Judge Jerry W. Baxter

SUPERIOR COURT OF FULTON COUNTY

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COMMENTS:

2009 cv 178947

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MAURICE FLOURNOY, et al.,	)	CIVIL ACTION
Plaintiffs, on behalf of themselves and all persons similarly situated,	)	No. 2009CV178947
v.	)	
THE STATE OF GEORGIA, et al.,	)	
Defendants.	)	

ORDER ON CLASS CERTIFICATION AND MANDAMUS

Plaintiffs, six indigent defendants convicted of felonies after trial, brought this putative class action on December 15, 2009, against the State of Georgia, the Georgia Public Defender Standards Council ("GPDSC"), and various state officials contending that they had been denied the assistance of conflict-free counsel in their motions for new trial and appeals. In their Complaint, Plaintiffs sought a writ of mandamus against Governor Sonny Perdue and GPDSC officials, including Mack Crawford, the Director of the GPDSC; Mike Berg, the Chairman of the GPDSC; Jim Stokes, the Conflicts Division Director of the GPDSC; and Jimmonique Rodgers, the Appellate Advocacy Division Director of the GPDSC. Simultaneous to filing the Complaint, Plaintiffs moved to certify a class of similarly situated indigent defendants. The Court held an evidentiary hearing on both mandamus and class certification on February 5 and February 10, 2010. After reviewing the record and hearing the evidence and arguments presented during two days of hearings, the Court enters the following findings of fact and conclusions of law.[1]

[1] Plaintiffs also seek injunctive and declaratory relief in their Complaint. These additional requests for relief are not presently before the Court and therefore are not considered in this

FINDINGS OF FACT

At the time of filing of the Complaint, the Plaintiffs in this action were among approximately 187 indigent defendants in Georgia who had not been provided a conflict-free appellate attorney to handle their motions for new trial and direct appeals.[2] The named Plaintiffs and the putative class members were each represented at trial by a public defender in a Circuit Public Defender ("CPD") office or by appointed private conflict counsel.[3] Following conviction and sentencing, each plaintiff requested new appellate counsel for his motion for new trial and appeal. When an indigent defendant requests new appellate counsel and a CPD office has a conflict of interest, the general procedure is for the CPD office to send a notice to the GPDSC of the indigent defendant's request for conflict-free appellate counsel.[4] Accordingly, after each

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Order. Defendants have also moved to dismiss Plaintiffs' federal claims in this action. Defendants' motion does not seek dismissal of Plaintiffs' mandamus claims and does not pertain to Plaintiffs' motion for class certification. It will therefore be considered by separate order.

[2] After conviction, an indigent defendant has a right to request new, conflict-free counsel to pursue a motion for new trial and direct appeal. *Garland v. State*, 283 Ga. 201, 657 S.E.2d 842 (2008). For simplicity's sake, the term "appellate counsel" as used in this Order refers to an attorney who handles a motion for new trial and/or direct appeal.

[3] Five of the six plaintiffs—Maurice Flournoy, Eugene Neal, Emory Teasley, Cornelius White, and Darryl White—were represented at trial by public defenders employed by a Circuit Public Defender office. One of the plaintiffs, Darnell Amaker, was represented at trial by a private attorney because the Atlanta Circuit Public Defender's office had a conflict-of-interest as a result of representing one of Darnell Amaker's co-defendants. *See* Affidavit of Maurice Flournoy ("Flournoy Aff.") ¶ 4; Affidavit of Eugene Neal ("Neal Aff.") ¶ 3; Affidavit of Emory Teasley ("Teasley Aff.") ¶ 3; Affidavit of Cornelius White ("C. White Aff.") ¶ 3; Affidavit of Darryl White ("D. White Aff.") ¶ 3; Affidavit of Darnell Amaker ("Amaker Aff.") ¶ 3, affidavits are attached to Pls.' Appendix as Exhibits 1-6.

Plaintiffs' Affidavits are considered for purposes of mandamus and class certification. *See* Order of Feb. 12, 2010 (denying Defendants' motion to strike affidavits). Likewise, the Court **GRANTS** Plaintiffs' Motion to Admit Defendants' Depositions and considers those depositions among the evidence admitted for purposes of class certification and mandamus.

[4] Generally, trial counsel notifies the GPDSC of a request for new conflict-free counsel by sending an "Appellate Conflict Request Form" to the Appellate Advocacy Division of the GPDSC. *See* Tr. at 109-10; Pls.' Ex. 5. After the Appellate Conflict Request Form is sent, the Appellate Division also asks the trial attorney to deliver the indigent defendant's case file and a copy of the trial transcript, once it is complete. *See* Defs.' Ex. 1. Upon receipt of an Appellate

Plaintiff's trial counsel filed a "placeholder" one-page motion for new trial within the 30-day deadline, the local CPD office notified the GPDSC that each Plaintiff had requested new, conflict-free counsel. It is undisputed that the GPDSC received notice of all Plaintiffs' and putative class members' requests for conflict-free counsel. Tr. at 104-06.

On January 19, 2010, Defendants filed an Answer, which admitted that "appellate representation was not being provided by Defendants" to five of the six named Plaintiffs at the time this lawsuit was filed.[5] Answer ¶ 4. Defendants also did not dispute that five of the six plaintiffs in this action were convicted in 2008 or earlier, and therefore had been without a lawyer to handle their motion for new trial and appeal for between one and three-and-a-half years.[6]

I. GPDSC's Appellate Advocacy Division

The Appellate Advocacy Division of the GPDSC ("Appellate Division") is the state entity responsible for providing representation to indigent defendants in motions for new trial and appeals in cases where a CPD office has a conflict of interest. Pls.' Ex. 1. According to the

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Conflict Request Form or other notice that an indigent defendant has requested conflict-free counsel on appeal, the Appellate Division (i) starts a new file for the indigent defendant; (ii) enters the indigent defendants' case information on its internal "Active Appeals" tracking spreadsheet; and (iii) enters the indigent defendants' case information on JCATS, which is the GPDSC's internal computer system for tracking indigent defense cases statewide. *See* Tr. at 109-14; Rodgers Dep. Ex. 33 (describing policy concerning receipt of new case); Pls.' Exs. 6-11 (JCATS forms for six Plaintiffs).

[5] As to the sixth Plaintiff, Cornelius White, Defendants contended at the hearing that he had been assigned counsel on December 10, 2009, several days before this lawsuit was filed. However, Plaintiff C. White's appellate attorney, a staff attorney within the Appellate Division, did not enter an appearance in his criminal case until after the lawsuit was filed, on January 20, 2010.

[6] Plaintiff Flournoy was convicted on March 1, 2007. Flournoy Aff. ¶¶ 4-9. Plaintiff Neal was convicted on October 31, 2008. Neal Aff. ¶¶ 3, 6. Plaintiff Teasley was convicted on June 29, 2006. Teasley Aff. ¶¶ 3, 7. Plaintiff Amaker was convicted on April 14, 2006. Amaker Aff. ¶¶ 3, 7-8. Plaintiff Cornelius White was convicted on May 10, 2007. C. White Aff. ¶¶ 3, 7. Plaintiff Darryl White was convicted on February 17, 2009. D. White Aff. ¶¶ 3, 4, 7.

Appellate Division's official description, the Appellate Division's responsibility arises from O.C.G.A. § 17-12-22(a) and O.C.G.A. § 17-12-23(a), which require the GPDSC to establish an effective and efficient procedure for handling cases where a CPD office has a conflict of interest. Pls.' Ex. 1. "When that conflict is post-conviction, the established procedure is for the Appellate Division to handle the defendant's appeal." *Id.* Both the Director of the Appellate Division, Jimmonique Rodgers, and the Director of the GPDSC, Mack Crawford, admit that the Appellate Division GPDSC is the entity responsible for providing appellate representation in cases where a conflict has been declared by a CPD office. Tr. at 98-100; 205-06.

The individual Defendants in this action are the governmental officials responsible for operating the Appellate Division and providing representation in motions for new trial and appeals in conflict cases. Ms. Rodgers is "[r]esponsible for the overall operation of the GPDSC Appellate Division, including staff and caseload." *Id.* The Appellate Division is overseen by Defendants Mack Crawford (Director of GPDSC), Jim Stokes (Conflict Division Director of GPDSC), and Michael Berg (Chairman of GPDSC). Because the GPDSC is an executive branch agency, the ultimate responsibility to direct and control its operations rests with Defendant Perdue, the Governor and chief executive branch official of the State of Georgia. Defendant Perdue has ultimate hiring authority over the GPDSC's Director, the Appellate Division Director, and the Appellate Division's staff attorneys.[7]

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[7] Defendant Perdue "supervises and oversees executive branch agencies in the State of Georgia, including the GPDSC." Defs.' Resp. to Pls.' Request for Admission No. 51. Defendant Perdue is also the appointing authority for the Director of the GPDSC. *See* O.C.G.A. § 17-12-5 ("The director shall be appointed by the Governor and shall serve at the pleasure of the Governor."). Finally, "the Governor's Office of Planning and Budget controls the hiring waivers for all employees of the State of Georgia and thus has the ultimate hiring authority for all positions within any of the divisions of the GPDSC," including the Appellate Division. Defs.' Resp. to Pls.' First Int. No. 6.

