

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

-----X	:	
KIMBERLY HURRELL-HARRING, et al.,	:	
	:	Index No. 8866-07
Plaintiffs,	:	
	:	
v.	:	AFFIDAVIT OF
	:	<u>DAVID J. CARROLL</u>
THE STATE OF NEW YORK,	:	
	:	
Defendant.	:	
-----X	:	

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

DAVID J. CARROLL, being duly sworn, deposes and says as follows:

1. I am Director of Research and Evaluations for the Justice Standards, Evaluation & Research Initiative (JSERI) of the National Legal Aid & Defender Association ("NLADA") and have held this position since January 2, 2002.
2. I am submitting this affidavit in conjunction with a motion for preliminary injunctive relief in *Hurrell-Harring v. State of New York*, a class-action suit seeking systemic reform of the public defense system New York.
3. This affidavit explains the standards-based assessment of the public defense systems that I supervised on behalf of NLADA for Ontario, Schuyler, and Washington counties, and reports the conclusions of that standards-based assessment, which involved assigning letter grades to those counties using a "report card" grading system.

4. In summary, the conclusion of our standards-based assessment was that the rights of the poor criminal defendants are being systematically violated in Ontario, Schuyler, and Washington Counties' criminal and family courts and that these counties fail to meet the American Bar Association's ten principles deemed necessary to provide constitutionally mandated legal representation. We gave them failing grades – "F"s – more than half the time.

BACKGROUND

5. NLADA champions effective legal assistance for people who cannot afford counsel, serves as a collective voice for both civil legal services and public defense services throughout the nation, and provides a wide range of services and benefits to its individual and organizational members. It is the nation's leading advocate for front-line attorneys and other equal justice professionals. Founded in 1911, NLADA is the oldest and largest national, nonprofit membership organization which devotes all of its resources to advocate equal access to justice for all Americans.

6. Over its long history, NLADA has become a leader in the development of national standards for indigent defense functions and systems, including: a) Guidelines for Legal Defense Systems in the United States (National Study Commission on Defense Services [staffed by NLADA; commissioned by the U.S. Department of Justice], 1976); b) The Ten Principles of a Public Defense Delivery System (written by NLADA officials, adopted by ABA in February 2002); c) Standards for the Appointment and Performance of Counsel in Death

Penalty Cases (NLADA, 1988; ABA, 1989); d) Defender Training and Development Standards (NLADA, 1997); e) Performance Guidelines for Criminal Defense Representation (NLADA, 1995); f) Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services (NLADA, 1984; ABA, 1985); g) Standards for the Administration of Assigned Counsel Systems (NLADA, 1989); h) Standards and Evaluation Design for Appellate Defender Offices (NLADA, 1980); i) Evaluation Design for Public Defender Offices (NLADA, 1977); and j) Indigent Defense Caseloads and Common Sense: An Update (NLADA, 1994).

7. NLADA's Justice Standards, Evaluation & Research Initiative (JSERI) is a research project with a discrete national capacity for public defense data collection, research, standards-based evaluation, and technical assistance. With proper evaluation procedures, standards help to assure professionals' compliance with national norms of quality in areas where the government policy-makers themselves may lack expertise. In the field of indigent defense, standards-based assessments have become the recognized norm for guaranteeing the adequacy of criminal defense services provided to the poor. The JSERI site assessment methodology employs the national standards as an objective measurement of an individual organization's mechanisms for effectuating key requirements of an indigent defense system including: independence, accountability, training, supervision, effective management, fiscal controls, competent representation, and workload.

8. As Director of Research and Evaluations for JSERI, I have directed numerous standards-based assessments of indigent defense systems on behalf of NLADA, including: Venango County (Franklin), Pennsylvania; Clark County (Las Vegas), Nevada; Avoyelles Parish (Marksville), Louisiana; Santa Clara County (San Jose), California; the State of Montana, the State of Louisiana, and the State Appellate Defender of Idaho; and, the Public Defender Services for the District of Columbia. I also co-authored a report for the U.S. Department of Justice, National Institute of Justice on the impact of standards on indigent defense services nationwide, and provided on-site technical assistance in Maryland, North Carolina, Rhode Island, and Texas. I am currently serving as an advisor to the Nevada Supreme Court Task Force on Indigent Defense and conducting a statewide indigent defense assessment for the Michigan Legislature.

9. Prior to coming to NLADA, I served as Senior Research Associate and Business Manager for The Spangenberg Group (TSG) a private for profit criminal justice consulting firm. TSG has served as the research arm of the American Bar Association's Standing Committee on Legal Aid & Indigent Defense for over twenty-years on indigent defense issues. I directed and worked on numerous projects on behalf of TSG, including: case-weighting studies in King County, WA (Seattle) and Tennessee; a statewide assessment of indigent defense services in Nevada; a study of indigent defense cost recovery efforts in Jefferson and Fayette Counties, Kentucky (Louisville and Lexington); and, a statewide assessment of West Virginia's Public Defender Services. I also was chosen to provide on-site technical assistance to statewide Task Forces in Illinois, Nevada,

Alabama, and Vermont under the auspices of the ABA and the U.S. Department of Justice.

