MAURICE A. DEANE SCHOOL OF LAW
HOFSTRA LAW

HOFSTRA LAW CLINIC

108 Hofstra University
Hempstead, NY 11549

tel: 516-463-5934
fax: 516-463-5937
lawclinic@hofstra.edu
law.hofstra.edu

New York State Office of Indigent Legal Services
Public Hearing on Eligibility for Assignment of Counsel
Tenth Judicial District
John P. Cohalan, Jr. Courthouse, Courtroom S-24

Written Testimony of Professor Elizabeth Nevins
Hofstra University's Maurice A. Deane School of Law

August 12, 2015

Thank you to the Office of Indigent Legal Services for the invitation to provide testimony at this important public hearing.[1]

My name is Elizabeth Nevins, and I am an Associate Clinical Professor of Law and the Attorney-in-Charge of the Criminal Justice Clinic at Hofstra University's Maurice A. Deane School of Law. Each semester, I supervise eight law students as they represent indigent criminal defendants charged with misdemeanors and/or violations in Nassau County District Court. A significant goal of the clinic is to educate students to become aware of and respond to policy issues affecting our clients in and out of the courthouse. Since my arrival at Hofstra, I have observed, alongside my students, gross violations with regard to the constitutional and statutory right to counsel in Nassau County. Today, I primarily limit my remarks to the unjustness of the processes that the District Court currently uses when it determines eligibility for appointed counsel, and recommendations for improving those processes.

I'd like to start by giving you a picture of what my students and I have observed as typical processes, and then I'll offer some of recommendations for improving the eligibility determinations.

First rule of eligibility determinations in District Court is that there are no rules. There is NO consistency or transparency at any point in the process. In District Court, defendants begin their cases in three different ways:

- Those who are arrested and detained by police come through lockup to Arraignments A, where Legal Aid represents anyone who has not already retained private counsel.

[1] This testimony has been prepared by a clinic of Hofstra University's Maurice A. Deane School of law, but does not purport to present the Law School's or the University's institutional views on the subject of eligibility determinations for appointment of counsel, if any.

- Those who receive desk appearances charging local offenses come to Room 155, where there is no counsel.

The eligibility determination is different depending on the defendant's starting point.

Courtroom 155: The easiest, and most egregious cases are those in courtroom 155. For these individuals, there is not only no stand-in counsel, but there is no discussion of the right to have counsel appointed, even as many individuals are charged with (and plead to) jailable offenses and are therefore entitled to appointed counsel.[2] To the contrary, we have seen defendants denied counsel who requested it without any eligibility assessment or determination.

Arraignments B: In Arraignments B, there is also no eligibility determination made.[3] There are no forms, no questions, no discussion. Instead, defendants without counsel are typically given a follow-up court date in a courtroom where private and 18b counsel appear. At that appearance – roughly six weeks after the initial court appearance and two to three months after the initial arrest, they may be asked in open court if they can afford counsel. If they say they cannot, the court engages in an inquiry on the record regarding their eligibility. The first question is typically whether they own their own home. I have never heard a follow-up with regard to the status of their homeownership – that is, the size of their mortgage, whether they are in foreclosure, etc. They are asked if they own a car, but not if they depend on the car to get to work. They are asked what they do and how much they earn. They may be asked other questions regarding "assets," including, in anecdotal cases, whether they have valuable art or antiques. They are sometimes, but not always, asked about liabilities, including dependents. And all of these questions are asked in open court, for all assembled to hear. The extent of the inquiry runs the gamut, as do the determinations of eligibility. We have seen individuals denied counsel for producing (upon the court's demand) an iPhone from their pocket, or because they are out on bail (regardless of who paid it or how). If they are found eligible, and they are not held on bail, they are told that "Legal Aid is assigned," and they are asked to return to court (in another six or more weeks), to a Legal Aid courtroom. Thus, it takes at least three appearances,

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[2] The Federal and State Constitutions both guarantee the right to counsel. U.S. Const. amend. VI, N.Y. Const. art. I, § 6. The right to counsel in New York "antedates the federal right, and is much broader than the federal equivalent." *People v. Richardson*, 159 Misc. 2d 167, 169-70 (Sup. Ct. Kings County 1993) (infra citations omitted). New York law requires counties to establish a system of representation for those who are charged with "crimes" and are "unable to afford counsel." N.Y. County L. § 722. A "crime" for this purpose includes not only state law violations, but also a "breach of any law, local law, or ordinance of a political subdivision" of the state, other than a traffic infraction, "for which a sentence to a term of imprisonment is authorized upon conviction thereof." *Id.* at § 722-a. *See also* N.Y. Crim. Pro. L. §§ 170.10 (providing that defendant charged in local criminal court "has the right to the aid of counsel at the arraignment and at every subsequent stage of the action" and that if he appears without counsel, he has right, "[t]o have counsel assigned by the court if he is financially unable to obtain the same" unless charged with exclusively traffic infraction(s)).

