Centralized Arraignments and Recent Developments in Indigent Legal Representation – ILS Perspective

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§ 11. Section 722-e of the county law, as added by chapter 878 of the laws of 1965, is amended to read as follows:

§ 722-e. Expenses. All expenses for providing counsel and services other than counsel hereunder shall be a county charge or in the case of a county wholly located within a city a city charge to be paid out of an appropriation for such purposes. Provided, however, that any such additional expenses incurred for the provision of counsel and services as a result of the implementation of a plan established pursuant to subdivision four of section eight hundred thirty-two of the executive law, including any interim steps taken to implement such plan, shall be reimbursed by the state to the county or city providing such services. Such

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plans shall be submitted by the office of indigent legal services to the director of the division of budget for review and approval. However, the director's approval shall be limited solely to the plan's projected fiscal impact of the required appropriation for the implementation of such plan, and his or her approval shall not be unreasonably withheld. The state shall appropriate funds sufficient to provide for the reimbursement required by this section.

§ 12. Section 832 of the executive law is amended by adding a new subdivision 4 to read as follows:

4. Additional duties and responsibilities. The office shall, in consultation with the indigent legal services board established pursuant to section eight hundred thirty-three of this article, have the following duties and responsibilities, and any plan developed pursuant to this subdivision shall be submitted by the office to the director of the division of budget for review and approval, provided, however that the director's approval shall be limited solely to the plan's projected fiscal impact of the required appropriation for the implementation of such plan and his or her approval shall not be unreasonably withheld:

(a) Counsel at arraignment. Develop and implement a written plan to ensure that each criminal defendant who is eligible for publicly funded legal representation is represented by counsel in person at his or her arraignment; provided, however, that a timely arraignment with counsel shall not be delayed pending a determination of a defendant's eligibility.

(i) For the purposes of the plan developed pursuant to this subdivision, the term "arraignment" shall mean the first appearance by a person charged with a crime before a judge or magistrate, with the exception of an appearance where no prosecutor appears and no action occurs other than the adjournment of the criminal process and the unconditional release of the person charged (in which event "arraignment" shall mean the person's next appearance before a judge or magistrate).

(ii) The written plan developed pursuant to this subdivision shall be completed by December first, two thousand seventeen and shall include interim steps for each county and the city of New York for achieving compliance with the plan.

(iii) Each county and the city of New York shall, in consultation with the office, undertake good faith efforts to implement the plan and such plan shall be fully implemented and adhered to in each county and the city of New York by April first, two thousand twenty-three. Pursuant to section seven hundred twenty-two-e of the county law, the state shall reimburse each county and the city of New York for any costs incurred as a result of implementing such plan.

(iv) The office shall, on an ongoing basis, monitor and periodically report on the implementation of, and compliance with, the plan in each county and the city of New York.

(b) Caseload relief. Develop and implement a written plan that establishes numerical caseload/workload standards for each provider of constitutionally mandated publicly funded representation in criminal cases for people who are unable to afford counsel.

(i) Such standards shall apply to all providers whether public defender, legal aid society, assigned counsel program or conflict defender in each county and the city of New York.

(ii) The written plan developed pursuant to this subdivision shall be completed by December first, two thousand seventeen and shall include interim steps for each county and the city of New York for achieving compliance with the plan. Such plan shall include the number of attor-

neys, investigators and other non-attorney staff and the amount of in-kind resources necessary for each provider of mandated representation to implement such plan.

(iii) Each county and the city of New York shall, in consultation with the office, undertake good faith efforts to implement the caseload/workload standards and such standards shall be fully implemented and adhered to in each county and the city of New York by April first, two thousand twenty-three. Pursuant to section seven hundred twenty-two-e of the county law, the state shall reimburse each county and the city of New York for any costs incurred as a result of implementing such plan.

(iv) The office shall, on an ongoing basis, monitor and periodically report on the implementation of, and compliance with, the plan in each county and the city of New York.

(c) Initiatives to improve the quality of indigent defense. (i) Develop and implement a written plan to improve the quality of constitutionally mandated publicly funded representation in criminal cases for people who are unable to afford counsel and ensure that attorneys providing such representation: (A) receive effective supervision and training; (B) have access to and appropriately utilize investigators, interpreters and expert witnesses on behalf of clients; (C) communicate effectively with their clients; (D) have the necessary qualifications and experience; and (E) in the case of assigned counsel attorneys, are assigned to cases in accordance with article eighteen-b of the county law and in a manner that accounts for the attorney's level of experience and caseload/workload.

(ii) The office shall, on an ongoing basis, monitor and periodically report on the implementation of, and compliance with, the plan in each county and the city of New York.

(iii) The written plan developed pursuant to this subdivision shall be completed by December first, two thousand seventeen and shall include interim steps for each county and the city of New York for achieving compliance with the plan.

(iv) Each county and the city of New York shall, in consultation with the office, undertake good faith efforts to implement the initiatives to improve the quality of indigent defense and such initiatives shall be fully implemented and adhered to in each county and the city of New York by April first, two thousand twenty-three. Pursuant to section seven hundred twenty-two-e of the county law, the state shall reimburse each county and the city of New York for any costs incurred as a result of implementing such plan.

(d) Appropriation of funds. In no event shall a county and a city of New York be obligated to undertake any steps to implement the written plans under paragraphs (a), (b) and (c) of this subdivision until funds have been appropriated by the state for such purpose.

§ 13. This act shall take effect immediately; provided, however, that sections one and two of this act shall take effect April 1, 2018 and shall apply to confessions, admissions or statements made on or after such effective date; provided, further sections three through ten of this act shall take effect July 1, 2017.

child and another father figure, and it would be detrimental to the child's interests to disrupt that relationship.

We conclude that a hearing is needed in this case to decide the merits of Kenneth's claim. At that hearing, Raymond must be joined as a necessary party, so that Family Court may consider the nature of his relationship with the child and make a proper determination of A.'s best interests. Consequently, we remit the matter to Family Court for such a hearing and determination.

In view of the foregoing, we need not address Kenneth's remaining issues. However, both the Support Magistrate's failure to advise Kenneth of his right to counsel before genetic testing was done and counsel's failure to consult with Kenneth before the January 2007 hearing are troubling events, which should not have occurred.

Accordingly, the order of the Appellate Division should be re-versed, with costs, and the matter remitted to Family Court for further proceedings in accordance with this opinion.

Chief Judge LIPPMAN and Judges CIPARICK, GRAFFEO, READ, SMITH and JONES concur.

Order reversed, etc.

15 N.Y.3d 8

Kimberly HURRELL–HARRING et al., on Behalf of Themselves and All Others Similarly Situated, Appellants,

v.

STATE of New York et al., Respondents.

Court of Appeals of New York.

May 6, 2010.

Background: Individuals who, as indigent criminal defendants, were assigned public defenders in various criminal prosecutions brought putative class action against State, alleging that public defense system was deficient and presented unacceptable risk that indigent defendants were being denied constitutional right to counsel. The Supreme Court, Albany County, Eugene P. Devine, J., denied State's motions to dismiss, and State appealed. The Supreme Court, Appellate Division, 66 A.D.3d 84, 883 N.Y.S.2d 349, reversed. Individuals appealed as of right.

Holdings: The Court of Appeals, Lippman, C.J., held that:

(1) individuals stated cognizable claim for constructive denial of their Sixth Amendment right to counsel, and

(2) arraignment was critical stage of criminal proceeding for purposes of right to counsel, even if guilty plea was not elicited at arraignment.

Affirmed as modified. Pigott, J., filed dissenting opinion, in which Read and Smith, JJ., concurred.

1. Criminal Law ⇐1730, 1840

Class of individuals who were assigned public defenders in various criminal proceedings stated cognizable claim for constructive denial of their Sixth Amendment right to counsel by alleging that certain individuals were arraigned without

appointment of counsel and left unrepresented in subsequent proceedings, while other individuals were nominally appointed counsel who were unavailable, unresponsive, or unprepared; individuals' claims were not solely performance-based and went to whether State had met its foundational obligation to provide indigent defendants with counsel, rather than whether ineffectiveness had assumed systemic dimensions. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇐1730

Arraignment was `critical stage of criminal proceedings for purposes of indigent defendants' Sixth Amendment right to counsel, even if guilty pleas were not then elicited from defendants, since defendants' pretrial liberty interests were regularly adjudicated at arraignment in absence of appointed counsel with serious consequences, both direct and indirect, including loss of employment and housing, and inability to support and care for particularly needy dependents; presence of defense counsel at arraignment is not dispensable, except at a defendant's informed option, when matters affecting defendant's pretrial liberty or ability subsequently to defend against charges are to be decided. U.S.C.A. Const.Amend. 6; McKinney's CPL § 180.10(3, 6).

3. Criminal Law ⇐1710, 1766

A criminal defendant, regardless of wherewithal, is entitled to the guiding hand of counsel at every step in the proceedings against him. U.S.C.A. Const. Amend. 6.

