

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA**

Darwin Yarls, Jr., Leroy Shaw, Jr., and Douglas *
Brown On Behalf of Themselves and All Others *
Similarly Situated, * Civil Action No. 3:16-cv-31
*
Plaintiffs, *
vs. * Judge _____
*
*
Derwyn Bunton, in his official capacity as * Magistrate _____
Chief District Defender for Orleans Parish, *
Louisiana; James T. Dixon, Jr., in his official *
capacity as Louisiana State Public Defender, *
* Complaint – Class Action
Defendants. *
*

CLASS ACTION COMPLAINT

INTRODUCTION

1. Plaintiffs Darwin Yarls, Jr., Leroy Shaw, Jr., and Douglas Brown are each currently detained on separate felony accusations in the Orleans Parish Prison. The prosecution has not formally charged any of the Plaintiffs with a crime, either by information or indictment.

2. Plaintiffs cannot afford attorneys. They have requested and been approved for a public defender from the Orleans Parish Public Defender's Office ("OPD").

3. However, OPD has refused to accept Plaintiffs as clients due to budgetary shortages and excessive caseloads. OPD has instead placed Plaintiffs on a waiting list for appointed counsel. OPD's refusal to represent Plaintiffs means that they must languish indefinitely in jail without counsel until OPD secures adequate resources to provide them with an attorney.

4. As long as OPD refuses to represent Plaintiffs, their prosecutions cannot proceed. Meanwhile, Plaintiffs have no access to an attorney for critical pretrial functions that would ordinarily be performed by defense counsel, such as conducting a preliminary examination to challenge their arrests and bail conditions; investigating the allegations; filing motions to preserve potentially exculpatory evidence; or negotiating with the prosecution.

5. The public defender's budgetary crisis and its denial of counsel to Plaintiffs both result from the State of Louisiana's chronic underfunding of its public defender system. While the legislature yearly appropriates funds for public defense, the public defender system overwhelmingly relies on locally generated fines and fees for revenue.

6. Under this scheme, approximately two-thirds of the state's budget for public defenders comes from a \$45 fee assessed primarily on traffic tickets. No other state in the nation is as dependent on local fines and fees to fund indigent defense.¹

7. Louisiana's structure dictates that the funding available to a public defender is inherently unreliable. Funding is captive to arbitrary factors like how many highways pass through a district, the degree to which local law enforcement prioritizes traffic enforcement, or the extent to which the district attorney relies on pretrial diversion.

8. As a result, public defenders have continually faced funding emergencies like the one in Orleans Parish. These crises have in turn forced offices into extreme measures like refusing clients.

9. Plaintiffs bring this class action under 42 U.S.C. § 1983 on behalf of themselves and those similarly situated who have been or will be denied counsel indefinitely because OPD has refused to represent them.

10. Plaintiffs seek a declaratory judgment that OPD's indefinite denial of counsel violates their Sixth and Fourteenth Amendment rights to counsel, as well as their Fourteenth Amendment right to due process and the equal protection of the laws.

JURISDICTION AND VENUE

11. Plaintiffs' claims arise under the Constitution and laws of the United States. This Court has jurisdiction over these claims pursuant to 28 U.S.C. §§ 1331, 1333(a)(3).

12. The federal rights asserted by Plaintiffs are enforceable under 42 U.S.C. § 1983.

¹ David Carroll, *Indigent Defense Progress Stunted by Out-Dated Funding Mechanism in Louisiana*, 6AC: Pleading the Sixth (Sept. 26, 2012), <http://sixthamendment.org/indigent-defense-progress-stunted-by-out-dated-funding-mechanism-in-louisiana/>.

13. This Court has the authority to grant declaratory relief under 28 U.S.C. § 2201-2202 and Fed. R. Civ. P. 57.

14. Venue is proper in the Middle District of Louisiana under 28 U.S.C. § 1391(b). Defendant Dixon and the Louisiana Public Defender Board reside in this district, and all defendants are residents of Louisiana, in which the Middle District of Louisiana is located.

PARTIES

Plaintiffs

15. Plaintiff Darwin Yarls, Jr. is an adult resident of Orleans Parish in the State of Louisiana. He is currently in custody at the Orleans Parish Prison on a felony accusation for which the prosecution has not formally charged him by information or indictment.

16. Plaintiff Leroy Shaw, Jr. is an adult resident of Orleans Parish in the State of Louisiana. He is currently in custody at the Orleans Parish Prison on a felony accusation for which the prosecution has not formally charged him by information or indictment.

