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.	Index No. 8866-07 Oral Argument Requested

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

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INTRODUCTION

This motion seeks preliminary injunctive relief to address the on-going crisis in New York's public defense system, which every day deprives indigent criminal defendants of their constitutional right to counsel and due process of law. Almost two years ago, Chief Judge Judith S. Kaye and a commission of experts pronounced the State of New York in violation of its constitutional and statutory responsibility to provide meaningful and effective assistance of counsel to people accused of crimes who are too poor to afford a private lawyer. Today, the under-funded and fragmented public defense system remains unchanged. Every day across the state, overworked, underpaid, poorly supervised, and insufficiently trained public defense attorneys struggle and often fail to meet basic standards of representation for their clients. Indigent defendants are denied outright their right to an attorney in critical proceedings, languish in jail unnecessarily, succumb to pressure to accept inappropriate guilty pleas, are sentenced too harshly, and perhaps are wrongfully convicted. The responsibility to guarantee the right to counsel for indigent defendants rests with the State. Fundamental structural reform to New York's public defense system – as called for by the Kaye Commission – is required to address this crisis, but preliminary action by the State is required immediately to address the untenable conditions in which public defense attorneys operate and the resulting irreparable deprivations of liberty indigent criminal defendants are currently experiencing. This motion seeks that preliminary relief.

On November 6, 2007, twenty clients of public defense attorneys in Onondaga, Ontario, Schuyler, Suffolk and Washington counties filed a class action complaint alleging that the systemic failures of New York's public defense system are violating their right to counsel under the Constitution and Laws of New York and the United States Constitution. Plaintiffs now seek

immediate action by this Court on behalf of themselves and the class of indigent criminal defendants in those five counties requiring the State to undertake the following measures to address the most severe systemic deficiencies in those counties and to lay the foundation for comprehensive reform: (1) implement standards and procedures to ensure that attorneys appointed to represent indigent criminal defendants have sufficient qualifications and training; (2) establish caseload and workload limits to ensure that public defense attorneys have adequate time to devote to each client's case; (3) guarantee that every eligible indigent criminal defendant is assigned a public defense attorney within 24 hours of arrest who is present at every critical proceeding and consults with each client in advance of any critical proceeding to ensure that the attorney is sufficiently prepared for any such proceeding; (4) ensure that investigators and experts are available to every public defense attorney for every case in which an attorney deems that investigative or expert services would be useful to the defense; and (5) establish uniform written standards and procedures for determining eligibility for the assignment of a public defense attorney.

The facts presented in this motion represent an incontrovertible consensus that indigent criminal defendants are experiencing irreparable harm as a result of the systemic failings of New York's public defense system. The motion draws from the conclusions of Chief Judge Judith S. Kaye's Commission on the Future of Indigent Defense Services, including the report of The Spangenberg Group to the Commission and the extensive testimony heard by the Commission; the affirmation of Jonathan Gradess, Executive Director of the New York State Defenders' Association, who brings a comprehensive knowledge of New York's public defense system and over 30 years of experience in that system; the affidavit of David Carroll from the National Legal Aid and Defenders' Association, which has conducted extensive studies of the public defense

systems in several New York counties; the affirmations of several lawyers from the counties that are the focus of this case describing the untenable circumstances in which they and their colleagues are forced to practice; and the affidavits of 23 indigent criminal defendants whose personal experiences in the public defense system demonstrate the impact of that system on the right to counsel. These sources establish beyond a doubt that plaintiffs are likely to succeed on the merits and are entitled to the preliminary relief they seek.

STATEMENT OF FACTS

There is no disputing that New York's public defense system is in a state of crisis and is failing to provide constitutionally adequate counsel to indigent criminal defendants. After two years of careful, statewide study and analysis of the public defense system, Chief Judge Judith S. Kaye's blue-ribbon Commission on the Future of Indigent Defense Services concluded that "the indigent defense system in New York State is both severely dysfunctional and structurally incapable of providing each poor defendant with the effective legal representation that he or she is guaranteed by the Constitution of the United States and the Constitution and laws of the State of New York . . . [and] has resulted in a disparate, inequitable, and ineffective system for securing constitutional guarantees to those too poor to obtain counsel of their own choosing." Commission on the Future of Indigent Defense Services, *Final Report to the Chief Judge of the State of New York* 3 (2006) (*Kaye Commission Report*) (attached to Stoughton Affirmation as Exhibit A).

The Kaye Commission was convened in May 2004 by Chief Judge Judith S. Kaye and, according to Judge Kaye's State of the Judiciary Address earlier that year, was charged with "examin[ing] the effectiveness of indigent criminal defense services across the State, and

consider[ing] alternative models of assigning, supervising and financing assigned counsel compatible with New York's constitutional and fiscal realities." *Kaye Commission Report* at 1 (citing Judith S. Kaye, *The State of the Judiciary* (2004)). Chaired by William E. Hellerstein and the Honorable Burton B. Roberts, the Commission consisted of thirty members representing each of New York's twelve judicial districts. It included prominent prosecutors, defense attorneys, academics and judges with "extensive experience in the prosecution, defense, and adjudication of criminal cases; experience in the state's legislative and budget processes; and involvement in court and criminal justice improvement organizations and academic scholarship regarding criminal justice and indigent criminal defense systems." *Kaye Commission Report* at 1.[1]

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[1] The Kaye Commission Report, including the constituent report from The Spangenberg Group and the transcripts of hearings before the Kaye Commission, are admissible as factual evidence under the common law public documents exception. That exception to the hearsay rule "is founded upon a public official's lack of motive to distort the truth when recording a fact or event in discharge of public duty." *People v. Garneau*, 120 A.D.2d 112, 116 (4th Dep't 1986). *See also Gentile v. County of Suffolk*, 129 F.R.D. 435, 448 (E.D.N.Y. 1990), *aff'd*, 926 F.2d 142 (2d Cir. 1991) (noting that the exception reflects "the reliability of most reports written and published by government agencies" and the reality that "[i]t would be almost impossible to require individual investigators to appear in court to testify any time the result of an investigation were probative of issues in individual litigation. Few individual litigants – particularly in civil rights cases – have the resources to duplicate the type of exhaustive reports produced by public agencies and funded by the taxpayers."). Just as the government investigatory report that concluded that the Suffolk police department had "systematically mismanaged their offices, had tolerated and even ratified employee misconduct and had failed to investigate or punish such conduct" over a period of years was admissible in *Gentile*, 926 F.2d at 146, so the Kaye Commission's conclusion and supporting facts demonstrating that the state has systematically mismanaged the public defense system, despite decades of studies and reports concluding that the system is failing, is also admissible here.

Even if these reports were not admissible as an exception to the hearsay rule, this Court has the discretion to weigh hearsay evidence to determine whether plaintiffs have established a probability of success on the merits. The CPLR does not expressly speak to the weight that should be given to hearsay evidence presented in support of a preliminary injunction. In modern cases, New York courts have suggested that hearsay should be assigned weight when it appears alongside admissible evidence that lends it credibility. *See, e.g.*, *Gerald Modell Inc. v. Morgenthau*, 196 Misc. 2d 354, 360 (Sup. Ct. N.Y. County 2003) (hearsay may be considered on preliminary injunction application when it appears alongside admissible evidence that lends it credibility); *City Comm'n on Human Rights v. Regal Gardens, Inc.*, 53 Misc. 2d 318, 320-21 (Sup. Ct. Queens County 1967) (same); *see also Zeneca, Inc. v. Eli Lilly & Co.*, No. 99 Civ. 1452, 1999 U.S. Dist. LEXIS 10852 at *6 (S.D.N.Y. July 19, 1999) ("[T]he Court may consider hearsay evidence in a preliminary injunction hearing."). Given that these reports have received the imprimatur of the state's senior jurist and appear alongside dozens of supporting affidavits, it is within the Court's authority to give them full consideration.

The Kaye Commission gathered information during four public hearings (in New York City, Albany, Rochester and Ithaca) and heard testimony from ninety-three individuals and groups from across the State, including public defenders, private defense lawyers, assigned counsel plan administrators, judges, prosecutors, experts in public defense, bar association representatives, members of the civil rights community, representatives of community groups, and criminal defendants and their families. *Kaye Commission Report* at 1-2.

The Kaye Commission also drew extensively on the factual findings of its consultant, The Spangenberg Group, which, according to the Kaye Commission, "is a nationally and internationally recognized criminal justice research and consulting firm that specializes in research concerning indigent defense services." *Kaye Commission Report* at 2. Including New York, The Spangenberg Group has conducted comprehensive, statewide studies of public defense systems in forty states. The Spangenberg Group, *Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense* 2 (2006) (*TSG Report*) (attached to Stoughton Affirmation as Exhibit B). For the Kaye Commission, The Spangenberg Group collected and analyzed data from each of New York's sixty-two counties and conducted independent site work in twenty-two counties specifically selected to be geographically and demographically representative of the entire State. *Kaye Commission Report* at 3; *TSG Report* at 4-6. According to the Kaye Commission, the Spangenberg Group's report, which was incorporated into the report of the Kaye Commission, represents "the most comprehensive study of indigent defense representation ever undertaken in New York State." *Kaye Commission Report* at 2.

The conclusion of this comprehensive study was that "New York's current fragmented

system of county-operated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused." *Kaye Commission Report* at 15. This conclusion was based on findings of fact in both the Kaye Commission and Spangenberg Group reports – findings substantiated by other documents and testimony offered by plaintiffs in support of this motion. Among other things, the Kaye Commission found, and plaintiffs' evidence demonstrates:

A Lack of Attorney Hiring Criteria, Performance Standards, Training and Supervisory Controls. The Kaye Commission found that public defense service providers across the state lack hiring criteria and operate without performance standards, training, and adequate supervision.[2] This was also the conclusion of a recent NLADA study of Schuyler County's Public Defender Office and is corroborated by the former Chief Defender of the county. Affidavit of David J. Carroll (Mar. 5, 2008) ¶¶ 92-94, 106-112 (noting that Schuyler County has no hiring criteria, no system for monitoring or evaluating public defender performance, and does not require or provide training); Affirmation of Connie Fern Miller (Feb. 29, 2008) ¶¶ 23, 36-37 (noting the lack of training or hiring criteria in Schuyler County Public Defender's office). Similarly, in Washington County there is no meaningful oversight of attorneys in the Public Defender's Office and no hiring criteria, training requirements, attorney supervision, or enforceable performance standards. Carroll Affidavit ¶¶ 27, 40-42, 53-60. In Suffolk County, where the primary service provider is the Suffolk County Legal Aid Society, there is no training

[2] *Kaye Commission Report* at 18 ("[V]ery few institutional providers have in place viable training programs and . . . access to training is inconsistent across the state. In regard to assigned counsel and contract defense programs, training ranges from non-existent to the barely adequate."); *TSG Report* at 50 (public defenders and legal aid lawyers "are subject to few mandatory standards of practice, inadequate training, and little or no oversight"); *id* ("Even where programs provide training and supervision, supervisors are often hampered by heavy caseloads and lack of time."); Affirmation of Jonathan Gradess (Mar. 10, 2008) ¶¶ 49-55.

program beyond requiring new attorneys to shadow another attorney for the first week of employment. The Legal Aid Society evaluates performance based on how quickly attorneys dispose of cases rather than based on any national or state performance standards, creating an incentive "to dispose of cases quickly by encouraging their clients to enter into plea agreements that do not necessarily represent their clients' best interests." Affirmation of Austin M. Manghan III (Feb. 25, 2008) ¶¶ 6, 38-39. The lack of training is particularly problematic in New York because of the high rate of turnover within institutional defender offices. *See, e.g., New York State Commission on the Future of Indigent Defense Services: Ithaca Hearing* 228 (discussing high rates of turnover among New York public defense providers) (statement of Susan Horn, Hiscock Legal Aid Society) (attached to Stoughton Affirmation as Exhibit D); Affirmation of Susan Betzjitomir (Mar. 10, 2008) ¶ 23 (noting the high rate of turnover in public defender offices).

In counties that rely on assigned counsel, there is no means of supervising or monitoring the quality of representation provided by individual private attorneys, often resulting in the appointment of inexperienced or inadequate attorneys to represent the poor.[3] This is so in Onondaga and Ontario counties,[4] which rely exclusively on the private bar to act as assigned

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[3] *TSG Report* at 57 (finding that assigned counsel are "subject to few requirements in order to be admitted to and remain on a panel, and are rarely subject to any mandatory rules or oversight regarding their performance.").

[4] *TSG Report* at 60 (noting the lack of performance criteria or oversight of assigned counsel in Onondaga County); Affirmation of J.A. Session (Feb. 26, 2008) ¶ 7 ("[M]any of the attorneys on the [Onondaga] ACP panel are too young, inexperienced and ill-trained to handle their cases. The criteria for getting listed on the ACP panels do not provide a sufficient check on the quality of representation."); *TSG Report* at 59 (noting that, in Onondaga County, "An assigned counsel board member said that they do not want to 'micromanage' the attorneys and will never set rules such as 'appointed counsel must visit incarcerated client[s] within three days'"); Affirmation of Edward W. Klein (Feb. 29, 2008) ¶ 4 ("ACP sets and enforces no practice standards for mandated representation and conducts no oversight of attorney performance. . . . There is no formal client complaint process or meaningful disciplinary process within the structure of the ACP for attorneys who fail to provide basic elements of adequate representation. In

counsel, as well as in counties such as Schuyler, Suffolk and Washington, which rely on assigned counsel for conflicts cases.[5]

The predictable result of a lack of training programs and performance standards is ill-trained and under-performing attorneys and the impact on indigent defendants is severe. "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." Gradess Affirmation ¶ 53. As the leader of a recent NLADA study of several counties' public defense systems noted, "No one monitors or imposes standards or requirements to determine whether a given attorney has the experience, training and qualifications necessary to competently handle the case to which he or she is appointed. As a result . . . [attorneys] must use their clients as guinea pigs while they learn." Carroll Affidavit ¶¶ 138-39. Without instruction and oversight, "attorneys file frivolous motions in some instances, fail to file appropriate motions in other instances, and miss the important issues in many cases." *Id.* ¶ 135. Poorly trained and supervised attorneys often fail to understand the need for investigative services for their clients' cases. Gradess Affirmation ¶¶ 53-55; *TSG Report* at 76-77 (finding that "experts and

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short, there is no process by which attorneys' work performance is measured."); *2006 Onondaga County Bar Association Assigned Counsel Program, Inc. Handbook of Policies, Rules, and Procedures* at 35 (attached to Klein Affirmation as Exhibit A) (stating that because panel attorneys are not employees of ACP, ACP cannot enforce any performance standards); Carroll Affidavit ¶¶ 120-22, 134-37, 147-52 (finding that the assigned counsel program in Ontario County has no mechanism to regulate or supervise attorney performance, no meaningful criteria for determining who may act as assigned counsel, and no access to or requirement of training); 2007 Amended Ontario County Assigned Counsel Plan at 5 (May 21, 2007) (attached to Stoughton Affirmation as Exhibit Q) (setting forth minimal criteria for participation in assigned counsel plan and setting forth no minimum performance standards or training requirements).

[5] *TSG Report* at 60 ("The Suffolk County program does not evaluate the performance of the 18-B attorneys nor does it require re-certification."); Carroll Affidavit ¶¶ 27, 70-73, 92 (noting that there is no oversight of the assigned private counsel's performance in Washington and Schuyler counties); Miller Affirmation ¶¶ 9, 23 (noting that no one is responsible for training or evaluating the qualifications or performance of assigned counsel in Schuyler County).

investigators are underutilized in Suffolk County, especially in misdemeanor cases; this was described as the culture of the practice."). Attorneys may respond to financial concerns rather than client needs by pressuring clients to take pleas that may not be in their best interests, as is often the case in Suffolk County. Manghan Affirmation ¶¶ 38-39. Some are afraid to take their clients cases to trial, allowing their inexperience to compromise their clients' rights. *TSG Report* at 60 (citing Suffolk County as an example). As one experienced attorney explains, "the jails are full of people who need not be there and would not be there if they had more qualified, better trained attorneys. Indigent criminal defendants are routinely over-sentenced and possibly wrongfully convicted because the system cannot provide them with adequate representation." Session Affirmation ¶ 10.

Lacking any mechanism for addressing the problem of under-performing attorneys, patterns of inadequate representation are allowed to continue. For example, in Onondaga County, "the board of directors of the assigned counsel plan does not like to remove attorneys from the list unless they have committed outright fraud. A district attorney told [The Spangenberg Group] that bad attorneys are appointed regularly in Onondaga County." *TSG Report* at 60. Similarly, in Schuyler County, a local Town Justice and former assigned counsel attorney reports that she has "seen very inexperienced attorneys be assigned to major felony cases" because "attorney assignments are based on criteria other than experience and competence." Betzjitomer Affirmation ¶ 14.

Even for more experienced attorneys, on-going training and enforceable performance standards are necessary to keep up with the ever-growing complexity of criminal law and procedure. For example, public defense attorneys in New York often lack the training necessary to understand the potential collateral consequences of a guilty plea to even a misdemeanor

offense or a violation. As Russell Neufeld, the former Chief of the New York Legal Aid Society's Criminal Defense Division testified in the public hearings before the Kaye Commission:

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

Kaye Commission Report at 25. The Kaye Commission's findings indicated that although knowledge of these consequences is essential to informed representation, "[r]egrettably, the vast majority of defendants do not experience such essential representation." *Id.*

The Spangenberg Group drew a similar conclusion based upon its study of New York's public defense system:

> In today's climate, the collateral consequences of a conviction seem to be greater and more numerous than in the past, and for some defendants, they are greater than the terms of the actual sentence. Collateral consequences encompass issues such as immigration, employment (including public and private employers), housing (including private, public and federally-subsidized housing), public benefits and welfare, family law (including custody, visitation and family offence proceedings), driver's licenses, forfeitures, civic participation (including voting and jury service), federal student loans, military service, government contracting, insurance coverage, and international travel. Many collateral consequences may result not only from a felony conviction, but also from a misdemeanor or violation conviction. It is therefore incumbent upon the attorney to advise a client of the collateral consequences of a conviction as well as the terms of a sentence. . . . Unfortunately, not all indigent defense attorneys in New York inform their clients of collateral consequences, often because they lack sufficient knowledge and training in the area. . . . In addition, many defendants are pleading without counsel to low-level offenses without being informed of potential collateral consequences.