4. Criminal Law ⇐1718, 1730

The right to counsel attaches at arraignment and entails the presence of counsel at each subsequent "critical" stage of the proceedings. U.S.C.A. Const. Amend. 6.

5. Criminal Law ⇐1730

A bail hearing is a critical stage of the State's criminal process, for purposes of right to counsel. U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐1731

Period between arraignment and trial when a case must be factually developed and researched, decisions respecting Grand Jury testimony made, plea negotiations conducted, and pre-trial motions filed, is critical for Sixth Amendment right to counsel purposes; indeed, to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. U.S.C.A. Const.Amend. 6.

7. Criminal Law ⇐1710

If no actual assistance for the accused's defense is provided, then the constitutional guarantee to counsel has been violated; the Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment. U.S.C.A. Const.Amend. 6.

8. Criminal Law ⇐1163(2)

In cases of outright denial of the right to counsel prejudice is presumed. U.S.C.A. Const.Amend. 6.

New York Civil Liberties Union Foundation, New York City (Corey Stoughton, Arthur Eisenberg, Christopher Dunn and Andrew Kalloch of counsel), and Schulte Roth & Zabel LLP (Gary Stein, Daniel Greenberg, Azmina Jasani and Kristie M. Blase of counsel), for appellants.

Andrew M. Cuomo, Attorney General, Albany (Barbara D. Underwood, Andrea Oser, Denise A. Hartman and Victor Paladino of counsel), for respondents.

Kathleen B. Hogan, District Attorney, Albany (Morries I. Kleinbart of counsel), for District Attorneys Association of the State of New York, amicus curiae.

Moskowitz, Book & Walsh, LLP, New York City (Susan J. Walsh of counsel), Norman L. Reimer, Washington, DC, Ivan Dominguez, Michael Getnick, Albany, Green & Willstatter, White Plains (Richard Willstatter of counsel), Ann Lesk, New York City, Bruce Green, Ellen C. Yaroshefsky, Adele Bernhard, White Plains, Jenny Rivera, Flushing, and Steve Zeidman for National Association of Criminal Defense Lawyers and others, amici curiae.

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Richards Kibbe & Orbe LLP, New York City (Lee S. Richards III, Arthur S. Greenspan and Eric S. Rosen of counsel), and Brennan Center for Justice at New York University School of Law (David S. Udell and Alicia L. Bannon of counsel), for Michael A. Battle and others, amici curiae.

Davis Polk & Wardwell LLP, New York City (Daniel F. Kolb, Daniel J. O'Neill, Jennifer Marcovitz and Lara Samet of counsel), and Legal Aid Society (Steven Banks and Janet Sabel of counsel), for Legal Aid Society, amicus curiae.

Jonathan E. Gradess, Albany, and Alfred O'Connor for New York State Defenders Association, amicus curiae.

David Loftis, New York City, Barry C. Scheck and Peter J. Neufeld for Innocence Project, Inc., amicus curiae.

[15]OPINION OF THE COURT

LIPPMAN, Chief Judge.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant "the right to ... have the Assistance of Counsel for his defence," and since *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) it has been established that that entitlement may not be effectively denied by the State by reason of a defendant's inability to pay for a lawyer. *Gideon* is not now controversial either as an expression of what the Constitution requires or as an exercise in elemental fair play. Serious questions have, however, arisen in this and other jurisdictions as to whether *Gideon's* mandate is being met in practice (*see e.g. Lavallee v. Justices in Hampden Superior Ct.*, 442 Mass. 228, 812 N.E.2d 895 [2004]).

In New York, the Legislature has left the performance of the State's obligation under *Gideon* to the counties, where it is discharged, for the most part, with county resources and according to local rules and practices (*see* County Law arts. 18–A, 18–B). Plaintiffs in this action, defendants in various criminal prosecutions ongoing at the time of the action's commencement in Washington, Onondaga, Ontario, Schuyler and Suffolk counties, contend that this arrangement, involving what is in essence a costly, largely unfunded and politically unpopular mandate upon local government, has functioned to deprive them and other similarly situated indigent defendants in the aforementioned counties of constitutionally and statutorily guaranteed representational rights. They seek a declaration that their rights and those of the class they seek to represent [16]are being violated and an injunction to avert further abridgment of their right to counsel; they do not seek relief within the criminal cases out of which their claims arise.

This appeal results from dispositions of defendants' motion pursuant to CPLR 3211 to dismiss the action as nonjusticiable. Supreme Court denied the motion, but in the decision and order now before

us (66 A.D.3d 84, 883 N.Y.S.2d 349 [2009]) the sought relief was granted by the Appellate Division. That court held that there was no cognizable claim for ineffective assistance of counsel other than one seeking postconviction relief, and, relatedly, that violation of a criminal defendant's right to counsel could not be vindicated in a collateral civil proceeding, particularly where the object of the collateral action was to compel an additional allocation of public resources, which the court found to be a properly legislative prerogative. Two Justices dissented. They were of the view that violations of the right to counsel were actionable in contexts other than claims for postconviction relief, including a civil action such as that brought by plaintiffs. While recognizing that choices between competing social priorities are ordinarily for the Legislature, this did not, in the dissenters' judgment, excuse the Judiciary from its obligation to provide a remedy for violations of constitutional rights (*id.* at 95, 883 N.Y.S.2d 349), especially when the alleged violations were "so interwoven with, and necessarily implicate[d], the proper functioning of the court system itself" (*id.* at 96, 883 N.Y.S.2d 349).

Plaintiffs have appealed as of right from the Appellate Division's order pursuant to CPLR 5601(a) and (b)(1). We now reinstate the action, albeit with some substantial qualifications upon its scope.

Defendants' claim that the action is not justiciable rests principally on two theories: first, that there is no cognizable claim for ineffective assistance of counsel apart from one seeking relief from a conviction, and second, that recognition of a claim for systemic relief of the sort plaintiffs seek will involve the courts in the performance of properly legislative functions, most notably determining how public resources are to be allocated.

[1] The first of these theories is rooted in case law conditioning relief for constitutionally ineffective assistance upon findings that attorney performance, when viewed in its total, case specific aspect, has both fallen below the standard of objective reasonableness (*see Strickland v. Washington*, 466 U.S. 668, 687–688, 104 S.Ct. 2052, 80 L.Ed.2d 674 [1984]), and resulted in prejudice, either with respect to the outcome of the proceeding (*id.* at 694, 104 S.Ct. 2052) or, under this Court's somewhat less outcome oriented standard of "meaningful assistance," to the defendant's right to a fair trial (*People v. Benevento*, 91 N.Y.2d 708, 713–714, 674 N.Y.S.2d 629, 697 N.E.2d 584 [1998]). Defendants reason that the prescribed, deferential (*see Strickland*, 466 U.S. at 689, 104 S.Ct. 2052; *Benevento*, 91 N.Y.2d at 712, 674 N.Y.S.2d 629, 697 N.E.2d 584) and highly context sensitive inquiry into the adequacy and particular effect of counsel's performance cannot occur until a prosecution has concluded in a conviction, and that, once there is a conviction, the appropriate avenues of relief are direct appeals and the various other established means of challenging a conviction, such as CPL article 440 motions and petitions for writs of habeas corpus or coram nobis. They urge, in essence, that the present plaintiffs can, based upon their ongoing prosecutions, possess no ripe claim of ineffective assistance and that any ineffective assistance claims that might eventually be brought by them would, given the nature of the claim, have to be individually asserted and determined; they argue that a finding of constitutionally deficient performance—one necessarily rooted in the particular circumstances of an individual case—cannot serve as a predicate for systemic relief. Indeed, they remind us that the Supreme Court in *Strickland* has noted pointedly that "the purpose of the effective assistance guarantee of the Sixth Amend-

ment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system[,] ... [but rather] to ensure that criminal defendants receive a fair trial" (466 U.S. at 689, 104 S.Ct. 2052).

These arguments possess a measure of merit. A fair reading of *Strickland* and our relevant state precedents supports defendants' contention that effective assistance is a judicial construct designed to do no more than protect an individual defendant's right to a fair adjudication; it is not a concept capable of expansive application to remediate systemic deficiencies. The cases in which the concept has been explicated are in this connection notable for their intentional omission of any broadly applicable defining performance standards. Indeed, *Strickland* is clear that articulation of any standard more specific than that of objective reasonableness is neither warranted by the Sixth Amendment nor compatible with its objectives:

> "More specific guidelines are not appropriate. The Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance.[18] It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms ...
>
> "In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances ... No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. Indeed, the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause" (466 U.S. at 688–689, 104 S.Ct. 2052 [citations omitted]).

