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CARL RICHARD, SR., JULIAN  
MARTIN SOLOMON, JR. AND  
CHARLIE MYERS ON BEHALF  
OF THEMSELVES AND ALL  
OTHERS SIMILARLY SITUATED

: 14TH JUDICIAL DISTRICT COURT

VS. NO. 2004-005405  
DVF

: PARISH OF CALCASIEU

THE STATE OF LOUISIANA,  
KATHLEEN BLANCO, IN HER  
OFFICIAL CAPACITY AS THE  
GOVERNOR OF THE STATE  
OF LOUISIANA, AND THE  
LOUISIANA STATE LEGISLATURE

: STATE OF LOUISIANA

FILED: SEP 23 2004

  
DEPUTY CLERK OF COURT

**MEMORANDUM OF LAW IN SUPPORT OF  
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

**I. INTRODUCTION**

In this civil rights action, Plaintiffs contend that the systemic denial of their fundamental right to the assistance of counsel in the Fourteenth Judicial District Court of Calcasieu Parish, Louisiana, violates the Sixth and Fourteenth Amendments to the United States Constitution, and Article 1, Sections 2 and 13 of the Louisiana Constitution of 1974. Plaintiffs request that this Court certify the proceedings as a class action pursuant to Louisiana Code Civ. P. art. 591(A) and 591(B)(2), on behalf of all adults who are or will be entitled to appointed counsel to represent them against criminal charges in the Fourteenth Judicial District in Calcasieu Parish. Plaintiffs respectfully submit that the requirements of Article 591 are satisfied in this case and that class certification should be ordered.

**II. THE NUMEROSITY, COMMONALITY, TYPICALITY,  
REPRESENTATION AND DEFINITION REQUIREMENTS OF  
LOUISIANA CODE CIVIL PROCEDURE ART. 591(A) ARE SATISFIED  
IN THIS CASE.**

The Louisiana Code of Civil Procedure art. 591 authorizes a lawsuit to proceed as a class action if all five prerequisites of Article 591(A) and one of the prerequisites of Article 591(B) are satisfied. See Clark v. Trus Joist MacMillian, 836 So.2d 454, 459 (La. App. 3d Cir. 2002). Article 591(A) permits class certification if:

- (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.

(4) The representative parties will fairly and adequately protect the interests of the class.

(5) The class is or may be defined objectively in terms of ascertainable criteria, such that the court may determine the constituency of the class for purposes of the conclusiveness of any judgment that may be rendered in the case.

Louisiana Code Civ. P. art. 591(A) While the initial burden is on the plaintiffs to establish that the statutory criteria are met, see Duhe v. Texaco, Inc., 779 So.2d 1070, 1078 (La. App. 3d Cir. 2001), any doubt as to certification must be resolved in favor of certification. See West v. G & H Seed Co., 832 So.2d 274, 292 (La. App. 3d Cir. 2002). All five of the Article 591(A) factors are satisfied in this case.

**A. Because The Plaintiff Class Is Large, Fluid, And Includes Future Members, It Satisfies The Numerosity Requirement Of Article 591(A)(1).**

The proposed class consists of “all adults who are or will be entitled to appointed counsel to represent them against criminal charges in the Fourteenth Judicial District in Calcasieu Parish.” During the course of a year, thousands of adults, upon arrest, are or will be entitled to have counsel appointed to represent them in the Fourteenth Judicial District Court.<sup>1</sup>

Although numbers alone are not necessarily determinative, see Sutton Steel & Supply, Inc. v. BellSouth Mobility, Inc., 875 So.2d 1062, 1066 (La. App. 3d Cir. 2004), the Third Circuit has held that a class containing 114 members is “surely” sufficient to satisfy Article 591.A(1). Martello v. City of Ferriday, 813 So.2d 467, 476 (La. App. 3d Cir.) cert denied, 537 U.S. 1972 (2002)); see Banks v. New York Life Ins. Co., 722 So.2d 990, 994 (La. 1998) (citing Thomas v. Charles Schwab & Co., 683 So.2d 734 (La. App. 3d Cir. 1996)).