TSG Report at 88-89. For example, in Onondaga County, The Spangenberg Group reported that as a defendant was pleading guilty to a prison assault, "[h]is assigned counsel was unaware of

the consequences on his client's good time at the prison resulting from the plea. The judge in fact raised the issue for the defendant and asked the attorney to look into the matter." *Id.* at 89.

The experiences of the 17 named plaintiffs and six other indigent criminal defendants who have submitted affidavits in support of this motion demonstrate the impact of the lack of performance standards and supervisory controls on clients. For example, almost all of the attorneys representing these clients apparently failed to understand the need for investigative services, even though a factual investigation may have aided in building a defense to the charges they faced or reducing their potential sentence.[6] Some defendants report that their attorneys advised them to accept plea agreements without conducting even the most cursory factual investigation.[7]

Their stories also speak of attorneys who missed opportunities for advocacy that could have benefited their clients. Among the few clients who had attorneys present at arraignment, almost all report that their attorneys failed to take actions that might have lowered bail and reduced unnecessary incarceration.[8] James Adams was charged with two felonies for allegedly stealing several sticks of deodorant from a drug store; despite repeated suggestions from the presiding judge that he was overcharged, his attorney failed to advocate for a reduction in charges prior to trial. Affidavit of Plaintiff Adams ¶¶ 5, 9, 15-16, 19. Eric Maier's attorney

[6] Affidavit of Plaintiff Booker ¶ 14; Affidavit of Plaintiff Metzler ¶ 24; Affidavit of Plaintiff Turner ¶¶ 13, 15-16; Affidavit of Plaintiff Loyzelle ¶¶ 11-15; Affidavit of Plaintiff Steele ¶¶ 5, 11; Affidavit of Plaintiff Briggs ¶ 14; Affidavit of Plaintiff Love ¶ 7; Affidavit of Plaintiff Glover ¶¶ 7, 23; Affidavit of Plaintiff Johnson ¶ 24; Affidavit of Plaintiff Yaw ¶15; Affidavit of Plaintiff Chase ¶ 20.

[7] Affidavit of Plaintiff Booker ¶¶ 9, 13-14; Affidavit of Plaintiff Metzler ¶¶ 23-24; Affidavit of Plaintiff Turner ¶ 9; Affidavit of Plaintiff Loyzelle ¶¶ 12-14; Affidavit of Plaintiff Steele ¶¶ 10-11; Affidavit at Plaintiff Love ¶¶ 7, 11; Affidavit of Plaintiff Glover ¶ 7; Affidavit of Plaintiff Habshi ¶¶ 8-12; Affidavit of Janica Moore ¶ 9.

[8] Affidavit of Plaintiff Booker ¶ 5; Affidavit of Plaintiff Metzler ¶¶ 6-10; Affidavit of Plaintiff Glover ¶ 5; Plaintiff Hurrell-Harring ¶¶ 5-6.

missed several deadlines for filing motions that could have resulted in his client's release. Affidavit of Eric Maier ¶¶ 6-7. Jemar Johnson's attorney presented a plea offer from the prosecutor without explaining the impact that pleading guilty might have on her public benefits, housing benefits, or employment prospects. *Id.* ¶¶ 15-16, 18. Kimberly Hurrell-Harring was charged with a felony for bringing a small amount of marijuana to her husband in prison. Despite case law indicating that she was overcharged,[9] her attorney failed to file a motion or advocate for a reduction to misdemeanor charges. On her attorney's advice, she pled guilty to the felony, facing a jail sentence and the likelihood of losing her nursing license. Affidavit of Plaintiff Hurrell-Harring ¶¶ 5, 8-9.

Almost none of the plaintiffs whose cases have reached the sentencing phase received any counseling or meaningful advocacy from their attorneys prior to or during sentencing.[10] John Vazquez, for example, was incorrectly sentenced as a second-time violent felony offender while being represented by a public defense attorney and had to file his own post-conviction motion to correct his sentence. Affidavit of John Vazquez ¶¶ 12-13. He also did his own research into a program that provides alternatives to incarceration and succeeded in getting himself into that program and avoiding jail time without any assistance or advice from his attorney. *Id.* ¶ 11. Similarly, Tosha Steele was sentenced to six years incarceration on drug charges, though her co-defendant boyfriend – who confessed that the drugs belonged to him – served only six months and entered a drug treatment program. Affidavit of Plaintiff Steele ¶ 11.

A Failure to Provide Representation to All Defendants at Critical Stages. Whether due to

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[9] *See, e.g.*, *People v. Stanley*, 19 A.D.3d 1152, 1152 (4th Dep't 2005) (small amount of marijuana should amount to charge of promoting prison contraband in the second degree, a misdemeanor); *People v. Brown*, 2 A.D.3d 1216, 1216 (3d Dep't 2003) (same).

[10] Affidavit of Plaintiff Booker ¶15; Affidavit of Plaintiff Loyzelle ¶ 15; Affidavit of Plaintiff Hurrell-Harring ¶¶ 10-12; Affidavit of Plaintiff Tomberelli ¶¶ 19-25.

a lack of sufficient staff to cover all critical proceedings, delays in appointment, or a lack of understanding about when the right to counsel attaches, public defense attorneys are not always available to represent each eligible defendant at every critical stage of the criminal process, thus directly depriving defendants of their right to counsel. *Kaye Commission Report* at 22; *TSG Report* at 47, 86; *New York State Commission on the Future of Indigent Defense Services: New York City Hearing* 270-71 (statement of Louis Mazzola, Suffolk County Legal Aid Society) (attached to Stoughton Affirmation as Exhibit C); Gradess Affirmation ¶¶ 30-31, 39; Miller Affirmation ¶ 15; Betzjitomir Affirmation ¶¶ 3-7; Carroll Affidavit ¶¶ 29-32, 74, 79-81, 124-27 (noting that counsel is most often not present at arraignment and other early critical stages in Washington, Schuyler and Ontario counties, and assigning those counties "F" grades for prompt appointment of counsel). As a result, defendants "often languish in jail without counsel for extended periods of time without being identified as needing public defense counsel" and "defendants who are released on bail are not assigned public defense counsel." Carroll Affidavit ¶¶ 75-76.

The lack of attorneys at arraignment impacts defendants' rights in several ways. As the former Chief Defender in Schuyler County explains:

> Bail determinations are made at arraignment, and discussions about plea offers and the facts charged occur directly between the prosecutor and defendants, and/or between the court and defendants. . . . Because there was no money or staff to ensure that a lawyer appeared with a defendant at arraignment, defendants routinely appeared for arraignment in both felony and misdemeanor cases without lawyers. Left to advocate for bail on their own, defendants were often incarcerated when they should not have been, or faced exorbitant bail amounts that they could not afford.

Miller Affirmation ¶¶ 16-17. *See also* Carroll Affidavit ¶ 125 ("When an indigent criminal defendant lacks counsel when bail is set, the court often sets bail at a higher than appropriate

amount on the basis of inappropriate factors."); Gradess Affirmation ¶ 31 ("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. The result is unnecessary incarceration, serious disruption to their lives and the lives of their families, and a serious risk of prejudicing their case.").

In a 2007 study of non-felony cases in New York City, the New York City Criminal Justice Agency found that higher rates of bail correlate with longer periods of pretrial detention and longer periods of pre-trial detention – even controlling for other factors – create an increased likelihood of conviction. The study suggests that detained defendants may be less able to assist in building a defense and they may feel pressure to plead guilty in order to gain release. *See* Mary D. Philips, *Bail, Detention, and Non-Felony Case Outcomes*, CJA Res. Brief, May 2007 (attached to Stoughton Affirmation as Exhibit R). Thus, the absence of counsel to advocate for lower bail or alternatives to pretrial incarceration at arraignment is severely prejudicial to indigent criminal defendants.

Moreover, the failure to provide an attorney in early stages and the delay in appointment of counsel often means that defendants are pressured into negotiating a resolution of their case directly with the State without benefit of attorney assistance. Gradess Affirmation ¶¶ 32-34 ("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."); Carroll Affidavit ¶ 126 ("[P]ublic defense clients are left to negotiate directly with the prosecutor for what most often results in a guilty plea and sentencing at the first court appearance."); *TSG Report* at 88 ("[P]rosecutors speak to pro se defendants directly in order to

negotiate plea offers, thus raising some ethical concerns."); *New York State Commission on the Future of Indigent Defense Services: New York City Hearing* 407 (statement of Miriam Gohara, NAACP-LDF) (attached to Stoughton Affirmation as Exhibit C) ("We also found in Schuyler County, where people were charged with a crime, who spent time in jail waiting for their case to be resolved, many of them resolved them on their own without counsel.").

The experiences of the named plaintiffs and affiants provide further evidence of the absence of counsel at critical stages, particularly arraignments, and the long delays in appointment of counsel. The vast majority were not represented at their arraignments.[11] Lane Loyzelle had no attorney at his arraignment on misdemeanor charges of stealing $20 from two people he knew; he did not see an attorney until two weeks later and languished in jail for three months before finally pleading guilty in order to get out of jail. Affidavit of Plaintiff Loyzelle ¶¶ 5-7, 11-15. James Adams, who was accused of stealing several sticks of deodorant from a drug store, also had no attorney at arraignment and remained incarcerated for six months until his wife was finally able to raise enough money from their family to post his bail. Affidavit of Plaintiff Adams ¶¶ 5, 26, 29. Richard Love was not represented by an attorney at his arraignment and was denied bail; three months later, when he was assigned a new attorney who filed a bail reduction motion, he was released. Affidavit of Plaintiff Love ¶¶ 4, 12. Christopher Yaw had no attorney at arraignment, where bail was set too high for him to afford. After an attorney entered his case, he was released on his own recognizance, having spent five months in jail. Affidavit of Plaintiff Yaw ¶¶ 4-5, 11. Both Kimberly Hurrell-Harring and Janica Moore were charged with bringing small amounts of drugs to their husbands in jail. Neither had a prior criminal record,

[11] Affidavit of Plaintiff Johnson ¶¶ 5-7; Affidavit of Plaintiff Love ¶ 4; Affidavit of Plaintiff Adams ¶ 5; Affidavit of Plaintiff Briggs ¶ 5; Affidavit of Plaintiff Habshi ¶ 5; Affidavit of Plaintiff Hurrell-Harring ¶ 6; Affidavit of Plaintiff McIntyre ¶ 5; Affidavit of Plaintiff Loyzelle ¶5; Affidavit of Plaintiff Tomberelli ¶ 5; Affidavit of Plaintiff Yaw ¶ 5; Affidavit of Janica Moore ¶ 5.

but without counsel at arraignment, bail was set for each at $10,000 cash. Affidavit of Plaintiff Hurrell-Harring ¶¶ 4-6, 8; Affidavit of Janica Moore ¶¶ 4-5. Ms. Hurrell-Harring remained in jail until, faced with no other options, she pled guilty to felony charges and agreed to serve six months, jeopardizing her nursing career and the welfare of her family, for whom she is the sole breadwinner. Affidavit of Plaintiff Hurrell-Harring ¶¶ 9-12. Ms. Moore spent over a month in jail before a judge reduced bail and she was able to post it. Affidavit of Janica Moore ¶ 16. She was unable to exercise her rights to have a preliminary hearing and testify before the grand jury because no attorney had yet been appointed at those stages. *Id.* ¶¶ 6-8.

Overwhelming Caseloads and Workloads. Public defense service providers in the counties often carry excessive caseloads or workloads.[12] "The primary, overarching 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." Gradess Affirmation ¶ 18. In counties that rely on assigned counsel – as all five of the counties that are the focus of this suit do to some extent – the lack of standards and supervision means that attorneys are free to represent, in addition to their private clients and appointments from other counties, as many appointed clients as they choose. In counties that rely on an institutional defender, such as Washington, Schuyler and Suffolk counties, excessive overall caseloads and workloads reduce public defense attorneys' ability to meaningfully and effectively represent each client. The Kaye Commission found that "virtually all institutional defenders testified to having to labor under excessive caseloads . . . . [R]equests for additional

[12] Given the lack of caseload and workload standards in the Counties and the state's failure to mandate and enforce accurate data reporting, exact caseload statistics are impossible to provide to the Court prior to discovery. As the Kaye Commission and supporting affidavits establish, however, there can be no denying that public defense service providers labor under excessive workloads that compromise their ability to provide meaningful and adequate representation.

funds to keep pace with ever-growing caseloads are, for the most part, not granted." *Kaye Commission Report* at 17-18.[13]

Workload and caseload problems are magnified in counties such as Schuyler and Washington, which rely on part-time defenders to do the work of full-time employees. As the Kaye Commission notes, "The burden of heavy caseloads is exacerbated in some counties by the use of part-time attorney positions . . . . [I]n some counties the part-time attorneys . . . are expected to handle full-time caseloads." *Kaye Commission Report* at 18 (quoting *TSG Report* at 46). *See also* Gradess Affirmation ¶ 20. Even some "full-time" defenders have private practices. *TSG Report* at 159. Budgetary constraints and political pressures force counties to rely on part-time defenders because poorly-funded part-time positions are easier to fill than poorly-funded full-time positions. *Id.* at 46. This is to the detriment of indigent criminal defendants. "While private practice can supplement a low salary, a defender's workload frequently demands full-time attention and is at odds with a part-time private practice." *Id.* at 156.

Schuyler County illustrates the problem. Three attorneys in Schuyler – the Chief Defender, a part-time assistant defender, and an attorney retained on contract for conflicts cases – are required to handle the entire public defense docket for both criminal and family courts.

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[13] *See also TSG Report* at 43 ("Given the funding problems and the need to show efficiency, it is not surprising that institutional providers throughout the state are burdened with heavy caseloads."); *id.* at 43 ("Unfortunately, defenders are not developing their own specific standards and across the state, they are handling heavy caseloads that are well in excess of national standards."); *New York State Commission on the Future of Indigent Defense Services: Albany Hearing* 254 (statement of Michael Whiteman, former counsel to Governor Rockefeller) (attached to Stoughton Affirmation as Exhibit E) ("Public defense caseloads are astronomical, with cases per lawyer per year in some cases reaching 1,000, 1,600, or even higher. If the annual billable hours for lawyers in all fields, which range from 1200 to 1900 hours, hold for public defense lawyers, as well, that amounts to about one hour per client."); Manghan Affirmation ¶¶ 20-22 (noting that Suffolk Legal Aid attorneys average 373 cases per year and that he has had up to 350 open cases at any given time); Carroll Affidavit ¶¶ 36-37, 39 (finding caseloads in Washington County "unreasonable," in that they "far exceed accepted national maximum caseload standards," and assigning the county a "D-" grade for reasonable workloads); *id.* ¶¶ 131-33 (assigning Ontario County an "F" grade for reasonable attorney workloads).

Miller Affirmation ¶¶ 6-8. In 2006, this amounted to 342 criminal dispositions and 51 family court dispositions. *Id.* Despite this already heavy public defense caseload, all three attorneys maintained their own private practices. *Id.* ¶¶ 6, 24. The Chief Defender estimates that she often had up to fifty open public defense cases at any given time, many of them complex felonies. *Id.* ¶ 6. Schuyler County does not monitor or regulate its public defense attorneys' workloads. Carroll Affidavit ¶¶ 87-91 (assigning Schuyler County a "D-" letter grade for reasonable workloads).

Suffolk County is another compelling example of the statewide problem of overwhelming caseloads and the impact on representation of clients. The Spangenberg Group found that in 2004:

> [T]he average criminal trial caseload per attorney in the [Legal Aid Society] office was 300 cases. This is in addition to parole hearings and appeals. In the district courts, 35 attorneys handled 18,567 cases, for an average district court caseload per attorney of 530 cases. . . . An 18-B attorney in the county told us that while LAS has good attorneys, because of their high caseloads, they are not able to spend enough time with clients and they talk clients into pleas. . . . Meanwhile, Suffolk County reports on its website that "to date, LAS has never declined a case due to an inability to handle their caseload." In neighboring Nassau County, LAS attorneys in the district courts are handling approximately 100 open cases at any one time. Not surprisingly, some judges were concerned about the level of attorney-client contact from these attorneys.

TSG Report at 44-45. *See also* Gradess Affirmation ¶ 22 (noting that "[o]verworked attorneys are often under excessive pressure to obtain pleas from their clients at the expense of meaningful representation.").

The stories of the plaintiffs from Suffolk County illustrate the point that high caseloads lead attorneys to pressure their clients into taking pleas without adequate consideration and consultation. Luther Woodrow of Booker felt pressured to take a plea by two of his likely overworked attorneys. Affidavit of Plaintiff Booker ¶¶ 9, 12-13. Edward Kaminski had an

attorney who only was interested in talking about the prosecutor's plea deal, not about the facts of Kaminski's case or a defense to the charges. Affidavit of Plaintiff Kaminski ¶ 9. Plaintiff Turner, who has had six different public defense attorneys through the course of his case, reports having to reject the same plea offer again and again, and that each time he turned it down "my lawyers would adjourn the case, then a new lawyer would come to me with the same plea the next time I came to court. . . . I feel like this is a tactic my lawyers are using to pressure me to take the plea . . . ." Affidavit of Plaintiff Turner ¶ 9.

Similarly, in Washington County, the norm of practice among overworked attorneys is to rush clients through to a plea without conducting any meaningful consultation with the client or investigation of the case. The leader of a recent NLADA study of that county explains:

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

Carroll Affidavit ¶ 34. The stories of the plaintiffs from Washington County substantiate this account. Affidavit of Plaintiff Habshi ¶¶ 8-12; Affidavit of Plaintiff Hurrell-Harring ¶¶ 9-10; Affidavit of Plaintiff McIntyre ¶¶ 18-22. According to both NLADA's findings and the experiences of the plaintiffs, this pattern also describes the typical case in Schuyler County. Carroll Affidavit ¶ 83; Affidavit of Plaintiff Tomberelli ¶¶ 17-18, 27-28; Affidavit of Plaintiff Yaw ¶ 14. Public defense clients in Onondaga and Ontario counties also often face pressure to accept pleas too early that may not necessarily be in their best interests, or have attorneys who seem interested only in effectuating the prosecutor's initial plea offer. James Adams's attorney, for example, failed to communicate a plea offer to his client, but nonetheless told the prosecutor and the court that his client would accept the deal. Fortunately, the court stepped in and

rejected the plea. Affidavit of Plaintiff Adams ¶¶ 10, 15. Richard Love, Jr. attempted to negotiate a better plea directly with the prosecutor in his case because his attorney would not do so. Affidavit of Plaintiff Love ¶ 11; *see also* Affidavit of Plaintiff Loyzelle ¶¶ 12-14; Affidavit of Todd Michael Sgro ¶¶ 17, 27; Affidavit of Charles R. Wright ¶ 6.

