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, Defendant.	**AFFIRMATION OF JONATHAN E. GRADESS** Index No. 8866-07

AFFIRMATION OF JONATHAN E. GRADESS

Jonathan E. Gradess, being an attorney duly admitted to practice law in New York State, affirms under CPLR 2106 and pursuant to the penalties of perjury as follows:

1. I am the Executive Director of the New York State Defenders Association, a position I have held since 1978 when I was hired by its Board of Directors to create a backup center and clearinghouse to improve the quality of public defense representation in New York State. Prior to that time, I had been an attorney with the New York City Legal Aid Society, had worked as a private investigator, was a partner in the law firm of McEvily, Kluewer & Gradess, served as a clinical instructor at Hofstra Law School, and had been the Chief of Standards and Goals for Prosecution and Defense in the New York State Division of Criminal Justice Services (DCJS).

2. It was during my work at DCJS that I came in touch with vast problems of representation in upstate New York. I had previously been aware of problems in downstate New York, having functioned in the midst of them for seven years.

3. Between May of 1978 and 1981, NYSDA was privately funded. In May of 1981, the New York State Legislature, recognizing defects in the state's public defense system, funded NYSDA to establish and administer the nation's only public defense backup center. Today, as chief executive officer of NYSDA, I supervise a staff of 23, including lawyers, researchers, support staff, and interns, and fulfill both a private and public mission to improve the quality and scope of publicly-supported legal representation to low income people.

4. A provision of our Public Defense Backup Center contract charges NYSDA with the responsibility to "review, assess and analyze the public defense system in the State, identify problem areas and propose solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary and other appropriate instrumentalities." Through its Backup Center, the Association provides support services, including training, legal research, consultation, advice, and technical assistance, to more than 100 county-based public defense offices, to counties, and to the more than 5000 public defense attorneys (assigned counsel, public defenders, legal aid attorneys) throughout New York. Additionally, the Association maintains an Immigrant Defense Project in New York City, which provides statewide training and backup for criminal lawyers handling cases which raise issues at the intersection of immigration and criminal law.

5. As a result of our contract and mission, NYSDA has a long history of studying and focusing public attention on the problems with New York State's public defense system. We have studied defender systems, made recommendations to county governments, and have directly assisted thousands of defenders with reference to their cases as well as regarding the administration of their offices. Since our office opened, we have handled well more than 33,000 requests for assistance, and have made recommendations concerning state and local practices and budgets.

6. For the last 15 years NYSDA has supported a public defense case management system, developed by us and now implemented in over 30 counties.

7. Throughout the 1980's and early 1990's, NYSDA decried the crisis in public defense funding through a series of reports and testimony before numerous public bodies. We also published studies concerning individual counties and statewide problems, developed tools for measuring county defender systems, designed and distributed a model voucher for the accurate capture of information for assigned counsel systems, and responded to requests from counties for assistance.

8. From 1998 through 2003, NYSDA, in cooperation with its Client Advisory Board and the League of Women Voters of New York State, held fact-finding hearings in New York City, Rochester, Albany, and Syracuse, and in Genesee, Schoharie, and Schenectady counties. These hearings gathered information on the state of the public defense system from the point of view of practitioners, judges, and clients.

9. In 2001, NYSDA 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." The report called as well for the creation of enforceable statewide standards for both eligibility and the evaluation of service providers.

10. In 2003, NYSDA was called upon by the Legislature to comment on and help refine the approach New York proposed to take in legislation raising assigned counsel fees and creating the Indigent Legal Services Fund. That fund promised in state money approximately 50 percent of the increased amount counties were expected to pay for the increase in assigned counsel costs. As a consequence, following the passage of that legislation, NYSDA was called upon by many counties to provide advice and assistance as they sought to change their public defense systems to avoid costs of the assigned counsel fee increase. During this period, many counties radically redesigned their public defense systems based solely on cost in what we have characterized as "a race to the bottom."

11. In 2004, NYSDA culminated a four-year process of standards development and published "Standards for Providing Constitutionally and Statutorily Mandated Representation in New York State." After a similar period of development, its Client Advisory Board in 2005 approved "Standards for Client-Centered Representation."

12. In 2006, as part of our contractual obligation to study New York's public defense system, we commissioned the National Legal Aid and Defender Association (NLADA), through its Field Research Program, to study 10 counties in New York State: Cattaraugus, Franklin, Jefferson, Lewis, Niagara, Ontario, Schuyler, Sullivan, Tioga, and Washington. In October 2007, an NLADA report detailed the problems with New York's public defense system as they affected Franklin County. The report concluded that, "Victimized 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...." It went on to state, "...leaving the task of funding public defense services to the counties – even in part – endangers a state's entire ability to dispense justice fairly."

