Centralized Arraignments and Recent Developments in Indigent Legal Representation – The County Public Defender's Perspective

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Presentation by Thomas N. N. Angell, Public Defender of Dutchess County, to the New York State Association of County Attorneys, Cooperstown, NY—May 22, 2017

Dutchess County's Journey to Counsel at Arraignment

I joined the Dutchess County Public Defender's Office in 1989 after spending most of the previous decade working at our local civil Legal Services office. Upon taking on my new responsibilities I was immediately troubled by the fact that the clients of our office were routinely having their liberty taken away from them and incarcerated without an attorney being present at their arraignment. The remedy in New York State to this seeming violation of basic due process rights had to await the New York State Court of Appeal's ruling in Hurrell-Harring v. State of New York, 15 N.Y. 3d 8 (2010) (attached as Exhibit A). In a decision written by Chief Judge Jonathan Lippman, the Court held for the first time that a criminal defendant's 6th Amendment U.S. constitutional right to counsel is violated when a criminal defendant is incarcerated without representation by counsel.

The following Law Day, May 1, 2011, Chief Judge Lippman issued his now famous pledge to provide lawyers for poor criminal defendants being arraigned in local courts and promised to remedy the situation within a year. He stated this problem "can no longer be tolerated in a modern, principled society governed by the rule of law". He announced that the newly created New York State Office of Indigent Legal Services (ILS) would initiate a grant program to assist local counties to provide this new service.

Needless to say, I did not need to be convinced that providing counsel at arraignment was a good idea. In addition, Dutchess County had a jail that was too small and was housing out nearly half of its inmates in neighboring counties jails. In seeking a remedy to the

overcrowding/housing out problem, the County's Criminal Justice Council identified the arraignment process as being an area that might be reformed to lessen the jail population.

On November 12, 2012, I met with the Dutchess County Magistrate's Association to discuss how the arraignment process might be changed and the approach the County should take in applying for the expected grant funding. The magistrates expressed concern regarding the time it would take to do arraignments if they had to wait for a public defender to arrive. They were concerned about conflicts between different courts holding arraignments at the same time. There were also concerns that they would be reported to the Commission on Judicial Conduct if they held an arraignment without waiting for a public defender to arrive.

On November 30, 2012, ILS released its request for proposals to provide counsel at first appearance. The proposal was due to ILS by February 15, 2013.

On January 8, 2013, the Executive Committee of the County's Criminal Justice Committee met to determine the course the County should take in responding to the ILS Request for Proposals. The meeting was attended by representatives of probation, jail, planning, mental hygiene, county executive, public defender, district attorney, parole, local police, a local community organization, two city court judges, and two officers of the magistrate's association. Several different options were discussed. One proposal was to hire two additional public defenders to handle off-hour arraignments in the busiest courts in the County. The second proposal would centralize the arraignments in the City of Poughkeepsie Court—the justice courts would continue doing arraignments without counsel and adjourn the case to the next day for the City of Poughkeepsie Judges to do an arraignment with counsel. In order for this to happen, the City of Poughkeepsie Judges would have to have been made

Acting County Court Judges. After considerable discussion, it was determined to propose the first option—hiring two public defenders to handle off-hours arraignments in the busiest local courts.

In February 2013, Dutchess County submitted a response to ILS requesting a three year grant of $615,102.00 to hire two assistant public defenders to handle after-hours appearances in Dutchess County's two city courts and the higher volume justice courts. (Proposal is attached as Exhibit B.)

On August 6, 2013, Dutchess County was informed that ILS had awarded the County a three year grant to provide counsel at first appearance as set forth in the County's submission. The term of the grant was from June 1, 2013 through May 31, 2016.

With the assistance of our County Attorney, I submitted a resolution to our County Legislature to accept the grant. On October 15, 2013, the County Legislature voted to accept the grant by a vote of 22 to 1. (Resolution is attached as Exhibit C.)

Given that the new public defenders to be hired were to have substantially different job responsibilities and work hours than our current staff, the resolution passed by the County Legislature established a new job title and classification—Arraignment Attorneys. I then worked with our Human Resource Department to flesh out the job description for the new position. (Job Description attached as Exhibit D.)

While the salary, benefits, and eligibility for pension was initially comparable to an assistant public defender, the method of being paid and work conditions were much different. One arraignment lawyer is working at a time. Hence, the arraignment attorney works one week on and one week off. Their work week is divided into shifts. During the week a shift runs from

5:00 PM to 9:00 AM. On weekends, there are two shifts per day: 5:00 PM Friday to 9:00 AM Saturday and then 9:00 AM Saturday to 5:00 PM Saturday. This holds true for Sundays and holidays as well. The arraignment attorneys get paid only if they work the assigned shifts. However, the attorney will be paid for the shift whether or not they actually get called out. They receive no paid sick time, personal time or vacation time. They only receive pension credit for the actual hours that they work. (Collective Bargaining Agreement attached as Exhibit E.)

The arraignment attorney is provided with a county vehicle, a telephone, and a tablet computer device which allows access to both the Public Defender's case management system and legal research websites. The arraignment attorney keeps the county vehicle at their place of residence while they are on duty. The arraignment attorney is not required to stay at home when they are on call, but is required to stay within the County so that they can respond if required.

While prior to receiving the ILS grant our office was handling arraignments during regular calendar calls in our County Court and City of Poughkeepsie Court upon request, the terms of the grant required our office to provide arraignment services to the City of Beacon Court and other high volume justice courts. Our office established within existing staff an on-call arraignment attorney rotation to cover the arraignment calls during normal business hours.

On December 10, 2013, I wrote a letter to the City Court Judges and local magistrates in the grant catchment area announcing the commencement of the Counsel at Arraignment program. Dutchess County was the first up-state county to start the arraignment program. (Letter to Judges attached as Exhibit F.)

The letter ended up causing controversy. Two sentences in particular caused problems. I wrote, "In order for this program to work effectively and efficiently, we would ask you only call us under circumstances where there is a reasonable possibility that bail will be set. If our office is called under circumstances where it is extremely unlikely that the defendant will be incarcerated, we may not be able to attend another proceeding where it is more probable that the defendant will be incarcerated or another Judge will be inconvenienced in waiting for our arrival."

Evidently one of the Judges to whom the letter was sent made an inquiry to the Office of Court Administration's Committee on Judicial Ethics to determine whether the request made in my letter was ethical for the Judge to comply with. In an opinion published on January 9, 2014, the Committee on Judicial Ethics determined that it was not ethical for a Judge to make a determination prior to calling the on-call public defender as to whether or not bail would be set. (Judicial Ethics Opinion attached as Exhibit G.)

Subsequent to commencing the Counsel at Arraignment program, two additional modifications were made. First, the arraigning Courts requested that our office have a dedicated telephone number which they could call during normal business hours rather than calling the main office number. This request was accommodated.

In the fall of 2015, the County Executive was contacted by the Magistrate's Association. They requested to a meeting to discuss the broadening of the Counsel at Arraignment program to all arraignments within Dutchess County. At the meeting, the County Executive agreed to do so. The Magistrates agreed to expand our response time to 90 minutes. Normally, we can have an attorney to the requesting Court within 30 minutes.

In order to effectuate this change of County policy, an additional attorney had to be hired to handle day time arraignments during normal business hours. Currently, we have the primary day time arraignment attorney and a back-up arraignment attorney selected from existing staff on a rotating basis. The second change which had to be made was to have a back-up attorney for the off hours and off calendar arraignments. To date, this is a function that has fallen primarily on me. We are currently evaluating setting up a different system, but to do so is complicated by the fact that such a back-up system will have to be negotiated with the union representing our attorney staff.

On October 5, 2015, I sent out a letter to all lower court judges in Dutchess County announcing that our office would commence providing County-wide arraignment services on October 13, 2015. (Letter to Judges attached as Exhibit H.)

The implementation of the Counsel at Arraignment program has been fairly smooth. In 2016, well over 95% of incarcerated defendants charged with penal law or vehicle and traffic law offenses had counsel at their arraignment. We had difficulties with one particular jurisdiction that would not call our office or give our attorneys sufficient time to arrive. However with assistance from the administrative judge and patience the problem appears to have been resolved. (Letter to Judge attached as Exhibit I.)

On January 6, 2017, ILS released its second RFP for a Counsel at First Appearance Grant. Dutchess County once again applied for funding. This time we requested $750,000.00 for the three year grant period. However, this will not cover the full cost of the program. Over a three year period we expect the cost to be $1,068,871.00. (Response to 2017 RFP attached as Exhibit J.)

I have also attached to my materials the reports that the arraignment attorney fills out after each arraignment. On the back of the form is our intake check list that we use to develop arguments for arraignment and to explore possible alternatives to incarceration. (Exhibit K.)

Our Counsel at Arraignment program has been subjected to evaluation by the State University of New York Albany through a grant awarded by the National Institute of Justice. (Description of study attached as Exhibit L.) Preliminary results show that the program has had a positive result in increasing the number of individuals released on their own recognizance at arraignment, permitted more defendants to post the bail that was set at arraignment, and permitted fewer people to be detained pending disposition of their cases.

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Exhibit
"A"

15 N.Y.3d 8, 930 N.E.2d 217, 904 N.Y.S.2d 296, 2010 N.Y. Slip Op. 03798

**1 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
Argued March 23, 2010
Decided May 6, 2010

CITE TITLE AS: Hurrell-Harring v State of New York

SUMMARY

Appeal, on constitutional and other grounds, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered July 16, 2009. The Appellate Division, with two Justices dissenting, (1) reversed, on the law, an order of the Supreme Court, Albany County (Eugene P. Devine, J.), which had conditionally denied a motion by defendant State of New York to dismiss the complaint by (a) requiring plaintiffs to serve and file a second amended complaint adding the counties of Onondaga, Ontario, Schuyler, Suffolk and Washington as defendants within 30 days, and (b) providing that unless the condition was complied with, defendant's motion to dismiss would be granted in its entirety; (2) granted defendant's motion; and (3) dismissed the complaint.

Hurrell-Harring v State of New York, 66 AD3d 84, modified.

HEADNOTES

Courts
Justiciable Questions
Challenge to Public Defense System—Ineffective Assistance of Counsel

([1]) Plaintiffs, who were defendants in various criminal prosecutions ongoing at the time of the action's commencement and sought a declaration that the State's system of providing constitutionally mandated counsel to indigent defendants violated their rights and those of the class they sought to represent, failed to state a justiciable claim based on ineffective assistance of counsel under *Strickland v Washington* (466 US 668 [1984]). General prescriptive relief is unavailable and incompatible with the adjudication of claims alleging constitutionally ineffective assistance of counsel. 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 purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, but rather to ensure that criminal defendants receive a fair trial.

Courts
Justiciable Questions
Challenge to Public Defense System—Denial of Assistance of Counsel

([2]) Plaintiffs, who were defendants in various criminal prosecutions ongoing at the time of the action's commencement and sought a declaration that the State's system of providing constitutionally mandated counsel to indigent defendants violated their rights and those of the class they sought to represent, *9 stated a justiciable claim for constructive denial of the right to counsel by reason of insufficient compliance with the constitutional mandate of *Gideon v Wainwright* (372 US 335 [1963]). Ten of the 20 plaintiffs were altogether without representation at the arraignments held in their underlying criminal proceedings, and eight of those unrepresented plaintiffs were jailed after bail had been set in amounts they could not afford. The complaint additionally contained allegations sufficient to justify the inference that those deprivations of counsel at critical stages of the proceedings might be illustrative of significantly more widespread practices. In numerous cases, representational denials were allegedly premised on subjective and highly variable notions of indigency, raising possible due process and equal protection concerns. Similarly, 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, might be reasonably understood to allege nonrepresentation rather than ineffective representation. Given the simplicity and autonomy of a claim for nonrepresentation, as opposed to one truly involving the adequacy of an attorney's performance, there was no reason why such a claim could not or should not be brought without the context of a completed prosecution. Assuming the allegations of the complaint to be true, there was considerable risk that indigent defendants are, with a fair degree of regularity, being denied constitutionally mandated counsel. The very serious dangers that the alleged denial of counsel entails outweighed the fairly minimal risks involved in sustaining the closely defined claim of nonrepresentation recognized here.

RESEARCH REFERENCES

Am Jur 2d, Constitutional Law §§ 268, 269; Am Jur 2d, Criminal Law §§ 1097, 1109, 1124.

Carmody-Wait 2d, Declaratory Judgments §§ 147:19, 147:20; Carmody-Wait 2d, Right to Counsel §§ 184:48, 184:61, 184:62.

LaFave, et al., Criminal Procedure (3d ed) § 11.7.

NY Jur 2d, Article 78 and Related Proceedings § 11; NY Jur 2d, Counties, Towns, and Municipal Corporations § 637; NY Jur 2d, Criminal Law: Procedure §§ 761, 795, 804; NY Jur 2d, Declaratory Judgments and Agreed Case §§ 21–23.

ANNOTATION REFERENCE

Modern status of rules and standards in state courts as to adequacy of defense counsel's representation of criminal defendant. 2 ALR4th 27.

FIND SIMILAR CASES ON WESTLAW

Database: NY-ORCS

Query: non-justiciab! /p ineffective /2 assistance /2 counsel attorney & deficien!

*10 POINTS OF COUNSEL

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.

