IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

THE INDIGENT DEFENDER BOARD OF ORLEANS PARISH, ET AL	*	
	*	**CIVIL ACTION NO.: 07-2798**
Plaintiffs,	*	**SECTION: I**
Versus	*	
	*	**MAGISTRATE: 2**
RAYMOND C. BIGELOW, ET AL	*	
Defendants.	*	

* *

MEMORANDUM IN SUPPORT OF RULE 12(b)(6) MOTION TO DISMISS

NOW INTO COURT, through undersigned counsel, come Defendants, Raymond C. Bigelow, in his official capacity as Chief Judge of the Orleans Parish Criminal District Court; and Lynda Van Davis, Benedict Willard, Frank A. Marullo Jr., Calvin Johnson, Dennis Waldron, Julian Parker, Camille Buras, Darryl Derbigny, Terry Q. Alarcon and Gerard Hansen, in their official capacities as Orleans Parish Criminal District Court Judges, which respectfully submit the following Memorandum in Support of the Defendants' Rule 12(b)(6) Motion to Dismiss.

The Defendants' instant Rule 12(b)(6) motion is not reached unless and until the Court has already determined that it does indeed have subject matter jurisdiction, and that the Defendants'

contemporaneously filed Rule 12(b)(1) Motion to Dismiss is due to be denied. In that event, and only in that event, Defendants urge this Court to nevertheless dismiss this action pursuant to F.R.C.P. Rule 12(b)(6), in that the Plaintiffs' Complaint fails to set forth any claim upon which relief might be granted by this Honorable Court.

INTRODUCTION

The arguments raised by the Defendants' Rule 12(b)(6) Motion to Dismiss are as follows:

First, Defendants assert that the Plaintiffs' lawsuit is, in all reality, a mandamus action. They do not seek to have the Defendant judges *not* do something. Quite to the contrary, the genuine thrust of the Plaintiffs' effort is to have this federal court order a group of state court judges to *do* several different things desired by these Plaintiffs. For instance, these Plaintiffs seek a court order requiring state court judges to recognize the Plaintiffs as the current IDB, and to work with them on an ongoing basis as if they are the current IDB into an indefinite period into the future. This is a mandamus action. As such, and because the Plaintiffs have failed to set forth a claim where the Defendant public officials have no discretion whatsoever, and that the Plaintiffs are clearly entitled to the requested relief such that all that the Defendants would have to do is perform a ministerial duty, no claim for relief is stated at all.[1]

Second, Plaintiffs' Fourteenth Amendment claim is frivolous. The board members do not have any sort of constitutionally protected interest in the remaining board members. Given the settled

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[1] The standard of review governing Rule 12(b)(6) motions is well settled. As the Fifth Circuit explained in *Blackburn v. Marshall, City of*, 42 F.3d 925, 931 (5th Cir. 1995), "However, 'dismissal is proper if the Complaint lacks an allegation regarding a required element necessary to obtain relief.' 2A *Moore's Federal Practice* §12.07 [2.-5] at 12-91 (fn. omitted). And, 'conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.'"

principles established in *Board of Regents v. Roth*, 92 S.Ct. 2701 (1972), the claim of a due process violation in this case is frivolous at best. As for the individual Plaintiffs, they fail to plead the existence of any particular process that they did in fact request, which was then actually denied by a defendant. In addition, under *Albright v. Oliver,* 114 S.Ct. 807 (1994), the individual Plaintiffs may proceed, if at all, only under the Sixth Amendment, not the Sixth and Fourteenth.

Third, there are no facts set forth within the Plaintiffs' Complaint that, if proven true, would establish a Sixth Amendment violation. Nowhere does the Complaint actually set forth any particular ongoing prosecution, or any active case where the Sixth Amendment might actually have been violated by any defendant. Plainly, no Sixth Amendment claim actually appears within the Plaintiffs' Complaint.