II. Appellate Division: 2007-2009

At its inception in June of 2007, the Appellate Division was staffed by 5 full-time staff attorneys and carried an annual caseload of 75 cases. During that period of time, the caseloads of the Appellate Division's then five attorneys were consistent with the 25 appeal-per-lawyer Standard for Limiting Case Loads.[8]

In February of 2008, the Georgia Supreme Court handed down *Garland v. State*, 283 Ga. 201, 657 S.E.2d 842 (2008), which unanimously held that an indigent defendant, upon conviction, is entitled to request a new attorney to raise ineffective assistance of counsel in a motion for new trial and appeal. Following *Garland*, the Appellate Division began receiving a higher volume of requests for conflict-free appellate attorneys. Since March of 2008, its caseload has grown steadily by 15-30 cases per month, but as a result of inadequate staffing and budget reductions, it has not been able to provide attorneys in a large and growing number of cases. In July of 2008, despite a request for additional funding, the Appellate Division's staff

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[8] The GPDSC's Standard for Limiting Case Loads provides that a public defender "shall not exceed . . . 25 Appeals to the Georgia Supreme Court or the Georgia Court of Appeals per attorney per year." Pls.' Ex. 14. It also provides that the standard "is not a suggestion or guideline, but is intended to be a maximum limitation on the average annual case loads of each lawyer employed as a public defender . . . ." *Id.* (emphasis omitted). The GPDSC's caseload standard tracks the American Bar Association Standard 3 "Caseload Limits and Types of Cases," which likewise limits an appellate lawyer's average annual caseload to 25 cases.

The GPDSC Standards for Limiting Case Loads was adopted by the Georgia Supreme Court in 1998 and later adopted and ratified by the GPDSC in 2003 and 2004, respectively. *See* Tr. at 226-29; Pls.' Ex. 14 (GPDSC's "Standard for Limiting Case Loads"); Pls.' Ex. 17 (caseload standard available on GPDSC website); Pls.' Ex. 22 (GPDSC meeting minutes dated Nov. 21, 2003 reflecting adoption of caseload standard); and Pls.' Ex. 23 (GPDSC meeting minutes dated Aug. 27, 2004, reflecting unanimous ratification of caseload standard). As Ms. Rodgers has noted, however, this standard is "deceptive" in Georgia because it pertains only to "paper" appeals. It does not contemplate the factual investigation and additional work required to investigate and litigate an indigent defendant's motion for new trial, which may be fact-intensive and complex, and often requires the presentation of additional evidence. *See* Tr. at 151-52; Pls.' Ex. 18.

was reduced from five full-time staff attorneys to two full-time and one part-time staff attorneys. The Appellate Division's total caseload and number of cases for which it could not provide appellate counsel are provided in the following chart, which was compiled from the monthly "Active Appeals" tracking reports generated by the Appellate Division between July 2008 and November 2009:[9]

Reporting Date	Number of Indigent Defendants Requesting Conflict-Free Counsel	Number of Indigent Defendants Without Conflict-Free Counsel
07/31/2008	176	30
09/29/2008	203	42
10/31/2008	224	61
11/30/2008	235	71
12/31/2008	249	77
01/28/2009	262	90
02/27/2009	283	90
03/31/2009	294	101
04/29/2009	310	118
05/29/2009	343	145
06/25/2009	364	166
07/24/2009	369	153
08/26/2009	408	130
09/28/2009	441	151
10/29/2009	470	179
11/23/2009	476	187

In the eight-month period between March and December 2008, the Appellate Division's caseload increased from 75 to 249, but as a result of inadequate resources, the Appellate Division was unable to assign 77 indigent defendants appellate counsel.[10] In a status report provided to GPDSC officials in December of 2008, Ms. Rodgers noted that the Appellate Division had

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[9] These numbers are not in dispute. *See* Defs.' Resp. to Pls.' Request for Admission No. 38. Each respective "Appeals Status Report," which is referred to by reporting date in this chart, was attached to Pls.' Appendix as Exhibits 12 through 28, and the November 2009 report was Plaintiffs' Exhibit 2 at the hearing in this matter. The individuals with "In House" listed in the "Attorney" column have requested but not been provided conflict-free appellate counsel.

[10] Appellate Division Status Report – December 2008, attached to Pls.' Appendix as Exhibit 31.

"passed the crisis point" and was receiving "backlash from both local judges and clients frustrated with inevitable delay." Pls.' Ex. 18.

In the year following Ms. Rodgers' December 2008 report, the Appellate Division's caseload doubled, and its funding was further reduced. By the end of November 2009, the number of cases to which the Appellate Division could not assign an attorney grew by 150% to 187. Nevertheless, in July of 2009, the budget for the Appellate Division still allowed for only two-and-a-half staff attorneys and reduced the funds authorized for contract attorneys by 50%, to $160,000. As a result, the number of individuals without appellate representation continued to grow.

In the last Active Appeals status report generated prior to this litigation, the Division reported a total caseload of 476, with an inability to assign appellate counsel to 187 persons. Of those 187 persons without counsel, over 50% had been without counsel for over one year. Some 10% (twenty-plus individuals) had been sentenced in 2007 or earlier, and had therefore been without appellate counsel for over three years. One indigent defendant, who was convicted and sentenced in 2002, has been (and remains) without conflict-free counsel for 7 years.

On December 15, 2009, six of the 187 persons without counsel filed this lawsuit, seeking class certification, mandamus, and other relief.[11]

III. Post-Litigation Developments

Following the filing of this lawsuit, the Appellate Division generated another Active Appeals report on January 12, 2010, which reported that the Appellate Division's caseload had grown to 515, with 191 indigent defendants unrepresented in their motions for new trial and

[11] With respect to Plaintiff Darryl White, this Court previously determined in his underlying criminal case that "the State's failure to afford Mr. White the assistance of counsel is a direct and continuing violation of his constitutional rights." *State v. White*, No. 07SC60599 (Order of May 4, 2009).

appeals. Pls.' Ex. 4. The number of unrepresented persons was later confirmed by a post-litigation audit of the Appellate Division performed at the request of Mr. Crawford shortly before his deposition in this matter.[12]

During their depositions, Defendants initially used the information generated by the audit to suggest that the GPDSC was not responsible for providing counsel in the 191 unrepresented cases. For example, Defendants asserted that the absence of a formal motion to withdraw in the trial court's record, a feature missing from virtually all of the 191 cases, precluded the Appellate Division from appointing counsel. However, as Defendants Rodgers and Crawford conceded during depositions and during the hearing on this matter, the GPDSC had never previously imposed a requirement that trial counsel file a formal motion to withdraw. Tr. at 327-28. To the contrary, the GPDSC often appointed counsel (before and after the lawsuit) absent a formal withdrawal by trial counsel. Finally, Defendants conceded that the GPDSC had not communicated any new policy requiring formal withdrawal to any of the CPD offices at any time before or during this litigation.[13] Tr. at 154-56.

Defendants also used the information in the audit to initially suggest that the GPDSC was not obligated to appoint conflict-free counsel until a local CPD office physically transferred a case file and transcript to the GPDSC pursuant to the Appellate Division's administrative case transfer policy. *See* Defs.' Ex. 1. During the hearing on this matter, however, Defendants

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[12] *See* Pls.' Ex. 16; Tr. at 134-36. At the direction of Mr. Crawford, GPDSC officials sent requests to CPD offices statewide for information concerning the 191 cases reported as without counsel in the January 19, 2010, Active Appeals status report. Among other things, Mr. Crawford asked that the CPD offices provide data concerning (i) whether the indigent defendant's case file had been physically delivered to the Appellate Division; (ii) whether the indigent defendant's transcript had been prepared; and (iii) whether the indigent defendant's trial attorney had filed a motion to withdraw. Mr. Crawford requested the data within 48 hours.

[13] Mr. Crawford also admitted than indigent defendant's right to conflict-free counsel does not depend upon whether trial counsel formally moves to withdraw. Crawford Dep. at 82-84.

conceded that the Appellate Division had regularly appointed counsel (both before and after this litigation) without the local CPD office first delivering a case file and transcript to the Appellate Division. Tr. at 132; 186. Defendants further admitted that receipt of such materials was not necessary for the appointment of counsel, and often appellate counsel might assist in recovering a transcript and case file from a local CPD office or court reporter. Tr. at 102; 253; 325.