I. Plaintiffs have stated a claim for prospective relief from systemic violations of the constitutional right to counsel. (*Gideon v Wainwright*, 372 US 335; *Rothgery v Gillespie County*, 554 US 191; *Maine v Moulton*, 474 US 159; *People v Hilliard*, 73 NY2d 584; *People v Settles*, 46 NY2d 154; *People v Ross*, 67 NY2d 321; *People v Baldi*, 54 NY2d 137; *People v Cunningham*, 49 NY2d 203; *McMann v Richardson*, 397 US 759; *People v Witenski*, 15 NY2d 392.) II. The Appellate Division erred in holding that the right to counsel is enforced exclusively through individual postconviction actions seeking reversal of a conviction. (*Strickland v Washington*, 466 US 668; *Luckey v Harris*, 860 F2d 1012; *People v Donovan*, 13 NY2d 148; *N.Y. County Lawyers' Assn. v State of New York*, 192 Misc 2d 424; *Nicholson v Williams*, 203 F Supp 2d 153.) III. The Appellate Division erred in holding that plaintiffs' claims will interfere with their ongoing criminal cases such that this action must be dismissed. (*New York County Lawyers' Assn. v Pataki*, 188 Misc 2d 776; *Luckey v Harris*, 860 F2d 1012; *Matter of Oglesby v McKinney*, 7 NY3d 561; *Matter of Taylor v Sise*, 33 NY2d 357; *Matter of Veloz v Rothwax*, 65 NY2d 902; *Matter of Morgenthau v Erlbaum*, 59 NY2d 143; *Reed v Littleton*, 275 NY 150; *Strickland v Washington*, 466 US 668.) IV. Plaintiffs' claims are justiciable because they allege failure to comply with mandatory and legal constitutional standards. (*Klostermann v Cuomo*, 61 NY2d 525; *Board of Educ., Levittown Union Free School Dist. v Nyquist*, 57 NY2d 27; *Campaign for Fiscal Equity v State of New York*, 86 NY2d 307; *Campaign for Fiscal Equity v State of New York*, 100 NY2d 893; *Jiggetts v Grinker*, 75 NY2d 411; *McCain v Koch*, 70 NY2d 109; *Gideon v Wainwright*, 372 US 335; *Marbury v Madison*, 1 Cranch [5 US] 137; *King v Cuomo*, 81 NY2d 247; *New York State Bankers Assn. v Wetzler*, 81 NY2d 98.)

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

I. Plaintiffs fail to state a justiciable claim. (*Gideon v Wainwright*, 372 US 335; *People v Witenski*, 15 NY2d 392; *Maine v Moulton*, 474 US 159; *People v Claudio*, 59 NY2d 556; *Strickland v Washington*, 466 US 668; *11 *People v Baldi*, 54 NY2d 137; *People v Turner*, 5 NY3d

476; *People v Arthur*, 22 NY2d 325; *People v Settles*, 46 NY2d 154; *People v D'Alessandro*, 13 NY3d 216.) II. This action for declaratory and injunctive relief was properly dismissed because it would interfere with ongoing criminal proceedings and because adequate other remedies exist to address claims for the denial of the right to counsel. (*Matter of Rush v Mordue*, 68 NY2d 348; *Matter of State of New York v King*, 36 NY2d 59; *Matter of Lipari v Owens*, 70 NY2d 731; *Matter of Patel v Breslin*, 45 AD3d 1240; *Matter of Veloz v Rothwax*, 65 NY2d 902; *Matter of Morgenthau v Erlbaum*, 59 NY2d 143; *Matter of Oglesby v McKinney*, 7 NY3d 561; *Matter of Beneke v Town of Santa Clara*, 9 AD3d 820; *Island Swimming Sales v County of Nassau*, 88 AD2d 990; *O'Shea v Littleton*, 414 US 488.)

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

There is no basis to find any violation of a counsel-related right remediable in a civil action. Finding such a violation would do incalculable damage to the ability to effectively litigate such claims in criminal proceedings. (*Matter of Stream v Beisheim*, 34 AD2d 329; *Gideon v Wainwright*, 372 US 335; *Strickland v Washington*, 466 US 668; *People v Baldi*, 54 NY2d 137; *People v Turner*, 5 NY3d 476; *People v Caban*, 5 NY3d 143; *People v Benevento*, 91 NY2d 708; *People v Claudio*, 83 NY2d 76; *Kimmelman v Morrison*, 477 US 365; *People v Wiggins*, 89 NY2d 872.)

Moskowitz, Book & Walsh, LLP, New York City (*Susan J. Walsh* of counsel), *Norman L. Reimer*, Washington, D.C., *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.

I. The *Strickland* postconviction, remedial standard is the wrong standard in a class action claim seeking prospective relief to halt and prevent system-wide deficiencies in how the State of New York meets its constitutional obligation to provide indigent defendants effective assistance of counsel. (*Strickland v Washington*, 466 US 668; *Williams v Taylor*, 529 US 362; *Wright v West*, 505 US 277; *Kieser v People of State of N. Y.*, 56 F3d 16; *Rompilla v Beard*, 545 US 374; *Luckey v Harris*, 860 F2d 1012, *appeal after remand sub nom. Luckey v Miller*, 976 F2d 673; *United States v Cronic*, 466 US 648; **12 *Geders v United States*, 425 US 80; *Holloway v Arkansas*, 435 US 475; *Kenny A. ex rel. Winn v Perdue*, 356 F Supp 2d 1353.) II. The Sixth Amendment right to effective assistance of counsel is broader than the right to assistance at trial and requires more than the mere appointment of counsel. (*Strickland v Washington*, 466 US 668; *Rothgery v Gillespie County*, 554 US 191; *Brewer v Williams*, 430 US 387; *Michigan v Jackson*, 475 US 625; *Higazy v Templeton*, 505 F3d 161; *Coleman v Alabama*, 399 US 1; *Kirby v Illinois*, 406 US 682; *United States v Gouveia*, 467 US 180; *Estelle v Smith*, 451 US 454; *Moore v Illinois*, 434 US 220.) III. The New York Constitution affords broader protection of the right to effective assistance of counsel and is cognizable prospectively. (*People v Elwell*, 50 NY2d 231; *People v Belton*, 55 NY2d 49; *People v P.J. Video*, 68 NY2d 296; *People v Torres*, 74 NY2d 224; *People v Dunn*, 77 NY2d 19; *People v Robinson*, 97 NY2d 341; *People ex rel. Ransom v Niagara County*, 78 NY 622; *People v Price*, 262 NY 410; *People v Settles*, 46 NY2d 154; *People v Benevento*, 91 NY2d 708.)

Willkie Farr & Gallagher LLP, New York City (*Lawrence O. Kamin, Maor A. Portnoy* and *Joseph M. Azam* of counsel), for the Fund for Modern Courts, amicus curiae.

I. Under New York's political question doctrine, the instant case is justiciable. (*Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo*, 64 NY2d 233; *Matter of Dairylea Coop. v Walkley*, 38 NY2d 6; *Jones v Beame*, 45 NY2d 402; *Strickland v Washington*, 466 US 668; *New York County Lawyers' Assn. v State of New York*, 294 AD2d 69; *Jiggetts v Grinker*, 75 NY2d 411; *Matter of Anderson v Krupsak*, 40 NY2d 397; *Bruno v Codd*, 47 NY2d 582; *Board of Educ., Levittown Union Free School Dist. v Nyquist*, 57 NY2d 27; *Klostermann v Cuomo*, 61 NY2d 525.) II. The justiciability of alleged systemic deficiencies denying the constitutional right to counsel to indigent criminal defendants is further confirmed by other courts which have consistently held that this dispute is justiciable. III. Arguments that the amended complaint presents a nonjusticiable political question are flawed. (*Klostermann v Cuomo*, 61 NY2d 525; *Campaign for Fiscal Equity v State of New York*, 86 NY2d 307; *Campaign for Fiscal Equity v State of New York*, 100 NY2d 893; *Board of Educ., Levittown Union Free School Dist. v Nyquist*, 57 NY2d 27; *New York County Lawyers' Assn. v Pataki*, 188 Misc 2d 776; *Matter of Anderson v Krupsak*, 40 NY2d 397; *Marbury v Madison*, 1 Cranch [5 US] 137; *Bruno v Codd*, 47 NY2d 582.) IV. Adjudicating constitutional claims is not only within the Judiciary's purview, it is the highest calling **13 for the courts. (*Duke Power Co. v Carolina Environmental Study Group, Inc.*, 438 US 59; *Powell v McCormack*, 395 US 486; *People v LaValle*, 3 NY3d 88;

People v Scott, 79 NY2d 474; *Klostermann v Cuomo*, 61 NY2d 525; *Board of Educ., Levittown Union Free School Dist. v Nyquist*, 57 NY2d 27; *Campaign for Fiscal Equity v State of New York*, 100 NY2d 893; *Powell v Alabama*, 287 US 45; *New York County Lawyers' Assn. v State of New York*, 294 AD2d 69.) V. The amended complaint presents significant issues that result in serious and immediate individual, familial and societal harms. (*Matter of New York State Inspection, Sec. & Law Enforcement Empls., Dist. Council 82, AFSCME, AFL-CIO v Cuomo*, 64 NY2d 233; *New York County Lawyers' Assn. v State of New York*, 196 Misc 2d 761; *Baba-Ali v State of New York*, 24 Misc 3d 576; *People v Claudio*, 83 NY2d 76; *United States v Cronic*, 466 US 648; *United States ex rel. Williams v Twomey*, 510 F2d 634; *Gideon v Wainwright*, 372 US 335; *Powell v Alabama*, 287 US 45; *N.Y. County Lawyers' Assn. v State of New York*, 192 Misc 2d 424; *McMann v Richardson*, 397 US 759.)

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.

I. The deficient system for defending the indigent alleged in the complaint undercuts the work of prosecutors and damages the integrity of the criminal justice system. (*People v Pelchat*, 62 NY2d 97; *Herring v New York*, 422 US 853; *Gideon v Wainwright*, 372 US 335; *People v DiSimone*, 23 Misc 3d 402; *People v Vilardi*, 76 NY2d 67; *Georgia v McCollum*, 505 US 42; *People v Settles*, 46 NY2d 154; *People v Santorelli*, 95 NY2d 412; *People v Taveras*, 10 NY3d 227.) II. Because courts have the power and responsibility to protect the integrity of the judicial system, this Court should find plaintiffs' claims justiciable. (*Campaign for Fiscal Equity v State of New York*, 100 NY2d 893; *New York County Lawyers' Assn. v State of New York*, 294 AD2d 69; *People v Ramos*, 99 NY2d 27; *Wehringer v Brannigan*, 232 AD2d 206, 89 NY2d 980; *Matter of Maron v Silver*, 58 AD3d 102; *N.Y. County Lawyers' Assn. v State of New York*, 192 Misc 2d 424; *Bruno v Codd*, 47 NY2d 582; *Matter of McCoy v Mayor of City of N.Y.*, 73 Misc 2d 508.) III. The State of New York's remaining objections to justiciability lack merit. (*People v Baldi*, 54 NY2d 137; *People v Stultz*, 2 NY3d 277; *Matter of Swinton v Safir*, 93 NY2d 758; *People v Donovan*, 13 NY2d 148; *People v Osorio*, 75 NY2d 80; *Castillo v Henry Schein, Inc.*, 259 AD2d 651; ***14** *Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740; *Kimmel v State of New York*, 302 AD2d 908; *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144; *People v Rivera*, 71 NY2d 705.)

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.

I. The right to meaningful and effective assistance of counsel represents far more than avoidance of wrongful convictions. (*Argersinger v Hamlin*, 407 US 25; *Gideon v Wainwright*, 372 US 335; *People v Witenski*, 15 NY2d 392; *People v Hughes*, 15 NY2d 172; *Powell v Alabama*, 287 US 45; *United States v Cronic*, 466 US 648; *McMann v Richardson*, 397 US 759; *People v Droz*, 39 NY2d 457; *People v Baldi*, 54 NY2d 137; *Strickland v Washington*, 466 US 668.) II. A judicial remedy is necessary and appropriate where ineffective assistance of counsel is systemic. (*New York County Lawyers' Assn. v State of New York*, 294 AD2d 69; *New York County Lawyers' Assn. v State of New York*, 196 Misc 2d 761; *Matter of Swinton v Safir*, 93 NY2d 758; *Klostermann v Cuomo*, 61 NY2d 525; *Bruno v Codd*, 47 NY2d 582; *Indiana Protection & Advocacy Servs. Commn. v Commissioner, Ind. Dept. of Correction*, 642 F Supp 2d 872; *Oregon Advocacy Ctr. v Mink*, 322 F3d 1101; *Marbury v Madison*, 1 Cranch [5 US] 137; *Campaign for Fiscal Equity v State of New York*, 100 NY2d 893; *Board of Educ., Levittown Union Free School Dist. v Nyquist*, 57 NY2d 27.) III. Systemic deficiencies in a system of indigent defense constrain the ability of assigned counsel to satisfy their professional obligations to clients.