13. Shortly after the publication of the report on Franklin County, report cards were issued by NLADA measuring the performance of six other counties – Cattaraugus, Niagara, Ontario, Schuyler, Tioga, and Washington – against the ABA's "Ten Principles of a Public Defense Delivery System." Of the 60 grades, there was one A, 7 C's, 22 D's, and 30 F's.

14. Based on my 39 years of experience, 30 as Executive Director of NYSDA, and my personal knowledge of public defense services in New York, it is clear to me that the current county-based system of public defense is so fragmented, underfunded, and poorly administered that it violates state and national standards of effective representation, as well as the constitutional right to counsel.

INTRODUCTION

15. The great promise of our State and Federal Constitutions and of the New York State Code of Professional Responsibility, indeed of the image of our profession, is that lawyers will have time for their clients. That time will include the opportunity to interview the client, listen to them, build rapport, investigate facts, review documents and evidence, file motions for discovery and pretrial relief, find witnesses, research the law and alternative dispositions, negotiate, counsel, decide on a course of action, build a theory of defense or a theory of the appropriate sanction, and, with the client, implement the chosen outcome. The only problem with this image as to New York's public defense system is that it is apocryphal. It simply does not and, given the current structure, cannot exist.

16. Clients are deprived of the client-attorney relationship, find it difficult to understand what their lawyers are doing and saying, are rushed through proceedings in a way that no client should be rushed, develop broad intergenerational mistrust of public defense providers, anticipate relief but settle for less, and become embittered and afraid, all unnecessarily, but as a consequence of the defects of this state's public defense system.

17. The expectations of clients are no greater than the standards that the legal profession has established for itself. As indicated in paragraph 11, NYSDA's Client Advisory Board prepared, and in 2005 adopted, "Client-Centered Representation Standards." Based on those standards, and on my own experience, I believe what clients want but what they do not receive is to be listened to and represented with compassion, dignity, and respect. They would like to be met with and visited when incarcerated. They would like their phone calls to be accepted and their letters answered. They would like a lawyer who takes the time to counsel and

explain in a manner that communicates understanding and respect. When their families have questions, they would like those questions to be answered. They would like language used in court, legal writing, and conversation that is clear and understandable. And they would like an investigation of the facts of their case to be pursued. They would like lawyers who are culturally sensitive, and prepared. In sum, they would like to feel that they are not being "sold down the river" by their lawyers. Subjected however as they are to outrageous indignities in a system in which their own lawyers have been made pawns in the game of resource allocation, they are routinely disappointed.

CASELOAD

18. The primary over-arching problem of the public defense system in New York is high unyielding caseloads. There are lawyers in New York handling caseloads higher than 1000 cases per year; smaller caseloads of 700 to 800 are not uncommon. It is simply impossible for such lawyers to spend enough time on each case to competently, zealously, and constitutionally represent their clients. It is inevitable that some clients will get priority over others. The use of the word triage is a frequent description by New York lawyers about what they do, particularly with minor cases. I am aware of a lawyer in one county with a caseload that exceeds 2000. A lawyer who has 2000 clients during a year, who works six days a week and takes a two-week vacation would have 72 minutes per client to do all that is necessary to fulfill his or her professional obligations. This is simply not possible. It is impossible for public defense attorneys to both provide high quality representation and handle their caseloads. They cannot fulfill their continuing obligation to stay abreast of changes and developments in the law and represent the number of clients they have. As a consequence of high caseloads, lawyers find they cannot visit

their clients, cannot investigate their cases, cannot develop the facts of those cases, rarely prepare cases for trial, and frequently take pleas without having investigated the matters they have been assigned.

19. There is no statewide system for tracking or managing attorney caseloads and workloads. In most places it is largely up to individual attorneys to manage their own caseloads and workloads. Moreover, the data that is available does not allow for reliable comparison between and among counties because there are no uniform data collection standards required for localities or for public defense offices.

20. The problem of excessive caseloads is exacerbated by the fact that many counties rely on part-time public defenders with competing private practices that distract from their public defense docket. In those jurisdictions where assigned counsel lawyers provide services, I know of no county that develops workload and caseload standards taking into account the defender's private attorney caseload. The same is true for part-time public defenders.

21. Throughout the state, 30 institutional and 20 assigned counsel programs provide adult Family Court representation in addition to their criminal defense work. This Family Court representation places an enormous burden on the public defense function.

