



New York State Office of Indigent Legal Services

Hearing on Eligibility for Assignment of Counsel

Testimony of Guisela Marroquin, Interim Director of the Lower Hudson Valley 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 Interim Director of the NYCLU’s Lower Hudson Valley Chapter. My office is here in White Plains, but I respond to civil liberties concerns in a multicounty area in this region.

Throughout the state, and here in the Lower Hudson Valley, the NYCLU works to ensure fairness in the criminal justice system, end mass incarceration, and prevent punishment of people simply because of their socioeconomic status. We are counsel to the class of criminal defendants who are eligible for public defense services in five counties— Ontario, Schuyler, Suffolk, Washington, and Onondaga 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 plans for ensuring quality and fairness in other aspects of the indigent defense system. Many of the problems that the NYCLU sought to address in the *Hurrell-Harring* litigation still remain in the Lower Hudson Valley.

Access to justice and fairness in the process should not depend on the county a defendant is in. ILS must promulgate flexible statewide standards for determination of eligibility for counsel, and ensure that providers have the necessary funding to provide adequate representation.

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, we documented policies that on their face deny counsel to people who cannot afford a lawyer. These include policies denying counsel merely because of ownership of an illiquid asset such as a home or a car that is necessary to work or attend school; account only for income and not for debt obligations; punish persons under 21 if they cannot provide proof of their parents' indigence; and completely fail to account for the actual cost of obtaining representation on the charges filed.¹

In the Lower Hudson Valley, youth are particularly affected by wrongful denial of counsel. When minors are charged with misdemeanor offenses, judges only review their parent's financial information to determine eligibility for appointment of counsel. In situations of estrangement or where parents refuse to help, the young person is left without counsel. Judges have made these determinations, even when Legal Aid attorneys advocate for appointment because of familial circumstances.

In addition to addressing these documented wrongful denials of counsel, ILS should adopt standards to ensure against other types of wrongful denials commonly observed around the country. A report by the Brennan Center for Justice documented instances of clients denied eligibility because a family member was able to post bond or when the client resided in a state mental health facility.² Standards to address these issues are needed whether or not there is an established record^h of faulty decisions on those bases in our state. There should be flexible statewide standards that allow for consideration of income disparities in areas like Westchester County. If regional variance is allowed it should be evidence-based, i.e., economic evidence of the cost of lawyers and cost of living, and the region should be clearly defined. The purpose of standards is to ensure the integrity of future decisions not merely to address the problems of the past.

¹ These examples, as well as the others that follow, are drawn from evidence introduced by the plaintiffs in their opposition to summary judgment in *Hurrell-Harring v. State of New York* as well as information reported by the NYCLU in *State of Injustice: How New York Turns its Back on the Right to Counsel for the Poor* (Sept. 2014) (http://www.nyclu.org/files/publications/nyclu_hh_report_FINAL.pdf).

² Brennan Center for Justice, *Eligible for Justice: Guidelines for Appointing Defense Counsel* (2008) (available at <http://www.brennancenter.org/sites/default/files/legacy/publications/Eligibility.Report.pdf>).

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. In 1965, in response to *Gideon v. Wainwright*, the legislature abdicated responsibility for public defense to county governments in County Law 18-B. The result is that the State has a patchwork of local programs instead of a true public defense system. Too often, those local programs are underfunded and thus lack the resources to provide effective counsel—creating the disparate system we currently have.

In Westchester County, Legal Aid is responsible for processing all misdemeanor cases (18B cases); however, no additional funding for necessary staff or services are provided. As a result of this caseload and limited resources, clients may face only one choice: accept plea bargains because Legal Aid does not have the capacity to adequately represent all eligible clients. This problem is further compounded for clients that have prior convictions or are undocumented immigrants.

ILS must promulgate standards that ensure that eligibility determinations are fair, objective, and insulated from these political and economic pressures. However, ILS must also acknowledge that statewide standards and procedures, will also affect each county's public defense system's caseload. 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.