



**New York State Office of Indigent Legal Services
Hearing on Eligibility for Assignment of Counsel
Testimony of Amol Sinha, Suffolk County Chapter Director; and
Jason Starr, Nassau County Chapter Director
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. The NYCLU’s mission is to defend and promote the principles, rights, and constitutional values embodied in the Bill of Rights of the U.S. Constitution and the Constitution of New York.

Throughout the state, and here on Long Island, 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, Washington, and here in Suffolk County. 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 and plan for ensuring quality and fairness in other aspects of the indigent defense system.

No criminal defendant may be denied counsel “by reason of a defendant’s inability to pay for a lawyer.”¹ Professional standards define such a person as one who cannot afford counsel “without substantial hardship,” and specifically note that defendants should not be denied based on the finances of friends and family, because bond has been posted, or because the person is able to pay part of the cost of representation.² Nor should access to justice and fairness in the process 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. STATEWIDE STANDARDS ARE NEEDED TO PREVENT WRONGFUL DENIALS OF COUNSEL.

In the vacuum created by the lack of state standards, criminal defendants who cannot afford counsel are denied access to publicly funded attorneys. In the NYCLU’s investigation of public defense services across the state, including here in Suffolk County, we documented policies that, on their face deny counsel to people who cannot afford a lawyer. When the NYCLU filed the *Hurrell-Harring* lawsuit, we had found that Suffolk County eligibility determinations were made on the basis of a

¹ *Hurrell-Harring v. State of New York*, 15 N.Y.3d 8, 15 (2010). See also *Gideon v. Wainwright*, 372 U.S. at 340 (stating that the Sixth Amendment requires that “counsel must be provided for defendants unable to employ counsel”).

² ABA Criminal Justice Standards: Providing Defense Services, Standards 5-4.1 to 5-4.3 (3d ed. 1992); New York State Bar Association Revised Standards for Providing Mandated Representation, Standards C-1 to C-3 (2013).

defendant's income and the value of any assets the applicant owned without accounting for any of the applicant's debt, the amount of equity in any assets, other financial obligations, or the actual cost of retaining a private attorney to defend against the relevant charge. In both Suffolk and Nassau Counties, defendants under the age of 21 have often been disqualified based on parental income, regardless of whether or not the defendant was estranged from his or parents or if the parents refused to pay.

In one case, a Suffolk County defendant was denied appointed counsel because the court determined that his weekly, after-tax income of approximately \$380 was sufficient to afford an attorney. However, the court did not inquire into the defendant's financial status, family obligations, and actual ability to pay. Forced to choose between paying rent and paying to retain an attorney, the defendant chose to pay his rent and proceed without counsel.

The absence of objective, statewide eligibility standards often leads to irrational, ad hoc denials of appointed counsel. Our investigation found that judges in Suffolk County's justice courts routinely made eligibility determinations based on arbitrary and subjective standards, resulting in the denial of counsel for individuals who should have been found eligible for public defense services.

II. STATEWIDE STANDARDS ARE NEEDED TO ENSURE FAIR PROCESS

Eligibility standards must focus not only on who is eligible, but also on how determination are made. Too often, the NYCLU has identified defendants who spend days or weeks in jail without meaningful contact with their attorney pending a decision on their financial eligibility. Indeed, until it was recently declared unconstitutional, one county's provider expressly prohibited defense counsel from undertaking work on behalf of non-incarcerated clients until the program administrator issued a final eligibility determination, a rule that resulted in denial of counsel in critical early stages.³

In order to prevent delays in representation, standards should require that all criminal defendants be presumptively deemed eligible, that representation should not be delayed or prejudiced pending a final determination, and that final eligibility determinations be made as soon as practicable.

III. 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 this sentiment repeated in places where one could easily find anecdotal evidence of wrongful denials of counsel, including instances where uncounseled guilty pleas were accepted. 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

³ *Roulan v. County of Onondaga*, 90 A.D.3d 1617, 1621 (4th Dep't 2011), *aff'd in relevant part* 21 N.Y.3d 902 (2013).

unrepresented defendants in arraignment sessions, sadly there remain across the state a significant number of arraignments not covered by institutional defenders. 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.

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 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.

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. 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.⁴

Third, even if judges *eventually* appoint public defense counsel, initial denials result in delays in the provision of counsel. Clients are in limbo while searching 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.⁵

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.

IV. 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.

⁴ See *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

⁵ 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.”).