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'GIDEON' AT 50

## **N.Y. Makes 'Painfully Slow' Progress in Applying Landmark Ruling**

BY JOEL STASHENKO

FIFTY YEARS to the day since the U.S. Supreme Court ruled in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that courts are required under the Constitution to provide indigent criminal defendants with counsel, critics say New York's quirky, county-based system of criminal representation for the poor is hampered by crushing defender caseloads, uneven quality of counsel, lawyer shortages in some counties and shortages of funding everywhere.

The state's shortcomings highlighted in a 2006 report commissioned by then-chief judge Judith Kaye persist, and the primary recommendations for improvement - creation of a statewide public defenders' office and the eventual state takeover of the costs - have gone largely unaddressed.

In the meantime, New York has its own Gideon-related suit awaiting trial in October. In *Hurrell-Harring v. State of New York*, 8866/2007, a suit brought by the New York Civil Liberties Union, plaintiffs allege systemic failure in the state's indigent criminal defense model and say issues exposed in the Kaye report remain unresolved.

If anything, the Hurrell-Harring complaint charges, New York has backslid from 1881, when a provision of the Criminal Procedure Law authorized courts to assign attorneys to represent poor defendants in felony cases.

"Sadly today, more than forty years after Gideon, the leadership and humanity New York State showed in the past have eroded badly," the action claimed in 2007.

"There is progress being made, but it is painstakingly slow and it is not close to being adequate to remedy the deficiencies that were identified in the Kaye Commission report and Hurrell-Harring," said William Leahy, director of the Office of Indigent Legal Services (ILS).

"In New York, we've got a very long way to go."

But even harsh critics of the state's approach say that on the 50th anniversary of Gideon, all is not lost.

They point to the creation of Leahy's office as the chief source for optimism after decades of the state's seeming indifference to Gideon compliance. ILS, which began operations in February 2011, recently grew to 10 employees. Its express purpose is to assist localities in complying with County Law Article 18-B, which embodies the state's representational requirement in Gideon.

"I think we are finally on track," said Seymour James, president of the New York State Bar Association who is also attorney-in-charge of the criminal practice of the Legal Aid Society, "but it's a slow train."

New York is one of 26 states that does not have a statewide public defender system. It relies instead on a hybrid system where New York City and the 57 counties outside the city contract with institutional legal services providers such as Legal Aid; have established public defenders' offices; turn to private attorneys chosen from "18-B" panels; or use a combination of these methods.

### **'Haphazard' System**

The Kaye commission, formally known as the Commission on the Future of Indigent Defense Services, found that the county-centric nature of the system was at the root of many of New York's problems.

Its 2006 report referred to the "haphazard, patchwork" amalgam of plans constituting a "system" lacking in oversight, uniformity of attorney standards and consistent, predictable funding. The commission said the remedy chiefly lies in creation of a statewide indigent defender office to define what "adequate" defender services entail and to make certain they are delivered throughout the state.

The commission also recommended that the state assume funding for all indigent criminal legal services.

"Our argument was, get it off the local level, take it off their plate and they wouldn't have to worry about it," said William Hellerstein, who chaired the commission along with the late Bronx Supreme Court Justice Burton Roberts.

Stephen Acquario, executive director of the New York State Association of Counties, said counties would be more than happy to be relieved of the Gideon mandate.

"Without question, if a different structure was implemented and administered and financed by the state, it would be welcome news to the counties," Acquario said. "We are overwhelmed by this and other mandates."

He said many county leaders and taxpayers are not sure why the counties should be involved at all in representing poor criminal defendants.

"This is a constitutional responsibility," Acquario said. "It lies squarely on the shoulders of the state of New York. That is the entity that is sworn to uphold the federal and the state constitutions. I am still not convinced it is legal for the state to have delegated this responsibility to the counties."

The state will spend \$82.5 million on criminal legal services for the poor in the current fiscal year of 2012-13. Leahy said counties and New York City will spend another \$330 million.

Acquario maintained that no one is sure of the precise spending by the counties and the city, but estimated it is at least \$400 million in the current fiscal year.

The state provides 18 percent to 20 percent of funding for Gideon services in New York, Leahy said. At the other end of the spectrum, he said, 28 states provide 100 percent of funding, or close to it.

