SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

KIMBERLY HURRELL-HARRING, JAMES ADAMS, JOSEPH BRIGGS, RICKY LEE GLOVER, RICHARD LOVE, JACQUELINE WINBRONE, LANE LOYZELLE, TOSHA STEELE, BRUCE WASHINGTON, SHAWN CHASE, JEMAR JOHNSON, ROBERT TOMBERELLI, CHRISTOPHER YAW, LUTHER WOODROW OF BOOKER, JR., EDWARD KAMINSKI, JOY METZLER,VICTOR TURNER, CANDACE BROOKINS, RANDY HABSHI, and RONALD McINTYRE, on behalf of themselves and all others similarly situated, Plaintiffs, v. THE STATE OF NEW YORK, GOVERNOR DAVID PATERSON, in his individual capacity, Defendants.	Index No. 8866-07 **AMENDED CLASS ACTION COMPLAINT**

INTRODUCTION

1. This civil rights lawsuit is brought to remedy the State of New York's persistent failure to guarantee meaningful and effective legal representation to indigent people accused of crimes, as required by the New York State Constitution and laws and the United States Constitution.

2. New York State was once a leader in guaranteeing the right to counsel to indigent people accused of crimes. In 1881, more than eighty years before the United States Supreme Court established the right to counsel in felony cases under the federal constitution in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the New York State Legislature adopted section 308 of the

Criminal Procedure Law, directing courts to appoint *pro bono* counsel for unrepresented felony defendants.

3. Sadly today, more than forty years after *Gideon*, the leadership and humanity New York State showed in the past have eroded badly. In the last few decades, dozens of reports, commissions, newspaper investigations, and lawsuits documented the degree to which those accused of crimes in New York State are denied basic constitutional protections.

4. Most recently, in June of 2006, the New York State Commission on the Future of Indigent Defense Services, which was convened by Chief Judge Judith S. Kaye, issued a comprehensive report detailing the crisis in New York's public defense system. After careful study of data from all across the state, the Kaye Commission concluded that "the indigent defense system in New York State is both severely dysfunctional and structurally incapable of providing each poor defendant with the effective legal representation that he or she is guaranteed by the Constitution of the United States and the Constitution and laws of the State of New York ... [and] has resulted in a disparate, inequitable, and ineffective system for securing constitutional guarantees to those too poor to obtain counsel of their own choosing."[1]

5. Despite the Kaye Commission's unequivocal statement that the State is now knowingly and systematically violating the fundamental rights of its poorest citizens to meaningful and effective legal representation in criminal cases, more than a year has passed without any action by the State to remedy the problem.

6. Plaintiffs Kimberly Hurrell-Harring, James Adams, Joseph Briggs, Ricky Lee Glover, Richard Love, Jr., Jacqueline Winbrone, Lane Loyzelle, Tosha Steele, Bruce Washington, Shawn Chase, Jemar Johnson, Robert Tomberelli, Christopher Yaw, Luther

[1] The Final Report of the New York State Commission on the Future of Indigent Defense is attached to this complaint and is thereby incorporated by reference pursuant to CPLR § 3014.

Woodrow of Booker, Jr., Edward Kaminski, Joy Metzler, Victor Turner, Candace Brookins, Randy Habshi, and Ronald McIntyre are among the thousands of defendants currently affected by the structural and systemic failings of the public defense system identified by the Kaye Commission. Plaintiffs bring this lawsuit on behalf of themselves and of all indigent persons with criminal felony, misdemeanor, or lesser charges pending in New York state courts in Onondaga, Ontario, Schuyler, Suffolk and Washington counties (hereinafter, "the Counties") who are entitled to rely on the government of New York to provide them with meaningful and effective defense counsel.

7. 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 by article I, section 6 of the New York State Constitution; sections 170.10, 180.10, 180.80, 190.50, and 210.15(2)(c) of the New York Criminal Procedure Law; sections 717 and 722-c of the New York County Law; and the Sixth and Fourteenth Amendments to the United States Constitution. Plaintiffs seek declaratory and injunctive relief against the State of New York to prevent violations of plaintiffs' legal rights and to remedy the State's continuing failure to ensure that plaintiffs and the class they represent receive meaningful and effective legal representation.

8. The Constitution and laws of the State of New York and the United States Constitution guarantee all persons facing criminal charges the right to counsel, even if they cannot afford a lawyer. It has long been established that the State is obligated to provide public defense counsel to such persons at every critical stage of the criminal justice process.

9. The right to counsel is a right to *meaningful* and *effective* assistance of counsel. Constitutionally adequate counsel is counsel that is capable of putting the prosecution's case to

meaningful adversarial testing. Where, as is the case in New York, public defense counsel do not have the resources and the tools to engage actively and meaningfully in the adversarial process, courts cannot ensure that their decisions, judgments, verdicts and punishments are rendered fairly and accurately.

10. The constitutional and statutory obligation to provide indigent defendants with meaningful and effective assistance of counsel rests with the State. Since 1965, the State has abdicated its responsibility to guarantee the right to counsel for indigent persons and has left each of its sixty-two counties to establish, fund and administer their own public defense programs, with little or no fiscal and administrative oversight or funding from the State.

11. Because of this abdication of responsibility, the public defense systems in the Counties suffer from some combination of the following deficiencies, among others: incoherent or excessively restrictive client eligibility standards; no written hiring and performance standards or meaningful systems for attorney supervision and monitoring; lack of adequate attorney training; a lack of resources for support staff, appropriate investigations and expert services; no attorney caseload or workload standards; an absence of consistent representation of each client by one lawyer; a lack of independence from the judiciary, the prosecutorial function, and political authorities; and inadequate resources and compensation for public defense service providers, especially as compared to their prosecutorial counterparts.

12. As a result of these deficiencies, many public defense providers in the Counties often fail to: provide representation for indigent defendants at all critical stages of the criminal justice process, especially arraignments where bail determinations are made; meet or consult with clients prior to critical stages in their criminal proceedings; investigate adequately the charges against their clients or obtain investigators who can assist with case preparation and

testify at trial; employ and consult with experts when necessary; file necessary pre-trial motions; or provide meaningful representation at trial and at sentencing.

13. The inability of public defense counsel to put the case against their clients to meaningful adversarial testing causes the class of indigent defendants to suffer numerous harms, including but not limited to: wrongful denial of representation; unnecessary or prolonged pre-trial detention; excessive or inappropriate bail determinations, which have been shown in increase the likelihood of conviction; waiver of meritorious defenses; guilty pleas to inappropriate charges; guilty pleas taken without adequate knowledge and awareness of the full, collateral consequences of the pleas; wrongful conviction of crimes; harsher sentences than the facts of the case warrant and few alternatives to incarceration; and waiver of the right to appeal and other post-conviction rights.

14. This complaint focuses on how the State's failure to provide funding and fiscal and administrative oversight has created a broken public defense system in Onondaga, Ontario, Schuyler, Suffolk and Washington Counties, but the failings in those counties and the types of harms suffered by the named plaintiffs are by no means limited or unique to the named Counties. The State's failure to provide funding or oversight to any of New York's counties has caused similar problems throughout the State.

15. As a direct result of the State's refusal to oversee, set standards for, and adequately fund public defense, indigent criminal defendants in the Counties and across the state face a severe and unacceptably high risk of not receiving meaningful and effective assistance of counsel. In the words of the Kaye Commission, "New York's current fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused."

TABLE OF CONTENTS

PARTIES

Plaintiffs

16. Plaintiff KIMBERLY HURRELL-HARRING is and at all times present herein has been a resident of Rochester, New York. Mrs. Hurrell-Harring has a pending criminal case in Washington County Court and is currently incarcerated in the Washington County Jail. Mrs. Hurrell-Harring is represented by the Washington County Public Defender's office.

17. Plaintiff JAMES ADAMS is and at all times pertinent herein has been a resident of Syracuse, New York. Mr. Adams has a pending criminal case in Onondaga County Court and is currently incarcerated in the Onondaga County Justice Center. Mr. Adams is represented by an attorney assigned to him by Onondaga County's Assigned Counsel Program.

18. Plaintiff JOSEPH BRIGGS is and at all times pertinent herein has been a resident of Syracuse, New York. Mr. Briggs has a pending criminal case in Onondaga County Court and is currently incarcerated in the Onondaga County Justice Center. Mr. Briggs is represented by an attorney assigned to him by Onondaga County's Assigned Counsel Program.

19. Plaintiff RICKY LEE GLOVER is and at all times pertinent herein has been a resident of Syracuse, New York. Mr. Glover has a pending criminal case in Onondaga County Court and is currently incarcerated in the Onondaga County Justice Center. Mr. Glover is represented by an attorney assigned to him by Onondaga County's Assigned Counsel Program.

20. Plaintiff RICHARD LOVE, JR., is and at all times pertinent herein has been a resident of Syracuse, New York. Mr. Love has a pending criminal case in Onondaga County Court and is currently incarcerated in the Onondaga County Justice Center. Mr. Love is represented by an attorney assigned to him by Onondaga County's Assigned Counsel Program.

21. Plaintiff JACQUELINE WINBRONE is and at all times pertinent herein has been a resident of Syracuse, New York. Mrs. Winbrone has a pending criminal case in Onondaga County Court. Mrs. Winbrone is represented by an attorney assigned to her by Onondaga County's Assigned Counsel Program.

22. Plaintiff LANE LOYZELLE is and at all times pertinent herein has been a resident of Palmyra, New York. Mr. Loyzelle has a pending criminal case in Canandaigua City Court and is incarcerated in the Ontario County Jail. Mr. Loyzelle is represented by an attorney assigned to him by Ontario County's Assigned Counsel Program.

23. Plaintiff TOSHA STEELE is and at all times pertinent herein has been a resident of Geneva, New York. Ms. Steele has a pending criminal case in Ontario County Court and is incarcerated in the Ontario County Jail. Ms. Steele is represented by an attorney assigned to her by Ontario County's Assigned Counsel Program.

24. Plaintiff BRUCE WASHINGTON is and at all times pertinent herein has been a resident of Rochester, New York. Mr. Washington has a pending criminal case in the Victor Town Court in Ontario County and is incarcerated in the Ontario County Jail. Mr. Washington is represented by an attorney who was assigned to him by Ontario County's Assigned Counsel Program.

25. Plaintiff SHAWN CHASE is and at all times pertinent herein has been a resident of Ithaca, New York. Mr. Chase has a pending criminal case in Hector Town Court and is represented by the Schuyler County Public Defender's Office.

26. Plaintiff JEMAR JOHNSON is and at all times pertinent herein has been a resident of Elmira, New York. Ms. Johnson is currently facing criminal charges in Schuyler

County Court and is incarcerated in the Schuyler County Jail. Ms. Johnson is being represented by the Schuyler County conflict defender.

27. Plaintiff ROBERT TOMBERELLI is and at all times pertinent herein has been a resident of Burdett, New York. Mr. Tomberelli is currently facing criminal charges in Schuyler County Court. Mr. Tomberelli is represented by the Schuyler County Public Defender's Office.

28. Plaintiff CHRISTOPHER YAW is and at all times pertinent herein has been a resident of Odessa, New York. He is currently facing criminal charges in Schuyler County Court and Orange Town Court. He is being represented by the Schuyler County Public Defender's Office.

29. Plaintiff LUTHER WOODROW OF BOOKER JR. is and at all times pertinent herein has been a resident of Mastic Beach, New York. Mr. Booker has a pending criminal case in the Suffolk County Court and is incarcerated at the Suffolk County Correctional Facility in Riverhead. Mr. Booker is represented by the Legal Aid Society of Suffolk County.

30. Plaintiff EDWARD KAMINSKI is and at all times pertinent herein has been a resident of Patchogue, New York. Mr. Kaminski has a pending criminal case in the Riverhead Town Court in Suffolk County. Mr. Kaminski is represented by the Legal Aid Society of Suffolk County.

31. Plaintiff JOY METZLER is and at all times pertinent herein has been a resident of Huntington, New York. Ms. Metzler has a pending criminal case in the Suffolk County District Court in Central Islip. She is represented by the Legal Aid Society of Suffolk County.

32. Plaintiff VICTOR TURNER is and at all times pertinent herein has been a resident of Bellport, New York. Mr. Turner has two pending criminal cases at the Suffolk County District Court. Mr. Turner is represented by the Legal Aid Society of Suffolk County.

33. Plaintiff CANDACE BROOKINS is and at all times present herein has been a resident of Fort Anne, New York. Ms. Brookins has a pending criminal case in the Granville Village Court in Washington County and is currently incarcerated in the Warren County Jail. Ms. Brookins is represented by the Washington County Public Defender's office.

34. Plaintiff RANDY HABSHI is and at all times pertinent herein has been a resident of Hudson Falls, New York. Mr. Habshi has a pending criminal case in the Washington County Court and is currently incarcerated in the Washington County Jail. Mr. Habshi is represented by an attorney who has contracted with Washington County to provide public defense services.

35. Plaintiff RONALD MCINTYRE is and at all times present herein has been a resident of Gloversville, New York. Mr. McIntyre has a pending criminal case in the Washington County Court and is currently incarcerated in the Washington County Jail. Mr. McIntyre is represented by an attorney who has contracted with Washington County to provide public defense services.

Defendants

36. Defendant the STATE OF NEW YORK is required by its own Constitution and laws and by the United States Constitution to provide meaningful and effective legal representation to indigent defendants in criminal court proceedings. The State Capitol and center of State government is in Albany County.

36(a). Defendant GOVERNOR DAVID PATERSON is the Governor of the State of New York and as such is responsible for enforcing the Sixth and Fourteenth Amendments of the U.S. Constitution as they apply to the provision of public defense services within New York State. The Governor also possesses specific administrative and fiscal authority to manage, oversee, set standards for, and fund public defense services in the State. In 2008, for example,

then-Governor Eliot Spitzer proposed legislation in the form of a "governor's bill" that would have provided funding for a statewide office with specific responsibilities related to the provision of public defense services in New York. No other state official possesses responsibility to ensure that the administration of the public defense system is in compliance with constitutional and legal standards. The Governor is sued in his individual capacity.

JURISDICTION AND VENUE

37. This Court has jurisdiction over this action pursuant to Article 30 of the New York Civil Practice Law and Rules (CPLR) § 3001.

38. Venue is proper pursuant to Article 5 of the CPLR §§ 503(a), 503(c), and 505(a).

THE STATE'S FAILURE TO PROVIDE FOR CONSTITUTIONALLY AND LEGALLY ADEQUATE PUBLIC DEFENSE SERVICES

The Impact of the Public Defense Crisis on the Plaintiffs

Kimberly Hurrell-Harring (Washington County)

39. Kimberly Hurrell-Harring is a registered nurse and has no prior criminal record. Prior to her arrest, she held one full-time and one part-time job in order to care for her mother, who is recovering from a stroke, and her four-year-old and sixteen-year-old daughters.

40. Mrs. Hurrell-Harring was arrested on September 29, 2007, and charged with one count of introduction of prison contraband in the first degree, a felony, and possession of marijuana, a violation. Mrs. Hurrell-Harring was accused of bringing 22.1 grams, or about ¾ of one ounce, of marijuana to her incarcerated husband for his personal use. She faces up to seven years imprisonment and up to $5000 in fines.

41. Mrs. Hurrell-Harring was not represented at her arraignment, where, despite her lack of prior criminal history, bail was set at $10,000 cash or $20,000 bond. Mrs. Hurrell-Harring could not afford to post bail and was remanded to the Washington County Jail, where she remains.

42. Mrs. Hurrell-Harring first met her attorney at the county jail shortly after her arraignment. During this meeting, Mrs. Hurrell-Harring felt that her attorney took no interest in her case, her family, or her future. Mrs. Hurrell-Harring's attorney has refused to take any calls she has made to his office since this initial interview.

43. Although Mrs. Hurrell-Harring strongly hoped for probation, so that she could continue to support her family, her attorney did not move to reduce the felony charge to promoting prison contraband in the second degree, a misdemeanor, despite clear precedent holding that the lesser charge is the appropriate one given the small amount of marijuana involved. *See, e.g., People v. Stanley*, 19 A.D.3d 1152, 1152, 796 N.Y.S.2d 767 768, (4th Dept. 2005); *People v. Brown*, 2 A.D.3d 1216, 1216, 769 N.Y.S.2d 657, 657 (3d Dept. 2003). On information and belief, Mrs. Hurrell-Harring's attorney also failed to advocate for a plea bargain to reduced charges and/or probation given the circumstances of her offense, her lack of a prior record, and her family situation.

44. On October 12, 2007, having been incarcerated for several weeks and presented with no other options, Mrs. Hurrell-Harring pled guilty to promoting prison contraband in the first degree. During the court proceeding in which she pled guilty, it was clear that her attorney had not informed her of the full consequences of the plea prior to her decision to enter it.

45. Ms. Hurrell-Harring will be sentenced on November 16, 2007. Based on her plea bargain, she expects to be sentenced to six months imprisonment and five years of probation. As

a result of this felony conviction, Mrs. Hurrell-Harring stands to lose her license to serve as a registered nurse, a profession she has served in for twelve years.

46. The State of New York has not provided Mrs. Hurrell-Harring with the representation to which she is constitutionally and legally entitled, insofar as she was not represented at all critical stages; has not had sufficient opportunity to discuss with her attorney the factual basis for the charges against her, to participate in building a defense to those charges, or to make informed decisions regarding the progress and disposition of her case; and has been denied investigative services, motions practice and vigorous advocacy that could have contributed to her defense and/or brought an end to unnecessary incarceration. Upon information and belief, the State of New York will continue to fail to provide Mrs. Hurrell-Harring with the legal representation to which she is entitled as her case proceeds.

47. The representation provided to Mrs. Hurrell-Harring is illustrative of the pattern of representation provided to indigent defendants in the Counties and results from of the structural and systemic failings that led the Kaye Commission to conclude that New York State is failing to meet its constitutional and legal obligations to indigent persons accused of crimes, including the absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and largely county-financed public defense system.

James Adams (Onondaga County)

48. James Adams was arrested on July 31, 2007, and charged with robbery in the third degree, burglary in the third degree, and harassment in the second degree, all felonies. Mr. Adams is accused of shoplifting several sticks of deodorant from a drug store. If convicted, Mr. Adams faces a maximum sentence of fourteen years imprisonment on these charges.

49. Mr. Adams was represented by an attorney at his arraignment but was assigned a different attorney during the arraignment. Bail was set at $2500, which Mr. Adams could not afford.

50. Mr. Adams has never seen his attorney outside of open court. Mr. Adams first saw his attorney at a court appearance on August 7, 2007. During this appearance, Mr. Adams's attorney asked for a one-week adjournment because he had neither reviewed his client's file nor had time to prepare for the hearing. Mr. Adams's attorney was not even aware that his client was incarcerated. When the hearing ended, Mr. Adams asked his attorney for a chance to speak about his about his case, but Mr. Adams's attorney did not meet with him.

51. On August 14 and September 4, 2007, Mr. Adams again appeared in court. Both times, his case was adjourned. On each occasion, Mr. Adams asked his attorney for a meeting, but no meeting occurred. During these court appearances, the judge encouraged the prosecutor and defense counsel to negotiate the felony burglary and robbery charges down to misdemeanor petit larceny, but the attorneys did not do so.

52. On September 18, 2007, Mr. Adams appeared in court again but his attorney did not appear. The prosecutor attempted to present Mr. Adams with a notice that his felony charges had been referred to a Grand Jury, but the judge admonished the prosecutor that notice must be served on Mr. Adams's counsel. During this appearance, Mr. Adams heard the prosecutor tell the judge that he had extended a plea offer to Mr. Adams. Mr. Adams's attorney never communicated that offer to Mr. Adams.

53. Mr. Adams wanted to discuss the possibility of exercising his right to appear before the Grand Jury with his attorney but, unable to reach his attorney, Mr. Adams lost his

opportunity to do so. Mr. Adams was indicted on felony burglary and robbery charges on September 21, 2007.

54. Mr. Adams has attempted to contact his attorney several times between his court appearances, but his attorney's dedicated voicemail box is always full and his office does not accept collect phone calls from the jail. Mr. Adams's wife also has called his attorney several times, but the attorney never returned her calls. Mr. Adams contacted Jail Ministry, a prisoner-rights organization, to ask them to call his attorney on his behalf, but Mr. Adams's attorney still never contacted him.

55. On September 25, 2007, Mr. Adams attempted to file his own *pro se* motion under NY CPL § 190.80, which generally requires release of any person accused of a felony who has not been indicted within forty-five days of arrest. Without an attorney to provide counsel, he simply mailed form papers obtained from the prison law library and he is not sure whether he properly filed his motion.

56. Still unable to reach his attorney, Mr. Adams wrote directly to the district attorney on October 3, 2007, explaining the facts of his case and alleging that he had been misidentified by the prosecution's witnesses.

57. During a court appearance on October 5, 2007, Mr. Adams hand-delivered a letter to his attorney and to the prosecutor complaining about the lack of attorney-client communication and explaining the possible misidentification. During this court appearance, without prompting from Mr. Adams's attorney, the judge expressed concern that Mr. Adams had been overcharged for felony burglary and robbery for allegedly stealing deodorant from a drug store. The judge suggested that because of this concern he would review the Grand Jury

minutes. Despite these statements from the judge questioning the basis for the indictment, Mr. Adams's attorney did not file a motion to dismiss the indictment.

58. During his most recent court appearance, on October 19, 2007, the judge ordered Mr. Adams's attorney to file a motion to dismiss the indictment. As with his prior court appearances, Mr. Adams's attorney did not speak to Mr. Adams before or after the appearance.

59. Mr. Adams has not had any contact with his attorney in nearly a month and does not know the status of his case. Mr. Adams has spent many hours in the jail law library trying to understand what it means to dismiss an indictment and what the judge's suggestion to file this motion means for his case.

60. As of the filing of this complaint, Mr. Adams has been incarcerated for more than three months for allegedly stealing deodorant from a drug store. Mr. Adams's next court appearance is scheduled for November 30, 2007, at which time he will have been incarcerated for four months.

61. As a result of his arrest and incarceration, Mr. Adams, lost his job as a day laborer and is unable to support his wife, his two teenage daughters, and his granddaughter. Mr. Adams's family was evicted from their home because they could not afford to pay rent without his income.

62. The State of New York has failed to provide Mr. Adams with the representation to which he is constitutionally and legally entitled, insofar as he has not had sufficient opportunity to discuss his case with his attorney, to participate in building a defense to the charge against him, or to make informed decisions regarding the progress and disposition of his case; has been deprived of investigative assistance, motions practice and vigorous advocacy that may contribute to a favorable resolution of the charge against him and/or an end to unnecessary

incarceration; and does not understand where his case stands or the status of the charges against him. Upon information and belief, the State of New York will continue to fail to provide Mr. Adams with the legal representation to which he is entitled as his case proceeds.

63. The representation provided to Mr. Adams is illustrative of the pattern of representation provided to indigent defendants in the Counties and results from the structural and systemic failings that led the Kaye Commission to conclude that New York State is failing to meet its constitutional and legal obligations to indigent persons accused of crimes, including the absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and largely county-financed public defense system.

Joseph Briggs (Onondaga County)

64. Joseph Briggs was arrested on August 7, 2007, and charged with possession of stolen property in the third degree, a felony. Because of prior felony convictions, Mr. Briggs faces a maximum life sentence if convicted of these charges.

65. Prior to his arrest, Mr. Briggs was a self-employed roofer who was attempting to start his own small roofing business.

66. Mr. Briggs was not represented by an attorney at his arraignment, at which he was denied bail.

67. Mr. Briggs first saw his attorney at a court appearance on September 4, 2007, almost a month after his arrest and incarceration. In the preceding weeks, Mr. Briggs, who was eager to speak to his attorney about his case and ask about the possibility of a bail reduction so he could get back to work, learned that his attorney had adjourned several court appearances without consulting him. While awaiting this court appearance, Mr. Briggs asked the court

deputy to ask his lawyer to come speak to him in the holding cell to discuss his case and prepare for the appearance, but Mr. Briggs's attorney did not do so.

68. Mr. Briggs next saw his attorney on September 10, 2007, in a meeting that lasted approximately five minutes. After that brief meeting, Mr. Briggs attempted on numerous occasions to contact his attorney from the jail, but his attorney's dedicated voicemail box was always full and his office did not accept collect calls from the jail. Mr. Briggs also wrote to his attorney but never received any response.

69. Mr. Briggs was indicted on September 19, 2007. Mr. Briggs's attorney never consulted with him before waiving his right to a preliminary hearing and never discussed with him his right to testify before the Grand Jury.

70. Mr. Briggs next appeared in court on October 10, 2007. Mr. Briggs's attorney did not appear in court on that day. The judge asked Mr. Briggs if he would like to get a new attorney. Mr. Briggs said yes, and the judge assigned a new attorney.

71. Mr. Briggs has never met or spoken with his new attorney. He has written to her three times and tried to call his new attorney but her voicemail box is always full and her office does not accept collect calls from the jail. Meanwhile, Mr. Briggs has been unable to discuss with his attorney the possibility of moving to dismiss the indictment because he was denied an opportunity to testify before the Grand Jury, file other motions for release based on his prolonged and unnecessary pretrial incarceration, or obtain a copy of his file because his attorney has not responded to these letters.

72. Mr. Briggs contacted Jail Ministry, a prisoner rights organization, to ask for its help in contacting his attorney, but Jail Ministry told him that it had passed along so many

complaints about lack of attorney-client contact to that particular attorney that she had instructed the organization never to call her about her clients again.

73. Mr. Briggs's next court date is not scheduled until December 7, 2007. Mr. Briggs, who has been incarcerated since August 7, 2007, does not understand why his next court date is so far away or what is happening with his case.

74. Upon information and belief, neither of Mr. Briggs's attorneys has conducted any independent investigation into the facts surrounding Mr. Briggs's case or the existence of any possible defenses that might be available to him.

75. The State of New York has failed to provide Mr. Briggs with the representation to which he is constitutionally and legally entitled, insofar as he has not been represented in all critical proceedings; has not had sufficient opportunity to discuss his case with his attorney, to participate in building a defense to the charge against him, or to make an informed decision about the progress and disposition of his case; has been subjected to lengthy and unnecessary pretrial incarceration; and does not understand where his case stands or the status of the charges against him. Upon information and belief, the State of New York will continue to fail to provide Mr. Briggs with the legal representation to which he is entitled as his case proceeds.

76. The representation provided to Mr. Briggs is illustrative of the pattern of representation provided to indigent defendants in the Counties and results from the structural and systemic failings that led the Kaye Commission to conclude that New York State is failing to meet its constitutional and legal obligations to indigent persons accused of crimes, including the absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and largely county-financed public defense system.

Ricky Lee Glover (Onondaga County)

77. Ricky Lee Glover was arrested on June 12, 2007, and charged with burglary in the third degree, a felony, and related misdemeanor charges of petit larceny and possession of burglary tools. Because of prior felony convictions, the maximum sentence Mr. Glover faces on these charges is life imprisonment.

78. Mr. Glover was represented at arraignment by an attorney, but was assigned to a second attorney during the arraignment. He was denied bail and remanded to jail, where he remains.

79. After arraignment, Mr. Glover immediately tried to contact his new attorney but his attorney's dedicated voicemail box was consistently full and her office would not accept collect calls from the jail.

80. Mr. Glover met his attorney only once, on June 21, 2007, in the jail. According to a grievance filed on behalf of Mr. Glover by the Onondaga County Human Rights Commission, during that meeting, which lasted only a few minutes, Mr. Glover's attorney informed him that he had a "dead case" even though she admitted that she had not obtained and reviewed any files from the prosecutor or conducted any discovery or independent investigation. Mr. Glover asked his attorney to advocate for bail but she did not do so. Mr. Glover has not seen his attorney since this first meeting more than four months ago.

81. During their first and only meeting, again according to Mr. Glover's grievance, Mr. Glover specifically asked his attorney not to waive his right to a preliminary hearing. Mr. Glover's attorney adjourned his first scheduled preliminary hearing on June 15, 2007. On June 29, 2007, Mr. Glover's attorney, against his specific instructions, waived Mr. Glover's right to a preliminary hearing in a letter to the judge.

82. On July 10, 2007, having been unable to reach his attorney for over a month, Mr. Glover filed his own *pro se* motion for release under NY CPL § 180.80, which generally requires release of any person accused of a felony who has been held for more than 120 hours after arrest without a preliminary hearing. Mr. Glover was unaware that his attorney had already waived his preliminary hearing. Mr. Glover only found out that his right had been waived months later when he called the Onondaga County Human Rights Commission.

83. Since their first and only meeting in June, Mr. Glover has neither met with his attorney nor been able to reach her by telephone. Mr. Glover's family has also attempted to reach his attorney several times. On one occasion, Mr. Glover's mother was able to reach his attorney, who told his mother that Mr. Glover was "about to get out." Months later, Mr. Glover remains in jail.

84. On October 6, 2007, Mr. Glover, still unable to reach his attorney, filed his own *pro se* motion under NY CPL § 190.80, which generally requires release of any person accused of a felony who has not been indicted within 45 days of arrest. Without an attorney to provide counsel, Mr. Glover did not know where to file the motion and remains unsure whether it was properly filed.

85. On October 15, 2007, Mr. Glover learned that the felony charges he was facing had been reduced to misdemeanor charges. He learned this because an attorney grievance committee forwarded a copy of a letter his attorney had written to that committee defending her representation of Mr. Glover against his complaint. His attorney never communicated this information to Mr. Glover; he would not have known if he had not received this letter from the grievance committee.

86. Since learning his charges were reduced, Mr. Glover has been researching in the jail law library whether he can file his own motion for a bail reduction so he can get out of pretrial detention.

87. Mr. Glover's attorney also represents him on pending traffic violations in the Onondaga Town Court. Mr. Glover is anxious to have a hearing and resolve those charges, but his attorney has adjourned his hearing at least four times without consulting with Mr. Glover. Unable to reach his attorney to address this issue, Mr. Glover wrote directly to the town court justice to ask him not to allow his attorney to adjourn his case again.

88. Mr. Glover is concerned that his attorney may have a conflict of interest because she may have represented his daughter in a family court proceeding involving him. He has been unable to raise this issue with his attorney, however, because he cannot reach her.

89. As of the filing of this complaint, Mr. Glover has been incarcerated 148 days and has had no direct contact with his attorney since June 21, 2007, more than four months ago.

90. The State of New York has not provided Mr. Glover with the representation to which he is constitutionally and legally entitled, insofar as he has not had sufficient opportunity to discuss his case with his attorney, to participate in building a defense to the charges against him, or to make informed decisions about the progress and disposition of his case; has been deprived of investigative assistance, motions practice and vigorous advocacy that may contribute to a favorable resolution of his case and/or an end to unnecessary incarceration; may have been deprived to the right to appointment of counsel free of conflicts of interest; and does not understand where his case stands or the status of the charges against him. Upon information and belief, the State of New York will continue to fail to provide Mr. Glover with the legal representation to which he is entitled as his case proceeds.

91. The representation provided to Mr. Glover is illustrative of the pattern of representation provided to indigent defendants in the Counties and results from the structural and systemic failings that led the Kaye Commission to conclude that New York State is failing to meet its constitutional and legal obligations to indigent persons accused of crimes, including the absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and largely county-financed public defense system.

Richard Love, Jr. (Onondaga County)

92. Richard Love, Jr. was arrested on September 12, 2007, and charged with grand larceny in the third degree and criminal possession of a forged instrument, both felonies. Upon information and belief, Mr. Love faces sentencing as a repeat felony offender and could face a life sentence on these charges.

93. Mr. Love was not represented by an attorney at his initial arraignment, at which he was denied bail.

94. Mr. Love first saw his attorney days after his arraignment when he came to the jail for a few minutes so that Mr. Love could sign a form that the attorney needed so he could get paid. Mr. Love next saw his attorney during a court appearance weeks later, in late September. Mr. Love's attorney did not meet or speak with Mr. Love before or after the appearance. During the proceeding, Mr. Love did not understand what was going on and was not even sure what charges were being discussed.

95. Upon information and belief, Mr. Love's attorney has not conducted any independent investigation into the facts surrounding Mr. Love's case or the existence of any possible defenses that might be available to him.

96. Mr. Love was eager to file a motion for bail so he could return to work, but his attorney did not file a bail reduction motion. Mr. Love remains incarcerated.

97. Mr. Love has attempted on numerous occasions to contact his attorney from jail but his attorney's dedicated voicemail box is usually full and his office does not accept collect calls from the jail. Mr. Love's family has also attempted to reach his attorney without success. Mr. Love called the Onondaga County Assigned Counsel Program to seek its assistance in contacting his attorney, but the Onondaga County Assigned Counsel Program informed him that it could not help him.

98. On October 5, 2007, Mr. Love wrote to the judge and asked to proceed *pro se* rather than continue to be represented by his current attorney.