17. Plaintiff Douglas Brown is an adult resident of Orleans Parish in the State of Louisiana. He is currently in custody at the Orleans Parish Prison on a felony accusation for which the prosecution has not formally charged him by information or indictment.

Defendants

18. Defendant Derwyn Bunton is the Chief Public Defender for the Orleans Parish Public Defender's Office. He is sued in his official capacity for declaratory relief. He is domiciled in the Eastern District of Louisiana.

19. Defendant James Dixon is the state public defender for the Louisiana Public Defender Board (the "Board"), the executive agency charged with administering Louisiana's

indigent defense system. Dixon is employed by the Board to carry out its responsibilities. Defendant Dixon's office approved and supervises OPD's Restriction of Services Plan. He is domiciled in the Middle District of Louisiana.

FACTS

20. Plaintiff Yarls was arrested on January 12, 2016, on an accusation of vehicular homicide. The alleged accident occurred nearly two months prior to the arrest. The victim was Mr. Yarls' longtime girlfriend. The statutory maximum for this offense is thirty years in prison with hard labor. La. Rev. Stat. Ann. §14:32.1. Mr. Yarls is 51-years old.

21. Mr. Yarls had his initial appearance before the magistrate on January 12, 2016.

22. The magistrate found probable cause for the offense and set Mr. Yarls' bail at \$75,000. Mr. Yarls has been unemployed since the accident and lacks the means to purchase his release.

23. Plaintiff Shaw was arrested on January 12, 2016, on an accusation of armed robbery. The statutory maximum for this offense is ninety-nine years in prison with hard labor without benefit of parole, probation, or suspension of sentence. La. Rev. Stat. Ann. §14:64. Mr. Shaw is 48-years old.

24. Mr. Shaw had his initial appearance before the magistrate on January 12, 2016.

25. The magistrate found probable cause for the offense and set Mr. Shaw's bail at \$75,000. Mr. Shaw is unemployed and receives Social Security Disability. He lacks the means to purchase his release.

26. Plaintiff Brown was arrested on January 13, 2016, on an accusation of first degree robbery. The statutory maximum for this offense is forty years in prison with hard labor without

benefit of parole, probation, or suspension of sentence. La. Rev. Stat. Ann. §14:64.1. Mr. Brown is 44–years old.

27. Mr. Brown had his initial appearance before the magistrate on January 14, 2016.

28. The magistrate found probable cause for the offense and set Mr. Brown's bail at \$25,000. Mr. Brown works at a temp service and makes approximately \$1,000 a month. He lacks the means to purchase his release.

29. Counsel appointments in Orleans Parish are also conducted at the initial appearance, pursuant to Article 230 of the Louisiana Code of Criminal Procedure. If the magistrate court determines that an arrestee is unable to afford counsel, the court appoints OPD, which represents 85% of criminal defendants in the parish.

30. In accordance with this practice, the magistrate on January 12, 2016 determined that Mr. Yarls could not afford an attorney and appointed OPD.

31. In accordance with this practice, the magistrate on January 12, 2016 determined that Mr. Shaw could not afford an attorney and appointed OPD.

32. Under ordinary circumstances, OPD would accept Mr. Yarls and Mr. Shaw as clients and begin representing them immediately upon the magistrate's order of appointment.

33. However, an OPD representative, acting on behalf of Defendant Bunton, informed the court that OPD was refusing the magistrate's order to represent Mr. Yarls, Mr. Shaw.

34. The court, in response to OPD's refusals, scheduled a second hearing for January 15, 2016, to again determine whether Mr. Yarls and Mr. Shaw were entitled to appointed counsel.

35. However, prior to their January 15th hearing, Mr. Yarls and Mr. Shaw were brought before the court on January 14, 2016 for another hearing to determine counsel.

36. The court again found Mr. Yarls and Mr. Shaw indigent and appointed OPD to represent Mr. Yarls and Mr. Shaw.

37. Again, an OPD representative, acting on behalf of Defendant Bunton, informed the court that OPD was refusing the magistrate's order to represent Mr. Yarls and Mr. Shaw.

38. The magistrate accepted OPD's notice that they were refusing to represent Mr. Yarls and Mr. Shaw and set both cases for a status conference hearing on February 16, 2016.

39. Also in accordance with the standard practice in Orleans Parish, the magistrate on January 14, 2016 determined that Mr. Brown could not afford an attorney and appointed OPD.

40. Again, an OPD representative, acting on behalf of Defendant Bunton, informed the court that OPD was refusing the magistrate's order to represent Mr. Brown.

41. The magistrate accepted OPD's notice that they were refusing to represent Mr. Brown and set Mr. Brown's case for a status conference hearing on February 11, 2016.