Fourth, Plaintiffs' "second" cause of action is a claim under 42 U.S.C. §1983. However, that is a mere redundancy of the first cause of action, for §1983 does not itself create any substantive rights. There is no distinct cause of action raised by Plaintiffs' "second" cause of action that is not raised in Plaintiffs' first cause of action.

Fifth, Plaintiffs' "third" cause of action - - an expressly pleaded state law claim - - is illogical. Plaintiffs assert that to the extent the judges are violating state law, state law is unconstitutional "as applied." Defendants will attempt to grapple with the illogic of this claim, but assert that they cannot possibly state an "as-applied" constitutional claim on these "facts." In addition, these claims cannot currently move forward as the Plaintiffs failed to sue and serve Louisiana's Attorney General as required by La.C.C.P.Art. 1880.

Sixth, Plaintiffs' fourth and final cause of action - - again a state law claim - - asserts that the Defendant judges violated state law by not promulgating a one-year term of office, and by actively

seeking to create a new bar association. The first of these claims is frivolous in that a one-year term was indeed established. This Court may take judicial notice of that fact because the rule was established in a record of a court.[2] Second, it is frivolous to assert that either state or federal law would be violated by a group of duly elected judges advocating publicly to a large group of lawyers who practice in the field of criminal law, that they should all come together to freely associate and to debate matters of public concern. The idea is, with respect, preposterous. In all reality, the Plaintiffs ask for a federal court order to chill the free-speech rights of the Defendant judges, as well as the free speech rights of lawyers in Louisiana who are not a party to this cause, upon the speculative possibility that the members of the new bar association might be of a different mindset than the Plaintiffs. It is incredible that a group of lawyers would come to a federal court touting constitutional law principles, and make such an allegation.

For these reasons, as will now be explained in more detail, Defendants submit that the Plaintiffs' lawsuit is wholly frivolous, and fails to set forth any claim upon which relief might be granted by this Honorable Court.

ARGUMENT

Each of the different topics set forth previously will now be addressed in turn:

1. Plaintiffs Seek a Mandamus

It is broadly recognized that a request for relief in the nature of mandatory injunction is no different than a request for a mandamus. *Panama Canal Co. v. Grace Line, Inc.*, 318, 78 S.Ct. 752 (1958) (concluding, in a suit to compel a federal entity to fix new tolls, that "[t]he principle is no different than if mandamus were sought"); *Miguel v. McCarl*, 54 S.Ct. 465, 467 (1934) (when the

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[2] See *Davis v. Bayless*, 70 F.3d 367, 372, n. 3 (5th Cir. 1995).

effect of an mandatory injunction is equivalent to the issuance of mandamus it is governed by similar considerations); *Swan v. Clinton*, 100 F.3d 973, 977 n.1 (D.C.Cir.1996) ("a request for an injunction based on the general federal question statute is essentially a request for a writ of mandamus in this context, where the injunction is sought to compel federal officials to perform a statutorily required ministerial duty"); *Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1236 (10th Cir.2005) (observing that relief in the nature of mandamus and an injunction ordering the federal government to take action are "interchangeable"); *Fallini v. Hodel*, 783 F.2d 1343, 1345 (9th Cir.1986) ("In effect, the injunction is no different than the mandamus. When the effect of a mandatory injunction is equivalent to the issuance of mandamus it is governed by similar considerations.").

A. Federal Law - In General

It is well established that mandamus is an extraordinary remedy that is "granted only in the exercise of sound discretion." *Whitehouse v. Illinois Central R. Co.*, 75 S.Ct. 845, 850 (1955). In fact, the remedy of mandamus is considered so drastic that it is to be invoked only in extraordinary situations. *Allied Chemical Corp. v. Daiflon, Inc.*, 101 S.Ct. 188, 190 (1980). In *Allied Chemical*, the Court explained that mandamus should issue only in extraordinary circumstances because:

> [I]ts use has the unfortunate consequence of making a district court judge a litigant, and it indisputably contributes to piecemeal appellate litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule appellate review should be postponed until after final judgment has been rendered by the trial court. A judicial readiness to issue the writ of mandamus in anything less than a extraordinary situation would "run the real risk of defeating the very policies sought to be furthered by that judgment of Congress." *Allied Chemical*, 101 S.Ct. at 190.