[3] I do not include cases that come through Arraignments B which are assigned to 18b counsel for consideration under the Adolescent Diversion Program. For these cases, 18b counsel are assigned at the outset, and the eligibility determination, if any, would in fact be made in Arraignments B. Such cases, however, are a tiny minority of the cases that come through Arraignments B, and an even smaller proportion of criminal cases overall.

and easily four to six months after arrest, before an indigent defendant finally meets her assigned counsel.[4]

Arraignments A: Finally, in Arraignments A, Legal Aid attorneys try to have defendants not already represented by counsel fill out a financial information sheet and provide it to the court.[5] They do not, however, reach every defendant, in part because the attorneys are already overwhelmed with the need to interview and verify defendants' information for bond determinations, as well as the need to appear before the court. Further, not every judge considers the form that Legal Aid presents to the court when the case is called. If there is no form, or if the court disregards it, the judge will do an oral inquiry, in open court, concerning the defendant's financial status. Again, the extent, content, and determination of the inquiry vary tremendously judge to judge. And it may take several appearances before a person finally gets counsel if the judge isn't sitting one day or the defendant can't gather the right proof of financial status. If a person is found to qualify, he or she will be sent to a Legal Aid part for the next appearance -- even if a conflict should be apparent at the first appearance -- only to be reassigned to an 18b counsel at the subsequent appearance.[6]

Based on these illustrations, I offer a number of recommendations:

1) **The standard for determinations must be fair, clear, and consistent**. The law does not establish what the legal standard of "unable to afford counsel," means.[7] Case law does make clear that the standard is *not* "indigence."[8] But the fact that this standard varies depending upon the jurisdiction, the judge, and sometimes even the hour of the day, violates fundamental tenets of fairness and equality, not to mention the Due Process and Equal Protection Clauses.[9] The New York State Defenders Association and others have promulgated guidelines, typically based on federal poverty levels, to assist Chief Defenders and others in making eligibility determinations.[10] These guidelines are worthy of consideration, and such a clear standard is appealing because it could help

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[4] Notably, if Legal Aid determines that there is a conflict, the defendant will then be reassigned to 18b counsel, and will receive yet another court date, six to eight weeks later, to appear with her new conflict attorney, in a courtroom designated for private/18b counsel.

[5] A copy of such a form is attached hereto as Exhibit A [Legal Aid Financial Questionnaire].

[6] Legal Aid has recently begun screening for conflicts at arraignments for felony cases that come in through Arraignments A. There is no such screening for lower level offenses, however, even where the conflict is immediately obvious, as in the case of codefendants arrested together.

[7] County Law § 722 provides that "[t]he governing body of each county and the governing body of the city in which a county is wholly contained shall place in operation throughout the county a plan for providing counsel to persons charged with a crime ...who are *financially unable to obtain counsel.* Each plan shall also provide for investigative, expert and other services necessary for an adequate defense." *See also* N.Y. Crim. Pro. L. §§ 170.10, 180.10 (emphasis added).

[8] *United States v. Harris,* 707 F.2d 653, 660 (2d Cir. 1983); *People v. King,* 41 Misc. 3d 1237(A), *3 (Town Ct. Bethlehem 2013).

[9] U.S. Const. amend. XIV; *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that indigent defendants must have right to free trial transcripts pursuant to both equal protection and due process values). *See also* Eric Wolf, *The Theory and Application of Equal Protection: Developments in the Right to Counsel*, 5 Wm. Mitchell J. L. & Prac. 1 (2012) (discussing competing and related doctrines of Due Process and Equal Protection in Supreme Court's analysis of right to counsel).