On February 3, 2010, two days prior the hearing in this case, the GPDSC apparently reached agreement with ten lawyers to represent some of the 191 indigent defendants who did not have appellate representation. *See* Defs.' Exs. 22-27.[14] In exchange for a flat fee of $1200 to $1500 per case, each contract attorney agreed to take on between 10 and 15 cases. Tr. at 157-60. The attorneys also agreed not to seek more than $150 for travel expenses and not more than $150 for incidental expenses, which include reimbursement for expert witness fees. Defs.' Exs. 22-27, ¶¶ 9-10. Prior to executing the contacts, the GPDSC did not inform the ten contract attorneys about the identity of their clients, the nature of the cases that they would be assigned, or the complexity of the legal or factual issues in each case they would handle. Tr. at 130; 198-203.

On February 4, 2010, the day prior to the hearing in this matter, Ms. Rodgers chose the cases to which each attorney would be assigned. Among the 117 cases assigned to the contract attorneys, Ms. Rodgers assigned lawyers to the five named Plaintiffs in this action who were at that time without appellate counsel.

During Ms. Rodgers' deposition, she estimated that a motion for new trial and direct appeal of a criminal case required an average of 140 hours of attorney time, excluding time for travel. Rodgers Dep. at 233:17-25. As the Court observed during the hearing on this matter, a

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[14] Mr. Crawford executed six written contracts, which were admitted into evidence at the hearing as Defs.' Exhibits 22-27. The agreements with the four other contract attorneys had not been reduced to writing as of the date of the hearing.

contract attorney who spends the average amount of time on each case therefore will earn between $8.57 to $10.71 per hour, with no additional funds for the cost of overhead. Mr. James Bonner, a part-time staff attorney in the Appellate Division of the GPDSC, testified that, given the amount of worked required to pursue a motion for new trial and direct appeal, he could not undertake a motion for new trial and direct appeal for a flat fee of $1,200-1,500. Tr. at 256.

On February 9, 2010, the Appellate Division issued its monthly Active Appeals Status report. The report indicated that, after the assignment of attorneys to 117 cases, 68 individuals still remained without active appellate counsel.[15] That number does not include requests from individuals received since the final hearing on this matter on February 10, 2010. During the hearing, Ms. Rodgers testified that approximately 15 to 30 new requests for appellate counsel are received each month by the Appellate Division. Tr. at 204; 210. Accordingly, by the end of 2010, the Appellate Division will receive between 165 and 330 new requests for conflict-free counsel in addition to the 68 requests made by individuals who are currently not being provided conflict-free counsel. Tr. at 332-33.

Mr. Crawford's testimony at the hearing also revealed that the Appellate Division does not have the resources at present to provide lawyers to the 68 cases without appellate counsel Tr. at 222. It likewise does not have the resources to provide lawyers to the 15 to 30 additional

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[15] *See* Defs.' Ex. 15 (Active Appeals report dated Feb. 9, 2010). The February 2010 Active Appeals report designates 42 cases as "In House," i.e., without an active appellate lawyer assigned. However, the report also contained a new designation applied to 26 cases formerly reported as "In House" that were instead notated as "pending" and nominally assigned to Ms. Rodgers and Cindy Wang, the other full-time staff attorney in the Appellate Division. Tr. at 320-23. Ms. Rodgers testified that the new designation—which had never appeared before in an Active Appeals report—indicated that these cases would be eventually picked up by the Division's staff attorneys. However, Ms. Rodgers admitted that no lawyer was actively working on these cases and no appellate lawyer had yet entered an appearance in any of these 26 cases. Tr. at 134-45; 140-42. Accordingly, the Court finds that these 26 cases are appropriately considered among the 68 without active appellate counsel.

monthly requests for conflict-free counsel the GPDSC will receive in the future. The Appellate Division's two full-time staff attorneys are far in excess of the GPDSC Standard for Limiting Case Loads, and therefore cannot be assigned additional cases.[16] Finally, the Appellate Division has assigned the full number of cases for which it has contracted with appellate attorneys to handle, and it does not have any additional contracts under which it could assign additional cases to attorneys. Tr. at 131. Mr. Crawford testified at the hearing that there are currently no additional funds available to hire additional staff attorneys for the Appellate Division or to contract with additional attorneys to handle Appellate Division cases. Tr. at 222.

Having entered these findings of fact, the Court turns to consider Plaintiffs' requests for relief.

CONCLUSIONS OF LAW

Plaintiffs seek class certification and an order granting a writ of mandamus requiring Defendants to provide effective and conflict-free counsel to Plaintiffs and the members of the proposed class. The Court considers both requests in turn.

I. Class Certification

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

> All indigent persons who (i) were or will be convicted in a Georgia court of a criminal offense carrying a term of incarceration; (ii) have provided or will provide notice to Defendants of their request for conflict-free appellate counsel to pursue a motion for new trial and/or first direct appeal; and (iii) have been denied or will be denied conflict-free counsel after giving such notice.

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[16] As of February 9, 2010, Ms. Rodgers had a caseload of 46 active cases, not including the six "pending" cases listed in the report. Ms. Wang had a total of 39 active cases, which does not include the 20 "pending" cases listed in that report.

Pls.' Reply Brief in Support of Motion for Class Certification at 1.[17]

Defendants have not disputed that there are numerous individuals who have requested the appointment of conflict-free counsel and who have not been provided with such counsel. Nor have Defendants disputed that the number of individuals in this position continues to grow each month. Rather, Defendants contend that, by assigning the named Plaintiffs counsel the day prior to the hearing on this matter, they have mooted the claims in this case. Defendants also challenge the commonality of Plaintiffs' and the proposed class members' claims. For the reasons that follow, the Court finds that Plaintiffs have standing to represent the class and that class certification is proper in this action.

A. The Named Plaintiffs Have Standing to Represent the Class

It is well-settled law that a plaintiff's standing is determined at the time of filing of the complaint and that a later expiration of a class representative's claims does not render the case moot or deprive the court of jurisdiction to certify the class. *See Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975).[18] The United States Supreme Court reaffirmed this principle in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). In *County of Riverside*, arrestees brought a class action seeking injunctive and declaratory relief under 42 U.S.C. § 1983, alleging that the county had violated the Fourth Amendment by failing to provide prompt judicial determinations of probable cause to persons arrested without a warrant. *Id.* at 47. Ultimately, the named plaintiffs either received probable cause determinations or were released from custody, rendering their

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[17] Plaintiffs provided an amended class definition in their reply brief in light of information discovered through depositions and the discovery process.

[18] Because the Georgia statute governing class actions mirrors the federal rule on class actions, Georgia courts may rely on federal class action cases as persuasive authority. *State Farm Mut. Auto. Ins. Co. v. Mabry*, 274 Ga. 498, 499, 556 S.E. 2d 114, 117 (2001).

individual claims moot; however, this fact did not prevent the Court from reaching the merits of the case:

> In factually similar cases, we have held that 'the termination of a class representative's claim does not moot the claims of the unnamed members of the class.' . . . That the class was not certified until after the named plaintiffs' claims had become moot does not deprive us of jurisdiction.

Id. at 51-52 (internal citations omitted).

Similarly, in *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980), the Court held that a named plaintiff whose personal claim had expired had standing to appeal the district court's denial of certification despite the complete absence of any cognizable interest in the certification question. *See id.* at 404 ("[A]n action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied. The proposed representative retains a 'personal stake' in obtaining class certification sufficient to assure that Art. III values are not undermined."); *see also Swisher v. Brady*, 438 U.S. 204, 213 n.11 (1978) (district court not deprived of class certification power where actions of the state ended controversies with the original named plaintiffs); *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1045-51 (5th Cir. 1981) (holding class certification proper where defendants satisfied named plaintiffs' financial claims prior to class certification).

At the time the complaint in this action was filed, it was undisputed by both parties that five of six of the named plaintiffs had not been provided a conflict-free appellate lawyer. *See* Answer ¶ 4. The sole reason put forth by Defendants as to why this case is now moot is that contract attorneys were appointed to represent the named Plaintiffs and some of the putative class members on appeal prior to the hearing scheduled in this matter. For the reasons provided in more detail below, the Court finds that Defendants did not moot the claims of the named Plaintiffs by the nominal assignment of attorneys to the Plaintiffs' cases immediately prior to the

hearing in this matter. In any event, whether Defendants have mooted the claims of the named Plaintiffs and certain other class members is of little moment. According to the most recent report issued by the Appellate Division, at least 68 convicted indigent defendants who have made a request have not been provided appellate counsel. Defs.' Ex. 15; *see supra* n.15. Therefore, a live controversy exists between Defendants and at least these 68 individuals, and between Defendants and future members of the proposed class.[19] Because, under the authorities set forth above, a class representative has standing to represent the class despite being afforded individual relief, Plaintiffs' class claims in this action remain viable. Accordingly, Plaintiffs have standing to represent the class, and Defendants' actions have not rendered the case moot.