22. Overworked attorneys are often under excessive pressure to obtain pleas from their clients at the expense of meaningful representation. Public defense clients often encounter attorneys who appear only interested in discussing plea offers or only speak to their clients about a plea. This process of generating pleas by discussing only plea offers with their clients, refusing

trials, and engaging in triage may allow attorneys to "manage" their active caseloads, but this is done at the expense of clients' constitutional rights.

ACCESS TO COUNSEL

23. Three problems come together when examining access to counsel for public defense clients. The first has to do with procedures for determining eligibility for publicly-paid counsel. The second is an absence of attorneys, and the third is delay in assignment. These three problem areas converge for many clients at arraignment.

24. There are many eligible defendants in this state who are found ineligible for counsel. There are also eligible defendants denied without an eligibility inquiry. In many counties, the guidelines threshold is too low to achieve counsel for those unable to afford counsel, and in many others there is a rigid application of rules. For example, in some places, if you are employed, you don't receive a public defender regardless of how paltry your salary or how recent your employment. The counsel inquiry in justice courts is frequently insufficient or non-existent. Jailed defendants, arraigned without lawyers, are sometimes told to "go back and make some phone calls to try and get counsel." In sum, there is a random and disparate application of the "unable to afford" standard which governs decision-making regarding the appointment of counsel.

25. There are no functional statewide criteria for determining who is eligible for public defense services, and local judges throughout the state are left to their own devices to set eligibility standards. The resultant guidelines, county-by-county and court-by-court, are incoherent and frequently overly restrictive.

26. Most counties fail to adequately account for debts in considering whether a person is financially eligible for appointed counsel. Many counties automatically disqualify a person who owns assets, such as a home or a car, without considering the actual value of the asset, equity available in the asset, or the fact that some assets may be necessities, such as a car in rural areas.

27. Several counties disqualify minors and people under the age of 21 based on parental income, or they substantially delay the arraignment of such people waiting for sometimes estranged parents to come forward. Even where parents will not contribute to the client's defense, in some counties coercive procedures are used to force minors and their parents to retain counsel.

28. Because the eligibility determination process is intimately related to the expenditure of county funds, the standards governing eligibility are frequently used to restrict the expenditure of those funds. As a result of the differing standards and this overarching concern about the county fisc, I have seen instances where a client will be deemed eligible in one county but is denied the right to counsel in another county based on different eligibility standards. Individuals who would receive an appointed attorney under any reasonable definition of their inability to pay are left without an attorney despite the fact that they clearly cannot afford to hire their own. This blatant denial of counsel resulting in the harm that *Gideon* was to prevent results in a one-sided adversarial system in which defendants cannot effectively mount a defense.

29. As reports of the Commission on Judicial Conduct note, there are judges who simply are not willing to appoint counsel; there are others who believe they are doing their duty

by holding down the costs associated with appointment. Consequently, invidious practices have grown up, such as soliciting invalid waivers of counsel or creating the environment in which such waivers are likely to take place. I have seen examples of people found ineligible based on non-existent spousal income, and of clients deprived of counsel for substantial periods based on their ownership of assets which no reasonable person could expect to liquidate.

30. These eligibility anomalies, combined with the structural design flaws of the public defense system, make it extremely common for criminal defendants unable to afford counsel to be arraigned without legal representation. In many jurisdictions, the number of courts where arraignments can take place, and the number of judges before whom arraignments may be scheduled, far exceed the number of available counsel to provide representation. Furthermore, there is a lack of enforceable standards mandating the presence of attorneys at each critical stage of a prosecution, and a lack of funds to supply adequate numbers of lawyers to attend arraignments.

31. Frequently in New York State, critical decisions are made at arraignment that go beyond the limited statutory requirements of such proceedings. Consequently, important rights are adjudicated before defendants ever meet an attorney. Frequently the judge will set bail at a level that will be maintained for the duration of the prosecution. Lacking an advocate who understands the factors upon which bail is set or typical outcomes in the particular court, unrepresented public defense clients often are denied bail or have unreasonably high bail set. This results in unnecessary incarceration, serious disruption to their lives and the lives of their families, and a serious risk of prejudicing their case.

32. Pleas may also be entered at arraignment before the defendant is assigned counsel. Unrepresented defendants are left to negotiate offers directly with the prosecutor and the judge, and they must make decisions about whether to enter a guilty plea without consulting an attorney. Some of this activity arises from venality, some from ignorance of the law, and some from the practical unavailability of counsel after an eligibility determination. Whatever the reasons, clients are disadvantaged by the absence of counsel at arraignment. In some jurisdictions, their request for counsel has been deemed a constructive waiver of their rights under CPL 180.80.

