year in *Bynum v. State*, 289 Ga. App. 636, 638, 658 S.E.2d 196, 198 (2008), trial courts presiding over criminal cases “lack the authority” to order the appointment counsel under the IDA. Instead, as *Bynum* recognized, the IDA requires the GPDSC—and not trial courts—to appoint counsel. Therefore, the only legal remedy available to an indigent defendant seeking the appointment of counsel is a mandamus action to compel the GPDSC to provide counsel. *Id.* (holding that defendant without counsel “may seek relief by application for a writ of mandamus”).

4. To be constitutionally sufficient, appointed counsel must be capable of adequately and effectively representing the Plaintiffs at the motion for new trial stage and in their first direct appeal. The nominal appointment of unpaid or overburdened attorneys does nothing to remedy the constitutional violation. As the Supreme Court has explained: “[N]ominal representation on an appeal as of right—like nominal representation at trial—does not suffice to render the proceedings constitutionally adequate; a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.” *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); *see also Harris v. Champion*, 938 F.2d 1062, 1068 (10th Cir. 1991); *Holly v. Smyth*, 280 F.2d 536, 542 (4th Cir. 1960).

GPDSC policies recognize this constitutional requirement and, for that reason, specifically limit the number of appeals that each attorney may handle in a given year to 25.<sup>2</sup>

For the reasons set forth in this Motion and in the supporting memorandum of law, Plaintiffs respectfully request that the Court grant mandamus nisi.

Pursuant to O.C.G.A. § 9-6-27(a), the hearing in a mandamus action must be held no less than ten and no more than 30 days after mandamus nisi is granted.

Accordingly, plaintiffs request a hearing, as soon as the Court deems practicable consistent with this statutory requirement, requiring Defendants Perdue, Crawford, Berg, Stokes, and Rodgers to show cause as to why mandamus absolute should not issue compelling these Defendants to discharge their non-discretionary duty to provide counsel to each member of the plaintiff class consistent with the United States and Georgia Constitutions, the Indigent Defense Act of 2003, in accordance with the standards adopted by the GDPSC.

[signatures on next page]

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<sup>2</sup> See GPDSC Standard For Limiting Case Loads and Determining the Size of Legal Staff in Circuit Public Defender Offices (hereinafter “GPDSC Standard for Limiting Case Loads”), available at [http://www.gpdsc.com/cpdsystem-standards-limiting\\_casloads.htm](http://www.gpdsc.com/cpdsystem-standards-limiting_casloads.htm) and attached to Appendix as Exhibit 46 (emphasis in original).

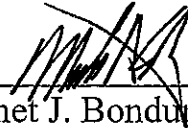
Respectfully submitted this 15th day of December 2009.



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**CERTIFICATE OF SERVICE**

I hereby certify that pursuant to Ga. Code Ann. § 9-11-4, I have this day perfected service of this **PLAINTIFFS' EMERGENCY MOTION FOR RULING ON MANDAMUS NISI** upon Defendants at the following address:

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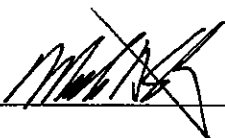
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This 15th day of December, 2009.

  
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United States and Georgia Constitutions, the Indigent Defense Act of 2003,  
and in accordance with the standards adopted by the GDPSC.

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**JUDGE**  
**SUPERIOR COURT OF FULTON COUNTY**