Plaintiffs' stories show other symptoms of overworked attorneys as well. For example, several plaintiffs report that their attorneys frequently obtained continuances, sometimes even while their clients languished in jail, often because they appeared unprepared.[14] Some plaintiffs filed motions on their own behalf after undertaking independent legal research in the jail law library because their attorneys could not or would not do it themselves.[15] Ricky Lee Glover was released from jail after seven months only because he filed his own motion for release.[16] Finally, as noted in detail in the next section, all of the plaintiffs and affiants had almost no meaningful contact with their likely overworked and overburdened attorneys. In short, "[i]t is impossible for public defense attorneys to both provide high quality representation and handle their caseloads." Gradess Affirmation ¶ 18.

A Lack of Attorney-Client Consultation and Communication. The Kaye Commission's factual conclusions paint "a distressing picture of minimal attorney-client contact." The Commission Report elaborates:

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[14] Affidavit of Plaintiff Booker ¶ 11; Affidavit of Plaintiff Kaminski ¶¶ 9, 16, 19; Affidavit of Plaintiff Metzler ¶¶ 21-22, 26; Affidavit of Plaintiff Turner ¶ 9; Affidavit of Plaintiff Loyzelle ¶¶ 10-11; Affidavit of Plaintiff Steele ¶¶ 7-9; Affidavit of Plaintiff Adams ¶¶ 6-8, 10, 20; Affidavit of Plaintiff Briggs ¶¶ 7-8; Affidavit of Plaintiff Glover ¶¶ 6, 16-18; Affidavit of Plaintiff Habshi ¶ 8; Affidavit of Plaintiff Yaw ¶¶ 9-10; Affidavit of Plaintiff McIntyre ¶¶ 14-15; Affidavit of Plaintiff Johnson ¶ 9; Affidavit of Eric Witherspoon ¶¶ 8, 11; Affidavit of Janica Moore ¶ 11-14, 19.

[15] Affidavit of Plaintiff Adams ¶ 13; Affidavit of Plaintiff Glover ¶¶ 10, 12, 14.

[16] Affidavit of Plaintiff Glover ¶¶ 10, 12, 14, 21, 23.

> We were told of attorneys who did not visit their clients in jail, return phone calls, answer letters, or conduct even minimal investigations of their clients' cases. In some counties, the only attorney-client contact available is through collect calls to counsel, which many counsel refuse to accept. In a number of counties, attorney-client contact occurs only when the defendant is brought to court for a scheduled appearance. . . . Especially disturbing was the testimony from former prisoners and from families of defendants as to the lack of contact with counsel, creating the perception, and most likely the reality, of a lack of attention to a defendant's case. As TSG learned from its site visits, "it is not uncommon for indigent defense attorneys across New York State to meet a client for the first time on the day of court. Thus, attorney-client contact frequently occurs in court where the attorney's time is short and there is often no setting for meaningful, confidential communications."

Kaye Commission Report at 19 (quoting *TSG Report* at 67).[17]

The lack of attorney-client communication can be attributed to any number of systemic factors, such as overworked attorneys with no time for meaningful client contacts and ill-trained attorneys who do not fully appreciate the importance of thoroughly interviewing and developing a relationship with the client. Gradess Affirmation ¶¶ 47-48. In some cases, undoubtedly driven by resource pressures, the policies of public defense program administrators actively discourage attorney-client contacts. In Onondaga County, for example, the Assigned Counsel Program frequently cuts vouchers for time spent consulting with clients. Affirmation of Jeffrey R. Parry ¶¶ 8-11.

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[17] *See also* Gradess Affirmation ¶¶ 41-43 ("In county after county, I am aware that attorneys commonly do not visit their clients in jail, return phone calls, or answer letters."); *TSG Report* at 68 (finding that in Onondaga, attorneys "frequently are unable to visit their client in jail prior to court."); *id.* at 69 (explaining that it is common for a defendant in Onondaga County to remain in jail "long beyond what we know would be a reasonable period of time served simply waiting for the first appearance of the Assigned Counsel attorney."); *New York State Commission on the Future of Indigent Defense Services: Ithaca Hearing* 176 (statement of Kurt Andino, Jail Ministry Program) (attached to Stoughton Affirmation as Exhibit D); Klein Affirmation ¶¶ 9-11 (detailing attorneys' failure to maintain in contact with their clients); *TSG Report* at 70 ("One 18-B attorney from Suffolk County said that he only goes to the jail to visit homicide clients."); Carroll Affidavit ¶ 33 (in Washington County public defense lawyers "have very little time to conduct interviews, which are the essence of the privately retained lawyer-client relationship."); *id.* ¶¶ 129-31 (noting that public defense attorneys in Ontario County "often have insufficient time to have informed and effective meetings with their clients in order to reach considered decisions about the process and substance of their cases."); Betzjitomer Affirmation ¶ 21-22 (noting the lack of attorney-client communication in Schuyler County); Miller Affirmation ¶¶ 8, 19-22 (same).

Public defense attorneys' failure to meaningfully communicate with their clients has tangible impacts on the right to meaningful and effective assistance of counsel. As Jonathan Gradess, Executive Director of the New York State Defenders' Association, explains:

> 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. . . . Attorneys who have not spoken with their clients may also waive important rights without gaining their clients' informed consent.

Gradess Affirmation ¶¶ 44-46.

The lack of meaningful attorney-client contact is amply demonstrated by the experiences of the indigent defendants in this case. Most of the plaintiffs and affiants never properly met with their attorneys at any stage of their case, only seeing them during or in the minutes preceding court appearances. With rare exceptions, their attorneys never visited their incarcerated clients in jail.[18] Nor were their attorneys communicating with them in other ways: almost all of them report that attorneys do not or cannot return phone messages or accept phone calls from incarcerated clients and do not respond to letters.[19] Many attorneys waive critical rights without first consulting with their clients, often despite express instructions not to do so.[20]

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[18] Affidavit of Plaintiff Booker ¶¶ 6-9, 12, 16; Affidavit of Plaintiff Kaminski ¶¶ 7, 9, 11, 15; Affidavit of Plaintiff Metzler ¶¶ 11, 14, 17, 21-23; Affidavit of Plaintiff Turner ¶¶ 8, 10, 12-13; Affidavit of Plaintiff Loyzelle ¶¶ 8, 11, 14; Affidavit of Plaintiff Steele ¶¶ 5-9; Affidavit of Plaintiff Glover ¶¶ 7, 19, 23; Affidavit of Plaintiff Adams ¶¶ 6, 8; Affidavit of Plaintiff Briggs ¶¶ 6-10; Affidavit of Plaintiff Habshi ¶ 7; Affidavit of Plaintiff McIntyre ¶¶ 5-7, 16-17; Affidavit of Plaintiff Johnson ¶¶ 9-10, 13; Affidavit of Plaintiff Tomberelli ¶¶ 7-10; Affidavit of Eric Witherspoon ¶¶ 11-12.

[19] Affidavit of Plaintiff Booker ¶ 16; Affidavit of Plaintiff Kaminski ¶ 12; Affidavit of Plaintiff Turner ¶¶ 10, 11;; Affidavit of Plaintiff Glover ¶¶ 6, 8, 22; Affidavit of Plaintiff Love ¶¶ 9-10, 13; Affidavit of Plaintiff Briggs ¶¶ 6, 10, 13; Affidavit of Plaintiff Adams ¶¶ 12, 22; Affidavit of Plaintiff Hurrell-Harring ¶ 7; Affidavit of Plaintiff McIntyre ¶¶ 8-10; Affidavit of Plaintiff Johnson ¶ 10; Affidavit of Plaintiff Tomberelli ¶ 11; Affidavit of Eric Witherspoon ¶ 9, 13-14.

[20] Affidavit of Plaintiff Booker ¶ 8; Affidavit of Plaintiff Metzler ¶ 13; Affidavit of John Vazquez

Lane Loyzelle, who was accused of stealing $20, met his attorney for the first time two weeks after his arrest and then languished in jail for more than two months before seeing him or appearing in court again. Affidavit of Plaintiff Loyzelle ¶¶ 7, 11-12. Ricky Lee Glover was in jail for seven months until a judge released him based on a motion he filed himself; during the time he was incarcerated, he met with his attorney only once, more than six months prior to his release. Affidavit of Plaintiff Glover ¶ 23. Joseph Briggs was incarcerated after arraignment for over a month without ever meeting an attorney; during that time he lost his roofing business. Affidavit of Plaintiff Briggs ¶¶ 7-8, 18. Eric Witherspoon has been incarcerated for over a year and did not see or speak to his attorney for the four months between September 2007 and January of this year. Affidavit of Eric Witherspoon ¶ 3, 16. James Adams became so frustrated with his attorney's failure to meet with him to discuss his case that he wrote directly to the court and the district attorney offering his defense, risking prejudice to his case. Affidavit of Plaintiff Adams ¶¶ 14-15.

The Lack of Resources for, Among Other Things, Investigators and Experts. The Kaye Commission found that, "Many institutional providers testified to their lack of access to investigators, social workers, foreign language interpreters and other support services." *Kaye Commission Report* at 18. *See also* Gradess Affirmation ¶¶ 56-61. Collectively, New York counties reported spending an average of less than $15 per case disposition on investigators in 2006 and just over $10 per case for expert services. Affidavit of Demetrius Thomas (Mar. 26, 2008) ¶¶ 9, 11. In Suffolk and Onondaga counties – the only two of the five counties at issue in

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¶ 8; Affidavit of Eric Maier ¶ 4-5; Affidavit of Plaintiff Steele ¶ 6; Affidavit of Plaintiff Glover ¶¶ 9-10, 12; Affidavit of Plaintiff Adams ¶ 11; Affidavit of Plaintiff Briggs ¶ 11; Affidavit of Plaintiff Habshi ¶ 6;; Affidavit Plaintiff McIntyre at ¶ 17; Affidavit of Plaintiff Tomberelli ¶¶ 15-16; Affidavit of Eric Witherspoon ¶ 4-7; Affidavit of Todd Michael Sgro ¶¶ 10-11; Affidavit Janica Moore at ¶ 8; Affidavit of Charles R. Wright ¶ 9.

this suit to report data – the number is even lower. *Id.* ¶ 10. The public defender in Schuyler County once exceeded her entire annual budget for ancillary services paying for one psychiatric expert in a single case. She was reprimanded by the legislature and asked why she could not simply use prosecution experts to defend her clients. Miller Affirmation ¶¶ 27-28.

The lack of adequate staff investigators for institutional defenders directly impacts the quality of representation. As The Spangenberg Group found:

> Many public defender and legal aid offices have no staff investigators and must contract out for these services. . . . [T]here is a big difference between having an investigator on staff who you can consult and make quick requests to every day, and having to contact an outside investigator to schedule an appointment before making a request. In addition, public defenders with limited funds can feel pressure not to spend money on outside contractors. . . . Even when an office has investigators on staff, often there are not enough of them or they are assigned to perform work other than investigations, such as eligibility screening and meeting with clients at the jail.

TSG Report at 49-50.[21]

For assigned counsel programs, as well as for institutional defenders with inadequate funds for investigative services, expenditures on investigative and expert services must be approved by the court. "In this respect, the courts are put in the position of guarding the county's coffer. This unavoidable and unenviable role is not lost on many judges who are constrained by limited county funds. In some cases, the county or the court insists that the defense use the state's expert." *TSG Report* at 74-75.

Onondaga County exemplifies the problem. "[T]here is often a tacit pressure on 18-B

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[21] *See also* Miller Affirmation ¶ 25 (noting that the Schuyler County Public Defender's office had no investigators); Carroll Affidavit ¶¶ 90, 110 (Schuyler has no staff investigator and "no funds for public defense counsel to use for investigations . . . . As a result, public defense counsel conducts very little, if any, independent defense investigation."); Manghan Affirmation ¶¶ 18-19 (noting that one of Suffolk Legal Aid's two offices had only one investigator for 20-25 attorneys, making it impossible to rely on investigators in each case where one was needed); Carroll Affidavit ¶¶ 38, 48-49 (noting that Washington County "lacks any investigative or secretarial services" and "has no investigative capacity" and "has limited to no resources or access to expert witness assistance").

attorneys to not apply for experts in order to keep costs down." *TSG Report* at 74; *see also* Parry Affirmation ¶¶ 15-16 (explaining how the assigned counsel program discourages attorneys from applying for expert and other professional services for their clients). One judge in Onondaga County told The Spangenberg Group that "he does not receive requests for investigators and experts except in the most serious cases, and even then he is extremely mindful of cost and requires attorneys to provide 'lots of detail' as to their need for the services." *TSG Report* at 75. According to 2004 data, the most recent available without discovery in this case, "while there were 2,900 felony assignments made through the Assigned Counsel Program, and $3.8 million paid in attorney vouchers, only about $71,000 was spent on experts and investigators." *Id.* at 77. Even where attorneys do seek the assistance of expert witnesses, there often is no money available to hire them. *New York State Commission on the Future of Indigent Defense Services: Ithaca Hearing* 96-97 (statement of Craig Schlanger, Onondaga County Assigned Counsel Program) (attached to Stoughton Affirmation as Exhibit D) ("[T]here are situations where lawyers have to go begging for experts to take cases, as they say, on 18-B rates . . . sometimes lawyers have a problem getting authorization to hire experts to be paid at their full rate."). Similar dynamics exist in Schuyler County, where one assigned counsel attorney reports that difficulties getting court approval for expert funds results in attorneys "not requesting expert services, as there is a general belief that such requests will be denied . . . ." Betzjitomer Affirmation ¶¶ 18-20.

As noted above, the vast majority of the plaintiffs and affiants report that their attorneys did no factual investigation into their case, and no plaintiff or affiant reports having been offered or provided with expert services for their defense. *See supra* note 6 (citing affidavits).

Incoherent or Excessively Restrictive Eligibility Standards. The Kaye Commission

found that a lack of coherent, rational eligibility standards operated to deprive indigent defendants of representation to which they are entitled. The report states:

> [G]uidelines for the appointment of counsel exist only in a few counties and . . . even in those counties, the guidelines were not uniformly applied. Thus, a defendant may be deemed eligible for the appointment of counsel in one county and ineligible in a neighboring county or even in a different court within the same county. Moreover, public defenders and assigned counsel themselves are frequently charged with the responsibility for making initial eligibility determinations. This responsibility not only adds unduly to their workloads but also raises serious ethical issues. Judges and court clerks also share in the responsibility for determining eligibility for assignment of counsel and must do so with limited or no standards to follow. . . . [I]n the absence of uniform guidelines, subjective and sometimes disparate eligibility determinations are made across the state, and competing concerns such as county funding and workload may become inappropriate factors in the determinations.

Kaye Commission Report at 15-16.[22] By way of example of the impact on the outright denial of the right to counsel caused by such standards, Washington County's public defender office apparently denied services to 60 percent of the defendants referred to the office for representation. Thomas Affidavit ¶ 16. Financial pressure to contain costs by limiting cases often drives these excessively restrictive eligibility standards. *Id.* ¶ 28 ("standards governing eligibility are frequently used to restrict the expenditure of [county] funds."); *Onondaga Assigned Counsel Program Annual Report* at 3 (attached to Klein Affirmation as Exhibit C) (stating that ACP changed its eligibility standards as a measure to "hold down the line of costs" and touting the fact that the new system resulted in more defendants being denied eligibility than in the previous year).

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[22] *See also TSG Report* at 95 ("The absence of uniform eligibility standards and procedures in New York has resulted in disparate and, in some instances, inappropriate eligibility determinations."); Manghan Affirmation ¶¶ 35-37 (noting that the eligibility process in Suffolk County was "arbitrary" and "often results in some defendants being denied Legal Aid representation when they should qualify for it"); Gradess Affirmation ¶¶ 24-25 ("There are many eligible defendants in this state who are found ineligible for counsel. There are also eligible defendants denied without an eligibility inquiry. . . . [Eligibility guidelines] are incoherent and frequently overly restrictive.").

Examples of inappropriate eligibility considerations include the failure to consider debts and the automatic denial of counsel if a client owns certain assets such as a car or a house. Gradess Affirmation ¶ 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."); Klein Affirmation ¶ 6 (in Onondaga, "ownership of a home, including a mobile home, no matter the amount of equity in or the value of the home, automatically disqualifies a client from eligibility for assigned counsel."); *New York State Commission on the Future of Indigent Defense Services: Albany Hearing* 237-38 ("There are issues in which ownership of a home automatically precludes assignment of counsel, without consideration of the value of the home, equity in the home, or the ability to obtain a loan against the home, without looking to the time. And that home can even be a mobile home.") (statement of Jim Murphy, Legal Services of Central New York) (attached to Stoughton Affirmation as Exhibit E). Similarly, "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." Gradess Affirmation ¶ 24.

Another example of excessively restrictive eligibility standards is denying counsel to clients under the age of 21 based on parental income, regardless of whether the parents actually support the client, or denial based on failure to report parental income, even if the client is unable to obtain that information from uncooperative or estranged parents. Miller Affirmation ¶ 13 ("If someone was under 21 years old, the person's parental income was taken into account regardless of whether the parent was willing to contribute to the child's defense. I do not believe that the

public defender's office could handle its caseload if it did not treat the applications of those under 21 in this way."); Parry Affirmation ¶ 20 (explaining how Onondaga County denies eligibility based on failure to obtain parental income information); Klein Affirmation ¶ 7 (same); *New York State Commission on the Future of Indigent Defense Services: Ithaca Hearing* 222 ("The use of parental income to determine eligibility for those under 21 years of age is a continuing problem. That's a problem not just in Onondaga County, but I think across the state.") (statement of Susan Horn, Hiscock Legal Aid Society) (attached to Stoughton Affirmation as Exhibit D); Gradess Affirmation ¶ 27 ("Several counties disqualify minors and people under the age of 21 based on parental income").