33. A particularly bad practice is the frequent refusal by courts to appoint counsel in violation cases and the often willing acquiescence of public defense lawyers.

34. Without the benefit of counsel, defendants unable to hire counsel are vulnerable to pressure to plead guilty. They are tempted by the promise of swift resolution of their cases and suggestions that an early plea is the best offer they will receive. Without the assistance of counsel, defendants are unlikely to understand whether their behavior fits the legal definition of their charges, the full collateral consequences of a plea, and whether the bargain with which they have been presented is in fact fair or reflective of common practice. Moreover, public defenders actually have an incentive to ignore the practice of counselless pleas in the interest of holding caseloads down.

35. It is not uncommon for local judges to engage in colloquies with defendants that can prejudice their cases. Unrepresented defendants at arraignments and other early proceedings

may make incriminating statements. Representation by a competent attorney could prevent such situations.

36. Even after arraignment, there are places in the state where it has taken weeks, and sometimes months, to get a lawyer assigned to a case. The Backup Center has received calls from judges seeking to find counsel for appointment. We have received calls from clients who live out of state, but have in-state charges, trying to determine the status of their case and the appointment of their lawyer, having unsuccessfully contacted the county of their arrest for this information. And there are occasions where individual judges search three, four or five counties to solicit counsel to handle a case.

37. Even more frequently, defendants spend weeks upon weeks waiting for an assigned lawyer to begin actually working on their case. Incarcerated defendants often languish in jail waiting to meet their lawyers, while only a small amount of work by an attorney might allow a defendant to be released. Even without a real possibility of getting out of jail, unrepresented defendants feel trapped and lost in the criminal justice system when they do not see their counsel. This makes them resistant to a trusting relationship, cooperation, or pleas after an attorney becomes involved.

38. Because of these frequent delays, some defendants unable to afford counsel have found themselves indicted without ever having seen a lawyer. Thus they loose the opportunity to be counseled about the wisdom and value of appearing before the grand jury.

39. Institutional defenders often do not have sufficient staff to ensure that attorneys are appointed in a timely manner and are available to represent their clients in all critical

proceedings, or even to visit their clients after counsel is assigned but before the next court appearance. Assigned counsel systems similarly often do not have procedures in place to ensure timely appointment of counsel and the availability of attorneys at all critical stages.

40. Throughout this state, it is rare for public defense attorneys to begin working on cases immediately after arraignment, and no enforceable standard exists to mandate basic early client contact, immediate commencement of investigation, and the prompt interviewing of witnesses.

ATTORNEY-CLIENT CONTACT

41. In county after county, I am aware that attorneys commonly do not visit their clients in jail, return phone calls, or answer letters. In a number of counties, the only attorney-client contact that occurs is when a client is brought to court for a scheduled appearance. Attorneys will talk to a client for a brief period prior to going to court, often in a public area within earshot of other defendants, court personnel, attorneys, or even the district attorney or judge.

42. In some jurisdictions it is possible to observe the lack of client-attorney contact by simply watching court proceedings and listening. In full view of the judge, lawyers ask fundamental questions of their clients, revealing a complete lack of knowledge of the facts of the case or the facts of the lives of their clients. This can happen not only when counsel has just been appointed at arraignment, but also at later proceedings due to the lack of attorney-client contact and investigation.

43. We have on occasion over the years reviewed jail visiting books to determine the amount of client-attorney contact. But even without this level of empirical support, lawyers are fairly candid to report that they do not visit their clients in jail. Indeed, in some counties there are lawyers who consider the difficulties of getting into the jail as a basis for not seeing their clients at all. Others request clients be brought to the courthouse for visits. This forces some clients to arise at three or four o'clock in the morning, travel by bus, sit in the pens all day to see their attorneys for five or ten minutes, and then after the visit face a similarly long return to jail. We have studied counties in which the jail is visible from the lawyer's office or the courthouse, and yet no visitation takes place.

44. As a result of the lack of attorney-client communication, counsel frequently do not learn enough from a client to investigate the facts of their case. Without the names of potential witnesses, the substance of alibis, or even the client's basic perspective on the events in question, an attorney may wrongly rely on the police or the district attorney's presentation of the facts.

45. It is not uncommon to meet relatively new attorneys whose experience in the criminal justice system has led them to conclude that their first step in a case, rather than the review of the sufficiency of the accusatory instrument, interview, or investigation, is to communicate the plea offer to their client.