42. Because Mr. Yarls has been unemployed for two months and is currently in jail, he will remain unable to afford counsel by the time of the February 16th hearing, and for the foreseeable future.

43. Because Mr. Shaw is unemployed and is currently in jail, he will remain unable to afford counsel by the time of the February 16th hearing, and for the foreseeable future.

44. Because Mr. Brown is employed with a temp service and is currently in jail, he will remain unable to afford counsel by the time of the February 11th hearing, and for the foreseeable future.

45. OPD refused to represent Mr. Yarls, Mr. Shaw and Mr. Brown as part of its Restriction of Services protocol (“ROS”).

46. OPD initiated the ROS on July 1, 2015 – the first day of its 2016 fiscal year – due to \$1 million shortfall in locally generated (\$300,000) and state (\$700,000) revenue for Fiscal Year 2015. Ex. 1, Letter from Derwyn D. Bunton, Chief Dist. Def., OPD, to New Orleans Criminal Justice Stakeholders (Jun. 18, 2015).

47. Defendant Dixon officially approved the ROS on behalf of the Louisiana Public Defender Board on December 1, 2015. Ex. 2, Letter from Derwyn D. Bunton, Chief Dist. Def., OPD, to the Honorable Arthur Hunter, Jr., Orleans Par. Criminal Dist. Court, Section K (Dec. 11, 2015) at 1.

48. The ROS included a hiring freeze for current and future staff attorney vacancies. Ex. 3, Orleans Public Defenders Office, Restriction of Services Plan Fiscal Year 2016 at 3. Defendant Bunton asserted in the ROS that OPD’s inability to replace or expand staff, combined with the office’s already excessive number of active cases, would result in clients being placed on a waiting list for representation.² *Id.* at 4, 5.

49. Since beginning the ROS, OPD has lost a significant number of attorneys, particularly among its most experienced staff. Ex. 2, at 1. This has caused the caseloads for

² Orleans Parish also provides funding to OPD as a matter of parish policy. See *State v. Citizen*, 898 So. 2d 325, 338 (La. 2005). Since OPD announced its ROS, Orleans Parish has increased its allocation to OPD by \$400,000. Ex. 3, at 2, n.1. This increase prevented OPD from implementing ten days of staff furloughs in 2016, wherein OPD would not appear at arraignments and initial appearances for any potential client. But the additional funding is not enough to keep OPD from placing clients on a waiting list for representation. Ken Daley, *Orleans public defenders need time to find lawyers for cases, Burton says*, TIMES-PICAYUNE, (Jan. 4, 2016), http://www.nola.com/crime/index.ssf/2016/01/public_defenders_start_declini.html.

most staff attorneys to rise well above the standards set by the American Bar Association and the Louisiana Public Defender Board. *Id.* at 1-2.

50. On November 20 and 23 of 2015, Judge Hunter of the Orleans Parish Criminal District Court held a hearing on OPD's ability to provide constitutionally adequate and ethical representation to its clients.

51. OPD staff members, including Defendant Bunton, and expert witnesses all asserted at the hearing that OPD was failing to meet its constitutional and ethical obligations to clients because too many staff attorneys had unmanageable caseloads. *See generally*, Ex. 4, Tr. of Ct. Proceedings Held on the 20th Day of November in 2015, Louisiana v. Wroten et. al, No. 520-385 (Louisiana Criminal District Court, Orleans Parish); Ex. 5, Tr. of Ct. Proceedings Held on the 23rd Day of November in 2015, Louisiana v. Wroten et. al, No. 520-385 (Louisiana Criminal District Court, Orleans Parish); Ex. 6, Aff. of Derwyn Bunton, Chief District Defender, Nov. 20, 2015; Ex. 7, Aff. of Lauren Anderson, Attorney, Nov. 20, 2015; Ex. 8, Aff. of Mariah Holder, Attorney, Nov. 20, 2015; Ex. 9, Aff. of Phillip Jobe, Investigator, Nov. 20, 2015; Ex. 10, Aff. of Stanislav Moroz, Attorney, Nov. 20, 2015; Ex. 11, Aff. of Thomas Frampton, Attorney, Nov. 20, 2015; and Ex. 12, Aff. of Tina Peng, Attorney, Nov. 20, 2015.