[10] *See* Memorandum from Charlie O'Brien, Managing Attorney, N.Y. State Defenders Ass'n, to N.Y. Chief Defenders (Jan. 24, 2014), attached hereto as Exhibit B [NYSDA Memo].

establish more consistency. However, while it may be compelling to establish a numerical cutoff, strict adherence to such numbers can violate the court's need to determine eligibility based on a range of criteria and circumstances that would affect whether a person can truly afford to obtain her own counsel.[11] A better standard would provide more flexibility, and, as detailed below, more specific criteria for consideration, without specifying a rigid formula. One model is the standard used in the federal system, which provides that a person is unable to afford counsel if her "net financial resources and income are insufficient to obtain qualified counsel," with explicit consideration given to "the cost of providing the person and his dependents with the necessities of life" and the cost of securing his relief on bail.[12] As hard as it may be, the Office of Indigent Legal Services must establish a definition of "unable to afford counsel" and criteria for making that determination that are sufficiently uniform to produce fairness.

2) **The criteria examined must be fair, relevant, and consistent.** One way of promoting consistency and fairness is to identify the most appropriate criteria for making eligibility determinations and ensure that a mandatory screening relies upon these set criteria in every case.[13] There are numerous recommendations that could be made here; I will offer just a few:

    a. **An individual must be assessed for eligibility on his own**. The determination must be based on an individual's ability to pay on his own, without regard to the finances of other household members, family, or friends, unless such individuals indicate their willingness to pay in a timely way. In New York State, where we still treat 16 year-olds as adults for purposes of criminal liability, we should also treat them as independent for this eligibility determination. Further, simply

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[11] *See King*, 41 Misc. 3d 1237(A), at *3 (noting that eligibility determination "must be made on a case-by-case basis, and cannot be premised solely on any single factor" and that the court should give substantial consideration "to the assets and debts of the defendant, the seriousness of the charge, the complexity of the case, and the cost of privately retained counsel in the jurisdiction where the representation will occur.") Although there is scant other case law on what constitutes "unable to afford counsel" in New York, the issue has been addressed in numerous other states and in federal courts, including in New York's federal courts. *See, e.g.*, *United States v. Harris*, 707 F.2d 653, 661-62 (2d Cir. 1983) (finding that courts should consider ability to afford counsel "in light of economic realities," including, *inter alia* realistic costs of defense and financial needs of defendant and dependents); *United States v. Knott*, 142 F. Supp. 2d 468, 469 (S.D.N.Y. 2001) (citing same and other factors for consideration listed in *United States v. Barcelon*, 833 F.2d 894, 897 n.5 (10th Cir. 1987).

[12] United States Judicial Conference, *Guide to Judiciary Policy, Vol. 7, Defender Services, Part A, Guidelines for Administering the CJA and Related Statutes*, Ch. 2. § 210.40.30 (available at http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-appointment-and-payment-counsel#a220) (accessed on Aug. 5, 2015) (hereinafter "CJA Guidelines").

[13] Although universal screening should be the norm, it is plain that a defendant's failure to furnish evidence of his eligibility should not relieve court of its responsibility to inquire into her financial status. *See United States v. Barton*, 712 F.3d 111, 117 (2d Cir. 2013) (quoting *United States v. Gravatt*, 868 F.2d 585, 588-89 (3d Cir. 1989)) ("'[T]he defendant's burden [of establishing eligibility] does not relieve the district court of its responsibility, once on notice of the defendant's inability to retain private counsel, to make further inquiry into the defendant's financial condition,' and 'the court may not adopt an unconditional requirement that the defendant complete [a financial affidavit] before his application for appointment of counsel will be considered') (internal quotation marks omitted); *United States v. Moore*, 671 F.2d 139, 141 (5th Cir. 1982) (noting district court abused its discretion when it "improperly demanded that the defendant fill out a [financial affidavit form] before the court would further consider the appointment of counsel").

because family members or friends have chosen to help an individual in some respect – perhaps by paying his bail or allowing him to live in their spare room -- we should not presume their resources will or should be imputed to the individual charged with a crime.[14] Indeed, in domestic violence cases, this could mean asking the victim of the offense to be responsible for the defendant's fees. The federal Criminal Justice Act provides an appropriate model for policy in this area, which, among other things, ensures that an appointment of counsel is not delayed while any investigation into resources occurs.[15]

b. **Only *liquid* assets should be considered relevant.** If the question is whether a person can actually pay a lawyer for a matter as time-sensitive as a pending criminal case, the fact that she owns a home or a car that she needs to get to work may be patently irrelevant. And case law supports the contention that only liquid assets should be relevant to the inquiry.[16]

c. **Expenses should be considered relevant, too.** A person's expenses must be examined alongside assets as part of the investigation into his ability to afford counsel. This may seem obvious, but it is not a factor that is uniformly considered in Nassau County eligibility determinations. In addition to support for dependents (including child support and childcare), medical expenses, existing debts, and transportation needs are among the factors that the court must examine in determining whether an individual is truly able to afford counsel on his own.[17] In addition, the cost of defending himself – including not only the true cost of hiring counsel in a particular jurisdiction for a particular offense, but also the inevitable expenses related to a criminal case (such as fines and fees for even the