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

Ineffective assistance of counsel claims cannot be adequately resolved within the context of criminal case litigation in many counties in New York because overburdened and underfunded public defense lawyers do not file CPL article 440 motions, which are necessary for proper adjudication of these claims. (*Rothgery v Gillespie County*, 554 US 191; *Luckey v Harris*, 860 F2d 1012; *People v Linares*, 2 NY3d 507; *People v Brown*, 45 NY2d 852; *People v Rivera*, 71 NY2d 705; *People v Whitfield*, 44 AD3d 419; *People v Noll*, 24 AD3d 688.)

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

New York's system for indigent defense does not guarantee that New York's ***15** poor will receive the full scope of their right to effective assistance. Additionally, the remedy of *Strickland v Washington* (466 US 668 [1984]) is insufficient to remedy this systemic constitutional

wrong. The current system for indigent defense in New York should be subject to systemic reform by the courts, both to ensure the constitutional rights of all criminal defendants and to minimize the risk that innocent defendants are convicted for crimes they did not commit. (*People v Settles*, 46 NY2d 154; *People v Claudio*, 59 NY2d 556; *People v Baldi*, 54 NY2d 137; *People v Caban*, 5 NY3d 143; *Youngblood v West Virginia*, 547 US 867; *Strickler v Greene*, 527 US 263; *People v Deskovic*, 201 AD2d 579, 83 NY2d 1003, 210 F3d 354, 531 US 1088; *People v Newton*, 150 AD2d 991, 74 NY2d 816; *Porter v Gramley*, 112 F3d 1308, *cert denied sub nom. Porter v Gilmore*, 523 US 1042.)

OPINION OF THE COURT

Chief Judge Lippman.

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 US 335 [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.* **2 *Lavallee v Justices in Hampden Superior Ct.*, 442 Mass 228, 812 NE2d 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 AD3d 84 [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), especially when the alleged violations were "so interwoven with, and necessarily implicate[d], the proper functioning of the court system itself" (*id.* at 96).

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.

The first of these theories is rooted in case law conditioning relief for **3 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* *17 *Strickland v Washington*, 466 US 668, 687-688 [1984]), and resulted in prejudice, either with respect to the outcome of the proceeding (*id.* at 694) 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 NY2d 708, 713-714 [1998]). Defendants reason that the prescribed, deferential (*see Strickland*, 466 US at 689; *Benevento*, 91 NY2d at 712) 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 Amendment 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 US at 689).

([1]) 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 . . .
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> "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 **4 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 US at 688-689 [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 NY2d at 712; *People v Baldi*, 54 NY2d 137, 146-147 [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 US at 687-689). 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 **5 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.

([2]) 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 NY2d 83, 87-88 [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.

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 US at 345, quoting *Powell v Alabama*, 287 US 45, 69 [1932]). The right attaches at arraignment (*see Rothgery v Gillespie County*, 554 US 191, 128 S Ct 2578 [2008]) and entails the presence of counsel at each subsequent "critical" stage of the proceedings (*Montejo v Louisiana*, 556 US —, 129 S Ct 2079 [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 **6 from the presently named plaintiffs,[2] a circumstance which would undoubtedly require the "critical stage" label (*see Coleman v Alabama*, 399 US 1, 9 [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 F3d 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 *21 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 US at 209).

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 F2d 214, 215 [2d Cir 1965]; *United States ex rel. Combs v Denno*, 357 F2d 809, 812 [2d Cir 1966]; *United States ex rel. Hussey v Fay*, 220 F Supp 562 [SD NY 1963]; *Holland v Allard*, 2005 WL 2786909, 2005 US Dist LEXIS 46609 [ED NY 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, **7 encompass 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.

Also "critical" for Sixth Amendment purposes is the period between arraignment and trial when a case must be factually *22 developed 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 US 159, 170 [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*.

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.' *23 *Avery* v. *Alabama*, 308 U. S. 444, 446 (1940) (footnote omitted)" **8 (*United States v Cronic*, 466 US 648, 654-655 [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) 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.

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 US] at 659, and n. 25. Prejudice in these circumstances is so likely ****9** that case-by-case inquiry into prejudice is not worth the cost. *Ante*, at 658. 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 US at 692).

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 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 ****10** 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 US at 654, quoting Schaefer, *Federalism and State 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 *26 government 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— **11 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 US] 137, 147 [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 NY2d 307 [1995]; *Jiggetts v Grinker*, 75 NY2d 411 [1990]; *McCain v Koch*, 70 NY2d 109 [1987]; *Klostermann v Cuomo*, 61 NY2d 525 [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 *27 the 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.

**12 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 ***28** or 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 US 668 [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). I agree, and would affirm the Appellate Division's determination in that regard, ****13** 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 whether the counties were in compliance with the constitutional mandate of *Gideon* (majority op at 22-23).

In support of this rationale, the majority relies on *United States v Cronic* (466 US 648 [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 US 175, 190 [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 US 120, 124 [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 US at 659-660).

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 ****14** 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 [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 F3d 336 [5th Cir 2001], *cert denied sub nom. Cockrell v Burdine*, 535 US 1120 [2002] [defense counsel slept during capital trial]; *Restrepo v Kelly*, 178 F3d 634 [2d Cir 1999]; *Rickman v Bell*, 131 F3d 1150 [6th Cir 1997], *cert denied* 523 US 1133 [1998] [defense counsel acted as second prosecutor]; *Tippins v Walker*, 77 F3d 682, 686 [2d Cir 1996] [counsel slept through trial]; *Harding v Davis*, 878 F2d 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 F2d 158, 161 [2d Cir 1987], *cert denied* 484 US 1008 [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 **15 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).

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 US 335, 345 [1963], quoting *Powell v Alabama*, 287 US 45, 69 [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.

*31 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 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 **16 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 NY2d 83, 87-88 [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 *32 the Sixth Amendment" (*United States ex rel. Caccio v Fay*, 350 F2d 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 F2d 809, 812 [2d Cir 1966]; *United States ex rel. Hussey v Fay*, 220 F Supp 562 [SD NY 1963]; *see also Holland v Allard*, 2005 WL 2786909, 2005 US Dist LEXIS 46609 [ED NY 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 AD2d 639 [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 US 59 [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 **17 required reversal of conviction]; *Hamilton v Alabama*, 368 US 52, 54 [1961] [denial of counsel at arraignment was reversible error where, under Alabama law, certain defenses 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).

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). 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. **18

Order modified, etc.

FOOTNOTES

Footnotes

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 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) 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.

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

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 NY2d 707, 714-715 [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 NY2d 731 [1987]; *Matter of Veloz v Rothwax*, 65 NY2d 902 [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 NY2d 700 [1978]) would not be properly relied upon by the State here.

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 NY2d 137 [1981]).

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.

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.

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 US 191, 204 and n 14 [2008]).

7 The majority observes that a bail hearing is a critical stage of the criminal process (majority op at 20). 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.

End of Document

Exhibit
"B"

Response to Request for Proposal
NYS Office of Indigent legal Services
Counsel at First Appearance

PROJECT SUMMARY

County Requesting Funds:	Dutchess County
Contact Person:	Thomas N. N. Angell, Esq. (845) 486-2280 phone (845) 486-2266 fax tangell@dutchessny.com
Fiscal Intermediary:	Public Defender Office Laura Aylward, Legal Administrative Assistant 22 Market Street, 4th Fl, Poughkeepsie, NY 12601
Amount of Funding Requested:	$615,102.00

Proposed project overview: Dutchess County proposes to hire two assistant public defenders to handle after-hours first appearances in our two city courts and the higher volume justice courts (Town of Hyde Park, Town of Pleasant Valley, Town of LaGrange, Town of Poughkeepsie, Town of East Fishkill, Town of Fishkill, Village of Fishkill, Town of Wappingers Falls and Village of Wappiners Falls).

A. Plan of Action

Project Rationale

1) Description of the Problem:
Indigent defense in Dutchess County is provided by the public defender. The public defender currently provides counsel at first appearance in the County Court for all cases.

We have two city courts. Our largest city court is in Poughkeepsie. Public defenders are present in this Court on every week day. The public defender routinely stands in for arraignments for all indigent defendants. If an arraignment is scheduled during business hours, other then during the regular scheduled calendar, a public defender will be sent to the City Court of Poughkeepsie to handle the proceeding. If an individual is arraigned by the City of Poughkeepsie Court on a weekend or evening the case is adjourned to the following day's calendar. The delay in seeing counsel can be from several hours to eighty-eight hours on a three day weekend.

Public defenders in the City Court of Poughkeepsie routinely have access to the defendant's criminal history, accusatory instruments, pre-trial release eligibility report from the probation department, at times a mental health screening report from the department of mental hygiene and a personal interview with the client prior to appearing before the judge for the arraignment. Of the 891 incarcerated individuals arraigned in the City of Poughkeepsie Court with counsel in 2012 433 individuals, approximately 50% were released from custody at their first appearance before the Judge.

Unfortunately, the level of service provided in the City of Poughkeepsie Court is not provided in the other lower courts in Dutchess County. The City of Beacon Court has a regular criminal calendar only once a week. The public defender is only present in the City Court of Beacon for the regular calendar, specialized calendars (drug court and the domestic violence calendar), hearings and trials. An indigent defendant has counsel present at the first appearance only if the arraignment is scheduled during a time when a public defender would otherwise be present in the City Court of Beacon.

With respect to the remaining justice courts in the county, the situation is similar to that of the City of Beacon. A public defender will be present for the first appearance of an indigent defendant only if the public defender is scheduled to be present for some other purpose. Otherwise, for the defendant incarcerated at first appearance the public defender's office will see the individual at the jail on the next business day.

In summary, funding of this proposal will allow Dutchess County to provide counsel at first arraignment to indigent defenders in the busiest lower courts in the County, a service that is not currently provided. We would hope to have a positive impact on reducing the incarceration rate at the first appearance similar to what is currently happening in the City of Poughkeepsie Court at present.

2) Documentation of the Nature and Extent of the Problem:
The public defender's office studied the number of uncounselled first appearances which resulted in incarceration for the month of July, 2012 (an average month). We estimate there were a total of 295 criminal defendants sent to the jail without the benefit of an attorney being present at the point in time that the decision to incarcerate was made by all the arraigning court in Dutchess County. (Attached as Exhibit "A" is a map showing the distribution of the un-counseled arraignments.)

Quality of Representation

3) Description of Proposal to Deliver Quality Indigent Legal Services at First Appearance:
Dutchess County will make available public defenders for first appearances 24 hours a day / 7 days a week to the following courts: City of Poughkeepsie, City of Beacon, Town of East Fishkill, Town of Fishkill, Village of Fishkill, Town of Hyde Park, Town of LaGrange, Town of Pleasant Valley, Town of Wappingers Falls and Village of Wappingers Falls. These are our busiest lower courts. (Attached as Exhibit "B" is a map outlining the jurisdictions to be covered by the this new service.)

We plan to provide a public defender telephone number for the judges to call when they are contacted by law enforcement authorities to do an after hours arraignment. The responding public defender would then make arrangements to appear in court for the first appearance. Upon arriving in the court the public defender will obtain a copy of the criminal history and accusatory instruments of the accused. The public defender will meet privately with the accused, review the charges, criminal history, bail criteria and any other pertinent information. The public defender will call family members, crisis residences, and mental health facilities, as appropriate, to locate an alternative to incarceration. The assigned public defender will appear before the magistrate with the accused, make appropriate legal arguments regarding the sufficiency of the accusatory instrument, bail criteria and potential alternatives to incarceration. The public defender will make sure the accused understands his/her legal rights at arraignment and enter the appropriate plea.

4) Continuous Representation of the Client:
Dutchess County utilizes the vertical representation model. Attorneys are assigned to handle a specific court or part and all the cases that arise therein. In

the vast majority of cases the original attorney will handle a specific client from arraignment to the resolution of the case.

However, maintenance of the vertical representational model will not be possible with respect to after hour's arraignments. Instead we will expect the arraignment attorney to provide the office with a detailed report the following business day. The report will include a brief overview of the arraignment proceeding, the legal issues identified, alternatives to incarceration explored or to be explored, and names, addresses and telephone numbers of witnesses to be interviewed, contacted or subpoenaed for the next court proceeding. In addition, all defendants remanded to the Dutchess County jail will be interviewed on the next business day by the staff of the public defenders office.

5) Effective Representation in Cases Resolved Before Trial:
Assignment of attorneys to clients would occur pursuant to established procedures with the added benefit that the assigned attorney would have access to the work and report of the attorney at first appearance.

The public defender's office is staffed by experienced, well trained attorneys. Each attorney is required to attend continuing legal education courses in the criminal law. The office has monthly case conferencing discussions; all attorneys are expected to attend. All pending indictments are discussed at these meetings. Further, each attorney is required to provide a bi-weekly report to the public defender on the status of each of his/her incarcerated clients. Finally, all complaints made by clients are thoroughly reviewed and discussed with the assigned attorney. All written complaints are responded to in writing.

In summary, effective representation is assured for all of our clients by mandatory attorney training, case conferencing, periodic written status reports, and a responsive complaint management process.

6) Assignment of Attorneys to Effected Courts:
As stated previously, public defender attorneys are assigned to courts or parts of the court so that vertical representation can be maintained. The new attorneys funded by this grant would handle only the off hour arraignments in designated courts. The two attorneys would take turns in providing this service so that coverage would be available 24 hours / 7 days a week. The existing attorney staff would continue to handle the first appearance during normal working hours.

