

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MAURICE FLOURNOY, et al,

Plaintiffs, on behalf of
themselves and all persons
similarly situated.

v.

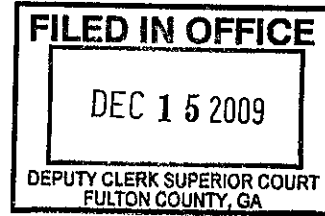
THE STATE OF GEORGIA, et al,

Defendants.

CIVIL ACTION

No. 2009CV178947

CLASS ACTION



PLAINTIFFS' MOTION
FOR CLASS CERTIFICATION

Plaintiffs respectfully request that this Court certify, pursuant to O.C.G.A. § 9-11-23, a class of "all indigent persons who have been or will be convicted in a Georgia court of a criminal offense carrying a term of incarceration 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."

In support of this Motion, Plaintiffs state the following:

1. Under O.C.G.A. § 9-11-23(a)(1), Plaintiffs satisfy the numerosity requirement for the certification of a class action. Members constituting the proposed class are so numerous as to make it impractical to

bring them all before the Court. There are nearly 200 indigent defendants who are currently without legal representation on appeal of their criminal proceedings due to the Defendants' failure to appoint conflict-free counsel as required by law. Further, the proposed class is comprised of every indigent individual convicted in Georgia of a crime carrying a term of incarceration who currently is, and in the future will be, without conflict-free counsel to pursue a motion for new trial and/or first direct appeal. Thus, the potential class is not only numerous but likely to continue to grow until relief is provided.

2. Under O.C.G.A § 9-11-23(a)(2), the proposed class satisfies the commonality requirement for the certification of a class action. All members of the proposed class seek mandamus and injunctive relief to compel Defendants to provide adequate, conflict-free representation to indigent defendants seeking to appeal their convictions. The federal and state constitutional, and state statutory rights asserted are also common to each member of the class. No members of the class seek monetary damages. The key fact at the heart of the proposed class action is common to every member—that Defendants' have systematically failed to appoint a conflict-free appellate counsel despite Plaintiffs' qualification for the assistance of an attorney provided at public expense.

3. Under O.C.G.A. § 9-11-23(a)(3), the named Plaintiffs satisfy the typicality requirement for the certification of a class action. Here all Plaintiffs assert claims not just typical of, but *identical* to, the proposed class. The federal and state constitutional and state statutory provisions invoked by the named Plaintiffs impose obligations on Defendants that apply to all members of the proposed class. Accordingly, all these claims are typical of the class. Also, the failure of Defendants to provide adequate, conflict-free appellate counsel to indigent defendants in the State of Georgia applies with equal force to all members of the proposed class. Thus, the named Plaintiffs' claims arise from the same essential events as the proposed class of indigent defendants who currently, and in the future will, lack appellate counsel.

4. Under O.C.G.A. § 9-11-23(a)(4), Plaintiffs and their counsel satisfy the adequacy of representation requirement for class certification. The named Plaintiffs and their counsel will ensure adequate representation of the class. Plaintiffs' counsel has extensive experience in class action litigation and has particular experience in litigating the claims raised in this action. *See, e.g., Amadeo v. State*, 259 Ga. 469 (1989) (challenging on interlocutory review the trial court's replacement of the post-conviction attorneys); *Smith et al. v. Fulton County et al.*, United States District Court

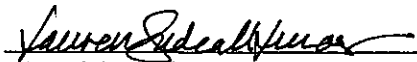
of the Northern District of Georgia, Civil Action No. 1:02-CV-2664-CC (challenging the legality and constitutionality of the indigent defense programs operated by Fulton County and the nine municipalities within Fulton County); *Parks et al. v. Fennessy et al.*, United States District Court for the Middle District of Georgia, Civil Action No. 1:96-CV-182-3 (challenging the denial of counsel in the State Court of Sumter County to indigent persons accused of misdemeanors); *Stinson v. Fulton County Board of Commissioners*, United States District Court for the Northern District of Georgia, Civil Action No. 1:94-CV-0240 (challenging the failure to provide lawyers to indigent persons between arrest and indictment); *People Accused of Crimes, et al. v. Mack Crawford, et al.*, Superior Court of Fulton County, Civil Action No. 2008CV151884 (challenging the legality and constitutionality of interrupting ongoing attorney-client relationships by terminating full-time, salaried conflict attorneys and replacing them with contract conflict defenders in the Non-Complex Division of Fulton County Superior Court); *Bowling et al. v. Lee, et al.*, Superior Court of Coweta County, Civil Action No. 01-V-802 (challenging the constitutionality and legality of the indigent defense program operated by officials of Coweta County). The named Plaintiffs do not have any interests that would conflict with members of the class.