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[14] For analogous reasoning, see *People v. Ulloa*, 1 A.D.3d 468, 469 (2d Dep't 2003), finding that "a defendant's status as an indigent is not altered merely because his or her family and friends retain private counsel to represent him or her at trial" and ordering that otherwise indigent individual qualified for free hearing transcripts).

[15] The federal Criminal Justice Act makes the following provision for "Family Resources" of a defendant: "The initial determination of eligibility should be made without regard to the financial ability of the person's family *unless the family indicates willingness and financial ability to retain counsel promptly.* At or following the appointment of counsel, the judicial officer may inquire into the financial situation of the person's spouse (or parents, if the person is a juvenile) and *if such spouse or parents indicate their willingness to pay all or part* of the costs of counsel, the judicial officer may direct deposit or reimbursement." CJA Guidelines, Vol. 7, Part A, Ch. 2: § 210.40.50 (emphasis added).

[16] *See King*, 41 Misc. 3d 1237(A) at *3, one of the rare New York State cases opining on the factors relating to an eligibility determination, which holds that "[o]nly available liquid assets should be considered, and non-liquid assets, such as a home used as a primary residence, or an automobile necessary to sustain employment, and reasonable household furnishings should be excluded from the net asset inquiry."

[17] Similarly, federal regulations that limit provision of legal services from organizations receiving Legal Services Corporation funds to those individuals who meet a specific income level provide "a variety of exceptions under which a person whose income exceeds" mandated levels, specifically based on regulatory factors such as current income prospects, fixed debts and obligations (including all taxes and medical expenses), and the cost of obtaining private legal representation with respect to the particular matter in which assistance is sought. *Application of S. Tier Legal Servs.*, 100 Misc. 2d 1068, 1075 (Sup. Ct., Steuben Cty. 1979) (citing regulations from 45 C.F.R. § 1611.5(b)).

most minor of convictions, as well as costs for mandated treatment or community service) must be part of this calculus.[18]

3) **The standards and criteria must be transparent.** To my knowledge, if any guidelines or screening criteria exist and/or are used by judges in Nassau County District Court, they have not been made public.[19] To the extent that any standards, criteria, or guidelines are issued or followed by any court, this information must be made available to defendants and to their counsel. They should be published and prominently posted and available in the courthouse to promote public confidence in the fairness of the system and ensure that the standards are indeed being upheld. Published criteria helps ensure that the standards are upheld uniformly because it provides public accountability.

4) **The determination must be made as early as possible.** It is beyond dispute that the right to counsel attaches at arraignment, if not before, and lasts through all subsequent proceedings.[20] In Nassau County District Court, however, individuals are structurally denied access to assigned counsel for months, even in cases where they are undoubtedly unable to afford counsel. As the New York State Defender Association said in its report on this issue published *over twenty years ago* and citing virtually every set of professional standards, "[e]ffective representation of the accused, which includes the constitutional right to present a defense, compels the appointment of counsel at the earliest possible stage of the proceedings....even before the defendant's first appearance before a judicial officer or the filing of formal charges."[21]

5) **The assessment should be confidential**. There is simply no reason that a person's personal financial information must be shared in front of a courtroom full of people. Such a public airing can lead people to exaggerate their earnings, for fear of embarrassment (but in derogation of the right to counsel and the accuracy of the information), and certainly means public disclosure of very personal information. In some matters, disclosure of information may even have Fifth Amendment implications, as in the case of domestic violence matters (where familial relationship is an element of the crime), tax

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[18] Even conviction of a non-criminal violation in New York comes with a mandatory $120 in surcharges and fees. *See* Penal Law § 60.35 (1)(a)(iii). Convictions for misdemeanors cost a minimum of $200. N.Y. Penal Law § 60.35 (1)(a)(ii). And fines, fees, and mandatory programs related to a DUI can cost significantly more, even before considering the heightened cost of an attorney to defend such a complex charge. *See, e.g.* NY VEH & TRAF § 1809 (imposing additional mandatory fees for DUI convictions). In Nassau County, even those who will never be convicted of any offense face costs to subsidize community service placement or substance abuse treatment that prosecutors routinely order as a condition precedent for an adjournment in contemplation of dismissal pursuant to Criminal Procedure Law § 170.55. *See, e.g.*, EAC Registration Form with Mandatory Fees, attached hereto as Exhibit C [EAC Form].

