New York State Office of Indigent Legal Services

Hearing on Eligibility for Assignment of Counsel

Testimony of Melanie Trimble, Director of the Capital Region Chapter of the New York Civil Liberties Union

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The New York Civil Liberties Union ("NYCLU") respectfully submits the following testimony regarding the necessity of statewide standards for determining who is eligible for public defense services in criminal cases. The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and nearly 50,000 members. I am the Director of the NYCLU's Capital Region Chapter. My office is here in Albany, but I respond to civil liberties concerns in a multicounty area in this region.

The NYCLU works tirelessly to ensure fairness in the criminal justice system, end mass incarceration, and prevent punishment of people because they are poor. We are counsel to the class of criminal defendants who are eligible for public defense services in five counties—Onondaga, Ontario, Schuyler, Suffolk and Washington. The settlement of our litigation protecting those defendants' right to counsel, *Hurrell-Harring v. State of New York*, gave rise to the mandate for the Office of Indigent Legal Services ("ILS") to create statewide eligibility standards.

Access to justice and fairness in the process should not depend on the county a defendant is in. Statewide standard Access to justice and fairness in the process should not depend on the county a defendant is in. Statewide standards for determination of eligibility for counsel are needed to ensure fairness in the process, and prevent wrongful denials of counsel.

I. THE ASSERTION THAT ALL DEFENDANTS UNABLE TO AFFORD COUNSEL EVENTUALLY RECEIVE A PUBLIC DEFENSE ATTORNEY UNDERSCORES THE WISDOM OF STATEWIDE ELIGIBILITY STANDARDS.

In response to calls for reform, it is commonly asserted that every defendant who cannot afford a private attorney eventually gets a public defender. Providers often say that, notwithstanding the absence of formal policies or identifiable systems, their default is to represent any client without a private lawyer at arraignment. Judges often note that they have no desire to allow a case to drag on while a defendant tries in vain to find a lawyer whom he can afford.

There are four reasons why this assertion underscores rather than undercuts the need for reform.

First, ILS should not accept such representations unless they are backed up by data. Time and again in our investigations across the state we heard of wrongful denials of counsel and uncounseled guilty pleas were accepted. These problems are particularly pervasive in Washington County. The Washington County's Public Defenders Office is responsible for making eligibility determinations and relies on written guidelines that account only for income and family size; hence, debt payments, regular monthly bills, credit worthiness or job loss as a result of arrest or incarceration are not considered. This process places the onus of proving financial need on the client in a burdensome and confusing process that results in delays in and wrongful denials of representation. In fact, by its own admission, the Public Defender's office does not appear in a large number of arraignment sessions, knowingly violating the right to counsel of indigent defendants arraigned in the County. As a result, defendants are sometimes pressured to accept a plea or unable to advocate for appropriate bail determinations before counsel is assigned, and thus face unnecessary incarceration.

While it is plausible that many judges default to appointing counsel for the sake of judicial economy, it also plausible that defendants who are wrongly deemed ineligible for counsel quickly plead guilty and thus conserve judicial economy at great expense to justice or are pressured to proceed *pro se*. And while it is plausible that many institutional defenders default to representing unrepresented defendants in arraignment sessions, sadly there remain across the state and within this judicial district a significant number of arraignments not covered by institutional defenders, and it is also plausible that, following arraignment, pressures to keep caseloads down result in post-arraignment eligibility decisions that wrongfully terminate representation. ILS should not base policy decisions on plausible theories; it should base them on verifiable evidence.[1]

[1] An illustrative example of the need for better data to test the assumption of "default" public defense representation is Suffolk County. The conventional wisdom is that the Suffolk Legal Aid Society, if anything, represents *too many* defendants—including some who could afford private attorneys. This assumption seems to be based on the Legal Aid Society's well-deserved reputation as an organization that strives to meet their clients' needs under difficult financial constraints. Yet data produced to the NYCLU by the Office of Court Administration shows an inexplicably high number of *pro se* criminal defendants in Suffolk – 10,562 cases in a single year (2010), primarily misdemeanor cases, amounting to more than 1/3 of the criminal cases in the county and more than the annual caseload of the Legal Aid Society and the