46. Attorneys who have not spoken with their clients may also waive important rights without gaining their clients' informed consent. Waiving the right to a preliminary hearing or the right to testify before the grand jury because the attorney believes waiver is in the client's best

interest leaves many clients confused or distrustful. The resulting distrust frustrates development of a defense plan. Moreover, in some cases clients may have had a legitimate reason to disagree with the attorney's assessment, including knowing that some of the prosecutor's evidence may not be available for a preliminary hearing or that some witnesses may appear unreliable on the stand.

47. In many cases, the lack of attorney-client contact is not due to uncaring lawyers. Rather it is a direct result of overwhelming caseloads and workloads that public defense attorneys are forced to carry. Without adequate funding or enforceable caseload/workload standards, public defense attorneys cannot attend all of the mandatory hearings and other essential proceedings in their cases and still have the time to consult with their clients.

48. Assigned counsel jurisdictions present particular problems. Appointed counsel may not meet with their clients enough to create a meaningful and effective attorney-client relationship out of fear that they will not be paid for their services. We have seen routine voucher-cutting practices in which judges and others cut vouchers of lawyers who visited their clients "too often" in jail, or spent time talking with clients' families, or took too long on a letter, visited appellate clients in prison, or performed other services essential to quality representation.

HIRING/PERFORMANCE/TRAINING

49. County public defense systems rarely have written attorney selection and performance standards. Most lack meaningful procedures for attorney supervision and monitoring. While a few counties have consequential standards and criteria for placement on assigned counsel panels, most have neither. These programs generally have no mechanism to

monitor or enforce standards of representation, and removal of lawyers from panels is a rare event. Very few public defense systems in New York have any mechanism for disciplining or removing attorneys from public defense practice for inadequate representation.

50. Many public defense attorneys lack training, and lack opportunities to be trained. Few public defense offices have adequate budgets for training; many have none. Very few programs have mandatory training programs. Large segments of the defender community who live in remote areas or are understaffed or have high caseloads or lack of support staff cannot break away to be trained. There is no statewide mandate for the training of public defense lawyers. Mandatory CLE requirements permit public defense lawyers without consequence to fulfill their MCLE requirements with courses irrelevant to their public defense practice.

51. Although NYSDA provides regular training programs for public defense attorneys, many attorneys cannot travel to our programs due to the geographic and other constraints set out above.

52. Due to funding constraints, salaries are often set so low that only the least experienced attorneys will be willing to accept a fulltime position. Thus, given the structure of training and this phenomenon, any learning that occurs happens on the job at the expense of clients.

53. Because of the lack of training and supervision of public defense attorneys, many attorneys unwittingly fail to provide a meaningful defense for their clients at trial and sentencing. They fail to adequately investigate the charges against their clients or to obtain investigators who can assist with case preparation and testify at trial. They also fail to employ and consult with

experts when necessary, fail to file necessary pretrial motions, and generally fail to meet minimum standards of professional representation. All of this places the liberty of their clients in jeopardy.

54. The culture that has grown up around the investigation of public defense cases in New York has had dire consequences in two specific ways. Because many public defense lawyers have not learned how to use investigators, a class of investigators for public defense clients has not emerged in this state as has occurred elsewhere. Frequently the investigators employed by public defense offices are former police officers, some of whom are not up to the task of investigating public defense cases. More importantly, the effort by counties to hold down costs has resulted in the utilization of many "staff investigators" being deployed exclusively for eligibility reviews and not field investigation.

55. Even in those jurisdictions where training is deemed to be an important part of an office culture and some monies are allocated for its purpose, it is exceedingly rare to see a commitment to, let alone the financing of, routine training for secretaries, other support staff, paralegals and social workers, where available, or for investigators or attorney managers. Because of constraints on hiring, the lack of performance standards, and the virtual absence of meaningful training, the capacity of most public defense offices to provide zealous and high-quality representation as a matter of routine practice is non-existent.

SUPPORT SERVICES

56. Public defense service providers in New York lack resources for adequate support staff and equipment, as well as necessary services like experts and investigators.

57. Without paralegals and adequate secretarial staff, already stretched public defense lawyers must use their scarce time to perform rudimentary tasks or simple legal research, reducing the amount of time they can spend meeting with clients, developing cases, or drafting individualized legal pleadings.