In Schuyler County, the public defenders' office has been forced by budgetary considerations to deny eligibility to any person with income greater that $12,763, regardless of whether that person carried debts or had financial obligations that made it impossible to afford a private attorney. Miller Affirmation ¶ 13. As a result, the former Chief Defender estimates that more than 40 percent of the clients referred to her office were denied counsel based on a determination that they were ineligible. Miller Affirmation ¶ 14; Thomas Affidavit ¶ 16 (confirming that estimation based on reported data). Susan Betzjitomir, a local town justice and former assigned counsel attorney, reports that "instances arise where [Schuyler County] public defenders wish, improperly, to reject applicants for their services" because of financial pressure to cut costs and this "leads to many defendant who are in fact indigent being denied appointment of counsel." Betzjitomer Affirmation ¶¶ 8-12. Shawn Chase, for example, was repeatedly and erroneously found ineligible for public defense services until he got a letter from another attorney explaining to the court and the public defender's office that he was, in fact, eligible. Affidavit of Plaintiff Chase ¶¶ 5-14. As a result, his case was delayed for five months, during

which he had no attorney. *Id.* ¶ 5.

Even when restrictive eligibility standards do not operate to bar indigent defendants from receiving counsel, high procedural hurdles to obtaining representation – such as overly complex or burdensome application processes – may delay the assignment of counsel through the early stages of a case, causing eligible indigent defendants to go without counsel during critical proceedings. *See, e.g.*, Parry Affirmation ¶¶ 7, 19-21; Miller Affirmation ¶¶ 13-14.

The Absence of Vertical Representation. The Counties' public defense systems are often designed so that indigent defendants are provided with different public defense attorneys at different stages of the process. Such "horizontal" representation creates a barrier to forming a meaningful attorney-client relationship and developing a client's trust. Moreover, when a defendant's case is between stages, it simply lies dormant with no representation being provided, no investigations conducted, and no counsel to advise the client until the case is assigned a new attorney at the next stage. Thus, horizontal representation exacerbates problems such as the lack of attorney-client communication and the failure to provide appropriate investigative and expert services. The Spangenberg Group explains the problem in detail:

> In order to handle the high caseloads and numerous dockets, many institutional providers provide "horizontal" rather than "vertical" representation. Rather than assigning one staff attorney to handle a case from assignment through disposition (vertical representation), any number of attorneys may handle the case at different stages or dockets (horizontal representation). . . . In this manner, a defendant may be represented by any number of different attorneys during the life of the case. In addition, when a defendant's case is between court appearances, it sometimes also remains between attorneys with no investigation or work performed on the case. While horizontal representation is usually employed for the sake of efficiency, it can be difficult and confusing for a client; it may create a barrier to forming a meaningful attorney-client relationship and developing a client's trust.

TSG Report at 47-48.[23]

[23] *See also* Manghan Affirmation ¶¶ 32-34 (noting that Suffolk Legal Aid often has different

The lack of continuous representation has real impact on indigent criminal defendants. Plaintiff Turner has had at least six different attorneys assigned to him throughout the course of his case. Affidavit of Plaintiff Turner ¶¶ 6-7, 17-18. Plaintiffs Booker, Kaminski, McIntyre and Metzler have all had three different lawyers, hindering their ability to form meaningful attorney-client relationships, creating stress and confusion, and forcing them to begin anew with an attorney unfamiliar with the facts of their case each time.[24] Several others of the plaintiffs had "arraignment-only" attorneys or had new attorneys assigned once they were indicted, so that they second attorney did not enter their case until weeks after arrest, often after critical stages in the criminal process had passed.[25]

Lack of Independence from Judicial, Prosecutorial and Political Authorities. Public defense providers in the counties lack independence from judicial, prosecutorial and political authorities. "New York fails to ensure the independence of its indigent defense providers who are too often subject to undue interference from the counties that fund them." *Kaye Commission Report* at 20. The Spangenberg Group elaborates:

> One of the biggest overall problems these programs face is a lack of independence from the counties that fund them. As a result, many providers feel pressure to limit their budget requests and to prove their efficiency to the funding source. . . . In some counties, while the burden on the providers has increased, the funding and resources have not. . . . All these factors leads to inadequate staffing and high caseloads that help prevent attorneys from providing quality representation to each client. This problem is frequently exacerbated by a lack of

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attorneys representing a client at different stages of the case "because of the shortage of attorneys"); Miller Affirmation ¶ 18 (noting that, in Schuyler County, felony clients routinely had a new attorney assigned once a case was transferred to county court, often months after the case was opened); Carroll Affidavit ¶¶ 96-97 (assigned Schuyler an "F" grade for continuous, vertical representation).

[24] Affidavit of Plaintiff Booker ¶¶ 6, 10; Affidavit of Plaintiff Kaminski ¶¶ 10, 14, 17, 18; Affidavit of Plaintiff Metzler ¶¶ 14, 18, 26; Affidavit of Plaintiff McIntyre ¶¶14-15.

[25] Affidavit of Plaintiff Glover ¶ 5; Affidavit of Plaintiff Tomberelli ¶ 6; Affidavit of Plaintiff Yaw ¶¶ 3, 12-13; Affidavit of John Vazquez ¶¶ 4-5.

meaningful performance standards and oversight.

TSG Report at 39. *See also* Gradess Affirmation ¶¶ 75-90.

In the course of its investigation, The Spangenberg Group visited counties where officials reported that the public defender had to be of a particular political party to be appointed by the county, where the District Attorney played a major role in selecting the public defender, and where "a zealous advocate is not as likely to get approved." *Id.* at 40. No fewer than seven county public defenders and legal aid society directors – from Saratoga, Rensselaer, Essex, Greene, Steuben, Onondaga, and Westchester counties – testified before the Kaye Commission, citing specific instances of political interference with their ability to provide meaningful and effective representation to their indigent clients. *Id.* at 41. The recent NLADA study of Washington, Ontario and Schuyler counties assigned those counties F, C+, and D- grades for independence, respectively. Carroll Affidavit ¶¶ 20-24, 65-69, 117-119.

Political interference diminishes the quality of representation. In Onondaga County, for example, the Assigned Counsel Program noted that "any quality improvement argument has to be couched and sold to the county as cost savings to get it through." *TSG Report* at 57. The director of a legal aid society that formerly handled a large percentage of Onondaga County's criminal docket reported the following exchange with a county legislator to the Kaye Commission:

> A legislative committee member asked me the following series of questions in a hostile tone of voice, starting with, isn't it true that the legal aid society has a policy of not disposing of cases at arraignment? I answered that that was in fact our policy because we were never given adequate resources to be able to meet our clients in jail before arraignment or to have staff present to discuss cases with them before arraignment. Therefore, it would be a violation of an ethical [obligation] to our clients to do so. The next question was, isn't it true that you make motions in every case? The answer unfortunately was no. We don't have the resources to do that. . . . The next question was, isn't it true that you served

> demands to produce in every case? The answer was yes. That is the statutory requirement to preserve our client's rights to discovery. And, finally, I was asked, isn't it true that you require a written response from the DA's office to those demands? . . . These questions were very troubling because they imply that we were doing something wrong by fulfilling our legal and ethical responsibility to our clients and that we were subjected to criticism for providing vigorous representation to our clients. . . . I was subsequently told by a member of the judiciary...that the word on the street was that we lost the city court program because we delayed cases. My response then and my response [now] is, one person's delay is another person's due process.

New York State Commission on the Future of Indigent Defense Services: Ithaca Hearing 230-32 (statement of Susan Horn, Hiscock Legal Aid Society) (attached to Stoughton Affirmation as Exhibit D). Shortly after this exchange, the county terminated the legal aid society's contract to perform certain criminal public defense representation for Onondaga County. *Id.*

The former Chief Defender of Schuyler County reports that the lack of political independence "compromised the ability of the Schuyler County Public Defender's Office to serve its clients" and that she had to lobby the legislature annually for her budget, which evaluated performance based entirely on efficiency rather than the quality of services provided to indigent defendants. Miller Affirmation ¶¶ 4-5. Her experience starkly illustrates the risks of placing constitutionally necessary services in the hands of political bodies:

> The attitude of the county legislature was that it was not very important to fund the public defender adequately. This arose from a belief that the public defender defends guilty people and that it is a waste of money to fund such services. . . . [T]he legislature seemed to believe that people should just plead guilty and it placed far more importance on funding the prosecution. . . . A legislator once told me that he did not understand why I needed money for assigned counsel given that they had hired me. I explained, not just that time but on other occasions, that when there are multiple defendants in a criminal case or opposing parties in Family Court, each defendant or party needs a separate lawyer because there are conflicts of interest between them. . . . I do not believe that the legislature ever fully understood this during my four-year appointment.

Miller Affirmation ¶¶ 10-11.

In addition to the lack of independence from political functions, The Spangenberg Group noted a lack independence from the judicial function, especially with regard to the assignment of counsel to particular cases.

> The assignment of cases to 18-B attorneys in New York is often performed by judges on an ad hoc basis. Even in counties with formal assigned counsel plans and paid administrators, individual case assignments frequently occur in court according to the judge's own procedure. This lack of uniform assignment procedures among New York's counties and courts leaves the assigned counsel systems open for abuse; sometimes the unfortunate result is an unfair allocation of cases and a lack of independence of the attorney from the judge making the assignments. When assignments are made by the court without the guidance of clear and fair assignment procedures, there is an increased risk that the assignments will be based on favoritism or a bias of the court. As suggested by the ABA standards, such a system is open to be attacked for, at the very least, an appearance of a conflict between the interests of the defendants in receiving quality representation and the interests of the court. The interests of the court may be personal, political, or merely the desire to handle a large number of cases with the greatest efficiency. Each of these conflicting interests appears to be at play somewhere in New York.

TSG Report at 63.

Even before discovery has begun in this case, examples of this phenomenon are already documented in the Counties. In Suffolk, for example, where the assignments are made by judges, The Spangenberg Group found that "some attorneys are appointed because of their reputation for pleading or not litigating cases." *TSG Report* at 63. In Onondaga County, "a number of judges got together and had a 'draft' to pick the core attorneys that they wanted in their courtrooms. One 18-B attorney in the county told [The Spangenberg Group] that although he is not on the felony panel, he is sometimes assigned felony cases by a judge." *Id.* at 64.

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

See supra 23 (detailing problems obtaining expert and investigative services).

Inadequate Resources and Compensation, Especially as Compared to Prosecutorial Counterparts. Public defense service providers are under-funded, under-resourced and ill-equipped to carry out their constitutional responsibility to defend their clients. As a result of the failure to commit adequate state funds, the total amount of money spent on public defense services is insufficient to meet basic constitutional and legal standards and directly results in systemic violations of indigent criminal defendants' right to counsel. The Kaye Commission minced no words on this point: It found that "funding for indigent defense services is totally inadequate." *Kaye Commission Report* at 2. *See also id.* at 17 ("The amount of monies currently allocated within the State of New York for the provision of constitutionally-mandated indigent criminal defense is grossly inadequate."); *TSG Report* at 155 ("New York's indigent defense system is in a serious state of crisis and suffers from an acute and chronic lack of funding.").

The underfunding of public defense services is illustrated starkly by comparison to the resources provided to prosecutorial counterparts. The dramatic disparity in resources highlights the handicap public defense attorneys must carry as they attempt to put the prosecution's case to meaningful adversarial testing. As the Kaye Commission found:

> Prosecutors are consistently better funded and better staffed than indigent criminal defense service providers. Their personnel, on average, have higher salaries and greater ancillary resources than do their public defender counterparts. Moreover, the disparity is not just apparent in funding, salaries and the number of full-time employees but in additional in-kind resources available only to prosecutors. This includes access to all law enforcement agencies in the county, as well as the New York State Division of Criminal Justice Services, the FBI and the state crime laboratory. In addition, prosecutors often receive federal and state grant assistance that defenders do not. For example, the creation of new drug and other specialty courts (as of September 8, 2005, 218 courts were operational with at least 55 more planned) often comes with additional federal grants for prosecutors and courts but not for defense providers. Nonetheless, institutional providers in particular are expected to staff many more parts, and make many

more court appearances, with no additional resources.

Kaye Commission Report at 23. *See also* Gradess Affirmation ¶¶ 62-74. In its recent study of Washington, Ontario and Schuyler counties, NLADA assigned "F" letter grades to each of these counties in evaluating the parity between the prosecutorial and defense functions. Carroll Affidavit ¶¶ 52, 108, 146.[26]

The lack of adequate funding exacerbates all of the underlying causes of the deprivation of constitutionally rights of indigent criminal defendants, as attorneys must sacrifice basic elements of adequate representation due to budgetary constraints. As one service provider stated:

> For public defenders and legal aid societ[ies], the results of inadequate funding are inadequate staffing, too high case loads, too low salaries, all of which result in high turnover, constant training of new attorneys and ultimately the diminishing of the quality of representation. The pressure of cost containment often put constitutional providers in the untenable position of having to choose between decent salaries for our staff and adequate funding for expert's services for clients and other support services.

New York State Commission on the Future of Indigent Defense Services: Ithaca Hearing 228 (statement of Susan Horn, Hiscock Legal Aid Society) (attached to Stoughton Affirmation as

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[26] *See also TSG Report* at 83-84; *New York State Commission on the Future of Indigent Defense Services: Albany Hearing* 250-51 ("Year in and year out the state has added to the responsibilities and workload of public defense lawyers, criminalizing more behavior, increasing penalties, without adding resources to meet those defense responsibilities. The state has increased funding for prosecution and law enforcement a great deal more than it has increased funding for those who enforce constitutional rights.") (statement of Michael Whiteman) (attached to Stoughton Affirmation as Exhibit E); Miller Affirmation ¶¶ 23-24 (noting that Schuyler County district attorney's salary was more than 50% higher than Chief Defender's salary, despite equivalent levels of experience, and that Public Defenders' Office had less than half the staff of the District Attorney's office, despite the fact that the Public Defender was responsible for both criminal and Family Court cases). The inability to compensate attorneys competitively forces many out of public defense practice. *See, e.g.*, Manghan Affirmation ¶¶ 8-12 (noting that attorney "could not afford the cost of living on Long Island" on Suffolk Legal Aid salary and left Legal Aid to make more money).

Exhibit D).[27]

Furthermore, "[m]any institutional providers are practicing under inadequate conditions regarding office space, technology and overall resources." *TSG Report* at 50. For example, the Suffolk County Legal Aid Society does not have enough office space for all of its employees. *TSG Report* at 49. Similarly, the Schuyler County Public Defender was, until recently, forced to operate out of her own private office, with the county covering only two-thirds of her overhead expenses and no provision for a library, computer, copy machines or other necessary equipment. Miller Affirmation ¶ 31. "Many institutional defenders have scarce technological resources for computerized case-tracking, conducting conflicts checks, and conducting legal research. . . . Some offices have little or no access to online research tools such as Westlaw or Lexis." *TSG Report* at 50.

For assigned counsel programs, severe underfunding pressures attorneys to keep costs low and administrators to cut vouchers for attorney reimbursement, even at the expense of adequate representation. In Onondaga County, for example, a county court judge who recently ordered the assigned counsel program to pay several attorneys immediately in full for vouchers the county had cut or delayed paying, criticized the program for "incessant bureaucratic nitpicking" in cutting attorney vouchers, remarking that "good attorneys" were being driven out of the program and that the pattern of voucher-cutting "almost amounts to an on-going violation of the Sixth Amendment." Jim O'Hara, *Syracuse Post-Standard*, Sept. 6, 2007 (discussing

[27] *See also Kaye Commission Report* ay 17 ("under-funding has a deleterious impact on all aspects of indigent defense representation."); *TSG Report* at 50 (finding that basic clerical support staff is insufficient in many public defense offices and, as a result, "attorneys must not only handle their difficult caseload, but also perform non-legal work such as typing, copying and filing."); Miller Affirmation ¶ 4 ("[T]he chronic lack of adequate funding . . . compromised the ability of the Schuyler County Public Defender's Office to serve its clients."); Manghan Affirmation ¶¶ 13-19 (noting that Suffolk Legal Aid office has no paralegals or translators, and only one investigator for twenty to twenty-five attorneys).

Stanton v. Onondaga County, 05-1025) (attached to Parry Affirmation as Exhibit 2). *See also* Session Affirmation ¶ 2-4 (the assigned counsel program "regularly and excessively cuts attorney vouchers for public defense representation, delays payments on attorney vouchers, and creates pressure on attorneys to sacrifice necessary representation in order to control costs."); Parry Affirmation ¶¶ 4-6 ("ACP systematically fails to pay attorneys for the total hours of work they perform on behalf of indigent criminal defendants, forcing public defense attorneys to choose between adequate representation of their clients and their own financial needs and interests. . . . ACP flatly bars payment for services essential to meaningful representation").[28]

Assigned counsel attorneys also often have difficulty obtaining payment in a timely fashion. The Spangenberg Group report found that in Suffolk "it can take between four and seven months to get paid," while in Onondaga, there is "a large delay in paying any vouchers that have been cut and then contested by the attorney." *TSG Report* at 66. Indeed, in Onondaga County, several attorneys have had to sue the County to obtain payment for public defense services. *See* Session Affirmation ¶ 5; Parry Affirmation ¶ 4-5, 10, 12-15. In Schuyler County, assigned counsel attorneys report that requirement that they advance all litigation costs out of pocket and the inability to receive any interim payment until after a case is closed "gives financial incentive to assigned counsel to conclude cases quickly, often times to the detriment of

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[28] The Onondaga County Assigned Counsel Program's board of directors has "a voucher subcommittee whose primary goal, according to a board member, is to cut costs. Indeed, [The Spangenberg Group] observed a meeting of the board in which members reviewed and cut vouchers." The Report continues:

> [S]ince the 18-B rates were increased, Onondaga County has focused on cost-saving measures with the assigned counsel plan, including scrutinizing vouchers and ending payment for travel time and expenses within the county as well as payment for "routine letters" to clients (e.g., reminding a client of a court date). We were told that 18-B attorneys constantly feel pressure from the assigned counsel board, county and judges to keep their vouchers down.

TSG Report at 57. *See also* Parry Affirmation ¶¶ 4-5, 22-24 (detailing impact of voucher cutting on the quality of representation).

their clients." Betzjitomer Affirmation ¶ 19.

SUMMARY OF ARGUMENT

The factual findings from the Kaye Commission on the Future of Indigent Defense Services, supported by information contained in the affirmations and affidavits submitted in support of this motion, constitute overwhelming proof of systemic failure in the public defense system. Taken together, these facts describe a public defense system in crisis that is incapable of meeting the basic needs of its clients and poses a severe and unacceptably high risk that indigent criminal defendants will be denied their right to meaningful and effective assistance of counsel.