The traditional use of mandamus has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Will v. Calvert Fire Ins. Co.*, 98 S.Ct. 2552, 2556 (1978); *Kerr*, 96 S.Ct. at 2123 (1976); *Will v. United*

States, 88 S.Ct. 269, 273 (1967); *Roche v. Evaporated Milk Assn.*, 63 S.Ct. 938, 941 (1943).

To ensure that mandamus remains an extraordinary remedy and to avoid any erosion of the final judgment rule, the Court has required a party seeking mandamus to show:

1. There are no other adequate means to attain the relief desired,
2. That the right to issuance of the writ is clear and indisputable, and
3. Even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances.

Cheney v. United States District Court for the District of Columbia, 124 S.Ct. 2576, 2587 (2004); *Kerr*, 96 S.Ct., at 2124; *Allied Chemical Corp.*, 101 S.Ct. at. 190; *Bankers Life*, 74 S.Ct. at 148; *United States v. Duell*, 19 S.Ct. 286, 287 (1899).

Importantly, the use of mandamus is intended to provide a remedy only if the defendant owes him a clear nondiscretionary duty. *Kerr*, 426 96 S.Ct. at 2123-2124 (1976); *United States ex rel. Girard Trust Co. v. Helvering*, 57 S.Ct. 855, 857 (1937).

B. State Law - In General[3]

A writ of mandamus may be directed to a public officer to compel the performance of a ministerial duty required by law. LSA-C.C.P. art. 3863. However, a writ of mandamus may only be issued in cases where the law provides no relief by ordinary means or where the delay involved in obtaining ordinary relief may cause injustice. LSA-C.C.P. art. 3862.

Mandamus has long been considered an extraordinary remedy that must be used sparingly

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[3] Defendants present both the state and federal standards relating to mandamus to show that both require an incredibly high burden be placed on the Plaintiffs.

by the court and only to compel action that is clearly provided by law. *Smith v. Ruston Fire & Police Civil Serv. Bd.*, 41,297 (La.App. 2nd Cir. 9/12/06), 939 So.2d 586, 590; *Allen v. St. Tammany Parish Police Jury*, 96-0938 (La.App. 1st Cir.2/14/97), 690 So.2d 150, 153, *writ denied*, 97-0599 (La.4/18/1970), 692 So.2d 455. In mandamus proceedings against a public officer involving the performance of official duty, nothing can be inquired into but the question of duty on the face of the statute and the ministerial character of the duty he is charged to perform. *Plaisance v. Davis*, 03-0767 (La.App. 1st Cir.11/07/03), 868 So.2d 711, 718, *writ denied*, 03-3362 (La.2/13/04), 867 So.2d 699. Mandamus will not lie in matters in which discretion and evaluation of evidence must be exercised. *Allen*, 690 So.2d at 153. In short, the remedy is not available to command the performance of an act that contains any element of discretion, however slight. *State ex rel. Loraine, Inc. v. Adjustment Board*, 57 So.2d 409, 411 (La.1952); *Fire Protection District Six v. City of Baton Rouge Dept. of Public Works*, 03-1205 (La.App. 1st Cir.12/31/03), 868 So.2d 770, 772, *writ denied*, 04-0299 (La.4/08/04), 870 So.2d 270; *Schmill v. St. Charles Parish*, 96-894 (La.App. 5th Cir. 3/12/97), 692 So.2d 1161, 1166.