99. On October 26, 2007, Mr. Love appeared before a different judge. Mr. Love's attorney once again did not prepare Mr. Love for this appearance or meet with him prior to entering the courtroom. During this proceeding, the prosecutor presented a plea offer that Mr. Love had already rejected. Because his attorney had failed to do so, Mr. Love began to negotiate directly with the judge and the prosecutor and to advocate for a reduction to misdemeanor charges. Mr. Love told the judge that he felt uncomfortable taking a plea because he had never met with his attorney to discuss the facts of his case. Upon hearing this, the judge agreed to assign a new attorney to Mr. Love.

100. Mr. Love is a veteran of the United States Navy. He is married with two grown children and seven grandchildren. Before he was arrested, Mr. Love held two jobs to support his family. Because he has been incarcerated for nearly two months, he lost both of his jobs.

101. The State of New York has not provided Mr. Love with the representation to which he is constitutionally and legally entitled, insofar as he has not been represented in all

critical proceedings; has not had sufficient opportunity to discuss his case with his attorney, to participate in building a defense the charges against him, or to make an informed decision about the progress and disposition of his case; and has been deprived of investigative assistance, motions practice and vigorous advocacy that may contribute to a favorable resolution of his charges and/or an end to unnecessary incarceration. Upon information and belief, the State of New York will continue to fail to provide Mr. Love with the legal representation to which he is entitled as his case proceeds.

102. The representation provided to Mr. Love is illustrative of the pattern of representation provided to indigent defendants in the Counties and results from the structural and systemic failings that led the Kaye Commission to conclude that New York State is failing to meet its constitutional and legal obligations to indigent persons accused of crimes, including the absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and largely county-financed public defense system.

Jacqueline Winbrone (Onondaga)

103. Jacqueline Winbrone was arrested on September 12, 2007, and charged with possession of a loaded firearm in the second degree, a felony. After being called to her home because of a domestic dispute, the police searched the Winbrone family's car and found the firearm, which Mrs. Winbrone stated was not hers and must belong to her husband. The maximum sentence Mrs. Winbrone faces on these charges is 15 years imprisonment.

104. Prior to her arrest, Mrs. Winbrone was the sole caretaker for her seriously ill husband, who relied on her to transport him to dialysis treatment several times a week. Shortly after Mrs. Winbrone was arrested, her husband passed away. Mrs. Winbrone believes that her

husband died because he had no one to care for him and transport him to dialysis. Because no one was able to make rent payments while she was incarcerated, Mrs. Winbrone has been evicted from her home.

105. Mrs. Winbrone was represented at arraignment but was assigned to a different attorney during the arraignment. Bail was set at $10,000, which she could not afford.

106. After arraignment, Mrs. Winbrone wished to seek a bail reduction so she could take care of her family. She attempted to contact her attorney but his dedicated voicemail box was consistently full and his office would not accept collect calls from the jail.

107. On September 16, 2007, Mrs. Winbrone learned that her husband had died. Because the jail permitted her to make a non-collect call, Mrs. Winbrone was able to reach her attorney in his office for the first time and ask him to petition for a bail reduction so she could leave jail and attend the funeral. Her attorney nevertheless failed to obtain a bail reduction hearing until a few days later, after the funeral had already occurred. At the bail reduction hearing, the court reduced bail to $5000, which Mrs. Winbrone, who is on public assistance, still could not afford. In open court, Mrs. Winbrone tried to explain to her attorney that this bail reduction would not make any difference, but he did not respond. At the end of the hearing, Mrs. Winbrone asked her attorney if they could meet, but he left without speaking to her.

108. On September 17, 2007, without consulting with Mrs. Winbrone or explaining the reasons, Mrs. Winbrone's attorney waived her right to a preliminary hearing.

109. Thereafter, Mrs. Winbrone tried several times to reach her attorney by phone without success. She wrote to him, asked her mother to call him long-distance from Georgia, and called a prisoner-rights organization to ask it to reach out to him, again without success.

Unable to reach her attorney, Mrs. Winbrone wrote a letter to the judge in her case explaining the facts of her case, hoping the judge would help her get out of jail.

110. Mrs. Winbrone next saw her attorney several weeks later at a court appearance on November 1, 2007, which she believes was scheduled because of the letter she wrote to the judge. During this appearance, her attorney did not speak to her at all. She did not understand what was happening during this proceeding. When she heard her attorney misstating certain facts of her case to the judge, she tried to correct him, but was told that her attorney must speak on her behalf in court.

111. Upon information and belief, Mrs. Winbrone's attorney has not conducted any independent investigation into the facts surrounding Mrs. Winbrone's case or the existence of any possible defenses that might have been available to her.

112. On November 2, 2007, Mrs. Winbrone appeared before the court and was released on her own recognizance after spending almost two months in jail. Mrs. Winbrone believes that her release is a result of a meeting she had with advocates from an Onondaga County pretrial release program, not the result of any advocacy by her attorney.

113. The State of New York has not provided Mrs. Winbrone with the representation to which she is constitutionally and legally entitled, insofar as she has not had sufficient opportunity to discuss her case with her attorney, to participate in building a defense to the charge against her, or to make informed decisions about the progress and disposition of her charge; has been deprived of investigative assistance, motions practice and vigorous advocacu that may have contributed to a favorable disposition of her charge and/or and end to unnecessary incarceration; and was subjected to several weeks of unnecessary incarceration. Upon

information and belief, the State of New York will continue to fail to provide Mrs. Winbrone with the legal representation to which she is entitled as her case proceeds.

114. The representation provided to Mrs. Winbrone is illustrative of the pattern of representation provided to indigent defendants in the Counties and is results from the structural and systemic failings that led the Kaye Commission to conclude that New York State is failing to meet its constitutional and legal obligations to indigent persons accused of crimes, including the absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and largely county-financed public defense system.

Lane Loyzelle (Ontario County)

115. Lane Loyzelle was arrested on September 27, 2007 and charged with petit larceny, a misdemeanor, for allegedly stealing twenty dollars from two people he knew. He faces a maximum sentence of one year imprisonment, as well as fines of up to $1000.

116. At his arraignment, Mr. Loyzelle was not provided with an attorney. Bail was set at $2500 cash or $5000 bond, which he could not afford. Mr. Loyzelle asked the judge to lower the bail so that he could return to work and not lose his job. His request was denied and he was remanded to the Ontario County Jail. Mr. Loyzelle has now lost his job.

117. Mr. Loyzelle has met with his attorney only once. This meeting took place immediately before a court appearance on October 10, 2007, lasted approximately five minutes, and took place in the holding area outside the courtroom, in full hearing of other inmates. Mr. Loyzelle was uncomfortable discussing his case in front of other inmates, but Mr. Loyzelle's attorney never met with him other than in this public space.

118. Upon information and belief, Mr. Loyzelle's attorney never conducted any independent investigation into the facts surrounding Mr. Loyzelle's case or the existence of any valid defenses that might have been available.

119. As of the filing of the complaint, Mr. Loyzelle has been incarcerated for six weeks for allegedly stealing $20 and has not had any contact with his attorney for almost a month.

120. The State of New York has not provided Mr. Loyzelle with the representation to which he is constitutionally and legally entitled, insofar as he has not been provided with representation at every critical stage; has not had sufficient opportunity to discuss his case with his attorney, to participate in the building of a defense against the charges he faces, or to make informed decisions about the progress and disposition of his case; and has been denied investigative assistance, motions practice and vigorous advocacy that may contribute to a favorable resolution of his case. Upon information and belief, the State of New York will continue to fail to provide Mr. Loyzelle with the legal representation to which he is entitled as his case proceeds.

121. The representation provided to Mr. Loyzelle is illustrative of the pattern of representation provided to indigent defendants in the Counties and results from the structural and systemic failings that led the Kaye Commission to conclude that New York State is failing to meet its constitutional and legal obligations to indigent persons accused of crimes, including the absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and largely county-financed public defense system.

Tosha Steele (Ontario County)

122. Tosha Steele was arrested on July 25, 2007, and charged with criminal possession of a controlled substance in the third degree, a felony. Ms. Steele, who has three children, faces a maximum of 25 years in prison and fines of up to $30,000.

123. Ms. Steele's attorney has never visited her in jail. She has only seen her attorney twice since her arrest in July, both times during or immediately prior to court appearances and has spoken briefly on the phone with him once when she was able to reach him from the jail.

124. Ms. Steele first met her attorney immediately before a court appearance for approximately five to ten minutes in the holding area outside the courtroom, in full hearing of other inmates.

125. Ms. Steele did not see her attorney again until her next court appearance almost a month later, on August 20, 2007. Without meeting with or consulting Ms. Steele beforehand, Ms. Steele's attorney waived her right to a preliminary hearing. Ms. Steele was confused about what had occurred but her attorney never explained it to her.

126. Ms. Steele's attorney failed to appear in court for her most recent court appearance on October 5, 2007, and her case was adjourned, prolonging her pre-trial incarceration. Ms. Steele's attorney has not contacted her to explain his failure to appear in court or to notify her of her next court date.

127. Upon information and belief, Ms. Steele's attorney has not conducted any independent investigation into the facts surrounding Ms. Steele's case or any possible defenses that may be available to her.

128. As of the filing of this complaint, Ms. Steele has been incarcerated for more than three months and has not had any contact with her attorney for more than two months.

129. The State of New York has failed to provide Ms. Steele with the representation to which she is constitutionally and legally entitled, insofar as she has not had sufficient opportunity to discuss her case with her attorney, to participate in building a defense to the charges against her, or to make informed decisions about the progress and disposition of her case; has been subjected to lengthy and unnecessary pretrial incarceration; has been deprived of investigative services, motions practice and vigorous advocacy that could contribute to her defense and/or bring an end to unnecessary incarceration; and does not understand where her case stands or the status of the charges against her. Upon information and belief, the State of New York will continue to fail to provide Ms. Steele with the legal representation to which she is entitled as her case proceeds.

130. The representation provided to Ms. Steele is illustrative of the pattern of representation provided to indigent defendants in the Counties and results from the structural and systemic failings that led the Kaye Commission to conclude that New York State is failing to meet its constitutional and legal obligations to indigent persons accused of crimes, including the absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and largely county-financed public defense system.

Bruce Washington (Ontario County)

131. Bruce Washington was arrested on August 20, 2007, and charged with petit larceny, a misdemeanor. He faces a maximum sentence of one year imprisonment, as well as fines of up to $1000.

132. At arraignment, Mr. Washington was not represented by counsel. Bail was set at $1500 cash or $3000 bond, which he could not afford, and he was remanded to jail.

133. Mr. Washington's first meeting with his attorney occurred several days after his arrest at the Ontario County Jail and lasted less than ten minutes. Outside of this first meeting, Mr. Washington has never met with his attorney in the jail. All other contact has occurred solely before or after scheduled court appearances and has lasted no more than a few minutes.

134. Mr. Washington's attorney is a specialist in real estate and tax law, not criminal defense.

135. Upon information and belief, Mr. Washington's attorney never conducted any independent investigation into the facts surrounding Mr. Washington's case or the existence of any valid defenses that might have been available.

136. After remaining in jail for almost two months unable to discuss a possible defense with his attorney, Mr. Washington pled guilty as charged on October 16, 2007. At the time of his plea, Mr. Washington was not informed of the full consequences of his guilty plea. For example, after his plea had been entered, Mr. Washington learned that the lengthy pre-sentencing investigation required in his case would result in his being incarcerated for approximately three weeks longer than the sentence contemplated by his plea agreement. Mr. Washington's attorney has not met with Mr. Washington since entering the guilty plea and, upon information and belief, has not taken any action to address the delay in sentencing. Mr. Washington's sentencing hearing is scheduled for January 8, 2008.

137. The State of New York has not provided Mr. Washington with the representation to which he is constitutionally and legally entitled, insofar as he has not been represented at every critical stage of the proceedings; has not had sufficient opportunity to discuss his case with his attorney, to participate in building a defense to the charges against him, or to make informed decisions about the progress and disposition of his case; was deprived of investigative assistance,

motions practice and vigorous advocacy that may have contributed to his defense; and has been subjected to lengthy and unnecessary pretrial incarceration. Upon information and belief, the State of New York will continue to fail to provide Mr. Washington with the legal representation to which he is entitled as his case proceeds.

138. The representation provided to Mr. Washington is illustrative of the pattern of representation provided to indigent defendants in the Counties and is results from the structural and systemic failings that led the Kaye Commission to conclude that New York State is failing to meet its constitutional and legal obligations to indigent persons accused of crimes, including the absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and largely county-financed public defense system.

Shawn Chase (Schuyler County)

139. Shawn Chase was arrested on April 6, 2007, and charged with driving while intoxicated and driving with a blood alcohol level over 0.08%, both misdemeanors, and possession of an open container of alcohol in a motor vehicle, a traffic infraction. Mr. Chase faces a maximum of one year of imprisonment plus fines on these charges.

140. Mr. Chase's case was delayed five months before he was deemed eligible for a public defense attorney. After repeated denials of his application for representation by the Schuyler County Public Defender's Office, he was finally assigned counsel by a judge.

141. Mr. Chase submitted his first application for public defense services shortly after his first court appearance, in late April or early May 2007. When he applied, he was incorrectly told that he would have a hard time obtaining an attorney because his charges were mere traffic violations. The public defender's office later denied his application based on his household

income and unspecified county guidelines, despite the fact that Mr. Chase has previously been found eligible for public defense services in a neighboring county.

142. Once a month between May and October of 2007, Mr. Chase appeared in court and was told his case must be adjourned so that he could obtain counsel. During this time, Mr. Chase applied for a public defender approximately three additional times. Upon information and belief, his application was denied each time also on the basis of his household income and unspecified county guidelines.

143. At a court appearance in August of 2007, Mr. Chase, frustrated with his inability to obtain an attorney, provided the court, the prosecutor, and the assistant pubic defender with a letter prepared by a retired lawyer explaining why Mr. Chase was entitled to a public defender. At his next court appearance, in September of 2007, the judge ordered the Schuyler County Public Defender's office to represent Mr. Chase. During this court appearance, four months after his arrest, Mr. Chase finally met with his attorney for the first time.

144. At Mr. Chase's trial, on October 30, 2007, Mr. Chase discovered only ten minutes before he took the stand that he would be testifying. He was not prepared for his testimony. Mr. Chase was convicted of driving while intoxicated. Mr. Chase erroneously believes that this conviction will bar him from obtaining a commercial license for his planned career as a civil engineer. His attorney has not met with him since his conviction.

145. Mr. Chase's sentencing hearing is scheduled for December 19, 2007. Mr. Chase is not sure what sentence he could face and how that sentence could impact his future plans.

146. The State of New York has failed to provide Mr. Chase with the representation to which he is constitutionally and legally entitled, insofar as he experienced unnecessary and prolonged delay in the appointment of counsel based on incoherent and excessively restrictive

eligibility standards; did not have sufficient opportunity to make informed decisions about the progress and disposition of his case; and was denied effective representation at trial. Upon information and belief, the State of New York will continue to fail to provide Mr. Chase with the legal representation to which he is entitled as his case proceeds.

147. The representation provided to Mr. Chase is illustrative of the pattern of representation provided to indigent defendants in the Counties and results from the structural and systemic failings that led the Kaye Commission to conclude that New York State is failing to meet its constitutional and legal obligations to indigent persons accused of crimes, including the absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and largely county-financed public defense system.

Jemar Johnson (Schuyler County)

148. Jemar Johnson was arrested on August 30, 2007, and charged with criminal possession of a controlled substance in the third degree, a felony. Ms. Johnson faces a maximum sentence of nine years imprisonment if convicted.

149. Ms. Johnson was not represented at arraignment, where bail was set at $15,000 cash or $30,000 bond. Unable to pay this amount, she was remanded to jail.

150. On September 10, 2007, Ms. Johnson's case was scheduled for a hearing, but Ms. Johnson was not taken to court and did not hear from her attorney to explain why she did not appear in court. The next day she found out from a corrections officer that her bail had been reduced to $10,000 cash or $20,000 bond. Still unable to pay, she remained in jail.

151. Ms. Johnson has met her attorney only once, shortly after her arraignment. She is unable to call her attorney because his office does not accept collect calls from the jail. She wrote to him at least three times before he came to visit her again, at the end of September.

152. Upon information and belief, Ms. Johnson's attorney has conducted no independent investigation into the charges Ms. Johnson faces, including contacting any of the witnesses who could assist her defense.

153. Ms. Johnson received a plea offer from the district attorney but she cannot make an informed decision about whether to accept the plea because she does not understand the full, collateral consequence of such a conviction, including the possible impact on her public assistance. Ms. Johnson has lost confidence that her attorney will provide her with good advice about whether to accept a plea or proceed to trial, and does not trust that her attorney is capable of mounting a defense for her at trial.

154. As of the filing of the complaint, Ms. Johnson has been incarcerated for more than two months. Although biologically male, Ms. Johnson identifies as a female and is uncomfortable being housed in with other men in the Schuyler County Jail. Her prolonged incarceration is harming her ability to obtain her General Educational Development certificate, which she was working for prior to her arrest. Although Ms. Johnson is ready to take the GED test, no one will come from Albany to administer the test to her because she is the only one in the Schuyler County Jail who is ready to take it.

155. The State of New York has failed to provide Ms. Johnson with the representation to which she is constitutionally and legally entitled, insofar as she has not been represented in all critical proceedings; has not had sufficient opportunity to discuss her case with her attorney, to participate in building a defense to the charge against her, or to make informed decision about

the progress and disposition of her case; has been denied access to investigative services, motions practice and vigorous advocacy that could contribute to her defense; and has been subjected to prolonged and unnecessary incarceration. Upon information and belief, the State of New York will continue to fail to provide Ms. Johnson with the legal representation to which she is entitled as her case proceeds.

156. The representation provided to Ms. Johnson is illustrative of the pattern of representation provided to indigent defendants in the Counties and results from the structural and systemic failings that led the Kaye Commission to conclude that New York State is failing to meet its constitutional and legal obligations to indigent persons accused of crimes, including the absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and largely county-financed public defense system.

Robert Tomberelli (Schuyler County)

157. Robert Tomberelli was arrested on June 15, 2007, and charged with driving while under the influence of alcohol, a misdemeanor; aggravated unlicensed operation of a motor vehicle in the first degree, a felony; and two traffic infractions for having no headlights and parking in an intersection. Mr. Tomberelli faces a maximum sentence of 4 years imprisonment.

158. At his arraignment on June 15, 2007, Mr. Tomberelli was not represented by counsel and he was released on his own recognizance.

159. Mr. Tomberelli has been represented by two different attorneys in his case because his case was originally in town court, which is covered by the one attorney, and was later transferred to county court, which is covered by a different attorney.

160. On July 26, 2007, Mr. Tomberelli met with his second attorney. During this meeting, his attorney called the prosecutor's office and, despite the fact that she had not yet discussed the issue with Mr. Tomberelli, informed the prosecutor that Mr. Tomberelli would waive his right to an indictment before a grand jury.

161. On October 4, 2007, Mr. Tomberelli waived his right to grand jury indictment and entered guilty pleas to the offenses of driving while under the influence of alcohol and aggravated unlicensed operation of a motor vehicle. The guilty plea would subject him to the jurisdiction of Schuyler County's specialty drug court. Mr. Tomberelli is unsure whether his guilty plea means he will face prison time, what it means that his plea subjects him to the jurisdiction of the drug court, or what the possible collateral consequences of his guilty plea might be. Mr. Tomberelli felt pressured to plead because he was given only a short amount of time to accept or reject the plea, and he did not understand whether he had any other options, such as going to trial or negotiating a better plea.

162. Mr. Tomberelli's sentencing is scheduled for November 15, 2007. Although he has expressed concern about terms of probation that would confine him to Schuyler County because his job is in another county, upon information and belief, his attorney has not raised this issue with a probation officer or the district attorney.

163. The State of New York has failed to provide Mr. Tomberelli with the representation to which he is constitutionally and legally entitled, insofar as he was not represented in all critical stages; was deprived of consistent, vertical representation; and has not had sufficient opportunity to discuss his case with his attorney, to participate in building a defense to the charges against him, or make informed decisions about the progress and disposition of his case. Upon information and belief, the State of New York will continue to fail

to provide Mr. Tomberelli with the legal representation to which he is entitled as his case proceeds.

164. The representation provided to Mr. Tomberelli is illustrative of the pattern of representation provided to indigent defendants in the Counties and results from the structural and systemic failings that led the Kaye Commission to conclude that New York State is failing to meet its constitutional and legal obligations to indigent persons accused of crimes, including the absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and largely county-financed public defense system.

Christopher Yaw (Schuyler County)

165. Christopher Yaw was arrested on June 25, 2007, for the felony crime of grand larceny in the fourth degree. He was arraigned without counsel in Dix Town Court, where bail was set at $5000 cash or $10,000 bond. Unable to pay this amount, he was remanded to the Schuyler County Jail. He was later transferred to the Chemung County Jail, where he remains. Mr. Yaw faces a maximum sentence of 4 years imprisonment on this charge.

166. Although Mr. Yaw agreed to waive both his right to a preliminary hearing and his right to a grand jury indictment, he did not fully understand the consequences of these waivers at the time.

167. In September, 2007, Mr. Yaw wrote two letters to his attorney but received no response. Subsequently, his attorney said she would visit him on October 19, 2007, but she did not do so. In late October, Mr. Yaw learned that his November 1, 2007, court appearance had been adjourned. His attorney has provided no explanation for the adjournment.

168. On September 20, 2007, Mr. Yaw was arraigned in Orange Town Court on misdemeanor charges and traffic infractions related to his felony charge. Because these charges are filed in a different court and the Schuyler County Public Defender's office assigns different attorneys to each court, Mr. Yaw is represented by a different attorney on these charges even though they arise out of the same alleged incident as his felony charge.

169. Mr. Yaw understands only through his own research that one of the offers being considered by the district attorney for his felony charge is equivalent to a sentence he could get if he went to trial on that charge. Although he wishes to take his cases to trial, he has not had the opportunity to talk to his attorneys about the charges against him, the facts of his case, or whether it would be possible to negotiate a better plea.

170. Upon information and belief, Mr. Yaw's attorneys have conducted no independent investigation into the facts surrounding Mr. Yaw's case or the existence of any valid defenses that might have been available to him.

171. The State of New York has not provided Mr. Yaw with the representation to which he is constitutionally and legally entitled, insofar as he was not represented at all critical stages; was deprived of consistent, vertical representation; has not had sufficient opportunity to discuss his case with his attorney, to participate in building a defense to the charges against him, or to make informed decisions about the progress and disposition of his case; and has been deprived of investigative assistance, motions practice and vigorous advocacy that may contribute to a favorable resolution of his charges and/or an end to unnecessary incarceration. Upon information and belief, the State of New York will continue to fail to provide Mr. Yaw with the legal representation to which he is entitled as his case proceeds.

172. The representation provided to Mr. Yaw is illustrative of the pattern of representation provided to indigent defendants in the Counties and results from the structural and systemic failings that led the Kaye Commission to conclude that New York State is failing to meet its constitutional and legal obligations to indigent persons accused of crimes, including the absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and largely county-financed public defense system.

Luther Woodrow of Booker, Jr. (Suffolk County)

173. Luther Woodrow of Booker, Jr. was arrested on September 28, 2007 and charged with criminal possession of stolen property in the fourth degree, a class E felony. He faces a maximum sentence of four years of imprisonment, as well as fines of up to $5000.

174. Mr. Booker was arraigned on September 29, 2007, at the Suffolk County District Court in Central Islip. Bail was set at $1000 bond, which Mr. Booker could not afford, causing him to remain in jail. Mr. Booker's attorney did not advocate for lower bail.

175. At his next court appearance, on October 2, 2007, Mr. Booker was represented by a different Legal Aid attorney. Mr. Booker met with this second attorney for five minutes immediately before his scheduled court appearance. This meeting took place in the inmate holding area, in full hearing of correctional officers and other inmates. Although Mr. Booker still sought a reduction in bail to enable him to return to his job and family, his second attorney, like the first, did not file a bail reduction motion.

176. Mr. Booker had no other contact with his second attorney until his October 16, 2007, court appearance. Prior to that appearance, Mr. Booker again met with his second attorney for less than five minutes in the holding area.

177. During the court appearance on October 16, Mr. Booker's second attorney waived his right to file a motion under CPL § 180.80 without having discussed the issue with him or received his consent. Mr. Booker signed the waiver in open court without being told what he was signing or the consequences of such a waiver. At the time of signing, Mr. Booker did not know what type of document he was signing and felt confused and pressured to sign it.

178. After waiving his right to release, Mr. Booker's second attorney informed him, in open court, that the best Mr. Booker could hope for would be the prosecutor's offer of eight months of jail time. Mr. Booker felt he had no alternative but to enter a guilty plea and, in open court, agreed to do so. The judge then questioned Mr. Booker and, when Mr. Booker persistently maintained his innocence despite having just entered a guilty plea, withdrew and voided the plea. Mr. Booker's second attorney told him that she would meet with him in the holding area after the proceeding to discuss what had happened with respect to his voided guilty plea. Mr. Booker waited but she never returned.

179. When Mr. Booker subsequently attempted to reach his second attorney from the jail, the Legal Aid office informed him that he was being assigned a new, third attorney. Mr. Booker asked if he could speak with this new attorney but was told that Legal Aid was yet not sure who the new attorney would be.

180. Still having no idea who his new attorney was, Mr. Booker appeared in court for a scheduled appearance on October 22, 2007. Mr. Booker's case was adjourned because no Legal Aid attorney appeared in court that day to represent him, and he returned to jail.

181. The next day, Mr. Booker was brought to court again and met his third attorney for minutes before his scheduled court appearance. Like his other attorney meetings, this one took place in the holding area, in full hearing of correctional officers and other inmates, and

lasted only a few minutes. In court that day, presented with no other options and without understanding the full, collateral consequences of his plea, Mr. Booker accepted the same plea offer he had rejected at his prior court appearance and entered a plea of guilty.

182. Upon information and belief, none of Mr. Booker's attorneys conducted any independent investigation into the facts surrounding Mr. Booker's case or the existence of any valid defenses that might have been available.

183. Mr. Booker is scheduled to be sentenced on November 20, 2007. Mr. Booker has not had any contact with any of his attorneys since he entered his guilty plea on October 23, 2007, and no attorney has contacted him to prepare him for sentencing.

184. Because he has been incarcerated for almost two months awaiting resolution of his charges, Mr. Booker has not been able to provide necessary financial and emotional support to his pregnant live-in girlfriend and her six young children.

185. The State of New York has failed to provide Mr. Booker with the representation to which he is constitutionally and legally entitled, insofar as he has been deprived of consistent, vertical representation; and has not had sufficient opportunity to discuss his case with his attorneys, to participate in building a defense to the charges against him, or to make informed decisions about the progress and disposition of his case. Upon information and belief, the State of New York will continue to fail to provide Mr. Booker with the legal representation to which he is entitled as his case proceeds.

186. The representation provided to Mr. Booker is illustrative of the pattern of representation provided to indigent defendants in the Counties and results from the structural and systemic failings that led the Kaye Commission to conclude that New York State is failing to meet its constitutional and legal obligations to indigent persons accused of crimes, including the

absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and largely county-financed public defense system.

Edward Kaminski (Suffolk County)

187. Edward Kaminski was arrested on December 11, 2006, and charged with grand larceny in the fourth degree, a felony. The maximum sentence that he faces is four years imprisonment and fines of up to $5000.

188. Mr. Kaminski was assigned a Legal Aid attorney on March 20, 2007, after he ran out of funds to pay for his private attorney. Mr. Kaminski's first contact with his Legal Aid attorney was for less than five minutes in the public hallway outside the court room before an appearance.

189. Following this brief meeting, Mr. Kaminski never saw, spoke with, or communicated with his attorney except during scheduled court appearances or in the public hallway outside the courtroom for less than five minutes prior to court appearances.

190. At a court appearance on May 15, 2007, Mr. Kaminski was informed that he would be assigned to a different Legal Aid attorney. Neither the court nor his new attorney offered any explanation for the reassignment.

191. On September 19, 2007, Mr. Kaminski was assigned to a third Legal Aid attorney. Mr. Kaminski was dismayed because he felt he had developed a relationship with his second attorney and had been satisfied with and confident in that attorney's representation. Once again, no explanation for the reassignment was offered. As with both of his previous attorneys, Mr. Kaminski only met with his third attorney for less than five minutes outside the court room in the public hallway, in front of other defendants, immediately prior to his court appearance.

Upon information and belief, Mr. Kaminski's new attorney had not had time to review Mr. Kaminski's case file and familiarize himself with the status of his case. At the appearance, Mr. Kaminski's attorney requested an adjournment.

192. Mr. Kaminski missed his October 15, 2007, court date. Shortly afterward, Mr. Kaminski's first attorney – not his present attorney – wrote him a letter informing him that a bench warrant had been issued due to Mr. Kaminski's non-appearance.

193. At his next court date, on October 30, 2007, Mr. Kaminski approached both his first and his third Legal Aid attorneys in the hope of clearing up his confusion about who was representing him. Mr. Kaminski was not alone in his confusion, as his third Legal Aid attorney confessed that he did not know who Mr. Kaminski's attorney was at the time and stated that the Legal Aid office is in "chaos."

194. At that court appearance, on October 30, the judge presented Mr. Kaminski with a pre-trial order stating that, due to his non-cooperation with the Legal Aid Society, his right to court-appointed counsel had been waived. Mr. Kaminski believes that the large number of adjournments on his case due to the constant changing of Legal Aid attorneys gave the court the misperception that he was not cooperating with them. However, upon information and belief, his attorneys sought adjournments most often to compensate for their lack of preparation. Mr. Kaminski is currently without a lawyer. His trial is scheduled for November 29, 2007.

195. The stress caused by the confusion and prolonged adjudication of his case has affected Mr. Kaminski's health. He has lost fifteen pounds since he was charged and often has trouble sleeping at night. Mr. Kaminski has missed necessary medical appointments to treat his neuropathy and Hepatitis C because the dates often conflict with required court appearances. He has also been unable to visit and care for his elderly mother who suffers from dementia.

196. The State of New York has failed to provide Mr. Kaminski with the representation to which he is constitutionally and legally entitled, insofar as he has been wrongly denied his right to counsel; has been deprived of the ability to develop a meaningful attorney-client relationship and to have representation at every critical stage due to lack of consistent representation; and does not understand where his case stands or what work has been done on it while on the verge of going to trial as a *pro se* litigant. Upon information and belief, the State of New York will continue to fail to provide Mr. Kaminski with the legal representation to which he is entitled as his case proceeds.

197. The representation provided to Mr. Kaminski is illustrative of the pattern of representation provided to indigent defendants in the Counties and results from the structural and systemic failings that led the Kaye Commission to conclude that New York State is failing to meet its constitutional and legal obligations to indigent persons accused of crimes, including the absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and largely county-financed public defense system.

Joy Metzler (Suffolk County)

198. Joy Metzler was arrested on October 16, 2007, and charged with petit larceny, a misdemeanor. The maximum sentence she faces is one year in jail, as well as fines up to $1000.

199. Ms. Metzler saw her attorney for the first time in open court during arraignment. Bail was set at $1000 cash or $3000 bond, which Ms. Metzler could not afford, causing her to remain in jail for seven days until her brother was able to raise money and post bail. Ms. Metzler's attorney took no action to advocate for lower bail and, as a result of her incarceration,

she lost her new job. She is unsure how her family, including her brother and his three children who depend on her income, will now get by.

200. At her next court appearance, on October 22, 2007, Ms. Metzler was represented by a second Legal Aid attorney. This attorney met with Ms. Metzler for a few minutes prior to the court appearance in the holding area, in full hearing of correctional officers and other inmates. Since then, Ms. Metzler has not seen or heard from her attorney and remains unsure of the status of her case.

201. Upon information and belief, neither of Ms. Metzler's attorneys conducted any independent investigation into the facts surrounding Ms. Metzler's case or the existence of any valid defenses that might have been available.

202. The State of New York has failed to provide Ms. Metzler with the legal representation to which she is constitutionally and legally entitled, insofar as she has not been provided with consistent, vertical representation; has not had sufficient opportunity to discuss her case with her attorney, to participate in building a defense to the charges against her, or to make informed decisions about the progress and disposition of her case; and was subjected to unnecessary incarceration. Upon information and belief, the State of New York will continue to fail to provide Ms. Metzler with the legal representation to which she is entitled as her case proceeds.

203. The representation provided to Ms. Metzler is illustrative of the pattern of representation provided to indigent defendants in the Counties and results from the structural and systemic failings that led the Kaye Commission to conclude that New York State is failing to meet its constitutional and legal obligations to indigent persons accused of crimes, including the

absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and largely county-financed public defense system.

