



New York State Office of Indigent Legal Services

Hearing on Eligibility for Assignment of Counsel

**Testimony of KaeLyn Rich, Director of Genesee Valley Chapter of the New
York Civil Liberties Union**

August 6, 2015

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 Genesee Valley Chapter of the NYCLU. My office is here in Rochester, but I respond to civil liberties concerns in a nine county area in this region including Genesee, Livingston, Monroe, Ontario, Orleans, Steuben, Wayne, Wyoming and Yates counties.

Throughout the state, and here in the Genesee 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— Schuyler, Suffolk, Washington, Onondaga, and here in Ontario 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. Many of the problems that the NYCLU sought to address in the *Hurrell-Harring* litigation still remain in the Genesee 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. THE INCOHERENCE OF NEW YORK'S METHODS OF DETERMINING ELIGIBILITY REQUIRES STATEWIDE REFORM.

Eligibility determinations are made inconsistently across the state. Decisions may be made by the arraignment 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. There may be written criteria or there may be none.

In Genesee Valley, counties that allow the assigned counsel administrator to make eligibility determinations have no uniform guidelines, so in addition to having varying poverty level thresholds, some counties fail to consider other factors that affect an individual's financial situation. Therefore, a defendant may qualify for appointment of counsel in one county, but may not qualify in a neighboring county. In other counties, judges make initial eligibility decisions based on their subjected determinations of a defendant's financial status. These problems that arise from the lack of standardization are then further compounded by the fact that most defendants have no avenue for judicial appeal.

ILS should promulgate flexible statewide standards to address these issues. 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.

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. Like any other such determination, it must be subject to judicial review. Denials of eligibility should be made in writing, provided in court or by proof of service to the defendant, and accompanied by information about how to appeal that decision. 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.

Eligibility standards must focus not only on who is eligible but also on how determinations are made.

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

Too often, the NYCLU has documented examples where persons under 21 or minors are wrongfully denied counsel because of limited application procedures that do not accurately reflect the defendant's financial and familial circumstances. This is a significant problem in Monroe county, where persons under 21 parental information is used to make an eligibility determination, despite estrangement or the parents refusal to aid the young person. 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. ILS must ensure that eligibility standards and procedures account for the defendant's actual financial status, so that individuals are not left in limbo because of their perceived circumstances.

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.

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).