Proof of such a "severe and unacceptably high risk" establishes a systemic violation of the right to counsel under both the Sixth Amendment to the U.S. Constitution and the Constitution of the State of New York. Plaintiffs' proof does not rest on the proposition that they received ineffective assistance of counsel as defined by case law governing individual, post-conviction claims. Rather, plaintiffs have established a probability of success on the merits by demonstrating that the systemic flaws in New York's public defense system are so severe that they pose a constitutionally cognizable risk that indigent criminal defendants are being denied meaningful and effective assistance of counsel.

Plaintiffs and the class they seek to represent suffer irreparable harm with each day that the current regime remains in place. Plaintiffs seek a preliminary injunction that would require the State to move forward immediately with initial reforms of the public defense system by addressing the most urgent needs of indigent criminal defendants and the attorneys charged with their defense. These immediate, initial steps will lay the foundation for the comprehensive systemic reform plaintiffs seek as their final relief.

ARGUMENT

This Court has broad discretion to grant a preliminary injunction "in any actions where . . . the defendant . . . is doing . . . an act in violation of the plaintiff's rights . . . or . . . where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which . . . would produce injury to the plaintiff." CPLR § 6301. This discretion includes the power to grant affirmative, mandatory relief in the form of a preliminary injunction directing government entities or officials to fulfill their constitutional and statutory responsibilities. *See, e.g.*, *McCain v. Koch*, 70 N.Y.2d 109, 116-17 (1987) (holding that courts have the power to issue mandatory preliminary injunctions to force government to provide housing that meets minimum legal standards); *Doe v. Dinkins*, 192 A.D.2d 270, 275-76 (1st Dep't 1993) (affirming a mandatory preliminary injunction requiring an increase in homeless shelter capacity); *Boung Jae Jang v. Brown*, 161 A.D.2d 49, 55-57 (2d Dep't 1990) (affirming a mandatory preliminary injunction requiring a police department to actively protect political protesters); *N.Y. County Lawyers' Ass'n v. State*, 192 Misc. 2d 424, 429-30 (Sup. Ct. N.Y. County 2002) (issuing a mandatory injunction to remedy defects in New York's system of compensating public defense attorneys).

In exercising its discretion to grant a preliminary injunction, the Court must evaluate whether plaintiffs have demonstrated (1) a likelihood of success on the merits; (2) danger of irreparable injury absent an injunction; (3) a balance of equities in their favor. *Nobu Next Door LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 (2005); *Doe v. Axelrod*, 73 N.Y.2d 748, 750 (1988). Plaintiffs address each of these elements in Parts I, II, and III below.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS BY SHOWING THAT STATE'S NEGLECT OF THE PUBLIC DEFENSE SYSTEM PUTS INDIGENT CRIMINAL DEFENDANTS AT SEVERE AND UNACCEPTABLY HIGH RISK OF BEING DENIED MEANINGFUL AND EFFECTIVE ASSISTANCE OF COUNSEL.

New York's failing public defense system systemically violates indigent criminal defendants' right to counsel. As established by the only public defense reform case previously litigated in New York State courts, the legal standard for establishing a systemic violation of the right to counsel under both federal and state law is a showing that plaintiffs and the class they represent face a "severe and unacceptably high risk" of receiving ineffective assistance of counsel due to systemic deficiencies in the public defense system. *See N.Y. County Lawyers' Ass'n v. State*, 192 Misc. 2d 424 (Sup. Ct. N.Y. County 2002) (granting preliminary injunction under both federal and state law); 196 Misc. 2d 761 (Sup. Ct. N.Y. County 2003) (judgment for plaintiff after trial). The types of systemic deficiencies that give rise to such a risk, as well as the meaning of "ineffective assistance of counsel," are well-defined by both the case law and by long-established and generally accepted national and state standards for judging the adequacy of defense representation and public defense systems. When these well-established legal standards are applied to the facts of this case, as set forth in the findings of the Kaye Commission and the affidavits and documentary evidence submitted by plaintiffs on this motion, plaintiffs' right to relief is clear.

A. A Systemic Right to Counsel Claim is Established By Proof that Indigent Criminal Defendants Face a "Severe and Unacceptably High Risk" of Being Denied Meaningful and Effective Assistance of Counsel.

This case seeks systemic reform of the public defense system on behalf of a class of indigent criminal defendants. The proper legal standard for evaluating whether the state is

systemically violating the constitutional and legal right to counsel is established not by individual, post-conviction right to counsel cases but by systemic reform cases similar to this one. Looking to such cases, it is clear that the proper legal standard asks whether, in light of the identifiable systemic failings, plaintiffs and the class they represent face a "severe and unacceptably high risk" of being denied meaningful and effective assistance of counsel that is capable of putting the prosecution's case to meaningful adversarial testing.

The seminal case in this area, *New York County Lawyers' Ass'n v. State*, was a systemic right to counsel challenge to the statutory cap on compensation for assigned counsel. The plaintiffs alleged that "failure to provide sufficient compensation to private counsel . . . has resulted in systematic deficiencies in the Supreme, Criminal and Family Courts in New York City and a risk that indigent adults and children will be denied their rights to meaningful and effective assistance of counsel and due process of law." 188 Misc. 2d 776, 787-88 (Sup. Ct. N.Y. County 2001) (denying motion to dismiss), *aff'd* 294 A.D.2d 69 (1st Dep't 2002). Plaintiffs prevailed both on a motion for preliminary injunction, 192 Misc. 2d 424 (Sup. Ct. N.Y. County 2002), and later at trial. 196 Misc. 2d 761 (Sup. Ct. N.Y. County 2003). The Supreme Court, New York County, found that indigent defendants faced "severe and unacceptably high risk [of] receiving inadequate legal representation." 192 Misc. 2d at 426; *see also* 196 Misc. 2d at 763 (finding for plaintiffs because they established that indigent criminal defendants "are at unreasonable risk of being subjected to a process that . . . fails to confirm the confidence and reliability in our system of justice."). In issuing a preliminary injunction, the court reasoned that "[g]ranting prospective relief to secure constitutional standards in state proceedings based on evidence of the likelihood of depriving fundamental and statutory rights has long been within the province of the courts. Evidence that minors and indigent adults will likely receive ineffective

assistance of counsel . . . is sufficient to warrant judicial intervention." 192 Misc. 2d at 432 (internal citations omitted).

Although the First Department never passed on the merits of the decision at trial, it issued an earlier opinion upholding the denial of the state's motion to dismiss. 294 A.D.2d 69 (1st Dep't 2002).[29] This decision, which represents the highest level decision on the standard for systemic indigent defense reform cases in New York state, rejected the State's contention that failure to allege specific incidents in which the right to counsel had actually been violated was fatal to the complaint. Quoting the Court of Appeals' decision in *Swinton v. Safir*, 93 N.Y.2d 758 (1999),[30] the First Department held that "proof of a 'likelihood of the occurrence of a threatened deprivation of constitutional rights is sufficient to justify prospective or preventive remedies . . . without awaiting actual injury.'" 294 A.D.2d at 74.

Prospective standards based on the risk or probability of jeopardizing constitutional rights, like the "severe and unacceptably high risk" applied in *New York County Lawyers' Ass'n*, also have been applied in systemic public defense reform cases in federal courts. In *Luckey v. Harris*, for example, the Eleventh Circuit noted, "In a suit for prospective relief the plaintiff's burden is to show 'the likelihood of substantial and immediate irreparable injury . . . ." 860 F.2d 1012, 1017 (11th Cir. 1988) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)), *rev'd on*

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[29] In New York, Appellate Division cases control statewide. *See Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 664-65 (2d Dep't 1984). Thus, the First Department's decision in *New York County Lawyers' Ass'n* is controlling authority.

[30] *Swinton* involved a terminated police officer's attempt to get a name-clearing hearing and expungement of stigmatizing material from his personnel file before it could be disseminated to future employers. Using the language cited in the text above, the Court of Appeals found that the plaintiff did not need to allege any actual harm in order to receive prospective relief. The Court of Appeals in *Swinton* relied on a systemic public defense reform case, *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), for the proposition that risk of constitutional violation is the standard, providing further doctrinal support for the "severe and unacceptably high risk" standard. *Swinton*, 93 N.Y.2d at 765-66.

abstention grounds, 976 F.2d 673 (11th Cir. 1992). The *Luckey* court went on to explain the critical distinction between claims alleging systemic, prospective violations of the right to counsel and traditional "ineffectiveness" claims following a finding of guilt:

> The sixth amendment protects rights that do not affect the outcome of the trial. Thus, deficiencies that do not meet the "ineffectiveness" standard may nonetheless violate a defendant's rights under the sixth amendment. . . . Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief – whether the defendant is entitled to have his or her conviction overturned – rather than to the question of whether such a right exists and can be protected prospectively.

860 F.2d at 1017. *See also Nicholson v. Williams*, 203 F. Supp.2d 153, 240 (E.D.N.Y. 2002) (in a case challenging systemic barriers to effective representation, "[t]he appropriate test for determining whether the system for appointed counsel is adequate should be whether counsel so appointed are reasonably likely to render . . . reasonably effective assistance.") (internal quotation and citation omitted); *Wallace v. Kern*, 392 F. Supp. 834, 845-46 (E.D.N.Y.) (granting a preliminary injunction to cap public defender caseloads based on evidence that excessive caseloads create the risk that lawyers cannot adequately consult with clients or investigate their cases), *rev'd on abstention grounds*, 481 F.2d 621 (2d Cir. 1973).

These cases establish that proof of "ineffective assistance of counsel" on an individual level is not a necessary component of a systemic right-to-counsel claim. Rather, identification of systemic defects that pose unacceptable threats to the right to counsel is sufficient. This proposition has been applied in other state jurisdictions to evaluate systemic public defense reform cases. *See, e.g., Best v. Grant County*, No. 04-2-00189 (Wash. Sup. Ct. Oct. 14, 2005) (denying summary judgment to county defendant in systemic indigent defense reform suit on grounds that individual constitutional injury is not required, as proof of systemic defects creates undue risk of constitutional injury); *Rivera v. Rowland*, No. CV 950545629S, 1996 WL 636475

at *5 (Conn. Sup. Ct. Oct. 23, 1996) (denying a motion to dismiss in a state-wide public defense reform class action, finding that the plaintiffs state a claim by alleging that they "are at imminent risk of harm" due to, among other things, extreme caseloads and inadequate financial and human resources); *State v. Peart*, 621 So. 2d 780, 791 (La. 1993) (finding a constitutional violation where evidence of systemic flaws proved that "defendants who must depend on [the public defense system] are not likely to be receiving the reasonably effective assistance of counsel the constitution guarantees"); *State v. Smith*, 681 P.2d 1374, 1384 (Ariz. 1984) (finding that systemic deficiencies create a rebuttable presumption of inadequate assistance of counsel). Thus, the consensus of systemic reform cases around the country supports application of the *New York County Lawyers' Association* standard of "severe and unacceptably high risk" to systemic public defense reform cases such as this one.

B. National and State Standards Should Be Used to Evaluate Whether New York's Public Defense System Meets Constitutional Standards.

In determining what factors create a "severe and unacceptably high risk" of the denial of the right to counsel, the Court should look both to case law defining the right to counsel and to national and state standards governing the provision of defense services. As The Spangenberg Group noted in its report to the Kaye Commission,

> A measure of an adequately functioning indigent defense system is an evaluation of whether indigent defense counsel are able to follow national and state performance standards in all indigent defense cases. Unfortunately, . . . during the course of our study, it was apparent that many providers of mandated legal representation, as well as the local systems themselves, fell far short of meeting these standards. The resulting conclusion is that the right to counsel of indigent defendants is being placed at serious risk throughout New York State.

TSG Report at 21.

Courts have in several instances looked to national and state standards and guidelines to

evaluate constitutional claims in public defense reform litigation. The *New York County Lawyers Association* case cited ABA and NLADA standards in its opinion after trial assessing the representation problems created by the low 18-B rates. *N.Y. County Lawyers' Ass'n*, 196 Misc.2d at 775 (accepting the ABA and NLADA standards as trial exhibits). In *Wallace v. Kern*, a class action on behalf of felony detainees seeking injunctive relief with respect to representation by attorneys at The Legal Aid Society, the court concluded: "Comparing the level of representation now provided The Legal Aid Society with the American Bar Association Standards, it becomes evident that the overburdened, fragmented system used by Legal Aid does not measure up to the constitutionally required level." 392 F. Supp. at 847. The highest courts of Arizona and Louisiana have held that there is a rebuttable presumption of ineffective assistance of counsel when a system does not meet ABA standards. *See State v. Peart*, 621 So. 2d 780 (La. 1993); *State v. Smith*, 681 P.2d 1374 (Ariz. 1984).

Moreover, New York courts in individual ineffective assistance of counsel cases frequently look to ABA and other professional standards to judge the competency of counsel.[31] Federal courts likewise rely on standards to evaluate right to counsel claims. In *Strickland v. Washington*, for example, the United States Supreme Court stated that "prevailing norms of practice as reflected in American Bar Association standards and the like, *e.g.*, ABA Standards for

[31] *See, e.g.*, *People v. Henriquez*, 3 N.Y.3d 210, 226-27 (2004) (Smith, J., dissenting) (citing ABA standards as a benchmark for evaluating effective assistance of counsel); *Stultz*, 2 N.Y.3d at 285 n.13 (noting that evaluating claims of ineffective assistance for appellate counsel is more difficult because while there are ABA standards for trial counsel there are none for appellate counsel); *Settles*, 46 N.Y.2d at 164 (citing the ABA Code of Professional Responsibility for the principle that right to counsel attaches after indictment); *People v. Medina*, 44 N.Y.2d 199, 208 (1978) (citing the ABA Code of Professional Responsibility for determining whether there is good cause to replace a particular public defense counsel with another court-appointed attorney); *People v. Bennett*, 29 N.Y.2d 462, 466-67 (1972) (citing ABA standards for the proposition that defense counsel must conduct adequate investigations); *People v. Rivera*, 12 Misc.3d 1158(A), at *22 (Sup. Ct. Bronx County 2006) (citing ABA standard to evaluate counsel's failure to respect client's right to make strategic decisions at trial).

Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ('The Defense Function') are guides to determining what is reasonable" attorney performance for purposes of the Sixth Amendment. 466 U.S. 668, 688 (1984).[32]

In light of this well-established law, the propriety of judging New York's public defense system against ABA, NLADA, NYSDA and NYSBA standards in addition to relevant case law is clear. As demonstrated below, New York's system fails to live up to those standards, as well as the standards set by state and federal case law, and thus places indigent criminal defendants across the state at severe and unacceptably high risk of not receiving meaningful and effective assistance of counsel.

C. New York's Public Defense System Places Indigent Criminal Defendants at Severe and Unacceptably High Risk of Being Denied Meaningful and Effective Assistance of Counsel.

As stated above, the Kaye Commission concluded in no uncertain terms that "the indigent defense system in New York State is both severely dysfunctional and structurally incapable of providing each poor defendant with the effective legal representation that he or she is guaranteed

[32] *See also Rompilla v. Beard*, 545 U.S. 374, 387 (2005) (citing ABA standards to criticize an attorney's failure to properly investigate and noting that the ABA standards describe the obligations of defense counsel "in terms no one could misunderstand"); *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003) (re-emphasizing the appropriateness of *Strickland*'s reliance on ABA standards and looking to ABA standards to find scope of counsel's investigation into mitigating factors for death penalty sentencing phase inadequate); *Roe v. Flores-Ortega*, 528 U.S. 470, 490 (2000) (Souter, J., dissenting) (citing ABA standards on defense counsel's duty to consult with client and endorsing the use of standards to evaluate ineffective assistance cases); *Cuyler v. Sullivan*, 446 U.S. 335, 346 n.11 (1980) (citing ABA standards to support the proposition that defense counsel have a duty to notify courts of potential conflicts); *id.* at 356, n.3 (Marshall, J., dissenting) (citing ABA standards to define "conflict of interest"); *Grenier v. Wells*, 417 F.3d 305, 321 (2d Cir. 2005) ("Norms of practice, reflected in national standards like the American Bar Association (ABA) Standards for Criminal Justice, are useful guides for evaluating reasonableness. The Supreme Court has frequently cited the ABA Standards in its decisions evaluating the constitutional sufficiency of defense counsel's investigations.") (internal citations omitted); *United States v. Russell*, 221 F.3d 615, 620-21 (4th Cir. 2000) (relying on ABA standards to assess claim of ineffective assistance of counsel); *United States v. Blaylock*, 20 F.3d 1458, 1466 (9th Cir. 1993) (same); *United States v. Loughery*, 908 F.2d 1014, 1018 (D.C. Cir. 1990) (same); *United States v. Arakelian*, No. 04 CR 447, 2006 WL 1153376, at *11 (S.D.N.Y. Apr. 26, 2006) (quoting ABA standards concerning defense counsel's duties during plea bargaining).

by the Constitution of the United States and the Constitution and laws of the State of New York . . . [and] has resulted in a disparate, inequitable, and ineffective system for securing constitutional guarantees to those too poor to obtain counsel of their own choosing." *Kaye Commission Report* at 2. The Commission further found that "New York's current fragmented system of county-operated and largely county-financed indigent defense services fails to satisfy the state's constitutional and statutory obligations to protect the rights of the indigent accused." *Id.* at 15. That conclusion was based on a comprehensive, two-year study of New York's public defense system by The Spangenberg Group, respected experts in the field of public defense services, which found that "[e]very day – and for years – the dysfunctional [public defense] system subjects indigent adults and children across the state to a severe and unacceptable risk of being denied meaningful and effective representation in violation of their state and federal right to counsel." *TSG Report* at 155. In the words of the Chief Judge herself,

> I have not seen the word 'crisis' so often, or so uniformly, echoed by all of the sources, whether referring to the unavailability of counsel in the Town and Village Courts, or the lack of uniform standards for determining eligibility, or the counties' efforts to safeguard county dollars, or the disparity with prosecutors, or the lack of attorney-client contact, or the particular implications for communities of color.

Judith S. Kaye, *The State of the Judiciary* 10 (2006) (attached to Stoughton Affirmation as Ex. F).

