SUPREME COURT
STATE OF NEW YORK COUNTY OF ALBANY

KIMBERLY HURRELL-HARRING, et al,
Plaintiffs

-against-

DECISION/ORDER
Index No. 8866-07

THE STATE OF NEW YORK, GOVERNOR DAVID PATERSON, in his individual capacity,
Defendants.

Appearances:

New York Civil Liberties Union Foundation
By: Corey Stoughton
Arthur Eisenberg
Christopher Dunn
Daniel Freeman
125 Broad Street, 19th Floor
New York, New York 10004
For the Plaintiffs

Schulte Roth & Zabel LLP
By: Gary Stein
Danny Greenberg
Sena Kim- Reuter
919 Third Avenue
New York, New York 10022
For the Plaintiffs

Hon. Andrew M. Cuomo
Attorney General of the State of New York
By: David Cochran
Adrienne Kerwin
Victor Paladino
The Capitol
Albany, New York 12224
For the Defendant

Devine, J:

Plaintiffs are allegedly indigent individuals who had criminal charges pending in Onondaga, Ontario, Schuyler, Suffolk and Washington Counties at the time this action was

commenced. Plaintiffs commenced this action seeking a declaration that their constitutional rights are being violated due to systemic deficiencies in the manner of providing a defense to indigent individuals in the five designated counties and for injunctive relief requiring the state to provide a system of public defense which complies with the New York and United States Constitutions, as well as state law, in such counties. Plaintiffs also will seek class action certification to bring this action on behalf of all other indigent persons who may be entitled to counsel at public expense in such counties now or in the future.

Defendant has moved to dismiss the complaint on the grounds that a declaratory judgment action may not be brought to challenge whether plaintiffs are receiving effective assistance of counsel in their criminal proceedings, in part because adequate remedies are available within the criminal proceedings and that discovery and trial in this action would prejudice and delay pending criminal matters, that plaintiffs lack standing to challenge the adequacy of representation provided or to be provided to other un-named criminal defendants, that the structure and funding of public defense systems is a legislative function and is not justiciable, that the issue of the nature of representation of unknown future criminal defendants is not ripe for adjudication, that plaintiffs have failed to name necessary parties and that the third cause of action, which seeks relief pursuant to 42 USC § 1983, fails to state a cause of action because the only named defendant, the State of New York, is not a person subject to suit under such statute. Plaintiffs have served an amended complaint as of right[1] adding Governor David Paterson as a party defendant. Defendants have not raised any objection to service of the amended complaint and have not addressed plaintiffs' contention that such service renders the

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[1]CPLR § 1003 and Rule 3025 (a).

objection with respect to § 1983 moot.[2] Accordingly, it is determined that such objection has been rendered moot by service of the amended complaint.

The complaint alleges that due to a number of systemic deficiencies in the manner in which public defense services are provided to indigent persons accused of crimes, the plaintiffs, as well as all others similarly situated, are subject to a severe and unacceptably high risk of not receiving meaningful and effective assistance of counsel at every critical proceeding during their criminal prosecutions. It is alleged that in the counties of Onondaga, Ontario, Schuyler and Washington, defendants are rarely represented at arraignment, when critical bail determinations are made, that many of the counties have incoherent or excessively restrictive eligibility standards, that there is a general lack of contact and communication between the accused and the attorney which is required to provide meaningful representation, that there is a lack of hiring criteria, performance standards, supervision and training, that there are insufficient expert and investigative services available, that the attorneys are subject to excessive caseloads and workloads which prevent them from providing meaningful and effective representation, that there is a lack of vertical representation with the accused being represented by several different attorneys, that there is a lack of political and professional independence which compromises both institutional and individual providers of public defense services and that there is chronic under-funding and under-compensation which prevents the provision of meaningful and effective representation.

A careful reading of the complaint reveals that there are no allegations that any of the named plaintiffs have actually received ineffective assistance of counsel which prejudiced the

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[2]*See e.g.* Haley v. Pataki, 106 F 3d 478, 482 (2d Cir 1997).