Further, it is also well understood that since mandamus is to be used only when there is a clear and specific legal right to be enforced or a duty that ought to be performed, it never issues in doubtful cases. *State ex rel. Hutton v. City of Baton Rouge*, 47 So.2d 665, 670 (La.1950); *Townsend v. Trustees of Louisiana College*, 05-1283 (La.App. 3rd Cir. 4/12/06), 928 So.2d 715, 718; *Wiginton v. Tangipahoa Parish Council*, 00-1319 (La.App. 1st Cir.6/29/01), 790 So.2d 160, 163, *writ denied*, 01-2541 (La.12/07/01), 803 So.2d 971.

C. Application of Those Precepts Here

The Court is now asked to review the "Relief Requested" in the Plaintiffs' Complaint, beginning at page 19 thereof. Though the Plaintiffs couch their claims for relief in terms of a prohibitory injunction, clearly they seek a mandatory injunction, and thus a mandamus. For instance, the reality of Plaintiffs' request for relief is that this Court would be required to order the Defendants to recognize the prior board as the current board, and to deal with these people on an ongoing basis for an indeterminate amount of time on innumerable issues moving forward into an unknown future. Second, this Court would have to order the state court judges to ignore state law, and to not recognize that they are the persons who are to set policy concerning appointments of board members. The judges would have to be ordered that they are to tender to the prior board and to the bar associations, the right to set policy concerning board appointments for the future for the IDB of New Orleans. The judges would have to be ordered to return the size of the board to nine persons. The only relief that is prohibitory is Plaintiffs' request for an order preventing the judges from freely associating with lawyers who practice in the field of criminal law, and to avoid speaking out publically for the purpose of creating an association of lawyers.

Plainly, the Plaintiffs seek to have this Court issue to a mandamus to a group of duly elected judges concerning matters that are committed to the sound discretion of those judges. (After all, the Defendant judges are the ones who are to rule on whether an indigent defendant has indeed received effective assistance of counsel.) In no sense is the Plaintiffs' effort directed at causing these judges to perform a ministerial duty. In no sense can the Plaintiffs' Complaint be construed as setting forth a claim for relief based upon facts upon which there is no dispute, and where there can be no debate over whether the Plaintiffs are entitled to the requested relief. As such, the Complaint plainly fails

to state any claim for which relief might be granted by this Honorable Court.

2. Plaintiffs' Fourteenth Amendment Claim

At paragraph 33 of the Complaint, the individual Plaintiffs assert that their constitutional rights to "due process of law" under the Fourteenth Amendment have been violated. At paragraph 34 of the Complaint, the board asserts that their "constitutionally protected interest in their positions without notice or an opportunity to heard" has been violated. Neither contention can withstand scrutiny. Focusing first upon the claims of the board, the Defendant judges submit the following:

The right to protection under the Due Process Clause is based on the existence of a protected interest in liberty or property. *American Mfrs. Mut. Ins. Co. v. Sullivan*, 119 S.Ct. 977, 989 (1999). Generally, the party claiming such a right bears the burden of proving the interest. *Conn v. Gabbert*, 119 S.Ct. 1292, 1295 (1999).

While the protection afforded a property interest is provided by the Constitution, the property interests themselves are not created by the Constitution and must derive from some other source such as state law. *Phillips v. Washington Legal Foundation*, 118 S.Ct. 1925, 1930 (1998); *Cleveland Bd. of Education v. Loudermill*, 105 S.Ct. 1487, 1491,(1985); *Bryan v. City of Madison*, 213 F.3d 267, 275 (5th Cir. 2000). However, the question of whether an interest rises to the level of a protected property interest is a matter of federal constitutional law. *Town of Castle Rock, Colo. v. Gonzales*, 125 S.Ct. 2796, 2803-2804, (2005) (due process ultimately a question of federal constitutional law).