The new attorneys would be supervised by the Public Defender and the Chief Assistant Public Defender. Their filed reports would be reviewed on a daily basis. The new attorneys would be required to attend monthly staff meetings. They would be required to participate in bi-weekly supervisory review meetings. Should any problem arise, it would be dealt with immediately. Finally, each attorney would be reviewed annually through a formal evaluation process.

7) Utilization of Support Staff:
The public defender's office is fortunate to have an excellent support staff. Under this proposal the clerical staff would be used to make sure the first appearance report was promptly placed in the client's file and immediately given to the assigned attorney. The investigative staff would be available to track down and interview necessary witnesses, collect necessary evidence and view, visit and photograph appropriate crime scenes or other locations as directed by the assigned attorney. Finally, the social work staff would be available to assist in placement of a client in an appropriate treatment center or alternative housing location.

8) Qualifications of Attorneys and Training Requirements:
The attorneys hired under this initiative will have to be admitted members of the New York State Bar and in good standing. The last two assistant public defenders hired had multiple years of prior experience (criminal assistant excess of 10 years and family assistant approximately 3 years). The Public Defender would seek to hire attorneys of equal caliber and experience as it has in the past.

Initially, the new attorneys would receive on the job training by existing staff. The new attorney would be accompanied to court by a seasoned and experienced attorney until such time as the Public Defender felt that the attorney was ready to go by him/her-self. In addition, the attorney would be required to attend continuing legal education focused on criminal law. And as appropriate and available, the attorney would be required to attend a lengthier training program, such as the National Criminal Defense College in Macon, Georgia or the Trial Training program sponsored by the New York State Defender's Association.

9) Non-English Speaking Clients:
Dutchess County contracts with a language translation service which provides services telephonically around the clock. This service would be utilized initially. Dutchess County also contracts with several OCA approved interpreters who are available with reasonable notice to accompany assigned attorneys to the jail to interview clients or attend office appointments for the same purpose.

10) Sufficient Time for Attorneys to Consult with Clients:
Attorneys who handle day time arraignments routinely take the time to fully interview their clients prior to appearing before the arraigning judge. If sufficient time is not afforded to the attorney, the attorney requests a second call of the case so that further interaction with the client can take place. Attorneys assigned to handle first appearances would be required to take the time necessary to adequately represent their client.

B. Data Collection, Performance, Measurement and Evaluation

11) Existing Case Management System:
The public defender's office utilizes the New York State Defender Association's Public Defender Case Management System (PDCMS). The generic system was customized specifically for the use of Dutchess County. The entire intake process is automated. At intake all appropriate demographic and pertinent case information is placed into the system by a designated intake specialist.

The Dutchess County jail provides internet access to the public defender's office. All intakes at the jail are done on the PDCMS system. The clerical staff then updates the case information as the case proceeds. Attorney and investigative staff do so as well. When the file is closed, it is so noted in the case management system. The PDCMS is the electronic backbone of the public defender's office. It is utilized in all cases and by all staff.

The attorney who appeared with the client at first appearance would be noted in PDCMS. All information provided by the arraigning attorney would be uploaded into the system by the intake staff.

12) Gathering Critical Information:
Information regarding the presence or absence of an attorney at arraignment, bail outcomes, time spent in jail and time from arraignment to disposition are all available currently. Dutchess County has a fully integrated criminal justice data collection system. The public defender's office is able to cross-tabulate its data with the jail's information system. However, the public defender data is not accessible to anyone outside of the public defender's office.

Every work day the public defender is provided a list of all new inmates incarcerated at the jail during the previous day. Each inmate is interviewed by dedicated public defender intake staff. All information gathered during the interview is placed in the PDCMS system and is immediately available to all public defender staff. The PDCMS has multiple search functions for the preparation of special reports. In addition, Dutchess County provides additional data search capabilities to the public defender through its Office of Computer and Information Services which matches data from the PDCMS system with data from the jail's information system.

13) Description of Present Information Available:
For preparation of this response and to illustrate the current capabilities of Dutchess County's information technology system, the month of July 2012 was chosen for review. Baseline arraignment data was gathered through cross

referencing the jail's booking data, to which the public defender's office has access and PDCMS data. One of the nine higher volume justice courts chosen for this initiative was studied in detail.

During the month of July 2012, 108 after hour arraignments took place in the Town of Poughkeepsie's justice court which resulted in incarceration. No public defender was present at any of these arraignments. Forty six (46) of those arraigned posted bail within 48 hours. Within one week of incarceration, an additional 12 individuals made bail and 13 were released by court order. Within 30 days of arraignment an additional 8 individuals were released on bail and 12 were released by court order. Of the original 108 individuals studied 17 were incarcerated for more then 30 days.

With respect to the length of time from arraignment to disposition, a smaller sample size was studied (27 of the original 108 cases, 25% of the sample size). The results were as follows:

- 11% - 3 cases were disposed of at first appearance;
- 52% - 14 cases were disposed at the second or third appearance;
- 26% - 7 cases were disposed at the fourth or fifth appearance;
- 7% - 2 cases were disposed of by the seventh or eighth appearance; and
- 4% - 1 case was referred to the Grand Jury approximately 10 weeks after the initial appearance.

The Town of Poughkeepsie Court usually meets weekly. Hence, one appearance normally equals a week.

While the above information was gathered manually by reviewing data maintained by Dutchess County in its computer systems. A report could be easily written to automate the gathering of pertinent information on the impact of an attorney's presence at first appearance.

14) Changes Needed to be Made in Data Collection:
Dutchess County is currently able to comply with the data requirements outlined in the Request for Proposals.

C. Applicant Capability and Personnel

15) Project Leader:
Public Defender Thomas N. N. Angell will be the project leader.

16) Extensive consultation took place in the development of this proposal. Dutchess County has only one Article 18-B provider, the public defender. Dutchess County does not have an assigned counsel administrator or an approved bar association

plan. Each judge/magistrate maintains his/her own list of attorneys to assign in case a conflict arises which prevents the public defender from handling a case.

This proposal was developed and approved by the Executive Committee of the County's Criminal Justice Council. The Executive Committee met with the two City of Poughkeepsie Court Judges, the Chief Clerk and Deputy Chief Clerk of the City of Poughkeepsie Court, the President and Vice-President of the Dutchess County Magistrate's Association. The membership of the Executive Committee of the Criminal Justice Council (CJC) includes the District Attorney, Director of Probation, Division Chief of the Department of Mental Hygiene, Chief of Police of the City of Poughkeepsie, Area Supervisor of the New York State Department of Corrections and Community Supervision, Public Defender, Deputy County Executive and the Executive Director of an inner-city youth development agency. In addition to the deliberations of the Executive Committee of the CJC, the Public Defender had several independent meetings with the Dutchess County Magistrate's Association to discuss various proposals to address the issue of counselless first appearances in justice courts.

17) Extent of Collaboration:
This proposal is a result of extensive discussions and collaborations. The local Magistrate's Association has indicated its willingness to assist in implementation of this new program should it be funded.

D. Budget and Cost

18) Annualized Three-Year Budget as Follows:

(See attached budget form.)

19) Subcontracting:
Dutchess County does not plan to sub-contract.

20) Budget Narrative:

Salaries: Dutchess County plans to hire two assistant public defenders with an annual salary of $59,805.00 per attorney.

Fringe Benefits: Fringe benefits at 56% of salary with annual increase of 5%. This number is based on an average employee and could vary considerably.

Vehicle Lease: Dutchess County plans to lease an all wheel drive vehicle for $5,400.00 per annum so that the public defenders would be able to access justice courts even during severe weather events.

Vehicle Gas/Repairs: $4,120.00 is designated to cover the fuel and repair costs for the previously mention leased vehicle.

Technology: Dutchess County proposes to provide each of its Assistant Public Defenders with an I PAD, a cell phone and data and voice services for both. The I Pad's cost $1,000.00 each and will be used for legal research while at a court proceeding and transmission of legal documents and arraignment report back to the main office. The cell phones would enable the designated city court judges and local magistrates to contact the available public defender when needed. The cell phones cost $50.00 a piece. The data/voice fees for all the aforementioned electronic devices are approximately $2,000.00 a year.

Training: $750.00 is included to cover the cost of mandatory Continuing Legal Education for the attorneys hired.

21) Monitoring Expenditures:
Dutchess County has a sophisticated financial management computerized system. Grant expenditures will be initially monitored by the public defender's office. Further, the County budget office requires quarterly financial reports from each department. Further, as in all counties, an annual budget is required to be presented and approved by the county governing body.

Exhibit
"C"

Public Safety

RESOLUTION NO. 2013276

RE: AUTHORIZE GRANT AGREEMENT WITH NEW YORK STATE OFFICE OF INDIGENT LEGAL SERVICES AND AMENDING THE 2013 ADOPTED COUNTY BUDGET AS IT PERTAINS TO PUBLIC DEFENDER (A.1170)

Legislators KELSEY, ROMAN, BORCHERT, WILKINSON, MICCIO, JETER-JACKSON, HORTON, and PERKINS offer the following and move its adoption:

WHEREAS, the Public Defender has advised that the New York State Office of Indigent Legal Services has awarded a Counsel at First Appearance project grant in the amount of $615,102 for the period of June 1, 2013 through May 31, 2016 to provide funding for counsel at first arraignment in the County, and

WHEREAS, this program provides legal assistance to indigent individuals arrested and facing incarceration in the Dutchess County Jail at their first appearance before a magistrate in designated jurisdictions within the County, and

WHEREAS, the Public Defender will hire additional staff to fulfill the programmatic requirements of this grant, and

WHEREAS, due to the fact that the duties to be performed are limited and otherwise differ from the title of Assistant Public Defender and shall be performed outside of the normal work day on a non-traditional work schedule, these positions shall be classified as Arraignment Attorneys, Management Grade MD and will be paid on a per shift basis and therefore will not accrue benefit time, and

WHEREAS, the Arraignment Attorneys will receive pension and health insurance benefits, if eligible, to be paid in accordance with Resolution No. 2010363, entitled, "Requiring Management and Confidential Officers and Employees to Contribute Toward The Cost Of Their County Health Insurance Benefit" which defines the rate that new employees will pay, and

WHEREAS, since these positions are funded by the grant, they will only exist for the duration of the grant, and

WHEREAS, it is necessary for this Legislature to authorize the execution of the Grant Agreement and amend the 2013 Adopted County Budget to provide for the receipt and expenditure of said funds as outlined in the grant, now therefore, be it

RESOLVED, that this Legislature hereby authorizes the County Executive to accept the grant award from the New York State Office of Indigent Legal Services and further authorizes and empowers the County Executive to execute said grant on behalf of the County of Dutchess, and be it further

RESOLVED, that the Commissioner of Finance is hereby authorized, empowered and directed to amend the 2013 Adopted County Budget as follows:

APPROPRIATIONS
Increase

A.1170.4412	Grant Project Costs	$34,172

REVENUES
Increase

A.1170.30890.01	Other St Aid Indigent Legal Svc	$34,172

CA-161-13
KPB/kvh/ca/G-0186/C-8830
08/13/13 **revised 9/18/13**
Fiscal Impact: See attached statement

APPROVED
MARCUS J. MOLINARO
COUNTY EXECUTIVE
Date 10/24/2013

STATE OF NEW YORK
ss:
COUNTY OF DUTCHESS

This is to certify that I, the undersigned Clerk of the Legislature of the County of Dutchess have compared the foregoing resolution with the original resolution now on file in the office of said clerk, and which was adopted by said Legislature on the 15th day of October 2013, and that the same is a true and correct transcript of said original resolution and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal of said Legislature this 15th day of October 2013.

CAROLYN MORRIS, CLERK OF THE LEGISLATURE

FISCAL IMPACT STATEMENT

☐ NO FISCAL IMPACT PROJECTED

APPROPRIATION RESOLUTIONS
(To be completed by requesting department)

Total Current Year Cost · $ 34,172

Total Current Year Revenue · $ 34,172

and Source
NYS Office of Indigent legal Services
Counsel at First Appearance Grant Funds

Source of County Funds *(check one)*: ☐ Existing Appropriations, ☐ Contingency,
☐ Transfer of Existing Appropriations, ☑ Additional Appropriations, ☐ Other *(explain)*.

Identify Line Items(s):
A.1170.4412 - Grant Project Costs

Related Expenses: Amount $ _____
Nature/Reason:

Anticipated Savings to County: _____

Net County Cost (this year): _____
Over Five Years: _____

Additional Comments/Explanation:
NYS OILS has awarded Dutchess County a grant of $615,102 to fund counsel at first arraignment. This is a three year grant, beginning in June of 2013 and ending in May of 2016. We are only amending the 2013 budget to reflect the grant project costs for the remainder of 2013 in the amount of $34,172.