We too have for similar reasons eschewed the articulation of more specific, generally applicable performance standards for judging the effectiveness of counsel in the context of determining whether constitutionally mandated representation has been provided (*see People v. Benevento*, 91 N.Y.2d at 712, 674 N.Y.S.2d 629, 697 N.E.2d 584; *People v. Baldi*, 54 N.Y.2d 137, 146–147, 444 N.Y.S.2d 893, 429 N.E.2d 400 [1981]). This is not to say that performance standards are not highly relevant in assuring that constitutionally effective assistance is provided and in judging whether in a particular case an attorney's performance has been deficient, only that such standards do not and cannot usefully define the Sixth Amendment-based concept of effective assistance. While the imposition of such standards may be highly salutary, it is not under *Strickland* appropriate as an exercise in Sixth Amendment jurisprudence.

Having said this, however, we would add the very important caveat that *Strickland's* approach is expressly premised on the supposition that the fundamental underlying right to representation under *Gideon* has been enabled by the State in a manner that would justify the presumption that the standard of objective reasonableness will ordinarily be satisfied (*see Strickland*,[19] 466 U.S. at 687–689, 104 S.Ct. 2052). The questions properly raised in

this Sixth Amendment-grounded action, we think, go not to whether ineffectiveness has assumed systemic dimensions, but rather to whether the State has met its foundational obligation under *Gideon* to provide legal representation.

Inasmuch as general prescriptive relief is unavailable and indeed incompatible with the adjudication of claims alleging constitutionally ineffective assistance of counsel, it follows that plaintiffs' claims for prospective systemic relief cannot stand if their gravamen is only that attorneys appointed for them have not, so far, afforded them meaningful and effective representation. While it is defendants' position, and was evidently that of the Appellate Division majority, that the complaint contains only performance-based claims for ineffective assistance, our examination of the pleading leads us to a different conclusion.

According to the complaint, 10 of the 20 plaintiffs—two from Washington, two from Onondaga, two from Ontario and four from Schuyler County—were altogether without representation at the arraignments held in their underlying criminal proceedings. Eight of these unrepresented plaintiffs were jailed after bail had been set in amounts they could not afford. It is alleged that the experience of these plaintiffs is illustrative of what is a fairly common practice in the aforementioned counties of arraigning defendants without counsel and leaving them, particularly when accused of relatively low level offenses, unrepresented in subsequent proceedings where pleas are taken and other critically important legal transactions take place. One of these plaintiffs remained unrepresented for some five months and it is alleged that the absence of clear and uniform guidelines reasonably related to need has commonly resulted in denials of representation to indigent defendants based on the subjective judgments of individual jurists.

In addition to the foregoing allegations of outright nonrepresentation, the complaint contains allegations to the effect that although lawyers were eventually nominally appointed for plaintiffs, they were unavailable to their clients—that they conferred with them little, if at all, were often completely unresponsive to their urgent inquiries and requests from jail, sometimes for months on end, waived important rights without consulting them, and ultimately appeared to do little more on their behalf than act as conduits for plea offers, some of which purportedly were highly unfavorable. It is repeatedly alleged that counsel missed court appearances, and that when they did [20] appear they were not prepared to proceed, often because they were entirely new to the case, the matters having previously been handled by other similarly unprepared counsel.[1] There are also allegations that the counsel appointed for at least one of the plaintiffs was seriously conflicted and thus unqualified to undertake the representation.

The allegations of the complaint must at this stage of the litigation be deemed true and construed in plaintiffs' favor, affording them the benefit of every reasonable inference (*Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]), the very limited object being to ascertain whether any cognizable claim for relief is made out (*id.*). If there is a discernible claim, that is where the inquiry must end; the difficulty of its proof is not the present concern. The above summarized allegations, in our view, state cognizable Sixth Amendment claims.

1. This claim, referred to by plaintiffs as one based on "lack of consistent vertical representation," is raised by each of the four Suffolk County plaintiffs.

[2–5] It is clear that a criminal defendant, regardless of wherewithal, is entitled to " 'the guiding hand of counsel at every step in the proceedings against him' " (*Gideon v. Wainwright*, 372 U.S. at 345, 83 S.Ct. 792, quoting *Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 [1932]). The right attaches at arraignment (*see Rothgery v. Gillespie County*, 554 U.S. 191, 128 S.Ct. 2578, 171 L.Ed.2d 366 [2008]) and entails the presence of counsel at each subsequent "critical" stage of the proceedings (*Montejo v. Louisiana*, 556 U.S. ——, 129 S.Ct. 2079, 173 L.Ed.2d 955 [2009]). As is here relevant, arraignment itself must under the circumstances alleged be deemed a critical stage since, even if guilty pleas were not then elicited from the presently named plaintiffs,[2] a circumstance which would undoubtedly require the "critical stage" label (*see Coleman v. Alabama*, 399 U.S. 1, 9, 90 S.Ct. 1999, 26 L.Ed.2d 387 [1970]), it is clear from the complaint that plaintiffs' pretrial liberty interests were on that occasion regularly adjudicated (*see also* CPL 180.10[6]) with most serious consequences, both direct and collateral, including the loss of employment and housing, and inability to support and care for particularly needy dependents. There is no question that "a bail hearing is a critical stage of the State's criminal process" (*Higazy v. Templeton*, 505 F.3d 161, 172 [2d Cir.2007] [internal quotation marks and citation omitted]).

Recognizing the crucial importance of arraignment and the extent to which a defendant's basic liberty and due process [2] interests may then be affected, CPL 180.10(3) expressly provides for the "right to the aid of counsel at the arraignment and at every subsequent stage of the action" and forbids a court from going forward with the proceeding without counsel for the defendant, unless the defendant has knowingly agreed to proceed in counsel's absence (CPL 180.10[5]).[3] Contrary to defendants' suggestion and that of the dissent, nothing in the statute may be read to justify the conclusion that the presence of defense counsel at arraignment is ever dispensable, except at a defendant's informed option, when matters affecting the defendant's pretrial liberty or ability subsequently to defend against the charges are to be decided. Nor is there merit to defendants' suggestion that the Sixth Amendment right to counsel is not yet fully implicated (*see Rothgery*, 554 U.S. at ——, 128 S.Ct. at 2589).

The cases cited by the dissent in which the allegedly consequential event at arraignment was the entry of a not guilty plea (*United States ex rel. Caccio v. Fay*, 350 F.2d 214, 215 [2d Cir.1965]; *United States ex rel. Combs v. Denno*, 357 F.2d 809, 812 [2d Cir.1966]; *United States ex rel Hussey v. Fay*, 220 F.Supp. 562 [S.D.N.Y.1963]; *Holland v. Allard*, 2005 WL 2786909, 2005 U.S. Dist LEXIS 46609 [E.D.N.Y.2005]) do not stand for the proposition that counsel, as a general matter, is optional at arraignment. Indeed, such a proposition would plainly be untenable since arraignments routinely, and in New York as a matter of statutory design, en-

2. It is, however, alleged that in the counties at issue pleas are often elicited from unrepresented defendants at arraignment.

3. It does not appear that any of the plaintiffs who were arraigned without counsel and jailed when they could not afford the bail consequently fixed agreed to proceed without a lawyer. The dissent's assertion (at 32 n. 7, 904 N.Y.S.2d at 311 n. 7, 930 N.E.2d at 232 n. 7) that plaintiffs were not "forced" to participate in bail hearings without counsel is, apart from being without any support in the record, irrelevant given the clear entitlement to counsel under the statute, and indeed the Constitution.

compass matters affecting a defendant's liberty and ability to defend against the charges. The cited cases rather stand for the very limited proposition that where it happens that what occurs at arraignment does not affect a defendant's ultimate adjudication, a defendant is not on the ground of nonrepresentation entitled to a reversal of his or her conviction. Plaintiffs here do not seek that relief. Rather, they seek prospectively to assure the provision of what the Constitution undoubtedly guarantees—representation at all critical stages of the criminal proceedings. In New York, arraignment is, as a general matter, such a stage.

[6] Also "critical" for Sixth Amendment purposes is the period between arraignment and trial when a case must be factually |22developed and researched, decisions respecting grand jury testimony made, plea negotiations conducted, and pretrial motions filed. Indeed, it is clear that "to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself" (*Maine v. Moulton*, 474 U.S. 159, 170, 106 S.Ct. 477, 88 L.Ed.2d 481 [1985]).

This complaint contains numerous plain allegations that in specific cases counsel simply was not provided at critical stages of the proceedings. The complaint additionally contains allegations sufficient to justify the inference that these deprivations may be illustrative of significantly more widespread practices; of particular note in this connection are the allegations that in numerous cases representational denials are premised on subjective and highly variable notions of indigency, raising possible due process and equal protection concerns. These allegations state a claim, not for ineffective assistance under *Strickland*, but for basic denial of the right to counsel under *Gideon*.