[19] Case law makes reference to financial cutoff information from "the Eligibility Guidelines of the Second Department, " *People v. Kearns*, 189 Misc. 2d 283, 285 (Sup. Ct., Queens County 2001), but I have been unable to obtain such a document from neither Westlaw nor Google, and there is no such document circulated among the public at the courthouse.

[20] *People v. Settles*, 46 N.Y.2d 154, 165 (1978) ("A defendant is entitled to the assistance of an attorney at any critical stage of the prosecution," including, e.g., the filing of an accusatory instrument, but also at a court order of removal or at a post-indictment/prearraignment line-up procedure) (infra citations omitted).

[21] New York State Defenders Association, Inc., *Determining Eligibility for Appointed Counsel in New York State: A Report from the Public Defense Backup Center* 4 (1994).

offenses (where income may be a question of fact), or even drug possession cases (where ownership of a vehicle is at issue). At a minimum, prosecutors should be precluded from subsequently using disclosures during this screening against the defendant, so as not to require defendants to choose between exercising their Fifth and Sixth Amendment rights.[22] Further, the proceedings should be conducted in writing and/or at the bench to maximize the defendant's privacy. If the court must maintain a written record of the proceedings, it can keep the screening document or other discussion of personal financial information in the file under seal.[23]

6) **A defense attorney or independent party should administer the screening and make the initial determination of eligibility**. I have noted above that attorneys from Nassau County's Legal Aid office currently fill out a financial form on behalf of arrestees who come through Arraignments A. The primary downside in having them perform this duty is that it risks interfering with their other duties to interview clients and to appear before the court for arraignment and bail determinations. The confidentiality of the financial information or other issues that may arise during the interview can be protected, however, and there is some efficiency because Legal Aid attorneys are already engaging defendants in initial interviews. If agency defense counsel have a conflict regarding caseloads – that is, there is some indication that they are minimizing appointments because of an under-resourced office – they may not be the best situated to administer the screening. On the other hand, because confidential information may be raised during such an interview, and because of the risks that a judge or prosecutor may use the procedure to influence plea-bargaining or otherwise streamline a crowded docket, neither the sitting judge in the case nor the government should administer financial screening. Accordingly, either defense counsel or an independent administrative agent should be charged with screening individuals and providing their findings to the court. Finally, although the court is responsible for appointing counsel,

7) **The screening process should not be unduly onerous**. The screening and appointment process should not be so burdensome as to discourage defendants from seeking counsel or to appropriate excessive resources from court administration. Given the first of these concerns, defendants should not have to pay to exercise this constitutional right, even if it does impose some cost on the state.[24] Requiring incredibly detailed proof of financial circumstances -- including (as in some jurisdictions), evidence that a person has repeatedly sought and failed to obtain private counsel before the court can make an

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[22] *See United States v. Pavelko*, 992 F.2d 32, 34 (3d Cir. 1993) (noting that "some courts have invoked a 'blanket suppression' of all statements made at the initial appearance, relying on the Supreme Court's instruction that it is 'intolerable that one constitutional right should have to be surrendered in order to assert another'"). *See also United States v. Branker*, 418 F.2d 378, 380-81 (2d Cir. 1969) ("[T]he government should not be permitted to use as part of its direct case any testimony given by a defendant at a hearing where he is seeking ... the assignment of counsel on the ground of his financial inability ... to secure counsel. The defendant should enjoy his constitutional rights to counsel ... without running the risk that thereby he may be incriminating himself with respect to the charges pending against him.")

[23] The court in *King* properly recognized the importance of maintain such confidentiality as it determined the defendant's ability to pay, keeping details out of the opinion and ordering his financial statement to be maintained in the court file but sealed from public view. *King*, 41 Misc. 3d 1237(A) at *4.