Furthermore, joinder of all putative class members is highly impracticable in this case. Because defendants are arrested, indicted, arraigned and sentenced on a weekly basis in Calcasieu Parish, the class includes numerous future defendants who cannot be joined. See Johnson v. E.I. Dupont deNemours & Co., 721 So.2d 41, 44 (La. App. 5th Cir. 1998) (noting that a request for injunctive relief which would involve future class members favors certification of class); Pederson v. Louisiana State Univ., 213 F.3d 858, 868 n.11 (5th Cir. 2000) (when a class includes future members who will be affected by the complained of practices, “joinder is certainly impracticable” (citation omitted)).<sup>2</sup> The numerosity requirement is therefore satisfied in this case.

**B. The Nature Of The Challenged System And Its Constitutional Validity Present Common Questions Of Fact And Law Satisfying Article 591(A)(2).**

In this case, Plaintiffs challenge the constitutionality of Defendants’ policies and practices that deprive citizens facing prosecution in the Fourteenth Judicial District Court of

<sup>1</sup> Plaintiffs need not show the precise number of class members. See Calloway v. Westinghouse Elec. Corp., 642 F. Supp. 663, 671 (M.D. Ga. 1986).

<sup>2</sup> Reference to federal jurisprudence is helpful when determining whether a class should be certified under Article 591 because the state provisions are based on the federal provisions. See Guillory v. Union Pacific Corp., 817 So.2d 1234, 1236 (La. App. 3d Cir. 2002).

Calcasieu Parish of their fundamental right to the assistance of counsel. Their challenge presents questions of law and fact common to the proposed class.

“The test of commonality is not a demanding one, and requires only that there be at least one issue, the resolution of which will affect all or a significant number of the putative class members.” Duhe, 779 So.2d at 1078. It makes no matter that plaintiffs have been wronged to varying degrees or that they claim disparate complaints or experiences. See Clark, 836 So.2d at 461. Indeed, the commonality requirement should be read liberally as a shorthand test of whether the principal purpose of the class action procedure -- to advance the efficiency and economy of litigation -- is satisfied in a particular case. See Gen. Tel. Co. of Southwest v. Falcon, 457 U.S. 147, 159 (1982); see also Mathews v. Hixson Bros., Inc., 865 So.2d 1024, 1029 (La. App. 3rd Cir. 2004).

In this case, all members of the proposed class are adults who are or will be entitled to appointed counsel to represent them against criminal charges in the Fourteenth Judicial District in Calcasieu Parish. They present a common legal issue. The constitutional right to the assistance of counsel was firmly established in Gideon v. Wainwright, 372 U.S. 335 (1963) and other seminal United States Supreme Court cases and in State v. Peart, 621 So.2d 780, 789 (La. 1993). The right to counsel is a categorical imperative in our system of criminal procedure; it does not vary with the specific circumstances of a particular defendant or accusation. Moreover, all members of the proposed class are equally subject to the system of providing appointed counsel and the policies and practices that constitute the factual core of the class claims, including: whether Calcasieu Parish’s Public Defender program has been and continues to be plagued by systemic deficiencies, including excessive caseloads, severe understaffing, inadequate resources, and defective policies and procedures; whether these systemic deficiencies in the Public Defender program deprive class members of the right to counsel; and whether the failure to provide counsel violates rights guaranteed to plaintiffs and members of the plaintiff class by the Sixth and Fourteenth Amendments to the United States Constitution as well as by state constitutional and statutory law. See, e.g., Lake v. Speziale, 580 F. Supp. 1318, 1333 (D. Conn. 1984) (holding that no commonality or typicality problem exists where “the claim of each similarly situated person is essentially identical, *i.e.*, that he or she is entitled to appointed counsel”). Article 591(A)(2) is therefore satisfied.

**C. The Typicality Requirement Of Article 591(A)(3) Is Satisfied Because The Named Plaintiffs’ Claims Have The Same Essential Characteristics As The Claims Of The Class.**

The policies and practices challenged in this action apply with equal force to the named Plaintiffs and all the members of the class so that the claims of the named Plaintiffs are typical of those of the class.