Prepared by: Rachel Armstrong, Budget Office

Out.pdf

Public Safety Roll Call

District	*Name*	*Yes*	*No*
District 8 - City and Town of Poughkeepsie	Rollson*	✓	
District 3 - Town of LaGrange	Borchert*		
District 6 - Town of Poughkeepsie	Flesland*		
District 10 - City of Poughkeepsie	Jeter-Jackson*		
District 16 - Towns of Fishkill, East Fishkill and City of Beacon	MacAvery*		
District 1 - Town of Poughkeepsie	Doxsey		
District 2 - Towns of Pleasant Valley and Poughkeepsie	Wilkinson (VC)	absent	
District 4 - Town of Hyde Park	Serino		
District 5 - Town of Poughkeepsie	Roman (C)		
District 12 - Town of East Fishkill	Weiss		
District 19 - Towns of North East, Stanford, Pine Plains, Milan	Blalock		
District 23 - Town/Village of Pawling, Beekman and East Fishkill	Thomes		

Present: 11 Resolution: ✓ Total : 11 Yes 0 No

Absent: 1 Motion: ___ Abstentions: 0

Vacant: 0

2013276 AUTHORIZE GRANT AGREEMENT WITH NEW YORK STATE OFFICE OF INDIGENT LEGAL SERVICES AND AMENDING THE 2013 ADOPTED COUNTY BUDGET AS IT PERTAINS TO PUBLIC DEFENDER (A.1170)

Date: October 10, 2013

Roll Call Sheets

District	Last Name	Yes	No
District 8 - City and Town of Poughkeepsi	Rolison		
District 3 - Town of LaGrange	Borchert	absent	
District 6 - Town of Poughkeepsi	Flesland		
District 10 - City of Poughkeepsi	Jeter-Jackson		
District 16 - Towns of Fishkill, East Fishkill and City of Beacc	MacAvery		
District 1 - Town of Poughkeepsi	Doxsey		
District 2 - Towns of Pleasant Valley and Poughkeeps	Wilkinson		
District 4 - Town of Hyde Parl	Serino		
District 5 - Town of Poughkeepsi	Roman		
District 7 - Town of Hyde Parl	Perkins		
District 9 - City of Poughkeepsi	White		
District 11 - Towns of Rhinebeck and Clinto	Tyner		
District 12 - Town of East Fishkil	Weiss		
District 13 - Towns of LaGrange, Union Vale, and Wapping	Bolner		
District 14 - Town of Wappinge	Amparo		
District 15 - Towns of Poughkeepsie and Wapping	Incoronato		
District 17 - Town and Village of Fishki	Miccio	absent	
District 18 - City of Beacor	Forman		
District 19 - Towns of North East, Stanford, Pine Plains, Mill	Bialock		
District 20 - Town of Red Hool	Traudt		
District 21 - Town of East Fishkil	Horton		✓
District 22 - Town of Beekmal	Hutchings		
District 23 - Town/Village of Pawling, Beekman and East Fishl	Thomes		
District 24 - Towns of Dover and Union Val	Surman		
District 25 - Amenia, Stanford, Washington, Pleasant Vall	Kelsey		

Present: 23 Resolution: ✓ Total: 22 1

Absent: 2 Motion: — Yes No

Vacant: 0 Abstentions: 0

2013276 AUTHORIZE GRANT AGREEMENT WITH NEW YORK STATE OFFICE OF INDIGENT LEGAL SERVICES AND AMENDING THE 2013 ADOPTED COUNTY BUDGET AS IT PERTAINS TO PUBLIC DEFENDER (A.1170)

Date: October 15, 2013

Discussion on the foregoing resolution 2013276 resulted as follows:

Legislator Jeter-Jackson questioned if it would it be possible to use skype rather than an in-person appearance.

Tom Angell, Public Defender, stated that under this grant using skype was not possible and added that an in-person appearance was necessary.

Legislator Roman questioned that although video conferencing was not allowed with this grant, if the idea was being explored for the future. He also asked that if these two positions were not needed after three years, could they be deleted.

Tom Angell, Public Defender, stated that it was required that someone be in person during arraignments. He stated that the proposal was from the Criminal Justice Council for three years, at which time it would be reviewed. He added that he was an advocate for central arraignment because it would be a more effective system.

Roll call on the foregoing resolution resulted as follows:

AYES:	23	Amparo, Blalock, Bolner, Doxsey, Flesland, Forman, Horton, Incoronato, Jeter-Jackson, Kelsey, MacAvery, Perkins, Rolison, Roman, Serino, Surman, Thomes, Traudt, Tyner, Weiss, White, Wilkinson
NAYS:	1	Hutchings
ABSENT:	2	Borchert, Miccio

The foregoing resolution was adopted.

Exhibit
"D"

ARRAIGNMENT ATTORNEY

DISTINGUISHING FEATURES OF THE CLASS:

This is important professional legal work involving the responsibility for representing indigent defendants at first arraignment as assigned by the Public Defender. The work responsibilities of an Arraignment Attorney involve but are not limited to interviewing clients, contacting family members and friends, reviewing the client's criminal history, and making the appropriate legal arguments to the arraigning magistrate. Arraignment Attorney must be able to work nights and weekends and will be on-call to respond to designated courts to address initial arraignments of criminal defendants who may face possible incarceration. Work is performed in accordance with guidelines provided in law.

TYPICAL WORK ACTIVITIES:

The following is indicative of the level and types of activities performed by incumbents in this title. It is not meant to be all inclusive and does not preclude a supervisor from assigning activities not listed which could reasonably be expected to be performed by an employee in this title.

1. Represent criminal defendants at arraignment proceedings;
2. Initiate such proceedings as necessary to protect the rights of the accused;
3. Assist the public defender in the representation of criminal defendants in legal proceedings;
4. Confers with defendants, family members and friends, law enforcement officers, judges and district attorneys concerning individual cases;
5. Prepares reports and other legal documents consistent with their assigned duties;
6. Participate in Public Defender staff meetings and seminars as directed by the Public Defender;
7. Meets with Public Defender on a regular basis to review work progress.

FULL PERFORMANCE KNOWLEDGE, SKILLS, AND ABILITIES:

Knowledge of the principles and practices of criminal law to effectively defend clients;
Knowledge of court procedures and the rules of evidence to protect the rights of the accused;
Skill in the preparation of briefs and in the presentation of a defense before a jury;
Ability to analyze, appraise and apply legal principles, facts and precedent to legal problems;
Personal characteristics necessary to perform the duties of the position;
Physical condition commensurate with the demands of the position.

MINIMUM QUALIFICATIONS:

Admission to practice law in the State of New York.

SPECIAL REQUIREMENT

Possession of a New York State Driver License at time of appointment and to maintain the position.

Adopted: 12/12/13

Exhibit
"E"

Appendix C:

ARRAIGNMENT ATTORNEYS

The following list is based on a two position Arraignment Attorney model.

Work Week: Weekends: 2 shifts, each day, Saturday, and Sunday for a total of 4 shifts per weekend.

Weekdays: 1 shift, each day, Monday through Friday for a total of 5 shifts.

Standard work week: 9 shifts per week; approximately 469 total shifts per year.

Shifts begin week 1 Monday at 5:00 PM and ends the following Monday of week 2 at 9:00 AM.

Compensation: Works every other week. Effective July 1, 2016, each employee will work approximately 234 shifts per year at the rate per shift indicated below:

Year:	Rate per Shift:
2011	$250
2012	$250
2013	$250
2014	$255
2015	$260
2016	$265
2017	$270
2018	$276
2019	$281

Employees may cover for each other's full shifts as needed. In emergency situations only, where an employee is unable to finish the coverage of an assigned shift, the shift compensation will be pro-rated for each employee based on actual time on call.

If a two week orientation period is required by the Public Defender to be familiar with the courts in the County, then the employee will be paid a minimum hourly salary of AD (which is the minimum rate of AD divided by full-time work hours (1820 hours)) and work a Monday through Friday, 9 a.m. to 5 p.m. work week.

Holidays: When an employee is assigned to cover a shift that falls on the actual recognized holiday, the employee will be paid an additional $100 for that shift.

Merit Increases: Ineligible for merit increases, but subject to annual performance appraisal.

Personal Jury Duty: No pay or leave conferred upon them.

Longevity: Ineligible for longevity payments.

Personal Time: No Personal Time

Sick Time: No Sick Time

Vacation: No Vacation Time

Bereavement: No Bereavement Leave

Meal Allowances & Mileage: No meal allowances or mileage during shift.

Reimbursements: No reimbursement for attending mandatory monthly meetings.

Exhibit
"F"

MARCUS J. MOLINARO
COUNTY EXECUTIVE

THOMAS N. N. ANGELL
PUBLIC DEFENDER

COUNTY OF DUTCHESS
OFFICE OF THE PUBLIC DEFENDER

December 10, 2013

Hon. XXXXXXXXXX
City of XXXXXXX Justice Court
XX Main Street
Poughkeepsie, NY 12601

Re: Counsel at Arraignment

Dear Judge XXXXXX:

The Dutchess County Public Defender's office will commence its Counsel at Arraignment program on December 30, 2013 at 9:00 a.m. We will have an attorney available 24 hours a day, seven days a week including holidays to attend arraignment proceedings in your Court. If a criminal defendant is brought before you, where there will be a request for bail, even if the case will be adjourned to a different jurisdiction, please call us, unless you are aware that retained counsel will be appearing.

In order for this program to work effectively and efficiently, we would ask you only call us under circumstances where there is a reasonable possibility that bail will be set. If our office is called under circumstances where it is extremely unlikely that the defendant will be incarcerated, we may not be able to attend another proceeding where it is more probable that the defendant will be incarcerated or another Judge will be inconvenienced in waiting for our arrival.

During the hours of 9:00 a.m. to 5:00 p.m. on business days please call our main number **(845) 486-2280**. Ask to speak to Patty, the legal secretary assigned to your Court. If the secretary is not available, please ask for either supervisor Laura Aylward or Joe Matteo. At times other than normal business hours, please call **(845) 475-6271**. When you or your staff calls, we will let you know the name of the attorney and the expected time of arrival of the attorney at your Court.

For your further information, I am enclosing the direct line telephone numbers to our entire administrative staff. I have also included my home telephone number and cell phone number. Finally, I have enclosed the County holiday schedule for 2014 so that you are aware of the days our office is closed.

This office is committed to working with you to assure that a criminal defendant's constitutional right to counsel at arraignment is provided in appropriate cases. If you have any specific questions about this new program, please do not hesitate to contact me. I am certainly available to meet with you prior to the implementation date.

Sincerely,

Thomas N. N. Angell
Dutchess County Public Defender

TNNA/ps
Enclosure

cc Hon. Casey McCabe
Dutchess County Magistrate's Association

ADMINISTRATIVE STAFF	
THOMAS N. N. ANGELL Dutchess County Public Defender	(845) [redacted] Home (845) 486-2276 Office (845) [redacted] Cell
GEORGE A. HAZEL Chief Assistant Public Defender	(845) [redacted] Home (845) 486-2297 Office
JOE MATTEO Chief Investigator	(845) 486-2270 Office
LAURA ALYWARD Legal Administrative Assistant	(845) 486-2288 Office

Exhibit
"G"

Joint Opinion 13-124/13-125/13-128/13-129

September 12, 2013

Digest: (1) A judge may not meet privately with the public defender concerning implementation of a new counsel-at-arraignment program for indigent defendants unless the district attorney consents, but may meet jointly with the public defender and the district attorney to discuss such matters, and may attend an open forum concerning implementation of the program, provided that the district attorney is expressly invited to attend. (2) A judge may speak *ex parte* with a defendant on topics relevant to determine the defendant's financial eligibility for the counsel-at-arraignment program, where the program is, by its terms, restricted to indigent defendants. (3) Provided that the district attorney is on notice that the counsel-at-arraignment program is in effect, the district attorney's failure to send, designate or otherwise reasonably make available a representative to attend or participate in such arraignments, may be treated as implied consent for the judge to conduct such arraignments *ex parte*. (4) A judge may not accede to a public defender's request that the judge should contact the defender's office for representation under the counsel-at-arraignment program only in cases where bail may be imposed and incarceration is a possibility.

Rules: CPL 530.20(2)(b); 170.10(3)(c); 22 NYCRR Part 100, Preamble; 22 NYCRR 100.2; 100.2(A), (B), (C); 100.3(B)(1), (4), (6); 100.3(B)(6)(d)-(e); Opinions 13-92; 13-32; 11-85; 10-61; 10-13; 09-178; 03-45; Joint Opinions 06-154/06-167; 01-100/01-101; *Hurrell-Harring v State*, 15 NY3d 8 (2010).

Opinion:

Four judges ask about their ethical obligations in light of a new program by which the State of New York has awarded grant money to twenty-five counties to provide indigent criminal defendants with counsel at their initial court appearances. The judges note that such arraignments may occur outside of normal court hours.[1] Each judge states that the grant money is not sufficient to pay for legal representation of all indigent defendants at all arraignments throughout the judge's county. Thus, the counsel-at-arraignment program will be implemented in selected town, village and city courts; and in some cases, the public defender's office wishes to impose additional restrictions. Each judge raises questions about the propriety of his/her participation in the proposed local implementation of the program.

A judge must always avoid even the appearance of impropriety (*see* 22 NYCRR 100.2) and must always promote public confidence in the judiciary's integrity and impartiality (*see* 22 NYCRR 100.2[A]). Thus, for example, a judge must respect and comply with the law (*see id.*), must not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment (*see* 22 NYCRR 100.2[B]), must not convey or permit others to convey the impression that they are in a special position to influence the judge (*see* 22 NYCRR 100.2[C]), and must not be swayed by partisan interests (*see* 22

NYCRR 100.3[B][1]). A judge must also accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law (*see* 22 NYCRR 100.3[B][6]). Thus, a judge is prohibited from initiating, permitting, or considering *ex parte* communications or other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending proceeding, unless an exception applies (*id.*). For example, a judge may, with the consent of the parties, confer separately with the parties and their lawyers on agreed-upon matters (*see* 22 NYCRR 100.3 [B][6][d]), and may initiate or consider *ex parte* communications "when authorized by law" to do so (22 NYCRR 100.3[B][6][e]).