Victor Turner (Suffolk County)

204. Victor Turner was arrested on August 18, 2007, and charged with criminal possession of a controlled substance in the seventh degree and resisting arrest, both misdemeanors, and disorderly conduct, a violation. Mr. Turner also faces another misdemeanor possession of a controlled substance charge from an earlier incident in 2006. The maximum sentence Mr. Turner faces is six years imprisonment, as well as fines of up to $7250.

205. Legal Aid began its representation of Mr. Turner on or around January of 2007, when he ran out of funds to pay the private attorney he has been able to retain on his 2006 charge. Since that time, Mr. Turner's case has been handled by at least four different Legal Aid attorneys. During the first seven months of his representation by Legal Aid, he was represented by a different attorney at each court appearance. His current attorney has been handling his case for four months.

206. Mr. Turner's only meetings with his various attorneys have taken place at the courthouse immediately before or during scheduled court appearances. Each of these meetings lasted less than five minutes and took place in the hallway or other public areas of the courtroom, in full hearing of correctional officers and other defendants.

207. Mr. Turner has repeatedly refused to accept a plea offer urged on him by both the prosecutor and his own attorneys. Each time, Mr. Turner's attorneys have responded to his refusal by requesting an adjournment of his case, whereupon the prosecutor and Mr. Turner's

next attorney would simply present the same plea bargain to him again at the next court appearance.

208. Mr. Turner has never spoken with or seen any of his attorneys except in court. During the first ten months of his representation by Legal Aid, he did not even have contact information for Legal Aid and was unable to ask questions or get updates about the status of his case. Mr. Turner eventually received a business card with his current attorney's contact information during his October 19, 2007, court appearance, ten months after he was assigned to be represented by Legal Aid.

209. Upon information and belief, Mr. Turner's attorneys have conducted no independent investigation of the facts underlying his charges or any possible defenses that may be available to him. Mr. Turner is concerned that witnesses who could support his defense may disappear because the incident underlying his arrest occurred over one year ago.

210. The prolonging of Mr. Turner's case over the past year has made it difficult for him to hold down a job because he must constantly request days off for court appearances. As a result, Mr. Turner is unable to meet his child-support obligations to his young daughter. Mr. Turner also lost his car, making it even more difficult to hold down a job and make his monthly court appearances.

211. Mr. Turner's next court appearances are scheduled for November 16, 2007, and November 30, 2007. His attorneys have yet to explain the purpose of these appearances or prepare him for them.

212. The State of New York has failed to provide Mr. Turner with the representation to which he is constitutionally and legally entitled, insofar as he has not been provided with consistent, vertical representation; has not had sufficient opportunity to discuss his case with his

attorneys, to participate in building a defense to the charges against him, or to make informed decisions about the progress and disposition of his case; has been deprived of appropriate investigative assistance, motions practice and vigorous advocacy that may have contributed to a favorable resolution of the charges; and does not understand where his case stands or the status of the charges against him. Upon information and belief, the State of New York will continue to fail to provide Mr. Turner with the legal representation to which he is entitled as his case proceeds.

213. The representation provided to Mr. Turner is illustrative of the pattern of representation provided to indigent defendants in the Counties and results from the structural and systemic failings that led the Kaye Commission to conclude that New York State is failing to meet its constitutional and legal obligations to indigent persons accused of crimes, including the absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and largely county-financed public defense system.

Candace Brookins (Washington County)

214. Candace Brookins was arrested on October 15, 2007, and charged with five counts of forgery in the second degree, a felony, five counts of criminal possession of a forged instrument in the second degree, also a felony, and one count of petit larceny, a misdemeanor. Ms. Brookins faces a maximum sentence of twenty years in prison, as well as fines of up to $51,000.

215. Ms. Brookins has a four-year-old daughter whom Ms. Brookins's mother is taking care of while Ms. Brookins is incarcerated. If Ms. Brookins were sentenced to the statutory

maximum, she would not be released until her daughter was twenty-four, losing all opportunity to raise and parent her.

216. Ms. Brookins has only spoken to her attorney once over the phone and once immediately prior to a court appearance on October 16, 2007, when her attorney spoke to her while a corrections officer was only feet away, with no apparent concern for confidentiality. Ms. Brookins's attorney has not provided her with a copy of her court files or the investigative files for her case.

217. Upon information and belief, Ms. Brookins's attorney has conducted no independent investigation into the facts surrounding Ms. Brookins's case or the existence of any possible defenses that may be available to her

218. Ms. Brookins is currently represented by the same attorney who represented a witness in Ms. Brookins's case when that witness was initially charged with the crime with which Ms. Brookins now stands accused, a clear conflict of interest. The witness had been charged with crimes derived from passing bad checks, but, represented by Ms. Brookins's current attorney, defended herself by claiming that Ms. Brookins had in fact written the checks without her permission. The charges against the witness were dropped, and charges were subsequently filed against Ms. Brookins based on the witness's statements.

219. Ms. Brookins had a court hearing on October 30, 2007. Upon information and belief, her case was adjourned pending indictment. She remains incarcerated.

220. The State of New York has failed to provide Ms. Brookins with the representation to which she is constitutionally and legally entitled, insofar as she has not had sufficient opportunity to discuss her case with her attorney, to participate in building a defense to the charges against her, or to make informed decisions about the progress and disposition of her

case; and has not been provided with an attorney who is free from conflicts concerning her case. Upon information and belief, the State of New York will continue to fail to provide Ms. Brookins with the legal representation to which she is entitled as her case proceeds.

221. The representation provided to Ms. Brookins is illustrative of the pattern of representation provided to indigent defendants in the Counties and results from the structural and systemic failings that led the Kaye Commission to conclude that New York State is failing to meet its constitutional and legal obligations to indigent persons accused of crimes, including the absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and largely county-financed public defense system.

Randy Habshi (Washington County)

222. Randy Habshi was arrested on July 26, 2007, and charged with burglary in the second degree, a felony. He faces a maximum sentence of fifteen years of imprisonment, as well as fines of up to $15,000.

223. At arraignment, Mr. Habshi was not represented by counsel. Bail was set at $100,000 cash or $200,000 bond, which he could not afford.

224. Without any meaningful conversations with his attorney and without fully understanding the nature of the waiver, on August 1, 2007, Mr. Habshi waived his preliminary examination based on his attorney's instruction.

225. For over two months, between August and October, Mr. Habshi never saw or spoke with his attorney outside of court appearances, despite Mr. Habshi's repeated attempts to contact his attorney. At a court appearance on October 10, 2007, Mr. Habshi's attorney did not

show up. The next day, Mr. Habshi's attorney visited him in jail for a few minutes solely to deliver the prosecutor's plea offer.

226. Mr. Habshi's official criminal record contains what he believes to be a mistake, but his attorney has provided him no opportunity to discuss the mistake or the possibility of clearing it up. This potential error, a plea to a misdemeanor that is currently recorded as a felony, could make a substantial difference in sentencing if Mr. Habshi were to plead guilty or be found guilty after trial. The prosecutor's plea offer reflects the possibly mistaken premise that Mr. Habshi has a previous felony conviction.

227. Mr. Habshi has taken advantage of his time in jail to break several addictions. He has completed a GED course and is awaiting the results of his examination. Nevertheless, Mr. Habshi's attorney has failed to speak with him concerning any details of his life which might become relevant at sentencing, should Mr. Habshi plead guilty or be found guilty after trial.

228. The State of New York has failed to provide Mr. Habshi with the representation to which he is constitutionally and legally entitled, insofar as he had insufficient opportunity to discuss his case with his attorney, to participate in building a defense to the charges against him, and to make informed decisions about the progress and disposition of his case. Mr. Habshi has also been deprived of alternatives to incarceration that would offer him effective treatment for his past drug addictions. Upon information and belief, the State of New York will continue to fail to provide Mr. Habshi with the legal representation to which he is entitled as his case proceeds.

229. The representation provided to Mr. Habshi is illustrative of the pattern of representation provided to indigent defendants in the Counties and results from the structural and systemic failings that led the Kaye Commission to conclude that New York State is failing to meet its constitutional and legal obligations to indigent persons accused of crimes, including the

absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and largely county-financed public defense system.

Ronald McIntyre (Washington County)

230. Ronald McIntyre was arrested on October 24, 2005, and charged with grand larceny in the fourth degree, a felony. He faces a maximum sentence of seven years of imprisonment, as well as fines of up to $5,000.

231. On December 20, 2005, Mr. McIntyre notified the court that he had attempted to contact his public defense attorney several times to ascertain the date of his next court hearing, but the public defender had not returned his calls. Mr. McIntyre's court file contains no indication that the court responded to his request for information concerning his next court date. Because of his attorney's failure to inform him of his court date, Mr. McIntyre then missed his court date on January 17, 2006. A bench warrant was issued for Mr. McIntyre's arrest, and he was re-arrested and remanded to jail on August 14, 2007.

232. Mr. McIntyre was assigned a new attorney following his re-arrest. He spoke with this attorney for only one or two minutes at two separate court appearances.

233. Mr. McIntyre has now been assigned a third attorney. Mr. McIntyre has had no contact with this third attorney and has not been able to discuss the strategic ramifications of testifying before the grand jury with any attorney.

234. As of the filing of this complaint, Mr. McIntyre has been incarcerated for nearly three months and does not understand what is happening with his case or whether he has been indicted.

235. The State of New York has failed to provide Mr. McIntyre with the representation to which he is constitutionally and legally entitled, insofar as he has been denied consistent, vertical representation, hampering his attempts to explain his case to an attorney and his hopes of receiving substantive representation; and has had insufficient opportunity to discuss his case with his attorney, to participate in building a defense to those charges, or to make informed decisions about the progress and disposition of his case. Upon information and belief, the State of New York will continue to fail to provide Mr. McIntyre with the legal representation to which he is entitled as his case proceeds.

236. The representation provided to Mr. McIntyre is illustrative of the pattern of representation provided to indigent defendants in the Counties and results from the structural and systemic failings that led the Kaye Commission to conclude that New York State is failing to meet its constitutional and legal obligations to indigent persons accused of crimes, including the absence of statewide standards, meaningful oversight and adequate funding of the current county-operated and largely county-financed public defense system.

The Right to Counsel in New York State

237. The right to counsel is firmly established in New York State and has been since the Legislature passed section 308 of the Criminal Procedure Law in 1881. Indeed, the Constitution and laws of New York provide far more extensive protections in this area than federal constitutional law provides. *See, e.g., People v. Settles*, 46 N.Y.2d 154, 161 (1978) ("So valued is the right to counsel in this State ... it has developed independent of its Federal counterpart .... Thus, we have extended the protections afforded by our State Constitution beyond those of the Federal – well before certain Federal rights were recognized."); *People v.*

Arthur, 22 N.Y.2d 325, 328 (1968) (noting that the broad right to counsel in New York requires exclusion of confession taken after attorney request and was denied access to client, though federal law may not); *People v. Benevento*, 91 N.Y.2d 708, 714 (1998) (rejecting the more restrictive "harmless error" test applied to federal claims of ineffective assistance of counsel and applying a more flexible standard); *People v. Krom*, 61 N.Y.2d 187, 197 (1984) (explaining that, in contrast to federal law, the right to counsel in New York does not permit law enforcement to question a suspect after invocation of right to counsel even if the suspect initiates conversation).

238. In 1965, the Court of Appeals further expanded the right to counsel in *People v. Witenski*, which held that indigent defendants in all criminal cases, not merely in felony prosecutions, are entitled to have counsel appointed to represent them. 15 N.Y.2d 392, 395 (1965). The Court of Appeals observed that the "right and the duty of our courts, to assign counsel for the defense of destitute persons, indicted for crime, has been, by long and uniform practice, as firmly incorporated into the law of the State, as if it were made imperative by express enactment." *Id.* at 397 (internal quotation omitted). The Court also noted that in New York State "the right of counsel must be made 'meaningful and effective' in criminal courts on every level." *Id.* at 395.

239. That same year, the Court of Appeals held in *People v. Hughes*, that an indigent defendant "who is by statute accorded an absolute right to appeal ... is entitled to the assignment of counsel to represent him on such appeal if he so requests." 15 N.Y.2d 172 (1965). It is equally well established that this right requires "meaningful and effective" assistance of assigned appellate counsel. *Id.* at 173.

240. Accordingly, under the Constitution and laws of New York, as well as the Constitution of the United States, the obligation to provide meaningful and effective assistance of counsel to indigent defendants in all criminal court proceedings rests with the State.

The State's Abdication of Responsibility for Public Defense Services to the Counties

241. In 1965, to meet constitutional mandates, the Legislature adopted Article 18-B of the New York County Law, requiring each of New York's 62 counties to establish its own plan for providing indigent criminal defendants with legal representation. Article 18-B offers counties the option of creating a public defense system using one of three methods, or a combination thereof: (1) establishing county public defender offices; (2) contracting with a private legal aid society; or (3) using a panel of private assigned counsel.

242. Onondaga County relies solely on an assigned counsel system to provide public defense services to criminal defendants. The assigned counsel program is administered by the Onondaga County Bar Association under contract with the county government.

243. Ontario County also relies solely on an assigned counsel system, administered by the Ontario County Bar Association, to provide public defense services to criminal defendants.

244. Schuyler County relies on a county public defender office to provide public defense services to criminal defendants. The Schuyler County public defender office consists of a Chief Public Defender and one part-time assistant public defender. The county maintains a contract with a private attorney from an adjacent county to handle most cases in which the public defender cannot represent the client due to a conflict of interest; any additional conflicts cases are distributed among a small number of assigned counsel.

245. Suffolk County contracts with a legal aid society to provide the majority of its public defense services, with a smaller number of conflicts cases handled by assigned counsel. The Suffolk County Legal Aid Society consists of approximately 60 full-time attorneys who staff two offices, one in the eastern part of the county and another in the western part.

246. Washington County relies on a county public defender office to provide public defense services to criminal defendants. The Washington County public defender office consists of one part-time Chief Public Defender and three additional part-time assistant public defenders. Conflict cases are handled by assigned counsel.

The Lack of Enforceable, Statewide Standards

247. Unlike the vast majority of the rest of the country, New York State has established no enforceable standards for the provision of public defense services by which the quality of representation can be measured and guaranteed. Thus, there is no mechanism for measuring whether constitutionally adequate counsel is being provided to indigent defendants and for insuring against disparities in the quality of representation by mere happenstance of geographic location.

248. The American Bar Association (ABA), the National Legal Aid and Defender Association (NLADA), the National Advisory Commission on Criminal Justice Standards and Goals (NAC), the New York State Defenders Association (NYSDA), and the New York State Bar Association (NYSBA) have all promulgated standards reflecting a general consensus for measuring the quality of defense services. *See, e.g.*, ABA Standards for Criminal Justice: Providing Defense Services (3d ed. 1992); ABA Ten Principles of a Public Defense Delivery System (2002); ABA Standards for Criminal Justice, Providing Defense Services (3d ed. 1992);

NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984); NLADA, Standards for the Administration of Assigned Counsel Systems (1989); NAC Report of the Task Force on Courts (1973); NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Representation in New York State (2004); NYSBA, Standards for Providing Mandated Representation (2005).

249. None of these standards are enforced by the State.

The Lack of State Supervision and Oversight

250. Article 18-B delegates to the counties responsibility for providing meaningful and effective representation in criminal proceedings to people who cannot afford private lawyers. The State exercises no meaningful supervision or oversight of the provision of public defense services.

251. No state agency or office exists for the purpose of monitoring or evaluating the quality of representation provided under the counties' chosen plans for providing public defense.

252. Although the Office of the State Comptroller requires each county to submit an annual report in order to qualify for state funding for public defense services, no state agency or officer reviews these forms for the purpose of evaluating whether the counties' systems meet constitutional standards for representation. A county's system is only evaluated by the Comptroller's office if the annual report reflects a reduction in local expenditures from the previous year, in which case the county may still qualify for state funds if they demonstrate a "maintenance of effort" to provide public defense services.

253. Counties often provide inaccurate or incomplete information in their annual reports. In past years, several counties have failed to complete any report at all.

The Lack of Adequate State Funds for Public Defense Services

254. Article 18-B places the financial burden on the counties to provide public defense services. The result, according to the Kaye Commission Report, is that "[t]he amount of monies currently allocated within the State of New York for the provision of constitutionally-mandated indigent criminal defense is grossly inadequate."

255. In 2003, responding to a court ruling, the Legislature raised the rates of compensation for private assigned counsel lawyers (known as 18-B lawyers) and created the Indigent Legal Services Fund ("ILSF") to provide, for the first time, some state funding to compensate for the additional county expenditures required to cover the increase in 18-B rates.

256. Despite the creation of the ILSF, state funding remains a very small percentage of the overall cost of public defense services in the counties and does not ensure adequate funding levels. In all but one county, state funds in 2006 accounted for one-quarter or less of the total costs of providing public defense services. In many counties, state funds constituted only 15% of overall public defense expenditures. Across the state, state funds accounted for 18% of total spending on public defense, with counties bearing the burden for most of the remaining costs.

257. As the Kaye Commission notes, the State's failure to provide adequate funding "imposes a large unfunded mandate by the state upon its counties [that] results in a very uneven distribution of services and compromises the independence of defense providers." The Kaye Commission concludes that the funding system "results in an inadequate and in many respects an unconstitutional level of representation and creates significant disparities in the quality of representation based on no factor other than geography, thereby impugning the fairness of New York's criminal justice system."

The Kaye Commission on the Future of Indigent Defense's Indictment of New York's Public Defense System

258. A comprehensive indictment of New York's public defense system came in June 2006, when the Kaye Commission on the Future of Indigent Defense released a report concluding that "the indigent defense system in New York State is both severely dysfunctional and structurally incapable of providing each poor defendant with the effective legal representation that he or she is guaranteed by the Constitution of the United States and the Constitution and laws of the State of New York .... [and] has resulted in a disparate, inequitable, and ineffective system for securing constitutional guarantees to those too poor to obtain counsel of their own choosing."

259. The Kaye Commission was convened in May 2004 by Chief Judge Judith S. Kaye and, according to Judge Kaye's State of the Judiciary Address earlier that year, was charged with "examin[ing] the effectiveness of indigent criminal defense services across the State, and consider[ing] alternative models of assigning, supervising and financing assigned counsel compatible with New York's constitutional and fiscal realities." Chaired by William E. Hellerstein and the Honorable Burton B. Roberts, the Kaye Commission consisted of 30 members representing each of New York's twelve judicial districts and included prominent prosecutors, defense attorneys and judges.

260. The Kaye Commission conducted four public hearings (in New York City, Albany, Rochester and Ithaca), with testimony from 93 individuals and groups from across the State, including public defenders, private defense lawyers, assigned counsel plan administrators, judges, prosecutors, experts in public defense, bar association representatives, members of the civil rights community, representatives of community groups, and criminal defendants and their families.

261. The Kaye Commission also drew extensively on the factual findings of its consultant, The Spangenberg Group, which, according to the Kaye Commission, "is a nationally and internationally recognized criminal justice research and consulting firm that specializes in research concerning indigent defense services." The Spangenberg Group collected and analyzed data from each of New York's 62 counties and conducted independent site work in 22 counties specifically selected to be geographically and demographically representative of the entire State. The Spangenberg Group's findings were presented to the Kaye Commission in an April 5, 2006, report entitled *Status of Indigent Defense in New York.* According to the Kaye Commission, the Spangenberg Group's report represents "the most comprehensive study of indigent defense representation ever undertaken in New York State."

262. Based on the facts uncovered by the Spangenberg Group and on the hearings it conducted, the Kaye Commission concluded that "New York's current fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused."

263. The Kaye Commission's "ultimate conclusion," based on all the information presented to it, was "that the delivery system most likely to guarantee quality representation to those entitled to it is a statewide defender system that is truly independent, is entirely and adequately state-funded, and is one in which those providing indigent defense services are employees of entities within the defender system or are participants in an assigned counsel plan that has been approved by the body established to administer the statewide defender system." Further, the Commission noted that "[a]dequate funding of indigent criminal defense must be provided by the New York Legislature from the State's General Fund, not from the counties."

New York State's Long History of Violating the Right to Counsel for Indigent Defendants

264. The Kaye Commission report is only the latest in a long line of indictments of New York's public defense system. The State has never fully lived up to its obligation to provide meaningful and effective assistance of counsel to all indigent defendants facing criminal charges, though it has long known that its obligation was not being met. There is a decades-long history of indictments levied against New York's fractured public defense system.

265. As far back as 1967, the New York State Bar Association conducted a seminar addressing the absence of standards for ensuring quality representation and the lack of guidelines for determining eligibility, utilizing investigators and experts, and establishing the scope of representation. Throughout the 1980s and early 1990s, the New York State Defenders Association published a series of reports and testified before numerous bodies decrying the crisis in public defense funding. In 1994, the New York County Lawyers Association established a task force to study the issue and, the following year, urged the immediate creation of a Board of Trustees for Indigent Defense to oversee and secure the professional independence of defender organizations in New York City.

266. In 1997, the New York County Lawyers' Association's Task Force on the Representation of the Indigent issued a report declaring that the rates of compensation for assigned counsel were inadequate and "inconsistent with New York's commitment to equal justice." NYCLA, *Task Force on the Representation of the Indigent, Assigned Counsel Compensation Committee* (1997).

267. In 2000, the Unified Court System issued a report, *Assigned Counsel Compensation in New York: A Growing Crisis*, which focused on the problem created by low rates for assigned counsel. The report concluded not only that rates should be increased, but also

that the State must share the cost of assigned counsel compensation, establish a statewide review process for reviewing rates, and implement statewide eligibility standards.

268. In March 2001, after holding extensive hearings, the Appellate Division, First Department's Committee on Legal Representation of the Poor issued a report entitled *Crisis in the Legal Representation of the Poor: Recommendations for a Revised Plan to Implement Mandated Funded Legal Representation of Persons Who Cannot Afford Counsel.* The report concluded that "[t]he entire system by which poor people are provided legal representation is in crisis" and that the major causes of the crisis included "lack of resources, support and respect, [and] inadequate funding of institutional providers combined with ever-increasing caseloads." The Committee called on the State "to reconsider the entire legislative structure relating to governmentally funded legal representation of the poor."

269. Also in 2001, the New York State Defenders' Association issued a report, *Resolving the Assigned Counsel Fee Crisis: An Opportunity to Provide County Fiscal Relief and Quality Public Defense Services.* The report went beyond the call for raising assigned counsel rates and called for the creation of "an independent and politically insulated statewide Public Defense Commission that would oversee both the distribution of state funds and the provision of defense services," as well as the creation of enforceable, statewide standards for both eligibility determinations and evaluating service providers.

270. In April 2001, the *New York Times* published a three-part series on New York City's public defense system. An April 12, 2001, editorial accompanying the series noted that its description of the system raised a real question of "whether many defendants are getting the legal representation to which they are entitled, or are receiving merely token representation to give their trials a veneer of constitutionality" and called for "a strong state role – preferably through a

politically insulated commission – in setting quality standards … and in exercising vigorous oversight to make sure those standards are met."

271. In July 2001, the Committee for an Independent Public Defense Commission, chaired by Michael S. Whiteman, former counsel to Governor Nelson A. Rockefeller, declared that the indigent defense system was on the verge of collapse and presented a bill to establish an independent oversight commission.

272. In 2003, New York County Lawyers' Association successfully sued the State of New York, alleging that the compensation scheme for assigned counsel violated the state and federal constitutional right to meaningful and effective counsel. In his decision, Supreme Court Justice Lucindo Suarez made the following factual findings regarding the provision of public defense services across the State:

> Too many assigned counsel do not: conduct a prompt and thorough interview of the defendant; consult with the defendant on a regular basis; examine the legal sufficiency of the complaint or indictment; seek the defendant's prompt pre-trial release; retain investigators, social workers, or other experts where appropriate; file pretrial motions where appropriate; fully advise the defendant regarding any plea and only after conducting an investigation of the law and the facts; prepare for trial and court appearances; and engage in appropriate presentence advocacy, including seeking to obtain the defendant's entry into any appropriate diversionary program.

N.Y. County Lawyers Ass'n v. State, 196 Misc.2d 761, 774-75 (Sup. Ct. N.Y. County 2003).

273. In 2004, the inadequacies of New York's public defense system were noticed on a national level in the American Bar Association's Report, *Gideon's Broken Promise*. The report noted that New York failed to meet national standards regarding training for public defense service providers, unconstitutionally restricted eligibility standards because of financial pressures to keep costs low, and in some parts of the state had "radically out of whack" caseloads ranging from 1200 to 1600 cases per attorney.

274. Also in 2004, the NAACP Legal Defense & Education Fund released a report entitled *The Status of Indigent Defense in Schuyler County* concluding after four months of field work that "the quality of public defense services ... was extremely poor and fell short of state and federal constitutional, as well as professional standards for criminal defense."

275. In 2005, the New York State Bar Association's Special Committee to Ensure Quality of Mandated Representation released a report finding that public defense service providers in New York "are under-funded and overworked to such an extent that they lack the time or resources necessary to maintain and improve the quality of the representation they provide." The report concluded that addressing New York's public defense crisis required "the creation of an independent public defense oversight mechanism empowered to provide oversight, quality assurance, support and resources to providers of mandated representation."

276. As recently as August, 2007, a joint report of the National Legal Aid and Defender Association and the New York State Defender's Association detailed the problems with New York's public defense system as they impacted Franklin County. The report concluded that, "[v]ictimized by an underfunded and fragmented system that violates national legal standards and the state's professed commitment to equal justice, Franklin County fails to provide effective representation on behalf of the accused in criminal cases.... [L]eaving the task of funding public defense services to the counties – even in part – endangers a state's entire ability to dispense justice fairly."

277. In light of the Kaye Commission Report, the Spangenberg Group Report and the numerous reports and studies that preceded them, it is clear that the State has known of the deficiencies in the State's public defense system for many years. The State's failure to remedy

those deficiencies amounts to deliberate indifference to the constitutional and legal rights of indigent criminal defendants.

The Statewide Failure to Meet Basic Standards of Constitutional Legal Representation

278. As a result of the State's failure to provide oversight, standards, and funding, indigent persons in New York State, including in the Counties, are not receiving, or are at severe and unacceptably high risk of not receiving, constitutionally and legally adequate representation, as measured by well-accepted national and state standards.

279. There is a national consensus on both the requirements of meaningful and effective public defense delivery systems and the tasks public defense providers must undertake to provide constitutionally adequate legal representation. This consensus is reflected in standards for the provision of public defense services promulgated by the American Bar Association (ABA), the National Legal Aid and Defender Association (NLADA), the National Advisory Commission on Criminal Justice Standards and Goals (NAC), the New York State Defenders Association (NYSDA), and the New York State Bar Association (NYSBA).

280. The public defense system in New York does not live up to these basic standards. As the Kaye Commission found, "New York's indigent defense system does not even conform to the American Bar Association's Ten Principles of a Public Defense Delivery System."

281. The public defense systems in the Counties suffer many symptoms of a broken public defense system as measured by national and state standards, including: inadequate staffing resulting in no representation for some defendants, particularly in arraignments where bail determinations and other critical decisions are made; incoherent or excessively restrictive eligibility standards that exclude indigent people from getting counsel; lack of attorney-client

consultation and communication impairing the ability to present and prepare a defense and advocate for pre-trial release; a lack of hiring criteria, performance standards and supervisory controls resulting in a lack of meaningful and effective counsel; a lack of training resulting in inexperienced and inadequate counsel; a lack of resources for investigations and expert services where they are needed to present an adequate defense; overwhelming caseloads and/or workloads that prevent attorneys from serving all their clients; a lack of vertical representation, such that different attorneys represent the same defendant at various stages, impairing the development of an attorney-client relationship, resulting in gaps in representation during critical phases, and depriving clients of lawyers who understand their case; a lack of independence from judicial, prosecutorial and political authorities that compromises the ability to provide adequate representation; and inadequate resources and compensation, particularly as compared to prosecutorial personnel, resulting in poor quality representation.

Inadequate Staffing and the Failure to Provide Representation to Indigent Defendants At All Critical Stages

282. Attorneys are not always available to represent each eligible defendant at every critical stage of the criminal process, thus directly depriving defendants of the right to counsel.

283. The Spangenberg Group's report to the Kaye Commission found that public defense service providers "in most counties across the state are not staffed sufficiently to cover all of the numerous dockets in their counties." Moreover, "some judges do not apply the law [requiring appointment of counsel] ... out of fiscal concern ...."

284. National and state standards for the administration of a public defense system recognize that a defense attorney should be present at all critical stages of the prosecution, including arraignment. *See* First Department Indigent Defense Organization Oversight Committee, General Requirements for All Organized Providers of Defense Services to Indigent

Defendants (1996), Performance Standard II; NLADA Guidelines for Legal Defense Systems in the United States (1976), Guidelines I-1.2(a) & V-5.11; NLADA Performance Guidelines for Criminal Defense Representation (1995), Guidelines 1.1 & 3.1; NLADA Standards for the Administration of Assigned Counsel Systems (1989), Standards 2.1(c) & 2.5(a); NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standard V(A)(3); NYSBA Standards for Providing Mandated Representation (2005), Standard B-2.

285. The common practice of making bail determinations during arraignment makes the presence of counsel even more critical at this stage. In a 2007 study of non-felony cases in New York City, the New York City Criminal Justice Agency found that higher rates of bail correlate with longer period of pretrial detention, and longer periods of pre-trial detention, even controlling for other factors, creates an increased likelihood of conviction. The study suggests that detained defendants may be less able to assist in building a defense and that detained defendants may feel pressure to plead guilty in order to gain release. *See* Mary D. Philips, Ph.D., *Bail, Detention, and Non-Felony Case Outcomes*, CJA Research Brief (May 2007). Thus, the absence of counsel to advocate for lower bail or alternatives to pretrial incarceration at arraignment is particularly harmful.

286. In Onondaga County, for example, many defendants are not represented at arraignments where crucial decisions about bail are made and pleas may be offered and accepted without benefit of advice from counsel. Attorneys assigned to cover arraignments often do not have the time or resources to interview all incarcerated defendants before arraignment, and if defendants are not interviewed they are not represented. Defendants who are not in custody are largely not represented at arraignment at all.

287. In Ontario County, many defendants are unrepresented at arraignment, and bail determinations are regularly made without the benefit of representation or advocacy by counsel. One county justice reports that in the ten years he has been on the bench, he has only seen an attorney present at arraignment once. Without the benefit of advocacy from counsel, bail may be set based on inappropriate factors. For example, some judges frequently deny bail to unrepresented defendants who did not take a breathalyzer test at the time of an arrest for a DUI.

288. In Schuyler County, defendants appear without attorneys at arraignments where, again, bail determinations are often made. Defendants are therefore unable to advocate for appropriate bail determinations and thus face unnecessary incarceration.

289. In Washington County, nearly all defendants are unrepresented at arraignments and in the early stages of the criminal process. Defendants are sometimes pressured not to get lawyers by judges and prosecutors who offer a plea before counsel is assigned and imply that the plea offer will be withdrawn if the defendant waits for the appointment of counsel. Defendants also are unable to advocate for appropriate bail determinations and thus face unnecessary incarceration.

290. Many defendants who are unrepresented in critical proceedings plead guilty without the benefit of advice from counsel and without fully understanding the consequences of their plea. Unrepresented defendants may be forced to negotiate with the district attorney and the judge directly, without the benefit of advice and representation from counsel.

291. Similarly, many defendants who are unrepresented in critical proceedings make incriminating statements that could prejudice their cases. In Schuyler County, for example, a judge stated to an unrepresented defendant charged accused of making false statements, "It says

here you lied to the police," and the defendant, without counsel to advise him, confirmed that he had done so.

292. The Counties often fail to appoint counsel for defendants charged with lower-level offenses, in plain violation of the right to counsel. In Suffolk County, for example, judges often deny counsel to a defendant because he or she is facing a violation charge, even though the defendant is in custody or facing jail time.

293. The deprivation of the right to counsel is particularly evident in the justice courts, also known as "town and village" courts. These courts handle by far the largest number of cases in the state's criminal justice system, including violations, misdemeanors and the preliminary stages of felony prosecutions.

294. The Kaye Commission found "that the deprivation of indigent defendants' right to counsel was widespread in Town and Village Courts. Specifically, we learned that there are significant delays in the appointment of counsel, that many indigent defendants must negotiate pleas with the prosecution while unrepresented, and that many justices themselves lack a clear understanding as to which cases trigger the right to counsel. The Commission also learned that all too often counsel for indigent defendants are not available to attend the numerous Town and Village Courts."

295. The institutional providers in Suffolk, Schuyler and Washington counties do not have adequate staff to cover all the justice courts in their jurisdictions. The assigned counsel programs in Onondaga and Ontario do not have any system for ensuring that assigned counsel are available during critical proceedings in the justice courts. As a result, eligible defendants go unrepresented at critical stages.