5. Finally, under O.C.G.A § 9-11-23(b)(2), Defendants have refused to act on grounds generally applicable to the entire class, thereby making injunctive and declaratory relief appropriate and satisfying the final requirement for class certification. Defendants have a clear and non-discretionary duty to appoint counsel for indigent defendants who cannot otherwise afford a lawyer under the Sixth and Fourteenth Amendments of the U.S. Constitution, GA. CONST., art. I, § 1, ¶ XIV and the Georgia Indigent Defense Act of 2003. Defendants' failure to act and provide conflict-free appellate counsel to indigent defendants applies equally to members of the class.

For the reasons set forth in this Motion and in the supporting memorandum of law, Plaintiffs request that the Court certify this case as a class action pursuant to O.C.G.A § 9-11-23 and as provided in the proposed Order attached hereto as Exhibit A.

Respectfully submitted this 15th day of December, 2009.

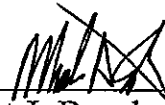
[signatures on next page]



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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' MOTION FOR CLASS**

CERTIFICATION upon Defendants at the following address:

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This 15th day of December, 2009.



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**IN THE SUPERIOR COURT OF FULTON COUNTY
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MAURICE FLOURNOY, et al,)	
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similarly situated.)	
)	CLASS ACTION
v.)	
)	
THE STATE OF GEORGIA, et al,)	
)	
Defendants.)	

[PROPOSED] ORDER

Now before this Court is Plaintiffs' Motion for Class Certification. The court has considered the pleadings filed in support of and in opposition to the motion. The Court finds this case is properly brought as a class action pursuant to O.C.G.A. § 9-11-23.

BACKGROUND

On December 15, 2009, Plaintiffs filed a complaint alleging that Defendants failed to perform their mandatory and non-discretionary official duties under statutory and constitutional law to provide the named Plaintiffs and proposed class with adequate, effective, and conflict-free counsel to represent them in their motions for new trial and appellate proceedings.

Plaintiffs seek mandamus, declaratory and injunctive relief to remedy the alleged statutory and constitutional violations of the named Plaintiffs' and proposed class's constitutional rights. Complaint ¶ 1.

On December 15, 2009, Plaintiffs also filed a motion requesting that this court allow this civil action to proceed as a class. Plaintiffs seek certification of a class comprised of:

All indigent persons who have been or will be convicted in a Georgia court of a criminal offense carrying a term of incarceration 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.

Plaintiffs' Motion for Class Certification at 1.

DISCUSSION

A party seeking to certify a class must demonstrate that it has met all four requirements of the Georgia Rules of Civil Procedure 23(a) and at least one of the requirements of Rule 23(b). Rule 23(a) states that class certification is proper if Plaintiffs demonstrate that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. O.C.G.A. § 9-11-23(a).

Plaintiffs seek to certify the proposed class under Rule 23(b)(2).

Under this rule a court may authorize class certification where “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.”

O.C.G.A. § 9-11-23(b)(2).

A. Rule 23(a) Requirements

a. Numerosity

A class must be “so numerous that joinder of all members is impracticable.” O.C.G.A. § 9-11-23(a)(1). Plaintiffs estimate that as of November 2009 there were nearly two hundred individuals in the proposed class; that number increases each month. Courts have found that a class comprised of far fewer people satisfies the numerosity requirement. *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986).