In *Board of Regents of State Colleges v. Roth*, 92 S.Ct. 2701 (1972), an assistant professor, Roth, was hired with no tenure rights by the Wisconsin university system. *Roth*, 92 S.Ct. at 2703. When his contract was not renewed, he challenged the decision for lack of an adequate due process hearing. In considering this challenge, the Court stated that liberty and property interests are "broad

and majestic terms ... for that reason, the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges'." *Id*. 92 S.Ct. at 2706. The Court, however, then went on to explain that Roth had neither a liberty nor property interest in continued employment under these circumstances:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. ...
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law--rules or understandings that secure certain benefits and that support claims of entitlement of those benefits. *Id*. 92 S.Ct. at 2709.

The Court found that Roth had no basis for anything more than a unilateral expectation of continued employment since his one year appointment "secured absolutely no interest in re-employment for the next year." *Id*. 92 S.Ct. at 2710. For this reason, the Court held that Roth had no protected property interest under the broadest definition. *Id*.

Notably, absent an actual property interest, there is nothing subject to due process and the inquiry into same simply ends. *Cabrol v. Town of Youngsville*, 106 F.3d 101, 105 (5th Cir. 1997).

Louisiana law is clear. Absent a contractual agreement for employment for a specified term or a legislative or regulatory restraint on a public entity's termination authority, Louisiana law does not establish a right to continued employment. See LSA-C.C. art. 2747 ("A man is at liberty to dismiss a hired servant attached to his person or family, without assigning any reason for so doing."); *Guillory v. St. Landry Parish Police Jury*, 802 F.2d 822, 825-26 (5th Cir.1986), *cert. denied*, 107 S.Ct. 3190 (1987) ("Guillory had no written employment contract; he served a one year term and had no property right to reappointment."); *Jackson v. East Baton Rouge Parish Indigent Defender's*

Board, 353 So.2d 344, 345 (La.App.1st Cir.1977) ("there is no case holding that a specific employment position is a property right of that employee, absent a showing of any contractual agreement or legislative act or rule."). Instead, termination is at the will of either party, and in the case of a governmental entity, termination is at the will of the appointing officer, provided no restraints are placed on his power. *Cowart v. Lee*, 626 So.2d 93, 94 (La.App. 3rd Cir. 1993); *Jackson*, 353 So.2d at 345. Simply put, the prior board members do not have a constitutionally protected interest in their prior positions upon the board.

Defendants submit now that it is abundantly clear that a mere subjective expectancy of continued employment, without more does not create a property interest which would be protected by procedural due process. *Perry v. Sinderman*, 92 S.Ct. 2694, 2700 (1972). Under these precepts, the board's claim at paragraph 34 of their Complaint that they have "a constitutionally protected interest in their positions" is unfounded as a matter of law.

Turning now to the claims of the individual Plaintiffs, Defendants submit these points:

As an initial matter, the Fifth Circuit has recognized that one cannot claim a "denial" of a "process" that is allegedly "due" unless one has requested that process, and in fact it was indeed denial by the defendant. See *Rathjen v. Litchfield*, 878 F.2d 836 (5th Cir. 1989). In *Rathjen*, the plaintiff asserted that his due process rights were violated, but could not establish that he had ever asked for the process at issue. The same problem exists at bar for all Plaintiffs.

Nowhere within the Complaint do either of the two individual Plaintiffs assert that in their criminal proceeding, that they sought some process of any of the Defendants, and were refused the same. Where within the Complaint do these two individuals assert that they brought their Sixth Amendment issue to a particular Defendant judge, only to have that judge refuse to take up the issue?

To assert that a judge denied a litigant their due process rights, is to assert that the judge refused to entertain an issue, and refused the processes available through the court.

Second, it is absurd for these individual Plaintiffs to contend that they have the right to sue every single judge on the bench. Does each Plaintiff have a case pending before each judge? Constitutional rights are individualized in their nature, and their individualized nature applies equally to the Defendants. Each Defendant has the right to know what is being claimed that he or she did as an individual, and to not be sued as simply part of a group. In *Chuman v. Wright*, 76 F.3d 292 (9th Cir. 1996), the court held that the district judge erred in instructing the jury that, "When the deprivation of the rights is the result of a 'team effort' all members of the 'team' may be held liable." The court ruled that such a standard "allows the jury to lump all the defendants, rather than require it to base each individual's liability on his own conduct." Defendants appreciate that in this case there is no claim of a damages remedy. Nevertheless, the pleadings standards apply with equal force. Given that no one has alleged to this Court a claim of actual conduct by individual Defendants, no claim has been stated at all.

