

**COPY**

SUPREME COURT  
STATE OF NEW YORK

COUNTY OF ALBANY

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KIMBERLY HURRELL-HARRING, et al,  
Plaintiffs,

-against-

**DECISION/ORDER**  
Index No. 8866-07

THE STATE OF NEW YORK, GOVERNOR  
DAVID PATERSON, in his individual capacity,  
THE COUNTY OF ONONDAGA, NEW YORK,  
THE COUNTY OF ONTARIO, NEW YORK,  
THE COUNTY OF SCHUYLER, NEW YORK,  
THE COUNTY OF SUFFOLK, NEW YORK, and  
THE COUNTY OF WASHINGTON, NEW YORK,  
Defendants.

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Appearances:

New York Civil Liberties Union Foundation  
By: Deborah Berkman  
Arthur Eisenberg  
Christopher Dunn  
125 Broad Street, 19<sup>th</sup> Floor  
New York, New York 10004  
For the Plaintiffs

Schulte Roth & Zabel LLP  
By: Gary Stein  
Danny Greenberg  
Sena Kim- Reuter  
919 Third Avenue  
New York, New York 10022  
For the Plaintiffs

Hon. Andrew M. Cuomo  
Attorney General of the State of New York  
By: David Cochran  
Adrienne Kerwin  
The Capitol  
Albany, New York 12224  
For the State Defendants

Gordon Cuffy  
Onondaga County Attorney

By: Michael McCarthy  
421 Montgomery Street, 10<sup>th</sup> Floor  
Syracuse, New York 13202  
For Defendant Onondaga County

John Park  
Ontario County Attorney  
By: Michael Reinhardt  
Ontario County Courthouse  
27 North Main Street, 4<sup>th</sup> Floor  
Canandaigua, New York 14424  
For Defendant Ontario County

Dennis Morris  
Assistant County Attorney  
105 9<sup>th</sup> Street, Unit 5  
Watkins Glen, New York 14865  
For Defendant Schuyler County

Christine Malafi  
Suffolk County Attorney  
By: Leonard Kapsalis  
P.O. Box 6100  
Hauppauge, New York 11787-4311  
For Defendant Suffolk County

Fitzgerald Morris Baker Firth P.C.  
By: William Scott  
P.O. Box 2017  
Glens Falls, New York 12801  
For Defendant Washington County

Devine, J:

Plaintiffs are allegedly indigent individuals who had criminal charges pending in Onondaga, Ontario, Schuyler, Suffolk and Washington Counties at the time this action was commenced. They commenced the action seeking a declaration that their constitutional rights were being violated due to systemic deficiencies in the manner of providing a defense to indigent individuals in the five named counties and for injunctive relief requiring the state to provide a

system of public defense which complies with the New York and United States Constitutions, as well as state law, in such counties. Plaintiffs have now moved for class action certification to bring this action on behalf of all other indigent persons who may be entitled to counsel at public expense in such counties, now or in the future.

Defendant Schuyler County has raised an objection to the timeliness of the motion, contending that since it was served more than 60 days after said defendant served its answer the motion is untimely. CPLR 902 requires a motion for class certification to be made within "sixty days after the time to serve a responsive pleading has expired for all persons named as defendants in an action brought as a class action." The actual date of service of an answer is irrelevant.<sup>1</sup> Pursuant to a stipulation extending the time to answer, defendant Schuyler County's time to serve an answer expired on October 15, 2008. Furthermore, defendants Onondaga and Ontario Counties' time to serve an answer expired on October 24, 2008. Given the multiple defendants, this latter date governs the time for moving for class certification.<sup>2</sup> The motion was served on December 5, 2008, well within the 60-day period, regardless of which date is used. It is therefore determined that the motion is timely.

On a motion for class action certification, plaintiff must establish that

"the class is so numerous that joinder of all members is impracticable, common questions of law or fact predominate over questions affecting only individual member, the claims or defenses of the representative parties are typical of the class as a whole, the representative parties will fairly and adequately protect the interests of the class, and a class action is superior to other available methods for the fair and efficient adjudication of the

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<sup>1</sup> See Shah v Wilco Sys., Inc., 27 AD3d 169, 174 [1st Dept 2005].