B. Requirements of Class Certification

Having determined that Plaintiffs have standing to represent the class, the Court now turns to consider whether Plaintiffs meet the requirements of class certification.

A party seeking to certify a class must demonstrate that it has met all four requirements of O.C.G.A. § 9-11-23(a) and at least one of the requirements of § 9-11-23(b). Section 9-11-23(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

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[19] The Court also concludes that the doctrine of voluntary cessation does not render this case moot. The appointment of counsel to members of the class at most constitutes partial voluntary cessation, and regardless, the "general rule [is] that voluntary cessation of a challenged practice rarely moots a . . . case." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n. 1 (2001); *Sierra Club v. EPA*, 315 F.3d 1295, 1303 (11th Cir. 2002). In addition, Defendants have not satisfied the "the formidable burden of showing that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-92 (2000). And, even if the unconstitutional practice at issue in this case had ceased temporarily, the Court would retain jurisdiction under the capable-of-repetition-yet-evading-review exception to the mootness doctrine. *See Gerstein v. Pugh,* 420 U.S. 103 (1975).

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 § 9-11-23(b)(2) or, alternatively, under § 9-11-23(b)(3). Under § 9-11-23(b)(2), a court may authorize class certification where "[t]he 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). Under § 9-11-23(b)(3), a court may also authorize class certification where "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." O.C.G.A. § 9-11-23(b)(3).

In their opposition papers, Defendants challenge only the numerosity and commonality elements under § 9-11-23(a). Defendants do not contest the typicality and adequacy requirements of § 9-11-23(a) or the requirements for class certification under § 9-11-23(b). Still, the Court will consider whether Plaintiffs have established all elements of class certification.

C. O.C.G.A. § 9-11-23(a)

1. Numerosity

A class must be "so numerous that joinder of all members is impracticable." O.C.G.A. § 9-11-23(a)(1). A class of 25 or 40 persons is a sufficient number to meet the numerosity requirement of O.C.G.A. § 9-11-23(a)(1). *Sta-Power Indus. v. Avant*, 134 Ga. App. 952, 955, 216 S.E.2d 897, 901 (1975). As of the filing of this lawsuit, approximately 187 persons had requested and not been provided conflict-free counsel on appeal. Even with the nominal assignment of contract lawyers to 117 cases on February 4, 2010, there still remain at least 68

potential class members who had requested and not been provided conflict-free counsel. Courts have found that a class comprised of fewer people satisfies the numerosity requirement. *See Cox v. American Cast Iron Pipe Co.*, 784 F.2d 1546, 1553 (11th Cir. 1986) ("more than forty" members enough to satisfy numerosity requirement); *Ford Motor Credit Co. v. London*, 175 Ga. App. 33, 36, 332 S.E.2d 345, 347 (1985) (a precise number is not required for a determination of numerousness; the number need only be "so large that each cannot practically represent himself").

Based upon the testimony of Ms. Rodgers, there will be 15 to 30 more individuals per month who will request and potentially be without conflict-free counsel in the future. The Court finds that joinder is impractical in this case because of the large number of proposed class members, the number of future potential class members, and the impracticality of individuals incarcerated across the state joining in a single action. Therefore, the Plaintiffs have satisfied the "numerosity" requirement.

2. Commonality

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

The principal issues in this case are whether the proposed class members are entitled to conflict-free counsel on appeal and whether Defendants have denied them such counsel in violation of state and federal law. Each of the proposed class members share the common facts of (i) having been convicted of a crime carrying a term of incarceration; (ii) having requested the assistance of conflict-free counsel on appeal; and (iii) having not been provided conflict-free

counsel. Likewise, Plaintiffs' and the proposed class members' entitlement to relief in this case is governed by the same constitutional and statutory framework. Thus, the claims of the Plaintiffs and proposed class members share common questions of law and fact.

Defendants argue in their Response that there are varying factual circumstances among putative class members precluding Plaintiffs from meeting the commonality requirement, including variations as to the crimes of which proposed class members have been convicted, the status of their cases, the time of their incarceration, and the amount of time that may pass before counsel is appointed. *See* Class Certification Response at 5-6. However, these circumstances have little to no bearing on the principal issues in this action—which is whether or not Plaintiffs have been provided conflict-free counsel and whether Defendants have a duty to provide such counsel. The right to conflict-free counsel does not depend upon the crime for which an indigent defendant has been convicted (presuming it carries a term of incarceration), how long the indigent defendant has been incarcerated, or the length of time since the indigent defendant has made a request.

Accordingly, the Court finds that members of the proposed class share common issues of law and fact and have satisfied the commonality requirement.

3. Typicality

Plaintiffs must also demonstrate typicality to qualify for class certification. Typicality is fulfilled if "[t]he 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). Accordingly, Plaintiffs must show that "the claims or defenses of the class and the class representatives arise from the same event or pattern or practice and are based on the same legal theory." *Kornberg v. Carnival Cruise Lines*, 741 F.2d 1332, 1337 (11th Cir. 1984). Factual distinctions between the named plaintiffs' claims and

the claims of other class members do not necessarily render the named plaintiffs' claims atypical. *Buford v. H & R Block, Inc.*, 168 F.R.D. 340, 350 (S.D. Ga. 1996), *aff'd*, 117 F.3d 1433 (11th Cir. 1997).

Plaintiffs allege that Defendants have committed the same unlawful acts against each named plaintiff and each member of the proposed class. Defendants do not dispute that Plaintiffs' claims are typical of those of the class members. The Plaintiffs and class members alike assert that they have requested and been denied conflict-free counsel. The class representatives assert claims not just typical of, but virtually identical to, the proposed class. Based on the evidence submitted in support of class certification, the Court finds that Plaintiffs' claims arise from a pattern or practice of conduct similarly applied to all members of the proposed class. Likewise, the federal and state constitutional and state statutory provisions at issue impose obligations on Defendants that apply with equal force to all members of the proposed class. The Court therefore finds that the "typicality" requirement is satisfied.

4. Adequate Representation

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). Defendants do not contest that the Plaintiffs and their attorneys are adequate class representatives. Moreover, given that the named Plaintiffs seek the same relief to that which is sought by the remainder of the class, there is no potential for conflicting interests between class members. The Court also finds that class counsel has sufficient experience in class action litigation, including in litigating the type of claims raised in this action. As such, the Court is satisfied that class counsel will adequately represent the plaintiffs' class and pursue the action vigorously. For that reason, the

Court finds that named plaintiffs and their counsel have satisfied the adequacy-of-representation requirement.

D. The Class is Certified Pursuant to Section 9-11-23(b)(2)

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." The allegation that Defendants have failed to provide conflict-free appellate counsel applies equally to members of the class, and Defendants have not presented any evidence to the contrary. Defendants do not dispute that Plaintiffs have satisfied O.C.G.A. § 9-11-23(b)(2). Accordingly, the Court finds that this civil action should be certified under § 9-11-23(b)(2).

In addition to satisfying the specific elements of O.C.G.A. § 9-11-23(b)(2), this Court finds several interests that would be served by certifying a class under the particular facts of this case. First, because mandamus is the only vehicle to vindicate an indigent defendant's right to counsel,[20] the only other recourse for the proposed class members would be to bring presumably *pro se* individual mandamus actions. Such an alternative is unlikely and infeasible given that the proposed class members are indigent and currently unrepresented by counsel; nor would it advance judicial efficiency to require a flood of individual mandamus actions. Second, certifying a class in this case will enable this Court to craft relief to address the lack of conflict-free representation for the entire class, which conserves judicial resources and avoids the possibility of inconsistent judgments.

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[20] *See Bynum v. State*, 289 Ga. App. 636, 637, 658 S.E.2d 196, 197-98 (2008) (holding that the proper course for an indigent defendant seeking new appellate counsel is for the defendant to file a petition for a writ of mandamus).

In sum, 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 shared by all members of the proposed class; the representatives' claims are typical of the claims of the class; and the representatives, through counsel, are able to fairly and adequately protect the interests of the class.[21] O.C.G.A. § 9-11-23(a). Further, the class alleges that Defendants have acted or refused to act on grounds generally applicable to the class. The Court finds a class action is the best means by which to fairly and efficiently resolve these claims. O.C.G.A. §§ 9-11-23(b)(2).[22]

Accordingly, the Court **GRANTS** Plaintiffs' Motion for Class Certification. Pursuant to O.C.G.A. §§ 9-11-23(a) and (b), the Court hereby **CERTIFIES** a class of

> All indigent persons who (i) were or will be convicted in a Georgia court of a criminal offense carrying a term of incarceration; (ii) have provided or will provide notice to Defendants of their request for conflict-free appellate counsel to pursue a motion for new trial and/or first direct appeal; and (iii) have been denied or will be denied conflict-free counsel after giving such notice.