In addition, it is dubious at best that the current Supreme Court would recognize *both* a Sixth and a Fourteenth Amendment right as arising out of the same set of facts. Significantly, the case of *Gideon v. Wainwright*, 372 U.S. 335 (1963), upon which the Plaintiffs rely at paragraph 14 of their Complaint, was decided almost 45 years ago. In the last two decades, the Supreme Court has clearly shifted away from analyzing individual fact patterns under multiple constitutional amendments. As was noted in *Albright v. Oliver,* 114 S.Ct. 807 (1994):

> Where a particular amendment "provides an explicit textual source of constitutional protection" against a particular sort of government behavior, "that amendment, not the more general notion of 'substantive due process,' must be the guide for analyzing

these claims." *Id*. at 813.

See also *Graham v. Connor*, 109 S.Ct. 1865, 1870 (1989), wherein the Court explained that, "The first inquiry in any §1983 suit is 'to isolate the precise constitutional violation with which [the defendant] is charged.'" The analytical path of *Graham*, and in particular the analytical path of *Albright*, strongly suggests that it would be inappropriate today to accept the notion that the individual Plaintiffs may proceed in this Court under *both* the Sixth Amendment and the Fourteenth Amendment.

3. The Individual Plaintiffs' Sixth Amendment Claim

The right to counsel, of course, means the right to effective counsel. *Evitts v. Lucey*, 105 S.Ct. 830 (1985); *McMann v. Richardson*, 90 S.Ct. 1441 (1970) ("It has long been recognized that the right to counsel is the right to the effective assistance of counsel").

In *Strickland v. Washington*, 104 S.Ct. 2052 (1984), the Supreme Court established the test for determining when counsel has rendered ineffective assistance. This test requires that the prisoner show:

1) That the performance of his counsel was deficient, i.e., that he "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and

2) That the deficient performance by his counsel prejudiced his defense, i.e., "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 104 S.Ct. at 2064.

As such, ineffective-assistance-of-counsel claims can generally only be raised when collaterally attacking a conviction pursuant to 28 U.S.C.A. § 2255 ("remedies on motion attacking sentence"). The reason for this necessary restriction stems from the fact that such a claim usually requires the development of facts outside the original record. *United States v. Teague*, 953 F.2d

1525, 1535, n. 11 (11th Cir.1992) ("This court will generally entertain claims for ineffective assistance of counsel only on collateral review because such claims usually require factual findings best made in an evidentiary hearing"); *United States v. Lee*, 374 F.3d 637, 654 (8th Cir.2004) (ineffective-assistance-of-counsel claims are generally not cognizable on direct appeal and should be raised through a 28 U.S.C. § 2255 motion); *United States v. Thomas*, 389 F.3d 424, 429 (3rd Cir.2004) ("It is well-established that ineffective assistance of counsel claims are generally not entertained on a direct appeal"); *United States v. Birges*, 723 F.2d 666 (9th Cir.1984).

This standard is clearly inappropriate for a civil suit seeking <u>prospective</u> relief. *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir.1988) ("*Luckey I*"), *cert. denied*, 110 S.Ct. 2562 (1990). The Sixth Amendment protects rights that do not affect the outcome of a trial. *Id*. Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief - whether the defendant is entitled to have his or her conviction overturned - rather than to the question of whether such a right exists and can be protected prospectively. *Id*.

