



NYCLU

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**New York State Office of Indigent Legal Services
Hearing on Eligibility for Assignment of Counsel
Testimony of John A. Curr, III, Western Regional Office 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. I am the director of the NYCLU’s Western Regional Office. My office is here in Buffalo, but I respond to civil liberties concerns in all of the counties covered by the state’s 8th Judicial District.

Throughout the state, and here in Western New York, the NYCLU works 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, as well as plans for ensuring quality and fairness in other aspects of the indigent defense system. The fact that no counties in the 8th Judicial District were included in the *Hurrell-Harring* litigation does not mean that the problems the NYCLU sought to remedy do not also exist here.

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

I. THE INCOHERENCE OF NEW YORK’S METHODS OF DETERMINING ELIGIBILITY REQUIRES STATEWIDE REFORM

Eligibility determinations are made inconsistently across the state, including in the Western Region. Decisions may be made by the arrainging judge, by probation or pre-trial services, or by staff in an institutional provider. There may be a formal, written application or an informal, oral inquiry. In some counties, written criteria guide the determinations; in others, there are none.

As the Kaye Commission on the Future of Indigent Defense Services noted after an exhaustive statewide study, “guidelines for the appointment of counsel exist in only a few counties and . . . even in those counties, the guidelines were not uniformly applied.” As a result, “a defendant may be deemed eligible for the appointment of counsel in one county and ineligible in a neighboring county or even in a different court within the same county.”¹ Indeed, courts in Allegany County have operated without written guidelines in place, allowing substantial variation in determinations from one judge to the next. The Kaye Commission report went on to note that “[i]n the absence of uniform guidelines, subjective and sometimes disparate eligibility determinations are made across the state, and competing concerns such as county funding and workload may become inappropriate factors in the determinations.”²

The NYCLU’s research reveals that little has changed on the ground in the decade since the Kaye Commission. Perhaps a handful of counties throughout the state have adopted standards where none existed in 2006, but mending a few patches in the patchwork system does not address the Kaye Commission’s fundamental point. In the course of gathering information about how determinations are made, ILS should not lose sight of how the fractured and irregular nature of the system, in itself, is an irrefutable argument for the promulgation of comprehensive statewide standards. Procedural fairness is a cornerstone of the criminal justice system. Consistent procedures are needed for both the perception and the reality of justice.

II. 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. The NYCLU’s investigation of public defense services across the state 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.³

It is our understanding that similar concerns exist throughout the Western Region. Cattaraugus County has considered home and car ownership but not taken into account whether the defendant has outstanding debts. Wyoming County has even considered whether the defendant can borrow funds to pay for an attorney, resulting in wrongful denials for those who are clearly unable to afford an attorney. Some counties tie eligibility to varying percentages of poverty guidelines, while others use sliding scales that depend more on the severity of the offense than ability to pay. While we believe that uniform, statewide standards are preferable, if ILS allows for regional variances to be employed, such variances must be evidence-based—for example, economic

¹ New York State Commission the Future of Indigent Defense Services, *Final Report to the Chief Judge of the State of New York* (June 18, 2006) at 15.

² *Id.*

³ These examples, as well as others cited throughout this testimony, 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.

evidence that the costs of lawyers or cost of living is higher or lower in a specific and clearly defined region—and not arbitrarily determined.

In addition to addressing such documented wrongful denials of counsel, ILS should adopt standards to ensure against other types of wrongful denials commonly observed around the state. 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.⁴ Standards to address these issues are needed to ensure the integrity of future decisions.

III. STATEWIDE STANDARDS ARE NEEDED TO ENSURE FAIR PROCESS.

In many places, eligibility determinations are tainted by political pressure to keep the costs of public defense down and preserve a market for private attorneys who charge criminal defendants for services. It is our understanding that providers have been involved in eligibility determinations in Chautauqua, Erie, Genesee, Niagara, and Wyoming Counties. While our litigation did not examine the eligibility determinations in these counties, our research elsewhere uncovered explicit evidence of these pressures. In one county, for example, we obtained correspondence between the provider of defense services and the judiciary asking judges to refrain from overriding the provider's eligibility denials because those overrides increased their caseloads. We have spoken to criminal defendants who were told by their assigned counsel that they were ineligible or were likely to be found ineligible, and were instead pressured to retain the assigned counsel for below-market rates.

ILS must promulgate standards that ensure that eligibility determinations are fair, objective, and insulated from these political and economic pressures. Written criteria and transparent processes will make a significant difference, but standards explicitly addressing objective processes are necessary.

Standards should require that eligibility determinations be made by an objective, independent person—not the provider of defense services and not the judge presiding over the case. Prosecutors, probation officials, and government actors with financial incentives to reduce costs likewise should be prohibited from involvement in assessing eligibility. Standards should require that determinations be made by a neutral magistrate or by an independent government agency or contractor.

IV. 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

⁴ Brennan Center for Justice, *Eligible for Justice: Guidelines for Appointing Defense Counsel* (2008), <http://www.brennancenter.org/sites/default/files/legacy/publications/Eligibility.Report.pdf>.

programs are underfunded and mismanaged by cash-strapped and politically unwilling county governments.

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* 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 local caseloads. County governments may well object on that basis, but that complaint 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.

V. 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.