296. In Schuyler County, one part-time assistant public defender must cover all non-felony cases in 11 justice courts, as well as paternity, child support, and drug treatment court cases. In Washington County, three part-time assistant public defenders cover 24 justice courts, in addition to sharing the family court docket with the Chief Public Defender.

297. It is not uncommon in the Counties for the right to counsel to be waived inappropriately in the justice courts, leaving defendants to negotiate directly with the prosecutor, most often resulting in a guilty plea and sentencing at the first court appearance.

298. In many counties, justice courts hold "DA nights" in which a district attorney is present to represent the prosecution in critical proceedings, but oftentimes no public defense attorney is available to represent indigent defendants. During these proceedings, when no public defense attorney is present, indigent defendants must negotiate and interact with both the justice and the prosecutor and may even enter a guilty plea, all without the benefit of counsel.

Incoherent or Excessively Restrictive Financial Eligibility Standards and Delays in the Appointment of Counsel

299. The lack of statewide eligibility standards results in incoherent and poorly designed processes for determining whether defendants are financially eligible for public representation and for ensuring prompt assignment of counsel.

300. The Kaye Commission found that "[t]here are no clear standards regarding eligibility determinations and procedures," and 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 determination."

301. National and state standards for the administration of a public defense system mandate clear guidelines governing eligibility determinations, in order to ensure that defendants

who need public representation are not denied their right to counsel. *See* NLADA Guidelines for Legal Defense Systems in the United States (1976), Guidelines I-1.5, I-1.6; NAC Report of the Task Force on Courts (1973), Standard 13.2; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standard VII; NYSBA Standards for Providing Mandated Representation (2005), Standards C-1, C-2.

302. National and state standards for the provision of public defense services also mandate that defense counsel be assigned as soon as possible after arrest, detention or a request for counsel. *See* ABA Ten Principles, Principle 3; ABA Standards for Criminal Justice, Defense Function (3d ed. 1993), Standard 4-3.6; ABA Standards for Criminal Justice, Providing Defense Services (3d ed.1992), Standard 5-6.1; NLADA Guidelines for Legal Defense Systems in the United States (1976), Standard I-1.2; NLADA Standards for the Administration of Assigned Counsel Systems (1989), Standard 2.5; NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984), Guidelines III-18; NAC Report of the Task Force on Courts (1973), Standard 13.1; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standard V(A)(3); NYSBA Standards for Providing Mandated Representation (2005), Standard B-1, B-2, B-4.

303. In Onondaga County, the assigned counsel program maintains written standards for eligibility that improperly exclude eligible defendants from representation. For example, ownership of a home – even a mobile home – automatically precludes assignment of counsel, without consideration of the value of the home, the equity in the home, or the ability to obtain a loan against the home. The standards also fail to consider whether clients carry any debts that would prevent them from being able to afford a lawyer.

304. Minors in Onondaga County are excluded from representation based on parental income, even if the parent will not pay for a lawyer, and based on lack of parental cooperation in providing income information.

305. In practice, moreover, eligibility determinations in Onondaga County are made by each judge according to his or her different and often subjective standards and procedures. The administrator of the assigned counsel program recently sent a letter from the county pressuring judges to assign counsel in fewer cases because of the county's fiscal concerns.

306. A lack of clarity regarding eligibility and assignment procedures in Onondaga County results in occasions where assigned counsel will attempt to coerce public defense clients into paying fees, a phenomenon, known as "flipping" a client. For example, one client reported that his assigned counsel attorney demanded $7500, with a $2500 retainer, before he would do any work on the client's case. The attorney also phoned the client's wife to demand payment. The client has not been able to pay the attorney and has remained incarcerated for over a month while his attorney persists in adjourning his court dates. A client of another assigned counsel attorney paid his appointed lawyer $2000 that he borrowed from his family for the promise of a "better result."

307. In Ontario County, judges make initial eligibility decisions based on their subjective determinations of a defendant's financial status, rather than through any standard process applying clear and uniform guidelines. Ultimate discretion over eligibility decisions rests with the assigned counsel administrator, with no avenue for judicial appeal.

308. Schuyler County has excessively stringent eligibility standards that result in the exclusion of clients who should qualify for a public defender. For example, owning a car is considered evidence that a client can afford a private lawyer, regardless of the value of the car,

and without accounting for the fact that a car is a basic necessity in rural Schuyler. One judge indicated to a defendant that if he made more than $16,000 a year, he would not qualify. Despite having one of the highest poverty rates in the State of New York, over the past four years nearly half of the clients referred to the Schuyler County public defender have been deemed "not indigent." Many people who are considered eligible in surrounding counties are deemed ineligible for public defender services in Schuyler.

309. Defendants in Schuyler County under the age of 21 are often disqualified based on parental income, regardless of whether the defendant is able to rely on that income.

310. In Suffolk County, eligibility determinations are based on income and the value of any assets that the applicant owns without accounting for debts, the amount of equity in any assets, other financial obligations, or the actual cost of retaining a private attorney to defend against the relevant charge. One defendant was denied a legal aid attorney after informing the court that he earned $12 per hour and that his weekly income after taxes is approximately $380. Without inquiring further into the defendant's financial status, family obligations, or ability to pay for an attorney, the judge informed the defendant that he would need to retain a private attorney. Forced between paying rent and paying to retain an attorney, the defendant chose to pay his rent and proceed without counsel.

311. Clients under the age of 21 in Suffolk County may be excluded from representation based on parental income, even if they are estranged from their parents or their parents refuse to pay for a lawyer.

312. In many of the justice courts in Suffolk County, eligibility determinations are made by judges based on arbitrary and subjective standards, often resulting in the denial of counsel for individuals who should be found eligible for public defense services.

313. In Washington County, eligibility determinations are made by the public defender office based on written guidelines that account only for income and family size and do not account for debts and other significant financial obligations.

314. In many counties, the system for determining eligibility results in serious delays and barriers to the appointment of counsel. For example, there are often delays in the appointment of counsel because of confusion on the part of applicants regarding the process for applying, the failure of judges to properly inform eligible defendants about the process, failure to appoint counsel immediately at arraignment, and difficulties in sorting out conflicts in multiple-defendant felony cases.

315. In Ontario County, for example, it is not uncommon for incarcerated clients to wait several days before learning the names of their attorneys and having an opportunity to communicate with them. In Onondaga County, one client languished in jail for three weeks before learning the name of his assigned counsel.

316. In Schuyler County, clients sometimes must wait a month or more after arrest before being assigned an attorney. One client applied for counsel the day she was arrested but, after not hearing from the public defender's office for over a month, gave up and asked a public defender from an adjacent county to represent her.

Lack of Attorney-Client Contact and Communication

317. Indigent defendants in the Counties suffer from a lack of access to and communication with their public defense counsel.

318. The Kaye Commission found that it is common to find public defense attorneys who do "not visit their clients in jail, return phone calls, answer letters, or conduct even minimal investigations of their clients' cases. In some counties, the only attorney-client contact available

is through collect calls to counsel, which many counsel refuse to accept. In a number of counties, attorney-client contact occurs only when the defendant is brought to court for a scheduled appearance."

319. National and state standards for public defense systems recognize that client contact and communication are essential elements of meaningful and effective representation. *See* ABA Ten Principles, Principle 4 (commentary); ABA Standards for Criminal Justice, Prosecution Function and Defense Function (3d ed. 1993), Standards 4-2.1, 4-3.1, 4-3.8; NLADA Guidelines for Legal Defense Systems in the United States (1976), Guideline I-1.3(a); NLADA Performance Guidelines for Criminal Defense Representation (1995), Guideline 1.3(c); NAC Report of the Task Force on Courts (1973), Standard 13.3; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standard VIII(A)(5), (7); NYSBA Standards for Providing Mandated Representation (2005), Standard I-3.

320. In Onondaga County, the assigned counsel program does not monitor or encourage attorney-client contacts. Indeed, the program frequently cuts vouchers for "too much" client contact. Most assigned counsel attorneys are unable or unwilling to visit their clients in jail and conduct all client contact prior to court appearances. One client reported having been incarcerated on misdemeanor charges for almost five months and never having spoken with his attorney about his case. Another attorney's client complained to the Onondaga Human Rights Commission that he had been in jail for more than 200 days without being indicted and had not seen his assigned counsel attorney in several months. When confronted with this fact by the Onondaga County Human Rights Commission, the attorney responded that he could not visit his client more often because "[Onondaga] County will not pay for superfluous jail visits."

321. In Onondaga County, assigned counsel under pressure of excessive caseloads frequently do not have time to speak to a client about anything other than a plea offer. One client reported that, after being unable to reach his attorney during several weeks in jail, he attempted to discuss his case with her before a court appearance but she interrupted him, said she "doesn't want to hear it," and refused to discuss anything but the prosecutor's plea offer. When the client expressed discomfort with the offer, the attorney began to walk away, swore at the client, and told him that if he wanted to go to trial he'd have to find another attorney.

322. Many incarcerated clients in Onondaga are unable to speak with their attorneys because their offices will not accept collect calls and their voicemail boxes, which are accessible by direct line from the jail, are always full.

323. The Ontario County assigned counsel program also does not monitor or ensure adequate attorney-client contacts. Incarcerated clients are often unable to reach their attorneys and do not receive timely updates about the status of their cases.

324. In Schuyler County, incarcerated inmates often cannot reach their public defender because their public defender's office is not equipped to or will not accept collect phone calls, which are some inmates' only means of making telephone calls. Released clients also may have trouble meeting with their attorney, particularly as the conflict defender and most assigned counsel attorneys maintain offices in other counties that are difficult and expensive to reach.

325. In Suffolk County, clients often complain that their attorneys do not return their calls and only want to talk about plea bargains. Clients are often pressured to accept plea bargains without any explanation of alternative options. Incarcerated clients rarely meet with their Legal Aid attorney outside of court appearances.

326. In Washington County, public defense attorneys rarely meet with clients outside of court appearances, most often in public places such as at counsel's table within earshot of the judge and the prosecutor. Incarcerated clients have particular trouble communicating with their attorneys. Although the county jail has established a system for allowing toll-free legal calls from the jails, not all the public defenders have taken advantage of this system. Communication is so infrequent that one public defense attorney even arranged a plea bargain before ever having met his client. The bargain was struck based on the prosecutor's version of the facts then presented to the client in a public hallway outside the court as a *fait accompli*.

327. In all the Counties, public defense lawyers frequently waive client's rights, such as the right to a preliminary hearing or the right to testify before a Grand Jury, without consulting with their clients or explaining the reasons for the waiver, sometimes against their clients' express instructions. For example, in Onondaga County, a client strongly wished to testify before the Grand Jury in order to present an alibi and offer witnesses in support of his alibi, but repeated phone calls to his assigned counsel attorney from the jail, as well as calls from the client's family, were ignored, and the client was unable to assert his right to testify or even discuss the option with his lawyer.

328. A lack of attorney-client communication particularly harms clients with mental health issues. In Suffolk County, for example, a 22-year-old veteran of the Iraq War who was diagnosed with Post Traumatic Stress Syndrome upon his return from Iraq was represented by a Legal Aid attorney who failed to communicate with the client at any time before, during, or after arraignment. As a result, the attorney did not learn of or address the client's mental health issues. Without access to mental health treatment, the client was almost immediately arrested again and spent two days in jail before being assigned to a second Legal Aid attorney who also failed to

communicate with the client about his mental health issues. Only when the client's mother directly communicated with the judge about the defendant's Post-Traumatic Stress Syndrome was the client given a mental examination and offered assistance.

329. A lack of attorney-client contact often results in prejudice to a client's case or unnecessary incarceration. For example, in Onondaga County, a client facing misdemeanor charges missed a court appearance because his attorney never informed him of the court date and never returned the client's repeated phone calls. As a result, a bench warrant was issued and the client was arrested, denied bail, and spent almost a month in jail. The client reported that he felt pressure to plead guilty just so he could get out of jail, even though he felt he had a valid defense.

Lack of Attorney Hiring Criteria, Performance Standards and Supervisory Controls

330. There are no meaningful attorney hiring criteria, performance standards or supervisory controls to ensure basic quality of representation among public defense service providers.

331. The Kaye Commission found that "[d]espite the existence of various sets of standards for representation that bar associations have issued over the years, there is no single set of standards that actually governs what 'adequate' indigent defense services means." Moreover, because the practice standards that exist are not enforceable in New York, "in some areas, substandard practice has become the acceptable norm."

332. National and state standards for the administration of a public defense system state that written hiring criteria are necessary to ensure that an attorney's ability, training, and experience match the complexity of the cases he or she faces. *See* First Department Indigent Defense Organization Oversight Committee, General Requirements for All Organized Providers

of Defense Services to Indigent Defendants (1996), Performance Standard II; NLADA Guidelines for Legal Defense Systems in the United States (1976), Standard V-5.9; NYSBA Standards for Providing Mandated Representation (2005), Standard E-2; *see also* ABA Ten Principles, Principle 6 (requiring that counsel's ability, training, and experience match the complexity of the case); NLADA Performance Guidelines for Criminal Defense Representation (1995), Guideline 1.2(a) (same).

333. National and state standards also mandate that a public defense system maintain written performance standards complemented by a system of active supervisory control. *See* ABA Ten Principles, Principle 10; First Department Indigent Defense Organization Oversight Committee, General Requirements for All Organized Providers of Defense Services to Indigent Defendants (1996), Performance Standards IV & VI; NLADA Guidelines for Legal Defense Systems in the United States (1976), Standard V-5.4; NLADA Standards for the Administration of Assigned Counsel Systems (1989), Standard 4.4; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standard VI(E); NYSBA Standards for Providing Mandated Representation (2005), Standard J-1 to J-9.

334. The criteria for placement on the assigned counsel panels in the Counties are minimal and do not create any meaningful check on the quality of representation. In Schuyler County, for example, any willing attorney, no matter how inexperienced, can be appointed to the most complex felony case. In Washington County, an individual with knowledge of the system reported that some attorneys on the assigned counsel panel are "barely qualified to practice law." An attorney on the assigned counsel panel in Washington reported that he had been assigned a complex felony case straight out of law school, even though he thought that was "unfair" to his

client. In Onondaga County, the criteria for getting on the panels are minimal and may be waived.

335. The institutional providers in Schuyler, Suffolk and Washington counties do not have any written hiring criteria for attorneys.

336. None of the Counties have any binding or enforceable written performance standards for attorney conduct.

337. In Suffolk County, Legal Aid attorneys are evaluated and promoted almost exclusively based on the number of cases that they dispose of each year. Thus, there is an enormous incentive to encourage pleas regardless of whether they are in the best interest of the clients. Consequently, less than one percent of all cases are brought to trial. For example, one Legal Aid Society client found himself represented by a new attorney at a court proceeding several days after his arrest. Prior to the proceeding, the attorney met with the client for only 5 minutes and advised the client to accept a plea bargain even though the offer equaled the maximum sentence for the pending charges. The attorney refused to seek a reduction in the charges or to attempt to negotiate a better plea offer. Because no other options were explained to him, the defendant accepted the plea bargain, believing that he had no choice but to do so.

338. In Onondaga County, because there are no supervisory controls over assigned counsel, attorneys who have repeatedly been removed from representing individual clients by judges for cause are still permitted to remain on the assigned counsel panel lists and receive new client assignments.

339. Moreover, because Onondaga County has no meaningful system for handling complaints and disciplining attorneys for inadequate performance, clients are often not able to get an attorney removed for cause when removal would be appropriate. For example, Plaintiff

Richard Love, who is African-American, asked a judge to remove his attorney after his attorney made a racist comment to him during a court appearance. The judge asked if Mr. Love could afford his own attorney. When Mr. Love reported that he could not, the judge replied, "then you're stuck." Only when a different judge was assigned to Mr. Love's case was his attorney removed and a new attorney assigned.

Lack of Training

340. Public defense service providers in the Counties are not subject to any statewide training requirements related to criminal defense representation and are not provided with adequate access to training programs.

341. The Kaye Commission found that "very few institutional providers have in place viable training programs and ... [i]n regard to assigned counsel and contract defense programs, training ranges from non-existent to the barely adequate."

342. Onondaga, Ontario, Schuyler, and Washington counties have no training requirements for public defenders or assigned counsel other than the standard Continuing Legal Education (CLE) requirements for active membership in the Bar, which do not require specialized courses in criminal defense practice. Furthermore, these Counties do not allocate any funding for public defense service providers to fulfill their CLE requirements.

343. In Suffolk County, there are no formal training requirements for attorneys beyond the requirement to obtain some of their annual CLE credits in criminal law. Lack of funding often prohibits attorneys from participating in outside training workshops and seminars.

344. One effect of the lack of training is that many public defense attorneys are unaware of, and thus unable to advocate for, available alternatives to incarceration for their clients. For example, in Suffolk County, a Legal Aid attorney incorrectly informed a defendant

that he did not qualify for a drug treatment program that can serve as an alternative to incarceration. The defendant performed his own research and learned that he did in fact qualify. Unable to contact his attorney after repeated attempts, the defendant wrote to the judge, who appointed a new attorney and approved the defendant's admission to the treatment program.

345. National and state standards for public defense systems recognize that meaningful and effective representation cannot occur without a mandatory, universal training program for public defense providers. *See* ABA Ten Principles, Principle 9 (commentary); ABA Standards for Criminal Justice, Providing Defense Services (3d ed. 1992), Standard 5-1.5; NLADA Defender Training and Development Standards (1997), Standard 1.1; NLADA Guidelines for Legal Defense Systems in the United States (1976), Guideline V-5.7, 5.8; NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984), Guideline III-17; NLADA Standards for the Administration of Assigned Counsel Systems (1989), Standards 4.2, 4.3.1, 4.3.2, 4.4; NLADA Performance Guidelines for Criminal Defense Representation (1995), Guideline 1.2(b); NAC Report of the Task Force on Courts (1973), Standard 13.16; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standard VI(A), (B); NYSBA Standards for Providing Mandated Representation (2005), Standard F-1, F-2; N.Y. CLS Sup. Ct. § 613.9 (2007).

Lack of Support Services and the Failure to Conduct Investigations and Seek Expert Services

346. Public defense service providers in the Counties are not provided with the resources required to obtain necessary support services, including investigators and experts. Without these services, preparing a constitutionally and legally adequate defense for clients is often impossible.

347. The Kaye Commission found that public defense services throughout the State are marked by "inadequate provision of and lack of requests for expert and investigative services."

348. National and state standards for public defense systems recognize that the provision of meaningful and effective assistance of counsel requires adequate support staff, including investigators, and that conducting investigations is a key component of competent counsel. *See* ABA Standards for Criminal Justice, Providing Defense Services (3d ed. 1992), Standard 5-1.4; ABA Standards for Criminal Justice, Prosecution Function and Defense Function (3d ed. 1993), Standard 4-4.1(a); NLADA Performance Guidelines for Criminal Defense Representation (1995), Guideline 4.1; NLADA Guidelines for Legal Defense Systems in the United States (1976), Guideline IV-4.1; NLADA, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984), Standard III-9; NLADA Standards for the Administration of Assigned Counsel Systems (1989), Standard 4.6; NAC Report of the Task Force on Courts (1973), Standard 13.14; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standard VIII(A)(6); NYSBA Standards for Providing Mandated Representation (2005), Standard H-1, H-6. *See also* N.Y. County Law §§ 722, 722-c (2007).

349. National and state standards for public defense systems recognize that a constitutionally and legally adequate public defense system must allow for the appointment of experts where necessary to present a meaningful and effective defense. *See* ABA Standards for Criminal Justice, Providing Defense Services, Standard 5-1.4; NLADA Guidelines for Legal Defense Systems in the United States (1976), Guideline III-3.1; NLADA, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984), Guideline III-8; NLADA Performance Guidelines for Criminal Defense Representation (1995),

Guideline 4.1(b)(7); NAC Report of the Task Force on Courts (1973), Standard 13.14; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standard VIII(A)(8)(c); NYSBA Standards for Providing Mandated Representation (2005), Standards H-1, H-6; N.Y. County Law §§ 722, 722-c (2007).

350. In 2006, based on data reported by the counties, New York State spent an average of $11.80 per case on investigative services and $5.65 per case on expert services.

351. In Onondaga and Ontario counties, as is common among counties that rely on an assigned counsel system, assigned counsel must apply to the Court for approval of funds for investigative and expert services, and there is often tacit pressure not to apply for such services in order to keep costs down.

352. In Onondaga County, some judges are reluctant to order expenditures of county funds on investigators and experts, and many assigned counsel have given up requesting funds for such services. One judge has noted that, mindful of costs, he requires attorneys to provide "lots of detail" as to their need for investigator services. Not surprisingly, this judge reports that he "does not receive requests for investigators ... except in the most serious cases."

353. In Ontario County, some courts report receiving as few as one or two requests per year for expert or investigative services.

354. In Schuyler and Washington counties, the public defender offices have inadequate support staff, have no staff paralegals or investigators, and do not have the capacity to conduct investigations. In Schuyler County, public defenders have been forced to use the State's experts in their defense of their clients. Washington County reports having spent no money on expert services in 2005 and 2006.

355. In Suffolk County, the Legal Aid Society employs only six staff investigators to support 60 attorneys and investigate approximately 26,000 cases per year, despite the fact that ABA standards suggest there should be one staff investigator for every three attorneys. ABA Ten Principles, Principle 8 (commentary n.23). Most of these investigators hold other jobs, are available only part-time, and have other administrative responsibilities outside of performing investigations. The Suffolk County Legal Aid Society also has no paralegals or support staff with legal training. Additionally, attorneys must sometimes share computers, impeding their ability to conduct online research and perform other functions necessary to represent their clients meaningfully and effectively

356. The Suffolk County Legal Aid Society reports having spent no money on experts from 2002 to 2006. In 2006, only 2% of the assigned counsel program's reported expenses were attributed to expert services.

Excessive Caseloads and/or Workloads

357. Public defense service providers in the Counties operate under the burden of excessive caseloads and/or workloads that compromise their ability to provide effective representation to their clients.

358. None of the Counties has meaningful, written caseload or workload standards or any effective mechanism to monitor attorney caseloads and workloads.

359. The Kaye Commission found that "virtually all institutional defenders ... labor under excessive caseloads."

360. In the Counties that rely on assigned counsel, attorneys are free to represent, in addition to their private clients and appointments from other counties, as many appointed clients as they choose. In Counties that rely on an institutional defender, excessive overall caseloads and workloads reduce public defense attorneys' ability to meaningfully and effectively represent each client. In Washington County, one public defender reported that he had "too many cases" and admitted that his high caseload puts pressure on him to take pleas for his clients even when he believes the client has a strong defense.

361. The problem of excessive caseloads is compounded in many of the Counties by a reliance on part-time public defenders with competing private practices that distract from their public defense docket and create excessive caseload burdens. The institutional defenders in Schuyler and Washington counties, for example, rely exclusively on part-time assistant defenders, and the chief defenders in both counties have private practices in addition to their ostensibly "full time" public defender jobs.

362. The problem is further compounded by the fact that all public defense service providers in the Counties are also responsible for handling Family Court cases, which many attorneys report require even more time and resources than criminal cases.

363. Excessive caseloads and workloads place enormous pressure on public defense attorneys to secure plea agreements and avoid going to trial, even when this decision may not be in the best interests of their clients. Across the State, based on data reported by the Counties in 2006, less than 2% of public defense cases are taken to trial. In the Counties, the trial rate is 1.4%, or only 463 out of more than 32,000 reported public defense cases.

364. The strong pressure to obtain early pleas also places pressure on attorneys to accept plea offers that waive clients' rights to appeal and other post-conviction remedies.

Unsurprisingly, therefore, only a very small percentage of criminal convictions in New York are appealed. In 2006, according to data reported by the Counties, the percentage of criminal cases appealed in Onondaga, Ontario, Schuyler, Suffolk and Washington collectively was just 1.3%. Washington County reported having no appeals in 2006, while Suffolk and Schuyler counties reportedly less than 1% of cases were appealed.

365. National and state standards for the provision of public defense services provide caseload management is an essential element of a constitutional public defense system. *See* ABA Ten Principles, Principle 5 (commentary); ABA Standards for Criminal Justice, Prosecution Function and Defense Function (3d ed. 1993), Standard 4-1.3(e); ABA Standards for Criminal Justice: Providing Defense Services (3d ed. 1992), Standard 5-5.3; NLADA Guidelines for Legal Defense Systems in the United States (1976), Guidelines V-5.1, 5.3; NLADA, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984), Guidelines III-6, III-12; NLADA Standards for the Administration of Assigned Counsel Systems (1989), Standard 4.1.2; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standards IV, III(E); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006); NYSBA Standards for Providing Mandated Representation (2005), Standards G-1, G-2.

Lack of Vertical Representation

366. The Counties' public defense systems are often designed so that indigent defendants are provided with different public defense attorneys at different stages of the prosecutorial process. Such "horizontal" representation creates a barrier to forming a meaningful attorney-client relationship and developing a client's trust. Moreover, when a defendant's case is between stages, it simply lies dormant with no representation being provided, no investigations

conducted, and no counsel to advise the client until the case is assigned a new attorney at the next stage.

367. The Spangenberg Group report found that, even though it diminishes the quality of representation, many public defense service providers provide this kind of "horizontal" representation "for the sake of efficiency."

368. National and state standards for the administration of a public defense system provide that, as a general rule, the same attorney should continuously represent the client until completion of the case. *See* ABA Ten Principles, Principle 7; NLADA Guidelines for Legal Defense Systems in the United States (1976), Guideline 5.11; NLADA Standards for the Administration of Assigned Counsel Systems (1989), Standard 2.6; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standard V(A)(4); NYSBA Standards for Providing Mandated Representation (2005), Standard I-5. *See also* N.Y. County Law § 717 (2007).

369. In Onondaga County, for example, certain assigned counsel are assigned "arraignment days" in the City and County courts to represent felony defendants being arraigned in any given day. Some time after arraignment, clients are assigned a different lawyer.

370. In Suffolk County, defendants charged with felonies are almost always assigned different attorneys before and after indictment, often following substantial delays, and many defendants find that they are represented by a different attorney every time they appear in court. As a result, criminal defendants facing felony charges must learn to trust and communicate with a new attorney immediately after they are indicted, knowing that their previous attorney will no longer be able to help them.

371. In Schuyler and Washington counties, the system of assigning particular lawyers to particular courts means that nearly all felony defendants arraigned in a justice court are assigned to a new attorney when the case is transferred out of the justice court and into the county court, often after substantial delays.

The Lack of Political and Professional Independence

372. The system of county-based funding and administration causes a lack of independence from judicial, prosecutorial and political authorities for public defense services providers in the Counties.

373. The Kaye Commission found that, because of the State's abdication of public defense funding and administration responsibilities to the counties, "New York fails to ensure the independence of its indigent defense providers who are too often subject to undue interference from the counties that fund them."

374. No fewer than seven county public defenders and legal aid society directors – from Saratoga, Rensselaer, Essex, Greene, Steuben, Onondaga, and Westchester counties – testified before the Kaye Commission, citing specific instances of political interference with their ability to provide meaningful and effective representation to their indigent clients.

375. National and state standards for the administration of a public defense system require professional and political independence for public defense services providers in order to guarantee meaningful and effective representation of indigent defendants. *See* ABA Ten Principles, Principle 1; ABA Standards for Criminal Justice, Providing Defense Services (3d ed. 1992), Standards 5-1.3, 5-1.6; NLADA Guidelines for Legal Defense Systems in the United States (1976), Guideline 2.18; NLADA Standards for the Administration of Assigned Counsel Systems (1989), Standard 2.2; NLADA Guidelines for Negotiating and Awarding Governmental

Contracts for Criminal Defense Services (1984), Guideline II-1; NAC Report of the Task Force on Courts (1973), Standard 13.8; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standards II, III-A; NYSBA Standards for Providing Mandated Representation (2005), Standard A-1. *See also* DR 2-103 (22 NYCRR 1200.8).

376. In Onondaga, for example, the director of a legal aid society that formerly handled a large percentage of the county's criminal docket reported the following exchange with a county legislator to the Kaye Commission:

> A legislative committee member asked me the following series of questions in a hostile tone of voice, starting with, isn't it true that the legal aid society has a policy of not disposing of cases at arraignment? I answered that that was in fact our policy because we were never given adequate resources to be able to meet our clients in jail before arraignment or to have staff present to discuss cases with them before arraignment. Therefore, it would be a violation of an ethical [obligation] to our clients to do so. The next question was, isn't it true that you make motions in every case? The answer unfortunately was no. We don't have the resources to do that.... The next question was, isn't it true that you served demands to produce in every case? The answer was yes. That is the statutory requirement to preserve our client's rights to discovery. And, finally, I was asked, isn't it true that you require a written response from the DA's office to those demands? ... These questions were very troubling because they imply that we were doing something wrong by fulfilling our legal and ethical responsibility to our clients and that we were subjected to criticism for providing vigorous representation to our clients... I was subsequently told by a member of the judiciary...that the word on the street was that we lost the city court program because we delayed cases. My response then and my response [now] is, one person's delay is another person's due process.

Shortly after this exchange, the county terminated the legal aid society's contract to perform certain criminal public defense representation for Onondaga County.

377. In Onondaga County, rather than leaving staffing decisions to the Assigned Counsel Program, judges make the decision not only whether counsel should be appointed, but which lawyers to appoint to cases in their courtroom. This system creates a risk, and a

perception among attorneys, that lawyers who do not ensure swift disposition of their client's cases, even where swift disposition means sacrificing zealous representation, will not receive appointments from judges who are concerned about meeting state-set standards and goals for reducing docket congestion.

378. In both Onondaga and Ontario counties, assigned counsel must obtain judicial approval before spending any funds on investigators or expert services, thus subjecting counsel's judgment regarding the services necessary for zealous advocacy to a court's discretion.

379. There is no independent board or commission that oversees public defense services in Schuyler County. The Chief Public Defender is appointed by the county legislature and must lobby the legislature for necessary budget allocations and meet performance-based standards set by political actors in order to obtain sufficient funding.

380. In Suffolk County, the Legal Aid Society must obtain annual budget approval from the Suffolk County legislature. The Legal Aid Society must submit a detailed budget request and answer detailed questions about expenditures at a hearing before the county executive. Based on that hearing, the county executive recommends a budget allocation for the Legal Aid Society and the legislature votes on the budget. Most of the time, the Legal Aid Society obtains less than the amount it has requested.

381. In Washington County, there is no independent board or commission that oversees public defense services. The public defender is selected by means of a low-bid process in which the County Board of Supervisors appoints the candidate in part on the basis of a proposal to run the office most cheaply over a two-year period. The Board of Supervisors approves the annual budget and must separately sign off on any expenditure for investigators or experts in individual felony cases. The county also accepts the low-bid proposal for conflict

defender services solely for cases arising out of the state prisons located in the county. Moreover, judges have unlimited discretion to reduce assigned counsel's bills for services. As a result, in 2006, per capita county expenditure for public defense in Washington County was under $7.50, well below the state average of $21.21.

Inadequate Compensation and Lack of Parity with Prosecutorial Counterparts

382. Public defense service providers in the Counties are, in general, inadequately compensated and lack the resources needed to provide effective representation.

383. National and state standards recognize the importance of adequately compensating both assigned counsel lawyers and institutional public defense service providers. *See* ABA Standards for Criminal Justice, Providing Defense Services (3d ed. 1992), Standard 5-2.4; NLADA Guidelines for Legal Defense Systems in the United States (1976), Guidelines III-3.1, 3.2; NLADA, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984), Guideline III-10; NLADA Standards for the Administration of Assigned Counsel Systems (1989), Standard 4.7.1; NAC Report of the Task Force on Courts (1973), Standards 13.7, 13.11; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standard III(C); NYSBA Standards for Providing Mandated Representation (2005), Standard K-3. *See also* N.Y. County Law § 722-b (2007).

384. In the federal system, guidelines state that the salaries and support given to federal public defenders must be substantially similar to that provided to Assistant United States Attorneys in the Department of Justice. *See* Guidelines for the Administration of the Criminal Justice Act and Related Statutes, Chapter IV, 4.02 A(3).

385. National and state standards also hold that comparable funding for prosecutorial and public defense services is a key measure of the health of a criminal justice system. *See* ABA Ten Principles, Principle 8; NLADA Guidelines for Legal Defense Systems in the United States (1976), Guideline 3.2; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standard III(C); NYSBA Standards for Providing Mandated Representation (2005), Standard K-1.

386. In 1965, the New York State legislature passed Article 18-B, setting the rates of compensation for private assigned counsel at $10 per hour for out-of-court work and $15 per hour for in-court time. The State raised rates slightly in 1977 and 1986, but rates remained stagnant from 1986 until 2003 until, following a lawsuit brought by the New York County Lawyers Association, the Legislature raised the rates to $60 per hour for misdemeanors and lesser offenses and $75 per hour for felonies and all other eligible cases.