The current view is that such civil claims regarding speculative allegations of prospective harm are not justiciable. *Quitman County v. State*, 910 So. 2d 1032, 1037 (Miss. 2005) (rejecting affirmative challenge to Mississippi's indigent defense system, and noting that the plaintiffs had not presented any evidence of harm to individuals); *Kennedy v. Carlson*, 544 N.W.2d 1, 6 (Minn.1996) (merely possible or hypothetical injuries was not enough for chief public defender to establish a justiciable issue that indigent clients would receive ineffective assistance of counsel due to funding, i.e., not enough to establish that "a direct and imminent injury which results from the alleged unconstitutional provision"); *Platt v. State of Indiana*, 664 NE2d 357 (Ind.App, 4/16/96), *cert denied*, 520 US 1187, 117 S.Ct. 1470 (1997) (claim seeking to enjoin county public defender system

because it effectively denied indigents effective assistance of counsel was not ripe for judicial review, absent showing that anyone was prejudiced by unfair trial).

Importantly, the Louisiana Supreme Court is in line with this view. See, *State v. Peart*, 621 So.2d 780, 787 (La.1993). In *Peart*, the Court reiterated that ineffective assistance of counsel claims are generally raised in applications for *post*-relief. *Id*. While the Court in *Peart* did in fact express that this general rule was not without exception, the Court went on to explain that said exception was limited to ongoing criminal matters. More specifically, the Court explained that if a defendant claims that *he is receiving* ineffective assistance from his attorney, and the *court has an adequate record before it*, the court may rule on the ineffective assistance of counsel claim at that time. *Id*.[4]

Considering the precepts just stated, there is literally nothing in the Plaintiffs' amorphous Complaint that sets forth an actual Sixth Amendment violation that was caused[5] by any of the Defendants. The entirety of Plaintiffs' Complaint is directed at purely hypothetical and speculative contentions about what might happen in the future. This does not state an actual claim.

4. Plaintiffs' "Second Claim for Relief"

In the Plaintiffs' first claim for relief, they assert both a Sixth Amendment and Fourteenth Amendment claim. Then, in the second claim for relief, they separately assert a claim under 42 U.S.C. §1983. In paragraph 38 of the Complaint, they assert that, "42 U.S.C. §1983, *et seq*., provides Plaintiffs a right of action for the violation of federal constitutional rights under color of state law."

It is a well-established and well-settled proposition that §1983 does itself predicate an

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[4] With respect to each individual Plaintiff's supposed denial of due process claims, have either of them requested this process? If they have not requested it, they they've not been denied it.

[5] Causation is yet another missing element in these Plaintiffs' Complaint. See *Baker, supra*, 99 S.Ct. At 2693, and *City of Oklahoma City v. Tuttle*, 105 S.Ct. 2427, 2433 (1985).

independent cause of action distinct from federal constitutional claims. As the Supreme Court explained *Albright v. Oliver*, 114 S.Ct. 807 (1994), "Section 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" *Id*. at 811-12. See also *Baker v. McCullen, supra*, at n. 3.

Plaintiffs' second claim for relief adds nothing. It does not in any way set forth a separate or additional claim for relief beyond what Plaintiffs seek in their first claim for relief. It should be dismissed.

5. Plaintiffs' Third Claim for Relief

Plaintiffs' third claim for relief is entitled, "The Violation of Plaintiffs' State Constitutional Rights by Defendants." This is clearly a state-law-based claim. If this Court decides that Plaintiffs' first and second claims for relief are subject to dismissal pursuant to F.R.C.P. Rule 12(b)(6), then in that event, Defendants urge this Court to dismiss the remaining state law claims without prejudice, and for lack of subject matter jurisdiction to be refiled (if the Plaintiffs believe such is appropriate) in the state courts.

Plaintiffs' third claim for relief is set forth at paragraph 40 of the Plaintiffs' Complaint. Paragraph 40, like Plaintiffs' third claim for relief, actually claims nothing. The first allegation of paragraph 40 is that "to the extent" that the statutory scheme violates Louisiana's Constitution, it violates Louisiana's Constitution. The next assertion is of accord. Plaintiffs assert that "to the extent" that the Defendant judges have violated the law, that the law is itself unconstitutional. Respectfully, these claims neither make sense, nor set forth an actual claim. By analogy, it's like saying, "To the extent I am walking, I am walking."