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[21] Defendants assert that the Prison Litigation Reform Act, 18 U.S.C. § 3626(a), restricts the nature of the injunctive relief available to the class members in this action. Class Certification Response at 6. As an initial matter, Defendants' argument does not affect the propriety of class certification; it merely addresses the nature of the remedy available to the class. In any event, however, the provision cited by Defendants expressly applies only to "any civil action *with respect to prison conditions*. . . ." This Court finds that § 3626(a) is inapplicable to the instant action because this action does not involve a challenge to prison conditions.

[22] In the alternative, this Court would find that this class would be properly certified under O.C.G.A. § 9-11-23(b)(3). Section 9-11-23(b)(3) authorizes class certification where "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Here, the issues common to all class members are dispositive of Plaintiffs' claims and therefore predominate over all other questions; no further individual analysis or assessment is necessary to grant Plaintiffs relief. Furthermore, there are no difficulties posed by bringing this lawsuit as a class action: there is no existing litigation pending with regard to the issues raised in the case and class members have little interest in controlling individual actions given that resolution of the issues presented by this case will address the constitutional violations asserted and that, as a practical matter, class members only have the means to bring such an action collectively.

II. Mandamus

Having certified a class of individuals being denied conflict-free counsel, the Court turns to Plaintiffs' request for a writ of mandamus ordering Defendants to provide conflict-free counsel to Plaintiffs.

Mandamus is an action to compel the performance of an official duty where there is no other legal remedy. O.C.G.A. § 9-6-20 ("All official duties should be faithfully performed, and whenever, from any cause, a defect of legal justice would ensue from a failure to perform or from improper performance, the writ of mandamus may issue to compel a due performance if there is no other specific legal remedy for the legal rights."). In order to prove entitlement to mandamus relief, a plaintiff must demonstrate that he has a clear legal right to the remedy sought and there is no alternative legal avenue for relief. After proving these prerequisites, there are two avenues to seek mandamus under Georgia law. First, "[w]here the duty of public officers to perform specific acts is clear and well defined and is imposed by law, and when no element of discretion is involved in performance thereof, the writ of mandamus will issue to compel [its] performance." *Bland Farms, LLC v. Georgia Dep't of Agric.*, 281 Ga. 192, 193, 637 S.E.2d 37, 39 (2006) (quoting *Forsyth County v. White*, 272 Ga. 619, 620, 532 S.E.2d 392, 393 (2000)). Second, mandamus may also issue when "the public official has committed a gross abuse of discretion." *Hall v. Nelson*, 282 Ga. 441, 444, 651 S.E.2d 72, 76 (2007) (citation and quotation omitted); *see also* O.C.G.A. § 9-6-21(a).

Plaintiffs seek mandamus relief against Defendant Perdue in his official capacity as Governor of the State of Georgia and against Defendants Crawford, Berg, Stokes, and Rodgers in their official capacities as GPDSC officials. As a threshold matter, Defendants contend that Plaintiffs have improperly sued these Defendants in their official, as opposed to their individual,

capacities. Defs.' Prehearing Br. at 13-15. Although Defendants are correct that a mandamus action is "a personal action against a public officer, not against the office," *Hall v. Nelson*, 282 Ga. 441, 444, 651 S.E.2d 72, 76 (2007), Plaintiffs do not seek mandamus against any governmental office. To the contrary, Plaintiffs have properly brought a personal action seeking mandamus against persons in their capacity as governmental officials to compel performance of their official duties.

Because mandamus compels a person to perform "official duties," O.C.G.A. § 9-6-20—and not individual duties—a plaintiff properly names a governmental officer in his or her official capacity. In *Hall v. Nelson,* for example, the Georgia Supreme Court affirmed the award of mandamus relief against "Appellant Beverly Hall *in her official capacity* as Superintendent of [the Atlanta Independent School System]," after concluding that "the Atlanta Board is not subject to mandamus, although its executive *officer*, Appellant, a named party in this action, is." *Id.* at 441, 444, 651 S.E.2d at 72, 76 (emphasis added). Likewise, in *Board of Trustees of Fulton County Employees Retirement System v. Mabry*, the Court of Appeals affirmed a grant of mandamus against each member of the Board of Trustees of the Fulton County Employees Retirement System "in their official capacities," requiring the Board to admit a Fulton County employee to join its retirement system. 221 Ga. App. 762, 765, 472 S.E.2d 542, 542-43 (1996). Numerous other cases have similarly awarded mandamus against governmental officers in their official capacities.[23] Accordingly, there is no merit to Defendants' contention that this Court should deny mandamus relief on the basis of the claimed misnomer.[24]

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[23] *See, e.g., Mobley v. Polk County*, 424 Ga. 798, 798, 251 S.E.2d 538, 539 (1979) (granting mandamus against Polk County official "in his official capacity" as tax commissioner requiring payment of salary to county employee); *Vollrath v. Collins*, 272 Ga. 601, 601-02, 533 S.E.2d 57, 58 (2000) (mandamus suit properly brought in official capacity and substitution of new official allowed); *Griffies v. Coweta County*, 272 Ga. 506, 508, 530 S.E.2d 718, 720 (2000) (granting

Having determined that Plaintiffs have properly named the individual Defendants in their official capacities, the Court turns to consider the propriety of awarding mandamus. For the reasons provided below, the Court concludes that Plaintiffs are entitled to mandamus.

A. Clear Right

As an initial matter, Defendants do not dispute that Plaintiffs have a clear right to conflict-free counsel in their motions for new trial and appeals. The right to effective and conflict-free counsel extends to "all 'critical' stages of the criminal proceedings," which includes the motion for new trial and first direct appeal. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2085 (2009); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963); *Douglas v. California*, 372 U.S. 353, 355 (1963); *Wood v. Georgia*, 450 U.S. 261, 271 (1981); *Adams v. State*, 199 Ga. App. 541, 542, 405 S.E.2d 537, 539 (1991) (right to counsel exists during motion-for-new-trial phase because it is a "critical stage" of the proceeding); *Williams v. Turpin*, 87 F.3d 1204, 1210 (11th Cir. 1996) (same). Similarly, under *Garland v. State*, a convicted indigent defendant has a right to request a conflict-free attorney to raise a claim of ineffective assistance of counsel in a motion for new trial and appeal. 283 Ga. at 201, 657 S.E.2d at 842.

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mandamus against defendants in their official capacities as members of Board of the Commissioners of Coweta County and Head of the Finance Department of Coweta County); *see also Marbury v. Madison*, 5 U.S. 137 (1803) (granting mandamus relief against James Madison in his capacity as a "public ministerial officer of the United States").

[24] The Court notes, in addition, that Defendants have not moved to dismiss the mandamus claims of Plaintiffs. Instead, Defendants first raised their claim of misnomer in a pleading filed on the afternoon before the merits hearing on this matter, after Defendants participated fully in mandamus and class certification discovery. Although the Court concludes that Defendants were properly named in their official capacities, even if they had not been properly named, the Court finds that Defendants have waived the issue of misnomer by failing to raise it in a motion to dismiss and failing to raise the issue until one day prior to the hearing on this matter, after jointly submitting a scheduling/pretrial order. *See City of Columbus v. Myszka*, 246 Ga. 571, 573, 272 S.E.2d 302, 306 (1980) (claim of official misnomer waived when "city failed to present it by 'specific negative averment'"); *Billy Cain Ford Lincoln Mercury, Inc. v. Kaminski*, 230 Ga. App. 598, 600, 496 S.E.2d 521, 523 (1998) (party waives objection to misnomer "due to its failure to object in the consolidated pretrial order regarding proper parties in interest").

Defendants do not challenge that Plaintiffs have a right to request new appellate counsel upon conviction.[25] Accordingly, the Court finds that Plaintiffs and the class members have a clear and present right to effective and conflict-free counsel provided at public expense to handle their motions for new trial and appeals.

B. No Alternative Avenue of Legal Relief

Second, Plaintiffs must demonstrate that there is no alternative legal avenue to seek the appointment of counsel. The Court finds that Plaintiffs have met this requirement.

In *Bynum v. State*, 289 Ga. App. 636, 637, 658 S.E.2d 196, 198 (2008), the Georgia Court of Appeals held that indigent defendants cannot seek the appointment of counsel in their underlying criminal proceedings because trial courts presiding over criminal cases "lack[] the authority" to order the appointment of counsel. *Id.* The court reasoned that the Georgia Indigent Defense Act of 2003 ("IDA"), O.C.G.A. § 17-12-1 *et seq.*, places the responsibility on the GPDSC—and not trial courts—to provide representation to an indigent defendant who have made a proper request. *Id.* (noting that the IDA "removed the responsibility for appointing counsel from the courts and placed it in the Georgia Public Defender Standards Council").[26] Accordingly, the court held that an indigent defendant should seek a writ of mandamus to vindicate the right to counsel: "Although the trial court was without the authority to grant Bynum's motion as filed, we find that Bynum is not without recourse as he may seek relief by application for a writ of mandamus." *Id.*

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[25] During their depositions and at the hearing in this case, Defendants Crawford and Rodgers admitted that Plaintiffs and the class members have a clear right to new counsel to represent them in motions for new trial and appeal. *E.g.*, Tr. at 205; Crawford Dep. at 15:1-5; *see also* Defs.' Resp. to Pl.'s Request for Admission Nos. 40-41.

