STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

KIMBERLY HURRELL-HARRING, et al., on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

-against-

DECISION and ORDER
INDEX NO. 8866-2007

THE STATE OF NEW YORK, et al.,

Defendants.

(Hon. Eugene P. Devine, J.S.C., presiding)

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DEVINE, J.:

This class action against the State of New York, Governor Andrew M. Cuomo (collectively referred to as State Defendants) and the counties of Onondaga, Ontario, Schuyler, Suffolk and Washington seeks, among other things, a declaration by the Court that the manner in which defendants provide indigent criminal defense services denied plaintiffs' constitutional right to counsel, actually and constructively. Procedurally, following years of extensive motion practice, the completion of discovery and fruitless attempts by the parties to negotiate a settlement, the note of issue and certificate of trial readiness was filed by plaintiffs in December 2011 and the trial date has been rescheduled on more than one occasion. After having been granted leave to file late motions, plaintiffs and State Defendants have served respective summary judgment motions.

Plaintiffs have cross-moved for partial summary judgment on their claim that the State Defendants have violated plaintiffs' constitutional rights by failing to provide counsel at arraignment, asserting that the experiences of the class members demonstrate that the deprivation of the right to counsel at this critical stage occurs on a systemic basis. State Defendants oppose the motion and further assert, as they have in their motion for summary judgment, that plaintiffs no longer qualify for the class certification that has been granted in this matter due to the failure of certain class members to appear for court-ordered depositions and that

the remaining plaintiffs are incapable of serving as class representatives. Furthermore, State Defendants maintain that they are unable to effectuate the remedies that plaintiffs have demanded inasmuch as existing statutory provisions already provide that criminal defendants must be afforded counsel at arraignment and set forth remedies for defendants that are arraigned without an attorney. Further, as to the merits of plaintiffs' cross-motion, State Defendants contend that plaintiffs cannot establish their prima facie entitlement to judgment as a matter of law on their claim that the lack of legal representation at arraignment constitutes an actual denial of the constitutional right to counsel as articulated in *Gideon v Wainwright* and its progeny.[1] Plaintiffs submitted a reply to the State Defendants' opposition papers.

State Defendants' Motion to Strike and to Decertify the Plaintiff Class

Before addressing plaintiffs' partial summary judgment motion, the Court will decide the State Defendants' application to decertify the plaintiff class and to strike parts of the amended complaint and any evidence relating to plaintiff class representatives who failed to appear for depositions and court-ordered discovery. Previously, in October 2012, plaintiffs sought an order allowing Ricky Lee Glover, Edward Kaminski, Candace Brookins, Jemar Johnson, Ronald McIntyre, Joy Metzler, Victor Turner and Bruce Washington to withdraw as class representatives. The Court denied the application with the exception of granting Kaminski's request to withdraw due to his poor health condition. The attorney affidavit in support of the withdrawal application indicated, generally, that plaintiffs' counsel had experienced great difficulty in communicating with the class representatives and that, if removed from the action, plaintiffs would not offer evidence relating to such defaulting representatives. Finding that the

[1] 372 US 335 [1963].

application prejudiced defendants and was inappropriate given the late hour of the request, the Court denied the motion. Of the 19 class representatives that remained, 8 failed to appear at their court-ordered depositions, causing the State Defendants to request the Court to strike the members' claims from the amended complaint and to bar plaintiffs from relying on evidence relating to said plaintiffs.

Whether to strike a pleading due to a party's failure to comply with court-ordered disclosure is within the court's discretion, however, such a drastic remedy should be reserved for occasions where the defaulting party's noncompliance was "willful and contumacious."[2] Clearly, the plaintiffs that refused to be deposed or otherwise appear in this matter did so intentionally and without regard to the impact that such default would have on the class as a whole. While plaintiffs contend that State Defendants' request to strike presents merely a difference of semantics from their previous opposition to plaintiffs' motion to have the plaintiffs voluntarily withdraw, that is not necessarily true. Specifically, State Defendants point out that, after striking plaintiff Candace Brookins from the case, any allegations regarding improper representation by an attorney with a conflict of interest must necessarily be eliminated as Brookins was the sole plaintiff to make such a claim. Likewise, State Defendants maintain that Luther Booker was the only Suffolk County plaintiff to adhere to the court order requiring depositions of all class representatives, thereby requiring the dismissal of plaintiffs' claims relating to representation at arraignment, eligibility determinations and caseload management as they pertain to Suffolk County. Whether plaintiffs can establish their conflict of interest allegation and claims of constructive denial of the right to counsel as against Suffolk County in the absence of these

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[2] Mazzuca v Warren P. Wielt Trust, 59 AD3d 907, 908 [3d Dept. 2009]; see CPLR 3216.

stricken plaintiffs will be determined when considering the evidence presented in State Defendants' summary judgment motion. Plaintiffs must ultimately demonstrate that the alleged "deprivations of counsel to indigent defendants are not simply isolated occurrences in the case of these . . . plaintiffs, but are a common or routine happenstance in the counties."[3] Accordingly, while the Court is inclined to grant the motion to strike the class representatives from this action, the claims of systemic actual or constructive denial of the right to counsel remain intact for final adjudication on the merits.