[7] Similarly, while variously interpretable, the numerous allegations to the effect that counsel, although appointed, were uncommunicative, made virtually no efforts on their nominal clients' behalf during the very critical period subsequent to arraignment, and, indeed, waived important rights without authorization from their clients, may be reasonably understood to allege nonrepresentation rather than ineffective representation. Actual representation assumes a certain basic representational relationship. The allegations here, however, raise serious questions as to whether any such relationship may be really said to have existed between many of the plaintiffs and their putative attorneys and cumulatively may be understood to raise the distinct possibility that merely nominal attorney-client pairings occur in the subject counties with a fair degree of regularity, allegedly because of inadequate funding and staffing of indigent defense providers. It is very basic that

> "[i]f no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated. To hold otherwise 'could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel. The Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment.' *Avery v. Alabama*, 308 |23U.S. 444, 446 [60 S.Ct. 321, 84 L.Ed. 377] (1940) (footnote omitted)" (*United States v. Cronic*, 466 U.S. 648, 654–655, 104 S.Ct. 2039, 80 L.Ed.2d 657 [1984]).

While it may turn out after further factual development that what is really at issue is whether the representation afforded was effective—a subject not properly litigated in this civil action—at this juncture, construing the allegations before us

as we must, in the light most favorable to plaintiffs, the complaint states a claim for constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of *Gideon*.[4] The dissent's conclusion that these allegations assert only performance based claims, and not claims for nonrepresentation, seems to us premature. The picture which emerges from a fair and procedurally appropriate reading of the complaint is that defendants are with some regularity going unrepresented at arraignment and subsequent critical stages. As noted, half the plaintiffs claim to have been without counsel at arraignment, and nearly all claim to have been left effectively without representation for lengthy periods subsequent to arraignment. If all that were involved was a "lumping together of 20 generic ineffective assistance of counsel claims" (dissenting op. at 30, 904 N.Y.S.2d at 309, 930 N.E.2d at 230) we would agree with the dissent that no cognizable claim had been stated, but we do not think that this detailed, multi-tiered complaint meticulously setting forth the factual bases of the individual claims and the manner in which they are linked to and illustrative of broad systemic deficiencies is susceptible of such characterization.

[8] Collateral preconviction claims seeking prospective relief for absolute, core denials of the right to the assistance of counsel cannot be understood to be incompatible with *Strickland*. These are not the sort of contextually sensitive claims that are typically involved when ineffectiveness is alleged. The basic, unadorned question presented by such claims where, as here, the defendant-claimants are poor, is whether the State has met its obligation to provide counsel, not whether under all the circumstances counsel's performance was inadequate or prejudicial. Indeed, in cases of outright denial of the right to counsel prejudice is presumed. *Strickland* itself, of course, recognizes the critical distinction between a claim for ineffective assistance and one alleging simply that the right to the assistance of counsel has been denied and specifically acknowledges that the [24]latter kind of claim may be disposed of without inquiring as to prejudice:

> "In certain Sixth Amendment contexts, prejudice is presumed. Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice. So are various kinds of state interference with counsel's assistance. See *United States v. Cronic*, [466 U.S.] at 659, and n. 25 [104 S.Ct. 2039]. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. *Ante*, at 658 [104 S.Ct. 2039]. Moreover, such circumstances involve impairments of the Sixth Amendment right that are easy to identify and, for that reason and because the prosecution is directly responsible, easy for the government to prevent" (466 U.S. at 692, 104 S.Ct. 2052).

The allegations before us state claims falling precisely within this described category. It is true, as the dissent points out, that claims, even within this category, have been most frequently litigated postconviction, but it does not follow from this circumstance that they are not cognizable apart from the postconviction context. Given the simplicity and autonomy of a claim for nonrepresentation, as opposed to one truly involving the adequacy of an attorney's performance, there is no reason—and certainly none is identified in the dissent—why such a claim cannot or

4. We note that *Cronic* is careful to distinguish this distinct claim from one for ineffective assistance (*Cronic*, 466 U.S. at 654 n. 11, 104 S.Ct. 2039).

should not be brought without the context of a completed prosecution.

Although defendants contend otherwise, we perceive no real danger that allowing these claims to proceed would impede the orderly progress of plaintiffs' underlying criminal actions. Those actions have, for the most part, been concluded,[5] and we have, in any event, removed from the action the issue of ineffective assistance, thus eliminating any possibility that the collateral adjudication of generalized claims of ineffective assistance might be used to obtain relief from individual judgments of conviction.[6] Here we emphasize that our recognition that plaintiffs may have claims for constructive denial of counsel should not [25] be viewed as a back door for what would be nonjusticiable assertions of ineffective assistance seeking remedies specifically addressed to attorney performance, such as uniform hiring, training and practice standards. To the extent that a cognizable Sixth Amendment claim is stated in this collateral civil action, it is to the effect that in one or more of the five counties at issue the basic constitutional mandate for the provision of counsel to indigent defendants at all critical stages is at risk of being left unmet because of systemic conditions, not by reason of the personal failings and poor professional decisions of individual attorneys. While the defense of indigents in the five subject counties might perhaps be improved in many ways that the Legislature is free to explore, the much narrower focus of the constitutionally based judicial remedy here sought must be simply to assure that every indigent defendant is afforded actual assistance of counsel, as *Gideon* commands. Plainly, we do not, even while narrowing the scope of this action as we believe the law requires, deny plaintiffs a remedy for systemic violations of *Gideon*, as the dissent suggests. It is rather the dissent that would foreclose plaintiffs from any prospect of obtaining such relief. And, when all is said and done, the dissent's proposed denial is premised solely upon the availability of relief from a judgment of conviction. Neither law, nor logic, nor sound public policy dictates that one form of relief should be preclusive of the other.

As against the fairly minimal risks involved in sustaining the closely defined claim of nonrepresentation we have recognized must be weighed the very serious dangers that the alleged denial of counsel entails. " 'Of all [of] the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have' " (*United States v. Cronic*, 466 U.S. at 654, 104 S.Ct. 2039, quoting Schaefer, *Federalism and State*

5. Defendants' contention that the action is, in light of this circumstance, moot overlooks the well-established exception to the mootness doctrine for recurring claims of public importance typically evading review (*see Matter of Hearst Corp. v. Clyne*, 50 N.Y.2d 707, 714–715, 431 N.Y.S.2d 400, 409 N.E.2d 876 [1980]).

6. It follows that if plaintiffs' claims are found to be meritorious after trial, such a determination will not entitle them to vacatur of their criminal convictions. And, although the issue is not specifically raised, we note in the same connection that, in view of the circumstance that this action will not disturb the progress or outcomes of plaintiffs' criminal actions (*cf. Matter of Lipari v. Owens*, 70 N.Y.2d 731, 519 N.Y.S.2d 958, 514 N.E.2d 378 [1987]; *Matter of Veloz v. Rothwax*, 65 N.Y.2d 902, 493 N.Y.S.2d 452, 483 N.E.2d 127 [1985]), and that the action seeks relief largely unavailable in the context of the underlying individual criminal actions, the rule generally applicable to bar collateral claims for equitable intervention in ongoing criminal prosecutions (*see e.g. Kelly's Rental v. City of New York*, 44 N.Y.2d 700, 405 N.Y.S.2d 443, 376 N.E.2d 915 [1978]) would not be properly relied upon by the State here.

Criminal Procedure, 70 Harv. L. Rev. 1, 8 [1956]). The failure to honor this right, then, cannot but be presumed to impair the reliability of the adversary process through which criminal justice is under our system of |26government dispensed. This action properly understood, as it has been by distinguished members of the prosecution and defense bars alike, does not threaten but endeavors to preserve our means of criminal adjudication from the inevitably corrosive effects and unjust consequences of an unfair adversary process.

It is not clear that defendants actually contend that stated claims for the denial of assistance of counsel would be nonjusticiable; their appellate presentation, both written and oral, has been principally to the effect that the claims alleged are exclusively predicated on deficient performance, a characterization which we have rejected. Supposing, however, a persisting, relevant contention of nonjusticiability, it is clear that it would be without merit. This is obvious because the right that plaintiffs would enforce—that of a poor person accused of a crime to have counsel provided for his or her defense—is the very same right that *Gideon* has already commanded the states to honor as a matter of fundamental constitutional necessity. There is no argument that what was justiciable in *Gideon* is now beyond the power of a court to decide.

It is, of course, possible that a remedy in this action would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities. But this does not amount to an argument upon which a court might be relieved of its essential obligation to provide a remedy for violation of a fundamental constitutional right (*see Marbury v. Madison*, 1 Cranch [5 U.S. 137, 147, 2 L.Ed. 60 [1803] ["every right, when withheld, must have a remedy, and every injury its proper redress"]).