<sup>2</sup> See e.g. Citibank, [N.Y. State], N.A. v Suthers, 68 AD2d 790, 794 [4th Dept 1979].

controversy”.<sup>3</sup>

Each requirement is an essential prerequisite to class action certification, and whether each has been established by the representative plaintiffs is a decision that ‘rests within the sound discretion of the trial court’.<sup>4</sup>

Plaintiffs seek to define the class as “all indigent persons who have or will have criminal felony, misdemeanor or lesser charges pending against them in New York state courts in Onondaga, Ontario, Schuyler, Suffolk and Washington counties who are entitled to rely on the government of New York to provide them with meaningful and effective defense counsel.” With respect to the first requirement, plaintiffs have shown that there were more than 46,000 indigent criminal defendants in 2007 in the five defendant counties. It is certainly likely that the numbers are similar for 2008 and will be into the future. Clearly, joinder of all of the members of the class, many of whom will not qualify as members until they are charged with a crime, would be impracticable. Indeed, this class definition may be so numerous as to give rise to significant difficulties by increasing the possibility of conflicts of interest,<sup>5</sup> as well as making class notification, if found to be warranted pursuant to CPLR 904 (a), extremely problematic.

Plaintiffs also contend that common questions of law and fact predominate over

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<sup>3</sup> Rife v Barnes Firm, P.C., 48 AD3d 1228, 1229 [2008], *lv dismissed and denied* 10 NY3d 910 [2008]; *see* CPLR 901 (a); *see also* Rallis v City of New York, 3 AD3d 525, 526 [2004]; Solomon v Bell Atl. Corp., 9 AD3d 49, 51-52 [2004].

<sup>4</sup> Small v Lorillard Tobacco Co., 94 NY2d 43, 52 [1999]; *see* CLC/CFI Liquidating Trust v Bloomingdale's, Inc., 50 AD3d 446, 447 [2008]; Lauer v New York Tel. Co., 231 AD2d 126, 130 [1997].” (Alix v Wal-Mart Stores, Inc., 57 AD3d 1044, 1045, [3d Dept 2008]).

<sup>5</sup> *See* Alix v Wal-Mart Stores, Inc., 16 Misc.3d 844, 851 [Sup Ct, Albany County 2007, *affd* 57 AD3d 1044 [3d Dept 2008]].

individual issues. Plaintiffs have repeatedly stated that the instant action challenges a systemic deficiency in the manner in which defense services are provided to indigent defendants. The alleged harm is an abstract risk of being deprived of constitutional rights, rather than a specific, individual deprivation. They have consistently argued that the actual facts of each individual plaintiff's case are of little relevance. Moreover, plaintiffs do not seek any monetary damages. The only relief sought is declaratory and injunctive in nature. While there may indeed be significant differences in the deficiencies, if any, in the five different counties, which provide criminal defense services in distinctly different manners, they are not differences attributable to the circumstances of the individual class members. Moreover, there has been no showing that the differences between the five counties are so significant as to require severance of the claims with respect to individual counties. In any event, the CPLR expressly provides for the division of a class into subclasses if warranted.<sup>6</sup> Thus, in theory, each of the five counties could be analyzed separately, with differing declaratory and injunctive relief provided, even though the action was proceeding as a class action.

Plaintiffs must also establish that the claims or defenses of the representative plaintiffs are typical of those of the entire class. Defendants contend that plaintiffs can not meet this requirement due to the significant differences in the defense services received by each of the named plaintiffs and the differences between the five counties' criminal defense systems. However, as noted above, the plaintiffs' claims are not based upon the actual representation received by the named plaintiffs. Rather, plaintiffs rely upon allegations of systemic deficiencies which are on their face similar for all the named plaintiffs, as well as all class members,

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<sup>6</sup> See CPLR 906.

regardless of the quality of representation actually received or whether criminal defense services are provided through a public defender, assigned counsel or a private legal aid bureau or society. Defendants have not shown that they have any defenses to the claims of systemic deficiencies which significantly differ between the named plaintiffs and the un-named members of the class.

The named plaintiffs must also show that they will fairly and adequately protect the interests of the entire class. Most, if not all, of the criminal prosecutions of the named plaintiffs have concluded and, as such, they have no current actual interest in the litigation. Moreover, most of the named plaintiffs live significant distances from Albany County. It is likely that they are still burdened by limited financial resources to pay for travel to Albany for any pre-trial proceedings or for trial. None of the named plaintiffs have submitted current affidavits indicating a willingness actively to litigate this matter. Plaintiffs have noted only four affidavits from early 2008 in which the affiants stated in an entirely conclusory fashion that they joined the lawsuit in order to help others get adequate representation.

Thus, the extent to which the named plaintiffs will actively participate in this litigation is questionable. However, plaintiffs have shown that their attorneys have sufficient experience and ability adequately to litigate this matter. Moreover, it is possible, if not likely, that their organizational purposes would be sufficient to overcome any lack of interest by the individual named plaintiffs, providing a reasonable guarantee that the matter would be actively and vigorously pursued.