Even with the elimination of certain class representatives, the crux of this case remains unaltered, namely whether "in one or more of the five counties at issue[,] the basic constitutional mandate for the provision of counsel to indigent defendants at all critical stages is at risk of being unmet because of systemic conditions."[4] It appears that the current plaintiff representatives continue to satisfy the statutory requirements necessary to maintain this class action, despite certain class members' limited, or sometimes inaccurate, understanding of this litigation. While the trial court maintains the discretion to manage a class action and, if necessary, decertify a class, the Court finds that to do so at this juncture would needlessly complicate an already protracted lawsuit.[5] Even though this Court determined that plaintiffs should not have been granted class certification in the first instance, for the reason provided above, the Court declines to decertify the class as State Defendants have requested.

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[3] Hurrell-Harring v State of New York, 81 AD3d 69, 75 [3d Dept. 2011].

[4] Id., 81 AD3d at 73, quoting Hurrell Harring v State of New York, 15 NY3d 8, 25 [2010].

[5] see Lauer v New York Telephone Co., 231 AD2d 136 [3d Dept. 1997].

Plaintiffs' Cross-Motion for Partial Summary Judgment

Plaintiffs seek partial summary judgment on their claim that the State Defendants have violated the constitutional right of plaintiffs, and all similarly situated indigent criminal defendants, to have the assistance of counsel at arraignment. This claim of actual denial of the right to counsel is refuted by State Defendants, who maintain that plaintiffs have failed to demonstrate, by the proffer of competent evidence, that criminal defendants are actually denied their right to counsel at arraignment on a systemic basis and, further, insist that existing statutory provisions require criminal courts to ensure that the defendants are guaranteed their right to counsel at arraignment, thereby leaving State Defendants without any further opportunity to remedy the alleged continuing denial of counsel at arraignment.

The Court of Appeals has held that the complaint in this matter raised two cognizable Sixth Amendment claims, namely whether the failure of the state, in its provision of assigned counsel to indigent defendants – a duty it has delegated to the counties – to ensure that arraignments are conducted in the presence of counsel constitutes an actual violation of the right to counsel and, further, whether the counties' provision of legal services is so deficient so as to constructively deny the right of indigent defendants' constitutional right to counsel.[6] As is pertinent to plaintiffs' partial summary judgment motion, the Court determined that the right of indigent defendants to be represented by an attorney, under *Gideon v Wainright*, attaches at arraignment "and entails the presence of counsel at each subsequent 'critical' stage of the proceedings."[7]

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[6] Hurrell Harring v State of New York, 15 NY3d 8 [2010].

[7] Id., at 20.

Specifically, the Court found that:

> [A]rraignment itself must under the circumstances alleged be deemed a critical stage since, even if guilty pleas were not then elicited from the presently named plaintiffs, a circumstance which would undoubtedly require the "critical stage" label, it is clear from the complaint that plaintiffs' pretrial liberty interests were on that occasion regularly adjudicated with most serious consequences, both direct and collateral."[8]

The Court went on to state that the determination of bail applications must also be considered a critical stage of the proceedings. Further, the Court noted that CPL 180.10 precluded criminal courts at the arraignment stage in felony cases from "going forward with the proceeding without counsel for the defendant, unless the defendant has knowingly agreed to proceed in counsel's absence."[9] Notwithstanding this statutory protection, the Court of Appeals found that, should plaintiffs present proof that the State of New York was failing to provide counsel at critical stages of criminal cases, including, "as a general matter," at arraignment, a claim that defendants were violating plaintiffs' fundamental constitutional right to counsel would indeed be established.

To that end, plaintiffs must now proffer sufficient admissible evidence demonstrating their entitlement to judgment as a matter of law on their claim.[10] Should they succeed in that task, the burden will then shift to State Defendants to present proof that raises a material issue of fact warranting a trial.[11]

At the outset, the Court notes that plaintiffs' motion does not reference Ontario County,

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[8] Id.

[9] Id., at 21, citing CPL 180.10 [5].

[10] see Zuckerman v City of New York, 49 NY2d 557, 562 [1980].

[11] Id.

where a "Counsel at Arraignment" program has been implemented. Plaintiffs address, at the county level, their contention that due to systemic deficiencies, the State fails to ensure that criminal defendants' right to counsel at arraignment is upheld by the provision of counsel at that critical stage of the criminal proceeding.