Plaintiffs have demonstrated that joinder is impractical in this case since the class grows in number each month and the proposed class members are incarcerated throughout the State. Therefore, the Court finds that the Plaintiffs have met the “numerosity” requirement.

b. Commonality

Rules 23(a)(2) requires that common questions of law or fact exist among class members. O.C.G.A. § 9-11-23(a)(2). Rule 23(a)(2) requires only a showing that a single issue common to all members of the class exists. *See Hillis v. Equifax Consumer Services, Inc.*, 237 F.R.D. 491, 497 (N.D. Ga. 2006).

Plaintiffs clearly meet the commonality requirement. As alleged by Plaintiffs, the central issue in this case is whether Defendants have denied the named Plaintiffs and the proposed class of conflict-free appellate counsel in violation of state and federal law. Thus, the claims asserted by the class raise numerous common questions of law and fact where only a “single common issue” is required. The Court finds that Plaintiffs have satisfied the “commonality” requirement.

c. Typicality

Typicality is fulfilled if “the claims or defenses of the representative parties are typical of the claims or defenses of the class.” O.C.G.A. § 9-11-23(a)(3). The typicality requirement is satisfied when plaintiffs demonstrate that the defendant has “committed the same unlawful acts in the same method against an entire class.” *Kennedy v. Tallant*, 710 F.2d 711, 717 (11th Cir. 1983). Some “factual variation” between the representatives’

claims and those of the class does not render the named Plaintiffs' claims atypical. *See Larkin v. Pullman-Standard Div., Pullman Inc.*, 854 F.2d 1549, 1572-73 (11th Cir. 1998)

Plaintiffs allege that Defendants have committed the same unlawful acts in the same method against each named Plaintiff and the proposed class. Based on the evidence submitted in support of class certification, the court is satisfied that Plaintiffs have demonstrated that Defendants' failure to provide adequate, conflict-free appellate counsel to indigent defendants in the State of Georgia in violation of their federal and state constitutional and state statutory obligations applies with equal force to all members of the proposed class. Further, Plaintiffs assert claims not just typical of, but *identical* to, the proposed class. The federal and state constitutional and state statutory provisions invoked by the named Plaintiffs impose obligations on Defendants that apply to all members of the proposed class. The Court therefore finds that the "typicality" requirement is satisfied.

d. Adequacy

Under Rule 23(a)(4), plaintiffs seeking to represent a class must be able to "fairly and adequately protect the interests" of all class members. O.C.G.A. § 9-11-23(a)(4). The named Plaintiffs seek identical relief to that which is sought by the remainder of the class, and as such there is no

potential for conflicting interests in the action. Further, based on would-be class counsel's extensive experience in class action litigation, and particular experience in litigating the claims raised in this action, the Court is satisfied that class counsel has sufficient experience and will pursue the action vigorously. The Court finds that named Plaintiffs and their counsel will fairly and adequately represent the class.

B. Rule 23(b)(2) Requirements

As mentioned above, O.C.G.A. § 9-11-23(b)(2) authorizes class certification where “the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” Defendants’ refusal to ensure the provision of conflict-free appellate counsel to indigent defendants applies equally to members of the class. The Court finds that this civil action should be certified under § 9-11-23(b)(2).

CONCLUSION

Plaintiffs have established the prerequisites for certifying a class: The class is so numerous as to make it impracticable to bring all members before the Court; there are common questions of law and fact; the representatives’ claims are claims typical of the class; the representatives, through counsel,

are able to fairly and adequately protect the interests of the class; and, the Defendants have acted or refused to act on grounds generally applicable to the class, making appropriate injunctive or declaratory relief. O.C.G.A. § 9-11-23(a) & (b)(2).

For the reasons stated above, the Court **GRANTS** Plaintiffs' Motion for Class Certification. Pursuant to Rule 23(b)(2), the Court hereby certifies a class of

all indigent persons who have been or will be convicted in a Georgia court of a criminal offense carrying a term of incarceration 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.

IT IS SO ORDERED.

DATED this ___ day of _____, 2010.

JUDGE
SUPERIOR COURT OF FULTON COUNTY