ILS is asking for \$91 million in state funding in the budget being negotiated in the Legislature for the fiscal year beginning April 1.

The money comes from the Indigent Legal Services Fund, which is comprised of funding from surcharges on motor vehicle violations, attorney registration fees, the fee for criminal history searches and from surcharges on the restoration of driver's licenses after suspension.

The funding goes to both legal services for the poor in criminal cases and to provide representation to parents in Family Court proceedings.

### **Counsel for First Appearances**

Included in this year's budget request is a total of \$10.8 million for three targeted programs to be funded through competitive grants. One would distribute \$4 million to provide counsel at the defendant's first court appearance, another \$2.8 million to meet the federal mandate that lawyers provide their clients with accurate information about the immigration ramifications of their convictions as spelled out under *Padilla v. Kentucky*, 130 U.S. 1473 (2010), and \$4 million to cut excessive caseloads for upstate public defenders.

The goal of providing counsel at first court appearance was announced by Chief Judge Jona-

than Lippman in his 2011 Law Day address (NYLJ, May 3, 2011), though the state has missed the deadline Lippman set of May 2012 to provide such representation.

Leahy said projects are under way in Chautauqua, Erie, Ontario, Onondaga, Tompkins and Westchester counties, some with state money and others with funding from other sources, to have counsel present at all arraignments.

The initiative to better inform defendants of the immigration consequences of convictions has already started in New York City, Leahy said.

Over time, ILS will seek to fund more indigent criminal representation programs competitively and to require enhanced quality standards, Leahy said.

ILS' governing board has adopted standards for trial-level representation in Criminal and Family Court using the state bar's 2010 Revised Standards for Providing Mandated Representation as a guide. In its spring meeting on April 6, the state bar's House of Delegates will be asked to approve a revision of quality standards that incorporates some criteria developed by ILS.

"In New York we have just a full range [of criminal legal services for the indigent], from very inadequate to very admirable," said Leahy, the former chief counsel to the Massachusetts' Committee for Public Counsel. "The goal is to have it very uniform, not to have it depend on which part of the state and which jurisdiction you happen to appear in. The history has been that we have left each county to its own resources, its own traditions and its own standards. It is very slowly but very definitely starting to change. It will require a much more robust and sustained effort by the state."

Hellerstein, a former Brooklyn Law School professor, said New York is not alone in failing to embrace an indigent defense services office.

"I think the inability of the state to go whole hog on the statewide public defender oversight, which was the main recommendation of the commission, reflected reluctance in New York that is prevalent in many states around the country," Hellerstein said.

Leahy said the federal defense system for the poor is better-funded than the one in New York or any other state and is fundamentally less unwieldy because the federal court system is far more centralized than the state and justice court system is in New York.

"No state does as well as the federals do," Leahy said.

David Patton, the executive director and attorney-in-chief of the Federal Defender System for the Southern and Eastern districts of New York, acknowledged that his agency has some

advantages over its state counterparts but said those would be neutralized if Congress and the president are unable to come to an agreement on the federal budget.

As things stand now, Patton said he would have to start furloughing attorneys one day a week starting April 1.

"It is painful," Patton said. "It is demoralizing. It will affect what we can do for our clients. It will affect their rights."

### **New York's 'Gideon'?**

The New York Civil Liberties Union's challenge to the state's indigent defender system is scheduled to go to trial Oct. 14 in state Supreme Court in Albany. Justice Eugene Devine is tentatively scheduled to preside.

The suit claims that criminal defense for the poor in Onondaga, Ontario, Schuyler, Suffolk and Washington counties is hampered by deficiencies including the absence of attorneys at arraignment, rare face-to-face meetings between defendants and counsel outside of court, and a lack of support services such as investigators and other experts. The problems in those counties are representative of the state as a whole, the suit charges.

"The State of New York's broken public defense system has deteriorated to the point where it now deprives or threatens to deprive these plaintiffs and the class of indigent defendants they represent of rights guaranteed to them" under the state and federal constitutions, the Hurrell-Harring complaint charges.

Unreliable defense services has resulted in unnecessary or prolonged pretrial detention, guilty pleas to unwarranted charges, wrongful convictions and the waiver of defendants' rights to appeal, the suit alleges.