387. As a result of the financial pressure caused by the rise in 18-B rates, assigned counsel programs place pressure on assigned counsel to keep costs low and on assigned counsel administrators to cut vouchers, even at the expense of the client's needs and interests.

388. In Onondaga County, for example, a county court judge recently wrote an opinion criticizing the assigned counsel program for "incessant bureaucratic nitpicking" in cutting attorney vouchers for reimbursement, remarking that "good attorneys" were being driven out of the program and that the pattern of voucher-cutting "almost amounts to an on-going violation of the Sixth Amendment."

389. In Ontario County, assigned counsel are paid hourly rates that must cover the costs of health insurance, retirement savings, and overhead costs such as support staff, desks, computers, legal research expenses, and office supplies. Assigned counsel are often not

compensated for all the actual time devoted to their cases. For example, the county will not reimburse assigned counsel for any time spent traveling to the various courts throughout the county.

390. The gross disparity between the resources available to public defenders and the resources available to prosecutors highlights the chronic under-funding of public defense in New York, especially in light of the fact that public defense services providers must cover not only criminal prosecutions but also child abuse and neglect cases, family offenses, custody and visitation issues, paternity cases, and child support violations.

391. Although the state provides money to supplement district attorneys' salaries, it does not do so for the public defenders' salary. These state funds account for a large percentage of the salaries of many Counties' district attorneys. For example, in Schuyler, state funds account for approximately half of the District Attorney's wages.

392. The Kaye Commission found that "[p]rosecutors are consistently better funded and better staffed than indigent criminal defense service providers. Their personnel, on average, have higher salaries and greater ancillary resources than do their public defender counterparts."

393. In Schuyler County, the Chief Public Defender's salary in 2007 was $75,849, while the assistant public defender is paid $37,924. The conflict defender was paid $2500 per month and must provide for his own malpractice insurance and training, as well as absorb all overhead expenses. By contrast, the district attorney works in a fully supported office and makes more than 50% more than the Chief Public Defender, earning $119,800.

394. In Washington County, the Chief Public Defender's salary in 2007 was $51,000, while the District Attorney was paid more than twice as much, earning $119,792. Assistant public defenders each earned $44,290, while assistant district attorneys earn up to $60,715. In

addition, the assistant public defenders must pay for their own malpractice and health insurance expenses as well as overhead costs such as office space, support staff, legal research expenses, transportation expenses, computers and office equipment and supplies. Assistant district attorneys do not have to pay for these expenses and are provided with health care benefits.

395. According to the Spangenberg Group report, the Suffolk County Legal Aid Society recently experienced a 16% turnover in staff, including the loss of experienced attorneys, because of low salaries.

396. Inadequate resources and staffing within institutional providers can directly impact representation. As Spangenberg Group's report to the Kaye Commission noted, "[t]he need to be efficient sometimes also results in an institutional provider turning a blind eye to potential conflicts of interest." For example, in Schuyler County, a lack of resources for full staffing means that the Public Defender's secretary administers the assigned counsel program and thus decides which lawyers will represent co-defendants of public defender office clients, creating a systemic conflict of interest.

397. National and state standards for the provision of public defense services recognize a public defense system must be designed to avoid conflicts of interest. *See* ABA Standards for Criminal Justice, Defense Function (3d ed. 1993), Standard 4-3.5(c); NLADA Performance Guidelines for Criminal Defense Representation (1995), Guideline 1.3(b); NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standard VIII(A)(4).

The Effect of the Public Defense Crisis on Indigent Criminal Defendants

398. Hampered by the aforementioned systemic flaws, public defense counsel do not or are not able to perform even the most basic tasks necessary to provide meaningful and effective representation to their clients. They do not act as an adversarial check on the prosecutor in criminal cases.

399. Indigent criminal defendants in New York therefore are experiencing or are at severe and unacceptably high risk of experiencing: wrongful denial of representation; wrongful conviction of crimes; unnecessary or prolonged pre-trial detention; guilty pleas to inappropriate charges; waiver of meritorious defenses; guilty pleas taken without adequate knowledge and awareness of the full, collateral consequences of the pleas; harsher sentences than the facts of the case warrant and few alternatives to incarceration; and waiver of the right to appeal and other post-conviction rights. Defendants are routinely not asked about their immigration status, for example, notwithstanding that a plea which may result in no jail time may ultimately cause the deportation of some immigrant defendants.

400. The history of inadequate representation in New York State has created a pervasive public belief that representation by a public defender is grossly inferior to representation by a private attorney. Public defender clients in Washington County routinely express their desire to hire a "real lawyer" or a lawyer who wasn't just "a part of the system." Several clients reported a commonly held belief that public defenders work harder for their paying clients than for clients they represent as public defenders and that paying clients get more lenient plea bargains. Similarly, in Schuyler County the chief public defender has resisted calls to move the public defender's office into a county building because it would exacerbate clients' perception that public defenders are not independent from the judicial and prosecutorial functions.

CLASS ALLEGATIONS

401. The plaintiffs bring this class action pursuant to Article 9 of the New York Civil Practice Law and Rules on behalf of all indigent persons who have or will have criminal felony, misdemeanor, or lesser charges pending against them in New York state courts in Onondaga, Ontario, Schuyler, Suffolk and Washington counties (hereinafter, "the Counties") who are entitled to rely on the government of New York to provide them with meaningful and effective defense counsel. The Class includes all indigent persons against whom criminal charges will be brought in the Counties during the pendency of this action.

402. The class is so numerous that joinder of all members is impractical. At any given point in time, more than thousands of people with criminal cases pending in New York State courts in the Counties rely on public defense counsel for legal representation.

403. There are questions of law and fact common to the class that predominate over questions affecting only individual members, including but not limited to:

(1) whether the State has the responsibility under the Constitution of the State of New York and the United States Constitution to provide meaningful and effective assistance of counsel to indigent criminal defendants;

(2) whether in abdicating its responsibility to the counties, the State has failed to ensure that indigent criminal defendants receive meaningful and effective assistance of counsel;

(3) whether the State funds the public defense system in a manner that impedes the delivery of meaningful and effective assistance of counsel;

(4) whether the State's failure to oversee and set standards for the provision of public defense services impedes the delivery of meaningful and effective assistance of counsel;

(5) whether the State's failure to adequately fund, supervise and administer the public defense system in the counties violates the constitutional and statutory rights of the plaintiff class.

404. The claims of the class representatives are typical of the claims of the class members and by pursuing their own interests the class representatives will advance the interests of the absent class members. Each of the class members is being denied or is at severe and unacceptably high risk of being denied constitutionally and legally adequate assistance of counsel as a result of the defendants' failure to set standards for, oversee and fund public defense.

405. The class representatives will fairly and adequately protect the interests of the class. There are no conflicts of interest between the class representatives and the absent class members and the class representatives will vigorously prosecute this action on behalf of the class.

406. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

407. Defendants have consistently acted and refused to act in ways generally applicable to the class. Thus, final declaratory and injunctive relief with respect to the class as a whole is appropriate.

OTHER ALLEGATIONS

408. Plaintiffs and the members of the class have suffered or are at imminent, severe and unacceptably high risk of suffering irreparable harm because of the Defendants' failure to remedy the financial and administrative deficiencies that plague the provision of public defense. There is no adequate remedy at law to address those deficiencies or the consequent deprivation of adequate and competent assistance of counsel.

CLAIMS

First Cause of Action
(Violation of Article I, § 6 of the Constitution of the State of New York)

409. Plaintiffs hereby incorporate paragraphs 1-408 above.

410. Defendants are violating or will violate plaintiffs' rights under Article I, § 6 of the Constitution of the State of New York by failing to provide meaningful and effective assistance of counsel and due process of law.

Second Cause of Action
(Violation of New York State Statutes Guaranteeing the Right to Counsel for Indigent Defendants)

411. Plaintiffs hereby incorporate paragraphs 1-408 above.

412. Defendants are violating or will violate plaintiffs' rights under New York County Law § 717, 722-c; and New York Criminal Procedure Law §§ 170.10, 180.10, 180.80, 190.50, and 210.15 by failing to provide meaningful and effective assistance of counsel.

Third Cause of Action
(Violation of the Sixth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983)

413. Plaintiffs hereby incorporate paragraphs 1-408 above.

414. Defendants are violating or will violate plaintiffs' rights to meaningful and effective assistance of counsel and to due process of law in violation of the Sixth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983.

PRAYER FOR RELIEF

WHEREFORE, the plaintiffs respectfully request the following relief:

(1) The certification of this action as a class action, pursuant to Article 9 of the New York Civil Practice Law and Rules.

(2) A declaration pursuant to CPLR § 3001 that the plaintiffs' rights are being violated.

(3) A preliminary and a permanent injunction requiring defendants to provide a system of public defense consistent with the Constitution and laws of the State of New York and the United States Constitution.

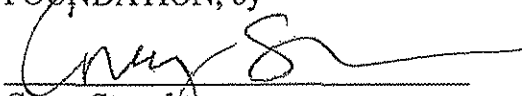
(4) An award of the plaintiffs' attorneys' fees, costs and disbursements accrued in pursuit of this action under CPLR § 8601, CPLR § 909 and 42 U.S.C. § 1988; and

(5) Any other relief the Court deems necessary or proper.

Dated: April 28, 2008
New York, NY

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION FOUNDATION, by



Corey Stoughton
Palyn Hung
Daniel J. Freeman
Donna Lieberman
Arthur Eisenberg
Christopher Dunn
125 Broad St., 19th Floor
New York, NY 10004
Tel: (212) 607-3300
Fax: (212) 607-3318

-and-

SCHULTE ROTH & ZABEL LLP

Gary Stein

Danny Greenberg
Sena Kim-Reuter
Estee Konor
Ximena Naranjo
Michelle Paris
919 Third Avenue
New York, NY 10022
Phone: (212) 756-2000
Fax: (212) 593-5955

Attorneys for Plaintiffs

On the Complaint: Demetrius Thomas, NYCLU paralegal

FINAL REPORT
TO THE CHIEF JUDGE
OF THE STATE OF NEW YORK

COMMISSION ON THE FUTURE OF INDIGENT DEFENSE SERVICES

June 18, 2006

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New York, NY

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Twelfth Judicial District (Ret.)
Marc Dreier LLP, New York, NY

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Davis Polk & Wardwell
New York, NY

John Dunne, Esq.
Whiteman Osterman & Hanna
Albany, NY

John V. Elmore, Esq.
Buffalo, NY

Klaus Eppler, Esq.
Proskauer Rose LLP
New York, NY

Hon. Joseph Fahey
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Onondaga County
Syracuse, NY

Fred Jacobs, Esq.
Hodgson Russ
New York, NY

Anita Khashu, Esq.
Project Director
Vera Institute of Justice
New York, NY

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Fern Schair, Esq.
American Arbitration Association
New York, NY

Laurie Shanks, Esq.
Professor of Law
Albany Law School
Albany, NY

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Tenth Judicial District
Mineola, NY

Hon. Charles Tejada
Acting Justice of the Supreme Court
First Judicial District
New York, NY

Hon. Joseph Zayas
Judge of the Criminal Court
New York County
New York, NY

Steven Zeidman, Esq.
Professor of Law
CUNY Law School
Queens, NY

Michele Zuflacht, Esq.
Hauppauge, NY

COUNSEL
Paul Lewis, Esq.
John Amodeo, Esq.
Robert Mandelbaum, Esq,
David Markus, Esq.

TABLE OF CONTENTS

Preface

When the Chief Judge of New York State, Judith S. Kaye, asked us to chair a commission on the future of indigent criminal defense services, we understood her concern about the quality of representation that indigent defendants were being afforded throughout the state. But until the Commission was formed and pursued its mandate, we did not appreciate the depth of the problems which, over the past two years, the Commission has observed. In the Commission's Interim Report, transmitted to the Chief Judge on December 1, 2005, we reported on these problems and outlined a proposal for a fully state-funded statewide defender system that we determined was essential if indigent defendants in New York State were to be accorded their constitutional rights to quality representation.

This Final Report presents the Commission's factual findings in greater detail than previously, with the added benefit of having the extensive report of the Commission's consultant, The Spangenberg Group, available to aid us in our determinations. In this Final Report, we also present with greater specificity, the statewide defender system that we believe is the only solution to the crisis in indigent defense representation in New York State. In an Addendum, we also set forth a number of measures that can be implemented immediately to ameliorate certain discrete deficiencies that adversely affect the representation of indigent defendants.

We are grateful to the witnesses who testified at the Commission's public hearings, to the individuals who submitted written commentary to the Commission, and to the many organizations who shared with us the results of their work as it pertained to the issues surrounding indigent defense representation. These groups include bar associations, legal services providers, the NAACP Legal Defense & Education Fund, Inc., the American Civil Liberties Union, the New York State Defenders Association, the New York Civil Liberties Union, the New York State Association of Criminal Defense Lawyers, the Association of Legal Aid Attorneys, the Northern Manhattan Coalition for Immigrant

Rights, the Brennan Center for Justice, the League of Women Voters, the Prison Action Network, and Prison Families of New York. We are also grateful to the hundreds of public officials, judges, and court personnel throughout the state who made themselves available to The Spangenberg Group in the course of its work. We are also indebted to the Open Society Institute, the Center for Court Innovation, the National Association of Criminal Defense Lawyers, and the law firm of Davis, Polk & Wardwell for their financial assistance, which greatly facilitated the Commission's ability to retain The Spangenberg Group as our consultant.

We also acknowledge our debt to the Commission's able counsels, Paul Lewis, John Amodeo, David Markus, and Robert Mandelbaum, whose wisdom and energy have greatly aided the Commission's endeavor.

William E. Hellerstein
Hon. Burton B. Roberts
Co-Chairs of the Commission

I. The Chief Judge's Commission on the Future of Indigent Defense Services

A. The Charge to the Commission

In February 2004, in her State of the Judiciary address, Chief Judge Judith S. Kaye announced the formation of the Commission. The Commission's charge, she stated, is to "examine the effectiveness of indigent criminal defense services across the State, and consider alternative models of assigning, supervising and financing assigned counsel compatible with New York's constitutional and fiscal realities." Chief Judge Kaye stated further that "under our current system created in 1965, which places the burden on local governments, a patchwork of indigent defense programs of varying size and character has developed around the State." The Commission, therefore, understood that its mandate was to (1) examine the existing methods of funding indigent defense services; (2) evaluate the effectiveness of the various criminal defense provider plans throughout the state; and (3) assess the quality of the representation afforded indigent criminal defendants, including the adequacy of training received by attorneys who deliver defense services, and the quantity and quality of ancillary resources, such as investigative and language interpretive services, afforded by and for defense providers.

B. The Commission and its Work

The Commission's formation was completed in May 2004. Its 30 members come from each of New York State's 12 judicial districts and have extensive experience in the prosecution, defense, and adjudication of criminal cases; experience in the state's legislative and budget processes; and involvement in court and criminal justice improvement organizations and academic scholarship regarding criminal justice and indigent criminal defense systems. The Commission's members also reflect the diverse political, social and ethnic diversity of the state.

The Commission held its organizational meeting in May 2004. It created four subcommittees to deal with (1) the current status of indigent defense in New York State; (2) the need for change; (3) proposals for change, and (4) financing mechanisms. Subcommittee meetings took place between plenary sessions of the Commission. The Commission held four public hearings: New York City on

February 11, 2005, Rochester on March 11, 2005, Ithaca on March 23, 2005, and Albany on May 12, 2005. A total of 93 individuals testified at the hearings and others submitted written statements. These individuals included public defenders, private criminal defense attorneys, assigned counsel plan administrators, judges, prosecutors, experts in indigent defense, bar association representatives, members of the civil rights community, representatives of community groups, and defendants and their families. A list of the witnesses who testified is set forth in **Appendix A.** [1]

The Commission also requested the Office of Court Administration, through Chief Judge Kaye and Chief Administrative Judge Jonathan Lippman, to retain The Spangenberg Group ("TSG") to conduct a statewide study of New York's indigent defense system. TSG is a nationally and internationally recognized criminal justice research and consulting firm that specializes in research concerning indigent defense services. For over 15 years, it has been under contract with the American Bar Association's Bar Information Program (ABA-BIP), which provides support and technical assistance to individuals and organizations working to improve their jurisdiction's indigent defense system. It has conducted empirical research in each of the 50 states and compiled comprehensive statewide studies of the indigent defense systems in more than half the states.

The Spangenberg Group's report, which is set forth as **Appendix B**, is the most comprehensive study of indigent defense representation ever undertaken in New York State. It depicts the real crisis that exists in the provision of indigent defense services in New York City and throughout the state. The seriousness of its principal conclusions – that funding for indigent defense services is totally inadequate and that the system, as presently constituted, is dysfunctional – cannot be minimized.

The Spangenberg Report is based on two major components: data collection/analysis and on-site assessment. For the data collection and analysis, TSG collected information on cost, caseload, and

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[1] Transcripts of the testimony at the hearings are available on the Commission's website: http://www.courts.state.ny.us/ip/indigentdefense-commission/index.shtml.

system type for each of New York's 62 counties. It conducted site work from September 2005 to March 2006, that involved visits to 22 counties, including the five counties comprising New York City, which were selected based upon factors such as judicial district, geography, and population. TSG spoke with defense attorneys, judges and court personnel, as well as with state, county, and city officials with knowledge of the criminal justice system. In addition to these interviews, TSG observed criminal court sessions in many of the counties in the study. It also attended each of the Commission's public hearings and reviewed the transcripts of testimony at each of the hearings.

The Commission delivered an Interim Report to Chief Judge Kaye on December 1, 2005 in which the Commission described the long-term and continuing crisis in the delivery of indigent criminal defense services in New York State[2] and concluded, on the basis of previous studies and testimony at its four public hearings, that:

> the indigent defense system in New York State is both severely dysfunctional and structurally incapable of providing each poor defendant with the effective legal representation that he or she is guaranteed by the Constitution of the United States and the Constitution and laws of the State of New York. In actuality, it is a misnomer to call it a "system" at all. Rather, it is a composite of a multiplicity of modalities, all of which are sanctioned by the statutory framework which New York State adopted in 1965 when it enacted Article 18-B of the County Law. Unfortunately, this framework has resulted in a disparate, inequitable, and ineffective system for securing constitutional guarantees to those too poor to obtain counsel of their own choosing. (Interim Report at 16)

The Commission also informed the Chief Judge that "[a]greement was virtually unanimous amongst the witnesses that there is a pressing need for an independent indigent defense oversight entity that, at a minimum, promulgates and enforces standards of effective representation," and that the creation of " a Statewide Defender Office is essential to both the independence of an indigent defense system and the ability to provide a consistently high level of representation to indigent defendants." (Interim Report at 24-25, 30) The Commission concluded that such a system must be entirely state-funded and it outlined the components

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[2] The Interim Report can be found at http://www.courts.state.ny.us/ip/indigentdefense-commission/index.shtml.

of such a system — that it should consist of an "Indigent Defense Commission, a Chief Defender, and Regional Defender Offices with local defender offices within each region that are established where needed." (Interim Report at 36) However, the Commission postponed the detailing of such a structure until the Commission's Final Report.

On January 27, 2006, Chief Judge Kaye, in a speech to the New York State Bar Association, previewed the Commission's recommendation for a state-funded, statewide indigent criminal defense system. That same day, the Association's House of Delegates unanimously called for statewide oversight of what it, too, portrayed as New York's "existing, balkanized system."[3] On February 6, 2006, Chief Judge Kaye released the Commission's Interim Report as part of her State of the Judiciary address. She stated that "[t]he Commission has convincingly concluded that the existing system needs overhaul. . . ," and that she had "not seen the word 'crisis' so often, or so uniformly, echoed by all of the sources, whether referring to the unavailability of counsel in Town and Village Courts, or the lack of uniform standards for determining eligibility, or the counties efforts to safeguard county dollars, or the disparity with prosecutors, or the lack of attorney-client contact, or the particular implications for communities of color."[4]

Since the Commission issued its Interim Report, the factual assessments upon which the Commission's conclusions were based have been overwhelmingly corroborated by TSG's factual findings. TSG's massive and comprehensive study provides a true understanding of the depth and scope of the crisis in the delivery of defense services to impoverished defendants in New York's criminal justice system. Therefore, we urge all who are concerned with this crisis to examine closely The Spangenberg Report. We do so at a time in New York's history when there is a chorus of voices calling for extensive and meaningful change in the delivery of indigent defense services in New York in order to effectuate the mandates of the

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[3] John Caher, *Kaye Says Panel Backs Funded Statewide Plan To Represent Indigents*, New York Law Journal, January 30, 2006, p. 1.

[4] Judith S. Kaye, *The State of the Judiciary* at 10 (2006).

United States Constitution and the Constitution and laws of the State of New York.[5]

II. The Right to Counsel in New York: An Ongoing Crisis

In 2006, there remains little to debate about the substantive meaning of the right to counsel. Although it took much too long for the value of the right to counsel to be fully appreciated in American jurisprudence, 43 years have elapsed since the Supreme Court, in *Gideon v. Wainwright*,[6] embraced fully the principle "that lawyers in criminal courts are necessities, not luxuries" because it is an "obvious truth" that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him;"[7] the Supreme Court also applied that principle to an indigent defendant's ability to appeal a conviction.[8] Several years after *Gideon*, the Court extended a poor person's right to counsel "to any criminal trial, where an accused is deprived of his liberty"[9] and, most recently, to cases in which a

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[5] In addition to the action taken by the House of Delegates of the New York State Bar Association, the New York State Association of Criminal Defense Lawyers informed the Commission on April 14, 2006 that in light of the Commission's recommendation that a statewide system of indigent defense services should be established, it "had convened a diverse working group of its members to think about the best way for a statewide system to be implemented in New York State." The Association's efforts have produced a draft bill that would create such a system; the bill mirrors many of the Commission's recommendations in its Interim Report and in this Report. In addition, the Committee for an Independent Public Defense Commission, chaired by Michael S.Whiteman, has long been active in seeking the creation of a statewide defender system. Among others who have spoken out in favor of such a system are former Chief Judge Sol Wachtler, former Court of Appeals Judge and former Dean of St. John's Law School, Joseph Bellacosa, former Chief Administrative Judge Richard Bartlett, former Senate Majority Leader Warren M. Anderson, Norman L. Reimer, then President of the New York County Lawyers' Association, Vincent E. Doyle III, chairman of the New York State Bar Association's Special Committee to Ensure Quality of Mandated Representation, and Jonathan Gradess, Executive Director of the New York State Defenders Association. *See,* John Caher, *Draft Bill Outlines Proposal for State 'Defender General,'* New York Law Journal, May 1, 2006, pp. 1, 8.

[6] *Gideon v. Wainwright,* 372 U.S. 335 (1963)

[7] *Gideon v. Wainwright,* 372 U.S. at 344.

[8] *Douglas v. California,* 372 U.S. 353 (1963).

[9] *Argersinger v. Hamlin,* 407 U.S. 25 (1972).

suspended sentence may "end up in the actual deprivation of a person's liberty."[10] The Supreme Court has also made it clear that the Sixth Amendment's guarantee of the right to the assistance of counsel means the right to the "effective assistance" of counsel.[11]

In our constitutional system, the United States Constitution, as interpreted by the Supreme Court, provides the minimal protections that states must afford persons charged with crime. In New York, however, the Criminal Procedure Law affords a more expansive right to counsel than federal law in that a defendant is entitled to counsel for any offense (except traffic infractions) regardless of whether incarceration is authorized upon conviction.[12] Additionally, the right to counsel provision of New York's Constitution, as interpreted by the Court of Appeals has, in a number of contexts, afforded greater protections to criminal defendants than does the federal constitution.[13]

This Report then is not about the adequacy of substantive law concerning the right to counsel for indigent defendants. It concerns whether the law's mandate is being afforded to every defendant entitled to its enjoyment. Regrettably, although rights under the Constitution and laws are individual rights,[14] it is clear that, on a widespread basis, they are not honored as such in New York State.

In 1965, to meet constitutional mandates, New York enacted Article 18-B of the County Law, which required each county and the City of New York to establish a plan for the provision of counsel to indigent

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[10] *Alabama v. Shelton,* 535 U.S. 25 (2002).

[11] *McMann v. Richardson,* 397 U.S. 759, 771 n4 (1970).

[12] See, CPL 180.10 (3)(c), CPL 170.10 (3), CPL 210.15 (2)(c). For a full discussion see The Spangenberg Report at 13.

[13] *See e.g. People v. Arthur* 22 N.Y.2d 325 (1968); *People v. Benevento,* 91 N.Y.2d 708 (1998).

[14] *See e.g. Hill v. Texas,* 316 U.S. 400, 405 (1942) ["Equal protection of the laws is something more than an abstract right. It is a command which the state must respect, the benefits of which every person may demand."]

defendants.[15] The law allowed localities to choose among several options. A locality could create a public defender office[16] and appoint through its governing body an attorney to fill the position;[17] it could opt to designate a legal aid society;[18] or it could adopt a plan of a bar association wherein the services of private counsel would be provided on a rotational schedule which plan would be coordinated by an administrator.[19] The statute also allowed a county to adopt a combination of these options.[20] The law mandated that "each plan . . .provide for investigative, expert and other services necessary for an adequate defense."[21] However, private assigned counsel compensation was set at $10 per hour for out-of-court work and $15 per hour for in-court time. The dollar amounts for investigative and other auxiliary services was capped at $300.[22]

The deficiencies in the structure created by Article 18-B became apparent almost at its outset. First and foremost was that Article 18-B did not include a mechanism to evaluate the quality of representation; it also placed the financial burden on counties and the City of New York. Other than requiring that a public defender, legal aid society, or assigned counsel administrator file an annual report with the Judicial Conference, [23] the statute contained no standards by which the quality of representation could be measured and enforced, nor did it establish a mechanism to ensure that there would not be serious disparities in the the quality of representation afforded indigent defendants simply by the mere happenstance of geographic

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[15] County Law § 722.

[16] County Law § 722 (1).

[17] County Law § 716.

[18] County Law § 722 (2)

[19] County Law § 722.

[20] County Law § 722 (4).

[21] County Law § 722.

[22] County Law § 722-c.

[23] County Law § 722-f.

location. Although the framework created by Article 18-B was supported by bar associations and government officials at the time, structurally it gave rise to a fractured, balkanized system, and those who opposed it recognized that it would place serious financial burdens on counties.

By January 1967, the New York State Bar Association already detected serious shortcomings in indigent defense representation in New York. In an Indigent Defense Seminar, held in conjunction with the Judicial Conference, the Association placed at the top of its agenda the following: the absence of standards for ensuring quality representation, the lack of guidelines for determining an accused's eligibility for assigned counsel and for ancillary services, such as investigators and experts, the scope of representation, and the representation of minors.

By 1981, the Legislature itself perceived that New York's system of indigent defense was in difficulty and it funded the New York State Defenders Association to administer a Public Defense Backup Center. The Association's mandate was to help defenders and their clients by assisting with cases, securing experts, and providing training. The Association was also asked to review, assess, and analyze the public defense system, identify problem areas and propose solutions in the form of specific recommendations to the various branches of government. Over the ensuing decade, the Association published a series of reports in which the manifold shortcomings in New York's indigent defense system were described.

With regard to rates of pay for assigned counsel, the Legislature in 1977 increased the rate for out-of court work from $10 to $15 per hour and from $15 to $25 per hour for in-court work. In 1986, the rates were increased to $25 per hour for out-of-court work and $40 for in-court work and payment for all appellate work was to be compensated at the in-court rate.

In the period from 1986 to 2003, bar associations and other interested organizations expressed growing concern about the lack of adequate funding for indigent defense representation and the quality of representation that was being afforded. In 1994, the New York County Lawyers Association raised serious questions about the quality of representation being afforded to the indigent defendant and the impact of

decreased funding on defense providers. As a result, it established a Task Force on the Representation of the Indigent.[24] In June 1995, the Task Force urged the immediate creation of a Board of Trustees for Indigent Defense to oversee and secure the professional independence of defender organizations in New York City. It recommended that the Board of Trustees be authorized to establish general policy for all individual and institutional counsel providing for the criminal defense of the indigent.

In October 1995, the Appellate Division, First Department, established the Indigent Defense Organization Oversight Committee ("IDOOC") to monitor the operation of organizations that contract with the City of New York to represent indigent defendants in criminal proceedings.[25] On July 1, 1996, IDOOC issued its standards, *General Requirements for All Organized Providers of Defense Services to Indigent Defendants,* which were adopted by the Appellate Division, First Department, as court rules. IDOOC's mandate did not include the oversight of assigned counsel programs. Nor was IDOOC authorized to alter the funding of any defender organization not in compliance with its standards. However, there is some evidence that IDOOC's standards and modest monitoring affected positively the quality of representation by institutional providers but no body similar to IDOOC has been created elsewhere in the State.[26]

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[24] Also in 1994, in New York City , then-Mayor Rudolph Giuliani reached an agreement with state court officials to begin using, as a cost savings measure, fewer 18-B attorneys to represent indigent defendants. This placed a greater burden on the Legal Aid Society's ability to fulfill its contractual obligations with the city. When the Association of Legal Aid Attorneys went on strike, Mayor Giuliani proposed to reduce the Society's funding by $16 million and issued a call for Requests for Proposals from nascent competing defense organizations to take over work of the Legal Aid Society at both the trial and appellate levels. As a result of this process, New York County Defender Services, Queens Law Associates, Brooklyn Defender Services, Bronx Defenders, the Center for Appellate Litigation, Appellate Advocates, and the Richmond County law firm of Battiste, Aronowsky & Suchow were allowed to contract with the city for defense work.

[25] *See,* 22 NYCRR, Part 613.5.

[26] The only body with any similarity to IDOOC was the Oversight Committee for the Criminal Defense Organizations for the Appellate Division, Second Department, created in 1997. The Committee was formed in response to a request by the Mayor's Criminal Justice Coordinator for an evaluation of the performance of the criminal defender groups created within the Second Department in 1996 by the City of New York. In February 1998, the Committee issued an evaluation of three new defender groups and found them to provide quality representation. However, neither the Legal Aid Society nor the 18-B

In February 1997, the Task Force of the New York County Lawyers Association announced that the rates of compensation for assigned counsel were inadequate and "inconsistent with New York's commitment to equal justice." In December 1997, the New York State Defenders Association called for state financial support of assigned counsel plans as well as legal aid societies and public defender systems. In 1998, IDOOC issued a report concluding that, at its current funding level and caseload levels, the Legal Aid Society of New York was not meeting the standards IDOOC had established. Also, in 1998, the New York State Defenders Association held fact-finding hearings throughout the state at which numerous witnesses testified to widespread inadequacies in the representation afforded indigent defendants.

In June 1999, the Unified Court System expressed its own deep concern with the inadequacy of assigned counsel fees and Chief Judge Kaye proposed using $63 million of the state's share of surcharge monies to offset the costs of a fee increase, a plan that was endorsed by bar leaders, the presiding justices of the Appellate Division, Attorney General Elliot Spitzer, and the New York State District Attorneys Association. In September 1999, the Deputy Chief Administrative Judge for Justice Initiatives, Juanita Bing Newton, convened a working group to find solutions to the fee crisis.

In January 2000, the Unified Court System issued its report, *Assigned Counsel Compensation in New York: A Growing Crisis.* Focusing exclusively on the low rates of compensation for assigned counsel, the report urged not only that the rates for assigned counsel should be increased, but also that due to the considerable fiscal burdens imposed on local governments, the state should share the cost of assigned counsel compensation.

In February 2000, the New York County Lawyers Association filed a lawsuit in Supreme Court, New York County (*New York County Lawyers Association v. New York State, et. al.)* alleging that indigent adult defendants and children in the First Department were being denied their constitutional rights to effective legal assistance. In January 2001, Governor George Pataki announced the creation of a joint task force to study

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Panel, by far the largest defense providers in the city were evaluated, and there is no indication that the Committee is currently operational.

the compensation rates for law guardians and assigned counsel and come up with a proposal for legislation.

In March 2001, after holding hearings, the Appellate Division, First Department's Committee on the Legal Representation of the Poor issued a report entitled *Crisis in the Legal Representation of the Poor: Recommendations for a Revised Plan to Implement Mandated Funded Legal Representation of Persons Who Cannot Afford Counsel.* The report stated that "[t]he entire system by which poor people are provided legal representation is in crisis." The report concluded that the crisis went well beyond the low rates for assigned counsel and emphasized that the major causes of the crisis were the "lack of resources, support and respect, [and] inadequate funding of institutional providers combined with ever-increasing caseloads." The Committee called upon "the New York State Legislature to reconsider the entire legislative structure relating to governmentally funded legal representation of the poor." Also, in March 2001, the New York State Defenders Association issued a report, *Resolving the Assigned Counsel Fee Crisis: An Opportunity to Provide County Fiscal Relief and Quality Public Defense Services.* The report called for the creation of an independent and politically insulated statewide Public Defense Commission that would oversee both the distribution of state funds and the provision of defense services.