10. I graduated from Boston College with a Master's in Philosophy in 1996. The details of my professional experience are set forth in my resume, a copy of which I have attached as Exhibit A to this affidavit.

STANDARDS-BASED ASSESSMENT METHODOLOGY

11. The concept of using standards to assess uniform quality is not unique to the field of public defense. In fact, the strong pressures on public officials of favoritism, partisanship, and/or self-interest underscore the need for standards to assure fundamental quality in all facets of government and all components of the justice system. For instance, realizing that standards are necessary to both compare bids equitably and to assure quality products, policy-makers long ago standardized requests for proposals and ceased taking the lowest bid to build a hospital, school or a bridge and required winning contractors to meet minimum quality standards of safety. Ensuring the rights of the individual against the undue taking of his or her liberty or life by the state merits no less consideration. The use of national standards of justice in this way also reflects the demands of several courts, including the United States Supreme Court in *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 545 U.S. 374 (2005).

12. The American Bar Association's *Ten Principles of a Public Defense Delivery System* present the most widely accepted and used version of national standards for public defense. (Attached hereto as Exhibit B). Adopted in

February 2002, the ABA *Ten Principles* distill the existing voluminous ABA standards for public defense systems to their most basic elements, which officials and policymakers can readily review and apply. In the words of the ABA Standing Committee on Legal Aid and Indigent Defendants, the *Ten Principles* “constitute the fundamental criteria to be met for a public defense delivery system to deliver effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney.” The American Bar Association's *Ten Principles of a Public Defense Delivery System* address: (1) Independence, (2) Delivery Mode & Funding, (3) Prompt Appointment of Counsel, (4) Client Confidentiality, (5) Reasonable Workloads, (6) Minimum Qualifications, (7) Continuous Representation, (8) Resource Parity, (9) Training, and (10) Accountability.

SITE WORK

13. In each county, NLADA representatives interviewed criminal justice representatives (Judges, District Attorneys, and public defense attorneys), observed courtroom proceedings, and read relevant county documents, among other things, in assessing the counties against the ABA *Ten Principles*.

14. The Site work was conducted in the New York Counties by qualified consultants with extensive background in indigent defense services under my direct supervision. NLADA consultants were trained to conduct standards based assessments and have been used on prior NLADA work. The consultants were: William Leahy, Chief Counsel of the Committee for Public Counsel Services for

the Commonwealth of Massachusetts and Chair of the American Council of Chief Defender's Systems Development and Reform Committee (Ontario, Washington); Gerard Smyth, Former Chief Public Defender for the State of Connecticut and Past-Chair of the American Council of Chief Defenders (Schuyler, background investigation on Ontario); and, Phyllis Subin, Former Chief Public Defender for the State of New Mexico and current co-Chair of NLADA's Defender Trainers Section (Schuyler, Washington). Resumes for all consultants are attached as Exhibit C.

15. Using the American Bar Association's *Ten Principles of a Public Defense Delivery System* as governing standards, I then created report cards that laid out how each county accomplished or failed the *Ten Principles* and graded each county on its performance relative to those standards. The New York counties received dismal grades: 16 "F"s, 9 "D"s, 4 "C"s, and only 1 "A".

Washington County

Methodology

16. On June 5-7, 2007, William Leahy and Phyllis Subin went to Washington County to observe its public defense system. The NLADA representatives observed court in: Family Court Docket, (Judge Pritzker's court); County Court (Judge McKeighan's court); Village Court at Fort Edward (Judge Joseph M. Malvuccio's court).

17. The NLADA Representatives also interviewed: a) Judge Stan Pritzker, County Judge (Family Court, Delinquency & Juvenile Treatment Court); b) Judge Kelly McKeighan, County Judge (Adult Criminal Court); c) Kathleen M.

LaBelle, Chief Clerk, Washington County Supreme & County Courts; d) Patrick E. Barber, Esq., Washington County Public Defender; e) Marie M. DeCarlo-Drost, Administrator, Public Defender Office; f) Elan Y. Cherney, Esq., (Part time) Assistant Public Defender; g) John J. Goodman, Esq. (Part time) Assistant Public Defender; h) Barry J. Jones, Esq., (Part time) Assistant Public Defender; i) Kevin C. Kortright, District Attorney, Washington County; j) Edwin M. Adeson, Esq., Panel Law Guardian; k) Roger A. Wickes, Esq., County Attorney; l) Daniel S. Martindale, Esq., Deputy County Attorney; m) Lt. George Smith, Washington County Jail; n) Sgt. Bassett, Washington County Jail; o) Kevin G. Hayes, Washington County Administrator; q) Michael J. Gray, Director, Washington County Alternative Sentencing Agency and Youth Bureau; r) Susan Mowrey, Assistant Director, Washington County Youth Bureau/Alternative Sentencing Agency

18. All the information regarding Washington County below is based on our interviews, court observations, and analysis of caseload and funding data received on site.