Like the commonality test, the test for typicality is not demanding. See Duhe, 779 So.2d at 1079. It requires that the class representatives’ claims are typical of all members. See Clark, 836 So.2d at 462. Under Article 591(A)(3), a sufficient link between named plaintiffs and class claims is established if the class representatives’ claims arise out of the same course of conduct

as the class members' claims and are based on the same legal theory. See Martello, 813 So.2d at 479-80 (finding that named plaintiffs' allegations against the defendants are typical of all claims directed at the common nature of the defendants' conduct); Duhe, 779 So.2d at 1079. Some factual variation between the representatives' claims and those of the class does not render the named plaintiffs' claims atypical. See Martello, 813 So.2d at 479-80.

In this case, there are no significant factual differences between the policies and practices that the named Plaintiffs face and those to which the entire class is subject. Most, if not all, defendants who are or will be entitled to appointed counsel to represent them against criminal charges in the Fourteenth Judicial District in Calcasieu Parish are systematically denied their constitutional right to counsel. Moreover, the legal claims of the named Plaintiffs are typical of those of the class. The typicality requirement of Article 591(A)(3) is therefore satisfied.

**D. The Named Plaintiffs Will Fairly And Adequately Protect The Interests Of The Class As Required By Article 591(A)(4).**

Whether named plaintiffs will fairly and adequately protect the unnamed class members' rights turns on three considerations. The first is whether the interests of the representative parties will conflict with those of the class members; the second is whether the class representatives have a sufficient interest in the outcome; the third is whether counsel for the named plaintiffs is qualified and experienced and will vigorously prosecute the interests of the class. See Duhe, 779 So.2d at 1079.

The named Plaintiffs and class members share a common interest in improving the policies and practices to which both groups are and will be subject. The named Plaintiffs are pursuing equitable relief that will inure to the benefit of all defendants in the Fourteenth Judicial District Court of Calcasieu Parish. There is therefore no reason to believe that any palpable conflict of interest will develop in this case.

Similarly, the named Plaintiffs have a sufficient interest in remedying the defects in the system for providing lawyers to indigent criminal defendants such as themselves. They recognize that the wrongs they have endured because of Defendants' conduct are not confined to their cases, but that most, if not all, indigent criminal defendants in Calcasieu Parish have had similar experiences. The named Plaintiffs want to change the system that affects themselves and others in their situation.

The law firms representing Plaintiffs in this action have extensive experience litigating complex civil action cases, including class actions, and also have extensive experience representing criminal defendants. Plaintiffs' counsel is committed to prosecuting the interests of the class vigorously through this lawsuit. Counsel has conducted extensive discovery and legal research for over two years in preparation for filing this action, and will adequately protect the interest of the class. In addition, Plaintiffs' local counsel is a respected member of the Louisiana bar and enjoys years of experience litigating complex civil actions, including class actions, in state and federal courts in Louisiana.

**E. Because Criteria For Determining Members Of The Class Are Easily Ascertainable, The Class Is Or May Be Objectively Defined As Required Under Article 591(A)(5).**

The final requirement of Article 591(A) is that the class is defined in objective terms that allow for a relatively easy determination of the criteria used for establishing class membership. See Martello, 813 So.2d at 483. The definition need not be so precise to permit identification of every single class member at the commencement of the action. See West, 832 So.2d at 292 (quoting Duhe, 779 So.2d at 1079). Rather, the definition should be concrete enough to be used by a court to determine whether a person is covered by any eventual judgment on the merits. See Martello, 813 So.2d at 483.

The class in this case satisfies the class definition requirements because it is defined in purely objective terms: All adults who are or will be entitled to appointed counsel to represent them against criminal charges in the Fourteenth Judicial District in Calcasieu Parish. This simple, straightforward definition clearly delineates who qualifies as a class member and who does not. Should judgment be entered in Plaintiffs' favor, this definition enables the Court to determine which individuals are subject to the relief awarded.