outcome of their case, as required to obtain reversal of a criminal conviction,[3] nor do plaintiffs rely upon such a claim. Rather the complaint alleges that because of the structure and funding of public defense services, it is likely that plaintiffs, as indigent criminal defendants, will be deprived of their constitutional right to effective assistance of counsel.[4] The complaint does not seek any relief within the context of the underlying criminal proceedings, but rather seeks prospective relief in the form of a declaration that indigent criminal defendants' general rights to assistance of counsel are being violated. While the complaint does contain allegations of a lack of communication with the plaintiffs' criminal defense attorneys with respect to essentially all of the 20 named plaintiffs, the allegations with respect to the individual plaintiffs do not provide the primary basis for plaintiffs' claims. Indeed, in New York County Lawyers' Assn. v. State of New York a complaint which did not address the representation provided to any particular clients was found to state a cause of action[5] and upon trial, it was determined that there were systemic deficiencies in the provision of public defense services requiring relief without mention of any proof of specific instances of ineffective representation.[6] The Appellate Division, First Department stated, "inasmuch as we view the alleged violations of constitutional rights to be based solely upon a claim of prospective harm, the action will not entail proof of past cases in

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[3]Strickland v. Washington, 466 US 668, 686-693 (1984)

[4]*See e.g.* New York County Lawyers' Assn. v. State of New York, 294 AD 2d 69 (1st Dept 2002).

[5]id.

[6]New York County Lawyers' Assn. v. State of New York, 196 Misc 2d 761, 775, (Sup Ct, New York County 2003).

which a NYCLA member was unable to provide effective assistance to a client."[7] It therefore appears that the allegations, concerning the representation actually provided to the named plaintiffs, merely amplify and are illustrative of plaintiffs' claims that the attorneys who represent indigent defendants in the subject counties are overworked and do not have sufficient time or resources to provide an appropriate defense. They further serve to establish standing. The action does not seek the equivalent of a declaration as to whether a statute is unconstitutional as applied to any of the plaintiffs or whether any of plaintiffs' conduct violates a penal law,[8] or the equivalent of review of a ruling in a criminal proceeding[9] as argued by defendant. Any actual interference with, prejudice to or delay in any of the criminal proceedings appears extremely unlikely and could be eliminated or minimized by appropriate limitations on discovery and/or admission of evidence at trial.[10]

It also appears that there is no adequate remedy at law or within the underlying criminal proceedings. One of the named plaintiffs, Jacqueline Winbrone, spent almost two months in jail, allegedly because of a lack of effective representation with respect to bail. She was eventually released on her own recognizance and ultimately all charges were dismissed. Clearly Ms. Winbrone, and all similarly situated criminal defendants, do not have any effective remedy

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[7]New York County Lawyers' Assn. v. State of New York, 294 AD 2d at 77.

[8]*Cf.* Church of St. Paul & St. Andrew v. Barwick, 67 NY 2d 510, 523 (1986); Reed v. Littleton, 285 NY 150, 153-157 (1937).

[9]*Cf.* Matter of Veloz v. Rothwax, 65 NY 2d 902, 904 (1985); Matter of Morgenthau v. Erlbaum, 59 NY 2d 143, 149-152 (1983).

[10]Indeed, as of the date of this decision and order, approximately half of the named plaintiffs' criminal proceedings have already terminated and it is likely that most if not all of the remaining ones will have terminated by the time a trial in the instant action is completed.

available within the context of their criminal proceeding. Moreover, the complaint alleges that public defense attorneys are overworked and do not have sufficient time to provide an adequate defense to the initial charges. It seems extremely unlikely that such attorneys would suddenly have the time available to bring an effective appeal on the ground that they, or perhaps one of their colleagues, had not provided an adequate defense. In addition, it is alleged that many indigent defendants accept plea bargains without any investigation into the facts or possible defenses and without proper counsel as to the implications of the conviction. Such plea bargains often waive the right to appeal. Any relief to such defendants in the criminal proceeding would thus be extremely unlikely. Furthermore, the argument that the rights of indigent defendants sought to be enforced herein may be effectively protected through post judgment remedies has been rejected by the Appellate Division, First Department in a similar action.[11] As such, the claim that plaintiffs have an adequate remedy at law is illusory and without merit.

Defendant contends that plaintiffs do not have standing to maintain this action. The argument is based in large part upon the contentions that plaintiffs may not litigate herein whether their right to counsel has been or is being violated in their pending criminal proceedings and that plaintiffs may not litigate whether other un-named individuals might at some time be denied the effective assistance of counsel. As already discussed, plaintiffs do not allege nor seek to prove that they have been deprived of effective assistance of counsel which would warrant reversal of their pending criminal proceedings. Rather, they seek prospective relief based upon the likelihood that their, and others similarly situated, constitutional rights will be violated. If a lawyers' association was found to have standing to assert such claims on behalf of their indigent

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[11] New York County Lawyers' Assn. v. State of New York, 294 AD 2d at 76.

criminal defendant clients, the named plaintiffs clearly have standing to raise these claims on their own behalf.[12] Moreover, although not yet certified,[13] the action is brought as a class action on behalf of all indigent criminal defendants, now and in the future, in the subject counties. Therefore, none of the plaintiffs are seeking to assert the rights of any third parties. Furthermore, given the prospective nature of the relief requested, claims on behalf of un-named future criminal defendants are ripe for review.[14] Accordingly, it is determined that the plaintiffs have standing to maintain this action.