We have consistently held that enforcement of a clear constitutional or statutory mandate is the proper work of the courts (*see Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 631 N.Y.S.2d 565, 655 N.E.2d 661 [1995]; *Jiggetts v. Grinker*, 75 N.Y.2d 411, 554 N.Y.S.2d 92, 553 N.E.2d 570 [1990]; *McCain v. Koch*, 70 N.Y.2d 109, 517 N.Y.S.2d 918, 511 N.E.2d 62 [1987]; *Klostermann v. Cuomo*, 61 N.Y.2d 525, 475 N.Y.S.2d 247, 463 N.E.2d 588 [1984]), and it would be odd if we made an exception in the case of a mandate as well-established and as essential to our institutional integrity as the one requiring the State to provide legal representation to indigent criminal defendants at all critical stages of the proceedings against them.

Assuming the allegations of the complaint to be true, there is considerable risk that indigent defendants are, with a fair degree of regularity, being denied constitutionally mandated counsel in |27the five subject counties. The severe imbalance in the adversary process that such a state of affairs would produce cannot be doubted. Nor can it be doubted that courts would in consequence of such imbalance become breeding grounds for unreliable judgments. Wrongful conviction, the ultimate sign of a criminal justice system's breakdown and failure, has been documented in too many cases. Wrongful convictions, however, are not the only injustices that command our present concern. As plaintiffs rightly point out, the absence of representation at critical stages is capable of causing grave and irreparable injury to persons who will not be convicted. *Gideon's* guarantee to the assistance of counsel does not turn upon a defendant's guilt or innocence, and neither can the availability of a remedy for its denial.

Accordingly, the order of the Appellate Division should be modified, without costs, by reinstating the complaint in accordance with this opinion, and remitting the case to that court to consider issues raised but not determined on the appeal to that court, and, as so modified, affirmed.

PIGOTT, J. (dissenting).

There is no doubt that there are inadequacies in the delivery of indigent legal services in this state, as pointed out by the New York State Commission on the Future of Indigent Defense Services, convened by former Chief Judge Kaye. I respectfully dissent, however, because, despite this, in my view, the complaint here fails to state a claim, either under the theories proffered by plaintiffs—ineffective assistance of counsel and deprivation of the right to counsel at a critical stage (arraignment)—or under the "constructive denial" theory read into the complaint by the majority.

The majority rightly rejects plaintiffs' ineffective assistance cause of action; such claims are limited to a case-by-case analysis and cannot be redressed in a civil proceeding. Rather than dismissing that claim, however, the majority replaces it with a "constructive denial" cause of action that, in my view, is nothing more than an ineffective assistance claim under another name.

The allegations in the complaint can be broken down into two categories: (1) the deprivation of "meaningful and effective assistance of counsel," and (2) the deprivation of the right to counsel at a "critical stage" of the proceedings, i.e., the arraignment. The claims under the former category are many: lack of a sufficient opportunity to discuss the charges with their attorney |28or participate in their defense; lack of preparation by counsel; denial of investigative services; lack of "vertical representation;" [1] refusal of assigned counsel to return phone calls or accept collect calls; inability to leave messages on assigned counsel's answering machine due to a full voicemail box, etc.

The majority rejects plaintiffs' main claim that the complaint states a cause of action for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984),[2] finding "a measure of merit" to defendants' arguments that such claims are premised on trial counsel's constitutionally deficient performance and do not form the basis for systemic relief (majority op. at 17, 904 N.Y.S.2d at 299–300, 930 N.E.2d at 220–21). I agree, and would affirm the Appellate Division's determination in that regard, because the *Strickland* standard is limited to whether an individual has received the effective assistance of counsel and cannot be used to attack alleged systemic failures, and the allegations of the complaint support no broader reading.

Rather than stopping at its rejection of the *Strickland* standard with respect to these allegations, however, the majority advances a third theory, and reads the complaint as stating a claim for "constructive denial" of the right to counsel, i.e., that upon having counsel appointed, plaintiffs received only "nominal" representation, such that there is a question as to

1. Presumably this refers to the fact that in some jurisdictions, a defendant may be represented by one lawyer in the local criminal court and have a different lawyer assigned in superior court.

2. Much of the focus of the majority is on the so-called *Strickland* standard, with respect to ineffective assistance of counsel. However, the "meaningful representation" standard obviously remains the standard to be applied in this state (*see People v. Baldi*, 54 N.Y.2d 137, 444 N.Y.S.2d 893, 429 N.E.2d 400 [1981]).

whether the counties were in compliance with the constitutional mandate of *Gideon* (majority op. at 22–23, 904 N.Y.S.2d at 303–04, 930 N.E.2d at 224–25).

In support of this rationale, the majority relies on *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), which recognizes a "narrow exception" to *Strickland's* requirement that a defendant asserting an ineffective assistance of counsel claim must demonstrate a deficient performance and prejudice (*Florida v. Nixon*, 543 U.S. 175, 190, 125 S.Ct. 551, 160 L.Ed.2d 565 [2004]). In other words, *Cronic*, too, is an ineffective assistance of counsel case—decided on the same day as *Strickland*—but one that allows the courts to find a Sixth Amendment violation "'without inquiring into counsel's actual performance or requiring the defendant to show the effect it had on the trial,' when 'circumstances [exist] that are so likely [29]to prejudice the accused that the cost of litigating their effect in a particular case is unjustified'" (*Wright v. Van Patten*, 552 U.S. 120, 124, 128 S.Ct. 743, 169 L.Ed.2d 583 [2008] [citations omitted]).

Cronic's "narrow exception" applies to individual cases where: (1) there has been a "complete denial of counsel"; i.e., the defendant is denied counsel at a critical stage of the trial; (2) "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; or (3) "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial" (466 U.S. at 659–660, 104 S.Ct. 2039).

Cronic's holding is instructive, if only to point out that the Supreme Court was reaching the obvious conclusion that, in *individual cases*, the absence or inadequacy of counsel must generally fall within one of those three narrow exceptions.[3] Constructive denial of counsel is a branch from the *Strickland* tree, with *Cronic* applying only when the appointed attorney's representation is so egregious that it's as if defendant had no attorney at all. Therefore, whether a defendant received ineffective assistance of counsel under *Strickland* or is entitled to a presumption of prejudice under *Cronic* is a determination that can only be made *after* the criminal proceeding has ended; neither approach lends itself to a proceeding like the one at bar where plaintiffs allege prospective violations of their Sixth Amendment rights.

The majority does not explain how it can conclude, on one hand, "that effective assistance is a judicial construct designed to do no more than protect an *individual* defendant's right to fair adjudication" and "is *not* a concept capable of expansive application to remediate systemic deficiencies" (majority op. at 17, 904 N.Y.S.2d at 300, 930 N.E.2d at 221 [emphasis supplied]), and on the other hand that a "constructive denial" of counsel theory could potentially apply to this class of individuals who, when they commenced the action, had not reached a resolution of their criminal cases. Courts reviewing the rare constructive denial claims have done so by looking [30]at the particular egregious behavior of the attorney in the particular case *after* the representation has concluded (*see e.g. Burdine v. Johnson*, 262 F.3d 336 [5th Cir.2001], *cert. denied sub nom.*

3. Even the defendant in *Cronic* was not entitled to rely on any of the exceptions delineated in that opinion, notwithstanding the fact that his retained counsel withdrew shortly before the trial date and, just 25 days before trial, the court appointed a young lawyer with a real estate practice to represent defendant in a mail fraud case that had taken the Government 4½ years to investigate. Supreme Court held that any errors by counsel at trial were to be examined using the *Strickland* test.

Cockrell v. Burdine, 535 U.S. 1120, 122 S.Ct. 2347, 153 L.Ed.2d 174 [2002] [defense counsel slept during capital trial]; *Restrepo v. Kelly*, 178 F.3d 634 [2d Cir. 1999]; *Rickman v. Bell*, 131 F.3d 1150 [6th Cir.1997], *cert. denied* 523 U.S. 1133, 118 S.Ct. 1827, 140 L.Ed.2d 962 [1998] [defense counsel acted as second prosecutor]; *Tippins v. Walker*, 77 F.3d 682, 686 [2d Cir.1996] [counsel slept through trial]; *Harding v. Davis*, 878 F.2d 1341 [11th Cir.1989] [constructive denial where counsel responded to defendant's displeasure of his representation by remaining silent and inactive at trial until replaced by the pro se defendant]; *Jenkins v. Coombe*, 821 F.2d 158, 161 [2d Cir.1987], *cert. denied* 484 U.S. 1008, 108 S.Ct. 704, 98 L.Ed.2d 655 [1988] [filing cursory five-page brief on appeal]).

That is not to say that a claim of constructive denial could never apply to a class where the State effectively deprives indigent defendants of their right to counsel, only that the various claims asserted by plaintiffs here do not rise to that level. Here, plaintiffs' complaint raises basic ineffective assistance of counsel claims in the nature of *Strickland*[4] (i.e., counsel was unresponsive, waived important rights, failed to appear at hearings, and was unprepared at court proceedings) and not the egregious type of conduct found in *Cronic*. Plaintiffs' mere lumping together of 20 generic ineffective assistance of counsel claims into one civil pleading does not ipso facto transform it into one alleging a systemic denial of the right to counsel.