Onondaga County

It is uncontroverted that class representatives Richard Love, James Adams and Joseph Briggs appeared without counsel at arraignment, during which stage bail applications were decided for all three. Attorneys from the Onondaga County Bar Association Assigned Counsel Program (ACP) averred that, with the exception of detained defendants in Syracuse City Court, defendants were routinely arraigned without the provision of counsel, citing to the difficulties that prevented the provision of such representational services. ACP attorney Donald Kelly explained that even in a large court such as Syracuse City Court, the provision of assigned counsel at arraignment is nearly impossible due the varying times when arrests are made and the lack of available attorneys at those times. Overall, the Onondaga County attorneys' testimony indicates that, even with an established arraignment program, it is still possible for criminal defendants to be arraigned without counsel.

Schuyler County

While class representatives Shawn Chase, Robert Tomberelli and Christopher Yaw were arraigned without counsel, Yaw was the only indigent defendant to be detained after the court set bail in an amount that he could not pay. Schuyler County Assistant Public Defender Matthew P. Hughson testified that defendants are "frequently" arraigned without counsel, stating that, unless he happens to be in court during an arraignment or a criminal defendant appears at arraignment

pursuant to an appearance ticket, "98 percent of the time they're being arraigned without an attorney."[12]

Suffolk County

The County contracts with the Legal Aid Society to provide public defense services pursuant to County Law Article 18-B. Plaintiffs do not assert that the remaining class representative from Suffolk County, Luther Booker, was arraigned without counsel, however, they present evidence that numerous class members have been arraigned without an attorney present, including one particular night court session in Patchogue Village Justice Court where a justice informed an entire courtroom of defendants, collectively, that although they had the right to an attorney, among other things, he would not be assigning counsel to these defendants as they were charged with mere violations. In another village court in Westhampton Beach in 2012, two class member indigent defendants were arraigned without counsel and ultimately pleaded guilty to reduced charges. Additionally, plaintiffs aver that, despite the presence of a Legal Aid Society attorney in the courtroom, two indigent defendants facing Vehicle & Traffic Law violations in the Village of Northport were forced to handle preliminary transactions in their cases without the assistance of counsel.

The testimony of Suffolk County Legal Aid attorneys indicates that, while the organization is able to provide legal representation at arraignment during regular court sessions, it was more likely that defendants would go without an attorney at arraignment off-hours or in the justice courts situated in the eastern part of the county.

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[12] Exhibits to Corey Stoughton's Affirmation, Volume III, Exhibit 43, page 37.

Washington County

Plaintiffs present testimony from attorneys in the Washington County Public Defender Office that reveals that indigent defendants are likely arraigned without counsel. Public Defendant Michael Mercure noted that his office did not have a formal policy regarding the need to have counsel present at arraignments, but rather, the public defenders would, if present in the courtroom, "step right up and do the arraignment" and, further, that the "vast majority" of arraignments in County Court are conducted with counsel present. However, Mercure conceded that arraignments in the county's 26 town and village courts could be conducted without an attorney. Attorney Christian Morris echoed Mercure's testimony, stating that unless the court requests a public defender, arraignments typically were conducted in the absence of a public attorney.

Named Washington County class representative James Adams was arraigned without counsel and other class members faced similar experiences of non-representation at their initial appearances, sometimes resulting in bail and detention determinations made by the courts without any input from defense counsel.

State Defendants challenge the affidavit evidence presented by legal interns with the New York Civil Liberties, in which the interns recounted their personal observations of justice courts proceedings in Suffolk County and Washington County, asserting that such hearsay evidence is inadmissible and cannot support the granting of judgment as a matter of law. The Court agrees that such hearsay is insufficient to support a determination of summary judgment. However, it is not because the Court disregards portions of plaintiffs' evidence that results in the finding that plaintiffs are not entitled to summary judgment. It is upon consideration of the totality of

competent evidence contained in the record that the Court concludes that material issues of fact preclude judgment as a matter of law on this claim.

State Defendants maintain, at the outset, that the proof relating to the named plaintiffs necessarily defeats their motion on various bases, including that several were either released on their own recognizance, were not held in custody, or were held due to a mandatory detainer or opted to enter a guilty plea. However, the testimony from attorneys serving in the defendant counties shows that, on a consistent basis, indigent criminal defendants are arraigned without being afforded their right to counsel. The prejudice to criminal defendants appearing without counsel before a court at arraignment, where "matters affecting a defendant's liberty and ability to defend against the charges," is presumptive, even if the adjudication of the plaintiffs' criminal matters did not, across the board, involve severe restrictions on their ability to defend themselves.[13]

While attorneys serving as assigned counsel to indigent criminal defendants in the defendant counties concede that there are indeed instances where a defendant is arraigned without counsel, the prevailing sentiment among the criminal practitioners that have testified in this matter is that such an occurrence does not necessarily result in the violation of a fundamental constitutional right. State Defendants maintain that, under the current statutory scheme, individuals brought before a court on a criminal charge are to be advised of their right to counsel and that an attorney will be assigned to them if they are eligible for public defense services. Where a defendant makes a request for an attorney, the matter is adjourned to allow the defendant time to retain an attorney, either private or assigned.