The right to counsel is firmly established in New York State and has been since the Legislature passed section 308 of the Criminal Procedure Law in 1881, establishing felony defendants' right to state-appointed counsel. In 1965, the Court of Appeals further expanded the right to counsel in *People v. Witenski*, which held that indigent defendants in all criminal cases, not merely in felony prosecutions, are entitled to have counsel appointed to represent them. 15

N.Y.2d 392, 395 (1965). The Court of Appeals observed that the "right and the duty of our courts, to assign counsel for the defense of destitute persons, indicted for crime, has been, by long and uniform practice, as firmly incorporated into the law of the State, as if it were made imperative by express enactment." *Id.* at 397 (internal quotation omitted). Both state and federal law recognize that, as the United States Supreme Court noted in the landmark case *Gideon v. Wainwright*, "lawyers in criminal courts are necessities, not luxuries" because it is an "obvious truth" that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." 372 U.S. 335, 344 (1963).

Under current New York law, the right to counsel extends to all felonies, misdemeanors, and non-traffic violations, regardless of the sentence actually imposed. N.Y. County Law § 722-a; *People v. Ross*, 67 N.Y.2d 321, 325 (1986). Under both federal and New York law, the right applies at every critical proceeding from arraignment through direct appeal. *People v. Claudio*, 83 N.Y.2d 76, 81 (1993) (arraignment); *People v. Samuels*, 49 N.Y.2d 218, 223 (1980) (same); *People v. Hodge*, 53 N.Y.2d 313 (1981) (preliminary hearings); *People v. Wicks*, 76 N.Y.2d 128 (1990) (same); *Coleman v. Alabama*, 399 U.S. 1 (1970) (same); *People v. Stultz*, 2 N.Y.3d 277, 278 (2004) (appeal); *Evitts v. Lucey*, 469 U.S. 387, 396 (1985) (same). There is also a right to counsel for parole revocation proceedings in New York. *Donohoe v. Montanye*, 35 N.Y.2d 221 (1974).

The right to counsel means more than having a lawyer in name only. At its most fundamental, the right to counsel is the right to "meaningful and effective" assistance of counsel. *People v. Baldi*, 54 N.Y.2d 137, 146-47 (1981); *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Effective assistance of counsel means that counsel puts the state's case to "the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984); *People v.*

Henriquez, 3 N.Y.3d 210, 229-31 (2004) ("the right to the effective assistance of counsel is the right of the accused, through his attorney, to subject the prosecution's case to meaningful adversarial testing defense").[33]

The facts set forth in this motion establish that plaintiffs and the class they represent face a severe and unacceptably high risk of the deprivation of their right to meaningful and effective assistance of counsel, as defined both by case law and by relevant national and state standards. As the Statement of Facts illustrates in great detail, evidence from the Kaye Commission and the various affidavits and affirmations submitted in support of this motion establish, *inter alia*: a lack of hiring criteria, performance standards, supervisory controls, and training resulting in a lack of meaningful and effective counsel; a failure to provide representation for some defendants in critical stages, particularly in arraignments where bail determinations and other critical decisions

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[33] New York courts have "consistently exercised the highest degree of vigilance in safeguarding the right of an accused to have the assistance of an attorney at every stage of the legal proceedings against him." *People v. Cunningham*, 49 N.Y.2d 203, 207 (1980) (per curiam). In particular, the Court of Appeals has noted that the definition of "meaningful and effective assistance of counsel" is less stringent and more flexible than the federal standard in evaluating ineffective assistance of counsel claims, and the Court has repeatedly and expressly declined to adopt the stricter federal standard, which requires proof of actual prejudice to the indigent criminal defendant's case. *See People v. Henry*, 95 N.Y.2d 563, 565-66 (2000); *People v. Benevento*, 91 N.Y.2d 708, 712-14 (1998). Indeed, in keeping with New York State's tradition as a leader in recognizing and enforcing human rights, the Constitution and laws of New York provide far more extensive protections in this area than federal constitutional law provides. *See, e.g., People v. Settles*, 46 N.Y.2d 154, 161 (1978) ("So valued is the right to counsel in this State it has developed independent of its Federal counterpart. Thus, we have extended the protections afforded by our State Constitution beyond those of the Federal – well before certain Federal rights were recognized.") (internal citations omitted); *see also People v. Arthur*, 22 N.Y.2d 325, 328 (1968) (noting that the broad right to counsel in New York requires exclusion of confession taken after attorney requested and was denied access to client, though federal law may not); *Benevento*, 91 N.Y.2d at 714 (rejecting the more restrictive "harmless error" test applied to federal claims of ineffective assistance of counsel and applying a more flexible standard); *People v. Krom*, 61 N.Y.2d 187, 197 (1984) (explaining that, in contrast to federal law, the right to counsel in New York does not permit law enforcement to question a suspect after invocation of right to counsel even if the suspect initiates conversation). Regardless of the precise contours of state and federal law regarding the right to counsel in individual cases alleging ineffective assistance of counsel, however, in the context of the clear and overwhelming failures of New York's public defense system, it is clear that both federal and state law is being violated.

are made; overwhelming caseloads and/or workloads that prevent attorneys from serving all their clients; a lack of attorney-client consultation and communication impairing the ability to present and prepare a defense and advocate for pre-trial release; a lack of resources for investigations and expert services where they are needed to present an adequate defense; and incoherent or excessively restrictive eligibility standards that exclude indigent people from getting counsel.. *Id.* Taken together, there can be no doubt that these systemic problems – which the Kaye Commission found manifest statewide and additional documents and testimony amplify as to the five counties that are at issue in this case – create a severe and unacceptably high risk that indigent criminal defendants in the Counties are being denied meaningful and effective assistance of counsel.

Case law defining the scope of "meaningful and effective assistance of counsel" demonstrates this point by identifying how the systemic harms identified by the Kaye Commission and plaintiffs' proof affect the right to counsel. For example, the cases emphasize the importance of a qualified, properly trained attorney to make the constitutional right to effective assistance of counsel meaningful. *See People v. Droz*, 39 N.Y.2d 457, 462 (1976) ("[T]he right to effective representation includes the right to assistance by an attorney . . . who is familiar with, and able to employ at trial basic principles of criminal law and procedure.") (internal citation omitted); *Miranda v. Clark County*, 319 F.3d 465, 471 (9th Cir.), *cert. denied*, 540 U.S. 814 (2003) (finding that a county may be liable for constitutional violations for a policy of appointing inexperienced, under-trained public defense lawyers to handle capital cases). Numerous cases highlight the fact that an attorney's failure to understand the complex, applicable criminal procedure provisions can lead to per se ineffective assistance.[34] The variety

[34] *See People v. McDonald*, 1 N.Y.3d 109, 115 (2003) (providing incorrect advice as to

of the errors in these cases highlights the complex nature of criminal litigation. Given that complex nature, a system that allows inexperienced, untrained, under-qualified and unsupervised attorneys to represent indigent defendants creates an unacceptable risk of legal mistakes rising to the level of inadequate assistance of counsel.

Case law also demonstrates that the right to counsel includes the right to have an attorney present at all critical stages, including arraignments as practiced in New York State. *See Claudio*, 83 N.Y.2d at 81; *Samuels*, 49 N.Y.2d at 223; CPL § 170.10(3)(c) (arraignment on information, prosecutor's information or misdemeanor complaint); *id.* § 180.10(3) (arraignment on felony complaint); *id.* § 210.15(2)(c) (arraignment on indictment). As the Supreme Court, New York County found in *New York County Lawyers' Ass'n*, the failure to provide attorneys at arraignments is strong evidence of systemic violations of the right to counsel. 196 Misc.2d at

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deportation consequences may constitute ineffective assistance of counsel under federal constitution); *Bennett*, 29 N.Y.2d at 465 (finding ineffective assistance where counsel failed to prepare an insanity defense for a suicidal/incompetent defendant); *People v. Turner*, 10 A.D.3d 458 (2d Dep't 2004) (finding ineffective assistance where counsel failed to object to the submission of a lesser included offense when no strategic reason could explain the failure); *People v. Fleegle*, 295 A.D.2d 760 (3d Dep't 2002) (finding ineffective assistance where counsel failed to notice and object to prejudicial prosecutorial misconduct and inexplicably elicited adverse testimony from witnesses); *People v. Perron*, 287 A.D.2d 808 (3d Dep't 2001) (finding ineffective assistance of counsel where counsel gave bad advice regarding possible sentence exposure); *People v. Rojas*, 213 A.D.2d 56 (1st Dep't 1995) (counsel's failure to pursue an alibi and mistaken identity defense deprived the defendant of effective assistance of counsel); *People v. Barrett*, 145 A.D.2d 842 (3d Dep't 1988) (finding ineffective assistance where counsel failed to file an alibi notice, elicited damaging testimony on cross-examination, and failed to make foundation objections to damaging testimony at trial); *People v. Hoyte*, 185 Misc. 2d 587, 592-93 (Sup. Ct. Bronx County 2000) (finding ineffective assistance where counsel failed to object to an erroneous jury charge, where evidence shows failure was attributable to ignorance of the law); *People v. Anderson*, 117 Misc. 2d 284 (Sup. Ct. Queens County 1982) (finding ineffective assistance where defense counsel failed to assert self-defense where record supported it and failed to inform the defendant of the right to appear before the grand jury or urge him to do so); *Kimmelman v. Morris*, 477 U.S. 365, 385 (1986) (holding that an ineffective assistance claim may be based on the failure to make a suppression motion); *Mask v. McGinnis*, 233 F.3d 132 (2d Cir. 2000) (finding ineffective assistance based on counsel's failure to recognize defendant's status as a second felony offender rather than a persistent violent felony offender); *Flores v. Demskie*, 215 F.3d 293, 304-05 (2d Cir. 2000) (finding ineffective assistance based on counsel's waiver of *Rosario* rights, where the "basis for this waiver was counsel's misunderstanding of *Rosario* and the failure to realize that harmless error did not apply").

772-73 (entering judgment for plaintiffs based on facts showing that there are "not enough assigned counsel who are willing and available to staff the Arraignment Parts in the New York City criminal courts").[35] Thus, the practice of failing to provide counsel for all defendants at critical proceedings such as arraignment creates a severe and unacceptably high risk that plaintiffs and the class they represent will not receive meaningful and effective assistance of counsel.

The right to meaningful and effective assistance of counsel further entails a right to an attorney with sufficient time to devote to understanding each client's case and developing a defense, time that is unavailable when attorneys operate under overwhelming caseloads and workloads. *Droz*, 39 N.Y.2d at 462, ("[T]he right to effective representation includes the right to assistance by an attorney who has *taken the time* to review and prepare both the law and the facts relevant to the defense . . . .") (citation omitted) (emphasis added); *Bennett*, 29 N.Y.2d at 466 ("[T]he defendant's right to representation does entitle him to have counsel . . . [who can] 'allow himself time for reflection and preparation for trial.'") (citation omitted).[36] Indeed, the court in

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[35] Although absence of counsel at arraignment should be considered a per se violation of the right to counsel, it is worth mentioning the severe harms that can result from going unrepresented at this critical stage. In New York, judges at arraignment are authorized to, and often do: demand a plea; remand defendants to jail without bail; set bail; set conditions of release; order mental examinations; issue orders of protection; and suspend or revoke driver's licenses. CPL §§ 170.10, 180.10, 510.20, 530.12, 530.13. As noted in the Statement of Facts, *supra*, when such crucial decisions relating to liberty and property are at stake, the need for assistance of counsel is at its peak.

[36] Moreover, the fact that it is a *per se* violation of the right to counsel for the state to deprive counsel of the opportunity to prepare, *see, e.g.*, *People v. Susankar*, 34 A.D.3d 201, 203 (1st Dep't 2006) (finding that denial of substitute counsel's request for adjournment for a short period until the attorney of record would be available is a denial of the right to counsel where substitute counsel is not familiar with the case and has not had time to prepare); *People v. Jones*, 15 A.D.3d 208 (1st Dep't 2005) (same); *Powell v. Alabama*, 287 U.S. 45, 59 (1932) (recognizing that "[i]t is vain to give the accused . . . counsel without giving [counsel] any opportunity to acquaint himself with the facts or law of the case"); *United States v. Verderame*, 51 F.3d 249, 252 (11th Cir. 1995) ("Implicit in this right to counsel is the notion of adequate time for counsel to prepare the defense."); supports the notion that the state's imposition of unmanageable workloads on public defense attorneys, no less than the direct denials of time to prepare in

New York County Lawyers' Association found that high caseloads and workloads for assigned counsel was a key factor in its finding that the State's inadequate compensation of assigned counsel constituted a systemic violation of the right to counsel. 196 Misc. 2d at 773-74. Thus, excessive caseloads and workloads contribute to the "severe and unacceptably high risk" that plaintiffs and the class they represent will not receive meaningful and effective assistance of counsel.

Similarly, attorney-client contact is a lynchpin of constitutionally adequate representation, and its absence is strong evidence of ineffective assistance. "From counsel's function as assistant to the defendant derive[s] the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." *Strickland*, 466 U.S. at 688; *see also Wallace*, 392 F. Supp. at 846 ("Consultation with the defendant to elicit information and to inform him of his rights is imperative.").[37] The fact that

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these cases, violates the right to counsel.

[37] Indeed, the absence of attorney-client communications is a classic symptom of ineffective assistance of counsel. *See, e.g.*, *Droz*, 39 N.Y.2d at 462 (assigned counsel deprived defendant of constitutional right to effective assistance of counsel where attorney made numerous omissions and errors including failure to consult with defendant); *Mitchell v. Childs*, 26 A.D.3d 685 (3d Dep't 2006) (finding ineffective assistance where counsel persistently failed to communicate with client); *People v. Bussey*, 6 A.D.3d 621, 622 (2d Dep't 2004) (finding ineffective assistance when an attorney visited the defendant in prison for first time two days before trial began); *People v. Gil*, 285 A.D.2d 7, 124-25 (1st Dep't 2001) (attorney first met client on day of arraignment and agreed to begin trial that day); *Rojas*, 213 A.D.2d at 62-63 (attorney never visited client in jail and only visited once for half an hour in holding pen prior to arraignment); *People v. Simmons*, 110 A.D.2d 666, 666 (2d Dep't 1985) (attorney spoke with client only once for fifteen to twenty minutes during the five month period preceding trial); *People v. Robinson*, 44 A.D.2d 813, 813 (1st Dep't 1974) (holding that the fact that the defendant did not meet his assigned counsel until day his guilty plea was entered "tends to support the contention that there may have been inadequate consultation"); *United States ex rel. Thomas v. Zelker*, 332 F. Supp. 595, 599 (S.D.N.Y. 1971) (find that when a trial attorney met with defendant for only thirty minutes two months prior to trial – and failed to speak to the defendant again until the day of trial – "timely appointment becomes a cruel joke when the defendant officially has a lawyer, but is actually being ignored.").

there can be no meaningful and effective assistance without proper attorney-client contact is highlighted by the fact that courts routinely reverse convictions where the state takes any affirmative steps to interfere with or burden such contact or communication.[38] No less than such examples of direct interference with attorney-client contacts, the broken public defense system prevents attorneys from effectively communicating with their clients and thus places indigent criminal defendants at severe and unacceptably high risk of receiving ineffective assistance of counsel.

The right to meaningful and effective assistance of counsel also entails a right to have a client's case investigated, where appropriate. As the federal court noted in *Wallace v. Kern*, "Counsel has an affirmative duty to conduct appropriate investigations, both factual and legal. . . . Failure to ascertain and investigate possible defenses has often resulted in a finding that the defendant was denied adequate representation." 392 F. Supp. at 846. In *New York County Lawyers' Ass'n*, the court found that the failure of attorneys to conduct investigations was strong evidence of systemic violations of the right to counsel. 196 Misc. 2d at 774-75. Courts routinely find that a failure to investigate constitutes a key component of a claim of

[38] *See, e.g.*, *People v. Joseph*, 84 N.Y.2d 995 (1994) (ordering defendant not to confer with his attorney during a weekend recess of trial violates the right to counsel); *People v. Hilliard*, 73 N.Y.2d 584, 586-87 (1989) (holding that a denial of the defendant's access to his attorney for thirty days after arraignment as punishment for contempt denied the defendant his fundamental right to fair trial); *People v. Spears*, 64 N.Y.2d 698 (1984) (holding that a refusal to allow counsel a brief recess to confer with a client during trial regarding strategy violates the right to fair trial); *People v. Narayan*, 54 N.Y.2d 106, 112 (1981) (recognizing "the stature of the constitutionally protected right of a criminal defendant effectively to confer with counsel and not to be deprived of that right of consultation for any substantial period of time"); *People v. Carracedo*, 214 A.D.2d 404 (1st Dep't 1995) (holding that an order barring consultation between counsel and defendant during an overnight recess during a suppression hearing violates right to counsel); *Geders v. United States*, 425 U.S. 80, 91 (1976) (holding that a court order preventing defendant from conferring with his counsel during a seventeen-hour overnight recess in trial between defendant's direct testimony and cross-examination impinged on the defendant's right to counsel).

ineffective assistance of counsel.[39] New York law also codifies the right to necessary investigative services for indigent defendants. *See* N.Y. County Law § 722-c (authorizing courts to provide "investigative, expert or other services" necessary for a defendant who "is financially unable to obtain them"). Similarly, a defendant's inability to get an expert witness in a case where expert testimony could aid the defense plainly violates due process,[40] and New York has

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[39] *See Droz*, 39 N.Y.2d at 462-63 (finding ineffective assistance where counsel, among other errors, made no attempt to contact witnesses or obtain prior testimony that would have impeached the prosecutor's primary witness); *Bennett*, 29 N.Y.2d at 466 ("[T]he defendant's right to representation does entitle him to have counsel conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed . . . .") (internal quotations and citations omitted); *Bussey*, 6 A.D.3d at 623 (holding that defense counsel's failure to investigate defendant's alibi or call any alibi witnesses to testify at trial denied defendant effective assistance of counsel); *People v. Fogle*, 10 A.D.3d 618 (2d Dep't 2004) (finding ineffective assistance where there was a complete failure to investigate and no strategic reason for the failure); *People v. Fogle*, 307 A.D.2d 299, 301 (2d Dep't 2003) ("The failure to investigate is so fundamental to the deprivation of the effective assistance of counsel that it cannot be rationalized away with a post hoc construction of the trial theory of defense."); *Simmons*, 110 A.D.2d at 666 (finding ineffective assistance in part because counsel failed to interview available witnesses); *Gil*, 285 A.D.2d at 12 (finding ineffective assistance where defense counsel agreed to begin trial prior to conducting any investigation); *People v. Nau*, 21 A.D.3d 568, 569 (2d Dep't 2005) ("[F]ailure to investigate or call exculpatory witnesses may amount to ineffective assistance of counsel."); *Strickland*, 466 U.S. at 691 ("[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); *Kimmelman*, 477 U.S. at 384 (noting that adversarial testing process "generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies"); *Lindstadt v. Keane*, 239 F.3d 191, 201 (2d Cir. 2001) (finding ineffective assistance based on counsel's failure to request and review reports that formed basis for the state's expert's link between physical evidence and child sexual abuse); *Zelker*, 332 F. Supp. at 599 ("[T]he failure to interview witnesses whose testimony may or may not have been favorable has been a central factor among those showing that the adequacy of the representation fell below the constitutional minimum.") (quotations omitted); *see also Turner v. Duncan*, 158 F.3d 449, 456 (9th Cir. 1998) (failure, in a murder trial, "to do even the most minimal investigation cannot be viewed as a strategic decision"); *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994) ("[A]n attorney must engage in a reasonable amount of pre-trial investigation . . . ."); *Lawrence v. Armontrout*, 900 F.2d 127, 129-30 (8th Cir. 1990) (counsel must ascertain and interview witnesses who allegedly have knowledge of the defendant's guilt or innocence); *Mason v. Arizona*, 504 F.2d 1345, 1351 (9th Cir. 1974) (holding that the right to counsel requires "the allowance of investigative expenses or appointment of investigative assistance for indigent defendants in order to insure effective preparation of their defense by their attorneys"); *Cole v. Peyton*, 389 F.2d 224, 226 (4th Cir. 1968) ("Counsel must conduct appropriate investigations, both factual and legal, to determine if matters of defense can be developed, and to allow himself enough time for reflection and preparation for trial."); *Louisiana v. Craig*, 637 So. 2d 437, 446-47 (La. 1994) (indigent defendants must receive "funding for the production or gathering of any evidence, testimonial or physical").