[26] *See also Georgia Public Defender Standards Council*, 285 Ga. 169, 171, 675 S.E.2d 25, 27 (2009) (observing that GPDSC now has responsibility to provide indigent defense).

Defendants do not dispute that the Plaintiffs have no alternative legal remedy to seek the appointment of counsel.[27] Accordingly, the Court finds that Plaintiffs have met their burden of demonstrating that there is no alternative avenue of legal recourse, and mandamus is the proper vehicle for the remedy sought.

C. Non-Discretionary Duty

Finally, Plaintiffs must demonstrate that the parties against whom mandamus is sought have a non-discretionary duty to provide conflict-free counsel or have grossly abused any discretion they may have in performing that duty. The Court finds that Defendants Perdue, Crawford, Stokes, Berg, and Rodgers have a non-discretionary duty to provide effective and conflict-free counsel to indigent defendants in motions for new trial and appeal where the Circuit Public Defender office has a conflict of interest.

1. GPDSC Officials' Non-Discretionary Duty to Provide Counsel

Under the IDA, the GPDSC and its governing officials are obligated to "assur[e] that adequate and effective legal representation is provided . . . to indigent persons who are entitled to representation under [the IDA]." O.C.G.A. § 17-12-1.[28] As a part of this obligation, these officials are required to "establish a procedure for providing legal representation in cases where the circuit public defender office has a conflict of interest." O.C.G.A. § 17-12-22(a). According

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[27] Defendants agree that "trial courts in Georgia lack the authority to appoint counsel to indigent defendants entitled to counsel under the Indigent Defense Act of 2003." Defs.' Resp. to Request for Admission No. 42. To be sure, Defendants argued during the hearing that an ineffective-assistance-of-counsel claim in an indigent defendant's criminal appeal serves as an alternative legal remedy. However, an ineffectiveness claim merely ensures that an indigent defendant's underlying criminal case was not prejudiced by constitutionally ineffective assistance of counsel. It does not provide the remedy sought here—namely, the appointment of counsel.

[28] *See also Georgia Public Defender Standards Council*, 285 Ga. at 171, 675 S.E.2d at 27 ("[The IDA] replaced the previous county-level piecemeal system with a statewide system which places on the Council the responsibility [to provide counsel].").

to the official description of the Appellate Division of the GPDSC, "[w]hen that conflict is post-conviction, the established procedure is for the Appellate Division to handle the defendant's appeal." Pls.' Ex. 1.

Ms. Rodgers is "[r]esponsible for the overall operation of the GPDSC Appellate Division, including staff and caseload." *Id.* The Appellate Division is overseen by Defendants Mack Crawford (Director of GPDSC), Jim Stokes (Conflict Division Director of GPDSC), and Michael Berg (Chairman of GPDSC). Mr. Crawford is specifically required to administer and coordinate the operations of the GPDSC and to ensure compliance with all applicable legal requirements and standards. *See* O.C.G.A. § 17-12-5(d)(3) ("The director shall . . . [a]dminister and coordinate the operations of the council and supervise compliance with rules, policies, procedures, regulations, and standards adopted by the council.").

Both Defendants Crawford and Rodgers testified that the Appellate Division of the GPDSC is the entity responsible for providing appellate representation to indigent defendants where a CPD office has a conflict of interest. Likewise, both admitted that, as GPDSC officials, they have a duty to provide indigent defense to those who are constitutionally entitled to a conflict-free attorney on appeal. Tr. at 98-100; 205-06; 325. In view of these facts and legal requirements set forth above, the Court finds that Defendants Crawford, Berg, Stokes, and Rodgers have a non-discretionary duty to provide effective and conflict-free counsel to the Plaintiffs' class.

2. The Governor's Non-Discretionary Duty to Provide Counsel

The constitutional obligation to provide counsel ultimately rests on the State of Georgia. *Gideon*, 372 U.S. at 344; *Douglas*, 372 U.S. at 355. As Governor, Defendant Perdue is constitutionally obligated to "take care that the laws are faithfully executed." GA. CONST. Art.

V, § II, ¶ II. Moreover, because the GPDSC is an executive branch agency, the ultimate responsibility to supervise, direct and control its operations rests with Defendant Perdue, the Governor and chief executive branch official of the State of Georgia. Defendant Perdue has ultimate hiring authority over the GPDSC's Director, the Appellate Division Director, and the Appellate Division's staff attorneys.[29]

As the chief executive officer of the State of Georgia and the GPDSC, the Governor has a non-discretionary obligation to provide effective and conflict-free counsel to the Plaintiffs' class.

3. The GPDSC Director's Non-Discretionary Duty to Comply with Caseload Standards

As stated above, O.C.G.A. § 17-12-5(d)(3) requires that "[t]he director shall . . . supervise compliance with rules, policies, procedures, regulations, and standards adopted by the council." In 2003 and 2004, during the time the GPDSC was organized within the judicial branch of government, the Standards Council adopted and ratified a 25 appeal-per-lawyer Standard for Limiting Case Loads. *See* Pls.' Ex. 14; 17; 22; 23. That standard had previously been adopted by the Georgia Supreme Court in 1998. *See* 246 Ga. 837 (adopting standard); *Sacandy v. Walther*, 262 Ga. 11, 12, 413 S.E.2d 727, 729 (1992) (detailing history of Court's adoption of indigent defense standards). GPDSC's caseload standard is posted on the GPDSC's website and

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[29] Defendant Perdue "supervises and oversees executive branch agencies in the State of Georgia, including the GPDSC." Defs.' Resp. to Pls.' Request for Admission No. 51. Defendant Perdue is also the appointing authority for the Director of the GPDSC. *See* O.C.G.A. § 17-12-5(a) ("The director shall be appointed by the Governor and shall serve at the pleasure of the Governor."). Finally, "the Governor's Office of Planning and Budget controls the hiring waivers for all employees of the State of Georgia and thus has the ultimate hiring authority for all positions within any of the divisions of GPDSC," including the Appellate Division. Defs.' Resp. to Pls.' First Int. No. 6.

identified as taking effect on August 27, 2004.[30] Because the caseload standard was properly adopted and ratified both by the Georgia Supreme Court and later by an independent judicial branch agency, it was effective when adopted and remains in effect today.[31] As such, pursuant to O.C.G.A. § 17-12-5(d)(3), the GPDSC Director must supervise and enforce the GPDSC's 25-appeal-per-lawyer caseload standard.

4. Defendants Do Not Have Discretion to Deny or Delay the Appointment of Conflict-Free Counsel

Defendants assert that mandamus should not issue because they have discretion in establishing the procedure for providing counsel to Plaintiffs and the class members. While it may be true that Defendants have some measure of discretion in deciding which counsel to appoint and the manner of appointment, Defendants have no discretion in *whether or not* to appoint counsel to Plaintiffs. Upon receiving an indigent defendant's request for conflict-free counsel on appeal, Defendants have a non-discretionary duty to promptly provide counsel to that indigent defendant.

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[30] *See* http://www.gpdsc.com/docs/cpdsystem-standards-limiting_caseloads.htm; *see also* O.C.G.A. § 17-12-8(c) (requiring GPDSC to post all standards on its website and "identify the date upon which such rule, regulation, policy, and standard took effect").

[31] Defendants contend that the caseload standard is without effect because the Georgia legislature, after adoption and ratification of the caseload standard by the Standards Council, subsequently adopted a requirement that all initial standards with a fiscal impact be ratified by the legislative and executive branches. *See* 2004 Georgia Laws 1st. Ex. Sess. Act 1EX 4 (H.B. 1) (previously codified at O.C.G.A. § 17-12-8(c)). However, that ratification requirement was later repealed by subsequent legislation. 2008 Georgia Laws Act 729 (H.B. 1245). As a result, legislative ratification is no longer required today.

In any event, as a regulation governing the practice of law of public defenders, the caseload standard is properly and exclusively within the purview of the judicial branch. The judicial branch has the exclusive authority to regulate the practice of law, and its authority cannot be circumscribed by a legislative ratification requirement. *Wallace v. Wallace*, 225 Ga. 102, 111-12, 166 S.E.2d 718, 724 (1969) ("[T]he judiciary cannot be circumscribed or restricted in the performance of its power and duty to regulate the practice of law . . . ."); *Sams v. Olah*, 225 Ga. 497, 498, 169 S.E.2d 790, 796 (1969) (striking down law that attempted to usurp court's power to regulate practice of law and stating that "[i]t is the duty of this court to reject legislative attempts to interfere with the exercise of its judicial powers").