Addressing plaintiffs' second theory—deprivation of the right to counsel at the arraignment—the majority posits that plaintiffs have stated a cognizable claim because 10 of them were arraigned without counsel, and eight of those remained in custody because they could not meet the bail that was set (majority op. at 19, 904 N.Y.S.2d at 301–02, 930 N.E.2d at 221–22).

It is undisputed that a criminal defendant " 'requires the guiding hand of counsel at every step in the proceedings against him' " (*Gideon v. Wainwright*, 372 U.S. 335, 345, 83 S.Ct. 792, 9 L.Ed.2d 799 [1963], quoting *Powell v. Alabama*, 287 U.S. 45, 69, 53 S.Ct. 55, 77 L.Ed. 158 [1932]). But the majority's bare conclusion that any arraignment conducted without the presence of counsel renders the proceedings a violation of the Sixth Amendment flies in the face of reality.

[3]The framework of CPL article 180 illustrates this point.[5] That provision presupposes that a criminal defendant, upon arraignment, may not have yet retained counsel or, due to indigency, requires the appointment of one. CPL 180.10 mandates that, in addition to apprising him of, and furnishing him with, a copy of the charges against him (*see* CPL 180.10[1]), the court must also inform an unrepresented defendant that he is entitled to, among

4. Nor, in my view, are such claims any different from the generic ineffective assistance of counsel claims routinely analyzed by state courts under this State's "meaningful representation" standard as enunciated in *Baldi*.

5. CPL 180.10 addresses the procedure to be followed at a defendant's arraignment on a felony complaint and the defendant's rights in that regard. Other provisions of the Criminal Procedural Law contain similar requirements. For instance, CPL 210.15 addresses the scenario where a defendant is arraigned on an indictment; however, in the latter scenario, the court's duties and responsibilities to apprise a defendant of his rights when appearing without counsel are essentially the same. CPL 170.10 addresses arraignments relative to an information, simplified traffic information, prosecutor's information or misdemeanor complaint, and sets forth the procedures the court must follow in apprising a defendant of his right to counsel and/or assignment of counsel.

other things, "an adjournment for the purpose of obtaining counsel" (CPL 180.10[3][a]) and the appointment of counsel by the court if "he is financially unable to obtain the same" (CPL 180.10[3][c]).[6] The court must also give the defendant the opportunity to avail himself of those rights and "must itself take such affirmative action as is necessary to effectuate them" (CPL 180.10[4]). This statute is a prophylactic one whose purpose is to protect a defendant's Sixth Amendment rights because, even in a situation where a defendant chooses to go forward without counsel, "the court must permit him to do so if it is satisfied that he made such decision with knowledge of the significance thereof" and, in a situation where it is not so satisfied, may decide not to proceed until defendant obtains or is appointed counsel (CPL 180.10[5]).

Giving plaintiffs the benefit of every favorable inference (*see Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]), the complaint nevertheless fails to state a cause of action for the deprivation of the right to counsel at arraignment. One reason is that there is no allegation that the failure to have counsel at one's first court appearance had an adverse effect on the criminal proceedings. The Second Circuit has rejected the assertion "that the absence of counsel upon arraignment is an inflexible, per se violation of the Sixth Amendment" (*United States ex rel. Caccio v. Fay*, 350 F.2d 214, 215 [2d Cir.1965]). Where a criminal defendant is arraigned without the presence of counsel and pleads not guilty—or the court enters a not guilty plea on his behalf—there is no Sixth Amendment violation (*see United States ex rel. Combs v. Denno*, 357 F.2d 809, 812 [2d Cir.1966]; *United States ex rel. Hussey v. Fay*, 220 F.Supp. 562 [S.D.N.Y.1963]; *see also Holland v. Mlard*, 2005 WL 2786909, 2005 U.S. Dist LEXIS 46609 [E.D.N.Y.2005]). The explanation as to why this is so is simple:

> "Under New York law, a defendant suffers no ... prejudice [by the imposition of a not guilty plea on arraignment without benefit of counsel], for whatever counsel could have done upon arraignment on defendant's behalf, counsel were free to do thereafter. There is nothing in New York law which in any way prevents counsel's later taking advantage of every opportunity or defense which was originally available to a defendant upon his initial arraignment" (*Hussey*, 220 F.Supp. at 563, citing *People v. Combs*, 19 A.D.2d 639, 241 N.Y.S.2d 104 [2d Dept.1963]).

As pleaded, none of the 10 plaintiffs arraigned without counsel entered guilty pleas and, indeed, in compliance with the strictures of CPL 180.10, all met with counsel shortly after the arraignment. Nor is there any claim that the absence of counsel prejudiced these plaintiffs (*cf. White v. Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 [1963] [petitioner, at initial proceeding without counsel, pleaded guilty without the knowledge that even if that plea was vacated after counsel was appointed, it was still admissible at trial, such that lack of counsel at initial proceeding required reversal of conviction]; *Hamilton v. Alabama*, 368 U.S. 52, 54, 82 S.Ct. 157, 7 L.Ed.2d 114 [1961] [denial of counsel at arraignment was reversible error where, under Alabama law, certain defens-

6. Indeed, the Supreme Court of the United States has favorably cited to CPL 180.10 in support of its observation that New York is one of the 43 states that "take the first step toward appointing counsel 'before, at or just after initial appearance'" (*Rothgery v. Gillespie County*, 554 U.S. 191, —— and n. 14, 128 S.Ct. 2578, 2586–2587 and n. 14, 171 L.Ed.2d 366 [2008]).

es had to be asserted during that proceeding or could have been "irretrievably lost"]).

The majority implies that the complaint pleads a *Gideon* violation because certain of the plaintiffs were not represented when the court arranged for the imposition of bail at the arraignment (*see* CPL 170.10[7]; 180.10[6]; 210.15[6]).[7] Quite often this initial appearance inures to the benefit of defendant who may [33]be released on his own recognizance or on manageable bail within hours of arrest. The only substantive allegations plaintiffs make relative to bail is that assigned counsel failed to advocate for lower bail at the arraignment or move for a bail reduction post-arraignment. If anything, the complaint alleges a claim for ineffective assistance of counsel under the federal or state standard, but the majority has rejected such a claim in this litigation (majority op. at 17–19, 904 N.Y.S.2d at 299–301, 930 N.E.2d at 220–22).

Finally, the majority notes that plaintiffs do not seek relief within the context of their own criminal cases, and therefore allowing plaintiffs to proceed on their claims "would [not] impede the orderly progress of [the] underlying criminal actions," asserting that even if plaintiffs' claims are found to be meritorious after trial they would not be entitled to a vacatur of their criminal convictions (majority op. at 24 and 25 n. 6, 904 N.Y.S.2d at 304–05 and 305 n. 6, 930 N.E.2d at 225–26 and 226 n. 6). In my view, if plaintiffs are able to establish a violation of *Gideon*, they should not be foreclosed from seeking a remedy; if plaintiffs are willing to waive any remedy to which they may be entitled, as they are doing here, then I see no reason why the courts have any business adjudicating this matter.

While the perfect system of justice is beyond human attainment, plaintiffs' frustration with the deficiencies in the present indigent defense system is understandable. Legal services for the indigent have routinely been underfunded, and appointed counsel are all too often overworked and confronted with excessive caseloads, which affects the amount of time counsel may spend with any given client. Many, if not all, of plaintiffs' grievances have been acknowledged in the Kaye Commission Report, which is implicitly addressed—as it should be—to the Legislature, the proper forum for weighing proposals to enhance indigent defense services in New York. This complaint is, at heart, an attempt to convert what are properly policy questions for the Legislature into constitutional claims for the courts.

Accordingly, I would affirm the order of the Appellate Division.

Judges CIPARICK, GRAFFEO and JONES concur with Chief Judge LIPPMAN; Judge PIGOTT dissents and votes to affirm in a separate opinion in which Judges READ and SMITH concur.

Order modified, etc.

7. The majority observes that a bail hearing is a critical stage of the criminal process (majority op. at 20, 904 N.Y.S.2d at 301–02, 930 N.E.2d at 222–23). While that may be a correct statement of the law, it has little application to these facts, as none of these plaintiffs asserts that they were forced to participate in a bail hearing without the aid of counsel.

FY 2017-18 Final Budget
Office of Indigent Legal Services (ILS) (Office)

	FY 2016-17 Final Budget	Executive Budget Request	Senate Proposal	Assembly Proposal	Final Budget
State Operations	$3.2 million	$4.83 million*	$4.83 million	$4.83 million	$4.83 million
Aid to Localities	$96.2 million	$104.81 million	$104.81 million	$104.81 million	$104.81million
All Funds	$99.4 million	$109.64 million	$109.64 million	$109.64 million	$109.64 million

*The Executive Aid to Localities proposal provided that "$4,830,000 . . . shall be transferred to state operations."