In Inquiry 13-125, a judge who is entitled to act in a representative capacity for certain other judges states that the local public defender wishes to meet with each affected judge in the county individually, without the district attorney present, to discuss implementation of the counsel-at-arraignment program. The judge is concerned that this proposed meeting might involve impermissible *ex parte* communications, as compared with alternative approaches such as "an open forum meeting" to which the public defender could invite the district attorney, the affected judges, and other interested parties. The judge asks whether it is ethically permissible to accept the public defender's invitation to discuss implementation of the counsel-at-arraignment program in a private meeting without the district attorney also being invited to participate.

The Committee has recognized the danger that a judge's impartiality will appear to be compromised when the circumstances of a proposed private meeting with the judge suggest that the meeting is essentially "an attempt to promote a particular agenda in connection with the judge's judicial decision-making in certain matters that will come before the judge" (Opinion 11-85) or otherwise to impermissibly "influence the judge's future [judicial] conduct" (Opinion 10-13). Thus, for example, the Committee has advised that a judge who has dismissed a number of parking tickets issued for illegal overnight parking must not meet privately with the Chief of Police and the Commissioner of Public Works for the municipality where he/she presides to discuss those decisions (*see id.*); that a recently elected judge must not meet privately with a local political party regarding the inner workings of the court, including its procedures, personnel or decisions (*see* Opinion 13-92); and that family court judges must not participate in regularly scheduled meetings with the County Department of Children, Youth and Families to discuss the substantive and procedural aspects of court operations with respect to how the court processes, schedules and resolves child abuse and neglect petitions (*see* Joint Opinion 06-154/06-167). To the extent that the public defender wishes to work with individual judges to develop policies, procedures or protocols to guide the court with respect to the counsel-at-arraignment program, the Committee believes that "working with representatives of only one side of an issue [to do so] could erode the public's confidence in the impartiality and independence of the judiciary" (Opinion 10-13). Moreover, to the extent that there is any *identifiable* pending or impending arraignment before a judge at the time of a private meeting with the public defender, there is also a risk such a meeting would involve, or appear to involve, impermissible *ex parte* communications (*cf.* Opinion 13-32; *see* 22 NYCRR 100.3[B][6]).

Therefore, based on the facts set forth in Inquiry 13-125, the Committee concludes that the affected judges must not agree to meet with the public defender privately about

the implementation of the counsel-at-arraignment program in future cases that will come before them, unless additional factors dispel the appearance of impropriety.

Under the circumstances presented, the Committee believes that the appearance of impropriety in the proposed private meetings will be dispelled if the district attorney consents to such meetings between an individual judge and the public defender relating to implementation of the program. In other words, should the district attorney, as the representative of the law enforcement and prosecutorial side of criminal proceedings, decide that the proposed meetings between individual judges and the public defender about implementation of the counsel-at-arraignment program are innocuous or desirable, the Committee believes that judges may rely on that determination. This is by analogy to the rule which permits judges, with the consent of the parties, to confer separately with the parties and their lawyers on agreed-upon matters (*see* 22 NYCRR 100.3[B][6][d]).[2]

Absent the district attorney's consent to the proposed private meetings described in Inquiry 13-125, if a judge nonetheless wishes to discuss implementation of the counsel-at-arraignment program with the public defender, the judge has at least two options. First, the judge may meet jointly with the public defender and a representative from the district attorney's office to discuss implementation of the counsel-at-arraignment program, as this ensures that both sides are represented. Second, in the alternative, the judge may attend an open forum concerning implementation of the counsel-at-arraignment program, provided that the district attorney is expressly invited to attend. The judge's attendance at such an open forum is not rendered impermissible if the district attorney declines an express invitation to participate (*cf.* Opinion 03-45 [judge may participate in a domestic violence consortium which "includes representatives from all components of the community," even though the public defender has declined an invitation to participate]).

In Inquiry 13-124, the judge emphasizes that only indigent defendants are eligible for the counsel-at-arraignment program, and thus the judge will need to speak to the defendant "about employment and financial status" to determine the defendant's eligibility. Once the judge determines that a defendant is eligible, the judge must contact an attorney from a list of possible defense counsel, provide the attorney "either verbally or by fax the accusatory instrument", and then provide the attorney with "an opportunity to speak to the defendant." The judge notes that although he/she must speak directly with defense counsel in order to make the assignment under the program procedures, the Criminal Procedure Law does not require the judge to contact the district attorney's office during an arraignment unless the defendant is charged with a felony.[3] The judge asks whether he/she may participate in the program as described, and asks specifically if these anticipated communications with the defendant and the defense counsel as part of the program are ethically permissible, particularly if the district attorney is not present. Similarly, in Inquiry 13-128, a judge has learned that the public defender and conflict defender "plan to have attorneys present in court" pursuant to the counsel-at-arraignment program but that the district attorney "will not be represented at these arraignments." Under these circumstances, the judge asks whether he/she may conduct arraignments when defense counsel is present pursuant to the counsel-at-arraignment program, but the district attorney is not present.

Initially, the Committee notes that when a defendant appears before a judge for arraignment, the judge's proposed communications with the defendant about his/her financial status are indeed *ex parte* communications in an identifiable pending proceeding (*see* 22 NYCRR 100.3[B][6]; *cf.* Opinion 13-32). However, it is permissible for a judge to engage in *ex parte* communications when authorized by law to do so (*see* 22 NYCRR 100.3 [B][6][e]). Here, the Criminal Procedure Law authorizes - and indeed apparently requires - a judge to speak *ex parte* with a defendant about topics relevant to determining the defendant's financial eligibility for assigned counsel.[4] Such communications are therefore permissible.[5]

Similarly, based on the facts provided by the inquirers, the Committee believes that the program itself contemplates certain very minimal *ex parte* communications between the judge and the defense attorney in order to determine the defense attorney's availability pursuant to the program procedures and to provide the attorney a copy of the accusatory instrument by fax or by telephone.

Perhaps the most significant ethics question raised in Inquiries 13-124 and 13-128 is whether it is permissible to conduct the arraignment itself *ex parte* if defense counsel is present pursuant to the program, and the district attorney is not present.

The Committee is mindful of the possible constitutional dimensions of the counsel-at-arraignment program (*see Hurrell-Harring v State*, 15 NY3d 8 [2010]; Joint Opinion 01-100/01-101 ["throughout the law runs the theme of judicial responsibility for guaranteeing the right to counsel on behalf of indigent defendants, from the appointment at arraignment through the appellate process"]), as well as the possibility that a local prosecutor might seek to maintain the *status quo* by declining to appear or otherwise participate in arraignments at which indigent defendants will be represented through the program.

Therefore, as long as the district attorney has notice of the counsel-at-arraignment program procedures and has a reasonable opportunity to appear or otherwise participate, the Committee concludes that a judge may conduct the arraignment after assigning counsel pursuant to the program, even if the district attorney either declines or fails to participate. In this regard, the Committee notes that a district attorney's office doubtless has a number of options to provide for a representative to participate in arraignments on learning of the counsel-at-arraignment program procedures. For example, the district attorney might, as the public defender has done, designate one or more assistant district attorneys for the law enforcement officer accompanying the defendant to contact on a case-by-case basis; might authorize the accompanying law enforcement officer to serve as the prosecutor's representative; or might waive the right to appear or participate. Because the Rules Governing Judicial Conduct are "rules of reason" (22 NYCRR Part 100, Preamble), the Committee believes that a judge would be justified in treating the district attorney's failure to make <u>any</u> reasonable effort to provide for a representative to participate in or attend the arraignment as "consent" to conduct the arraignment *ex parte* with defense counsel assigned pursuant to the program (*see* 22 NYCRR 100.3[B][6][d]).

Therefore, provided that the district attorney's office is on notice that the counsel-at-arraignment program is in effect, and that indigent defendants may now have counsel

in instances where they previously did not, a judge may treat a district attorney's failure to send or designate a representative to attend or participate in such arraignments, whether by telephone or otherwise, as implied consent by the district attorney for the judge to conduct such arraignments *ex parte* with the defense counsel assigned pursuant to the counsel-at-arraignment program, within the meaning of the Rules Governing Judicial Conduct (*see* 22 NYCRR 100.3[B][6][d]).

Finally, in Inquiry 13-129, a judge states that the local public defender has asked that judges contact the defender's office for representation under the counsel-at-arraignment program "only in cases where bail may be imposed and incarceration is a possibility." The inquirer is concerned that this procedure would require the judge to "make a preliminary, pre-arraignment determination" about the likelihood of bail and incarceration, "based upon whatever information [may] be provided by a law enforcement officer when the officer contacts the judge for the arraignment." Moreover, the judge notes that, if a judge makes a pre-arraignment determination that a defendant is not facing the possibility of incarceration, the proposed procedure will disqualify the defendant from the counsel-at-arraignment program even when an indigent defendant is facing consequences such as "suspension of a driver's license pending prosecution" after an arrest for driving while under the influence, or even "removal from their home via the issuance of an order of protection."[6] The judge asks, in effect, whether the public defender's proposed procedure is permissible.

In the Committee's view, the public defender's proposed procedure in Inquiry 13-129 is impermissible, as it effectively asks the judge to "pre-judge" the case by making determinations proper to a bail hearing at the pre-arraignment stage. Making the requested pre-judgments would, at the very least, create an appearance of impropriety and undermine public confidence in the judge's integrity and impartiality (*see* 22 NYCRR 100.2; 100.2[A]). Making such determinations at an inappropriately early stage could also create an appearance that the judge is not according the defendant "the right to be heard according to law" (22 NYCRR 100.3[B][6]), and could even cause the public to fear that the judge is performing his/her judicial duties based on bias or prejudice, rather than appropriate legal considerations (*see* 22 NYCRR 100.3[B][4]). The fact that a public defender, as opposed to a prosecutor, has suggested this procedure does not change the result.

---

[1] One judge notes that in his/her jurisdiction neither the district attorney nor the public defender traditionally attends after-hours arraignments, so that often the only participants are the judge, law enforcement representatives and the defendant (*cf. Hurrell-Harring v State*, 15 NY3d 8, 19 [2010] [describing allegations of "a fairly common practice in [certain] counties of arraigning defendants without counsel"]).

[2] Because the meeting has been proposed by the public defender, the "other side" is identifiable - it is the State of New York, whose known legal representative is the local prosecutor - even when there is no specific, identifiable pending or impending criminal proceeding.

[3] Criminal Procedure Law §530.20(2)(b) (No local criminal court may order recognizance or bail with respect to a defendant charged with a felony unless and until: (i) The district attorney has been heard in the matter or, after knowledge or notice of the application and reasonable opportunity to be heard, has failed to appear at the proceeding or has otherwise waived his right to do so.

[4] Criminal Procedure Law §170.10(3)(c) (The defendant has the right to the aid of counsel at the arraignment and at every subsequent stage of the action. If he appears upon such arraignment without counsel, he has the following rights: (c) To have counsel assigned by the court if he is financially unable to obtain the same; except that this paragraph does not apply where the accusatory instrument charges a traffic infraction or infractions only.

[5] The Committee trusts that judges will not attempt to go beyond the narrow range of topics necessary to determine the defendant's eligibility. The exception does not justify or warrant a discussion of the merits of the charges against the defendant or other issues beyond those reasonably necessary to determine the defendant's financial eligibility for the counsel-at-arraignment program, and the judge should discourage any attempt by the defendant to raise or discuss such issues *ex parte*.

[6] The Court of Appeals has stated that arraignment is a "critical stage" of criminal proceedings which may implicate a defendant's "pretrial liberty" interests, "ability to defend against the charges," and may also have "serious consequences, both direct and collateral" (*Hurrell-Harring v State*, 15 NY3d 8, 20 [2010]).

Exhibit
"H"

MARCUS J. MOLINARO
COUNTY EXECUTIVE

THOMAS N. N. ANGELL
PUBLIC DEFENDER

COUNTY OF DUTCHESS
OFFICE OF THE PUBLIC DEFENDER

October 6, 2015

Hon. Frank T. Weber, Jr.
Town of Stanford Court
26 Town Hall Road
Stanfordville, NY 12581

Dear Judge Weber:

As you are aware, representatives of the Dutchess County Magistrates Association recently met with County Executive Marcus Molinaro. Pursuant to the ruling of the New York State Court of Appeals in Hurrell-Harring v. New York State, 15 NY 3d 8 (2015), the Magistrates requested that Dutchess County provide attorneys at all arraignments in Dutchess County in which a criminal defendant faces incarceration.

As you are aware, the Dutchess County Public Defender has been providing arraignment services 24 hours a day, seven days a week for the two city courts and the high volume justice courts since January, 2014. Given the request of the Magistrates Association, County Executive Molinaro has agreed to expand these same arraignment services to all courts in the County.