[40] *See People v. Cotton*, 226 A.D.2d 738, 739 (2d Dep't 1996) (holding that the trial court erred in

established a statutory right to any necessary experts for indigent defendants alongside the provision of investigative services. *See id.* Case law also makes it clear that adequate assistance of counsel requires resort to expert witnesses where appropriate.[41]

Finally, with regard to excessively restrictive eligibility standards, it is a self-evident proposition that if a person too poor to afford a lawyer is nonetheless denied counsel, that person's constitutional rights have been violated. Although there is very little case law addressing proper eligibility standards, case law clearly holds that a proper eligibility determination is an essential component of the right to counsel. *People v. James*, 13 A.D.3d 649, 789 N.Y.S.2d 60 (2d Dep't 2006); *cf. In re Evan F.* 29 A.D. 3d 905, 815 N.Y.S.2d 697 (2d Dep't 2006) (same in family court context).

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denying attorney funds for an independent expert to determine the weight of cocaine); *People v. Jones*, 210 A.D.2d 904, 904 (4th Dep't 1994) (finding error where the lower court denied funds for neurological testing of a potentially mentally damaged defendant); *People v. Tyson*, 209 A.D.2d 354, 355 (1st Dep't 1994) (court erred in denying attorney funds for voice recognition expert); *People v. Vale*, 133 A.D.2d 297, 300 (1st Dep't 1987) ("[D]efendant was entitled to access to a psychiatric expert to aid in preparation of an insanity defense."); *People v. Hatterson*, 63 A.D.2d 736, 736 (2d Dep't 1978) ("[T]he denial of the defense motion for employment of a physician and a psychiatrist at the city's expense constituted an improvident exercise of discretion.") (internal citation omitted); *People v. Lind*, 61 A.D.2d 955 (1st Dep't 1978) (finding that the denial of funds for a handwriting expert was inappropriate); *People v. Irvine*, 40 A.D.2d 560, 560 (2d Dep't 1972) ("[T]he denial of the defense motion for employment of an investigator was an improvident exercise of discretion."); *Smith v. McCormick*, 914 F.2d 1153, 1157 (9th Cir. 1990) (finding a violation of due process where the court refused to allow the defense an independent expert witness because an indigent defendant has "the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate").

[41] *See People v. Rentz*, 67 N.Y.2d 829, 831 (1986) (suggesting that failure to have an expert witness examine a defendant who may have a mental defect presents a "colorable claim of ineffective assistance"); *People v. Wilson*, 133 A.D.2d 179, 181 (2d Dep't 1987) (finding ineffective assistance where counsel did not call expert but relied only on defendant's own testimony to establish mental defect defense); *Nau*, 21 A.D.3d at 569 (finding that an attorney's failure to use an expert psychiatric witness "may amount to ineffective assistance of counsel"); *Ake v. Oklahoma*, 470 U.S 68 (1985) (holding that an indigent defendant has a right to a psychiatric expert for an insanity defense); *Eve v. Senkowski*, 321 F.3d 110, 128-29 (2d Cir. 2003) (counsel provided constitutionally deficient representation in a child sexual abuse case by failing to utilize a medical expert to examine physical evidence); *Pavel v. Hollins*, 261 F.3d 210, 223-26 (2d Cir. 2001) (same); *Lindstadt*, 239 F.3d at 201 (finding ineffective assistance where counsel did not consult an expert to testify, or at least educate counsel, about the unreliability of certain physical evidence in child sex abuse cases).

In addition to case law, national and state standards identify the systemic problems established in this motion as symptoms of an unconstitutional public defense system. Such standards recognize that:

- Meaningful and effective representation cannot occur without a mandatory, universal training program for public defense providers.[42]

- Written hiring criteria are necessary to ensure that an attorney's ability, training, and experience match the complexity of the cases he or she faces.[43]

- A public defense system should maintain written performance standards complemented by a system of active supervisory control.[44]

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[42] *See* ABA Ten Principles, Principle 9 (commentary) (attached to Carroll Affidavit as Exhibit B); ABA Standards for Criminal Justice, Providing Defense Services (3d ed. 1992), Standard 5-1.5 ("ABA Standards for Criminal Justice") (attached to Stoughton Affirmation as Exhibit G); NLADA Defender Training and Development Standards (1997), Standard 1.1 (attached to Stoughton Affirmation as Exhibit H); NLADA Guidelines for Legal Defense Systems in the United States (1976), Guideline V-5.7, 5.8 (attached to Stoughton Affirmation as Exhibit I); NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984), Guideline III-17 (attached to Stoughton Affirmation as Exhibit J); NLADA Standards for the Administration of Assigned Counsel Systems (1989), Standards 4.2, 4.3.1, 4.3.2, 4.4 (attached to Stoughton Affirmation as Exhibit K); NLADA Performance Guidelines for Criminal Defense Representation (1995), Guideline 1.2(b) (attached to Stoughton Affirmation as Exhibit L); NAC Report of the Task Force on Courts (1973), Standard 13.16 (attached to Stoughton Affirmation as Exhibit M); NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standard VI(A), (B) (attached to Stoughton Affirmation as Exhibit N); NYSBA Standards for Providing Mandated Representation (2005), Standard F-1, F-2 (attached to Stoughton Affirmation as Exhibit O); NYSBA Lawyer's Code of Professional Responsibility, Disciplinary Rule 6-101, Ethical Considerations 6-1, 6-2; N.Y. CLS Sup. Ct. § 613.9 (2007).

[43] *See* First Department Indigent Defense Organization Oversight Committee, General Requirements for All Organized Providers of Defense Services to Indigent Defendants (1996), Performance Standard II (attached to Stoughton Affirmation as Exhibit P); NLADA Guidelines for Legal Defense Systems in the United States (1976), Standard V-5.9; NYSBA Standards for Providing Mandated Representation (2005), Standard E-2; *see also* ABA Ten Principles, Principle 6 (requiring that counsel's ability, training, and experience match the complexity of the case); NLADA Performance Guidelines for Criminal Defense Representation (1995), Guideline 1.2(a) (same).

[44] *See* ABA Ten Principles, Principle 10; First Department Indigent Defense Organization Oversight Committee, General Requirements for All Organized Providers of Defense Services to Indigent Defendants (1996), Performance Standards IV & VI; NLADA Guidelines for Legal Defense Systems in the United States (1976), Standard V-5.4; NLADA Standards for the Administration of Assigned Counsel Systems (1989), Standard 4.4; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standard VI(E); NYSBA Standards for Providing Mandated Representation (2005), Standard J-1 to J-9.

- A defense attorney should be present at all critical stages of the prosecution, including arraignment,[45] and that counsel must be assigned as soon as possible after arrest, detention, or a request for counsel.[46]

- A public defense system must provide caseload and workload management.[47]

- Client contact and communication are essential elements of meaningful and effective representation.[48]

- Conducting investigations is a key component of competent counsel, and meaningful and

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[45] *See* First Department Indigent Defense Organization Oversight Committee, General Requirements for All Organized Providers of Defense Services to Indigent Defendants (1996), Performance Standard II; NLADA Guidelines for Legal Defense Systems in the United States (1976), Guidelines I-1.2(a) & V-5.11; NLADA Performance Guidelines for Criminal Defense Representation (1995), Guidelines 1.1 & 3.1; NLADA Standards for the Administration of Assigned Counsel Systems (1989), Standards 2.1(c) & 2.5(a); NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standard V(A)(3); NYSBA Standards for Providing Mandated Representation (2005), Standard B-2.

[46] *See* ABA Ten Principles, Principle 3; ABA Standards for Criminal Justice, Standard 4-3.6; ABA Standards for Criminal Justice, Standard 5-6.1; NLADA Guidelines for Legal Defense Systems in the United States (1976), Standard I-1.2; NLADA Standards for the Administration of Assigned Counsel Systems (1989), Standard 2.5; NLADA Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984), Guidelines III-18; NAC Report of the Task Force on Courts (1973), Standard 13.1; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standard V(A)(3); NYSBA Standards for Providing Mandated Representation (2005), Standard B-1, B-2, B-4.

[47] *See* ABA Ten Principles, Principle 5 (commentary); ABA Standards for Criminal Justice, Standard 5-5.3; NLADA Guidelines for Legal Defense Systems in the United States (1976), Guidelines V-5.1, 5.3; NLADA, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984), Guidelines III-6, III-12; NLADA Standards for the Administration of Assigned Counsel Systems (1989), Standard 4.1.2; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standards IV, III(E), VIII-A(3); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006); NYSBA Standards for Providing Mandated Representation (2005), Standards G-1, G-2, I-1

[48] *See* ABA Ten Principles, Principle 4 (commentary); NLADA Guidelines for Legal Defense Systems in the United States (1976), Guideline I-1.3(a); NLADA Performance Guidelines for Criminal Defense Representation (1995), Guideline 1.3(c); NAC Report of the Task Force on Courts (1973), Standard 13.3; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standard VIII-A(5), (7); NYSBA Standards for Providing Mandated Representation (2005), Standard I-3; NYSBA, Lawyer's Code of Professional Responsibility, Ethical Considerations 7-8.

effective assistance of counsel requires adequate support staff, including investigators.[49]

- A public defense system must allow for the appointment of experts where necessary to present a meaningful and effective defense.[50]

- There should be clear guidelines governing eligibility determinations, in order to ensure that defendants who need public representation are not denied their right to counsel.[51]

Thus, based on both national and state standards and case law defining the scope of the right to counsel, it is abundantly clear that the symptoms of a broken public defense system found by the Kaye Commission create a severe and unacceptably high risk that indigent criminal defendants will be denied meaningful and effective assistance of counsel. Applying the proper legal standard for establishing a systemic violation of the right to counsel under both federal and state law, plaintiffs have demonstrated a likelihood of success on the merits.

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[49] *See* ABA Standards for Criminal Justice, Standard 5-1.4; NLADA Performance Guidelines for Criminal Defense Representation (1995), Guideline 4.1; NLADA Guidelines for Legal Defense Systems in the United States (1976), Guideline IV-4.1; NLADA, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984), Standard III-9; NLADA Standards for the Administration of Assigned Counsel Systems (1989), Standard 4.6; NAC Report of the Task Force on Courts (1973), Standard 13.14; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standard VIII(A)(6); NYSBA Standards for Providing Mandated Representation (2005), Standard H-1, H-6, I-7; NYSBA Lawyer's Code of Professional Responsibility, Disciplinary Rule 6-101, Ethical Consideration 7-1. *See also* N.Y. County Law §§ 722, 722-c (2007) (requiring counties to provide investigative and expert services that are "necessary for an adequate defense.")

[50] *See* ABA Standards for Criminal Justice, Standard 5-1.4; NLADA Guidelines for Legal Defense Systems in the United States (1976), Guideline III-3.1; NLADA, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1984), Guideline III-8; NLADA Performance Guidelines for Criminal Defense Representation (1995), Guideline 4.1(b)(7); NAC Report of the Task Force on Courts (1973), Standard 13.14; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standard VIII(A)(8)(c); NYSBA Standards for Providing Mandated Representation (2005), Standards H-1, H-6; N.Y. County Law §§ 722, 722-c (2007).

[51] *See* NLADA Guidelines for Legal Defense Systems in the United States (1976), Guidelines I-1.5, I-1.6; NAC Report of the Task Force on Courts (1973), Standard 13.2; NYSDA, Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State (2004), Standard VII; NYSBA Standards for Providing Mandated Representation (2005), Standards C-1, C-2.

II. PLAINTIFFS AND THE CLASS THEY REPRESENT FACE A DANGER OF IRREPARABLE INJURY ABSENT INJUNCTIVE RELIEF.

As the forgoing discussion establishes, indigent criminal defendants in the Counties face a "severe and unacceptably high risk" of not receiving their constitutional and legal right to meaningful and effective assistance of counsel. The every-day impact of that "severe and unacceptably high risk" on indigent criminal defendants is immense. They face both the risk and the reality of wrongful denial of representation, whether based on improper eligibility determinations or the absence of counsel at critical stages; unnecessary or prolonged pre-trial detention, whether based on delays in the appointment of counsel or lack of advocacy by counsel; excessive or inappropriate bail determinations, which have been shown to increase the likelihood of conviction; waiver of meritorious defenses due to untrained, unsupervised or inexperienced counsel; guilty pleas to inappropriate charges, based on pressure to plea by overworked counsel or mistaken advice from untrained, unsupervised or inexperienced counsel; guilty pleas taken without adequate knowledge and awareness of the full, collateral consequences of the pleas; possible wrongful conviction of crimes; harsher sentences than the facts of the case warrant and few alternatives to incarceration; and waiver of the right to appeal and other post-conviction rights – all because of systemic flaws that result from the state's failure to establish a properly functioning public defense system. *See* Statement of Facts, *supra*.

It therefore follows that plaintiffs have demonstrated irreparable injury absent the issuance of an injunction requiring the State to take responsibility for creating a functional public defense system. *See, e.g., Chrysler Corp v. Fedders Corp.*, 63 A.D.2d 567, 569 (1st Dep't 1978) ("[I]rreparable injury means a continuing harm resulting in substantial prejudice caused by the acts sought to be restrained if permitted to continue pendente lite."). That was precisely the

conclusion reached in *New York County Lawyers' Ass'n*, where the court found irreparable harm to indigent criminal defendants as a result of the low rates of compensation for 18-B assigned counsel attorneys. 192 Misc. 2d at 433. Indeed, the facts here are far more compelling than those in *New York County Lawyers' Ass'n*. In that case, a single systemic deficiency – namely, low rates of compensation – was found to create a risk of irreparable harm to the public defense clients who experienced "protracted pretrial detention." *Id.* The evidence here shows that and more, as indigent defendants suffer not only protracted pretrial detention, but also actual prejudice to their defense, excessive sentences and possible wrongful conviction.

A finding of irreparable harm is further supported by a long line of precedent holding that a threatened deprivation of a constitutional right constitutes irreparable injury for which an injunction may be granted. *See, e.g., Hill v. Comm. on Prof'l Stds. of the Third Judicial Dep't*, 5 A.D.3d 835, 836 (3d Dep't 2004) (describing infringement of constitutional rights as the functional equivalent of irreparable harm); *Times Square Books, Inc. v. City of Rochester*, 223 A.D.2d 270, 278 (4th Dep't 1996) (finding that the infringement of constitutional rights, "for even minimal periods of time, unquestionably constitutes irreparable injury"); *Chiasson v. N.Y. City Dep't of Consumer Affairs*, 132 Misc. 2d 640, 646 (Sup. Ct. N.Y. County 1986) (finding that "where there is a significant impairment of [constitutional rights] irreparable harm must be presumed").

Moreover, New York courts have long held that irreparable injury must be assumed in any case where monetary damages are inadequate. *See McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co.*, 114 A.D.2d 165, 174 (2d Dep't 1986) ("Irreparable injury . . . has been held to mean any injury for which money damages are insufficient."); *N.Y. County Lawyers' Ass'n*, 192 Misc. 2d at 433 (holding that irreparably injury is "material and actual, for which monetary

compensation is inadequate"). Here, no money damages can undue the harm caused by the failure to provide meaningful and effective assistance of counsel to those facing criminal charges. Thus, plaintiffs have demonstrated irreparable injury.

Moreover, plaintiffs have met the heightened standard for obtaining a mandatory preliminary injunction. As the Supreme Court, New York County, found in *New York County Lawyers' Ass'n*, a risk that indigent defendants are not receiving meaningful and effective assistance of counsel satisfies the heightened burden of showing extraordinary circumstances warranting affirmative preliminary injunctive relief. 192 Misc. 2d at 438.

Where, as here, the "condition of rest is exactly what will inflict the irreparable injury to the complainant," a court may issue a mandatory preliminary injunction, even if it will eventually grant the ultimate relief requested. *Chiasson*, 132 Misc. 2d at 647 (quoting *Bachman v. Harrington*, 184 N.Y. 458, 464 (1906)); *see also Egan v. N.Y. Care Plus Ins. Co.*, 266 A.D.2d 600, 601-02 (3d Dep't 1999) (finding grounds for issuing a mandatory injunction where the status quo would cause potential physical harm to a plaintiff).

As the Supreme Court, New York County, held in *New York County Lawyers' Ass'n*, courts have inherent power to issue mandatory injunctions in public defense reform cases because such cases involve the mandatory enforcement of constitutional rights and threaten the basic function of the judicial system:

> This court, as any court of competent jurisdiction, is vested under the inherent powers doctrine with all powers reasonably required to enable it to: perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful action effective . . . . Accordingly, when legislative appropriations prove insufficient and legislative inaction obstructs the judiciary's ability to function, the judiciary has the inherent authority to bring the deficient state statute into compliance with the constitution by order of a mandatory preliminary injunction. Concomitantly, when the Legislature creates a duty of compensation it is within the courts' competence to ascertain whether the State

> has satisfied that duty and, if it has not, to direct that the State proceed forthwith to do so. Therefore, long standing maxims rooted in the doctrine of separation of powers must yield in equity on a showing that the State's failure to raise the current compensation rates adversely affects the judiciary's ability to function and presumptively subjects innocent indigent citizens to increased risks of adverse adjudications and convictions merely because of their poverty.