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[13] Hurrell Harring v State of New York, 15 NY3d at 21, supra.

Suffolk County Legal Aid attorney Louis E. Mazzola testified that, where an attorney is not present in the court when a defendant is brought in for the first appearance, particularly in remote locations on the island, the courts most often "just put the case over, and we will come in on the next date, and will do the arraignment when we are there. If they are going to be in custody, I think in many cases they will bring them back sooner than the next court date, and if we have staff available, we send somebody to do that." To enhance the availability of counsel at arraignment, Suffolk County applied to the state Office of Independent Legal Services (hereinafter OILS) for a "Counsel at First Appearance" grant, stating in its application that the funds would "improve the delivery of indigent legal defense services at first appearances before a judge in the court of Suffolk County," especially in the eastern towns.[14] In fact, the defendant counties have applied for OILS funding under this "Counsel at First Appearance" grant program and other related programs.

Schuyler County Public Defender Wesley A. Roe observed in the proposal for funds pursuant to the OILS Counsel at First Appearance proposal that:

> When bail or orders of protection are sought by the State, court arraignments happen based upon the availability of the Judge. The Judge is simply contacted, a special time and appearance is arranged and the defendant is brought before the court. This can happen morning, noon, or night. Unless this happens on a pre-scheduled District Attorney/Public Defender day or night, the Public Defender's Office would not be aware of, or a part of, that proceeding. The extent of the problem providing counsel at first arraignment or appearance revolves around the lack of consistent place and time on when these arraignments take place and the availability of counsel at that moment to make contact with client and to attend that appearance.

Roe further indicated that OILS funding would allow his office to fund a full-time attorney position and other benefits that would allow the office to better serve its clients.

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[14] see Affirmation of Jeffrey Dvorin.

Clearly, the defendants' efforts since the inception of this action to improve their public defense services and the State's noteworthy efforts to support such efforts by the provision of grants, training and other resources, raises an issue of fact as to whether the denial of counsel at arraignment is truly a systemic phenomenon. While plaintiffs present the testimony of OILS Director William J. Leahy, in which he states that, although it was difficult to obtain accurate data from the counties regarding the numbers of defendants that are arraigned without counsel, that it became "clear that it's frequent," without further elaboration about the causation of such denials, thereby creating a credibility question that must ultimately be resolved at trial.[15]

The county defendants maintain that, as a practical matter, an express directive that they ensure that an attorney represent every defendant at every arraignment that is conducted would prove nearly impossible, particularly if arraignments continue to be conducted by courts in an unscheduled manner, at all hours of the day and night and at various court locations. Onondaga attorney Donald Kelly opined that the difficulties in ensuring that counsel appears at a defendant's initial appearance is even more pronounced at the town and village court level, stating:

> [I]t's almost a logistical impossibility to have attorneys represent people in all those arraignments. And probably would result in it being detrimental to the defendant because the town and village justices are not going to wake up at 2 o'clock in the morning for an attorney to arrive so that they can conduct the arraignment. They're going to conduct the arraignment. And if it's forced that they can't do that and then all arraignments are going to be held in the morning so that an attorney can be present, then it's likely that a number of people who otherwise would have been ROR'd would end up spending the night in jail."

State Defendants claim that even if this Court finds in plaintiffs' favor on their motion,

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[15] see Gulf Ins. Co. v Transatlantic Reinsurance Co., 69 AD3d 71, 86 [1st Dept. 2009].

there is no appropriate remedy that can be granted as neither the courts nor the Office of Court Administration, as administrator of justice courts that continue to conduct arraignments in the absence of counsel, have been added as parties to this action, thereby preventing the Court from forcing the court system to abide by the relief that plaintiffs have sought. The Court agrees. A great amount of evidence reveals that, for the most part, decisions to proceed with arraignments in the absence of counsel are being made by the arraignment courts. State Defendants' evidence shows that, more often that not, the courts are eschewing their statutory obligation to provide counsel to defendants at their first appearance, and not the public defenders. Often, the courts arrange arraignments based on judges' schedules or the availability of holding facilities, among other factors. Even where the defendant counties have established a system in which its public defenders are scheduled to serve at arraignment parts or be available for arraignment appearances around the clock, it appears that the courts often fail to notify the attorneys that defendants are being arraigned until after the fact. It is axiomatic that defense counsel, assigned or private, cannot be present if they are not even notified of the arraignment prior to its completion.