Defendant further contends that the policy and budgetary determinations with respect to the manner in which a public defense is provided to indigent criminal defendants are uniquely legislative in nature, rendering the issues non-justiciable. However, the action primarily seeks a declaration that the State has failed in its constitutional duty to provide meaningful and effective assistance of counsel to indigent criminal defendants. It would not require the judiciary to manage discretionary aspects of an essentially executive function of government.[15] Rather it seeks a determination that the State has or is likely to violate the plaintiffs' constitutional rights.[16] Thus, the Appellate Division, First Department, held that a similar action challenging the rate of

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[12]*See* New York County Lawyers' Assn. v. State of New York, 294 AD 2d at 75-76.

[13]*See* CPLR § 902

[14]*See* id. at 74.

[15]*See e.g.* Jones v. Beame, 45 NY 2d 402, 406 (1978); *cf.* Jiggetts v. Grinker, 75 NY 2d 411, 415 (1990).

[16]*See* Campaign for Fiscal Equity v State of New York, 86 NY 2d 307 (1995); Klostermann v Cuomo, 61 NY 2d 525, 539 (1984); Bruno v. Codd, 47 NY 2d 582, 588 (1979).

compensation for attorneys representing indigent criminal defendants raised justiciable issues.[17]

Defendant also argues that in order to state a justiciable cause of action the complaint must allege actual ineffective assistance of counsel sufficient to warrant reversal of a specific criminal conviction. However, the cases cited all involve challenges to criminal convictions in which the only relief sought and available was reversal of a conviction. Thus, defendant contends that failure to provide counsel at arraignment does not require reversal of a criminal conviction and therefore can not support plaintiffs' claims. In short, according to defendant, only the most egregious constitutional violations resulting in a conviction would give rise to any right to relief. As noted above, such argument would negate a remedy for a violation or potential violation of the constitutional right to counsel for any person acquitted of the charges or who had the charges dismissed. However, the Court of Appeals has recognized the validity of a cause of action based upon a claim that a constitutional right was likely to be violated - the plaintiff need not wait until irreparable injury has actually occurred.[18] Indeed, the Court of Appeals cited favorably a federal court case which held that a complaint seeking prospective relief based upon claims that indigent defendants were at severe risk of not receiving effective assistance of counsel due to systemic deficiencies in the delivery of indigent defense services stated a cause of action.[19] Moreover, the Appellate Division, First Department specifically held that such claims stated a justiciable cause of action.[20] It is therefore determined that allegations of systemic

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[17]New York County Lawyers' Assn. v. State of New York, 294 AD 2d at 72-73.

[18]*See* Matter of Swinton v. Safir, 93 NY 2d 758, 765 -766 (1999).

[19]Luckey v. Harris, 860 F 2d 1012 (11th Cir 1988).

[20]New York County Lawyers' Assn. v. State of New York, 294 AD 2d at 72-74.

deficiencies which give rise to a strong likelihood that plaintiffs' constitutional right to effective assistance of counsel will be violated state a justiciable cause of action seeking prospective declaratory relief without the need to allege or prove actual ineffective assistance of counsel sufficient to warrant reversal of a particular criminal conviction. Defendant does not challenge the specific allegations of systemic deficiencies in the complaint nor does it argue that such allegations are not sufficiently specific to state a cause of action.[21]

The complaint also seeks injunctive relief. Defendant contends that plaintiffs seek to compel the State to cure the alleged deficiencies in a specific manner, and that such relief would interfere with the exercise of legislative discretion and policy making. However, the complaint merely seeks a general direction that the State provide a criminal defense to the indigent which complies with all constitutional and legal requirements. It does not demand any specific manner of compliance. In any event, the Court of Appeals has stated that it is appropriate for the courts to go beyond a limited direction to comply in order to prevent continuous litigation over the manner in which constitutional violations are remedied.[22] The extent of the relief which might be granted can hardly be determined at this point in the litigation, rendering the objection premature. Accordingly, the motion to dismiss on the ground that the issues raised are not justiciable shall be denied.

Finally, defendant contends that the District Attorneys of the five respective counties, as well as plaintiffs' criminal defense lawyers, are necessary parties who might be inequitably

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[21]*Cf.* Paynter v State of New York, 100 NY2d 434 (2003); Campaign for Fiscal Equity v State of New York, 86 NY 2d 307 (1995).