192 Misc. 2d at 436-37 (internal quotation and citation omitted) (granting mandatory preliminary injunction requiring State to raise rates of pay for assigned counsel).[52]

Moreover, the fact that some of the plaintiffs in this case will have had the charges against them resolved by the time final relief is achieved counsels strongly in favor of permitting the issuance of a mandatory injunction. As the Supreme Court, New York County, held in issuing a preliminary injunction to require the provision of mental health services to discharged prison inmates, where some plaintiffs or class members will have already been put through a system that poses a risk of irreparable harm before the promulgation of a final judgment, courts should award a mandatory preliminary injunction. *See Brad H.*, 185 Misc. 2d at 431.

III. THE BALANCE OF EQUITIES WEIGHS IN FAVOR OF A MANDATORY PRELIMINARY INJUNCTION.

In balancing the equities, "it must be shown that the irreparable injury ... is more burdensome [to the plaintiffs] than the harm caused to defendant through imposition of the injunction." *Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.*, 70 A.D.2d 1021, 1022 (3d Dep't 1979). The test "simply requires the court to look to the relative prejudice to each party accruing from a grant or denial of the requested relief." *Ma v. Lien*, 198 A.D.2d 186, 187 (1st Dep't 1993).

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[52] Courts have found the "extraordinary circumstances" required to obtain a mandatory injunction present on facts far less compelling than this case. *See, e.g., IXIS N. Am., Inc. v. Solow Bldg. Co.*, 16 Misc.3d 1120(A) (Sup. Ct. N.Y. County 2007) (granting mandatory preliminary injunction to allow plaintiff to complete construction project where plaintiff showed loss of enjoyment of property absent injunction).

In this motion for a preliminary injunction, plaintiffs do not seek final, comprehensive reform of New York's public defense system. Rather, in light of the irreparable and ongoing harm indigent criminal defendants currently experience in the five counties represented by the twenty named plaintiffs, plaintiffs seek limited but immediate steps by the state to address some of the most fundamental deficits in the public defense systems in Onondaga, Ontario, Schuyler, Suffolk and Washington Counties. These components of plaintiffs' ultimate relief address some of the most urgent needs of the plaintiff class and offer the promise of placing the State on the path toward remedial reform. Specifically, plaintiffs ask that the State:

1. Implement standards and procedures to ensure that attorneys appointed to represent indigent criminal defendants have sufficient qualifications and training;

2. Establish caseload and workload limits to ensure that public defense attorneys have adequate time to devote to each client's case;

3. Guarantee that every eligible indigent criminal defendant is assigned a public defense attorney within 24 hours of arrest who is present at every critical proceeding and consults with each client in advance of any critical proceeding to ensure that the attorney is sufficiently prepared for any such proceeding;

4. Ensure that investigators and experts are available to every public defense attorney for every case in which an attorney deems that investigative or expert services would be useful to the defense; and

5. Establish uniform written standards and procedures for determining eligibility for the assignment of a public defense attorney.

At stake in this case are the fundamental rights to counsel and due process guaranteed by the Constitutions and laws of the State of New York and the United States. The extensively documented systemic violation of these rights jeopardizes the physical freedom of indigent criminal defendants. As explained above, they face risks of prolonged and unnecessary pretrial detention, excessive or disproportionate prison sentences, and wrongful conviction. Where such fundamental issues of liberty are implicated, there can be no question that the balance of equities

tilts in plaintiffs' favor. As the Appellate Division, First Department, held in affirming a preliminary injunction requiring state and city authorities to meet basic standards for the provision of shelter to homeless persons, where "[t]he plaintiffs seek to have . . . defendants comply with their statutory and constitutional obligations . . . inconvenience caused by compliance is outweighed by the harm which would be suffered otherwise." *Doe*, 192 A.D.2d at 275; *see also Varshavsky v. Perales*, 202 A.D.2d 155, 156 (1st Dep't 1994) (holding that due process violation caused by the failure to have home hearings on termination of disabled persons' benefits substantially outweighs "fiscal and staffing problems" created by issuance of a preliminary injunction); *Brad H. v. City of New York*, 185 Misc. 2d 420, 431 (Sup. Ct. N.Y. County 2000) (rejecting defendant's argument that a preliminary injunction to require improved mental health services should not issue because state did not have the funds to comply).

Indeed, courts have consistently rejected the argument that "the possibility of some administrative inconvenience or monetary loss to the government" tips the balance of equities in the government's favor, particularly where constitutional rights are at stake. *Thrower v. Perales*, 138 Misc. 2d 172, 178 (Sup. Ct. N.Y. County 1987) (granting a mandatory preliminary injunction to require New York City to provide benefits to homeless persons) (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983)). As the Court of Appeals noted in the context of a mandamus proceeding to require the state to fulfill its legal duty to treat the mentally ill, a defense against the issuance of an injunction based on lack of resources "is particularly unconvincing when uttered in response to a claim that existing conditions violate an individual's constitutional rights." *Klostermann v. Cuomo*, 61 N.Y.2d 525, 537 (1984).

The relief plaintiffs seek on this motion falls short of final, comprehensive, systemic reform of New York's public defense system. Rather, plaintiffs seek limited but immediate steps

by the State to address the more egregious aspects of the on-going deprivation of the constitutional right to meaningful and effective assistance of counsel in five counties. Moreover, the relief plaintiffs seek is designed to provide the State with flexibility in the implementation of Court's order. By requiring the State to submit a compliance plan, the State is afforded an opportunity to balance fiscal and administrative realities with the urgent and undeniable need to halt ongoing constitutional violations.

Moreover, the fact that the State has known for decades of the systemic constitutional failings of the public defense system undermines any claim of undue hardship. Decades of official reports,[53] media investigations,[54] and lawsuits[55] have pointed to the systemic failures of

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[53] *See, e.g., TSG Report* app. E (listing hearings, studies and reports from 1973-2005); Gradess Affirmation ¶¶ 7-13.

[54] *See, e.g.*, Michael McCormick, *Proper Public Defender's Office Beats Assigned Counsel*, Post Standard (Syracuse), Jan. 18, 2008, at A11; Mark David Blum, Editorial, *Onondaga County Needs a Public Defender Office*, Post Standard (Syracuse), Dec. 5, 2007, at A13; Michael Whiteman, *It's Past Time to Right an Old Wrong*, Times Union (Albany), Nov. 13, 2007, at A13; Robert Gavin, *Public Defense Costs Cause Discord*, Times Union (Albany), Oct. 12, 2007, at A3; Brandon Talbot, *Legal Aid Society Serves Up to 3,800 Clients Per Year*, Cent. N.Y. Bus. J. (Syracuse), July 6, 2007, at 31; Scott Christianson, Editorial, *Public Detectives*, N.Y. Times, June 3, 2007; Alfonso A. Castillo, *Judge Raps Public Defender System*, Newsday, Mar. 27, 2007, at A19; Tara E. Buck, *New York's Public Defense System in Crisis*, Daily Record of Rochester, July 5, 2006; Editorial, *Unacceptable Risk*, J. News (White Plains), July 2, 2006, at 6B; Danny Hakim, *Judge Urges State Control of Legal Aid for the Poor*, N.Y. Times, June 29, 2006, at B1; Michele Morgan Bolton, *Reforms Target Justice for Poor; State's Top Judge Seeks Overhaul of Public Defender System as Study Shows Legal Rights Lacking*, Times Union (Albany), June 29, 2006, at A1; Craig Fox, *Ontario Revisits Public Defender Issue*, Finger Lakes Times, Apr. 14, 2006, at 1; Editorial, *Justice Shortchanged*, Times Union (Albany), Feb. 6, 2006, at A6; Letter to the Editor, *Stronger Public Defense System Needed in State*, Times Union (Albany), Feb. 4, 2006, at A6; Michele Morgan Bolton, *New Criminal Defense System Urged for Poor*, Times Union (Albany), Jan. 31, 2006, at A1; Editorial, *A New York Disgrace*, Times Union (Albany), Jan. 24, 2006, at A8; Kit R. Roane, *When the Poor Go to Court*, U.S. News & World Rep., Jan. 23, 2006, at 34; Gary Craig, *State Panel Finds Problems With Legal Defense Services to Poor People*, Rochester Democrat & Chronicle, Mar. 12, 2005, at 3B; Katja Cerovsek et al., *Opening the Doors to Justice*, 17 Geo. J. of Legal Ethics 697 (2004); John O'Brien, *Some Lawyers Rarely Visit Their Poor Clients*, Post Standard (Syracuse), May 30, 2004, at A10; *Public Defender Crisis Grows With New Fees*, Times Union (Albany), Mar. 17, 2004, at B4; Letter to the Editor, *Advocates for the Indigent*, Post Standard (Syracuse), Mar. 1, 2004, at A7; Teri Weaver, *Defending Poor Isn't Cheap*, Post Standard (Syracuse), Feb. 29, 2004, at B3; Teri Weaver, *County's Counsel Program Faulted*, Post Standard (Syracuse), Feb. 24, 2004, at B3; Editorial, *And the Best Use of Qualified Assigned Counsel*, Post Standard (Syracuse), Feb. 12, 2007, at A14; Kimberly Helene Zelnick,

New York's public defense system. As The Spangenberg Group noted, "The serious condition of the indigent defense program in New York State will come as no surprise to any of the branches of state government . . . who have been sorely aware of problems for a number of years." *TSG Report* at 155. Indeed, the Kaye Commission's overwhelming factual evidence, unequivocal accusation of constitutional violations, and call for reform was announced in June of 2006, more than a year and a half ago, and yet the State has taken no steps toward reform. As the Appellate Division stated in upholding a preliminary injunction to improve homeless shelter services in *Doe v. Dinkins*:

> The defendants' strenuous objections to the court's [preliminary injunction] order because of their alleged inability to absorb the displaced men, and because services currently provided for the homeless will be interrupted, is unavailing. The City has been aware of the overcrowded conditions for more than a decade,

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In Gideon's Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion, 30 Am. J. Crim. Law 363 (2003); Jo Anna Chancellor Parker, *What a Poor Defense! Exploring the Ineffectiveness of Counsel for the Poor and Searching for a Solution*, 7 Jones L. Rev. 63 (2003); Jim O'Hara, *Funding Legal Services For Poor At Issue*, Post Standard (Syracuse), Dec. 9, 2002, at B3; Ray Kelly, *State Shamefully Neglects Duty to Indigent Defendants*, Times Union (Albany), Dec. 8, 2002, at C2; Opinion, *Shoring Up Our Legal Defenses*, Press & Sun-Bulletin (Binghamton), June 19, 2002, at 10A; *Shortchanging Justice*, Times Union (Albany), May 8, 2002, at A10; Opinion, *Independent Body Needed To Fix Crisis*, J. News (White Plains), Mar. 17, 2002, at 8B; Elizabeth Benjamin, *Court-Appointed Lawyers Can Expect That Raise*, Times Union (Albany), July 10,2001, at B2; Michael Whiteman, *Public Defense Services Sorely Need Improvement*, Times Union (Albany), June 1, 2001, at A12; Editorial, *Legal Aid*, Newsday, Apr. 21, 2001, at A20; Letter to the Editor, *For the Poor, Unequal Justice*, N.Y. Times, Apr. 14, 2001, at A12; *Drive-by Legal Defense*, N.Y. Times, Apr. 12, 2001; Jane Fritsch et al., *For Poor, Appeals Are Luck of the Draw*, N.Y. Times, Apr. 10, 2001; Jane Fritsch et al., *For the Poor, a Lawyer With 1,600 Clients*, N.Y. Times, Apr. 9, 2001; Jane Fritch et al. *Lawyers Often Fail New York's Poor*, N.Y. Times, Apr. 8, 2001; Teri Weaver, *Group to Study Counsel Program*, Post Standard (Syracuse), Feb. 8, 2001, at B3; James Toedtman, *Ruling Threatens Legal Aid Funds*, Newsday, June 16, 1998, at A21; I.H. Baker, *New York Should Fund Legal Aid to the Poor*, Times Union (Albany), May 17, 1998, at B4 (articles collectively attached to Stoughton Affirmation as Ex. S).

[55] *See, e.g., N.Y. County Lawyers Ass'n*, 196 Misc. 2d at 774-75 ("Too many assigned counsel do not conduct a prompt and thorough interview of the defendant; consult with the defendant on a regular basis; examine the legal sufficiency of the complaint or indictment; seek the defendant's prompt pre-trial release; retain investigators, social workers or other experts where appropriate; file pretrial motions where appropriate; fully advise the defendant regarding any plea and only after conducting an investigation of the law and the facts; prepare for trial and court appearances; and engage in appropriate presentence advocacy, including seeking to obtain the defendant's entry into any appropriate diversionary programs.").

> but has taken no concrete steps to resolve the problem . . . . The defendants' claim of hardship because of the court's directive is, therefore, negated by the notice and warnings they have received. That hardship was caused by their own inaction.

192 A.D.2d at 276.

Finally, the named plaintiffs in this proposed class action have established an entitlement to classwide preliminary injunctive relief. The Court has authority to issue classwide preliminary injunctive relief in a proposed class action, prior to consideration of the class certification motion, where, as here, the defendant's actions are directed against all members of the proposed class. *See, e.g.*, *Harris v. Wyman*, 60 Misc. 2d 1076, 1077 (Sup. Ct. Nassau County 1969) (issuing a preliminary injunction where defendants' actions were directed at the class and not at any individual); *Olson v. Wing*, 281 F. Supp. 2d 476, 489-90 (E.D.N.Y. 2003) (issuing preliminary injunction prior to consideration of class certification); *Weight Watchers of Phila. v. Weight Watchers Int'l*, 53 F.R.D. 647, 651 (E.D.N.Y. 1971) ("For the purpose of preventing and correcting abuses, once an action is filed as a class action it should be so presumed even prior to a formal determination that it is a class action.").[56]

In *Tucker v. Toia*, for example, the Fourth Department upheld the issuance of a preliminary injunction for classwide relief prior to consideration of a class certification motion. 54 A.D.2d 322, 323 (4th Dep't 1976). Indeed, the lower court later denied class certification in that case. 89 Misc. 2d 116, 132 (Sup. Ct. Monroe County 1977). Similarly, in *Lang v. Pataki*, the class sought to enjoin implementation and enforcement of allegedly unconstitutional amendments to the Real Property Actions and Proceedings Law, arguing that this would put

[56] Plaintiffs interchangeably cite federal and state case law on this question because courts interpreting the New York class certification statute, CPLR article 9, routinely look to federal case law for guidance. *See Carnegie v. H & R Block, Inc.*, 180 Misc. 2d 67, 71 n.5 (Sup. Ct. N.Y. County 1999) (cataloging cases).

plaintiffs at risk of being wrongfully evicted from their homes. 176 Misc.2d 676, 678-79 (Sup. Ct. N.Y. County 1998). Prior to class certification, the court issued preliminary relief "to the named plaintiffs and '*all others similarly situated.*'" *Id.* (emphasis added). Likewise, in *New York State National Organization for Women v. Terry*, prior to being removed to federal court, plaintiffs in a proposed "class of all family planning clinics and abortion providers" in New York City sought classwide injunctive relief. 697 F. Supp. 1324, 1327 n.1 (S.D.N.Y. 1988). Prior to class certification, the state court issued preliminary relief enjoining defendants from obstructing access to abortion facilities. *Id.* at 1327 n.3. As the leading treatise on class actions states, "The lack of formal class certification does not create an obstacle to classwide preliminary injunctive relief when activities of the defendant are directed generally against a class of persons." 3 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 9:45 (4th ed. 2002).[57]

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[57] Moreover, the Court may order classwide relief where plaintiffs have demonstrated a substantial likelihood of success in establishing the class certification requirements. *Doe v. Greco*, 62 A.D.2d 498 (3d Dep't 1978) (issuing preliminary injunction where plaintiffs demonstrated likelihood of success on class certification motion); *McWaters v. FEMA*, 408 F. Supp. 2d 221, 236 (E.D. La. 2005) (same). Here, plaintiffs clearly demonstrate a likelihood of success on the five requirements for class certification. Those requirements are: numerosity, commonality, typicality, that the class is fairly and adequately represented, and that a class action is the superior method to adjudicate the issue. CPLR § 901. The proposed class constitutes all indigent persons with criminal charges pending in New York state courts in Onondaga, Ontario, Schuyler, Suffolk and Washington counties who are entitled to rely on the government of New York to provide them with meaningful and effective defense counsel.

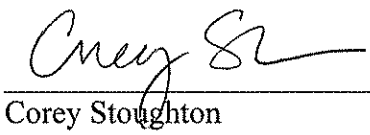
As joinder of all potential plaintiffs would be impractical, plaintiffs have met the numerosity requirement. Because the common issue that ties the class members together is New York's system-wide failure to provide them with constitutionally adequate indigent defense, plaintiffs have met the commonality requirement: no plaintiff or class member here presents any claim to relief premised on the particular facts of their criminal case representation. Also, the named plaintiffs' claims are typical of the class claims because the named plaintiffs' injuries arise from the same systemic failure of the State to ensure that indigent criminal defendants receive meaningful and effective assistance of counsel. Plaintiffs' attorneys are experienced in class action litigation and plaintiffs' interests coincide with the rest of the class, so the attorneys will fairly and adequately protect the class's interests. Finally, the class action is superior to other available methods of litigation because no individual claim to ineffective assistance of counsel could raise the systemic issues raised by this action, and the State has repeatedly failed to remedy its constitutional violations though it had ample notice of its failure based on the findings of the Kaye Commission report.

CONCLUSION

For all the foregoing reasons, plaintiffs respectfully request that the Court grant their motion for a preliminary injunction.

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION FOUNDATION, by



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Dated: March 27, 2008
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AFFIRMATION OF SERVICE

I hereby certify that I caused to be served by Federal Express Overnight Delivery the attached Notice of Motion, Memorandum in Support of Motion for Preliminary Injunction, and supporting affidavits on the following counsel of record:

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