[24] *Cf.* Fla Stat Ann § 27.52 (1)(b) (requiring defendants to pay $50 fee to court clerk to apply for determination of indigent status).

appointment of counsel -- is also unwarranted and may affect both defendants and court personnel seeking to administer the screening.[25] Finally, minor reporting errors should not result in harsh penalties for defendants seeking to provide information during screening interviews. If defendants fear prosecution based on unintentional or minor errors, they may opt to forego the screening and fail to avail themselves of their right to counsel.

8) **Err on the side of providing counsel.** To the extent that a person is "on the bubble," or there is some conflicting information regarding a person's eligibility that cannot be avoided, courts should assign counsel rather than risking a Sixth Amendment violation by failing to do so. It is also important, once counsel has been assigned, that the eligibility determination not be re-opened without good cause based on new information arising during the course of the litigation. Multiple redeterminations can make an otherwise efficient system inefficient and provide a possible avenue for abuse, as the court or the parties may seek to use the redetermination to pressure a defendant into accepting a plea. The Brennan Center for Justice makes a cogent recommendation to this end: "eligibility re-examinations should take place only at pre-determined intervals (for example, when a case is transferred from one court to another), or upon public disclosure of certain pre-determined types of new information (for example, the client winning the lottery)."[26] All this notwithstanding, the denial of counsel should be a formally appealable decision, as it is in many jurisdictions.[27] A defendant who is denied appointment of counsel should be able to bring documentation or other evidence that he would be otherwise unable to afford counsel to a judge other than the one who made the initial determination for *de novo* review.

In closing, I want to applaud the efforts of the Office of Indigent Legal Services, New York State, the NYCLU, and others for taking up this issue. I also want to make clear that my clinic students and I remain interested in access to justice for poor people in the State of New York. If we can be helpful in this pursuit, through research, advocacy, or consultation, please do not hesitate to reach out to us.

Thank you.

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[25] *See* Brennan Center for Justice, *Eligible for Justice: Guidelines for Appointing Defense Counsel* 19 (2008) (providing examples from New Jersey and Tennessee of such onerous processes).

[26] *Id.* at 24.

[27] *See, e.g.*, Fla. Stat. Ann. § 27.52(2) (providing for judicial review of the court clerk's indigency determination at defendant's request).

FINANCIAL AFFIDAVIT IN SUPPORT OF REQUEST FOR ASSIGNMENT OF A LAWYER

(Name) _____ (Case # _____)
swears to the truth of the answers to the following questions:

1. Can you afford to hire a lawyer to represent you in this case? Yes ☐ No ☐.

2. Are you now employed? Yes ☐ No ☐.
   If yes, name and address of your employer: _____
   _____.

   If yes, how much do you earn per month? $ _____.

3. If under the age of 21, what is your parent(s) or guardians(s) approximately monthly earnings?
   $ _____.

4. If married is your spouse employed? Yes ☐ No ☐.
   If yes, how much does your spouse earn per month? $ _____.

5. Have you received within the past 12 months any income from a business, profession or any other form of self employment, or in the form of rent payments, interest, dividends, retirement or annuity payments or other sources? Yes ☐ No ☐.
   If yes, give the amount received and identify the source: _____
   _____.

6. Do you have any cash over $1,000 on hand, or $1,000 or more in a savings or checking account or financial instrument such as a certificate of deposit (c.d.)? Yes ☐ No ☐.
   If yes, state the total amount: $ _____.

7. Marital status: ☐ Single; ☐ Married; ☐ Widowed; ☐ Separated; ☐ Divorced.

8. Total number of financial dependants: _____.
   List name of person(s) you support and your relationship to them:
   _____.

9. Housing: Rent ☐ Own ☐. Monthly rent or costs in maintaining residence: $ _____.

10. Do you own a vehicle(s)? Yes ☐ No ☐.
    If yes, year and model of vehicle(s): _____.

11. Are you currently assigned an attorney on any pending matter? Yes ☐ No ☐.
    If yes, name of attorney: _____.

FAILURE TO COMPLETE THIS FORM OR TO BRING ANY FINANCIAL DOCUMENTS THE COURT REQUESTS MAY RESULT IN YOUR NOT BEING ASSIGNED AN ATTORNEY OR LOSING AN ATTORNEY ALREADY ASSIGNED.