Starting Tuesday, October 13, 2015 at 9:00 AM, attorneys from the Public Defender's office will be available around the clock for arraignment services County wide. For day time arraignments during normal working hours, please call the following dedicated line at the Public Defender's office: (845) 475-3952. For after hour arraignments (evenings, weekends, and holidays) please call the following number: (845) 475-6271.

If for any reason you are unable to contact the Public Defender's office, you can reach Public Defender Tom Angell directly at (845) [redacted] (home); (845) 486-2276 (direct office line); or (845) [redacted] (cell phone).

The Public Defender's office is adding one additional day time attorney whose principal responsibility will be handling arraignments. You estimated the additional courts would produce approximately 150 additional off-hour arraignments over a 12 month period. Given this volume, the existing staff will be handling the off-hour arraignments. We will have back-up available if the on-call attorney cannot respond in a reasonable timeframe. The Public Defender's office plans to respond to all Courts within 90 minutes of receiving notification of the arraignment. Upon calling, the Public Defender's office will provide you with the name of the responding attorney and the approximate time of arrival.

22 Market Street, Poughkeepsie, New York 12601 • (845) 486-2280 • Fax (845) 486-2266 • Interstate (800) 660-8818
Not For Service of Legal Papers
www.dutchessny.gov

The County Executive has agreed to evaluate the quality of the expanded service in three months to see if any additional adjustments need to be made.

It is my hope that this expansion of arraignment services to the full County will not only bring our County into compliance with constitutional mandates, but will also be of assistance to the magistrates in the daily operation of their Courts.

Sincerely,

Thomas N. N. Angell
Public Defender

Exhibit

"I"

MARCUS J. MOLINARO
COUNTY EXECUTIVE

THOMAS N. N. ANGELL
PUBLIC DEFENDER

COUNTY OF DUTCHESS
OFFICE OF THE PUBLIC DEFENDER

October 11, 2016

Hon. [redacted]

Re: Off-Calendar Arraignments

Dear Judge [redacted]:

On June 30, 2016, I wrote you requesting a meeting to resolve the ongoing problem of public defenders not being present at arraignments for criminal defendants who are remanded by your Court to the Dutchess County Jail. I have yet to receive a response to my letter of June 30, 2016. The problem has persisted. I plan to call you shortly to schedule such a meeting.

On May 6, 2010, the New York State Court of Appeals ruled in Hurrell-Herring v. State, 15 N.Y.3d 8, 20-21, that defendants in criminal actions have a constitutional right to representation by counsel at arraignment. If the individual defendant is unable to afford counsel, appointed counsel is required to be present.

Specifically, the Court held as follows:

> 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 arraignments (*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. 778, 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, 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.Ed2d 387 [1970]), it is clear from the complaint that plaintiffs' pretrial liberty interest 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 *21 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]).

Hurrell-Herring v. State, 15 N.Y. 3d 8, 20-21 [2010].

In response to this ruling, the County of Dutchess commenced its counsel at arraignment program on December 30, 2013 providing an attorney 24 hours a day, 7 days a week for the higher volume city and justice courts in the County. On October 13, 2015, at the request of the Dutchess County Magistrates Association, the Public Defender's office expanded this arraignment service to cover all criminal courts in the County. As a result of the larger catchment area, the agreement reached with the magistrates was that an attorney would respond to the requesting Court within 90 minutes of receiving the call from the Court.

Since implementing the Countywide arraignment system in October 2015, I am not aware of a single instance where we have been unable to provide an arraigning Court with an attorney within the requisite 90 minutes. We monitor all individuals remanded to the Dutchess County Jail. Since October 2015, over 95% of the individuals incarcerated in the Dutchess County Jail on criminal charges have had an attorney present at arraignment. Of the 5% who did not have counsel, a substantial percentage were arraigned in the [redacted] Court.

Since I last wrote you on June 30, 2016, it has been reported to me that the following individuals have been arraigned by you and remanded to the Dutchess County Jail without an attorney being present:

- [redacted] Robbery Second, July 19, 2016;
- [redacted], Obstructing Breath, August 12, 2016;
- [redacted], Unlicensed Operation of a Motor Vehicle, August 12, 2016;
- [redacted], Resisting Arrest, August 17, 2016; and
- [redacted] Criminal Mischief Third, August 24, 2016.

I am very concerned that the constitutional rights of our clients be protected. I hope to be able to schedule a meeting with you shortly to resolve whatever difficulties exist that may be preventing proper representation at arraignment from taking place.

Sincerely,

Thomas N. N. Angell
Public Defender

TNNA:lma

Exhibit
"J"

Response to Request for Proposal
NYS Office of Indigent legal Services
Counsel at First Appearance

PROJECT SUMMARY

County Requesting Funds: Dutchess County
Contact Person: Thomas N. N. Angell, Esq.
(845) 486-2280 phone
(845) 486-2266 fax
tangell@dutchessny.com

Fiscal Intermediary: Public Defender Office
Joan McDermott, Sr. Accountant
22 Market Street, 4th Fl, Poughkeepsie, NY 12601

Amount of Funding Requested: $750,000

Proposed project overview:

Using the previous funding granted Dutchess County for this project, the county hired two nighttime arraignment attorneys. The County started this initiative in select high volume village, town and city courts within the county. In 2015, the Dutchess County Magistrates Association requested that this service be expanded to all villages, towns and cities within Dutchess County on a 24-hour basis. It was necessary to hire an additional attorney to cover the daytime, off–calendar, first time appearances. This funding cycle will allow Dutchess County to continue to provide counsel at first appearance to nearly 100% of all criminal defendants facing incarceration at their arraignment.

A. Plan of Action

Project Rationale

1) Description of the Problem:
Indigent defense in Dutchess County is provided by the Public Defender. The Public Defender currently provides counsel at first appearance in all Courts.

When it was decided to provide coverage for all courts in Dutchess County, it was determined that a daytime arraignment attorney was needed. When there are arraignments during on-calendar times, the attorney covering that court handles the first time appearance. For off-calendar arraignments, the judge calls to request an attorney to appear for arraignments for indigent defendants. If the daytime arraignment attorney is present at one court and another court schedules an arraignment, the office has attorneys scheduled as back up for each day of the week to provide coverage. Similarly, during non-business hours the Public Defender's office has two full time arraignment attorneys on staff. These two attorneys normally work one week on and one week off, with one attorney always being on call. If more than one court requests an attorney at the same time during non-business hours, a back-up attorney is called. To date, the back-up attorney has been the Public Defender. The County is in the process of negotiating with the union representing the attorneys in the Public Defender's office to create an off-hours coverage plan.

Public Defenders in the court routinely have access to the defendant's criminal history and accusatory instruments. They are able to have a personal interview with the client prior to appearing before the judge for the arraignment. Of the 6,289 individuals arraigned in court with counsel, in 2016, 1,685 individuals approximately 27% were released from custody at their first appearance before the Judge. After the Public Defender's office started to cover all the courts in the County, the number of arraignments with counsel increased by 34% (2015 compared to 2016).

In summary, funding of this proposal will allow Dutchess County to continue to provide counsel at first arraignment to indigent defenders in all of the courts in the County and to continue to have a positive impact on reducing the incarceration rate at the first appearance.

2) Documentation of the Nature and Extent of the Problem:
The Public Defender's office studied the number of uncounseled first appearances, which resulted in incarceration for the month of July 2012 (an average month). We estimated there were a total of 295 criminal defendants sent to the jail without the benefit of an attorney being present at the point in time that the decision to incarcerate was made by all the arraigning courts in Dutchess County. This is in stark contrast with the year 2016, where there were 115 cases where the criminal defendants did not have an attorney present at their first appearance. The primary reason for these arraignments without counsel is the failure of the arraigning court to call the Public Defender's office to request an attorney or the failure to wait for the attorney to arrive

in court. The Public Defender has agreed with the arraigning magistrates to respond to a call for arraignment services within 90 minutes of receipt of the telephone call. In most instances, the response time is closer to 30 minutes.

Quality of Representation

3) Description of Proposal to Deliver Quality Indigent Legal Services at First Appearance:

In 2017, we plan to continue to provide attorneys to appear for criminal defendants at all criminal courts on a 24-hour basis, 7 days per week. The County is currently developing a protocol to have additional back-up coverage for after-hours cases, where there are scheduling conflicts. The full cost of providing this service over the three-year grant cycle is estimated to be $1,068,871.00. Since the RFP limits the application amount to $750,000.00, over $250,000.00 will become a cost to local taxpayers.

We provide a Public Defender telephone number for the judges to call when they are contacted by law enforcement authorities for an off-calendar or after-hours arraignment. The responding Public Defender then arranges to appear in court for the first appearance. Upon arriving in the court, the Public Defender will obtain a copy of the criminal history and accusatory instruments of the accused. The Public Defender will meet privately with the accused; review the charges, criminal history, bail criteria and any other pertinent information. The Public Defender will call family members, crisis residences, and mental health facilities, as appropriate, to locate an alternative to incarceration. The assigned Public Defender will appear before the magistrate with the accused, make appropriate legal arguments regarding the sufficiency of the accusatory instrument, bail criteria and potential alternatives to incarceration. The Public Defender will make sure the accused understands his/her legal rights at arraignment and enter the appropriate plea.

4) Continuous Representation of the Client:

Dutchess County utilizes the vertical representation model. Attorneys are assigned to handle a specific court or part and all the cases that arise therein. In the vast majority of cases, the original attorney will handle a specific client from arraignment to the resolution of the case.

However, maintenance of the vertical representational model is not possible with respect to after hour and off-calendar arraignments. Instead, the arraignment attorney provides the office with a detailed report by at least the following business day. The report will include a brief overview of the arraignment proceeding, the legal issues identified, alternatives to incarceration explored or to be explored, and names, addresses and telephone numbers of witnesses to be interviewed, contacted or subpoenaed for the next court proceeding. In addition, all defendants remanded to the Dutchess County jail will be interviewed on the next business day by the staff of the Public Defender's office.

5) Effective Representation in Cases Resolved Before Trial:

Assignment of attorneys to clients would occur pursuant to established procedures with the added benefit that the assigned attorney would have access to the work and report of the attorney at first appearance.

The Public Defender's office is staffed by experienced, well trained attorneys. Each attorney is required to attend continuing legal education courses in the criminal law. The office has bi-monthly meetings; all attorneys are expected to attend. All pending indictments are discussed on a monthly basis with the assigned supervisor. Further, each attorney is required to provide a bi-weekly report on the status of each of his/her incarcerated clients. Finally, all complaints made by clients are thoroughly reviewed and discussed with the assigned attorney. All written complaints are responded to in writing.

In summary, effective representation is assured for all of our clients by mandatory attorney training, case conferencing, periodic written status reports, and a responsive complaint management process.

6) Assignment of Attorneys to Effected Courts:

As stated previously, Public Defender attorneys are assigned to courts or parts of the court so that vertical representation can be maintained. The attorneys funded by this grant handle only the off-calendar arraignments in all courts in Dutchess County. The two full-time attorneys would take turns in providing this service so that coverage would be available 24 hours / 7 days a week. As previously stated, the existing attorney staff will provide back-up coverage when there is a scheduling conflict for the nighttime attorney. The existing attorney staff will continue to handle back-up coverage for the first appearance during normal working hours.

The Public Defender and/or Bureau Chief supervise the arraignment attorneys. Their filed reports are reviewed on a daily basis. The arraignment attorneys are required to attend bi- monthly staff meetings. They are required to participate in monthly supervisory review meetings. Should any problem arise, it will be dealt with immediately. Finally, each attorney will be reviewed yearly through a formal evaluation process.

7) Utilization of Support Staff:

The Public Defender's office is fortunate to have an excellent support staff. Under this proposal, the clerical staff will be used to make sure the first appearance report is promptly placed in the client's file and immediately given to the assigned attorney. The investigative staff will be available to track down and interview necessary witnesses, collect necessary evidence and view, visit and photograph appropriate crime scenes or other locations as directed by the assigned attorney. Finally, the social work staff will be available to assist in placement of a client in an appropriate treatment center or alternative housing location.

8) Qualifications of Attorneys and Training Requirements:

The attorneys hired under this initiative are admitted members of the New York State Bar and in good standing. Should vacancies occur in the future, the Public Defender will seek to hire attorneys of equal caliber and experience as he has in the past.

9) Non-English Speaking Clients:
Dutchess County contracts with a language translation service, which provides services telephonically around the clock. This service will be utilized initially. Dutchess County also contracts with several OCA approved interpreters who are available with reasonable notice to accompany assigned attorneys to the jail to interview clients or attend office appointments for the same purpose.

10) Sufficient Time for Attorneys to Consult with Clients:
Attorneys who handle arraignments routinely take the time to fully interview their clients prior to appearing before the arraigning judge. If sufficient time is not afforded to the attorney, the attorney requests a second call of the case so that further interaction with the client can take place. Attorneys assigned to handle first appearances will be required and do take the time necessary to obtain sufficient information to adequately represent their client.

B. Data Collection, Performance, Measurement and Evaluation

11) Existing Case Management System:
The Public Defender's office utilizes the New York State Defender Association's Public Defender Case Management System (PDCMS). The generic system was customized specifically for the use of Dutchess County. The entire intake process is automated. At intake, a designated intake specialist places all appropriate demographic and pertinent case information into the system.