19. On November 2, 2007, NLADA finalized a report card grading Washington County based on the American Bar Association's *Ten Principles of a Public Defense Delivery System*. A copy of the Public Defense Report Card for Washington County is attached as Exhibit D.

Independence

20. No independent board or commission plans, oversees, or regulates the delivery of public defense representation in Washington County.

21. The chief Public Defender serves under a two-year contract with the County Board of Supervisors.

22. The County Board of Supervisors' major concern is cost control. Washington County representatives explained to us that to remain in office, any Public Defender must control costs to the satisfaction of County officials.

23. A judge has unlimited discretion to reduce an appointed lawyer's bill for services. No County statute or mandate prevents a judge from reducing the appointed lawyer's attorney fees.

24. I and NLADA gave Washington County an F for Independence in its Public Defense Report Card.

Delivery Mode & Funding

25. The Washington County Public Defender office consists of a full-time chief Public Defender and three part-time Public Defenders, all of whom maintain private law practices as well.

26. In cases where the Public Defender office has a potential conflict of interest, it assigns private counsel to provide legal representation. Determination of conflict cases appears to reside exclusively with the Public Defender.

27. We found that there is no oversight of the assigned private counsel's performance, and that oversight of the Public Defender's performance is spotty. There are no defined standards of performance, nor are any formal evaluations of counsel's performance undertaken. Furthermore, the paucity of staff defenders relative to the number of clients and the plethora of courts prevents any in-court assessment, and makes out-of-court consultation a rarity. In 2006, the Public

Defender office provided representation in 1,306 cases, and the private bar provided representation in 110 cases. During that same year, the County expenditure for public defense was just under seven and a half dollars per capita, which is 64.64% below the state norm (\$21.21). By comparison, Franklin County – a system determined to be in crisis by NLADA – spent \$12.88 per capita.

28. I and NLADA gave Washington County a D- for Delivery Mode & Funding in its Public Defense Report Card.

Prompt Appointment of Counsel

29. New York law ensures that a defendant is brought before a judge soon after his or her arrest. However, during the initial appearances observed in Washington County, no attorney was present. Any bail hearing conducted without assistance of counsel does not adhere to established national norms.

30. With some 25 Town and Village Courts dispersed over the 837 square miles of Washington County, the single full-time Public Defender and his three part-time associates can only make their scheduled court appearances. Thus, NLADA found that most defendants observed would meet their public defense attorney for the first time at the courthouse on the day their case was scheduled to be heard.

31. For defendants detained and who cannot meet bail, the Public Defender office has early initial communication with them because the jail is centrally located and jail officials cooperate with the Public Defender office. However, should a detainee post the bail upon which he or she is held, he or she is required – as are all other defendants seeking the assignment of counsel – to apply at the Public Defender office for continued representation.

32. I and NLADA gave Washington County an F for Prompt Appointment of Counsel in its Public Defense Report Card.

Client Confidentiality

33. The lawyers at the Public Defender office have very little time to conduct interviews, which are the essence of the privately retained lawyer-client relationship. Given the extremely high caseloads and the widely dispersed court locations, the norm is that the client will consult with counsel only via telephone or at the courthouse on the day his or her case is scheduled to be heard. The Public Defender often has many court appearances that day.

34. Typically, a Public Defender will meet his or her client for the first time at the courthouse, attempt to conduct a private interview, discuss the case with the prosecutor, attempt to reach a plea agreement, and, if successful in that effort, represent the client on a guilty plea and sentencing hearing, all in that single first acquaintance and only court appearance.

35. I and NLADA gave Washington County a D for Client Confidentiality in its Public Defense Report Card.

Reasonable Workloads

36. After observing Washington County, I found it unreasonable for a single full-time chief Public Defender and three part-time associates, no matter how experienced, to provide a uniformly high quality of representation to more than 1,300 criminal defendants per year.

37. The mixed felony and misdemeanor caseload of the Public Defender office, at over 520 clients per full-time equivalent counsel position, far exceeds accepted national maximum caseload standards for a full-time attorney.

38. The Public Defender office lacks any investigative or secretarial services. National standards presume all Public Defender offices have these services.

39. I and NLADA gave Washington County a **D-** for Reasonable Workloads in its Public Defense Report Card.

Minimum Qualifications

40. No standards exist to ensure that public defense counsel provided to poor people have the experience, training, and support necessary to provide effective representation.

41. There are no established criteria for the full-time chief Public Defender position, part-time assistant Public Defender positions, or assigned counsel who represent clients in those cases where the Public Defender may have a conflict of interest.

42. Washington County has no requirement to fund and does not fund initial or continuing specialized training in criminal defense practice.