[22]*See* Campaign for Fiscal Equity, Inc. v. State of New York, 100 NY 2d 893, 925 (2003).

affected by any judgment entered herein. Defendant's argument is based upon its contention that in order to recover herein plaintiffs must prove actual ineffective assistance of counsel sufficient to warrant reversal of their criminal convictions. As discussed above, plaintiffs do not allege nor do they seek to prove such ineffective assistance of counsel. Therefore, any judgment entered herein will not directly impact the criminal prosecutions and any indirect effect is too remote and speculative to require that the District Attorneys or defense attorneys be added as parties. However, the action directly challenges the manner in which the five counties provide criminal defense services. County Law § 722 requires the counties to place in operation a plan to provide criminal defense services to indigent defendants. The complaint seeks injunctive relief directly requiring such criminal defense services to comply with constitutional and legal requirements, which, absent an amendment to the County Law, would almost certainly require the respective counties to fund significant increases in attorneys fees, salaries or contracts and investigator and expert witness expenses. Thus, the lower court in New York County Lawyers' Assn. v. State of New York[23] held that the City was a necessary and indispensable party to an action challenging the rate of compensation of attorneys appointed to represent indigent criminal defendants. It is therefore determined that the Counties of Onondaga, Ontario, Schuyler, Suffolk and Washington are necessary parties who must be added herein.

The Court also notes that the complaint, as well as the Report on the Future of Indigent Defense Services annexed thereto, contain allegations that judges undertake critical proceedings without any attorney representing indigent defendants, tend to appoint defense attorneys who dispose of cases quickly to reduce their calendars, that judges are reluctant to approve expenses

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[23]192 Misc 2d 424, 427-428 (Sup Ct, New York County 2002).

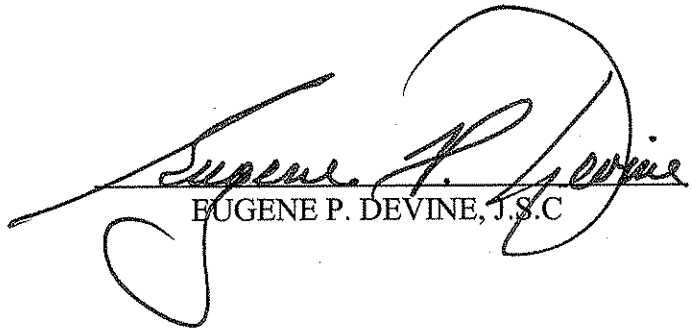
for investigators and experts, tend to discourage applications for such services and that eligibility determinations are made by judges with an eye toward protecting a county's fisc, that judges often delay appointing a defense attorney and that they often fail to properly inform eligible defendants about the process of obtaining a public defense. If true, the relief sought by plaintiffs will be incomplete should they emerge victorious. While it appears that many of these alleged problems might not be resolved by this litigation, no relief has been sought against any members of the judiciary. Moreover, it does not appear that any judgment issued herein would adversely affect any members of the judiciary in any legally cognizable manner. As such, it does not appear that the judges in the subject counties are necessary parties.

Accordingly, defendant's motion to dismiss is conditionally denied. Plaintiff must serve and file a second amended complaint adding the counties of Onondaga, Ontario, Schuyler, Suffolk and Washington as parties defendant within 30 days of the date hereof. Unless the foregoing condition is complied with by plaintiffs, then the defendant's motion to dismiss shall be granted in its entirety. In that event, defendant may submit a proposed Judgment **to the Court** on notice to plaintiff–supported by an affirmation of such non-compliance.

This memorandum constitutes both the DECISION and ORDER of the Court. This Original DECISION/ORDER is being sent to the plaintiffs' attorney. The signing of this DECISION/ORDER shall not constitute entry or filing under CPLR 2220. Counsel for the plaintiffs is not relived from the applicable provision of that section with respect to filing, entry

and notice of entry.

SO ORDERED
ENTER
Dated: Albany, New York
August 1, 2008



EUGENE P. DEVINE, J.S.C

Papers Considered:

1. Defendant's Notice of Motion, dated April 7, 2008.
2. Affirmation of Attorney Cochran, with exhibit, dated April 7, 2008.
3. Defendant's Memorandum of Law, dated April 4, 2008.
4. Affirmation of Attorney Stoughton, with exhibits, dated April 29, 2008.
5. Plaintiffs' Memorandum in Opposition dated April 29, 2008.
6. Defendant's Reply Memorandum of Law dated May 9, 2008.
7. Plaintiffs' Letter Memorandum dated May 27, 2008.