Nowhere within the Complaint do the Plaintiffs set forth facts upon which this Court could

actually evaluate whether the state statutory scheme is itself unconstitutional. As was recognized in *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995), "The Court is not required to 'conjure up unpled allegations or construe elaborately arcane scripts to save a complaint.'" In addition, and as demonstrated in both this Memorandum and in the Rule 12(b)(1) Memorandum, Plaintiffs have failed to actually plead any facts showing that the judges have indeed violated the legislative scheme. As such, there is nothing within the Complaint upon which to predicate either a facial or an as-applied challenge to Louisiana's statutory scheme for the provision of indigent defense.

6. Plaintiffs' Fourth Claim for Relief

This claim, like the third, is a purely state-law-based claim. If the Court decides it lacks subject matter jurisdiction over the first and second claims for relief, it is prayed that this claim be dismissed for lack of subject matter jurisdiction so that the Plaintiffs can refile it (if they believe such is appropriate) in state court.

Plaintiffs' fourth claim for relief has two components. First, at paragraph 42, Plaintiffs assert that the Defendant judges violated La.R.S. 144(D) "in failing to properly promulgate rules and regulations cabining their discretion to appoint board members." At paragraph 43, Plaintiffs assert that the Defendant judges have violated the state statute "in acting to create a new sham bar association."

Concerning paragraph 42, the only such rule that is put at issue in this case is the term of office of appointed board members. As to this claim, the Defendant judges submit that the Plaintiffs' professed lack of knowledge that their terms were for one year in no way *establishes* that such as rule was not in fact adopted by the judges. As per Exhibit A to the Defendants' Rule 12(b)(1) memo, the

relevant rule was adopted in April of 2006.

As for paragraph 43, it should be recognized that the Plaintiff board, itself comprising a group of highly talented and educated criminal defense attorneys, is asking this Court for an order that obviously would violate the First Amendment rights of both the Defendant judges, and every lawyer who would voluntarily choose to join that so-called "sham bar association." It is amazing that in the context of a lawsuit that purports to seek the vindication of federal constitutional rights, that these Plaintiffs are asking a federal judge to give them an order that would plainly violate perhaps the most fundamental of those rights, the right to free speech and to freely associate on matters of public concern.

Plaintiffs' fourth claim for relief has an obvious purpose. Reading it, along with paragraph 20v of the Complaint, it appears that some members of the prior board seek an order of this court that will tender to certain local bar associations the full and unfettered power to pick the members of the board. Plaintiffs seek an order of this Court that would allow the bar associations to set policy, rather than the Defendant judges. It is the Plaintiffs that seek to violate the law, not the judges.

CONCLUSION

The Defendant judges respectfully submit that they have established that not one claim for relief to be found within the Plaintiffs' Complaint actually states a claim upon which relief might be granted by this Honorable Court as a matter of law. They pray that the Plaintiffs' Complaint be dismissed, with prejudice and at the Plaintiffs' cost.

Respectfully submitted,

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Counsel for Defendants, Raymond C. Bigelow, in his official capacity as Chief Judge of the Orleans Parish Criminal District Court; and Lynda Van Davis, Benedict Willard, Frank A. Marullo Jr., Calvin Johnson, Dennis Waldron, Julian Parker, Camille Buras, Darryl Derbigny, Terry Q. Alarcon and Gerard Hansen, in their official capacities as Orleans Parish Criminal District Court Judges

CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2007, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send notice of electronic filing to the following:

Herbert v. Larson Jr.
Attorney at Law
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I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to the following non-CM/ECF participants:

N/A

/s/ Gerald J. Nielsen
Gerald J. Nielsen