43. In a particular case, the chief Public Defender or a Judge may select an individual attorney to represent a defendant based upon that attorney's experience or expertise, but this is not the normal practice.

44. I and NLADA gave Washington County a **D** for Minimum Qualifications in its Public Defense Report Card.

Continuous Representation

45. The Washington County Public Defender office practices continuous or "vertical" representation: a defendant is usually represented by the same attorney for the duration of his or her case. Vertical representation is a national standard.

46. Exceptions may occur due to shifting case intake from the Town and Village Courts which necessitates counsel reassignments, or where a case is reassigned to the chief Public Defender due to its complexity or severity.

47. I and NLADA gave Washington County a C for Continuous Representation in its Public Defense Report Card.

Resource Parity

48. Investigation is an essential foundation for effective criminal prosecution and criminal defense. The Washington County Public Defense Office has no investigative capacity. In contrast, the prosecutor may rely upon the entire array of town, county and even state police resources.

49. The Public Defender office has limited to no resources or access to expert witness assistance, on-line legal research, and continuing legal and forensic education. On the other hand, the prosecution has access to all these resources.

50. The chief Public Defender's salary is funded entirely by the County. In contrast, the salary of the District Attorney is funded by the County and supplemented significantly by a substantial contribution by the State.

51. Likewise, the prosecutor's professional law office is maintained and furnished with both state and local public funds. The chief Public Defender's professional law office is his or her private law office; the chief Public Defender's public defense law office is sparsely furnished portion of his or her private law office.

52. I and NLADA gave Washington County an F for Resource Parity in its Public Defense Report Card.

Training

53. There is no training requirement, either initial or continuing, for Public Defenders and private assigned counsel in Washington County. Also, neither the County nor the State offers or funds any formal training program.

54. However, in both criminal law and family law, litigation nationally is evolving rapidly. Effective representation requires knowledge of new legal and forensic developments.

55. I and NLADA gave Washington County an F for Training in its Public Defense Report Card.

Accountability

56. Washington County does not comply with national norms which require that individual defense counsel be consistently supervised and periodically evaluated according to an approved set of standards. The centerpiece of these standards is the provision of effective representation to indigent criminal defense clients.

57. There are no such defined standards of performance, nor are any formal evaluations of counsel's performance undertaken in Washington County.

58. Furthermore, the lack of staff Public Defenders relative to the number of clients and the large number and geographic location of courts prevents any in-court assessment and makes out-of-court consultation a rarity.

59. The taxpayers cannot be assured that their dollars are spent effectively and efficiently and in a manner calculated to ensure that justice is served.

60. I and NLADA gave Washington County an F for Accountability in its Public Defense Report Card.

Schuyler County

Methodology

61. On March 6-8, 2007, Phyllis Subin and Gerard Smyth went to Schuyler County to observe its public defense system. The NLADA representatives went to Schuyler County Family Court, Schuyler County Criminal Court, Schuyler County Adult Drug Court, and Town of Dix, Justice Court.

62. The NLADA representatives also interviewed: a) Lisa Orr, Administrator, Schuyler County Public Defender Office; b) Connie Fern Miller, Public Defender, Schuyler County Public Defender; c) Kristin E. Hazlitt, Esq., Assistant County Attorney, Family Court; d) Wesley Roe, Esq., Conflict Public Defender; e) Joseph G. Fazzary, Esq., Schuyler County District Attorney; f) Timothy M. O'Hearn, Schuyler County Government County Administrator; g) Ronald Alexander, Director of Probation, Schuyler County Probation Department; h) Dan Fitzsimmons, Esq., Children's Law Guardian, Schuyler County; i) Stewart McDivitt, Esq., Assistant Public Defender; j) Judge J. C. Argetsinger, County Judge, Schuyler County; and, k) Sheriff Sergeant William Preston, Schuyler County Jail.

63. All the information regarding Schuyler County below is based on our interviews, court observations, and analysis of caseload and financial data.

64. On November 15, 2007, NLADA finalized a report card grading Schuyler County based on the American Bar Association's *Ten Principles of a Public Defense Delivery System*. A copy of the Public Defense Report Card for Schuyler County is attached as Exhibit E.

Independence

65. No independent board or commission oversees public defense services in Schuyler County.

66. The County Legislature appoints the chief Public Defender.

67. Because the County Legislature appoints the chief Public Defender, the chief Public Defender lacks independence from the County. Thus, this structure fails to provide current and future Public Defenders the freedom to challenge decisions of the Legislature and/or the County Administrator. For example, the chief Public Defender is hard-pressed to urge for necessary budgetary increases at a time when the County is imposing performance-based budget measures in an attempt to decrease costs, as the County Legislature may then later retaliate by appointing someone else as Public Defender.