Defendants also suggest that they have discretion to delay the appointment of counsel until certain administrative conditions are met. Defendants contend, for example, that they are not obligated to provide conflict-free counsel to an indigent defendant who has made a request until the GPDSC receives the indigent defendant's case file and transcript. The Court notes that, prior to this litigation, Defendants had not imposed this administrative rule as a condition on the appointment of counsel. Likewise, Defendants appointed counsel to numerous indigent defendants after this litigation was filed before the physical delivery of a case file and transcript. In any event, as Mr. Crawford correctly testified, neither the right to counsel nor Defendants' duty to provide counsel may be suspended by an administrative rule requiring physical delivery of a case file and transcript. Crawford Dep. at 82-84. As the Georgia Supreme Court has previously ruled, the GPDSC cannot condition or override the right to conflict-free counsel based upon its own internal policies. *See Garland*, 283 Ga. at 203, 657 S.E.2d at 844 ("We need not decide whether the trial court, in denying appellant's request, correctly comprehended the policies of the Council regarding appointment of conflict counsel because the Constitutions of the United States and Georgia, not the Council's policies, are the governing authority here."). Therefore, to the extent that Defendants contend that their duty to appoint counsel is suspended or delayed until a local CPD office complies with various internal administrative policies, the Court rejects Defendants' contention.

Even if the GPDSC had some discretion in the timing of the appointment of counsel, however, it cannot wait for months or years after receiving a request for new counsel simply because it has not received a transcript or case file or it is otherwise inconvenient or costly to appoint counsel. For one, an indigent defendant cannot be penalized for exercising the right to conflict-free counsel. Memories fade and witnesses may move away. An indigent defendant

would be placed at a material disadvantage if he were forced to wait months or years before an appellate lawyer could begin investigating the grounds for the indigent defendant's motion for new trial or appeal. *Douglas v. California*, 372 U.S. 353, 355 (1963) ("For there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.'") (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)). Second, the mere fact that a trial attorney has not physically delivered a case file is no reason to continue to deny an indigent defendant conflict-free counsel; if anything, it is a reason to hasten the appointment of counsel.[32] And finally, the Court notes that an appellate lawyer's services may be needed prior to the delivery of a case file or the preparation of a trial transcript. In addition to the client requiring legal advice, a trial court may hold a motion-for-new-trial hearing prior to preparation of a trial transcript. *See* O.C.G.A. § 5-5-40(c) ("[T]he court may in its discretion hear and determine the motion [for new trial] before the transcript of evidence and proceedings is prepared and filed."); Unif. S. Ct. R. 41.1 (same); *Appling v. State*, 256 Ga. 36, 38, 343 S.E.2d 684, 686 (1986). For these and other reasons, an administrative policy requiring delivery of a case file and transcript cannot justify continuing to deny or delay providing conflict-free counsel to an indigent defendant who notifies GPDSC of a request for conflict-free counsel after conviction.

Defendants also apparently considered promulgating a new policy, in response to this lawsuit, requiring a court-approved motion to withdraw as a prerequisite to the appointment of

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[32] Some local public defender offices, such as the Atlanta Circuit Public Defender, consider it an ethical obligation to maintain the confidentiality of a client's case file until a lawyer has been appointed to an indigent defendant's case and has established an attorney-client relationship with the indigent defendant. For that reason, the Atlanta Circuit Public Defender has apparently refrained from delivering case files to the GPDSC until such appointment is made. Tr. at 190-91. Once the appellate lawyer is appointed, the CPD office or trial attorney has an ethical responsibility to turn over the client's file, which is owned by the client. Therefore, if anything, not receiving a case file is a reason to *appoint* an appellate attorney as opposed to *refuse* to appoint an appellate attorney.

new appellate counsel. Whatever the reason for adopting such a new policy (which the Court notes is unnecessary and inconsistent with Uniform Superior Court Rule 4.3),[33] such a requirement likewise would not delay or suspend Defendants' obligation to promptly appoint counsel. Irrespective of whether an indigent defendant's trial counsel has formally withdrawn, the GPDSC has a duty to provide the indigent defendant with conflict-free counsel upon receiving notice that the indigent defendant has invoked his right to such counsel after conviction.

5. Defendants Have a Non-Discretionary Duty to Provide Effective Assistance of Counsel

Defendants also contend that they have met their obligation to provide counsel to the named Plaintiffs and other class members who were assigned counsel after this lawsuit was filed, but prior to the Court's hearing. Defendants contend, therefore, that they have mooted the mandamus claims of the named Plaintiffs and certain class members who have recently been assigned counsel. The Court disagrees.

As the Supreme Court has explained, "nominal 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 (1991). Defendants have a duty to provide for the

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[33] The Court notes that Rule 4.3(a) only requires court-approved withdrawal when there is no substitute lawyer to take over the client's representation. Should there be no substitute lawyer, Rule 4.3(a) requires the departing lawyer to certify that she has counseled her client on the dangers of proceeding *pro se*. However, it is unnecessary for the departing lawyer to seek court-approved withdrawal when a new lawyer has been appointed to the client's case. Rule 4.3(b) states that when "the client wishes to substitute counsel, it will not be necessary for the former attorney to comply with rule 4.3(a). Instead, the former attorney may file with the clerk of court a notice of substitution of counsel signed by the party and the former attorney." Unif. S. Ct. R. 4.3(2).

effective assistance of conflict-free appellate counsel. Where "circumstances ma[k]e it so unlikely that any lawyer could provide effective assistance, that ineffectiveness [is] properly presumed without inquiry into actual performance at trial." *United States v. Cronic*, 466 U.S. 648, 656 (1984). A financial arrangement with an indigent defense counsel that "creates an economic disincentive for lawyers to perform adequate investigations, . . . discourages preparation, and ultimately affects the quality of representation" raises the presumption of ineffectiveness without inquiry into actual performance. *New York County Lawyers Assoc. v. State of New York,* 192 Misc. 2d 424, 745 N.Y.S.2d 376 (2002); *see also State v. Young,* 143 N.M. 1, 172 P.3d 138 (2007) ("The inadequacy of compensation in this case makes it unlikely that any lawyer could provide effective assistance, and therefore, as instructed by the United States Supreme Court, ineffectiveness is properly presumed without inquiry into actual performance.").[34] Therefore, indigent defense counsel are "entitled to reasonable and adequate compensation." *Birt v. State*, 259 Ga. 800, 801, 387 S.E.2d 879, 880 (1990).[35]

As described above, one day prior to the Feb. 5, 2010 hearing on this matter, the GPDSC executed contracts with 6 lawyers and verbally agreed with 4 additional lawyers to take on 117 cases at a fixed rate of $1,200-$1,500 per case. Prior to executing the contracts, the GPDSC did not inform the lawyers of the identity of their clients, the nature or complexity of their cases, or provide any additional facts upon which the attorneys could evaluate whether they had the time or resources necessary to provide effective representation in each of the 10-15 cases he or she

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[34] *See also New York County Lawyers Assoc. v. State of New York,* 196 Misc.2d 761, 763 N.Y.S.2d 397 (2003) (concluding that low rate of compensation to indigent defense lawyers had caused systemic ineffectiveness and unavailability of lawyers); *State of Kansas v. Smith,* 242 Kan. 336, 747 P.2d 816 (1987) ("When the attorney is required to advance expense funds out-of-pocket for an indigent, without full reimbursement, the system violates the Fifth Amendment.").

[35] *See also Sacandy v. Walther*, 262 Ga. 11, 13, 413 S.E.2d 727, 729 (1992); *Amadeo v. State*, 259 Ga. 469, 470 n.5, 384 S.E.2d 181, 183 n.5 (1989).

had been assigned. The GPDSC later assigned five of the named Plaintiffs' cases under these contracts. Three of the named Plaintiffs in this action—Darnell Amaker, Maurice Flournoy, and Eugene Teasley—were convicted of murder and sentenced to life imprisonment after trial. They were assigned attorneys who agreed to a total fee of $1,200 to research, investigate, and pursue their motions for new trial and appeals, with a $150 cap on reimbursement for expert fees.

According to the Appellate Division Director, an average motion for new trial and direct appeal of a criminal case requires 140 hours of attorney time, excluding time for travel. Were these attorneys to spend the average amount of time Ms. Rodgers estimates is necessary to litigate each of the 117 assigned cases, each attorney would earn between $8.57 to $10.71 per hour, depending on whether they were paid $1,200 or $1,500 per case, respectively. The attorneys accepting 15 cases will earn at most $22,500 for an estimated 2,100 hours—*i.e.*, one year of legal work. These contracts do not provide for the cost of office overhead, legal research, or other expenses, and each attorney agreed not to seek reimbursement for expert fees above $150, without having met their clients or analyzed their cases to determine whether expert assistance would be needed in their motions for new trial.[36] *See* Defs.' Exs. 22-27, ¶¶ 9-10.