There is, however, a significant possible tension between the claims of the named plaintiffs and some of the members of the proposed class. The named plaintiffs seek only declaratory and injunctive relief. There is no claim for monetary damages. It is certainly

possible that some of the members of the class have valid causes of action for legal malpractice against their defense counsel. While such claims clearly constitute a separate and distinct cause of action from the claim of a systemic deficiency in the provision of indigent defense services, the principles of *res judicata* bar further litigation between the same parties as to causes of action which were or could have been raised.<sup>7</sup> As long as the claims arise out of the same transaction or series of transactions, they are barred regardless of whether they are based upon different legal theories or seek different relief.<sup>8</sup> Claims of legal malpractice certainly arise out of the same series of transactions which give rise to the claim of an unacceptable likelihood of a deprivation of meaningful and effective assistance of counsel. Since public defenders are county employees, the counties which utilize a public defender could be sued under the theory of *respondeat superior*, thereby meeting the requirement of an identity of parties. Plaintiffs have thus failed to show that the named representative parties would fairly and adequately protect the interests of the entire class, including those with viable causes of action for money damages.<sup>9</sup>

Finally, the Court finds that plaintiffs have failed to show that a class action would be superior to other alternatives in obtaining a fair and efficient adjudication of the issues. When a proposed class action challenges governmental operations, and when a determination of an individual claim would effectively provide relief to the entire proposed class through the

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<sup>7</sup> See Jackson v Jamaica Hosp. Med. Ctr., 61 AD3d 1166, 1167 [3d Dept 2009].

<sup>8</sup> See Landau P.C. v LaRossa, Mitchell & Ross, 11 NY3d 8, 12 [2008].

<sup>9</sup> See Small v Lorillard Tobacco Co., 94 NY2d 43, 54 [1999].

operation of *stare decisis*, class certification is unnecessary and not warranted.<sup>10</sup>

The lack of need for class certification is even more compelling in the instant action. Plaintiffs seek a declaration that indigent criminal defendants' general rights to assistance of counsel are being violated together with injunctive relief to restructure the entire system of providing a defense to indigent criminal defendants. They have repeatedly stated that the facts and circumstances of any individual plaintiff are not at issue. Presumably, if they prevail, an entirely new, or significantly modified, system would replace the current system. The current alleged deficiencies would be corrected and there would be no need for any further litigation by would be class members based upon *stare decisis*. Indeed, any new deficiencies in the system would likely require a new action or proceeding, as they would not have been covered by the final judgment which may be entered herein.

Plaintiffs have not shown that there would be any actual benefit from class action certification. Clearly, plaintiffs may rely upon current indigent criminal defendants with compelling histories as non-party witnesses or may move to add such individuals as named parties, without requiring class action certification. They have also failed to show that any of the exceptions to the government operations principle are applicable. Plaintiffs do not seek a "complex injunction" applicable to individual criminal prosecutions. There has been no showing of a likelihood of a need for individual actions to enforce the terms of the injunctive relief which

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<sup>10</sup> See Mahoney v Pataki, 98 NY2d 45, 55 [2002]; Matter of Martin v Lavine, 39 NY2d 72, 75 [1976]; Matter of Jones v Berman, 37 NY2d 42, 57 [1975]; Matter of Legal Aid Socy. v New York City Police Dept., 274 AD2d 207, 213 [1st Dept 2000].

may be granted herein<sup>11</sup> or to recover small monetary amounts such that lack of class certification might effectively preclude relief to indigent persons.<sup>12</sup> Furthermore, there has been no showing that the defendants have ignored or are likely to ignore court orders.<sup>13</sup> Finally, while plaintiffs contend that there is an immediate threat of deprivation of constitutional rights, there has been no showing that injunctive relief which might be granted in the instant action without class certification would be insufficient to mitigate the threat for all members of the would be class or that any individual determinations would be required.<sup>14</sup>

Plaintiffs also contend that class action certification is necessary because the individual plaintiffs' claims are almost certain to become moot before the merits of this action can be determined. However, the issues are of significant importance, are almost certain to recur, and would be likely to evade judicial review if no exception to the mootness doctrine was applied.<sup>15</sup> As such, dismissal on the ground of mootness is very unlikely. Indeed, plaintiffs must rely upon a similar exception to maintain the proposed class action as the claims of the named plaintiffs

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<sup>11</sup> Cf. New York City Coalition to End Lead Poisoning v Giuliani, 245 AD2d 49, 51-52 [1st Dept 1997].

<sup>12</sup> Cf. Tindell v Koch, 164 AD2d 689, 695 [1st Dept 1991]; Ousmane v City of New York, 7 Misc.3d 1016(A) [Sup Ct, New York County 2005].

<sup>13</sup> See Matter of Legal Aid Socy. v New York City Police Dept., 274 AD2d at 213; New York City Coalition to End Lead Poisoning v Giuliani, 245 AD2d at 52.