68. Similarly, the County currently has plans to move the Public Defender office to a location within the courthouse, placing the current Public Defender in the awkward position of balancing her own personal and professional interests against those of the public clients and those of her employer. Locating the Public Defender office in the courthouse suggests that the Public Defender is employed by and a part of the court. This is contrary to affirming the Public Defenders' separate role from the courts.

69. I and NLADA gave Schuyler County a **D** for Independence in its Public Defense Report Card.

Delivery Mode & Funding

70. Schuyler County uses a part-time staffed office and contracts with the private bar to provide public defense representation. The private bar is relied on in cases where the Public Defender office has a potential conflict of interest. However, the small attorney population within Schuyler County limits the ability of the County to find qualified counsel willing to serve.

71. For example, one contract attorney resides in a neighboring county where, until recently, he held a separate public defense contract. This attorney is not supervised by Schuyler County and his workload, in Schuyler County and the neighboring county, is not monitored.

72. The chief Public Defender identifies and assigns all conflict cases.

73. I and NLADA gave Schuyler County a **D-** for Delivery Mode & Funding in its Public Defense Report Card.

Prompt Appointment of Counsel

74. While New York state law requires that a defendant be brought immediately before a judge following arrest, typically no attorneys are present at these initial appearances in Schuyler County. Without an attorney present, a defendant does not have anyone advocating on his or her behalf at the crucial point when his or her bond is set. Section 200.26 of the Uniform Rules for Courts Exercising Criminal Jurisdiction requires court justices to assign counsel at arraignment for a defendant who is unable to retain his or her own attorney. Schuyler County does not comply with this rule.

75. Defendants who are unable to make bail often languish in jail without counsel for extended periods of time without being identified as needing public defense counsel. The chief Public Defender and the jail staff attempt to monitor arrests to the extent possible in order to prevent these situations. The County Judge immediately appoints counsel when a felony defendant comes to his attention. However, no standards or guidelines exist to facilitate such identification and prompt appointment of counsel following arrest.

76. Defendants who are released on bail are not assigned public defense counsel. These defendants must find their own way to the Public Defender office in order to apply for appointed counsel.

77. The Public Defender office has a system in place for processing applications and determining eligibility for appointed counsel, and promptly notifying prospective clients as to whether they will receive appointed counsel. Beginning this process often takes a month or more post-arrest for potential clients who must first overcome obstacles imposed by lack of information and poverty to even reach the office.

78. The current application form is lengthy, complex, and requests confidential case-related information unnecessary to the eligibility determination. For example, the application asks for personal, financial, employment, expenses, and case information which are unnecessary to determine eligibility. Formal eligibility is based upon guidance from the New York State Defenders Association, whose March 2, 2007 memorandum explained the standard and criteria for determining eligibility and provided the federal poverty guidelines effective January 24, 2007.

79. The twelve Town and Village courts [covering over 328 square miles], their dispersed locations, and the number of separate court sessions preclude defense counsel from being present to provide representation to defendants at all court sessions.

80. Most defendants will meet their attorney for the first time (and in the case of misdemeanors typically the only time) when they arrive at the courthouse for a hearing in their case.

81. I and NLADA gave Schuyler County an F for Prompt Appointment of Counsel in its Public Defense Report Card.

Client Confidentiality

82. As defendants receiving public defense are indigent, it is extremely difficult for them to travel to their assigned counsel's office to meet with him or her because the Contract attorneys and most assigned counsel attorneys maintain their offices in other counties. As a result, a public defense counsel is most likely to meet with his or her client only at the courthouse immediately before the client's hearing.

83. Typically, during the same court appearance date, a public defense attorney will meet his or her client, discuss the case with the prosecutor and the client, and reach a plea agreement, and the defendant will enter a guilty plea and be sentenced.

84. The structure of the Town and Village court system, in addition to the delay in appointment of counsel, frequently prevents the attorneys from meeting with their clients sufficiently in advance of court proceedings.

85. The Schuyler County jail allows assigned counsel virtually unfettered access to incarcerated clients. The jail also has a direct phone line to the Public Defender office, although not in a confidential area, which male defendants can and do call the Public Defender office. The Schuyler County jail for female defendants does not provide a direct phone line. Also, for all incarcerated indigent defendants, the jail has no direct phone line to the assistant Public Defenders, contract attorneys, or assigned counsel attorneys.

86. I and NLADA gave Schuyler County a C- for Client Confidentiality in its Public Defense Report Card.

Reasonable Workloads

87. Schuyler County does not monitor or regulate its public defense attorneys' workloads.

88. Though the number of cases handled by the Public Defenders, contract attorneys, and assigned counsel appears reasonable upon initial statistical review, because public defense attorneys handle private cases and public defense cases outside Schuyler County, these numbers are inaccurate. For example, one attorney provided public defense in at least two counties, and neither county could accurately calculate his exact workload.

89. Also, attorneys cannot provide quality, and at times any, representation at every stage of the proceeding because of the numerous courts in which they must appear, the frequent court sessions, and the geographical distance of these courts.