In April 2001, *The New York Times* published a three-part series on New York City's indigent defense system. In an editorial, *Drive-by Legal Defense,* which commented on the series, *The Times* stated that it portrayed a system in which "underpaid, ill-prepared, virtually unsupervised private lawyers sometimes represent hundreds of defendants per year, leaving little time or incentive for them to master the facts, prepare and argue the cases or file appeals of dubious convictions." "There is a real question," said *The Times*, "whether many defendants are getting the legal representation to which they are entitled, or are receiving merely token representation to give their trials a veneer of constitutionality." *The Times* observed further that "[e]ven the public and nonprofit institutions that defend many of the state's indigent defendants are so starved for funds that they cannot do their best for clients." *The Times* called "for a strong state role – preferably through a politically insulated commission – in setting quality standards . . . and in exercising

vigorous oversight to make sure those standards are met."

In July 2001, the Committee for an Independent Public Defense Commission was formed, chaired by Michael S. Whiteman, former counsel to Governor Nelson A. Rockefeller. The Committee declared that the indigent defense system was on the verge of collapse and presented to the Governor and the Legislature a bill to establish an independent oversight commission.

In May 2002, Senator Dale Volker and Assemblyman Martin Luster introduced bills that, in addition to raising assigned counsel rates and eliminating caps on auxiliary defense services, also provided for creation of an independent public defense commission to promulgate standards for representation and which would serve as a conduit for state financing of up to 40 percent of the cost of local defense systems.

On February 5, 2003, Supreme Court Justice Lucindo Suarez rendered his decision in the lawsuit brought by the New York County Lawyers Association. He declared that the existing compensation rates for assigned counsel were unconstitutional because their inadequacy violated a defendant's constitutional and statutory rights to meaningful and effective representation. In describing the evidence bearing on the representation of the indigent, Justice Suarez made the following findings:

> Too many assigned counsel do not: conduct a prompt and thorough interview of the defendant; consult with the defendant on a regular basis; examine the legal sufficiency of the complaint or indictment; seek the defendant's prompt pretrial release; retain investigators, social workers or other experts where appropriate; file pretrial motions where appropriate; fully advise the defendant regarding any plea and only after conducting an investigation of the law and the facts; prepare for trial and court appearances; and engage in appropriate presentence advocacy, including seeking to obtain the defendant's entry into any appropriate diversionary program.[27]

In May 2003, the Legislature enacted legislation that increased the rates of compensation for assigned counsel.[28] The main provisions of the law, which took effect on January 1, 2004, (a) increased assigned counsel fees to $60 per hour for misdemeanors (with a per case cap of $2,400) and $75 per hour for

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[27] *New York County Lawyers Association v. New York State, et al.*, 196 Misc.2d 761, 774-75, 763 N.Y.S. 2d 397, 403 (Sup. Ct. N.Y. Co. 2003).

[28] S. 1406-B/A. 2106-B (Chapter 62 of the Laws of 2003).

felonies and all other eligible cases (with a per case cap of $4,400); (b) raised the caps on expert and investigative services to $1,000 per provider; (c) created a revenue stream for some state funding of defense services from various fees, such as attorney registration fees and Office of Court Administration charges for various electronic database searches; (d) established an Indigent Legal Services Fund ("ILSF"), under the joint custody of the Commissioner of Taxation and the Comptroller, to distribute state funds based on the total amount of local funds spent by localities on public defense statewide; and (e) created a task force to review the sufficiency of assigned counsel rates which sunsets on June 30, 2006.[29] However, under the 2003 legislation, monies from the Indigent Legal Services Fund first go to reimburse the state for payment of law guardians. The remainder was to be distributed, beginning only in 2005, to localities based on the percentage spent by a locality of the overall statewide total for public defense services.

On November 5, 2003, the Office of Justice Initiatives in the Office of Court Administration brought together, at Pace Law School, criminal defense attorneys, prosecutors, judges, and other stakeholders in the criminal justice system to examine the structure, method of financing, and the quality of representation provided by New York's public defense system. Experts from across New York State and elsewhere identified a host of major problems in the system and a consensus was reached as to the components for a quality defense system. These are: (1) detailed statewide standards of practice for public defense providers; (2) the provision of meaningful training, supervision, and mentoring of attorneys; (3) parity in salary and resources between the prosecution and the defense; (4) ensuring defender independence; and (5) development of a client-centered ethos.

In 2004, the New York State Bar Association established the Special Committee to Ensure Quality of Mandated Representation. The Special Committee was charged to study the issues that arose from the assigned counsel rate increase and the responses to that increase from the counties. It was also charged to

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[29] Although the task force was required to issue a report to the Governor and the Legislature on or before January 15, 2006, the members of the task force have not been appointed and it has never met.

recommend to the Association's Executive Committee steps that might be taken to ensure that mandated legal representation would satisfy constitutional standards. The Special Committee concluded that the most effective measure that the Association could take *in the short term* to ensure quality representation would be the promulgation of standards for the provision of such representation. In fulfillment of its mandate, the Special Committee produced an extensive set of standards noting, however, that it "made no qualitative judgments about the different provider systems allowed under [Article] 18-B."[30]

On April 2, 2005, the New York State Bar Association's House of Delegates approved, with some modifications, the set of standards that had been drafted by the Special Committee. The standards call for (1) a highly qualified and well-trained staff who are committed to the defense function; (2) an independent board of directors that sets policy; (3) limitations on caseload and workload that its lawyers assume; (4) intensive training for each lawyer; (5) a strong support staff, including full-time professional investigators and other relevant personnel. The House of Delegates also recommended that these standards be adopted as court rules.

In October 2005, the Special Committee issued a follow-up report in which it recommended that the Association "advocate for the creation of an independent public defense mechanism empowered to provide oversight, quality assurance, support, and resources to providers of mandated representation and to advocate for funding and reform when appropriate. As noted earlier, this recommendation also was approved by the Association's House of Delegates.[31] In April 2006, the New York State Association of Criminal Defense Lawyers issued its proposed draft bill calling for a statewide indigent defense structure overseen by a Public Defense Commission.

III. The Commission's Findings

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[30] In July 2004, the Chief Defenders of New York State also approved *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State.* These standards were adopted by the Board of Directors of the New York State Defenders Association.

[31] See n3 *ante.*

Based upon the Commission's four public hearings, a review of the extensive documentation provided to the Commission by witnesses and other parties, and a careful examination of TSG's comprehensive and exhaustive report, the Commission has concluded that there is, indeed, a crisis in the delivery of defense services to the indigent throughout New York State and that the right to the effective assistance of counsel, guaranteed by both the federal and state constitutions, is not being provided to a large portion of those who are entitled to it. In general terms, this failure is attributable to a lack of an independent statewide oversight mechanism that can set standards and ensure accountability in the provision of indigent criminal defense services and to a grievous lack of adequate funding by the state for those services. Specifically, the Commission makes the following findings:

A. New York's current fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused.

The system created in 1965 pursuant to Article 18-B of the County Law has, in the words of TSG, produced "a haphazard, patchwork composite of multiple plans that provides inequitable services across the state to persons who are unable to afford counsel. The multiple plans . . . not only lack uniformity and oversight, but often fail to comply with the requirements of the enabling statute. The result is a fractured, inefficient and broken system." (SR at 155) There is virtual universal agreement that what is required is an effective statewide structure designed to monitor and enforce compliance with existing norms and standards that govern the representation of indigent defendants. The fault lines in the system throughout New York State are numerous:

1. There are no clear standards regarding eligibility determinations and procedures.

At the outset of a criminal proceeding, there must exist an effective method for determining whether the accused is entitled to the assignment of counsel. However, TSG has found that guidelines for the appointment of counsel exist only in a few counties and that even in those counties, the guidelines were not uniformly applied. Thus, 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. Moreover, public defenders and assigned counsel themselves are frequently charged with the responsibility for making initial eligibility determinations. This responsibility not only adds unduly to their workloads but also raises serious ethical issues. Judges and court clerks also share in the responsibility for determining eligibility for assignment of counsel and must do so with limited or no standards to follow. TSG observed further 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." (SR at 157)

2. There is no statewide standard that defines "adequate" indigent defense and there exists no mechanism to enforce any particular set of standards.

Despite the existence of various sets of standards for representation that bar associations have issued over the years, there is no single set of standards that actually governs what "adequate" indigent defense services means. As TSG notes, "[w]hile New York has three sets of standards that relate to attorney performance and mandated legal representation, except for the general disciplinary rules of the professional code, they are largely unenforceable." (SR at 21) At the hearings, the Commission learned of at least one county executive who considers representation "adequate" if it avoids "ineffective assistance of counsel" claims on appeal. At least one public defender also thought this was the standard by which his office's representation should be measured; because no conviction from his office had ever been reversed on grounds of ineffective assistance, he too concluded that no attorney in his office had ever been less than effective.

As we noted previously, the New York State Bar Association recently adopted *Standards for Providing Mandated Representation.* Although it is the Association's hope that its standards will be widely accepted as minimum standards and that they will have a positive effect on the quality of representation, the fact remains that these standards, and those of other organizations that have adopted standards, are binding on no one. The consequence of having unenforced standards, as found by TSG, is that "in some areas, substandard practice has become the acceptable norm." (SR at 156) TSG has also noted that New York's

indigent defense system does not even conform to the American Bar Association's Ten Principles of a Public Defense Delivery System, which are set forth in The Spangenberg Report's Appendix C. (SR at 155)

3. The amount of monies currently allocated within the State of New York for the provision of constitutionally-mandated indigent criminal defense is grossly inadequate.

TSG has determined that "New York's indigent defense system is in a serious state of crisis and suffers from an acute and chronic lack of funding." (SR at 155) At an average cost-per-capita of $18.54,[32] New York ranks substantially lower in payment per defendant than a number of states. (SR at 29) Such under-funding has a deleterious impact on all aspects of indigent defense representation. Testimony at the Commission's hearings was replete with descriptions by defenders of their inability to provide effective representation due to a lack of resources. This lack of resources (a) results in excessive caseloads; (b) impedes the ability of many institutional providers to hire full-time defenders; (c) deprives defense providers of adequate access to investigators, social workers, interpreters and other support services; (d) is largely responsible for inadequate or non-existent training programs; and (e) contributes to defense providers having only minimal contact with clients and their families:

(a) excessive caseloads

At the Commission's four public hearings, virtually all institutional defenders testified to having to labor under excessive caseloads. TSG observes that "[g]iven the funding problems and the need to show efficiency, it is not surprising that institutional providers throughout the state are burdened with heavy caseloads." (SR at 43) A chilling example of this distressful fact came from the Monroe County Public Defender, one of the state's most highly regarded public defenders, who described in detail the overwhelming caseloads under which his office labors. (SR at 45) There was also much evidence presented at the hearings that public defenders or other institutional providers do not have adequate staff to cover all Town and Village Courts in a given jurisdiction and that requests for additional funds to keep pace with ever growing caseloads

[32] TSG computes cost-per-capita by dividing the total statewide indigent defense expenditure by New York State's population.

are, for the most part, not granted. In one county, for example, despite average misdemeanor caseloads of 1,000 cases per attorney and 175 felony cases per attorney per year, the chief public defender annually is required to submit to the county a proposal as to how he would operate his office with a 10 to 12 percent budget cut.

(b) inability to hire full-time defenders

Significant numbers of public defenders testified that they could only be funded by their respective counties to work part-time. As TSG determined "[t]he burden of heavy caseloads is exacerbated in some counties by the use of part-time attorney positions" and that "in some counties the part-time attorneys . . . are expected to handle full-time caseloads. (SR at 46)

(c) lack of adequate support services

Many institutional providers testified to their lack of access to investigators, social workers, foreign language interpreters, and other support services. TSG reports that "[t]hroughout our site work in New York, in all parts of the state, we were struck by the inadequate provision of and lack of requests for expert and investigative services." (SR at 72) In some defender offices, the attorneys conduct their own investigations, as best they can. A number of defenders testified that they even lacked sufficient funds for basic office supplies.

(d) lack of adequate training

There exist wide disparities in the training of indigent defense counsel. We learned that very few institutional providers have in place viable training programs and that access to training is inconsistent across the state. In regard to assigned counsel and contract defense programs, training ranges from non-existent to the barely adequate. While the New York State Defenders Association has training programs, they are not always easily accessible by overworked defenders. In some counties, institutional defense providers have no funds to provide training or even to send their attorneys to defender training programs and CLE programs. As noted by TSG, "other than Disciplinary Rule 6-10 (which forbids a lawyer from handling a matter which

the lawyer knows or should know that he or she is not competent to handle) public defenders and legal aid lawyers in many New York counties are subject to few mandatory standards of practice, inadequate training, and little or no oversight." (SR at 51)

(e) minimal client contact and investigation

Extensive hearing testimony also presented a distressing picture of minimal attorney-client contact. We were told of attorneys who did not visit their clients in jail, return phone calls, answer letters, or conduct even minimal investigations of their clients' cases. In some counties, the only attorney-client contact available is through collect calls to counsel, which many counsel refuse to accept. In a number of counties, attorney-client contact occurs only when the defendant is brought to court for a scheduled appearance. Although some judges indicated that they will grant an attorney's request that the defendant be brought to the courthouse for a meeting in between court appearances, there was no indication that this is a common request or that courts commonly grant such requests. Especially disturbing was the testimony from former prisoners and from families of defendants as to the lack of contact with counsel, creating the perception, and most likely the reality, of a lack of attention to a defendant's case. As TSG learned from its site visits, "it is not uncommon for indigent defense attorneys across New York State to meet a client for the first time on the day of court. Thus, attorney-client contact frequently occurs in court where the attorney's time is short and there is often no setting for meaningful, confidential communications." (SR at 67)

Recognizing that the above-described deficiencies are so clearly linked to inadequate funding, the Commission embraces TSG's conclusion that "no structural changes in the indigent defense system can be implemented, no mandatory and enforceable standards established, no statewide training developed and no substantial efforts undertaken to meet the state and federal counsel requirements, without a substantial infusion of additional funds to the state's indigent defense system." (SR at 155)

4. The current method of providing indigent defense services in New York imposes a large unfunded mandate by the state upon its counties, results in a very uneven distribution of services and compromises the independence of defense providers.

According to TSG, the counties provided 80 percent ($280,588,598) of the overall indigent defense funding in New York in fiscal year 2004. (SR at 27) TSG points out, however, that although the state provided 20 percent ($71,220,582) of all funding for indigent defense, 72 percent, or $51,551,710 from the new ILSF fund distributed to the counties, was provided through alternative revenue sources. In fact, the data shows that only slightly more than 6 percent of the total state and local expenditures for indigent defense services was attributable to the state general fund appropriation for fiscal year 2004. [33] (SR at 27)

In light of the fiscal burdens on the counties, it was not surprising that witnesses at the hearings spoke of experiences that made it clear that the funding structure compromised both the quality of representation and the very independence of the defense function. One institutional provider told of a County Executive's admonition to judges that they were "gatekeepers" of county funds. Another spoke of a County Executive's demands that, as part of his office's contract with the county, it waive certain of its clients' rights. Another stated that he had been reprimanded by his County Executive for spending money on an expert witness rather than relying on the prosecution's expert. As TSG found, "New York fails to ensure the independence of its indigent defense providers who are too often subject to undue interference from the counties that fund them. While County Law §722 requires the counties to provide indigent defense services 'necessary for an adequate defense,' this requirement is largely open to interpretation by the counties that are driven by competing fiscal (and sometimes) political concerns." (SR at 155-156)

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[33] Though the Commission was not charged with studying Family Court mandated representation, the criminal defense programs studied by TSG were, in many instances, inseparable from the programs providing Family Court representation. As TSG observed, "[f]amily court matters are an integral part of New York's indigent defense system and cannot be completely removed from an overalll consideration of the current system." (SR at 158) Indeed, these programs are frequently jointly administered and completely interdependent and reported county level fiscal data is usually merged into one amount covering both programs. *Ibid.* These factors suggest that the Indigent Defense Commission that we propose also oversee services providing for Family Court representation. However, given the limitations of the Commission's mandate, we are hesitant to make this a specific recommendation.

Ironically and unfortunately, the 2003 increase in assigned counsel rates actually had a negative impact on indigent defense representation. As TSG found, the increase caused many counties, as well as New York City, to "focus on the efficiency and cost-saving efforts of their providers," and that "[a] number of counties created a conflict office or shifted additional workload to institutional providers in an effort to control rising costs, often without sufficient additional resources." (SR at 156)

The Sixth Amendment and Article I, § 6, of the New York Constitution impose the obligation to provide effective assistance of counsel for all indigents accused of crime on the State of New York, not on counties or the legal profession. The state also must guarantee that the criminal defense function is truly independent. This means that defense counsel must have responsibility for case-by-case administration while leaving to judges their inherent right and obligation to ensure that courtroom proceedings comply with the mandates imposed by the law and the rules of professional responsibility. Therefore, defense counsel, as well as judges, also must be independent from the executive function at the local level, whose concerns with county-wide fiscal obligations have been shown to intrude on the defense function.

5. In Town and Village Courts, in which a majority of the justices presiding are not lawyers, there is a widespread denial of the right to counsel and even a lack of clear understanding as to which cases trigger the right to counsel.

The position occupied by Town and Village Courts in the administration of justice cannot be overstated. They handle the largest number of cases in the state's criminal court system and the fines they impose contribute greatly to state and local government coffers. However, the absence of a statewide defense oversight structure has had an especially devastating effect on the thousands of indigent defendants prosecuted in the Town and Village Courts throughout the state. In fact, the Commission was alarmed, not only by the vast disparity in these courts with respect to when the assignment of counsel is made, but also by the numerous outright denials of the right to assigned counsel itself.

There are 1,281 Town and Village Courts outside of New York City with 2,154 Town and Village justice positions, the majority of which are filled by non-lawyers. Like City Courts, Town and Village Courts

are "local criminal courts" and have trial jurisdiction over misdemeanors, violations and traffic infractions. They also have preliminary jurisdiction over felonies committed in any town located in a county where such Town or Village Court is situated. The Commission learned from witnesses at the Commission's hearings and from other sources that the deprivation of indigent defendants' right to counsel was widespread in Town and Village Courts. Specifically, we learned that there are significant delays in the appointment of counsel, that many indigent defendants must negotiate pleas with the prosecution while unrepresented, and that many justices themselves lack a clear understanding as to which cases trigger the right to counsel. The Commission also learned that all too often counsel for indigent defendants are not available to attend the numerous Town and Village Courts.

TSG's extensive findings with respect to proceedings in the Town and Village Courts are extremely serious. Among the most distressing are: (1) the lack of legal training, enforceable standards and oversight which "create a risk to the quality of justice rendered:" (2) that "[o]ften lacking sufficient legal knowledge and confidence, some justices are averse to trials and defense motions, seek advice from local prosecutors before making decisions, make subjective rather than legally-objective decisions, and/or lose their independence by succumbing to local government pressure to guard its funds," and frequently "set excessive bail in many minor cases." (SR at 161) TSG found that "[m]any indigent defendants in the town and village courts across the state are deprived of their state and federal right to effective assistance of counsel. Counsel is either not present, not assigned in a timely manner, or not assigned at all." (SR at 161)

TSG observed further that "[b]ecause town and village courts are not required to be courts of record, it is often difficult or impossible for a defendant to adequately exercise the right to appeal a decision by a local justice," and that "[i]n addition to lacking a record, some town and village courts are not held in a public place and fail to ensure full public access and open procedures." (SR 161) Thus, TSG concluded that it is not "currently possible to receive adequate and meaningful representation in many of the town and village courts in New York State," and that "major reform is needed to remove the numerous barriers to justice in

the locally-funded town and village court system." (SR 161-162) The widespread abrogation of the right to counsel for the indigent defendant in these courts is simply unacceptable.[34]

6. There is a significant statewide disparity between the resources available to public defenders and those enjoyed by prosecutors.

Prosecutors are consistently better funded and better staffed than indigent criminal defense service providers. Their personnel, on average, have higher salaries and greater ancillary resources than do their public defender counterparts. Moreover, the disparity is not just apparent in funding, salaries, and the number of full-time employees but in additional in-kind resources available only to prosecutors. This includes access to all law enforcement agencies in the county, as well as the New York State Division of Criminal Justice Services, the FBI and the state crime laboratory. In addition, prosecutors often receive federal and state grant assistance that defenders do not. For example, the creation of new drug and other specialty courts (as of September 8, 2005, 218 courts were operational with at least 55 more planned) often comes with additional federal grants for prosecutors and courts but not for defense providers. Nonetheless, institutional providers in particular are expected to staff many more parts, and make many more court appearances, with no additional resources. These disparities are well-documented in The Spangenberg Report. (SR at 83-863 The Report also calls attention to the American Bar Association's position, that "the appropriate measure of

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[34] When the Commission began its work, it did not anticipate discovering the vast range of shortcomings and abuses that abound in the Town and Village Courts throughout the state. Although the Commission believes its proposed statewide defender system can improve considerably the ability to provide representation to indigent defendants in those courts, we would be remiss if we did not call attention to the defects in the Town and Village Court system that we encountered in the course of our work. In our judgment, the abuses are so serious in the Town and Village Courts that they should be examined by a body with specific authorization to scrutinize the manner in which those courts function. In this regard, we note that Chief Judge Kaye has created a Special Commission on the Future of the New York State Courts and has stated that the Special Commission "will be asked to look at systems across the nation for ideas, and to propose a court structure that is free of barriers that force the unnecessary fragmentation of courts and cases, that is user-friendly, has the benefits of both specialization and simplicity and that is accessible to all New Yorkers; and to suggest procedures that complement such a streamlined system." Judith S. Kaye, *The State of the Judiciary* 24 (2006). An evaluation of the Town and Village Court system would seem appropriate to the work of a body such as the Special Commission.

health with a criminal justice system is whether each agency in the system – courts, prosecution, defender – receives adequate and balanced resources." (SR at 83) "Applying this measure of success," TSG concludes, "New York's system is failing." (SR at 83)

7. The lack of more open discovery procedures and variations in discovery practices impedes the efficient expedition of cases, timely investigation by the defense, including location of witnesses, and gives rise to unfairness.

The Commission heard considerable testimony regarding pretrial discovery practices among prosecutors' offices throughout the state. A major grievance of defense providers is that prosecutors refuse to disclose discovery materials until hours or even minutes before trial. It also is apparent that these practices vary among prosecutors' offices. Some prosecutors afford the defense more liberal discovery than is required by the current provisions of CPL Article 240. Most choose to afford only what is minimally required, and individual prosecutors at times do not do even that – as the plethora of discovery issues in criminal appeals and collateral attack cases evidences. Efforts to liberalize New York's discovery laws have gone on for years,[35] and it not within the Commission's mandate to enter this debate. However, in the course of our investigation, we could not ignore the obvious built-in inefficiency in existing discovery procedures and practices that causes delay and inhibits the efficient disposition of cases. Nor can we ignore TSG's observation, which is well within the Commission's mandate, that "[t]he problems facing New York's indigent defense providers – including inadequate resources, insufficient client contact, and a failure to request or receive investigative and expert services – are made more troubling by discovery practices and other prosecutorial policies with which they are faced." (SR at 77)

8. Defense providers are not providing the requisite counseling with regard to collateral issues that can affect critically a defendant's case, especially those regarding a defendant's immigration status. Insofar as minorities are disproportionally represented in the criminal justice system, this failure has particular implications for individuals in those communities.

Numerous witnesses at the Commission's hearings emphasized the importance of defense providers'

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[35] *See e.g.*, 2006 Report to the Chief Administrative Judge by the Advisory Committee on Criminal Law and Procedure at 4.

awareness of and ability to deal with a host of issues that disproportionately impact minorities. First and foremost is the relationship between the changing ethnic composition of the minority population and current government policies and practices with respect to immigration. This has greatly increased the need for defense attorneys to be cognizant of the immigration status of clients and to be able to render advice as to the possible effect on that status when assessing options that may be available to clients. This is especially critical with regard to a defendant's informed decision when entering a guilty plea to a misdemeanor or a violation. As Russell Neufeld, the former Chief of the New York Legal Aid Society's Criminal Defense Division, told the Commission:

> The collateral consequences of criminal convictions has [*sic*] grown rapidly. So the balance has shifted from the primary harm to a client almost always being the amount of prison time he or she is facing, to the collateral consequences of a conviction. These include a myriad of penalties such as deportation, an entire family's loss of public housing, expulsion from school, ineligibility for student loans and the disclosure to prospective employers of even violation convictions. Of these, deportation has increased to epidemic proportions. (SR at 145)

Other factors germane to informed representation include awareness of a defendant's employment history, housing status, overall family situation and the availability of diversionary programs. Regrettably, the vast majority of defendants do not experience such essential representation.

9. There is no comprehensive system of data collection designed to provide accurate statistics regarding the provision of indigent criminal defense services in New York. The absence of such a system significantly hampers the ability of policy makers and administrators to make informed judgments and plan meaningful improvements in the administration of indigent defense services.

The Spangenberg Report details the serious shortcomings in New York State's data collection system in regard to indigent defense. It emphasizes that "[w]hile there are a number of sources regarding appointment of indigent defense counsel, there is no single source for reliable information. In spite of the existence of very advanced and interconnected criminal justice data systems throughout the state, gathering detailed and reliable information for criminal and family court appointments to indigent defense providers is virtually impossible." (SR at 34) Even under the new Indigent Legal Services Fund legislation that raised compensation rates for indigent defense, the reports required of defense providers were often "prepared

inconsistently, incompletely, or not at all." (SR at 32-33) In this advanced technological age, such deficiencies are unnecessary and preventable and therefore unacceptable.

10. The Commission's ultimate conclusion, based on all the information that has been presented to us, is that the delivery system most likely to guarantee quality representation to those entitled to it is a statewide defender system that is truly independent, is entirely and adequately state-funded, and is one in which those providing indigent defense services are employees of entities within the defender system or are participants in an assigned counsel plan that has been approved by the body established to administer the statewide defender system.

As we have pointed out, New York's current funding of defense services is grossly inadequate in terms of total dollars and in requiring that counties bear the brunt of the costs for defense services, the funding structure has created substantial disparities among the various counties in the type of representation afforded indigent defendants; in many instances, it has seriously compromised the independence of defense providers. It is also significant that New York is out of step with the national trend that recognizes that full state funding is the preferable choice. As of October 1, 2005, 28 states fund their indigent defense system entirely through state funds.[36] Recent funding data that TSG has reviewed shows that 19 of 25 states that provide the highest *per capita* spending for indigent defense are also 100 percent state-funded.

There is also a clear trend among the states to develop statewide oversight mechanisms for indigent criminal defense. Twenty-eight states place the responsibility and oversight of their state and local indigent defense programs within a state commission or a statewide public defender.[37] In many states, both those with

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[36] Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawaii, Iowa, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Vermont, Virginia, West Virginia, Wisconsin, and Wyoming. See, *Indigent Defense Costs Per Capita, A State by State Comparison,* prepared by The Spangenberg Group for the ABA Bar Information Program, July 1, 2005.

[37] Alaska, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Vermont, Virginia, West Virginia, Wisconsin and Wyoming. Tennessee and Florida have statewide systems involving elected public defenders. Several of the remaining states have a commission with limited state oversight and responsibility. See *Statewide Indigent Defense Systems,* prepared by The Spangenberg Group for the ABA Bar Information Program, October 2005.

a statewide public defender program and those without, such oversight is provided exclusively through a state commission or oversight board. The oversight board is typically charged with setting policy for indigent defense services and advocating for state resources. In 25 states, there is total state oversight and 100 percent state funding. In several states, the commission provides some statewide oversight, but lacks full authority over indigent defense services. In other states, the oversight is provided by the chief public defender and there is no commission. New York is one of only six states that have no statewide responsibility or oversight mechanism for indigent criminal defense.[38]

III. The Commission's Recommendations:[39]

A. The delivery of indigent defense services in New York State should be restructured to insure accountability, enforceability of standards, and quality of representation. To this end there should be established a statewide defender office consisting of an Indigent Defense Commission, a Chief Defender and Regional Defender and Local Defender Offices, a Deputy Defender for Appeals, and a Deputy Defender for Conflict Defense.

1. The Indigent Defense Commission

a) Responsibility

The Indigent Defense Commission should have the responsibility for ensuring that quality legal representation is provided on a consistent basis throughout the state, independent of parochial or private interests. To achieve this end, the Commission should organize, supervise, and assume overall responsibility for the operation of New York's indigent defense system and pursue adequate funding necessary to accomplish these goals.

b) Composition

1. The Commission should be comprised of no fewer than nine nor more than 13

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[38] The other states are Arizona, Maine, Pennsylvania, South Dakota and Washington.

[39] As noted earlier, the Commission concluded that there are a number of interim measures that the Unified Court System can take immediately to ameliorate a number of deficiencies that adversely affect the representation of indigent defendants; these measures are set forth in the Addendum.

members appointed by the Governor, the Chief Judge, and the leaders of the State Legislature, with none of the three branches appointing a majority of its members. The selection should be made after solicitation of candidates for appointment from bar associations, individuals, and community, civic and other groups.

2. Commission members should reflect the geographic and ethnic diversity of the state and should be individuals who have a variety of backgrounds, experiences, and qualifications. They should also be individuals with significant experience in the provision of representation in criminal cases, or who have demonstrated a commitment to the provision of high quality representation of criminal defendants, or who have served people of low income in other contexts. An essential qualification for all candidates should be a firm commitment to the principle of independence of the defense function. However, no individual who is a public defender, prosecutor, judge, law enforcement officer, or a member or employee of a branch of government or of a government agency, should be eligible for appointment to the Commission. At least two-thirds of the Commission's members should be attorneys.

3. The term of office for a member of the Commission should be four years. However, initially, the terms of office should be staggered to ensure continuity of the Commission. The Commission's chairperson should be chosen by majority vote of the Commission's membership. The Commission's members should not be compensated for their work except for reimbursement of actual and necessary reasonable expenses in connection with their duties as members of the Commission. For budgetary purposes only, the Commission should be housed in the judicial branch. In all other respects, it must be independent of all governmental influence.

c) Function

The Indigent Defense Commission should have broad powers and responsibilities for the delivery of quality indigent defense services. It should: (1) hire a Chief Defender who should also serve as chief of the Commission's staff; (2) determine the location of Regional Defender Offices and local defender offices within each region as are needed; (3) hire Regional, Deputy, and local defenders upon

recommendation of the Chief Defender and hire the Conflict Defender; (4) together with the Chief Defender, establish and implement standards for performance, hiring, training and continuing legal education, permissible caseloads, support services, determination of financial eligibility, and any other standards that are required to supervise and monitor the delivery of defense services; (5) together with the Chief Defender, evaluate existing indigent defense programs and determine the type of indigent defense services that should be provided within each region which best serves the interests of indigent defendants in the region including but not limited to, regional defender offices, contract institutional defenders and assigned counsel plans; (6) be authorized to enter into contracts with institutional defense providers and assigned counsel plans that provide representation that meet the standards established by the Commission; (7) set compensation standards designed to ensure adequate and balanced funding for attorneys providing indigent defense services, including attorneys employed by regional and local defender offices, contract legal defense providers, and assigned counsel; (8) develop standards for hourly rates to be paid to assigned counsel, expert witnesses, investigators and interpreters and update those standards periodically.

The Commission should also: (9) determine the types of information required for the auditing and monitoring of the performance of the indigent criminal defense function and establish an appropriate mechanism for the collection and publication of such data; (10) establish auditing procedures in connection with the handling of public funds; (11) be authorized to receive grants and contributions for the conduct of special projects that will enhance further the delivery of indigent defense services; (12) in conjunction with the Chief Defender, make annual recommendations to the Chief Judge, Governor and the Legislature to improve the administration of the criminal justice system and the statewide indigent defense system.

2. The Chief Defender

a) The Chief Defender should be chosen by the Commission on the basis of his or her training, experience, and other qualifications as the Commission deems appropriate. Prior to making the appointment, the Commission should solicit recommendations from bar associations and interested

community groups and individuals.

b) The Chief Defender should serve as chief of the Commission's staff and should have the authority, in consultation with the Commission, to hire attorneys as Regional and Deputy Defenders and such other staff as the Chief Defender and the Commission deem necessary to effectuate the purposes of the statewide defender system and to hire appropriate staff for his or her own office.

c) The Chief Defender should assist the Commission with the promulgation of standards for performance of the indigent defense function and ensure that those standards are monitored and enforced in all regional and local defender offices.

d) The Chief Defender should insure that all regional and local defender offices are provided with adequate support services.

e) The Chief Defender should evaluate existing defender service programs and make recommendations to the Commission with respect to their continued existence.

f) The Chief Defender should create a statewide database of available experts, investigators, and interpreters by region.

g) The Chief Defender, in consultation with the Commission, should prepare the annual budget.