58. Without staff investigators, public defense attorneys must meet with witnesses and family members, verify the police and district attorney's account of the facts, and develop the factual case for their client. Most often, however, attorneys do not have the time to perform this work. When performed, it is rarely performed as well as professional investigators could perform it. And it is always done at the risk – if important facts or impeaching evidence are found – of lawyers being disqualified as counsel because they have become fact witnesses.

59. Without experts, public defense attorneys are often not able to develop and present viable defenses on their client's behalf. Whatever the reality as to the use of experts was when New York State established its public defense system in 1965, quality lawyering today requires routine access to experts. Whether the issue has to do with accessing and examining DNA, challenging fingerprint evidence, testing the problems associated with false confessions, or simply engaging in the traditional examination of arson, ballistics, and fiber evidence, such assistance is crucial. Psychological examinations are now much more relevant in the day-to-day practice of law than they were three decades ago. Recent exonerations and challenges to prosecutorial misconduct have established that challenging eyewitness identification, false confessions, poor crime lab oversight, problems of evidence preservation, botched autopsies, and impoverished lab procedures all require an expertise which public defense offices, absent

experts, do not possess. Without experts, some of the most crucial claims of innocence or incapacity may go unheard by judges and juries.

60. As assigned counsel are not reimbursed for time spent by secretaries or paralegals, they incur expenses that must be paid from their fees, reducing their rates, in reality, to an amount that makes many experienced criminal defense attorneys unwilling to take on assignments.

61. Even when experts or investigators are ostensibly available, there is often pressure on public defense attorneys to control costs by underutilizing them. Despite the usefulness and necessity of experts and investigators in a client's case, assigned counsel may fear being blacklisted from future assignments for requesting such services. Institutional providers may fear losing ground in their annual budget fight if they spend "too much" on these services. In some systems, institutional providers operating under fixed-fee contracts (the legality of which is questionable) may fear losing health insurance or other benefits if too much money is expended for support services.

DISPARITY WITH THE PROSECUTION

62. There is an enormous financial disparity between the resources provided to the prosecution function and those provided to the public defense function in New York State.

63. Since the establishment of the State's Indigent Legal Services Fund, some prosecutors have acknowledged a previous 3 to 1 disparity of prosecution to defense, alleging that the ratio has now been reversed.

64. The acknowledged disparity has always been justified by the argument that prosecutors must have larger budgets than defenders because they 1) initiate and conduct investigations, 2) prepare cases for the Grand Jury, and 3) handle all prosecutions including those cases where clients can afford lawyers, while public defense lawyers handle only those clients unable to afford counsel. This purported difference in responsibility has led to disparity being deemed acceptable.

65. The argument supporting greater resources for prosecutors overlooks obligations of public defense programs that district attorneys' offices do not have. For example, under County Law Article 18-B, public defense providers must represent adult respondents in Family Court in child abuse, neglect and permanent neglect cases, in family offenses, in custody and visitation cases, in paternity cases, and in child support violations. District attorneys handle none of these. Defense adversaries in these cases – county attorneys, private attorneys, and DSS attorneys – are all funded through alternative revenue streams.

66. Public defense providers must handle ordinance violations and Penal Law violations even when these are prosecuted not by district attorneys, but by town attorneys, special prosecutors or, until recently, State troopers.

67. Public defense attorneys, but not prosecutors, handle parole revocation cases and appeals from adverse parole determinations. It is the Division of Parole budget that supports these parole revocation specialists who prosecute cases defended by county public defense providers. The Indigent Parolee Representation Program, providing some state funding for defense representation in these cases, has never fully covered the cost of such representation.

Moreover, since 1996 two governors have refused to fund this program in their Executive budgets.

68. Disparity calculations have often failed to include resources available to the prosecution but denied to the defense. For example, the Department of Social Services supports DA units that prosecute welfare fraud as well as the Family Court cases noted above. Local police forces, the Bureau of Criminal Investigation, and sheriffs' deputies investigate cases, make arrests and help prepare cases on behalf of prosecutors. The Attorney General – funded exclusively through the Department of Law – helps district attorneys. Some district attorneys with generous budgets, as well as the New York State Prosecutors Training Institute, have supplied staffing to help upstate district attorneys prosecute cases.

69. The assistance of DCJS, the FBI and other inter-agency law enforcement working groups is often overlooked when calculating the resources available to the prosecution. And the availability of the state's criminal history repository to the prosecution as an aid to investigation, but not the defense, is virtually never calculated.