90. Moreover, because the county and state do not provide assigned counsel with a staff investigator or paralegal, these attorneys must do this work themselves.

91. I and NLADA gave Schuyler County a **D-** for Reasonable Workloads in its Public Defense Report Card.

Minimum Qualifications

92. Schuyler County established no standards or way to ensure that assigned counsel have the experience and training necessary to provide ethical and high quality representation.

93. The County Legislature has no criteria by which it selects the chief Public Defender, assistant Public Defenders, and conflict counsel. Rather, these attorneys are chosen based on their willingness to work at the state-established hourly rates. So it is the attorney's willingness and not experience that result in his or her appointment. Thus, an inexperienced attorney can be appointed to the most complex criminal or family law case because of his or her willingness to work at the hourly rates.

94. Though the current Public Defender and the County Judge informally monitor assigned counsel's courtroom performance, there are no established or even proposed standards or formalized systems that ensure that the assigned counsel's experience and credentials match those required for the case.

95. I and NLADA gave Schuyler County a **C** for Minimum Qualifications in its Public Defense Report Card.

Continuous Representation

96. Because the Public Defender office assigns its attorneys to specific courts as a practical way to cover all court sessions, the Public Defender office does not adhere to vertical representation. For example, an assistant Public Defender will represent a defendant arrested on a felony charge while the charge is in the Town or Village court, but then the chief Public Defender will represent the defendant if the charge is moved to the County Court.

97. I and NLADA gave Schuyler County an F for Continuous Representation in its Public Defense Report Card.

Resource Parity

98. Schuyler County's Public Defense office not only provides indigent defense in criminal cases, but also in child abuse and neglect, custody and visitation, and paternity cases, and for family offenses and child support violations. For all these cases, it must also determine eligibility.

99. The Public Defender is appointed the vast majority of criminal cases and works opposite the District Attorney. For family cases, which make up a larger portion of the Public Defender's work than criminal cases, the Public Defender may work opposite private attorneys, Department of Social Services attorneys, County attorneys, other appointed attorneys, or any combination of these kind of attorneys. Thus, I looked at not only the District Attorney office, but also the County Attorney office and the Department of Social Services.

100. In 2006, Schuyler County paid the *full-time* chief Public Defender \$75,000 per year. It also paid the *part-time* County Attorney the same amount. In

contrast, the County *and State* paid the full-time District Attorney \$119,800 per year, of which the County paid \$63,214 and the State paid \$56,586.

101. The huge disparity between State funding of the Public Defender and District Attorney's salaries directly impacts the quality of legal representation received by indigent defendants. The State does not supplement the Public Defender's salaries whatsoever while it supplements the District Attorney's salary by an amount equal to 75% of the Public Defender's total salary.

102. As a result of the salary disparity between Public Defenders and District Attorneys, qualified attorneys may not accept the Public Defender job due to the low pay or (as in Schuyler County) qualified attorneys – including the “full-time” chief Public Defender – may choose to work a separate private practice to subsidize the public defense salaries.

103. The public defense attorneys' private practices impact the amount of time public defense attorneys spend with indigent clients. Also, attorneys may be conflicted between their duties to their public clients and their private clients.

104. Only after the NAACP Legal Defense and Educational Fund concluded in a study that Schuyler County needed a full-time public defense program did Schuyler County, in 2004, hire a full-time Public Defender.

105. I and NLADA gave Schuyler County an **F** for Resource Parity in its Public Defense Report Card.

Training

106. Schuyler County and the State do not require the County public defense attorneys to obtain criminal defense or family law training nor provide such

training. Neither the County nor the State dedicated funds for continuing legal education of public defense attorneys.

107. Because all Schuyler County public defense attorneys supplement their public defense salaries by obtaining private clients for cases outside of criminal defense and family law, public defense attorneys must choose between obtaining continuing education in areas of law from their private practice or from their public defense practice. Moreover, the attorneys must determine where they spend *their own money and time* in obtaining the continuing education.

108. I and NLADA gave Schuyler County an **F** for Training in its Public Defense Report Card.

Accountability

109. No person or entity supervises or reviews the quality of representation provided by the Schuyler County's public defense attorneys.

110. Schuyler County and New York State provide no funds for public defense counsel to use for investigations, though defense counsel has an affirmative duty to conduct an investigation independent of that undertaken by law enforcement or the prosecution. As a result, public defense counsel conducts very little, if any, independent defense investigation. However, facts need to be tested and their accuracy determined; witnesses must be interviewed or located and their stories compared and analyzed; information that mitigates the severity of the crime or punishment must be discovered; the crime scene should be viewed and explored; and physical evidence must be examined and independently tested as necessary.

111. There is no accountability in Schuyler County's public defense representation system. For example, no one is charged with supervising the public defense attorneys. Thus, taxpayers cannot be assured that their dollars are spent effectively and efficiently and in a manner calculated to ensure that justice is served.