**III. THE REQUIREMENTS OF ARTICLE 591(B)(2) ARE SATISFIED BECAUSE DEFENDANTS HAVE ACTED AND REFUSED TO ACT ON GROUNDS GENERALLY APPLICABLE TO THE CLASS, THEREBY MAKING APPROPRIATE FINAL DECLARATORY AND INJUNCTIVE RELIEF WITH RESPECT TO THE PLAINTIFF CLASS AS A WHOLE.**

A prospective class action may be maintained if, in addition to satisfying all four requirements of Article 591(A), the action meets the requirements of Article 591(B)(2). This provision states that class certification is proper 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.

Courts have interpreted this requirement to mean that the opposing party "either has acted in a consistent manner toward members of the class so that his actions may be viewed as part of a pattern of activity, or has established or acted pursuant to a regulatory scheme common to all class members." 7A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure: § 1775 (2d ed. 1986). Analyzing the identically-worded Federal Rule of Civil Procedure 23(b)(2), federal courts have held that every class member need not be aggrieved by or desire to challenge defendant's conduct in order for some of them to seek relief. Johnson v. Am. Credit Co. of Georgia, 581 F.2d 526, 532 (5th Cir. 1978). Rather, the purpose of the type of inquiry required by Rule 23(b)(2) and Article 591(B)(2) is simply to ensure that "the interests of the class members are so like those of the individual representatives that injustice will not result from their being bound by such judgment in the subsequent application of principles of res judicata." Hassine v. Jeffes, 846 F.2d 169, 179 (3d Cir. 1988).

In this case, it is clear that the policies and practices challenged in this lawsuit apply generally to all class members. One system provides lawyers to all adults who are or will be

entitled to appointed counsel to represent them against criminal charges in the Fourteenth Judicial District in Calcasieu Parish. The defects in this system have and will continue to chronically deny the right to counsel to the class members in violation of their rights under the Sixth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 2 and 13 of the Louisiana Constitution of 1974.

The class action is an appropriate device for addressing this sort of unconstitutional regulatory scheme. See, e.g., Orantes-Hernandez v. Thornburgh, 919 F.2d 549 (9th Cir. 1990) (affirming injunction requiring INS to provide class of Salvadoran citizens with notification of right to representation by counsel); Lake, 580 F. Supp. at 1333 (holding that final injunctive or declaratory class relief was appropriate under Rule 23(b)(2) counsel denied to indigent litigants in civil contempt proceedings); Holland v. Steele, 92 F.R.D. 58, 64-65 (N.D. Ga. 1981) (certifying Rule 23 (b) (2) class in challenge to Sheriff's restriction on pretrial detainees' access to counsel and to the courts); Blyden v. Hogan, 320 F. Supp. 513, 517 (S.D.N.Y. 1970) (certifying class action in challenge to use of waiver form as violation of inmates' right to counsel); Green v. City of Tampa, 335 F. Supp. 293, 293 (M.D. Fla. 1971) (issuing declaratory and injunctive relief on behalf of class of all indigent persons who in the future will be denied counsel in municipal court). In this case, Plaintiffs as a class seek declaratory and injunctive relief, relief that is appropriate on a classwide basis in light of the generalized character of Plaintiffs' claims. Article 591(B)(2) is therefore satisfied.

#### IV. CONCLUSION

For these reasons, Plaintiffs request that this Court certify this lawsuit as a class action pursuant to Louisiana Code Civ. P. art. 591(A) and 591(B)(2) for the purposes of declaratory and injunctive relief, on behalf of all adults who are or will be entitled to appointed counsel to represent them against criminal charges in the Fourteenth Judicial District in Calcasieu Parish.

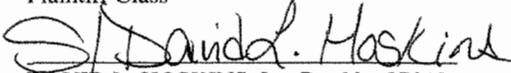
Respectfully Submitted,

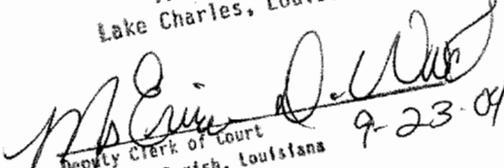
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