_____
Petitioner's Signature

Sworn to before me this _____ day of _____, 20

_____
Judge

New York State Defenders Association

194 Washington Avenue, Suite 500
Albany, New York 12210
(518) 465-3524 FAX: (518) 465-3249

MEMORANDUM

To: NY Chief Defenders
From: Charlie O'Brien, Managing Attorney
Date: January 24, 2014
Re: 2014 Poverty Guidelines: Making an Informed Eligibility Determination

The constitutional and statutory standard for determining eligibility is "financially unable to afford counsel,"[1] not indigency. The Court of Appeals has ruled that courts must "make a sufficient inquiry into the defendant's ability to engage a lawyer."[2] Income measures, such as a percentage of the poverty guidelines, may be useful shorthand for making an initial eligibility finding, but the failure to meet income guidelines alone cannot be a basis to deny the appointment of counsel. Likewise, the receipt of public assistance benefits such as Temporary Assistance, SSI or food stamps should indicate an individual's inability to retain counsel.

Meeting or exceeding income guidelines is not determinative of eligibility, but must be considered with other factors. In addition to income, a court (or any program or office that may make an initial eligibility recommendation) must consider other relevant information to determine an individual's ability to afford counsel, including:

- an individual's assets and debts;
- seriousness of charge(s);
- complexity of the case; and
- cost of private representation in the community where the defendant is charged.

Since some defender offices and courts use percentages of the Federal Poverty Guidelines for eligibility purposes, the table below provides the current Legal Services Corporation (LSC) income guidelines along with other commonly used levels. Please note that the LSC guidelines are used for civil legal services program eligibility determinations, and we do not endorse their use in determining public defense eligibility. Further, LSC guidelines are susceptible to misapplication. For example, non-cash benefits, such as food stamps and housing subsidies, are sometimes counted as income, even though LSC regulations specifically exclude them.

Please note that the Office of Indigent Legal Services has statutory authority to establish criteria and procedures to guide courts in determining eligibility for public defense representation.[3] For questions about eligibility determinations, please contact the Backup Center at (518) 465-3524.

	Annual Income by Percentage of Federal Poverty Guidelines* (Effective January 22, 2014)				
Family Size	**125% (LSC)**	**133%**	**200%**	**250%**	**350%**
1	$14,588	$15,521	$23,340	$29,175	$40,845
2	$19,663	$20,921	$31,460	$39,325	$55,055
3	$24,738	$26,321	$39,580	$49,475	$69,265
4	$29,813	$31,721	$47,700	$59,625	$83,475
5	$34,888	$37,120	$55,820	$69,775	$97,685
6	$39,963	$42,520	$63,940	$79,925	$111,895
7	$45,038	$47,920	$72,060	$90,075	$126,105
8	$50,113	$53,320	$80,180	$100,225	$140,315
Each Add'l. Person	$5,075	$5,400	$8,120	$10,150	$14,210

*These guidelines are based upon the current official poverty guidelines by family size as determined by the Department of Health and Human Services. The LSC guidelines are typically updated in the beginning of each year and published in 45 CFR Part 1611 et seq.

[1] See CPL Articles 170 and 180; County Law Article 18-B.
[2] *People v. McKiernan*, 84 NY2d 915 (1994).
[3] See Executive Law § 832(3)(c).

EAC NETWORK
COMMUNITY SERVICE PROGRAM
175 Fulton Avenue, Suite 401, Hempstead, NY 11550
(516) 483-2323 ♦ Fax (516) 486-0564
www.eacinc.org
Rhonda Wainwright-Jones, Program Director
Nanette Lennon-Knight, Coordinator

ISTRICT ATTORNEY COPY**

Nassau County District Attorney Referral Form

e Check Appropriate Disposition

Docket/SCI/IND: _____

nditional Discharge Expiration Date_____ 1 yr.

DA DC/CC # _____

:OD Expiration Date _____ 6 or 12 mos?

e-Plea Next Court Date _____

Community Service Hours _____

. Sentence

_____ Judge_____ Part 1 2 3 4 5 6 7 8 10 11 12
(Circle part)

ıse Attorney_____ Telephone #_____

)riginal Charge_____ Disposition Charge_____

)llowing administrative fee schedule is determined by the number of hours the defendant must complete and whether or not ıfendant is represented by a Private Attorney, Legal Aid or an18B Attorney:

te Attorney: _____$200 (over 35 hours) _____$150 (under 35 hours)
Aid or 18B Attorney: _____$100 (over 35 hours) _____$75 (under 35 hours)

ıent must be made by Cash or Money Order, payable to: *EAC, Inc.* Full payment must be received before defendant ced at a volunteer worksite.