112. I and NLADA gave Schuyler County an F for Accountability in its Public Defense Report Card.

Ontario County

Methodology

113. On March 27-29, 2007, William Leahy went to Ontario County to observe its public defense system. Gerard Smyth conducted a preliminary telephone interview with Assigned Counsel Coordinator, John Kennedy, in advance of the trip. Mr. Leahy went to Town Court of Hopewell; Schuyler County Court (Judge Reed's court); Town Court of Seneca; and Schuyler County Court (Judge Doran's court).

114. NLADA representatives also interviewed: a) John Kennedy, Assigned Counsel Administrator; b) Geoff Astles, County Administrator; c) Robert Gosper, Assigned Counsel and Law Guardian; d) Judge Doran; e) Michael Tantillo, District Attorney; f) Judge Fred Reed; g) Joe Dressner, Private Attorney; h) Jim Miller, Private Attorney; i) Alice Hooker, Private Attorney; j) Bob Zimmerman, Former Assigned Counsel Administrator; k) David Foster, Private Attorney; and l) Magistrate-Judge Nancy Wooden.

115. All the information regarding Ontario County below is based on our interviews, court observations, reading of 2007 Legal Services Agreement, and analysis of various caseload and financial data.

116. On November 2, 2007, NLADA finalized a report card grading Ontario County based on the American Bar Association's *Ten Principles of a Public Defense Delivery System*. A copy of the Public Defense Report Card for Ontario County is attached as Exhibit F.

Independence

117. The County Legislature wholly funds and pays for the Ontario County public defense system.

118. Ontario County pays the Bar Association to hire an Assigned Counsel Administrator. The Assigned Counsel Administrator then appoints counsel from among the private bar to represent eligible parties in criminal prosecutions and in certain family court proceedings.

119. I and NLADA gave Ontario County a C+ for Independence in its Public Defense Report Card.

Delivery Mode & Funding

120. Ontario County's public defense system is an assigned counsel system of appointed private attorneys. They provide representation to eligible indigent defendants of criminal and certain family court cases.

121. Ontario County's public defense function lacks an institutional presence and designated leader to engage with the judicial and prosecutorial functions within the county. For example, the Assigned Counsel Administrator cannot

impose quality controls over the attorneys assigned or create standards or requirements for assigned counsel. Moreover, the Assigned Counsel Administrator solely deals with administrative issues, not legal representation. The Administrator handles designation of an attorney for a case and processing of billings by that attorney.

122. I and NLADA are concerned that Ontario County does not have a structure to ensure uniform quality of representation within the county and provide for public defense attorneys to be an active part of policy making within the justice system. The state cannot absolve itself of its public defense responsibilities by merely passing the obligation on to a county to carry out -- or fail to carry out.

123. I and NLADA gave Ontario County a D for Delivery Model & Funding in its Public Defense Report Card.

Prompt Appointment of Counsel

124. Courts routinely arraign and jail indigent criminal defendants who are eligible for public defense but without counsel. In all the court proceedings NLADA consultants have observed, during an indigent criminal defendant's initial appearance before a Town or Village justice post-arrest, the justice will not appoint a lawyer. Thus, no one will advocate for the indigent criminal defendant at the crucial juncture of setting bond.

125. When an indigent criminal defendant lacks counsel when bail is set, the court often sets bail at a higher than appropriate amount on the basis of inappropriate factors. For example, in the absence of advocacy, the Town and Village

justices frequently deny reasonable bail to any person who did not take a breathalyzer test at the time of arrest for a driving under the influence charge, though a person is not required to take a breathalyzer test. An indigent defendant eligible for public defense may be held in jail up to ten days before he or she learns who his or her attorney is and has an opportunity to speak to that attorney.

126. If an indigent defendant is released from prison after making bond, he or she likely will appear in Town or Village court on his or her court date without counsel having been appointed. Counsel is routinely waived – often there is simply no mention of the right to counsel – and public defense clients are left to negotiate directly with the prosecutor for what most often results in a guilty plea and sentencing at the first court appearance.

127. I and NLADA gave Ontario County an F for Prompt Appointment of Counsel in its Public Defense Report Card.

Client Confidentiality

128. Once appointed, the public defense attorneys meet with their clients primarily at their private offices, by telephone, or in person at the jail or courthouse.

129. Defense attorneys often have insufficient time to have informed and effective meetings with their clients in order to reach considered decisions about the process and substance of their cases. For example, the District Attorney office has implemented a “felony screening” process which was originally intended to divert appropriate cases from going to County court as felonies and to facilitate dispositions at an early stage in the process. In practice, the District

Attorney provides almost no discovery to the defense and requires defendants to waive a preliminary examination and “plead blind” to a reduced charge. Without appropriate discovery and resources to conduct an investigation, defense counsel has no ability to assess the plea offer and fulfill her professional obligation to provide guidance for her client. Rather than achieving the stated purpose of insuring that an appropriate sentence is imposed at the appropriate offense level without undue delay, the practice has devolved into one where defendants are pressured into making a choice between a plea offer to what may be an inappropriate charge and sentence without meaningful advice of counsel or facing a far more harsher – and no less inappropriate – charge should the offer be rejected.