52. Following the hearing, Defendant Bunton announced on December 11, 2015, that OPD would start declining certain felony cases in mid-January of 2016. Ex. 2, at 2. The withdrawals would occur at a defendant's first appearance before the magistrate. *Id.*

53. Defendant Bunton predicted that OPD's inability to accept additional clients would continue either until its caseloads reduced or it received additional funding to hire more attorneys. *Id.*

54. Due to Defendant Bunton and OPD's refusal to represent them, Plaintiffs are suffering and will continue to suffer irreparable harm. Most critically, they face an unduly heightened risk of prolonged and unnecessary pretrial detention. *See* Ex. 3, at 5.

55. Plaintiffs have no advocates to advise them on whether to request a preliminary examination under Louisiana law, wherein they could challenge probable cause for their arrests or argue to lower their bail conditions. *See* Ex. 6, at ¶5.

56. Defendant Bunton's denial of counsel also prevents Plaintiffs from investigating the charges and preparing a defense, filing motions to preserve potentially exculpatory evidence or other discovery, conducting additional bail advocacy, or negotiating with the prosecution. *See id.*

57. These critical pretrial functions are all services available to defendants that OPD has accepted as clients, to those being prosecuted in public defender districts with adequate funding, or to those who can afford private counsel.

Louisiana's Funding Scheme for Public Defense

58. Plaintiffs' placement on a waiting list for appointed counsel results from the State of Louisiana's chronic underfunding of its public defender system.

59. The Louisiana Constitution obligates the legislature to provide a uniform system of securing competent representation for indigent defendants. LA. CONST. art. I, § 13.

60. In 2007, the legislature established the Louisiana Public Defender Fund (the "Fund"), administered by the Louisiana Public Defender Board, to meet this mandate. The Fund is primarily appropriated by the legislature, but lacks a guaranteed funding stream or source of revenue.

61. According to Defendant Dixon, the legislature has never provided the Board with adequate funding to operate the state's public defender system. Ex. 13, La. Pub. Def. Bd., 2014 Annual Board Report at 22.

62. The legislature also established in each of the state's forty-two judicial districts a Judicial District Indigent Defender Fund, which is administered by the district public defender.

63. The Fund consists of locally generated fines and fees, the most substantial of which is a \$45 fee assessed in cases when a defendant is convicted after trial, a plea of guilty or nolo contendere, or when a defendant forfeits a bond.

64. In practice, most of the revenue generated by this fee comes from traffic tickets. The fees collected from traffic tickets constitute nearly two-thirds of the funds available for public defense in Louisiana. *Id.*

65. The amount of money a district defender collects from traffic tickets varies widely from fiscal year to fiscal year, and from district to district. Factors such as the number of highways passing through a district and law enforcement's traffic enforcement priorities contribute greatly to this variance, independent of the actual demand for public defenders in a particular district.

66. Defendant Dixon and Defendant Bunton have admitted that Louisiana's dependence on locally generated revenue is inherently unreliable and inadequate. Ex. 2, at 3; Ex. 13, at 22.

67. Since 2010, twenty-nine of the state's forty-two public defenders have received emergency funding to avoid financial failure. Ex. 13, at 22. But districts such as the twenty-ninth (St. Charles Parish), through which multiple state highways pass, typically enjoy budget

surpluses. Four other defender districts anticipate similar surpluses for Fiscal Year 2016. *Id.* at 23.

68. Louisiana's dysfunctional funding scheme has forced at least fifteen of its forty-two defender districts to announce severe service restrictions in the past year.³ The affected districts are spread throughout the state, and include both rural and urban parishes.

69. As with OPD, all of the plans include protocols for establishing waiting lists, either because a district can no longer accept certain cases involving conflicts of interest among co-defendants, or to mitigate caseloads that vastly exceed ethical guidelines.

70. Defendant Dixon has predicted a collapse of the public defender system around the end of Fiscal Year 2016, when the Board expects nearly three-quarters – thirty-one of the forty-two – of defender districts to be at or near insolvency. Ex. 13, at 23.

CLASS ALLEGATIONS

71. Pursuant to Rule 23 of the Federal Rules of Civil Procedure, Plaintiffs bring this suit on behalf of themselves and all others similarly situated who are or will be affected by Defendants' unconstitutional policy of refusing to represent poor people accused of crimes.

72. Plaintiffs seek to represent a class defined as Orleans Parish arrestees with a right to appointed counsel who have been or will be denied counsel indefinitely due to their placement on a waiting list for representation by OPD.

73. Plaintiffs seek to represent a class of individuals to obtain declaratory relief establishing that their placement on OPD's waiting list for appointed counsel violates their constitutional rights to counsel and to equal protection.

³ The ROS plans for each of these districts are on file with Plaintiffs' counsel.