State Operations:

- Office Operations (A.3000-D/S.2000-D):
  - Of the $4.83 million State Ops appropriation in the FY 2017-18 Final Budget, $2.31 million is allocated for general office operations; $1.27 million for implementation of the *Hurrell-Harring* settlement; and $1.25 million for implementation of plans for statewide expansion of *Hurrell-Harring* reforms.

Aid to Localities:

- ILS Distributions and Grants/*Hurrell-Harring* Settlement (A.3003-D/S.2003-D):
  - Of the $104.81 million Aid to Localities appropriation in the FY 2017-18 Final Budget, $81.0 million is allocated to fund ILS distributions and grants and $23.81 million is allocated for implementation of the *Hurrell-Harring* settlement. The $23.81 million for the *Hurrell-Harring* settlement is allocated as follows:
    - $19.01 million for the five settlement counties to add staff and other resources needed to comply with caseload/workload standards determined by ILS.
    - $2.0 million to further implement the written plan developed by ILS to improve the quality of indigent defense in the five settlement counties; and
    - $2.8 million to further implement the written plan developed by ILS to provide in person representation of eligible defendants at all arraignments in the five settlement counties.

Article VI language:

- Statewide Expansion of *Hurrell-Harring* Reforms (A.3009-C/S.2009-C, Part VVV, §§ 11-13)
  - The FY 2017-18 Final Budget language requires the Office to develop and complete written plans, no later than December 1, 2017, to extend *Hurrell-Harring* reforms statewide, with the "projected fiscal impact of the required appropriation for the implementation of such plan" subject to the approval of the Director of the Budget. The plans shall include interim steps for each county and city of New York for achieving compliance by April 1, 2023. County expenditures to implement these plans would be fully reimbursable by the state. The written plans are:
    - **Counsel at Arraignment.** This plan would ensure that each criminal defendant eligible for publicly funded legal representation is represented by counsel in person at his or her arraignment.
    - **Caseload Relief.** This plan would establish numerical caseload/workload standards for each provider of constitutionally mandated representation in criminal cases.
    - **Quality Initiatives.** This plan would improve the quality of constitutionally mandated publicly funded representation in criminal cases by ensuring, *inter alia*, effective supervision and training, adequate access to investigators and experts, and properly qualified and experienced attorneys.

Division of the Budget

STATE OF NEW YORK
DIVISION OF THE BUDGET
ANDREW M. CUOMO, GOVERNOR
ROBERT F. MUJICA JR., DIRECTOR

FOR IMMEDIATE RELEASE:
April 7, 2017

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GOVERNOR CUOMO AND LEGISLATIVE LEADERS ANNOUNCE AGREEMENT ON FY 2018 STATE BUDGET

Governor Andrew M. Cuomo, Senate Majority Leader John Flanagan, Senate Independent Democratic Conference Leader Jeffrey Klein, and Assembly Speaker Carl Heastie today announced an agreement on the FY 2018 State Budget. The agreement continues the state's record of fiscal responsibility, holding spending growth to 2 percent while reducing taxes, making smart investments in education, enacting comprehensive criminal justice reforms, creating good-paying jobs, and rebuilding New York's infrastructure.

About the FY 2018 Budget

- State Operating Funds spending is $98.1 billion in FY 2018 – an increase of 2 percent. (State Operating Funds exclude Federal funds and capital).
- All Funds spending is $153.1 billion for FY 2018.
- Increases Education Aid by $1.1 billion, including a $700 million increase in Foundation Aid, bringing the new Education Aid total to $25.8 billion or an increase of 4.4 percent.
- Increases Medicaid State share funding to $23.5 billion.
- Extends tax rate on millionaires – 45,000 taxpayers impacted, 50 percent non-residents, preserving as $3.4 billion in revenue next year.
- Begins Middle Class Tax Cut – saving taxpayers $250 on average next year, and 6 million New Yorkers $700 annually when fully effective.

Statement from Governor Andrew M. Cuomo:

"With this Budget, New York is once again showing what responsible government can achieve. The result is a Budget that advances the core progressive principles that built New York: investing in the middle class, strengthening the economy and creating opportunity for all.

"This Budget enacts the Middle Class Recovery Act to continue the Empire State's upward trajectory and creates a path forward for those striving to get ahead. By making college at our world-class public universities tuition-free, we have established a national model for access to higher education, and achieved another New York first.

"For too long, draconian punishments for youthful mistakes have ruined the lives of countless young New Yorkers. By coming together, we reversed this injustice and raised the age of criminal responsibility once and for all so that 16- and 17-year-olds are no longer automatically processed as adults.

"This Budget continues the progress we have achieved to improve the lives of New Yorkers, and build a stronger, better Empire State that truly lives up to its motto: Excelsior."

Statement from Senate Majority Leader John J. Flanagan:

"This agreement will allow us to put in place a complete and final budget for the people of New York. The product of hard work and compromise, our state spending plan meets the needs of middle-class taxpayers and their families and advances key initiatives to make our state more affordable. It rejects new fees and protects one of the biggest and boldest tax cuts in state history, makes the largest ever investment in clean water, helps families better afford the high costs of college and ensures all of our schools have the resources they need to give students a high-quality education. On top of that, the new state budget enacts workers' compensation reforms to cut costs and help businesses create jobs, fully funds direct care professionals who treat our most vulnerable citizens and makes more than $200 million available to fight and win the battle against heroin and opioid addiction. I congratulate our partners in government, including the Governor, Speaker Heastie and Senator Klein, and thank my colleagues in the Senate Republican Conference for their tireless advocacy, their sound ideas and most of all their patience."

Statement from Assembly Speaker Carl E. Heastie:

"Throughout these budget negotiations the Assembly Majority has made it clear that our goal is, and always has been, to prioritize the health and well-being of New York's families and communities. Without critical support for public education, housing and water infrastructure and workable answers to the diverse challenges affecting communities across the state, we cannot succeed. The Assembly Majority is pleased to deliver a budget that keeps the promise to our students by securing significant aid for public schools as well as broadening access to higher education opportunity programs for middle and low income families. This conference is proud that our years-long goal to end the unjust treatment of young offenders in the justice system has finally been realized with this budget, which raises the age of adult criminal responsibility. We have heard the calls of our upstate and suburban communities and delivered greater choice in transportation alternatives with the approval of ridesharing that maintains our commitment to essential labor standards and public safety. This budget also continues our mission to ensure that workers are fairly compensated for their services and delivers funding to bring direct care and support workers closer to the living wage they deserve. The Assembly Majority is proud of this budget and what it means for the future of all New York's families. These are important and thoughtful investments that will continue to serve the best interests of New Yorkers for generations to come."

Statement from Senate Independent Democratic Conference Leader Jeffrey D. Klein:

"This is a budget that changes New York for the better. In it we create a historic $10 million immigrant legal aid fund to meet the urgent need of our immigrant communities. This major investment preserves the American Dream for those who, like our relatives, came here to seek it. We Raise the Age right, sending the majority of our 16- and 17-year-olds to Family Court, where they will get the services they need to get their lives back on track. We get our children off of Rikers Island within a year and we send a strong message that we believe in second chances. This budget contains a record increase in education spending, economic development initiatives and important water safety and quality projects. I thank Governor Cuomo, Senator Flanagan and Speaker Heastie for working hard to reach an agreement that benefits all residents in New York State."

Reducing Taxes to Record Lows for Middle-Class New Yorkers

The Budget continues to lower Personal Income Tax rates for middle-class New Yorkers. With the middle class tax cuts of 2012, rates were lowered from 6.85 percent to 6.45 percent for taxpayers in the $40,000-$150,000 income bracket, and to 6.65 percent in the $150,000-$300,000 income bracket. Under these new reforms, the rate will drop even further this year and will continue to drop all the way to 5.5 percent and 6 percent, respectively, when the cuts are fully phased in.

These new lower tax rates will save middle class New Yorkers nearly $6.6 billion in just the first four years, with annual savings reaching $4.2 billion by 2025. As the new rates phase in, they will be the state's

lowest middle class tax rates in more than 70 years. When the tax cuts begin, they will benefit 4.4 million filers, growing to 6 million filers when fully phased in.

Investing Record $25.8 Billion in Education

The FY 2018 Budget continues the progress made to strengthen educational outcomes and increase access to high-quality learning across New York State. It increases Education Aid by $1.1 billion, including a $700 million increase in Foundation Aid, bringing the new Education Aid total to $25.8 billion or an increase of 4.4 percent. Under Governor Cuomo, education aid has increased by $6.2 billion, or 32 percent, over six years.

Establishing the First-in-the-Nation Excelsior Scholarship Program to Provide Tuition-Free College for Families Making up to $125,000 & Investing in E-Books

The Budget enacts the Governor's landmark Excelsior Scholarship program to make college affordable at SUNY and CUNY two- and four-year colleges for working- and middle-class families. The program provides free tuition to families making up to $125,000 per year, and nearly 940,000 New York families are eligible for the program.