130. I and NLADA gave Ontario County a **D** for Client Confidentiality in its Public Defense Report Card.

Reasonable Workloads

131. Ontario County does not monitor or have any limits on the workload of public defense lawyers.

132. Ontario County’s public defense lawyers are not representing just Ontario County’s indigent criminal defendants. In addition to their appointed indigent clients, public defense lawyers are also free to represent private clients and accept appointed cases in other counties and from Ontario County’s law guardian system.

133. I and NLADA gave Ontario County an **F** for Reasonable Workloads in its Public Defense Report Card.

Minimum Qualifications

134. Ontario County and New York's only requirement for assigned counsel is that the attorney be licensed.

135. No one monitors or imposes standards or requirements to determine whether a given attorney has the experience, training, and qualifications necessary to competently handle the case to which he or she is appointed. As a result, attorneys file frivolous motions in some instances, fail to file appropriate motions in other instances, and miss the important issues in many cases.

136. Assigned counsel do not have access to training or mentoring in order to gain necessary experience, and thus, out of necessity, instead must use their clients as guinea pigs while they learn.

137. Neither the County nor New York give the Assigned Counsel Administrator the tools necessary to ensure that counsel are able to provide ethical and high quality representation.

138. I and NLADA gave Ontario County an F for Minimum Qualifications in its Public Defense Report Card.

Continuous Representation

139. Ontario County ensures vertical representation throughout the proceedings. However, the County does not ensure that the assigned counsel is qualified to handle the seriousness or anticipated complexity of a given case. This may result in an attorney assigned to a case he or she is ill equipped to handle.

140. I and NLADA gave Ontario County an A for Continuous Representation in its Public Defense Report Card.

Resource Parity

141. Ontario County does not spend its money for indigent legal defense in a way calculated to achieve parity between the prosecution and the public defense functions.

142. The public defense system is responsible for providing counsel to all eligible persons charged with felony or lesser offenses and probation/parole violations, as well as in child abuse and neglect cases, custody and visitation cases, and paternity cases, and for family offenses and child support violations. Public defense must also determine eligibility for legal assistance and appoint counsel to all eligible parties.

143. On the criminal court side, opposing counsel is the District Attorney. On the family court side, opposing counsel may be private attorneys, Department of Social Services attorneys, County attorneys, other assigned counsel, or any combination of these. Thus, in considering parity, I looked at the resources provided to the District Attorney office, the County Attorney office, and the Department of Social Services.

144. The prosecuting agencies are full-time staffed offices, where the attorneys receive salaries, health insurance, and retirement, and are provided with secretaries, desks, computers, supplies, and all the tools necessary to their jobs. By contrast, public defense lawyers are paid an hourly rate set by the state.

Moreover, these lawyers must use those funds to acquire all of the basic tools necessary to their jobs, tools which are provided free to the prosecutors.

145. Further, public defense attorneys are not paid for all their time devoted to the cases. The County Administrator unilaterally has determined that, while public defense attorneys will be reimbursed for their mileage in traveling to the various courts throughout the county, the County will not pay them for their travel time.

146. I and NLADA gave Ontario County an F for Resource Parity in its Public Defense Report Card.

Training

147. No one provides or requires Ontario County public defense attorneys any training in either criminal defense or family law. Neither the County nor the State has a dedicated fund for continuing legal education of public defense attorneys.

148. Because all Ontario County public defense attorneys supplement their public defense salaries by obtaining private clients for cases outside of criminal defense and family law, public defense attorneys must choose between obtaining continuing education in areas of law from their private as opposed to public defense practice. Moreover, the attorneys must determine where they spend their own money and time in obtaining the continuing education.

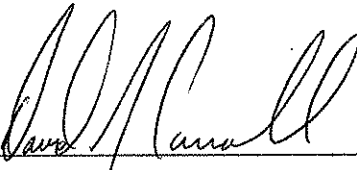
149. I and NLADA gave Ontario County an F for Training in its Public Defense Report Card.

Accountability

150. No one supervises or reviews the legal representation provided by the Ontario County's public defense attorneys. Thus, there is no accountability in Ontario County's public defense representation system.

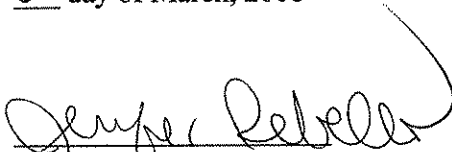
151. The taxpayers cannot be assured that their dollars are spent effectively and efficiently and in a manner calculated to ensure that justice is served.

152. I and NLADA gave Ontario County an F for Accountability in its Public Defense Report Card.



David J. Carroll

Sworn to before me this
5th day of March, 2008



Notary Public