Viewing this evidence in a light most favorable to State Defendants, the Court finds that material issues of fact exist in this case regarding whether plaintiffs' alleged denials of their right to counsel is causally related to a systemically defective public defense system. In affording State Defendants every favorable inference, the Court finds that as triable issues of fact exist, plaintiffs' motion for partial summary judgment must be denied.

State Defendants' Motion for Summary Judgment

Next, the Court will address State Defendants' motion seeking to dismiss plaintiffs' "constructive" denial of counsel claim. State Defendants maintain that plaintiffs are unable to

demonstrate that systemic deficiencies are the cause of the denial of their right to counsel, but rather, that the record evidence is limited to indigent defendants who have improperly raised ineffective assistance of counsel claims. Indeed, as reiterated by the Third Department, this case cannot be used as a vehicle for plaintiffs to make attorney performance claims.

In its narrowing of the scope of this action, the Court of Appeals found that the complaint stated a "constructive" denial of counsel claim that was premised on allegations that systemic deficiencies deprive indigent defendants, despite having an attorney assigned to them, of the right to counsel under *Gideon*. While the Court's decision expressly disallowed "nonjusticiable assertions of ineffective assistance seeking remedies specifically addressed to attorney performance, such as uniform, training and practice standards," it held that plaintiffs could assert a valid claim that they have been constructively denied counsel upon the presentation of proof that public attorneys "although appointed, were uncommunicative, made virtually no efforts on their nominal clients' behalf during the very critical period subsequent to arraignment, and, indeed, waived important rights without authorization from their clients."[16] Further, a viable claim of non-representation would lie where it could be demonstrated that counsel was not provided to a criminal defendant due to "subjective and highly variable notions of indigency."[17]

Actual Denial of Counsel Due to Eligibility Determinations

Now, State Defendants assert that, to the extent plaintiffs have contended that arbitrary eligibility determinations made in the defendant counties result in non-representation, this Court cannot provide any relief. Specifically, State Defendants maintain that because CPL 170.10 (3)

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[16] Hurrell Harring v State of New York, 15 NY3d at 22, supra.

[17] Id.

places eligibility determinations upon the courts, any award of injunctive or declaratory relief by the Court would be improper as the courts are not a party to this action. Plaintiffs' counsel tacitly acknowledges that the court system is a necessary party, stating that whether the relief ultimately granted in this matter, if any, is manifested as additional state budgetary allocations or efforts undertaken by the Office of Court Administration to "remove barriers" is yet unknown. As a general matter, the Court agrees that the failure to include the courts in this matter has created difficulties for all involved parties. However, this Court finds that, although mindful of the need to avoid making policy in rendering decisions, it cannot "abdicate [its] function as 'the ultimate arbiter'" of plaintiffs' constitutional rights.[18] Further, while courts are statutorily vested with the authority to assign counsel to defendants appearing before them, the truth of the matter is that such decision-making responsibilities are delegated by the court and are commonly made by personnel of the indigent legal services agencies, either in cooperation with the courts or following the receipt of applications submitted by defendants directly to the public defender offices.

As to the merits of the eligibility claim, State Defendants maintain that as Schuyler County, as the only county in which an eligibility claim was raised by a class representative, has changed its policy to ensure that persons under the age of 21 are no longer required to submit parental income information in an application for an assigned attorney, thereby requiring the Court to grant summary judgment in their favor on this issue. Plaintiff representative Shawn Chase alleged that he was denied an attorney for various reasons over the course of several

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[18] Hussein v State of New York, 19 NY3d 899, 903 [2012], citing Campaign for Fiscal Equity v State of New York, 8 NY3d 14, 28 [2006].

months due to his parent's income and, purportedly, because the charges against him would not warrant the assignment of an attorney. Schuyler public defense attorney Lisa Orr, however, testified that the policy was subsequently changed to allow for the assignment of counsel to defendants who are19 years of age or under and do not live independently.

Despite the policy change in Schuyler county, plaintiffs aver that indigent defendants continue to be exposed to the risk of actual denial of their right to counsel throughout the other counties due, not only to the lack of clear eligibility guidelines and policies, but also to decisions to deny counsel based on unsupportable factors such as the income of a girlfriend, family member or the receipt of unemployment benefits. As the record is replete with evidence raising an issue of fact with regard to whether the denial of counsel results from improper eligibility decisions, and if it does whether it is systemic in nature, judgment cannot be granted dismissing this claim at this point in time.

The remaining constructive denial of counsel claims that have been raised in this case so far pertain to, among other things, client communication, caseload management, use of expert and case investigation resources, attorney research and preparation of motions prior to trial, and resolution of attorneys' conflicts of interest. State Defendants, capably represented by a team of assistant attorneys general, argue that the level of representation given to indigent defendants and, in particular, to the class representatives, far exceeds that which is constitutionally mandated.