The Dutchess County jail provides internet access to the Public Defender's office. All intakes at the jail are done on the PDCMS system. The clerical staff then updates the case information as the case proceeds. Attorney and investigative staff do so as well. When the file is closed, it is so noted in the case management system. The PDCMS is the electronic backbone of the Public Defender's office. It is utilized in all cases and by all staff.

The attorney who appeared with the client at first appearance is noted in PDCMS. All information provided by the arraigning attorney is uploaded into the system by the intake staff/clerical staff.

12) Gathering Critical Information:
Information regarding the presence or absence of an attorney at arraignment, bail outcomes, time spent in jail and time from arraignment to disposition are all available currently. Dutchess County has a fully integrated criminal justice data collection system. The Public Defender's office is able to cross tabulate its data with the jail's

information system. However, the Public Defender data is not accessible to anyone outside of the Public Defender's office except by permission.

Every work day the Public Defender is provided a list of all new inmates incarcerated at the jail during the previous day. Dedicated Public Defender intake staff interview each inmate. All information gathered during the interview is placed in the PDCMS system and is immediately available to all Public Defender staff. The PDCMS has multiple search functions for the preparation of special reports. In addition, Dutchess County provides additional data search capabilities to the Public Defender through its Office of Computer and Information Services, which matches data from the PDCMS system with data from the jail's information system.

13) Description of Present Information Available:
The Dutchess County arraignment protocols and systems were the subject of an extensive and exhaustive empirical study pursuant to a federal grant obtained by the state University of New York (Albany). This study, soon to be published, details the favorable impact that the counsel at first appearance programs of the Dutchess County Public Defender's office had on the rate and length of incarceration of criminal defendants since its inception. The SUNY Albany researchers were able to glean sufficient information from the digital records maintained by both the jail and Public Defender to do this academic study. This same data record keeping will continue (and be enhanced) in the future.

14) Changes Needed to be Made in Data Collection:
Dutchess County is currently able to comply with the data requirements outlined in the Request for Proposals.

C. Applicant Capability and Personnel

15) Project Leader:
Public Defender Thomas N. N. Angell will be the project leader.

16) Extensive consultation took place in the development of this proposal.
Dutchess County has only one Article 18-B provider, the Public Defender. Dutchess County does not have an assigned counsel administrator or an approved bar association plan. Each judge/magistrate maintains his/her own list of attorneys to assign in case a conflict arises, which prevents the Public Defender from handling a case. Dutchess County does have an inter-municipal agreement with Ulster County to provide one conflict Public Defender to handle select courts. This conflict attorney rarely, if ever, handles first appearances.

The initial proposal for Counsel at First Appearance was developed and approved by the Executive Committee of the County's Criminal Justice Council. The Executive Committee met with the two City of Poughkeepsie Court Judges, the Chief Clerk and Deputy Chief Clerk of the City of Poughkeepsie Court, the President and Vice-President of the Dutchess County Magistrate's Association. The membership of the

Executive Committee of the Criminal Justice Council (CJC) includes the District Attorney, Director of Probation, Commissioner of Behavioral and Community Health, Commissioner of Community and Family Services, Chief of Police of the City of Poughkeepsie, Area Supervisor of the New York State Department of Corrections and Community Supervision, Public Defender, Deputy County Executive and the Executive Director of an inner-city youth development agency. In addition to the deliberations of the Executive Committee of the CJC, the Public Defender had several independent meetings with the Dutchess County Magistrate's Association to discuss various proposals to address the issue of counselless first appearances in justice courts. Subsequent modification to the initial proposal was made in consultation with the Magistrate's Association, the County Executive and the County Legislature.

17) Extent of Collaboration:
This proposal is a result of extensive discussions and collaborations. The local Magistrate's Association has indicated approval of this program by asking for 100% coverage in all courts. Continued discussions will occur as the County develops a plan to centralize arraignments.

D. Budget and Cost

18) Annualized Three-Year Budget as Follows:
(See attached budget form.)

19) Subcontracting:
Dutchess County does not plan to sub-contract.

20) Budget Narrative:

Salaries: Dutchess County has two assistant Public Defenders for nighttime arraignments with a beginning annual salary, in 2017, of $63,180.00 per attorney. It is anticipated that the attorneys will receive a minimum 2% increase per year, as per their contract.

In addition, in the event that the two nighttime Arraignment Attorneys are already otherwise engaged on a case, this plan provides for after-hours on-call backup when necessary (nights and weekends).

Fringe Benefits: Fringe benefits at 52.015 of salary. This number is based on an average employee and could vary considerably.

Vehicle Gas/Repairs: $3,200.00 is designated to cover the fuel and repair costs for the vehicle purchased with funds from the last funding period.

Mileage: It is estimated that the back-up nighttime and weekend attorneys will travel a minimum of 117 miles per week with their own personal cars. They will be compensated at the 2017 IRS rate of 53.5 cents per mile.

Technology: Dutchess County has provided each of its Nighttime Assistant Public Defenders with an I PAD, a cell phone and data and voice services for both. The cell phones enable the designated city court judges and local magistrates to contact the available Public Defender when needed. Dutchess County plans to provide a cell phone to the daytime attorney; so that he can receive calls when out-of the office. An additional cell phone will be provided and for the nighttime back-up attorney. This phone will be passed to the attorney on call for a particular week. The data/voice fees for all the aforementioned electronic devices are approximately $2,604.00 a year.

Training: $1,500.00 is included to cover the cost of mandatory Continuing Legal Education for the attorneys hired. ($500/arraignment attorney)

Costs to be absorbed by Dutchess County taxpayer's due to insufficient funding for 100% of program.

The daytime arraignment attorney has been in this program since its inception (He was hired as an off-hours arraignment attorney) and his current salary is $67,178.00. He will also receive a 2% increase for successive years.

21) Monitoring Expenditures:
Dutchess County has a sophisticated financial management computerized system. Grant expenditures will be monitored by the Public Defender's office. Further, the County budget office requires quarterly financial reports from each department. Further, as in all counties, an annual budget is required to be presented and approved by the county governing body.

COUNTY OF DUTCHESS

MARCUS J. MOLINARO
COUNTY EXECUTIVE

OFFICE OF THE PUBLIC DEFENDER

THOMAS N. N. ANGELL
PUBLIC DEFENDER

AFTER HOURS ARRAIGNMENT

COURTS: Town of Amenia, City of Beacon, Town of Beekman, Town of Clinton, Town of Dover, Dutchess County Court, Town of East Fishkill, T & V Fishkill, Town of Hyde Park, Town of Lagrange, Town of Milan, Town of Northeast, T & V of Pawling, Town of Pine Plains, Town of Pleasant Valley, City of Poughkeepsie, Town of Poughkeepsie, T & V Red Hook, T & V of Rhinebeck, Town of Stanford, Village of Tivoli, Town of Union Vale, T & V Wappinger, Town of Washington

***To be completed

CLIENT NUMBER:	CLIENT'S LAST NAME:
ARRAIGNMENT DATE:	FIRST NAME: MIDDLE:
TIME OF CALL:	ADDRESS:
ATTORNEY: Thomas N.N. Angell	CITY/STATE:
APPROX TIME OF ARRIVAL:	DOB:
COURT'S REPLY: Accepted or Rejected	PHONE:
COURT:	NEXT COURT DATE:
JUDGE:	PURPOSE: _____NCD _____PRELIM HRG _____OTHER
CHARGES:	TIME RETURNED HOME:
TYPE: ___Felony ___Misd ___VOP ___Other	TOTAL AMOUNT OF TIME:
REMAND $BAIL/$BOND ROR RUS:	

NOTES:

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MARCUS J. MOLINARO
COUNTY EXECUTIVE

COUNTY OF DUTCHESS
OFFICE OF THE PUBLIC DEFENDER

THOMAS N. N. ANGELL
PUBLIC DEFENDER

OFF CALENDAR ARRAIGNMENT

***To be completed

CLIENT NUMBER:	CLIENT'S LAST NAME:
ARRAIGNMENT DATE:	FIRST NAME: MIDDLE:
TIME OF CALL:	ADDRESS:
ATTORNEY: **THOMAS N.N. ANGELL**	CITY/STATE:
APPROX TIME OF ARRIVAL:	DOB:
COURT'S REPLY: Accepted or Rejected	PHONE:
COURT:	NEXT COURT DATE:
JUDGE:	PURPOSE: _____NCD _____PRELIM HRG _____OTHER
CHARGES:	TIME RETURNED HOME:
TYPE: ___Felony ___Misd ___VOP ___Other	TOTAL AMOUNT OF TIME:
REMAND $BAIL/$BOND ROR:	

NOTES:

Exhibit

"L"

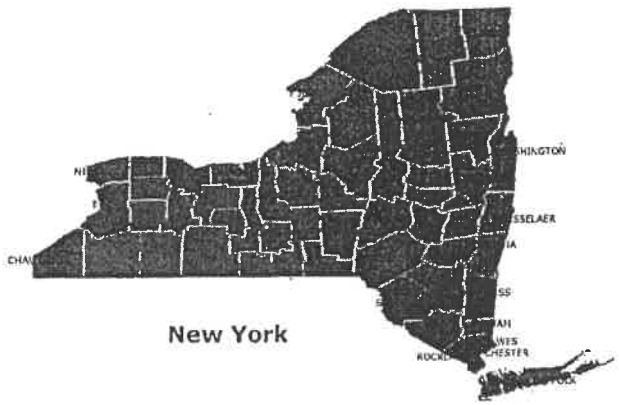
EARLY INTERVENTION BY COUNSEL:
A MULTI-SITE EVALUATION OF COUNSEL AT FIRST APPEARANCE

The challenge of providing counsel at first appearance has become a priority not only in New York but also nationwide. In 2012, the New York State Office of Indigent Legal Services (ILS) announced a competitive grant program, inviting county indigent defense providers to develop innovative strategies for increasing their capacities to provide representation at this critical early stage. In September 2014, the National Institute of Justice (DOJ) awarded a research grant to a partnership established between ILS and the University at Albany to investigate the efficacy of programs in six of those counties.

The project will examine the impact of those six counties' programs on case outcomes, criminal justice operations, and costs. The counties represent the diversity of upstate New York: they include rural and urban jurisdictions, and programs that provide representation through public defender as well as assigned counsel arrangements. The project explicitly recognizes that providers face differing constraints, needs, and opportunities, and therefore they devised strategies that best suit their communities.

> *While there are pending legal and constitutional challenges in this area that will continue to run their course, there is an independent and compelling moral obligation for every participant in the criminal justice system to work together to forge policy solutions to this problem – because the arraignment and pretrial jailing of defendants who are not represented by counsel is a fundamental failure that can no longer be tolerated in a modern, principled society governed by the rule of law.*
>
> Chief Judge Jonathan Lippman, 2011

The project will take place over two years. The findings will be shared with defender organizations, judicial associations, state and local government, and researchers, both within and outside of New York. The results of this research may set the stage for better provision of counsel across the nation.



New York

The project is directed by co-investigators from ILS and SUNY Albany, and staffed by graduate research assistants from the University's School of Criminal Justice. The feasibility of implementing counsel at arraignment projects, and of analyzing their real impacts on clients and communities, was demonstrated during evaluation of a pilot project in Ontario County (more information on reverse).

PROJECT STAFF:

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NIJ2014-IJ-CX-0027

WHAT TYPES OF INITIATIVES HAVE COUNTIES PROPOSED?

Providers have developed proposals that include:

- increasing attorney staffing during regular court arraignment hours
- providing on-call attorneys in courts located far away from defender offices
- extending existing attorney assignment plans to additional towns and villages
- facilitating access to attorneys in after-hours arrests

WHAT RESULTS DO WE EXPECT TO FIND?

Improvements in the scope of client representation:

- Higher rates of attorney presence at first appearances in target areas

Improvements in client outcomes:

- Fewer guilty pleas at first appearance
- Lower bail amounts, fewer pretrial detentions, more RORs
- Fewer pre-disposition days in jail

Improvements at the community or court level:

- Cost reductions associated with case processing time
- Cost reductions associated with reduced use of pre-trial detention

HOW WILL THIS RESEARCH BE CONDUCTED?

The pilot project: The research staff have already engaged in a pilot study of a first appearance initiative, and that study will be used as a model for research in the other counties. In 2012, the Ontario County Public Defender participated in a program designed to increase access to counsel at first appearance sessions in several town and village courts. In summer 2013, ILS initiated an evaluation of that program, essentially investigating the effect of that effort on outcomes for clients and the county. That evaluation involved on-site collection and comparison of case data *before* and *after* the program went into effect.

The results suggest that the program worked:

- Efforts to ensure access to counsel can be successful even in rural areas
- The cooperation of other criminal justice officials is key to program success
- Representation at first appearance is positively associated with client outcomes
- The county realized cost savings as a result of the program as well.

Data collection for the 6-county study: Data collection for the NIJ project will follow the pilot study protocols, and also will subscribe to stringent federal requirements for data security and confidentiality; access will be limited to certified project staff and all information that could conceivably identify individual cases will be deleted from data before analysis.

Oversight: The project is overseen by an Advisory Board representing the NYS Bar Association, the NYS Defenders Association, the NYS Association of Criminal Defense Lawyers, the NY City Court Judges Association, the NYS Magistrates Association, the School of Criminal Justice at UAlbany, and the Albany Law School. ***updated March 27, 2015***