The Lippman Court of Appeals narrowed the scope, of the complaint somewhat in *Hurrell-Harring v. State of New York*, 15 NY3d 8 (2010), but allowed the case to go to trial (NYLJ, May 7, 2010).

"Assuming the allegations of the complaint to be true, there is considerable risk that indigent defendants are, with a fair degree of regularity, being denied constitutionally mandated counsel in the five subject counties," Lippman wrote for a 4-3 majority in *Hurrell-Harring*. "The severe imbalance in the adversary process that such a state of affairs would produce cannot be doubted. Nor can it be doubted that courts would in consequence of such imbalance become breeding grounds for unreliable judgments."

The dissenters on the Court of Appeals said that while the plaintiffs' frustration with the indigent defender system is "understandable," the steps recommended by the Kaye

commission are up to the Legislature, not the courts. The state has suggested that defenders who feel that they have received inadequate representation could claim ineffective assistance of counsel on appeal after conviction.

Hellerstein said it is uncertain if judges today would make the kind of sweeping "managerial" ruling that the U.S. Supreme Court handed down in 1963 in *Gideon*.

"Whether courts now would pick up the cudgel in the context of financing structures for criminal defense, I don't know," Hellerstein said.

On the other hand, he said he regards Lippman, whose court may ultimately decide *Hurrell-Harring* after trial, as being "as sensitive to the defense side and the poor person's side and the criminal justice side as any chief judge that I have known."

There are signs that the evolving economics of the legal profession may address, in part, the traditional shortfall of attorneys, at least for institutional legal services providers upstate.

Norman Effman, long-time public defender in Wyoming County and chairman of the state bar's Committee to Ensure Quality of Mandated Representation, said he was surprised to receive almost 50 applications for the three staff attorney positions that opened in his office over the past two years.

Applicants for the \$45,000-a year jobs came not only from the Rochester-Buffalo areas, he said, but from Long Island and as far away as Chicago.

"There is no lack of people looking for jobs," he said.

Hellerstein said more should be done to enlist law schools in the training of prospective lawyers for indigent criminal defense work. He said the structure of law school - with its heavy emphasis on clinical work by students in their third years - plus the state's soon-to-be-implemented requirement that students work 50 pro bono hours to qualify for admission to the bar, provides ample time for students to train for criminal defense work.

"Those kinds of things fit in well with a public defender system," Hellerstein said. "There is a lot of potential there that was unforeseen by us in '06."

Lippman, who was attending a *Gideon* event in Washington, D.C. on Friday, said in a statement that *Gideon* "is arguably the greatest achievement in the history of our nation's criminal justice system," and has resulted in great progress.

"At the same time, we recognize that our work is far from over, and we must commit ourselves each and every day to making further strides toward truly achieving equal justice for all

Americans," Lippman said.

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### **Helping Alleviate Surrogate Caseload, Justice Balter Brings Direct Link to Legendary Surrogate Sobel**

A Specialist in Trusts & Estates, Balter Was Referee Under Sobel

A backlog of cases in Brooklyn Surrogate Court has been alleviated by the expertise of Brooklyn Supreme Court Justice Bruce Balter, assigned to help since late February.

Since then, according to the Office of Court Administration, Justice Balter has moved at least 50 of the older cases. Those cases, and others being concluded currently, were part of the backlog of uncontested probate proceedings and letters of administration, allowing many estates, some of which were indigent, to proceed with lawsuits vital to the estates.

The backlog in Surrogate's Court in part reflects a larger issue of Kings County's position as perhaps the busiest court system in the U.S. But it also resulted from what was reported in the New York Law Journal as a communication problem between the two sitting Surrogates, Margarita Lopez Torres and Diana Johnson.

In the Law Journal article, Surrogate Lopez Torres issued a statement that said, in part, "The cases that were referred to Justice Balter were uncontested matters that arose from conflicts affecting one of the surrogates in which she had to recuse herself ... Surrogates Johnson and Lopez Torres have worked out an arrangement that will resolve this situation, obviating the need for the further involvement of Justice Balter."

Surrogate Lopez Torres further added, referring to her fellow Surrogate Johnson, that "we have a collegial relationship and are able to make decisions on matters necessary to the court."

Administrative Judge Lawrence Knipel, Civil Term, Kings County, told the Brooklyn Daily Eagle, "Yes, Brooklyn is one of the busiest courts in the entire nation. But overall, we handle it