The new initiative will be phased in over three years, beginning for New Yorkers making up to $100,000 annually in the fall of 2017, increasing to $110,000 in 2018, and reaching $125,000 in 2019. The Excelsior Scholarship is a 'last mile' program, which extends the state's existing generous aid programs, including the nearly $1 billion Tuition Assistance Program and any applicable federal grants, and fills in any remaining gaps to cover the full cost of tuition.

New Yorkers must be enrolled in college full-time, averaging 30 credits per year and completing their degree on-time. The program includes built in flexibility, allowing students to pause and restart the program, due to a hardship, or take fewer credits one semester than another. Students must also maintain a grade point average necessary for the successful completion of their coursework. Under the program, New Yorkers will be required to live and work in-state for the number of years they received the Excelsior Scholarship. The Budget also includes a generous Maintenance of Effort to assist in meeting the operational needs of SUNY and CUNY.

As the cost of textbooks can be prohibitively expensive, the Budget also invests $8 million to provide open educational resources, including electronic-books, to students at SUNY and CUNY. At the state's direction, SUNY and CUNY will use this funding to target high-enrollment courses, including general education, to maximize student savings.

Under the FY 2018 Budget, a new Enhanced Tuition Award will also enable students attending private not-for-profit colleges to receive financial assistance to complete their college degree. The program provides a maximum award of $3,000, requires private colleges to provide a match and freeze student tuition for the duration of the award – maximizing the financial benefit to the student. The Enacted Budget includes $19 million for the program.

Enhancing the Middle Class Child Care Tax Credit

The Budget enacts an enhanced middle class child care tax credit that will help more than 200,000 middle-class families make their child care more affordable. The new tax credit would supplement the current New York State Child and Dependent Care Tax Credit and more than double the benefit for families earning between $60,000 and $150,000, bringing the total credit from $169 to $376 per household on average.

Protecting New Yorkers from the Soaring Cost of Prescription Drugs

Under the FY 2018 Budget, New York is the first state in the nation to cap the growth of prescription drug spending in its Medicaid program, which has grown 25 percent over the past three years. The agreement provides the Department of Health with a range of tools to lower the cost of prescription drugs, including

the ability to drive down the cost of certain drugs whose price is high relative to its therapeutic benefits. This unprecedented agreement enables the Medicaid program to allocate more resources for other essential health services and ensures high-quality care across New York State.

Combating the Opioid Epidemic

In 2016, the Governor signed into law a comprehensive plan to combat the heroin and opioid epidemic in New York State. The FY 2018 Budget builds on this progress by investing over $200 million to support prevention, treatment and recovery programs targeted toward chemical dependency, residential service opportunities, and public awareness and education activities.

Raising the Age of Criminal Responsibility

The FY 2018 State Budget raises the age of criminal responsibility to 18-years-old and ensures that young people who commit non-violent crimes receive the intervention and evidence-based treatment they need. New York was previously one of only two states in the nation that automatically processed all 16- and 17-year-olds as adults in the criminal justice system, no matter their offense.

The new measures will be phased in over time, raising the age of juvenile delinquency from age 16- to 17-years-old beginning on October 1, 2018, and subsequently raising the age of criminal responsibility to 18-years-old on October 1, 2019.

Further, young people will no longer be permitted to be housed in adult facilities or jails. Young people under the age of eighteen will no longer be placed or held at Rikers Island in New York City no later than October 1, 2018. They are to be placed in specialized juvenile detention facility certified by the New York City Administration for Children's Services and the State's Office of Children and Family Services, and in conjunction with the State's Commission of Correction and the New York City Department of Corrections.

The state will also create a Raise the Age implementation task force, with committee members designated by the Governor. Additionally, individuals who have been crime free for ten years after serving a sentence will be able to apply for the sealing of previous criminal convictions.

Delivering $2.5 Billion in Funding to Combat Homelessness and Increase Access to Affordable Housing

The FY 2018 Budget continues funding for the state's $20 billion comprehensive, five-year plan for affordable and supportive housing to ensure New Yorkers who are homeless or at risk of homelessness have safe and secure housing. The Budget includes $2.5 billion in funding to advance the creation of 100,000 new affordable and 6,000 supportive housing units.

Enacting "Affordable New York" Housing Program

Under the FY 2018 Budget, developers of new residential projects with 300 units or more in certain areas of Manhattan, Brooklyn and Queens will be eligible for a full property tax abatement for 35 years if the project creates a specific number of affordable rental units and meets newly established minimum construction wage requirements. The units must remain affordable for 40 years. For all other affordable developments in New York City, the period of affordability and abatement eligibility would be tied to the number of affordable units. This new program will create an estimated 2,500 new units of affordable housing per year.

Cutting Property Taxes and Costs of Local Government

The FY 2018 Budget continues the Governor's efforts to relieve the property tax burden and builds on the success of the 2 percent property tax cap. The typical New York homeowner pays 2.5 times more in local property taxes than in state income taxes. The Budget will empower citizens to control the cost of local government by requiring counties to assemble local governments to find efficiencies for real, recurring

taxpayer savings. To ensure transparency and an active role for citizens in reducing their tax burden, public hearings and comment periods will be required as part of the development of the shared services plans.

Extending Hurrell-Harring Settlement Reforms for Indigent Defendants across New York

The provision of quality criminal defense by the government to individuals who cannot otherwise afford counsel is of paramount importance, as the United States Supreme Court ruled in *Gideon v. Wainwright*. In 2014, the State successfully negotiated an agreement in *Hurrell-Harring et al. v. State of New York et al.*, a lawsuit filed against the state and five counties based upon an alleged failure to provide the necessary level of indigent defense services in those counties, to bring true reform to public defense systems that were failing.

To ensure fair and equal representation for all accused individuals, the FY 2018 Budget includes resources to develop the framework through which the state will fund one hundred percent of the costs necessary to extend the reforms provided for in the *Hurrell-Harring* settlement to all 62 counties in New York.

Providing Budget Flexibility to React to Potential Loss of Federal Aid

Given the looming threats from Washington, the FY 2018 Budget provides flexibility for the state to adjust spending during the fiscal year to account for a significant loss of federal aid. If federal support is reduced by $850 million or more, the New York State Director of the Budget will develop a plan to make uniform spending reductions. This plan would take effect automatically unless the legislature passes their own plan within 90 days.

Delivering Ride Sharing Across New York

The FY 2018 Budget authorizes Transportation Network Companies (TNC), such as Lyft and Uber, to operate across New York and creates uniform licensing standards. The Department of Motor Vehicles will have broad oversight of rideshare companies and will ensure compliance with all laws, rules, and regulations required as part of a TNC's operational license.

TNC companies will be required to maintain minimum insurance coverage levels of $1.25 million while a TNC driver is traveling to pick up a passenger and until the drop-off is completed. The state will also establish minimum standards to ensure passenger safety, including mandatory background checks, ongoing monitoring for traffic safety, anti-discrimination protections, and zero-tolerance drug and alcohol policies.

The Budget also establishes a statewide task force to study and deliver recommendations on accessibility needs to protect and provide transportation to vulnerable populations. Necessary workers' compensation coverage will also be provided to rideshare drivers through enhancements to the Black Car Fund. Finally, a statewide board will be established to review the impact of this newly authorized industry across the state.

Providing $2.5 Billion for Clean Drinking Water for All New Yorkers

To ensure that current and future New Yorkers have access to clean water, the Budget initiates the $2.5 billion Clean Water Infrastructure Act. This investment will protect public health, safeguard the environment, and preserve the state's water resources. These funds will help local governments address water emergencies, pay for local infrastructure construction projects, underwrite land acquisition for source water protection, and investigate and mitigate emerging contaminants in drinking water. These projects will improve the quality and safety of municipal drinking water distribution, filtration systems, and wastewater treatment infrastructure.

Enacting Comprehensive Workers' Compensation Reform

The Budget includes meaningful workers' compensation reforms that provide cost savings for businesses and better protections for injured workers. The new reforms ensure that the most significantly injured workers have the right to be considered for lifetime benefits. The reforms will also ensure swift access to

hearings for injured workers not receiving benefits, create a clear formulary for prescription drugs, and provide relief for first responders exposed to a traumatic event at work. Concurrent with expanded worker protections, businesses will be achieving overall savings, bringing much needed relief to municipal and private employers. Changes include establishing more definitive limits on caps and updating medical guidelines to reflect advances in modern medicine.

Increasing Direct Care Professional Salaries

The Budget includes a landmark agreement that will provide New York's 120,000 direct care professionals with a 6.5 percent raise over the next two years. These increases will help state-funded non-profits that specialize in the care of vulnerable New Yorkers not only recruit and retain employees, but continue to provide the same level of excellent care that have made them the backbone of New York's developmentally disabled and behavioral health system.

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