74. At the time of this filing, OPD has refused to represent at least 7 clients. It is unknown how many clients OPD will ultimately place on its waiting list for representation, and the number of clients on the waiting list will grow and fluctuate daily.

75. The class is so numerous that joinder of all members is impracticable, and, because the class includes future members, its size will grow over time if Defendants' unconstitutional practices persist.

76. There are questions of law and fact common to the class.

77. Common questions of fact include: the budgetary circumstances that led OPD to begin placing individuals on a waiting list for services; the protocols OPD uses when it refuses appointment; the procedures, if any, used by OPD, judges, and prosecutors to monitor cases on the waiting list; the typical amount of time individuals must remain on the waiting list; and the amount of funding available at the state and local levels to provide counsel for individuals on the waiting list.

78. Common questions of law include whether the placement of putative class members on a waiting list for appointed counsel violates their Sixth Amendment right to counsel and/or their Fourteenth Amendment right to the equal protection of the laws.

79. Plaintiffs' claims or defenses are typical of the claims or defenses of the proposed class. The constitutional deprivations Plaintiffs have suffered and continue to suffer are the same as those of putative class members.

80. Plaintiffs and their attorneys will fairly and adequately protect the interests of the class. Plaintiffs have no interests antagonistic to the proposed class, and they are represented by attorneys with significant expertise in criminal procedure and complex civil litigation.

81. Plaintiffs seek a declaratory judgment that theirs and others' denial of counsel by OPD violates their constitutional rights. Defendants' actions and omissions in violation of the federal constitution apply generally to the class as a whole; thus, final declaratory relief is appropriate for the proposed class pursuant to Rule 23(b)(2).

CLASS AND INDIVIDUAL CLAIMS FOR RELIEF

Count 1: Sixth and Fourteenth Amendment Right to Counsel

82. Because Plaintiffs and class members are too poor to afford private counsel, Defendant Bunton's placement of individuals on a waiting list for representation violates Plaintiffs and class members' Sixth and Fourteenth Amendment right to the assistance of counsel.

Count 2: Fourteenth Amendment Right to Due Process and Equal Protection Relative to Individuals Not Placed on OPD's Waitlist

83. Plaintiffs and class members have a fundamental right to the assistance of appointed counsel because they cannot afford private counsel.

84. Defendant Bunton's placement of Plaintiffs and class members on a waiting list for representation creates two classes of similarly situated individuals with a fundamental right to appointed counsel: eligible criminal defendants who are appointed counsel and eligible criminal defendants denied counsel by their placement on a waiting list.

85. Defendant Bunton's placement of Plaintiffs and class members on a waiting list for representation while Defendant Bunton provides counsel to other individuals in Orleans Parish violates Plaintiffs and class members' Fourteenth Amendment right to due process and equal protection.

Count 3: Fourteenth Amendment Right to Due Process and Equal Protection Relative to Criminal Defendants Able to Afford Private Counsel.

86. Plaintiffs and class members have a fundamental right to the assistance of appointed counsel because they cannot afford private counsel.

87. Defendant Bunton's placement of Plaintiffs and class members on a waiting list for appointed counsel has created dual criminal justice systems based on wealth in Orleans Parish. Criminal defendants in Orleans Parish who can afford private counsel have unfettered access to the assistance of counsel for preliminary examinations and other critical defense functions.

88. But Plaintiffs and class members cannot access these protections until Defendants secure adequate resources to appoint counsel and remove Plaintiffs and class members from the waiting list.

89. Defendant Bunton's placement of Plaintiffs and class members on the waiting list invidiously discriminates against class members based on wealth, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

RELIEF REQUESTED

WHEREFORE, Plaintiffs request that this Court:

- a. Certify this case as a class action.
- b. Enter declaratory relief in the form of a judgment establishing that Defendant Bunton's placement of individuals on a waiting list for public defender services violates Plaintiffs and class members' Sixth and Fourteenth Amendment right to the assistance of counsel.
- c. Enter declaratory relief in the form of a judgment establishing that Defendant Bunton's placement of Plaintiffs and class members on a waiting list for services while Defendant

Bunton provides counsel to other similarly situated individuals violates Plaintiffs and class members' Fourteenth Amendment rights to due process and equal protection.

- d. Enter declaratory relief in the form of a judgment establishing that Defendant Bunton's denial of counsel to Plaintiffs and class members on the waiting list invidiously discriminates against class members based on wealth, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment.
- e. Award costs and attorney's fees pursuant to 42 U.S.C. § 1988.
- f. Grant or award any other relief this Court deems just and proper.

Submitted the 14th day of January, 2016.

Respectfully submitted,

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