3. Regional and Local Defender Offices

a) A Regional Defender Office in each geographic region as determined by the Commission should be established, headed by a Regional Defender. The Regional Defenders should be hired by the Commission upon recommendation of the Chief Defender.

b) Within each region, local defender offices should be established as needed. The determination as to the location of such local offices should be made by the Commission, in consultation with the Chief Defender and the Regional Defender for the region. Each regional and local office should be situated to ensure that attorneys and support staff have maximum access to clients and their families,

courthouses, and detention facilities.

c) The Chief Defender and Regional Defender should consult with interested community groups and individuals in each region regarding matters affecting the delivery of indigent defense services in the region.

4. Appellate Representation

a) The Chief Defender should hire and supervise a Deputy Defender for Appeals who should develop a plan for the representation of indigent defendants who wish to appeal their convictions or respond to appeals by the prosecution. Such a plan should include standards for the determination of whether representation of an indigent client should continue beyond the direct appeal from the client's judgment of conviction.

b) The Deputy Defender for Appeals should monitor all appellate assignments, ensure that the assignment of cases is made promptly, that the record on appeal is obtained expeditiously and that all appellate service providers comply with the standards for performance established by the Commission.

c) The Deputy Defender for Appeals should maintain complete and accurate records of appellate and post-conviction services and expenses.

5. Conflict Defense Representation

a) There should be a Defender for Conflicts who is appointed and supervised directly by the Commission and is totally independent of the Chief Defender.

b) The Defender for Conflicts should be responsible for developing a plan for providing conflict counsel in criminal cases both at trial and on appeal. Such a plan may include Conflict Offices, contracts with assigned counsel plans or programs or with individual attorneys, as long as all providers of conflict defense services meet the standards for representation adopted by the Commission.

B. The enactment of the Indigent Defense Commission plan should be followed by an expeditious phase-in schedule that sets reasonable time limits for:

(1) the appointment of all members of the Indigent Defense Commission and

designation of its chairperson;

(2) the appointment of the Chief Defender;

(3) the establishment by the Commission of the requisite Regional and Local Defender Offices;

(4) the publication by the Commission of its initial set of standards and guidelines;

(5) the review and evaluation by the Chief Defender and the Commission of each existing defender program in the state;

(6) the effective date on which the Commission shall take over the responsibility and funding of all indigent defense programs in the state as designated by the Commission.

The Commission recognizes that implementation of a statewide defender system cannot be achieved overnight. However, in light of the crisis in defense representation that we have detailed and from which our proposal springs, its implementation must be undertaken with the greatest urgency lest many more thousands of impoverished defendants are deprived of their consitutional rights to a quality defense.

C. Adequate funding of indigent criminal defense must be provided by the New York Legislature from the State's General Fund, not from the counties. County funding should be phased out over a three-year period.

New York's experience since 1965 has demonstrated that a system of minimal state funding with primary financial responsibility at the county level does not work. It results in an inadequate and in many respects, an unconstitutional level of representation and creates significant disparities in the quality of representation based on no factor other than geography, thereby impugning the fairness of New York's criminal justice system. No substantial improvement can be achieved in the provision of indigent defense services in the state without a significant increase in overall state funding and the elimination of local funding. New York should join the majority of states that fund 100 percent of all costs of their indigent defense system. A system of direct state funding at the requisite adequate level will eliminate the geographic disparity in representation that currently abounds throughout the state. Because local funding drives up local costs and requires local choices to be made among social benefit programs, a state-funded defense system will spread out costs on a statewide basis and lessen greatly the fiscal impact on counties.

D. The system for funding indigent criminal defense services should provide for elimination of the overall disparity between prosecution and defense resources so as to achieve "adequate and balanced funding" defense representation.

A justice system's funding program that does not take into account disparities between prosecution and defense resources is neither fair nor sensible. It deprives indigent defendants of their constitutional rights and relegates the defense function, despite constitutional and statutory mandates, to a form of second class citizenship. There exists no justification for such imbalance and inequity in a system that professes to comport with one of the basic tenets of our legal system, "equal justice for all."

E. A comprehensive data collection system designed to provide an accurate picture of the provision of indigent criminal defense services in New York State should be established and maintained. Such a system would enable policy makers and administrators to make informed judgments concerning the administration of the indigent defense system and plan for improvements.

(1) There should be established a single source for reliable, indigent defense case activity and cost that can provide a complete and accurate picture of the system statewide and by region.

(2) The data system that is developed should be consistent with the plan for an overall criminal justice coordinated system currently being developed in New York State.

(3) All case and cost information should be entered in a single, statewide database that must also include the data collected for non-fingerprintable offenses.

IV. Conclusion

For more than two years, the Commission has examined the provision of indigent criminal defense services in New York State. We have been aided immeasurably by the high quality, professional study conducted by The Spangenberg Group. As a result of this undertaking, we have concluded that nothing short of major, far-reaching, reform can ensure that New York meets its constitutional and statutory obligations to provide quality representation to every indigent person accused of a crime or other offense. That substantially more funding must be dedicated to accomplishment of this task is a fact that can neither be disputed nor ignored. However, we also conclude that an infusion of additional funds, while absolutely

necessary, will not suffice. There must be established a statewide defender system, such as we have proposed, that is truly independent and which is structured to enforce standards of performance and demand true accountability from all who have the responsibility for defending those accused of a crime or other offenses. It must be a system for which the State of New York, not the counties, assumes full responsibility for funding. Only through such a system can constitutional mandates for quality indigent defense representation be realized on an equal basis throughout the state.

This Report is not the first to examine the adequacy of indigent legal representation in criminal cases in this state. Indeed, in this Report, we have catalogued the history of attempts by various organizations over the last 40 years to call attention to the defects in New York's manner of providing for indigent defense representation. But our Report, considered in tandem with The Spangenberg Report, is the most comprehensive evaluation ever done in New York State. It signals that the time for further study is over. The crisis in indigent representation in this state is a well documented fact. The time for action is now.

ADDENDUM*

I. GENERAL PROPOSALS

A. Amend the Rules of the Chief Administrator to require that the denial by a trial court of an assigned counsel's request for appointment of an investigator or expert under County Law section 722-c be set forth in a written order with written findings of fact supporting the court's determination.

The Spangenberg Report is replete with examples from around the State of what appear to be improper, summary denials by trial courts of assigned counsel requests for appointment of investigators and experts under County Law section 722-c. According to the Report, judges considering these requests are well aware that costs for investigative and expert services under section 722-c are borne by the county, and, "[i]n this respect, the courts are put in the position of guarding the county's coffer. This unavoidable and unenviable role is not lost on many judges who are constrained by limited county funds." (SR at 74) By requiring that all orders denying requested services under that section be in writing and contain written findings of fact in support of the court's determination, the proposed rule will help to ensure that: (1) these determinations are not based on inappropriate and irrelevant factors such as the fiscal status of the county at the time of the request; and (2) a proper record of the court's decision – including a decision rendered in a Town or Village Court where the proceedings are not recorded – is available in the event the defendant is ultimately convicted and raises the court's denial of his or her section 722-c request on appeal. In keeping with the *ex parte* nature of most of these section 722-c applications, the proposed amendment should allow the defense to request that any such written order and findings of fact be sealed until after the verdict is entered.

B. Amend the Rules of the Chief Administrator to permit administrative review of a trial court order reducing or denying a claim for compensation submitted by an assigned attorney, expert or investigator.

Section 127.2(b) of the Rules of the Chief Administrator currently provides, in relevant part, that a trial court order awarding compensation to an assigned attorney, investigator or expert in excess of the statutory limits set forth in Article 18-B "may be reviewed by the appropriate administrative judge, with or without application, who may modify the award if it is found that the award reflects an abuse of discretion by the trial judge." 22 NYCRR 127.2(b). Pursuant to subdivision (c) of section 127.2, "[a]n application for review may be made by any person or governmental body affected by the order." The Commission believes that defense attorneys, experts and investigators whose claims for compensation under article 18-B are reduced or denied by a trial judge should be allowed to have that determination reviewed administratively. Accordingly, the Commission recommends that Part 127 of the Rules of the Chief Administrator be amended to permit administrative review of a trial court order reducing or denying a claim for compensation submitted by an assigned attorney, expert or investigator.

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*As noted in the Preface, this addendum sets forth interim measures which the Commission believes would help to ameliorate a number of specific difficulties that adversely affect representation of indigent defendants in the state. These measures, if implemented, should not be understood to undercut, in any way, the necessity for the broad reforms that are presented in the main body of this Report.

C. Revise and periodically review OCA's hourly rate guidelines for investigators and experts, and develop and maintain a statewide list of available investigators and experts.

In February of 1992, then-Chief Administrator Matthew Crosson issued an administrative order (hereinafter "the order") adopting hourly rate "guidelines for the payment of reasonable compensation to court-appointed psychiatrists and other nonlawyer professionals" pursuant to Judiciary Law section 35 and County Law section 722-c. Presumably intended to provide guidance to trial judges in complying with the statutory requirement that the court determine "reasonable compensation" for experts and investigators assigned pursuant to these two sections, the order listed five "categori[es] of professional[s]" and corresponding hourly rates. Despite the Legislature's more than tripling of the statutory cap for investigative and expert services under section 722-c in 1993, the hourly rate guidelines established by the order have remained unchanged for more than 14 years. The Commission finds that the issuance by OCA of updated hourly rate guidelines for investigators, experts and other professionals retained by assigned counsel and other indigent defense providers would help to facilitate the broader use by these providers of these critical services. *See*, SR at 74-76. Accordingly, the Commission recommends that the Chief Administrative Judge issue a new administrative order updating the hourly rate guidelines, and that OCA review the guidelines at least every two years and update them as needed.

The Commission further finds that there is currently a need for a statewide list of experts and investigators who are willing and able to take cases at guideline rates. *See*, SR at 76-77. Accordingly, the Commission also recommends that OCA develop, maintain and make available to indigent defense providers and judges throughout the State a non-exclusive[1] list of investigators and experts who are available to take assignments at guideline rates. The list should be reviewed and updated frequently by OCA.

D. Expand the number of non-Penal Law petty offenses subject to the existing plea-by-mail procedure in the Summons Part of the NYC Criminal Court.

Pursuant to section 61 of the NYC Criminal Court Act and section 200.25 of the Uniform Rules for the Trial Courts, a defendant who has been served with an appearance ticket in lieu of an arrest, returnable in the Summons Part of the NYC Criminal Court, for a petty offense defined outside of the Penal Law that has been specifically designated by the Administrative Judge of the NYC Criminal Court as "appropriate for disposition" under that section, may waive arraignment in open court and the right to counsel, and offer to plead guilty to the offense by mail and pay a specified fine and surcharge. *See*, 22 NYCRR section 200.25(a) and (b). To date, the Administrative Judge of the NYC Criminal Court has designated one offense, "Consumption of Alcohol on the Streets" (NYC Administrative Code section 10-125(b)), as "appropriate for disposition" under that section. The Commission believes that expanding the number of non-criminal NYC Administrative Code offenses subject to the plea-by-mail procedures of section 200.25 would allow indigent defense providers in NYC to better allocate their limited resources to more serious (i.e., misdemeanor and felony) prosecutions.[2] Accordingly, the Commission recommends that the Administrative Judge of the NYC Criminal Court exercise his or her existing authority under section 200.25 to so expand the list of plea-by-mail offenses. In determining which additional offenses "would be appropriate for disposition" by mail, the Commission further recommends that the Administrative Judge not include any offense that might result in future "collateral consequences" to the defendant as a result of the plea.

E. Amend the CPL and other relevant statutes to expand the availability of plea-

by-mail procedures for selected petty offenses prosecuted outside NYC.

Because the section 200.25 plea-by-mail procedure adopted pursuant to the NYC Criminal Court Act cannot currently be applied in jurisdictions outside New York City, in order to conserve limited indigent defense resources in these jurisdictions the Commission recommends that the Legislature amend the CPL and other relevant statutes to allow for the expanded use in upstate counties of plea-by-mail procedures for selected non-criminal, non-Penal Law offenses that currently require the defendant's personal appearance in court, and/or an appearance by counsel, at arraignment. *See, generally*, CPL section 170.10(1)(a) and (1)(b). As with the New York City plea-by-mail rule, this procedure should not be used if the plea might result in future collateral consequences.

F. Amend Joint Rules of the Appellate Divisions to require that full-time defenders earn no less than 18 CLE credits, and other defenders earn no less than 12 CLE credits, every two years in criminal law.

The Commission finds that while some defender institutions aggressively train their attorneys and although the New York State Defenders Association has worked admirably to improve the professionalism of participating counsel, many attorneys remain under-prepared for their representations. Many defenders – institutional defenders and panel attorneys alike – fail to receive the ongoing, cutting-edge training in defense issues that their posts require. Even assuming that indigent defenders meet their Continuing Legal Education ("CLE") requirements for overall number of credits (*see*, 22 NYCRR section 1500.22[a] [24 credits, including four in ethics and professionalism, per biennium]), there is no requirement that defenders dedicate any portion of their CLE credits to matters relevant to defense of the indigent. The evidence is that cost and time constraints require many defenders to meet CLE requirements without regard to subject matter. The Commission recommends that the Joint Rules of the Appellate Divisions be modified to require that every two years full-time defenders earn no less than 18 CLE credits, and all other defenders earn no less than 12 CLE credits in courses related to criminal law. In turn, the OCA Attorney Registration Form will need to be amended to reflect these new CLE Rules and allow enforcement as under current law.

G. Expand Opportunities for Free CLE and joint training opportunities with prosecutors.

Apart from the substance of indigent defender training, cost remains a frequent impediment to defender training. The Commission urges every possible means be explored to provide defenders with free or reduced-rate CLE. The Commission calls on law schools and bar associations offering CLE programs, and the Judiciary itself, to make special efforts to make available CLE Board-certified training available at low or no cost to indigent defense attorneys and to publicize such opportunities by all practicable means.

Another helpful step would be the creation of specific training programs in which indigent defense attorneys and prosecutors would participate jointly. It is important that prosecutors be cognizant of issues that affect indigent defense representation, especially the ever-growing universe of the collateral consequences of a criminal conviction. In this regard, some curricula important for the defense function, are also important for prosecutors. The Commission therefore recommends that the New York State Defenders Association, perhaps under the sponsorship of the New York State Judicial Institute, develop joint training protocols.

H. Modify Rule 17.4 of the Rules of the Chief Judge to require that trial judges exercising criminal jurisdiction complete an OCA-certified program in indigent defense and

related topics every two years.

Effective judicial training in the complex issues surrounding indigent defense is as critical as effective defender training. There is a troubling lack of understanding by some judges about what constitutes indigence, when and how indigency determinations must be made, when and how investigators, experts and counsel should be appointed, etc. The Commission finds that a clear understanding of and sensitivity to these predicates to entry into the indigent defense system, as well as judicial knowledge of collateral consequences of conviction are important for a meaningful indigent defense. The Commission therefore recommends that the Rules of the Chief Judge be amended to require every judge or justice presiding in a court that exercises criminal jurisdiction to participate in a program approved by the Chief Administrator of the Courts addressing issues relating to indigent defense. Such a rule already exists for domestic violence issues (*see*, 22 NYCRR [Rules of the Chief Judge] section 17.4[a]).

I. Take immediate steps to ensure that, in accordance with County Law section 722(3), every existing county bar association assigned counsel program in the State is operated pursuant to a written plan that has been filed with, reviewed and approved by OCA.

Despite the requirements of County Law section 722(3) that a county's assigned counsel system be pursuant to a plan of the county's bar association, and that such plan be approved by the "state administrator" (i.e., OCA) before it is placed in operation, "in many counties, no such formal plan exists, nor does OCA appear to house a collection of such plans submitted for approval pursuant to the law." (SR at 159) *See also*, SR at 56, n171. It follows that when a county having a bar association plan elects to modify that plan, those changes must also be approved by OCA. According to the Spangenberg Report, as a result of the 2004 increase in hourly rates for assigned counsel, a large number of counties, as a cost-saving measure, established new public defender or conflict defender offices or made other significant changes to their 18-B programs for delivering indigent defense services. *See*, SR at 56-58,159. To the extent these changes included significant modifications to an existing county bar association assigned counsel plan, such modifications should have been reviewed and approved by OCA *before* being placed in operation. The Spangenberg Report cites only one example of a county whose modified bar plan was formally approved by OCA prior to implementation. *See*, SR, Appendix J.

In light of the above, the Commission recommends that OCA take immediate steps to ensure that, in accordance with County Law section 722(3), every existing county bar association assigned counsel program in the State is operated pursuant to a written plan that: (1) accurately reflects the program actually in operation in that county; and (2) has been filed with, reviewed and approved by OCA.

J. Allow defenders to use CPL article 182 videoconference technology to communicate securely with incarcerated clients. 2. Enact legislation to make CPL article 182 authorization statewide and permanent.

The Commission finds, as reflected in the Spangenberg Report, that "[i]ndigent defendants throughout the state suffer from a serious lack of contact from their attorneys. Too often, the only attorney-client contact takes place in court," and "[t]his in-court contact is frequently brief and occurs in an area that cannot ensure confidentiality." (SR at 157) Among the obstacles to frequent attorney-client visits are the great distances between certain courthouses where criminal cases are heard and the jail facilities where defendants are housed, as well as, in New York City, the relative inaccessibility of the Rikers Island jails. CPL article 182 allows incarcerated defendants in enumerated counties to make certain court appearances by

two-way closed circuit television without having to be brought to court. Under current procedures, however, these two-way closed-circuit systems are generally used in conjunction with formal court proceedings: because defenders are not granted access to the system, a low-cost or even no-cost method to connect defendants with their appointed counsel, and thus significantly to improve the quality and quantity of attorney-client contact while fully protecting clients' rights, is needlessly lost. Moreover, the authorization to use this common-sense device sunsets every few years and is limited only to certain counties. To cure these inefficiencies and help defenders properly communicate with their clients, the Commission urges that the Judiciary enact rules to give defenders access to the videoconference system to communicate with their clients, and to introduce legislation to make this available system permanent and statewide.

K. Amend the Uniform Rules for the Trial Courts to require that Superior Courts conduct CPL 530.30 bail reviews promptly after arraignment in all cases where an incarcerated defendant has been arraigned without counsel.

CPL section 530.30 allows for superior court review of bail and remand orders issued by a local criminal court, and permits the superior court to, *inter alia*, ROR a defendant held on bail or remanded by the local criminal court or fix bail in a lesser amount. In order to address the problem of unrepresented defendants languishing in jail on excessive bail following arraignment in a local criminal court, the Commission recommends that OCA amend the Uniform Rules for the Trial Courts to require that Superior Courts conduct CPL 530.30 bail reviews promptly after arraignment in all cases where an incarcerated defendant has been arraigned without counsel.

L. Devote OCA and DCJS resources to improve the collection and verification of indigent defense data.

The Commission finds that there is currently a paucity of reliable, accurate data on indigent defense services in the State. *See*, SR at 156. Pursuant to County Law 722-f(1), indigent defense providers are required to file annually a "report with the judicial conference [OCA] at such times and in such detail and form as the judicial conference may direct." The current annual report is a one-page form (UCS-195). As noted in the Commission's Interim Report (*see*, pp. 29-30), "there are various errors, omissions, and confusing data on a large number of [UCS-195] submissions by the counties." In addition, as noted by the Spangenberg Group, the "self-reported UCS-195 information from the counties cannot be verified through any other data source." (SR at 156) This Commission finds that a statewide Indigent Defense Commission would most certainly benefit from immediately improving indigent defense data collection efforts, including data collected through the UCS-195 form, electronic data captured and transmitted to the Division of Criminal Justice Services (DCJS) through OCA's "CRIMS," "ADBM" and "UCMS" electronic case management systems and specific data relating to counsel, investigator and expert assignments in the Criminal and Family Courts under County Law Article 18-B. *See*, SR at 156. Accordingly, the Commission recommends that OCA and DCJS devote the necessary resources to improve and streamline data collection and data verification processes in this critical area.

M. Create an office or entity within OCA charged with facilitating the implementation of this Commission's recommendations and preparing generally for implementation of the statewide defender system.

To prepare generally for implementation of the statewide defender system recommended by this Commission and help facilitate the implementation by OCA of the Commission's other recommendations, we recommend the creation of a coordinating body within OCA to serve as a focal point on the complex and

interrelated issues of indigent defense. Properly staffed, this office should, among other things:

- compile and verify indigent defense data (*e.g.*, the bar association plans required to be approved by the Chief Administrator under County Law § 722[3]);
- assist in the development and implementation of judicial education materials relating to indigent defense and collateral consequences of conviction;
- publicize and assist in implementing rules promulgated pursuant to this Commission's recommendations;
- coordinate with defense providers, and with the Indigent Defense Commission on the Judiciary's behalf when created;
- create and distribute informational materials (e.g. videotapes) on defendant rights and the nature of court proceedings to be shown in proper locations and at proper times in the adjudicative process;
- advocate generally for effective provision of indigent defense services, including the enactment of the legislative recommendations of this report.

II. TOWN AND VILLAGE COURT PROPOSALS

A. Amend the Uniform Rules for the Trial Courts to require Town and Village Courts to electronically record all proceedings relating to felonies, misdemeanors and Penal Law violations; allocate funds through OCA's Justice Court Assistance Program to assist localities in purchasing and maintaining the necessary recording equipment.

As noted in the Spangenberg Report, Town and Village Courts are not "courts of record," and criminal proceedings before these courts are, in most cases, conducted without preserving a verbatim record of those proceedings. *See*, SR at 160. Due in large part to the lack of a verbatim transcript of the proceedings, "it is often difficult or impossible for a defendant to adequately exercise the right to appeal a decision by a local [Town or Village] justice." (SR at 161) The Commission believes that, ideally, there should be a stenographic record of *all* non-civil proceedings conducted in the Town and Village Courts, and that these courts should, like all other criminal courts in the State, be "courts of record," at least when exercising their criminal jurisdiction. However, requiring Town and Village Courts to electronically record all proceedings relating to felonies, misdemeanors and Penal Law violations, and providing state funding through OCA's Justice Court Assistance Program to help localities obtain recording equipment, will enable the preservation of an accurate and complete record of these proceedings for appellate review and other purposes. *See, generally*, Part 138 of the Rules of the Chief Administrator ["Justice Court Assistance Program"].

B. Establish a procedure to determine the extent of compliance with section 200.26 of the Uniform Rules for Courts Exercising Criminal Jurisdiction and undertake appropriate action to ensure that Town and Village justices conscientiously comply with the rule.

Section 200.26 of the Uniform Rules for Courts Exercising Criminal Jurisdiction (hereinafter, "the rule"), requires Town and Village Courts, in cases where the defendant appears for arraignment without counsel and either cannot make bail or is remanded without bail, to make an initial determination as to the

defendant's eligibility for assigned counsel. Where it appears that the defendant is financially unable to obtain counsel, the court must assign counsel on the spot and promptly notify both assigned counsel and the local pretrial services agency of the court's assignment and issuance of the bail or remand order. *See*, 22 NYCRR section 200.26(c). Under the rule, Town and Village Courts must maintain a record in the case file of any communications and correspondence initiated or received by the court pursuant to the rule.

It has been over a year since the rule was adopted and there has been no systematic effort to determine the extent to which the state's over 1200 Town and Village Courts are in compliance. Indeed, the Spangenberg Report cites numerous examples from around the state of Town and Village justices who are simply unaware of the rule or are failing to comply with it. (SR at 112-114) Accordingly, the Commission recommends that the rule be amended to require Town and Village justices to periodically submit to OCA a form listing cases where, at the initial appearance, the court either fixed bail that the defendant could not immediately make, or remanded the defendant without bail; whether counsel was assigned in accordance with the rule; and whether the notice and other requirements of the rule were satisfied. The form would be signed by the justice prior to submission. Using the completed forms, OCA would then conduct periodic audits of selected Town and Village Courts to review individual criminal case files and other relevant court records (*see, generally,* 22 NYCRR section 200.23) to determine compliance with the rule.

C. Amend Part 17.2 of the Rules of the Chief Judge to double to two weeks the minimum training for newly-selected non-attorney Town and Village justices.

Educational programs for newly-elected, non-attorney Town and Village justices should be enhanced so that the justices are better informed and sensitized to the constitutional requirements and standards for appointing counsel, investigators and experts. One present problem is that new non-attorney justices receive only a single week of basic courses (see 22 NYCRR [Rules of the Chief Judge] section 17.2[a]), leaving little time for instruction on issues concerning the rights of indigent defendants. Even a qualified attorney might have significant difficulty rapidly absorbing and properly applying complex new materials of this scope; for a lay person, the challenge is more difficult. The Commission therefore recommends that OCA revamp and expand training for non-attorney justices by doubling basic training to two weeks in the first year, perhaps in two one-week programs. While the Commission appreciates that these mandates could impose significant burdens both on localities with Town or Village Courts and participating justices (who often must take leaves of absence from their full-time jobs to participate in such training), expanded basic education programs for non-attorney justices will help to provide protections for indigent defendants' rights.

D. Revamp Town and Village Court training programs to include quarterly practical programs and remote programs.

The Commission further finds that for attorney and non-attorney justices alike who have served for fewer than four years, the annual training provided is insufficient. Most Town and Village Courts are not convened daily and new justices have fewer opportunities to acclimate to their judicial duties. Further, a significant proportion of justices are not attorneys and have little if any other legal training. Thus, the current judicial training cycle becomes insufficient to build critical judicial skills. OCA's experience is that many local justices themselves have reported a desire for more frequent training. Supplemental training has been used in the Fifth Judicial District in the form of mock proceedings. These educational opportunities have been very successful and should be made a standard tool of training, available to justices no less than quarterly, perhaps divided between attorney and non-attorney judges to provide targeted assistance suitable

to participants' level of prior legal training. The Commission further finds that the Town and Village Court education program could significantly benefit from frequent telephone, video-conference and internet-based symposia.

E. Increase publicity of Town and Village Court Resource Center.

While the OCA Town and Village Court Resource Center has proved to be an invaluable resource to many local justices and staff with questions on all manner of Town and Village Court operations, procedure and substantive law, the Commission finds that the Resource Center might be even more helpful if more justices used it. To this end, the Commission recommends that the Judiciary, in partnership with the New York State Magistrates' Association and other stakeholders, better publicize the Resource Center to local officials, and especially court staff, perhaps even by relatively simple means as desktop paraphernalia that remind Town and Village Courts of the assistance available to them.

F. Establish a mechanism to coordinate conflicting meeting times of local courts within each judicial district and county.

Defenders and prosecutors reported significant difficulty in allocating staff among local courts. The sheer number of City Courts and Town and Village Courts – in some counties numbering in the dozens and scattered across hundreds of square miles – makes staff allocations inefficient, expensive and inordinately complex. Defenders and prosecutors report cases before multiple courts at the same time; defenders report losing so much time traveling between courts that they cannot meaningfully meet with their clients. So long as there exist multiple criminal tribunals in each county, separated from central detention facilities by significant distances, New York's indigent defense system will remain inherently inefficient, foisting wastefully high costs onto taxpayers and depriving clients of already scant time with their lawyers. To mitigate these inefficiencies, the Commission urges systematic coordination of the terms of City, Town and Village Courts in each judicial district and county to improve the effectiveness of defense, prosecution and other law enforcement functions. Where one defender or prosecutor is assigned to multiple courts, these courts *never* should convene at the same time. Given the need for a comprehensive approach, the Commission urges that the Judiciary take a lead role in working with local governments, prosecutors and defenders, service providers and other stakeholders to ensure against scheduling conflicts among these local courts.[3] While the Commission recognizes the historical independence of each Town or Village Court and its sponsoring locality, the complexity of efficiently providing indigent defense services – and the paramount interest of making this fractured system work – no longer permits each Town or Village Court to operate in a relative vacuum, without regard to the burdens of scheduling on defenders, prosecutors and taxpayers who fund their operations.

G. Promulgate a new Rule of the Chief Judge designating interpreters on the OCA Registry as "Official Interpreters" for the Town and Village Courts, and amend the Uniform Rules for the Trial Courts to require Town and Village Courts to include in case records a finding either that the defendant spoke English or had an OCA-certified interpreter.

Language barriers invariably complicate the provision of indigent defense services in the courtroom. This is especially true in the Town and Village Courts. Town and Village Courts and sponsoring localities often lack proper interpreting services for many reasons – some are unaware of their duty to provide

these services, others do not make funds available for this purpose, and some languages are difficult for which to find qualified interpreters. The Commission heard disturbing testimony that in some Town and Village Courts, a defendant's family member, an arresting officer, a prosecutor or even the judge serves as *ad hoc* interpreter, raising a palpable risk of mis-translation or worse. Moreover, without a transcript of the proceedings, there may be no way to ensure on appeal or collateral review that non-English speaking defendants' rights meaningfully to participate in their own defense are protected. In April 2006, OCA, noting the need to better connect Town and Village Courts with qualified interpreters, resolved to make available to Town and Village Courts the OCA registry of interpreters qualified to work in the State-paid courts. The Commission expects that the Town and Village Courts will find that this registry, coupled with availability of telephonic interpreting, will help speed engagement of interpreters, in almost any language, at any time of day, in any location across the State.

While the Commission applauds this OCA initiative, it will not fully address the real problem, which relates as much to *paying* interpreters as finding them. The root of the problem is an anachronistic statute that caps the compensation of Town and Village Courts' "official interpreters" at just $25 per day, paid by the county. *See*, Judiciary Law section 387.[4] Because few if any Town or Village Courts retain an "official interpreter" and few if any qualified interpreters agree to work for $25, Town and Village Courts face a daunting choice: proceed without an interpreter (and thus potentially violate a defendant's constitutional rights), or engage an interpreter and order localities to pay fees often far in excess of $25 (*i.e.*, violate section 387 and foist ostensibly unauthorized financial burdens on the sponsoring locality).[5] There are widespread reports that when a justice does engage an interpreter on promise of payment, the justice encounters significant resistance from the locality, making it harder to retain interpreters in later cases. Given that qualified interpreters in State-paid courts now earn $250 per day, the Commission finds that this $25 cap frustrates defendants' rights to participate in their own defense, and concurs in the New York State Magistrates Association's call for the Legislature to end this restriction.

The Commission concludes, however, that the exigency of this problem does not allow New York to wait for a legislative solution, nor need we wait. The recent establishment of a Statewide registry of interpreters and OCA's initiative to make this registry available to Town and Village Courts together create a vehicle by which the Judiciary itself can aid in resolving the problem. To this end, consistent with the Chief Judge's power to establish standards and administrative policies of statewide applicability for all New York courts including the Town and Village Courts,[6] the Commission proposes that the Judiciary promulgate a rule recognizing interpreters listed on the registry as "official interpreters" within the meaning of Judiciary Law section 387. Such a rule would require Town and Village Courts to exhaust the OCA registry before appointing an outside interpreter, and thus obviate the anachronistic $25 cap in almost all cases.

Of course, requiring Town and Village Courts to use the OCA registry (and presumably to pay OCA rates), will impose new costs on localities, and create a disincentive for justices to appoint interpreters, much like courts' disincentives to appoint investigators and experts whose fees are paid by the county. To address this disincentive, the Commission proposes amending section 200.23(b) of the Uniform Rule for the Trial Courts to marginally expand the existing reporting requirements for Town and Village Courts in criminal cases. This amendment would require Town and Village Courts to include in each case file a statement either that the defendant was fluent in English or that the Court engaged an interpreter certified by OCA to translate in the defendant's language for all proceedings. Because this statement would become part of each case record, this new rule would sensitize justices to their duty to appoint qualified interpreters and provide at least some documentary basis on which to review these proceedings.

H. Amend Judiciary Law section 387 to lift the $25/day cap on Town and Village Court temporary interpreter compensation and make these costs reimbursable by the State.

Recognizing the potential scope of the cost of interpreters and that Town and Village Courts may still need to engage outside interpreters, the Commission finds that judicial regulation alone cannot fully address the problem. A complete and fair way of dealing with the issue would be for the Legislature to amend section 387 to eliminate the $25 cap and make all interpreting costs reimbursable by the State at rates fixed in advance by the Chief Administrator of the Courts. Such an amendment would eliminate many operational and political impediments to meeting Town and Village Court obligations to appoint interpreters, and thereby make great strides to help vindicate many indigent defendants' constitutional rights in the Town and Village Courts.

Endnotes

1Under the Commission's proposal, indigent defense providers would, of course, be free to retain an investigator or expert who does not appear on the OCA-prepared list. The Commission would further recommend that, in distributing the proposed list, OCA make clear to defense providers and judges that the list in no way constitutes an endorsement by OCA of the quality of services provided by any of the listed experts or investigators.