Given the low rate of total compensation and the significant limitations placed on reimbursement of expert and other expenses, it is highly unlikely, if not practically impossible, for an attorney to provide effective representation to the named Plaintiffs and other class members under such a contractual arrangement. To the contrary, an attorney has a strong

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[36] In order to demonstrate ineffective assistance of counsel, it may be necessary for a criminal defendant to offer evidence of expert testimony that should have been offered at trial in order to meet the defendant's burden of demonstrating prejudice. *E.g.*, *Allen v. State*, __S.E.2d__, 2010 WL 338133, at *2 (Ga. Ct. App. Feb. 1, 2010) (concluding that defendant failed to demonstrate prejudice in his motion-for-new-trial hearing because he did not offer expert testimony); *Sarratt v. State*, 299 Ga. App. 568, 570, 683 S.E.2d 10, 14 (2009) (denying motion for new trial because defendant "failed to produce such an expert at the hearing on the motion for new trial").

economic disincentive to perform a thorough investigation and develop and present the substantial evidence often required to prevail in a motion for new trial. The inadequacy of compensation and the disincentives created by these arrangements raises a serious doubt that an attorney can provide effective assistance without suffering severe financial detriment or sacrifice. For that reason, Defendants have not met their obligation to provide effective assistance of counsel by nominally assigning attorneys to multiple cases of unspecified complexity under the arrangements described herein. Accordingly, the claims of the named Plaintiffs and class members have not been mooted by the Defendants' assignment of attorneys immediately prior to the hearing in this matter.

In sum, the United States Constitution, the Georgia Constitution, and the Indigent Defense Act of 2003—and not the policies of the GPDSC—provide the rules of law that govern this case. Having fully considered those rules and the arguments of the parties, the Court concludes that Defendants Perdue, Crawford, Berg, Stokes, and Rodgers have a clear and non-discretionary duty to provide the effective assistance of conflict-free counsel to Plaintiffs and the class members in this action.[37]

D. Mandamus Must Issue

The Plaintiffs' class is comprised of individuals that have been convicted of crimes carrying a term of incarceration and have notified the GPDSC that they have invoked their right to conflict-free appellate counsel. By definition, these individuals have a clear right to effective and conflict-free counsel. Plaintiffs are without legal recourse other than mandamus. Defendants Perdue, Crawford, Berg, Stokes, and Rodgers are the responsible governmental

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[37] The Court has concluded that Defendants have a non-discretionary duty to provide conflict-free counsel to Plaintiffs. However, to the extent that these officials have any discretion in their duty to provide conflict-free counsel, the Court alternatively finds that Defendants have grossly abused any such discretion in failing to provide counsel to the Plaintiffs' class.

officials who have a non-discretionary obligation to appoint conflict-free counsel. Because Plaintiffs have made the required showing, a writ of mandamus must issue requiring the Defendants to provide the effective assistance of conflict-free counsel.

The Court is mindful of the budgetary constraints faced by Defendants and other governmental entities. However, the duty to provide a legal defense to those whose liberty is at stake and who cannot afford an attorney is unqualified and unconditional, and it does not give way in times of economic distress. As both the United States and Georgia Supreme Courts have held, lack of funding does not excuse a failure to adequately provide indigent defense. *Georgia Public Defender Standards Council*, 285 Ga. at 173, 675 S.E.2d at 28 ("The indigent defense budgetary considerations raised by the Council do not constitute a proper policy matter for this Court."); *Garland*, 283 Ga. at 205 n.5, 657 S.E.2d at 846 n.5 ("In light of the constitutional rights involved, we find no merit in the Council's . . . . budgetary concerns that it raises as warranting a different holding"); *see also Bounds v. Smith*, 430 U.S. 817, 825 (1977) ("[T]he cost of protecting a constitutional right cannot justify its total denial.").[38]

In the end, it is this Court's duty to order the relief Plaintiffs now request. Were this Court to decline to award the relief requested, it would abdicate its own constitutional duty "to the citizens of this state to oversee the criminal justice system and to ensure that those who are

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[38] In addition, given that the Indigent Defense Fund has collected a surplus of over $23 million in court filing fees and fines in the last four years that has not been appropriated to indigent defense, it is difficult for Defendants to credibly argue that there are no funds available to remedy the Appellate Division's present inability to provide counsel. Tr. at 236-40. In 2004, as a part of the enactment of the Indigent Defense Act, Georgia established a special revenue mechanism to fund its new system of indigent defense. *See* H.B. 1EX (2004). Under this revenue mechanism, indigent defense is funded not through taxpayer general revenue, but through the courts—by collection of criminal fines and civil filings fees that were added for the express purpose of paying for indigent defense. Regrettably, between $4-6 million of these court-collected fines and fees have been annually redirected for the past four years to purposes other than indigent defense. *See* Tr. at 236-40; Pls.' Ex. 26.

accused of crimes are tried expeditiously, and that their constitutional rights are protected.'" *Threatt v. State*, 282 Ga. App. 884, 888, 640 S.E.2d 316, 319-20 (2006) (quoting *Spradlin v. State*, 262 Ga. App. 897, 900, 587 S.E.2d 155, 155 (2003)). Indeed, "Art. VI, § IX, ¶ I [of the Georgia Constitution] ... casts upon the courts the duty to ensure that crimes are speedily and efficiently prosecuted and that indigent defendants are effectively defended." *Wilson v. Southerland*, 258 Ga. 479, 480, 371 S.E.2d 382, 383 (1988).

The GPDSC has a duty to appoint counsel at the earliest possible opportunity upon receiving a request from an indigent defendant who is entitled to conflict-free counsel. *See* O.C.G.A. § 17-12-22(b) (requiring conflicts of interest to be identified "at the earliest possible opportunity"). Likewise, the legislature has provided that a defendant must file a motion for new trial within 30 days of the entry of the judgment on the verdict. "This and other statutorily established time limits clearly indicate the intention of the legislature that criminal matters be resolved promptly." *Stone v. State*, 257 Ga. App. 306, 307, 570 S.E.2d 715, 717 (2002). Therefore, while there is no statutorily defined number of days in which the GPDSC must provide counsel after receving a request, the motion-for-new-trial deadline indicates that under no circumstance should the GPDSC delay for longer than thirty days to provide counsel after receiving notice of a valid request.

For these reasons, the Court **GRANTS** a writ of mandamus absolute requiring Defendants Perdue, Crawford, Berg, Stokes, and Rodgers to provide all present members of the Plaintiffs' class effective and conflict-free counsel at the earliest possible opportunity, but no later than 30 days of the entry of this Order. As it relates to future members of the Plaintiffs' class, Defendants Perdue, Crawford, Berg, Stokes, and Rodgers shall provide counsel at the earliest possible opportunity after receiving a request for conflict-free counsel, but no later than

30 days after receiving notice of a request from a member of the Plaintiffs' class. Further, Defendants shall provide counsel to all class members in a manner consistent with the terms of this Order and the obligations imposed by the United States and Georgia Constitutions, the Indigent Defendant Act of 2003, and the standards adopted and ratified by the Standards Council, including the Standard for Limiting Case Loads.

CONCLUSION

For the reasons stated above, the Court **GRANTS** Plaintiffs' Motion to Admit Defendants' Depositions and **GRANTS** Plaintiffs' Motion for Class Certification. Pursuant to O.C.G.A. §§ 9-11-23(a) and (b)(2), the Court hereby certifies a class of:

> All indigent persons who (i) were or will be convicted in a Georgia court of a criminal offense carrying a term of incarceration; (ii) have provided or will provide notice to Defendants of their request for conflict-free appellate counsel to pursue a motion for new trial and/or first direct appeal; and (iii) have been denied or will be denied conflict-free counsel after giving such notice.

The Court also **GRANTS** a writ of mandamus absolute requiring Defendants Perdue, Crawford, Berg, Stokes, and Rodgers to provide all present members of the Plaintiffs' class effective and conflict-free counsel at the earliest possible opportunity, but no later than 30 days of the entry of this Order. As it relates to future members of the Plaintiffs' class, Defendants Perdue, Crawford, Berg, Stokes, and Rodgers shall provide counsel at the earliest possible opportunity after receiving a request for conflict-free counsel, but no later than 30 days after receiving notice of a request from a member of the Plaintiffs' class. Further, Defendants shall provide counsel to all class members in a manner consistent with the terms of this Order and the obligations imposed by the United States and Georgia Constitutions, the Indigent Defendant Act of 2003, and the standards adopted and ratified by the Standards Council, including the Standard for Limiting Case Loads.

SO ORDERED this 23 day of February, 2010.

HONORABLE JERRY W. BAXTER
FULTON COUNTY SUPERIOR COURT
ATLANTA JUDICIAL CIRCUIT

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