To that point, counsel representing Washington County in this matter avers that a close review of the evidence related to the class plaintiffs' experiences and that of other defendants represented by the county's Public Defender Office reveals that the representation provided by

that office was 'exemplary' and that such proof fails to show any constructive denial of indigent defendants' right to counsel. An attorney affirmation by State Defendants in support of the instant motion certainly demonstrates that the Washington Public Defender's Office is well managed and organized and that the attorneys consistently communicate with their clients, by phone and in person, in order to effectuate a competent defense in all stages of clients' criminal proceedings. Further, as to the use of investigators or experts in a given case, the office has not experienced difficulty in receiving budgetary approval to retain an expert or hire an investigator and Public Defender Mercure has, in fact, stated that such resources were utilized in cases where they were deemed necessary.

Although the staff is small in size, the Public Defender Office in Schuyler County is run by competent and experienced criminal attorneys and support staff. Testimony in the record indicates that the two attorneys in the office manage approximately 400 cases per year and respond to client calls and requests in an expeditious manner, often reporting to the nearby jail to meet with clients within a day of a request to meet. The Schuyler Public Defender is allotted funds to use for experts or investigators for any criminal or Family Court matter and uses a criminal defense management program (CMS) in order to "enhance the level of representation" of indigent defendants. Further, the former Schuyler County Public Defender averred that "[i]t is the policy of the [office] that each client has vertical representation . . . making representation more consistent and continuous." Finally, where a conflict of interest arises, the office hands the matter over to a conflict defender and, if necessary, to an attorney on the assigned counsel list, making sure that a defendant's case not prejudiced by a conflicted attorney.

Ontario County recently changed its public defense provider, shifting in 2010 from the

prior Assigned Counsel Program (ACP) to the current Public Defender office. State Defendants' evidence shows that the county has labored earnestly to provide competent legal representation. The office instituted procedures to ensure that clients were given representation by qualified attorneys and that the lawyers assigned to felony cases were sufficiently experienced. The public defenders were required to engage in regular communication with their clients and to provide "vertical representation" to such clients. State Defendants' attorney affirmation provides that the Ontario public defenders managed their caseloads without issue and that, in light of the availability of attorneys to take cases, the county adjusted its eligibility standards to take on more indigent defendants requiring assistance. Office policy dictates that assigned counsel meet with clients "within 24 hours of arraignment so that applications for bail or pre-trial release could be made prior to the first court appearance."[19]

In Onondaga County, the ACP is a board-governed agency that is comprised of highly experienced criminal attorneys and managed by an Executive Director and staff. The office sets high standards for its attorneys, requiring them to pursue regular communication and strategive case planning with clients, manage their caseloads, attend professional training and use the resources necessary to zealously defend their clients. Furthermore, State Defendants' attorney's affirmation states that the ACP is subject to regular county oversight, reporting the office's caseload and case dispositions, budget and conflict defender information.

Similarly, Suffolk County, via a contract with the Legal Aid Society, relies on highly competent attorneys who are required to undergo extensive in-house training and supervision, as well as given instruction on all phases of criminal litigation, including arraignment and every

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[19] Affirmation of Kelly L. Munkwitz, at ¶ 16.

other "critical stage." Complex criminal matters are assigned to more experienced attorneys and the office has a system whereby the attorneys advancement is "complemented by supervisory interaction."[20] As far as caseloads are concerned, State Defendants' attorney avers that federal caseload guidelines are irrelevant as "20 percent to 40 percent of an attorney's caseload consists of misdemeanor Aggravated Unlicensed Operation (AUO) charges, which are resolved with very little work necessary" and that the attorneys track their caseload on a computer software program and reported to the county. Attorneys appointed to certain courts work cooperatively with their colleagues to ensure that there is representation for all cases. Attorneys communicate with their clients by phone, video conferencing or in person, either in at the courthouse or at the jail. The office employs five investigators and is not limited in its use of an expert where such services are required.

Overall, while the Court will not detail each of their experiences here, it is apparent that the representation given to the named plaintiff representatives was reasonable under the attendant facts and circumstances of each case and reflected the sound professional judgment and advocacy skills of each of the assigned attorneys and their respective offices. By their evidentiary submissions, State Defendants have established a prima facie case entitlement to summary judgment dismissing the constructive denial claims raised in this case.[21] However, after having considered the volumes of evidentiary material presented by plaintiffs, the Court is compelled to conclude that triable issues of fact regarding their constructive denial claims have been raised,

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[20] Affirmation of Jeffrey Dvorin, at ¶ 25.