70. Substantial state grants are given to support prosecutors' budgets, but similar grants are not available for the defense. Since 1969, New York State has provided a steady stream of technical assistance, federal and state money, and statutory support for prosecution, without an equivalent commitment to defense. Some of these programs currently include the Tuition Reimbursement Program, DTAP, Prosecutor Retention and Recruitment Program, and Operation IMPACT. These and other state programs, frequently ignored in the analysis of disparity, provide resources and funding to district attorneys.

71. The State also funds a Special Narcotics Prosecutor, which has no equivalent for the defense, and the New York Prosecutors Training Institute (NYPTI), which provides services to prosecutors similar to those provided to the defense by our Backup Center. But the Backup Center's budget is less than half the amount of NYPTI's.

72. Statutory and economic incentives support fulltime district attorneys but not fulltime chief defenders. Section 183-a of the Judiciary Law requires the fulltime district attorney of each county having a population greater than 500,000 to receive an annual salary at least equivalent to that of a Justice of the State Supreme Court, and requires the fulltime district attorney of each county having a population greater than 100,000 but less than 500,000 to receive an annual salary at least equivalent to that of the county court judge. The same section requires the district attorney of each county with a population less than 100,000 (that chooses to have a fulltime district attorney) to receive an annual salary at least equivalent to that of the county court judge in the county of the district attorney's election or appointment. No similar provision exists to support the concept of professional, fulltime public defenders. This statutory support for prosecutors, but not defenders, has a budgetary component in the District Attorney Salary Reimbursement Program, which provides aid to help counties pay for this state-funded disparity achieved through legislation.

73. Even within traditional State aid programs that exist to assist localities with criminal justice costs there is disparity. In 2001 New York State broke with history and extended prosecution aid to all 62 counties leaving defense aid only in the 30 counties that had for years been funded jointly for both prosecution and defense, with prosecution aid always at a higher rate.

74. Despite the assertion by prosecutors referred to in paragraph 64 that the establishment of the Indigent Legal Services Fund to relieve counties of part of the increased costs of assigned counsel fees has reversed the disparity equation, in my experience the total resources available to prosecutors remains far higher than the resources available to their public defense counterparts.

INDEPENDENCE

75. One of the root causes of the problems faced by criminal defendants who are provided publicly appointed lawyers in New York's criminal justice system is the lack of political independence for public defense providers and administrators. In some instances, county governments will try to dictate to public defense providers the kind of representation they should provide. Lurking in the background of suggestions is the threat to remove the institutional defender or assigned counsel plan administrator who refuses to tow the line. The county's position is generally motivated by a desire to rein in costs rather than a desire to provide constitutionally adequate legal representation.

76. The threat of political interference, county control of public defense budgets, an office's chance for obtaining greater resources, and the day-to-day nature of public defense practices are all tied together in the issue of independence.

77. I recently tried to relate this problem in testimony before the State Legislature, stating, "[a]t the county level, we have watched Chief Defenders threatened with removal from office because they were too aggressive in the representation of their clients. We have seen lack of oversight – masking patronage – permit incompetent lawyers to serve. We have watched

talented lawyers become timid because of fear of executive branch reprisal. We have seen defenders time and again slash their own budget requests to meet political objectives. We have seen local threats about being too litigious borne on the wings of purported "office evaluations." We have seen resources withdrawn from offices for political – as opposed to budgetary – reasons." The testimony describes the key reason why New York's public defense system fails.

78. Lawyers often come to the work of public defense filled to the brim with hope and courage. They want to serve clients, aggressively defend client rights, and succeed in the profession. Soon, for many, these aspirations are transmuted by the combination of high caseloads, a lack of resources, and the need to keep things safe and peaceful at the county level.

79. Public defense services funded by county and city property taxes are not the number one priority for most county legislators. Some are openly hostile to the idea of funding both the prosecution and the defense. Indeed, it seems counter-intuitive to many local political leaders to use taxpayer money to pay to lock someone up while simultaneously using taxpayer money to defend against locking up that same person. County pressure to cut costs, to influence public defense decision-making, and to threaten consequences for resistance are all part of the environment in which public defense administrators work.

80. Side by side with political interference is the often painful fact that those counties and defenders that want to do the best job possible cannot afford to do so. Consequently, even within county administrations that are enlightened and committed there are constraints that create pressure to do more with less. This process of triage, publicly admitted, represents unconstitutional and unethical behavior, but it is subtly encouraged by county officials.

81. Several years ago I came upon the chief public defender of a small upstate county checking out of a hotel on the very first day of a three-day training event. He had found out quite by accident the night before that, without notice, he had been fired from his job and replaced by someone less experienced and less expensive.