<sup>14</sup> Cf. New York City Coalition to End Lead Poisoning v Giuliani, 245 AD2d at 51-52.

<sup>15</sup> See Matter of Hearst Corp. v Clyne, 50 NY2d 707, 714-715 [1980]; Matter of Jones v Berman, 37 NY2d at 57; Matter of Vanderminden v Tarantino, 60 AD3d 55, 57-58 [3d Dept 2009].

become moot by termination of their criminal proceedings.<sup>16</sup>

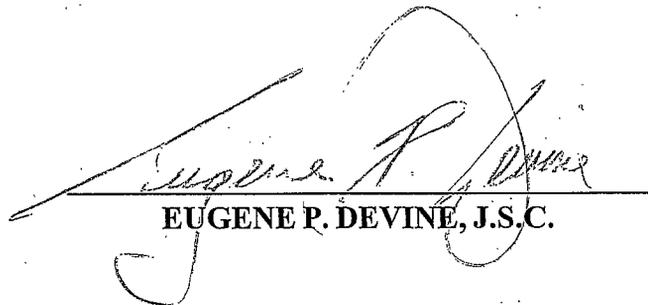
Inasmuch as plaintiffs have failed to show that they will fairly and adequately protect the interests of the entire class or that a class action would be superior to other alternatives in obtaining a fair and efficient adjudication of the issues, their motion for class action certification is hereby denied.

This memorandum constitutes both the DECISION and ORDER of the Court. This Original DECISION/ORDER is being sent to the attorney for the State defendants. The signing of this DECISION/ORDER shall not constitute entry or filing under CPLR 2220. Counsel for the plaintiffs is not relieved from the applicable provision of that section with respect to filing, entry and notice of entry.

**SO ORDERED**

**ENTER**

Dated: Albany, New York  
July 13, 2009



EUGENE P. DEVINE, J.S.C.

Papers Considered:

1. Plaintiffs' Notice of Motion, dated December 5, 2008.
2. Affirmation of Attorney Berkman, with exhibits, dated December 5, 2008.
3. Affirmation of Attorney Greenberg, with exhibit, dated December 5, 2008.
4. Affidavit of Demetrius Thomas, with exhibits, sworn to December 4, 2008.
5. Plaintiffs' Memorandum of Law, dated December 5, 2008.
6. Affirmation of Attorney Cochran, with exhibits, dated February 27, 2009.

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<sup>16</sup> See Brad H. v City of New York, 185 Misc2d 420, 425 [Sup Ct, New York County 2000].

7. Affirmation of Attorney Monastero, undated.
8. Affirmation of Attorney Gomes dated February 19, 2009.
9. Affirmation of Attorney Neldner dated February 18, 2009.
10. Affirmation of Attorney Oswald dated February 11, 2009.
11. Affirmation of Attorney Caponi dated February 19, 2009.
12. Affirmation of Attorney McDivitt dated February 11, 2009.
13. Affirmation of Attorney Reinhardt, with exhibits, dated February 13, 2009.
14. Affirmation of Attorney Hayden, with exhibits, dated February 20, 2009.
15. Unsworn, undated "Affidavit" of Attorney Duclos.
16. Unsworn, undated "Affidavit" of Attorney Sperano.
17. Affidavit of Attorney Schick sworn to February 23, 2009.
18. Affidavit of Attorney Roulan sworn to February 19, 2009.
19. Affidavit of Attorney Roe sworn to January 5, 2009.
20. Affidavit of Attorney Tantillo sworn to February 17, 2009.
21. Affidavit of Attorney Trunfio sworn to February 20, 2009.
22. Affidavit of Attorney Captor sworn to February 19, 2009.
23. Affidavit of Attorney Mosher, with exhibits, sworn to illegible day of October, 2008.
24. Affidavit of Attorney Vitale, with exhibits, sworn to February 17, 2009.
25. Affidavit of Attorney Barber, with exhibits, sworn to February 19, 2009.
26. Affidavit of Lisa Orr sworn to February 23, 2009.
27. State Defendants' Memorandum in Opposition dated February 27, 2009.
28. Affirmation of Attorney Scott, with exhibits, dated February 27, 2009.
29. Affirmation of Attorney Kapsalis, with exhibits, dated February 27, 2009.
30. Memorandum in Opposition of Defendants Counties of Suffolk, Ontario, Onondaga and Washington dated February 27, 2009.
31. Affirmation of Attorney Morris, with exhibits, dated February 13, 2009.
32. Memorandum in Opposition of Defendant County of Schuyler, undated.
33. Supplemental Affirmation of Attorney Berkman, with exhibits, dated March 27, 2009.
34. Plaintiffs' Reply Memorandum of Law dated March 28, 2009.