[21] see e.g. Phoenix Signal and Elec. Corp. v New York State Thruway Auth., 90 AD3d 1394, 1396 [3d Dept. 2011].

requiring this Court to deny State Defendants' motion for summary judgment. Where, as here, the issues are "arguable, issue-finding, rather than issue-determination, is the key" in a decision on an application for summary judgment.[22]

Plaintiffs rely on the testimony of public defense attorneys in the defendant counties to support the proposition that the attorneys are overburdened, under-compensated, a work in environments where vital resources are either denied or underutilized by staff. Leahy conceded that, although OILS sought to secure greater state funding to support the delivery of public defense services, the source of funding was often raided by the State and directed toward other budgetary needs.

Class members indicate that, even where they were eventually given an attorney, they spent time in jail without any information regarding their application for assigned counsel or that assigned counsel had made decisions in their cases without having been consulted. Sworn statements of indigent defendants from the defendant counties relay the difficulty they had in communicating with their assigned attorneys, sometimes waiting for months for updated information about their cases. Citing to the various direct and collateral damage caused by such poor or nonexistent communication, the class members raise an issue of fact with regard to this constructive denial issue. Other affidavit evidence relates the varied experiences of indigent defendants who felt forced by their attorneys to accept plea deals that they opposed after having been informed that it would be futile to pursue any available defenses to the charges against them. While the testimony of the class representatives often conflict with the sworn testimony of

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[22] Sillman v Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957][internal quotations and citations omitted].

the public attorneys and fail to indicate whether they informed the courts during the plea allocution that they had been pressured by their attorneys to accept the plea offers, the credibility concern that is created for this Court in considering these statements is one that must be dealt with at trial and not decided, in favor of either party, on the motion papers before it.[23]

Plaintiffs further challenge State Defendants' assertions that the counties sufficiently manage their caseloads, averring that, as there is no proper accounting methodology to track cases that are accepted by the offices and due to the lack of established caseload guidelines, cases can be delayed, often causing defendants to remain incarcerated longer than might be necessary. Generally, the collective testimony of the plaintiffs class members and even certain of the public attorneys themselves indicates that the limited financial resources allocated to public defender agencies, in conjunction with increasing numbers of defendants that require representation, may affect the ability of indigent defense attorneys to carry out their obligations to their clients. As plaintiffs' submission, and the record in its entirety, raises triable issues of fact with regard to the constructive denial claim, the Court is now restrained from dismissing it. Therefore, summary judgment cannot be granted to State Defendants.

Through the years spent on this case, the Court has observed that the reputation of the public defense system in this State has deteriorated due to anecdotal evidence presented by various media sources. This case shall determine whether there are systemic deficiencies in the existing public defense system or not. There are substantial issues of fact to be resolved at trial and it remains to be seen whether the plaintiff class can produce sufficient evidence to carry its

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[23] see Navetta v Onondaga Galleries Ltd. Liability Co., 106 AD3d 1468, 1470 [3d Dept. 2013].

burden and have the issues decided in their favor. As the determination of such issues is improper at this stage, summary judgment to either side must be denied.

Accordingly, it is now

ORDERED that State Defendants' motion for summary judgment dismissing the second amended complaint is **DENIED**, **except** that the part of State Defendants' motion seeking an order striking the portions of the amended complaint and any related evidence of the defaulting representative plaintiffs, namely Ricky Lee Glover, Bruce Washington, Jemar Johnson, Ronald McIntyre, Candace Brookins, Joy Metzler and Victor Turner, is **GRANTED**; it is further

ORDERED that plaintiffs' cross-motion for partial summary judgment is **DENIED** in its entirety; it is further

ORDERED that plaintiffs' cross-motion to strike certain portions of State Defendants' motion is **DENIED**.

Those arguments not specifically addressed herein have been fully considered by the Court and found to be either rendered academic or otherwise unpersuasive.

This Memorandum shall constitute both the Decision and Order of the Court. This original **DECISION and ORDER** is being sent to plaintiffs' attorney. The signing of this **DECISION and ORDER** shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of that section with respect to filing, entry and notice of entry.

SO ORDERED
ENTER

DATE: 12/16/13
Albany, New York

Eugene P. Devine

EUGENE P. DEVINE, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment against State Defendants, Affirmation of Corey Stoughton in Support of Plaintiffs' Motion for Partial Summary Judgment, dated September 6, 2013 and Memorandum of Law in Support of Plaintiffs' Motion for Partial Summary Judgment, dated September 6, 2013.

2. Plaintiffs' Exhibits to Affirmation of Corey Stoughton in Support of Plaintiffs' Motion for Partial Summary Judgment, Volumes I-III.

3. Affirmation of Adrienne J. Kerwin, Assistant Attorney General, in Opposition to Plaintiffs' Motion for Partial Summary Judgment, dated September 30, 2013, Affirmation of Renee Captor, dated September 30, 2013 and Memorandum of Law in Opposition to Plaintiffs' Cross-Motion on Behalf of Defendants State Of New York and Governor Andrew M. Cuomo, dated September 30, 2013.