2 According to the Spangenberg Report, from 1991 to 2004 there was a dramatic increase in summonses filed in NYC, from 98,278 in 1991 to 581,734 in 2004, an increase of 491 percent. (SR at 141) Moreover, according to the Spangenberg Report, in 2001, 98 percent of summonses in NYC were disposed of at arraignment, and it is estimated that a similar percentage are so disposed of today. *Id.*

3The Commission notes that the New York State Constitution and the Judiciary Law invest in the Chief Judge regulatory authority herself to enact rules that would harmonize local court schedules (see NY Const, art VI, §§ 1[a], 28[b]; Judiciary Law §§ 211[1][a], 212[1][c]). Under this authority, the Chief Judge or her designates, including the administrative judges of each judicial district, likewise may work with affected stakeholders to avoid scheduling conflicts.

4"If the services of an interpreter be required * * * and there be no unemployed [i.e. available] official interpreter to act, the court may appoint an interpreter to act temporarily in such court. Such interpreter shall before entering upon his duties file with the clerk of the court the constitutional oath of office. The court shall fix the compensation of such interpreter at not more than twenty-five dollars per day for each day's actual attendance by direction of the presiding judge or justice and such compensation shall be paid from the court fund of the county upon order of the court." Judiciary Law section 387.

5Where the $25 cap results in a locality being unable to meet a defendant's constitutional right to have an interpreter, the statutory cap probably is unconstitutional as applied and thus cannot limit the Town or Village Court's appointment of an interpreter.

6See NY Const, art VI, §§ 1(a), 28(c).

Steven Zeidman
Additional Commentary in which
Hon. Penelope Clute, Hon. Patricia Marks, Laurie Shanks
And Hon. Elaine Jackson Stack join.
June 20, 2006

"The poor man looks upon the law
as an enemy, not as a friend. For
him, the law is always taking
something away."

Attorney General Robert Kennedy, Law Day, May 1, 1964

The Commission's report concludes that "the time for further study is over . . . [t]he time for action is now."[1] I wholeheartedly concur; there is no need for "further study" and we must act "now." Every day in this state, thousands of people who are unable to afford counsel are being victimized as constitutional and ethical standards of effective assistance of counsel are routinely reduced to platitudes. Yet all the report essentially does is recommend "further study." Faced with the voluminous and detailed findings of the Spangenberg report,[2] which, parenthetically, come as no surprise to those who labor regularly in the Criminal Courts, the Commission merely recommends the same proposal that the New York State Defenders' Association (NYSDA) and the Committee for an Independent Public Defense Commission (spearheaded by the self-same NYSDA) first put on the table a few years ago - a statewide entity to oversee and coordinate the myriad indigent defense systems in place across the state.[3] While I concur that the case can certainly be made for a unified approach to the funding, delivery and oversight of indigent defense, more must be done, and on an immediate basis, to address the ongoing crisis in indigent defense.

Faced with indisputable evidence of a crisis of epic proportions, the Commission chooses to recommend the formation of another Commission. Ironically, that new Commission will no doubt be comprised of many of the same folks on this Commission. And, no doubt, the new Commission's first step will be to look to the Spangenberg report that is presently sitting in front of this Commission. By then, however, the report will be a few years old, so it will require rehiring Spangenberg for an update. Thereafter, the Commission should be poised to take "action." The Commission's decision to leave for another day and another body efforts to address immediately the apparent and well-documented sorry state of indigent defense is an inadequate response to a crisis. For that reason, I dissent from that part of the Commission's report which extols the formation of a new Commission as the panacea for all that ails indigent defense in this state.

And what exactly is the crisis that demands immediate attention? Is it about a lack of money, as the Commission's report emphasizes? Of course indigent defense is, and has historically always been, drastically underfunded. That shameful reality was common knowledge

[1] Commission report at 42.
[2] The Spangenberg report is attached to the Commission's report as Appendix B.
[3] The Committee for an Independent Public Defense Commission (CIPDC) was formed in 2001, and soon thereafter recommended the creation of an independent, statewide indigent defense oversight commission. Recently, the CIPDC presented a draft bill to legislative leaders. In fact, according to the Commission's report, a bill providing for an independent public defense commission was introduced by Senator Dale Volker and Assemblyman Martin Luster more than four years ago. Commission report at 17.

long before this Commission was convened. Should the myriad defense organizations and programs throughout the state be organized in some coherent way? Yes, but the crisis is about much more than funding and structure. Limiting the analysis to those factors serves to obfuscate the central issue – there must be careful examination of what it is that defenders of the indigent accused actually do and do not do. It is well past time for a comprehensive study and critique of the nature and quality of the work.

The time is ripe for such a discussion. On May 25, 2006, the New York Law Journal reported the decision in People v. DeJesus, where the court held that a defendant was not entitled to have his conviction set aside even though he had not been advised that his plea to a misdemeanor would automatically result in deportation. Reserving for another time and place a legal analysis of the holding, more to the direct point is the question of how it came to pass that a lawyer failed to know, or talk with his client about, the deportation consequences of a plea. That is a window into the real crisis.

The Spangenberg report itself documents the genesis of these tragedies. "By the year 2000, 18-B attorneys [in New York City] were disposing of 69 percent of all misdemeanor cases at arraignment."[4] Should not this Commission be concerned with such alarmingly high disposition rates, particularly at the accused's first court appearance? Should not there as well be an in-depth analysis of the general prevalence of guilty pleas and the corresponding lack of litigation? Just why is the plea rate so high? Are indigent defenders in some form coercing or subtly influencing their clients into pleading guilty early and often? Or are defense lawyers failing to listen to their clients and/or to value the benefits to their clients of actively contesting the charges? In the current climate of concerns about innocence and wrongful convictions,[5] as well as in the aftermath of the findings of police misconduct by the Mollen Commission[6] and the Attorney General's "stop-and-frisk" investigation,[7] should not there be a clarion call for defense lawyers to actively investigate and litigate?

Concerns about the reliance on guilty pleas are exacerbated by the explosion of collateral consequences attendant to conviction. It is undoubtedly harder than ever before for a defense attorney to navigate through the deluge of punishments that follow from a conviction. With that in mind, one would expect, and demand, that plea rates, especially at arraignment, would be decreasing. Yet, as Spangenberg observed in his report, "Collateral consequences of a criminal conviction are of particular concern in New York City as such a high percentage of cases plead out at arraignment and defense counsel spends very little time with their clients before a plea is entered."[8] Spangenberg further noted the lack of any real litigation: "Because so many cases plead at arraignment, litigation and motion practice has changed in New York City, with very few pretrial motions filed, especially in misdemeanor cases."[9] This Commission cannot remain silent in the face of these revelations.

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[4] Spangenberg report at 142.

[5] See, e.g., Adam Liptak, *Study Suspects Thousands of False Convictions*, N.Y. Times, Apr. 19, 2004, at A15.

[6] Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Dep't, City of New York, Commission Report (1994).

[7] Office of New York State Attorney General Elliot Spitzer, the New York City Police Department's "Stop & Frisk" Practices: A Report to the People of the State of New York from the Office of the Attorney General, Dec. 1, 1999.

[8] Spangenberg report at 144-45.

[9] Spangenberg report at 144.

Instead, why not recommend bold steps, as did the Broward County, Florida Public Defender? In a letter to all judges of the Criminal Court, he wrote that he had "forbidden his attorneys from advising indigent criminal defendants to plead guilty at arraignment unless they've had 'meaningful contact' with their clients in advance."[10] He reasoned that his lawyers were ethically and legally constrained from pleading clients guilty without having established an attorney-client relationship and having investigated the circumstances of the charges.[11] Notably, his actions seem to have the support of the local prosecutor.[12] In addition to simply being the right thing to do, his actions brought his office into conformity with the extant American Bar Association Standards, which state that "[u]nder no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial."[13] In fact, the standards recently promulgated by the New York State Bar Association contain similar cautions against pleas at arraignments unless or until adequate factual and legal investigation has taken place.[14] Yet this Commission chooses to make no recommendations regarding plea rates generally, pleas at arraignments in particular, or the overall confluence of pleas and collateral consequences.

We have heard and seen how problem-solving and community courts are proliferating. Does this Commission address the fundamental issues those changes portend? How can a defense attorney be most effective in those settings? Has the Commission given consideration to where a defense provider should ideally be located? Does not a Community Court suggest a community defense office? Again, the Commission chooses to leave these crucial, fundamental questions for another body at another time.

Where is the input of those most affected by indigent defense providers - clients and their families and communities?[15] What do those constituencies have to say about indigent defense? Why is it that every so-called "consumer perspective" study since Gideon v Wainwright[16] has found that clients harbor great resentment and mistrust toward their appointed attorneys?[17] Most studies have found that clients perceive their lawyers to be primarily interested in getting them to

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[10] Dan Christensen, *No More Instant Plea Deals, Says Public Defender*, Daily Business Review, June 6, 2005.
[11] Id.
[12] Id.
[13] ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 4-6.1 (3d ed. 1993).
[14] The New York State Bar Association Standards for Providing Mandated Representation (adopted by the New York State Bar Association House of Delegates on April 2, 2005) state in relevant part that counsel must "provide the client with the opportunity to make an intelligent and well-informed decision in those instances when such decision is to be made by the client (i.e, whether to plead guilty)" (I-3); "[obtain] all available information concerning the client's background and circumstances for purposes of . . . avoiding, if at all possible, collateral consequences" (I-7a.); and "[provide] the client with full information concerning such matters as . . . immigration . . . and other collateral consequenees" (I-7e.). Pleas at arraignments violate the letter and spirit of each of these standards.
[15] The Commission's report notes that "TSG [The Spangenberg Group] spoke with defense attorneys, judges and court personnel, as well as with state, county, and city officials with knowledge of the criminal justice system." Commission report at 3. Noticeably lacking is any input from present or past clients and their families, communities and advocacy organizations.
[16] 372 U.S. 335 (1963).
[17] See, e.g., Jonathan D. Casper, *Criminal Justice-The Consumer's Perspective* (Nat'l Inst. Of Law Enforcement and Crim. Just. Ed., 1972); Suzanne E. Mounts, *Public Defender Programs, Professional Responsibility, and Competent Representation*, 1982 Wis. L. Rev. 473, 474 ("That many clients are suspicious of, sometimes even hostile towards, their defenders has been repeatedly documented.").

plead guilty.[18] The reality of that perception is no doubt borne out in the Spangenberg findings. Other seemingly intractable issues that surface in those studies beg serious thought. Not surprisingly, indigent defendants express concern that they have no say in the selection of their lawyer[19] and that he or she is appointed to them by the government.[20] Compounding the problem is the ever-present belief that anything free is worth what you paid for it,[21] and also that so many defense attorneys seem to their clients to be inextricably linked with the other institutional players.[22] Are there possible solutions to these longstanding problems? Is not that the core of the original charge to the Commission – to confront difficult issues and to try to develop creative solutions? One such example is the concept of "Judicare," a kind of Medicare for legal needs.[23] Rather than consider such initiatives or think about ways of reconceptualizing indigent defense, the Commission report clings to the one thread of a statewide defense commission as if it is a cure-all.

Similarly, how can a Commission focused on indigent defense not squarely address the issue of race?[24] Who are the clients, what policing decisions brought them into court, who are the defenders, and how does the judiciary treat the accused? These questions have to be part and parcel of any report about criminal defense of the indigent.

The Commission's report should confront and address at least select items from the Spangenberg report's fifty-five findings. For example, as the Spangenberg report makes abundantly clear, most defense lawyers for the indigent have excessive caseloads.[25] Concomitantly, the report states that "[i]n New York, we did not encounter *any* institutional provider that had its own meaningful, written caseload standards,"[26] and that as a result, "they are handling heavy caseloads that are well in excess of the national standards."[27] While developing

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[18] See, e.g., Casper, supra note 17.

[19] See, e.g., Samuel J. Brakel, *Styles of Delivery of Legal Services to the Poor: A Review Article*, 1977 Am. B. Found. Res. J. 219.

[20] See, e.g., Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 Hastings Const. L.Q. 625, 667 (1986) ("The indigent defendant may view his defender at first with suspicion since the same source of funds that is paying the police to arrest him and the prosecutor to prosecute him, is also paying for his counsel.").

[21] See, e.g., Charles E. Silberman, *Criminal Violence, Criminal Justice* 306 (1978) ("[M]any defendants feel that he who pays the piper inevitably calls the tune; in their view, what you don't pay for, you don't get.").

[22] See, e.g., Alan F. Arcuri, *Lawyers, Judges, and Plea Bargaining: Some New Data on Inmates' Views*, 4 Int'l J. Criminology & Penology 177, 187 (1976) (more than 80% of defendants interviewed felt that their appointed lawyer and the prosecutor were working in collusion with the judge).

[23] For discussions of Judicare both in the United States and abroad, see, e.g., Rob Atkinson, *Historical Perspectives on Pro Bono Lawyering: A Social-Democratic Critique of Pro Bono Publico Representation of the Poor: The Good as the Enemy of the Best*, 9 Am. U.J. Gender Soc. Pol'y & L. 129, n.4 (2001); David J. McQuoid-Mason, *The Delivery of Civil Legal Aid Services in South Africa*, 24 Fordham Int'l L.J. 111 (2000); Dorothy Nicole Giobbe, *Legal Aid and Right to Counsel Under Canada's Charter of Rights and Freedoms*, 25 Brooklyn J. Int'l L. 205, 210 (1999) ("One of the most coveted aspects of the judicare, or certificate model, is the degree of control that clients have over choice of representation. Because clients have discretion in their selection of a lawyer, the certificate system is thought to possess a unique quality of confidence between client and lawyer.").

[24] See, e.g., Donna Coker, *Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. Crim. L. & Criminology 827 (2003).

[25] "[I]nstitutional providers throughout the state are burdened with heavy caseloads." Spangenberg report at 43.

[26] Spangenberg report at 44 (emph. added).

[27] Id.

numerical standards requires a degree of sophistication and an ability to weigh types of cases, there is no doubt that it can, and, more importantly, must, be done.[28] Yet the Commission declines to recommend caseload standards of any kind.[29]

Defending the indigent accused requires attorneys who understand and are ready to confront the modern age of "quality of life" and "zero tolerance" policing. Those lawyers must also be equipped to navigate through the newly developing problem-solving and community courts. And while every single arrest is brutally important, significant and meaningful to the person arrested, burgeoning collateral consequences have raised the stakes. A heretofore relatively "innocuous" charge can now lead to deportation, eviction, loss of government benefits, and a host of other problems, in addition to the fear, humiliation, frustration and concern that follows every arrest. The new age of criminal practice requires a new approach to criminal defense. Instead, the Spangenberg report paints a picture of rapid pleas and little or no motion practice. That reality must be confronted immediately.

There are hard questions to tackle but this Commission chooses to reserve them for another body at another time in the future. The notion seems to be that it is sufficient, or best, to wait for the Legislature to approve an adequately funded statewide commission. All seem to agree there is a crisis in defense of the indigent. To wait for legislative action strikes me as an unacceptable response to a crisis. I concur wholeheartedly with this much of the Commission's report - there "is no need for further study – the time for action is now."

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[28] See, e.g., Scott Wallace & David Carroll, *The Implementation and Impact of Indigent Defense Standards*, 31 S.U. L. Rev. 245 (2004).

[29] Part III of the Commission's report is titled, "The Commission's Recommendations." The recommendations that follow relate almost exclusively to the statewide defense commission. In a footnote, the report references "a number of interim measures that the Unified Court System can take immediately to ameliorate a number of deficiencies that adversely affect the representation of indigent defendants." Commission report at n.39. Given the overarching nature of the Commission's original mandate, and the magnitude of the indigent defense crisis that has now been documented, it seems more appropriate to insert those "measures" directly into the relevant portion of the text, rather than relegate them to a footnote and "Addendum." In fact, those measures represent the tip of the iceberg. Any number of additional steps could, and should, have been recommended in order to have an immediate, positive impact on the delivery of defense services.

Additional Commentary of Klaus Eppler In Which Hon. Penelope Clute, Laurie Shanks, Hon. Elaine Jackson Stack And Steven Zeidman Join

June 19, 2006

I wholeheartedly support the recommendations of the Commission, not only in its principal recommendation for a fully state funded system and the establishment of an Indigent Defense Commission ("IDC") directed and empowered to provide quality representation to indigent defendants, but also all the other recommendations in the Report including those in the Report Addendum. I believe that the truly monumental, thorough and detailed report of The Spangenberg Group will lend undeniably convincing support to the urgency of adopting the Commission's principal recommendations. As the First Chair of the Indigent Defense Organization Oversight Commission ("IDOOC") in the First Department and subsequently the Chair of the Committee in the First Department which issued the Report in 2001 on the Crisis in the Legal Representation of the Poor, I strongly believe that an independent agency's power to set, monitor and enforce standards – and to provide funding to support such standards – is the key to the provision of quality mandated legal representation.

There are two reasons for my feeling compelled to add a separate writing to the Commission's Report: First is the decision of this Commission – charged with making recommendations as to the future of indigent defense services in New York – not to make recommendations (or even express preferences) as to the system the IDC should strive for. It is my view that in the interest of the justice system, indigent defense services in New York State should be provided through a hybrid system that includes both an institutional provider component and a private bar – assigned counsel component.

Second, sharing Professor Zeidman's concern that the "crisis of epic proportions" requires immediate attention -- and not just by the legislature, I would have preferred that the Commission strongly advocate for the immediate adoption of minimum standards by all institutional providers and assigned counsel plans, preferably at the direction of the court system.

Respectfully submitted,

Klaus Eppler

Additional Commentary of Hon. Patricia D. Marks In Which
Hon. Penelope Clute, Hon. Sallie Manzanet, Laurie Shanks And Steven Zeidman Join

The Indigent Defense commission was appointed by Chief Judge Kaye in 2004 to study the indigent defense system from top to bottom and make recommendations for improvement of the indigent defense system. The inquiry would include the quality of current services, the standards for those services, the training of those who represent the indigent and the system for financing these services. The commission would also develop a model for a whole new system of indigent defense in New York.

I have reviewed the final report of the commission as of the June 9 meeting and feel compelled to write a separate report. I have been advised that a final report will not be available to review before I leave on Sunday. While I concur in the Commission's report, I write separately to share my thoughts on what I believe is the role of the courts in assuring that indigent defendants receive quality representation. I also urge the adoption of standards of meaningful representation.

JUDICIARY ROLE

I do not feel in the face of information that we have received that we can wait for the creation of a permanent indigent defense commission. I have been a judge for over twenty years. For the last eleven years, I have served as the Supervising Judge of the Criminal Courts of the Seventh Judicial District. If a defendant appearing in my courtroom is not being provided with the effective assistance of counsel, then I am obligated to intervene and protect that defendant's rights. Yet many members of this Commission seem to believe that the Unified Court System is not under the same

obligation, even though we have concluded that "the right to the effective assistance of counsel...is not being provided to a large portion of those who are entitled to it" (Commission Report, p.15). I refuse to believe that the Judiciary has less of a legal and moral responsibility to protect the rights of indigent criminal defendants than do the individual judges who make up the Judiciary.

While I agree with the main recommendation in our report–the creation of a permanent Indigent Defense Commission-- the Judicial Branch cannot just stand back and wait for someone else to act while it presides over a system that this Commission has characterized as "both severely dysfunctional and structurally incapable of providing each poor defendant with the effective legal representation that he or she is guaranteed by the Constitution of the United States and the Constitution and laws of the State of New York" (Interim Report, p. 16). It is my belief that the lack of involvement of the courts in this area has contributed to many of the problems identified in our reports. The creation of this Commission should be seen as only the first step in the Judicial Branch's aggressive campaign to address a crisis that is being played out in our courtrooms every day. In my view, it is time for the Executive, Legislative *and* Judicial branches to step forward.

I strongly urge the creation of a Judicial Office to address indigent defense services and respond in a meaningful way to assure that indigent defendants receive quality representation.

PERFORMANCE STANDARDS

I believe that a report from this commission should set standards for indigent

defense representation. I would propose the following as performance standards to be monitored and enforced by whatever means deemed appropriate by the Chief Judge[1]:

DEFINITIONS

"Public defense representation" means legal representation of any person financially unable to obtain counsel without substantial hardship who is (1) accused of an offense, other than a traffic infraction, for which a sentence to a term of imprisonment is authorized upon conviction thereof or (2) entitled to representation under article 6-C of the Correction Law or section 259-i of the Executive Law.

"Providers of public defense representation" include individual attorneys; public defender offices; legal aid bureaus or societies; corporations, voluntary associations or organizations permitted to practice law under the authority of Judiciary Law § 495 (7); and assigned counsel plans.

"Institutional providers of public defense representation" are those providers of indigent defense representation identified in County Law §§ 722(1) and (2), including public defenders; legal aid bureaus or societies; any corporation, voluntary association or organization permitted to practice law under the authority of Judiciary Law § 495 (7). An assigned counsel plan is not an "institutional provider of public defense representation."

"Assigned counsel plan" means a plan for the assignment of private attorneys pursuant to County Law § 722 (3).

"Assigned counsel" are private attorneys assigned to provide public defense representation pursuant to County Law § 722 (3).

A. INDEPENDENCE

1. The function of providing public defense representation, including the selection, funding and payment of counsel, must be independent. In the performance of their legal duties, providers of public defense representation should be free from political influence or any influence other than the interests of the client, and should be

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[1]These standards are from the staff and I believe that they are based on the NYSBA standards but I would note that they do not include standards of representation in Specialty courts such as drug courts. "Critical Issues for Defense Attorneys in Drug Court" published by the National Drug Court Institute begins to address such issues.

subject to judicial supervision only in the same manner and to the same extent as all other practicing lawyers. The selection of providers of public defense representation, including the head of any institutional provider of public defense representation, shall be made solely on the basis of merit.

B. EARLY ENTRY OF REPRESENTATION

1. Effective representation should be available for every eligible person whenever counsel is requested during government investigation or when the individual is in custody. Provision of counsel shall not be delayed while a person's eligibility for public defense representation is being determined or verified.

2. Eligible persons shall have counsel available for any court appearance.

3. Counsel shall be available when a person reasonably believes that a process will commence which could result in a proceeding where representation is mandated.

4. Institutional providers of public defense representation are encouraged, whenever possible, to make counsel available to arrested or charged defendants even before formal commencement of the criminal action.

C. QUALIFICATIONS OF COUNSEL

1. Attorneys who provide public defense representation must have sufficient qualifications and experience to enable them to render excellent representation to their clients in each particular case. Providers of public defense representation shall never allow an attorney to accept a case if that attorney lacks the experience or training to handle it competently unless the attorney is associated with another attorney on the case who does possess the necessary experience and training.

D. TRAINING

1. All attorneys and staff who provide public defense representation must be provided with continuing legal education and training sufficient to ensure that their skills and knowledge of the substantive and procedural law and ethical rules relevant to the area of law in which they practice are sufficient to enable them to provide excellent representation.

E. SUPPORT SERVICES AND FACILITIES

1. Public defense counsel must be provided with the investigative, expert, social work, secretarial, foreign language interpretation and other support services and facilities necessary to provide high-quality legal representation.

2. All providers of public defense representation must have adequate working space for each attorney and staff member, private office and conference room space in which attorneys can meet with clients, sufficient library facilities and/or access to online legal research materials, and computers and other necessary technical and communication equipment.

3. All institutional providers of public defense services shall maintain a ratio of one investigator, secretary and paralegal for every three staff attorneys.

F. ATTORNEY-CLIENT RELATIONSHIP

A public defense attorney must:

1. Communicate with his or her client on a regular basis during the course of representation, preferably in person. Such communications should be private. The attorney should respond promptly to the client's mail inquiries, and should have the capacity to accept collect calls from clients. In no event should public defense lawyers place "blocks" on their telephones to avoid receiving client phone calls from jail.

2. Communicate with family or friends of the client, to the extent that the client waives the attorney-client privilege as to such communication.

3. Inform the client on a regular basis of the progress of the case.

4. Ensure that the client receives copies of all documents prepared or received by the attorney.

5. Provide the client with the opportunity to make an intelligent and well-informed decision in those instances when such decision is to be made by the client (i.e., whether to plead guilty, whether to be tried by a jury or judge, whether to testify, and whether to appeal).

6. Abide by the Disciplinary Rules of the Code of Professional Responsibility (Part 1200 of Title 22, of the New York Codes, Rules and Regulations), and in particular those Disciplinary Rules concerning conflicts of interest (§§ 1200.20, 1200.24, 1200.26 and 1200.27) .

G. CONTINUITY OF REPRESENTATION

1. To the greatest extent possible, the same attorney should represent a client continuously from the inception of the representation until the initiation of the appellate proceeding, if any, unless a court determines that (a) there is a conflict of interest;(b) there has been a breakdown in the attorney-client relationship which interferes with counsel's ability to provide zealous, effective and high-quality representation; or (c)

some unforeseen circumstance, such as illness, prevents counsel from continuing to provide zealous, effective and high-quality representation.

2. When a client has multiple pending proceedings, the attorney on any one of them shall immediately and thereafter regularly communicate with the attorney(s) on the other matter(s), to the extent that the client waives the attorney-client privilege as to such communication. If feasible, and with the approval of the client, the attorneys shall make every effort to transfer the representation on all pending matters to a single attorney.

3. Counsel assigned at the appellate or post-conviction stage shall provide continuity of representation during that proceeding.

4. Under no circumstances may any attorney who has represented a person pursuant to assignment to provide mandated legal representation accept any payment whatsoever on behalf of the client in connection with the matter that is the subject of the assignment.

5. Institutional providers of public defense representation are encouraged to provide holistic services to the greatest extent possible.

H. QUALITY OF REPRESENTATION

No attorney shall accept a criminal case unless that attorney can provide, and is confident that he or she can provide, zealous, effective and high-quality representation. Such representation at the trial court stage requires, at a minimum:

1. Obtaining all available information concerning the client's background and circumstances for purposes of (a) obtaining the client's pretrial release on the most favorable terms possible; (b) negotiating the most favorable pretrial disposition possible, if such a disposition is in the client's interests; (c) presenting character evidence at trial if appropriate; (d) advocating for the lowest legally permissible sentence, if that becomes necessary; and (e) avoiding or minimizing, if at all possible, any potential collateral consequences of the conviction or the charge.

2. Investigating the facts concerning the offense charged, including (a) interviewing the client; (b) seeking discovery and disclosure of the People's evidence, exculpatory information and impeaching material; (c) obtaining relevant information from other sources; (d) interviewing witnesses to the relevant events; and (e) obtaining corroborating evidence for any relevant defenses.

3. Researching the law, including, as appropriate, state statutory and state and federal constitutional law, relevant to (a) the offenses charged (and any lesser-included offenses); (b) any possible defenses; (c) the relevant sentencing provisions; and (d) any other relevant matters, such as issues concerning the

accusatory instrument, the admissibility of evidence, the prosecutor's obligations, speedy trial rights, or any other relevant federal or state, constitutional, common-law, or statutory issue. Counsel has a continuing obligation to stay abreast of changes and developments in the law.

4. Preserving the client's options at all stages of the proceedings, including (a) to seek a jury trial; (b) to proffer a defense; (c) to seek dismissal of the indictment; (d) to seek dismissal of the charges for denial of statutory or constitutional speedy trial rights; (e) to seek preclusion or suppression of evidence; (f) to seek discovery, exculpatory information and impeaching material; and (g) to seek an appropriate disposition consistent with the client's best interests and instructions.

5. Providing the client with full information concerning such matters as (a) potential defenses and their viability; (b) the weaknesses in the People's case; (c) plea offers; (d) potential sentencing exposure, including the relationship of all potential sentences to any other sentences, potential release dates, or available correctional programs; and (e) all direct and potential collateral consequences, including those concerning immigration, housing, employment, education, family, licensure, civic participation, government benefits, and financial penalties. No guilty plea should be taken without an assessment of the potential collateral consequences of the plea.

6. Ensuring that a foreign language interpreter is present at every court appearance of a client not proficient in English, and that a sign language interpreter is present at every court appearance of a hearing-impaired client in need of such services, and objecting to the court's going forward with any court proceeding until such interpreter is provided.

7. Filing appropriate pretrial motions for, among other things, (a) dismissal of the charging instrument for facial or evidentiary insufficiency; (b) joinder or severance; (c) dismissal of the charges for denial of statutory or constitutional speedy trial rights; (d) suppression or preclusion of evidence; and (e) provision of additional resources not otherwise available
because of the client's financial circumstances. Counsel should research and update relevant case law in an effort to ensure that all written motions are of the highest quality.

8. Filing appropriate responses to motions, including motions in limine, brought by the People.

9. In the event of, and in advance of, trial, (a) developing a legal and factual strategy, using whatever investigative and forensic resources are appropriate; (b) preparing to select a jury; (c) preparing for cross examination of the People's witnesses and direct examination of defense witnesses; (d) developing a foundation for the introduction of defense evidence and for objecting to inadmissible evidence offered by the People; (e) formulating an opening statement; (f) crafting an effective

summation; and (f) drafting requests for jury instructions.

10. In the event of, and in advance of, sentence, (a) gathering favorable information and, where appropriate, presenting that information in written form; (b) reviewing the probation department report to ensure that it is accurate and taking whatever steps are necessary to correct errors; and (c) utilizing forensic resources if appropriate.

11. Preserving all appropriate objections for appeal.

12. Following a final disposition other than a dismissal or acquittal, (a) advising the client of the right to appeal and the requirement to file a notice of appeal; (b) filing a notice of appeal on the client's behalf if the client so requests; (c) advising the client of the right to seek appointment of counsel and a free copy of the transcript; (d) assisting the client in applying for appointment of counsel and a free copy of the transcript if the client requests; and (e) cooperating fully with appellate counsel.

13. Following a disposition from which the prosecutor has a right to appeal, (a) advising the client of the possibility that the prosecutor will pursue an appeal; (b) advising the client of the client's right to appointment of counsel should the prosecutor appeal; and (c) assisting the client in applying for appointment of counsel if the client so requests.

I. APPEALS

Zealous, effective and high-quality representation at the appellate stage means, at a minimum:

1. Obtaining and reviewing all portions of the record.

2. Researching the applicable law, including substantive law, procedural law and rules regarding the appeal.

3. Pursuing all appropriate post-conviction remedies.

4. Strategically selecting among the issues presented by the facts, considering the strength of authority, the facts, and the standard and scope of review. The selection of issues must be made with an awareness of the consequences for later post-conviction proceedings.

5. Preparing a statement of facts that accurately sets out the significant and relevant facts, with supporting record citations.

6. Presenting legal arguments that apply the most relevant and persuasive law to the facts of the case.

7. Writing in a clear, cogent and persuasive manner.

8. Requesting oral argument when such argument would be in the client's interests and, when oral argument is granted, being thoroughly prepared and presenting the argument in a clear, cogent and persuasive manner.

9. Preparing and filing an application for leave to appeal to the Court of Appeals should the client not prevail on the appeal to the appellate court, and preparing and filing an opposition to the prosecutor's application for leave to appeal to the Court of Appeals should the client prevail on the appeal to the intermediate appellate court.

10. In the event of an affirmance of the client's conviction by the Court of Appeals, or the denial of leave to appeal, advising the client of (a) the right to and procedures by which the client may seek certiorari to the United States Supreme Court; (ii) the circumstances under which the client may file a state court application for post-conviction relief; and (c) the circumstances under which the client may file a federal petition for a writ of habeas corpus, including the time limitations and the requirements of preservation and exhaustion.

J. SUPERVISION AND EVALUATION

1. All institutional providers of public defense services shall maintain a ratio of one supervisor for every ten staff attorneys.

2. The performance of each attorney and support staff shall be evaluated annually, by written evaluation complied by the attorney's supervisor.

3. Every public defense attorney assigned to carry a general caseload shall conduct a sufficient number of hearings and trials to maintain proficiency in criminal defense litigation. It shall be the responsibility of the attorney's supervisor to ensure that each attorney maintains a sufficiently active litigation practice as evidenced by a demonstrated ability and willingness to take appropriate cases to hearing and trial.

K. CASELOAD

1. Under no circumstances shall a public defense attorney annually handle more than 150 felonies, 400 misdemeanors, or 25 appellate assignments, as the case may be.

2. These caps should be appropriately weighted and adjusted for attorneys who handle both misdemeanors and felonies, or both trial-level cases and appeals.

3. No attorney employed by an institutional provider of public defense representation shall be permitted to maintain a private law practice.)

Such standards should also include performance and caseload standards for defense attorneys representing clients in problem solving courts.

I conclude by expressing my gratitude to Judge Kaye for appointing me to this commission. It was a terrific learning experience. I also express my appreciation to the staff who enthusiastically provided support and information throughout the process specifically John Amodeo, Paul Lewis, Robert Mandelbaum and David Markus. They were smart, resourceful, and respectful. It was a pleasure to work with them.

Respectfully submitted,

Patricia D. Marks
Supervising Judge Criminal Courts
Seventh Judicial District