****

COMMUNITY SERVICE PROGRAM PARTICIPANT AGREEMENT

ıc .'s Name_____

ess _____

)hone Number (Home) _____ (Work) _____ Cell_____

bove defendant is referred to the EAC Community Service Alternative Program. The volunteer service is to involve_____ of unpaid community services for a public, tax supported, or non-profit agency selected by the EAC Community Service am and must be satisfactorily completed by the next court date.

efendant understands that it is his/her responsibility to follow through on this referral by contacting the Community Service ative Program immediately at 175 Fulton Avenue, Suite 401, Hempstead, NY 11550. The defendant also understands that **e to contact the Community Service Alternative Program within 24 hours or failure to keep any scheduled ıntments with this referral will result in the defendant's case being returned to the District Attorney's office.**

lefendant understands that he/she must personally perform all hours as ordered and that no substitute for the defendant's nal performance is acceptable. The defendant will not supply any tools, supplies, or financial resources to a worksite; nor ase order or otherwise commit a worksite to any equipment, material or other services. The defendant understands that it is ır responsibility to complete the community service within the time specified by the Courts commencing with the first day of ment. Upon satisfactorily completing the required hours, the Community Service Alternative Program will advise the Nassau ty District Attorney's office of completion.

_____ _____
ıdant's Signature Date

****

Intake Date: _____ EAC CS ID#: _____ Completion Date: _____

am:

EAC NETWORK
REACHING PEOPLE IN NEED

PLEASE COMPLETE

Defendant Name: _____
Defense Attorney Name: _____
Docket Number: _____
Charge: _____
Judge: _____ Part: _____
Last Court Date: _____ Next Court Date: _____

.....DEFENDANT'S REGISTRATION FORM.....

COMMUNITY SERVICE PROGRAM

You have been referred to the EAC Community Service Alternative Program. The volunteer service is to involve _____hours of unpaid community services for a public, tax supported, or non-profit agency selected by the EAC Community Service Program and must be satisfactorily completed by the next court date.

The Administration fee for individuals represented by private attorneys is **$150.00 (**if the assignment does not exceed 35 hours). A $**200.00** Administration fee is required if the community service assignment exceeds 35 hours. Defendants with Legal Aid and 18B Attorneys will pay a **$75.00** Administration fee (if the assignment does not exceed 35 hours). A **$100.00** Administration fee is required if the community service assignment exceeds 35 hours. **Payment must be made by Cash or Money Order, payable to: *EAC, Inc.* Full payment must be received before defendant is placed at a volunteer worksite.**

It will be your responsibility to follow through on this referral by reporting to the Community Service Alternative Program **immediately** located at 175 Fulton Avenue, Suite 401, Hempstead, NY 11550. Please call 516-483-2323 x273. You can also contact Maria Bejarano at maria.bejarano@eacinc.org or Nanette Lennon-Knight at nanette.lennon@eacinc.org . Failure to contact the Community Service Alternative Program within **24 hours** or failure to keep any scheduled appointments with this referral will result in the defendant's case being returned to the District Attorney's office.

COMMUNITY SERVICE PROGRAM
175 Fulton Avenue, Suite 401, Hempstead, NY 11550
(516) 483-2323 ♦ Fax (516) 486-0564

DIRECTIONS to EAC Community Service Program:

- Start out going south on Main St toward Centre St.
- Take the 2nd right onto Fulton Ave/RT-24.
- 175 FULTON AVE is on the right.

New York State
Office of Indigent Legal Services
Public Hearing on Eligibility for Assignment of Counsel

Elizabeth Nevins
Hofstra University
Maurice A. Deane School of Law

August 12, 2015

Status Quo:
Nassau County District Court

- Arraignments A
- Arraignments B
- Courtroom 155

Recommendation 1:

The standard for determinations must be fair, clear, and consistent.

Recommendation 2:

The criteria examined must be fair, relevant, and consistent.

- **An individual must be assessed for eligibility on his own.**
- **Only *liquid* assets should be considered relevant.**
- **Expenses should be considered relevant, too.**

Recommendation 3:

The standards and criteria must be transparent.

Recommendation 4:

The determination must be made as early as possible.

Recommendation 5:

The assessment should be confidential.

Recommendation 6:

A defense attorney or independent party should administer the screening and make the initial determination of eligibility.

Recommendation 7:

The screening process should not be unduly onerous.

Recommendation 8:

Err on the side of providing counsel.