82. The tenured public defender in another small county standing up to accept his expected reappointment at the Board of Supervisors meeting designated for such reappointments had to quickly sit down. Without notice, he was replaced by someone else deemed more cooperative whose name was called and whose appointment was confirmed.

83. These examples are not exceptions; rather they are emblematic of the problem. The Schuyler County Public Defender was recently denied reappointment for refusing to compromise on the issue of confidentiality. Her refusal to move into county space that would subject witnesses and clients to the prying eyes of adversaries to save the county money cost her her job.

84. Nor is the threat to independence a rural county phenomenon. The Monroe County Legislature last month abandoned a 30-year-old merit selection system when it came time to replace the retiring public defender. The County Legislature simply replaced the model system with a process designed to pick the new candidate based on partisan political considerations.

85. Similarly, in New York City politics raises its head. A former Mayor, angered by a provider, let RFP's out to bid on public defense services. For many years the new providers thereby established were flat-funded. The City's Criminal Justice Coordinator once also resisted

the idea of caseload standards merely because such standards might raise costs. All this occurred in a city where, last year, 210,000 cases were disposed of at arraignment, 108,000 of them by plea of guilty.

86. Some years ago Onondaga County entertained the suggestion that money be saved by having assigned counsel lawyers take every fifth case for free. In 2003 a proposal by the assigned counsel program to the County suggested that money could be saved by a scheme that created structural impediments to clients being found eligible for service. These problems arise in environments rich with patterns and histories of local patronage. For many years the Albany County system would only hire Democrats. Similar irrelevant political considerations were present in Rockland County until the United States Supreme Court decided *Branti v. Finkel*, 445 U.S. 507 (1980), purportedly putting an end to the practice. But pressure does not have to be so blatant. Threats by county officials to public defenders that "they could be replaced" with an assigned counsel plan, threats to legal aid societies that "we are thinking of exploring a public defender office," and threats to replace assigned counsel programs with questionably legal but cheaper "conflict defender" offices are common tools designed to keep providers on edge and in line. The threat does not have to be explicit; particularly when it is accompanied by the question, "Do you really need to give these people a Cadillac defense?"

87. Public defense attorneys told by the officials who vote their budgets and salaries that the representation they provide is "too good" are placed in conflict with their clients daily. They then often resist seeking relief in appropriate courts, limit their representation to what is clearly expected, and try to maintain a low profile.

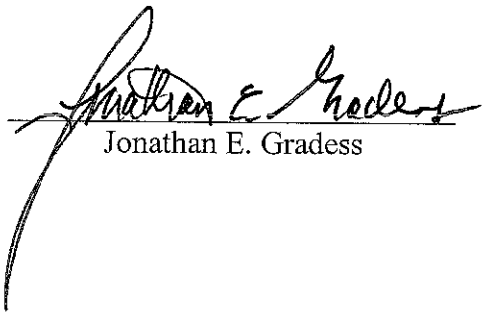
88. In many jurisdictions the public defense office cooperates in schemes which pass on the cost of representation to public defense clients, particularly in cases of minors. They do this not because they believe in it or even because it is legal; they do it to show they are trying to help save county money, and to prevent falling into disfavor. Public defenders as county entities are hard-pressed to sue their employers for violating their clients' rights in these illicit fee schemes or other policy practices, or regarding jail conditions. And although legal aid societies *can* sue in such circumstances, most do not.

89. In many of these counties the public defense attorneys have worked hard to improve their systems; they know their limitations, but they also fear that their replacements will undo whatever good they have achieved. They are thus forced to compromise over economics and structure, over aggressive advocacy and publicity in order to survive, all in the belief that their own mediocrity is superior to the mediocrity that might replace them.

90. Assigned counsel lawyers frequently fare worse. Often single practitioners, they function without adequate resources and are repeatedly deprived of investigators, experts, and support. Faced with an aggressive and determined judge seeking to meet Standards and Goals and move cases, they know that vigorous litigation that may delay quick disposition might lessen their chances of future assignments. If they act on that knowledge, they have conflicts because they end up approaching the case with their own best interests or that of the judge weighing in more heavily than the interests of their clients.

91. New York has delegated public defense responsibility to 62 localities that are administratively and fiscally unable to carry out that responsibility. The politically contaminated

environment in which the day-to-day work of public defense lawyers takes place is a profound flaw in the constitutionality of the system. It silently interferes with competent performance. The lack of standards and guidelines governing the system, combined with an inadequate fiscal base for providing high quality public defense services, dooms public defense clients to an almost endless array of horrors.



Jonathan E. Gradess

Dated: March 10, 2008
Albany, NY