4. Affirmation of John R. Petrowski, Esq., Suffolk County Assistant County Attorney, in Opposition to Plaintiffs' Motion for Partial Summary Judgment, dated October 2, 2013.

5. Affirmation of Carol L. Rhinehart, Deputy Onondaga County Attorney, in Opposition to Plaintiffs' Motion for Partial Summary Judgment, dated October 3, 2013.

6. Plaintiffs' Reply Memorandum of Law in Support of Motion for Partial Summary Judgment, dated October 9, 2013.

7. Notice of Motion for Summary Judgment, to Strike Portions of Second Amended Complaint and to Decertify Class, dated August 22, 2013 and Affirmation in Support of State Defendants' Motion for Summary Judgment by Adrienne J. Kerwin, Assistant Attorney General, with attached Exhibits A-W, dated August 22, 2013.

8. Memorandum of Law in Support of the State Defendants' Motion for Summary Judgment, dated August 22, 2013.

9. Affirmation of Jeffrey Dvorin in Support of State Defendants' Motion for Summary Judgment, with attached Exhibits A-R [Exhibits I, J, K, L, M and R filed under seal].

10. Affirmation of James McGowan in Support of State Defendants' Motion for Summary Judgment, with attached Exhibits A-X [Exhibits J, K, L, P, Q, R, S filed under seal].

11. Affirmation of Kelly L. Munkwitz in Support of State Defendants' Motion for Summary Judgment, with attached Exhibits A-V [Exhibits O, U and V filed under seal].

12. Affirmation of Tiffinay M. Rutnik in Support of State Defendants' Motion for Summary Judgment, with attached Exhibits A-Y [Exhibits W, X, Y filed under seal].

13. Affirmation of Keith Muse in Support of State Defendants' Motion for Summary Judgment, with attached Exhibits A-K [Exhibits E and F under seal].

14. Affirmation of John R. Petrowski, Suffolk County Assistant Attorney, in Support of Defendants' Motion for Summary Judgment, dated August 23, 2013.

15. Affirmation of William A. Scott, Esq., in Support of State Defendants' Motion for Summary Judgment, dated August 22, 2013.

16. Affirmation of Michael G. Reinhardt, Assistant Ontario County Attorney, in Support of State Defendants' Motion for Summary Judgment, dated August 23, 2013.

17. Affirmation of Carol L. Rhinehart, Deputy Onondaga County Attorney, in Support of State Defendants' Motion for Summary Judgment, dated August 26, 2013.

18. Affirmation of Geoffrey B. Rossi, Schuyler County Attorney, in Support of State Defendants' Motion for Summary Judgment, dated August 23, 2013.

19. Notice of Cross-Motion by Plaintiffs to Strike portions of affirmations of State Defendants' Attorneys, dated October 8, 2013 and Affirmation of Kristie M. Blase, Esq., in Opposition to State Defendants' Motion for Summary Judgment and Plaintiffs' Cross-Motion to Strike Certain Portions of State Defendants' Supporting Affirmations, dated October 8, 2013.

20. Exhibits to the Affirmation of Kristie M. Blase in Support of Plaintiffs' Opposition to the State Defendants' Motion for Summary Judgment, Volumes I-XIII containing Exhibits 1-294 [Select Exhibits 134, 135, 203, 205, 224, 233, 272, 273 Under Seal by Court Order].

21. Affidavit of Dr. Gary King, sworn to October 1, 2013, with attached exhibits.

22. Affirmation of Brooke Menshel, Esq., in Opposition to State Defendants' Motion for Summary Judgment, dated October 8, 2013.

23. Affirmation of Mariko Hirose, Esq., in Opposition to State Defendants' Motion for Summary Judgment, dated October 8, 2013.

24. Affirmation of Erin Beth Harrist, Esq., in Opposition to State Defendants' Motion for Summary Judgment, dated October 8, 2013.

25. Affirmation of Matthew W. Schmidt, Esq., in Opposition to State Defendants' Motion for Summary Judgment, dated October 8, 2013.

26. Affirmation of Susannah Karlsson, Esq., in Opposition to State Defendants' Motion for

Summary Judgment, dated October 8, 2013.

27. Affirmation of Matthew E. Yoeli, Esq., in Opposition to State Defendants' Motion for Summary Judgment, dated October 8, 2013.

28. Plaintiffs' Memorandum of Law in Opposition to the State Defendants' Motion for Summary Judgment, dated October 8, 2013.

29. Affirmation of Adrienne J. Kerwin in Reply and further Support of State Defendants' Motion for Summary Judgment, with attached Exhibits A-R, dated October 23, 2013 [Confidential Exhibits B, C, J, L, N, P for in camera review only].

30. Memorandum of Law in Reply to Plaintiffs' Opposition to the State Defendants' Motion for Summary Judgment, dated October 23, 2013.