Second, those who make this representation often leave out indigent defendants who are not incarcerated at arraignment—a population that should, according to the presumption of release in New York's bail statute, include the vast majority of misdemeanor defendants. Unlike defendants in jail, defendants at liberty are not, generally speaking, presumptively represented by public defense counsel and judges have less incentive in such cases to cut short a cycle of adjournments by overriding a previous eligibility denial to appoint counsel, and may feel freer to accept *pro se* representation. Misdemeanor defendants at liberty have no lesser right to counsel than any other criminal defendant.[2]

Third, even if judges *eventually* appoint public defense counsel, initial denials of counsel result in delays in the provision of counsel. Clients are in limbo while they search for an attorney they can afford. Perhaps the futility of this search becomes clear and counsel is appointed. But that delay, in itself, is a deprivation of the right to counsel during the critical pre-trial stage immediately following arraignment.[3]

Fourth and finally, if it were true that in practice all eligible people receive representation then implementing rational statewide standards would do no harm. Standards will bring greater confidence in the fairness of our public defense system, eradicate the risk and the perception of arbitrary and unwarranted denials, and do so at no additional expense even to the counties who continue to bear the cost of funding representation for the poor.

II. THE ABSENCE OF GUARANTEED STATE FUNDING CANNOT BE USED AS AN EXCUSE FOR FAILING TO FULFILL THE STATE'S RESPONSIBILITIES.

The absence of eligibility standards must be seen in the context of New York's decades-long failure to ensure meaningful and effective assistance of counsel to poor people accused of crimes. Too often, those local programs are underfunded and mismanaged by cash-strapped and politically unwilling county governments.

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county's assigned counsel program combined. If accurate, that data challenges the notion that Legal Aid serves as the "default" provider of representation in Suffolk County and raises questions about whether eligible criminal defendants are being denied or dissuaded from exercising their constitutional right to counsel. The referenced data can be found in "Suffolk Table 9" of the *A Preliminary Study of Criminal Cases and Indigent Defense in Five New York Counties, Exhibit A to the Affidavit of Dr. Gary King* (Oct. 1, 2013), submitted with Plaintiffs' Opposition to Defendants' Motions for Summary Judgment in *Hurrell-Harring v. State of New York*, Index No. 8866-07 (Albany Co.), (on file with the NYCLU).

[2] *See Argersinger v. Hamlin*, 407 U.S. 25 (1972).

[3] *See Roulan*, 90 A.D.3d at 1621 (striking down an Onondaga rule that prevented representation by assigned counsel attorneys until a final eligibility determination was made); NYSBA Standard C-5 ("Provision of counsel shall not be delayed while a person's eligibility for mandated representation is being determined or verified.").

Until the creation of ILS in 2010, the State had not promulgated any standards or rules to prevent such deficiencies in representation. Although ILS now issues important and laudable standards, and although the State has now agreed to provide the resources needed to meet those standards in the five *Hurrell-Harring* defendant counties, the State continues to make deliberate choices regarding the funding, oversight and monitoring of public defense that directly and predictably cause deprivations of the right to counsel in the "Forgotten 52" counties outside of New York City that are not beneficiaries of the *Hurrell-Harring* settlement.

Those "Forgotten 52" counties provide almost all the funding for their public defense systems, with the exception of a few state grant programs that account for a small minority of any given county's total expenditures. Absent an increase in state funding, those counties will bear the cost if state eligibility standards increase the caseloads of county defenders. County governments may well object to state standards on that basis. But that complaint, valid as it may be, cannot justify standards that fail to ensure the provision of counsel to those who cannot afford attorneys. Standards governing public defense should drive funding, not the other way around. The NYCLU remains committed to ensuring that the state provides the funding needed to meet such standards.

III. CONCLUSION

We thank ILS for the opportunity to offer testimony today on the importance of statewide eligibility standards. We look forward to continuing to work with ILS to ensure that our criminal justice system does not punish poverty and respects the constitutional right to counsel.