SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

KIMBERLY HURRELL-HARRING; JAMES ADAMS; JOSEPH BRIGGS; RICKY LEE GLOVER; RICHARD LOVE; JACQUELINE WINBRONE; LANE LOYZELLE; TOSHA STEELE; BRUCE WASHINGTON; SHAWN CHASE; JEMAR JOHNSON; ROBERT TOMBERELLI; CHRISTOPHER YAW; LUTHER WOODROW OF BOOKER, JR.; JOY METZLER; VICTOR TURNER; EDWARD KAMINSKI; CANDACE BROOKINS; RANDY HABSHI; and RONALD McINTYRE, on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

THE STATE OF NEW YORK, GOVERNOR ANDREW M. CUOMO, in his official capacity, THE COUNTY OF ONONDAGA, NEW YORK, THE COUNTY OF ONTARIO, NEW YORK, THE COUNTY OF SCHUYLER, NEW YORK, THE COUNTY OF SUFFOLK, NEW YORK and THE COUNTY OF WASHINGTON, NEW YORK,

Defendants.

Index No 8866-07

Devine, J.

MEMORANDUM OF LAW IN SUPPORT OF THE STATE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Preliminary Statement

Plaintiffs, all of whom, at the time that this action was commenced, were indigent criminal defendants, urge this Court to find that the State has not adequately met its obligation to provide them with legal representation. As the Court of Appeals has made clear, this case does not concern the possibility that plaintiffs' individual criminal cases were jeopardized due to ineffective assistance of counsel. Rather, plaintiffs' case hinges on the far broader, sweeping allegations that plaintiffs have been denied representation period, either actual or constructive, in contravention of their Sixth Amendment right, due to systemic failures that in plaintiffs' view call for huge, unprecedented prospective systemic relief.

To establish their case, plaintiffs sought and obtained class certification based on their allegations that the class representatives suffered harms illustrative of the allegations in the complaint. The plaintiffs identified Five Counties -- Washington, Onondaga, Ontario, Schuyler and Suffolk (the "Five Counties") -- where the indigent criminal defendants allegedly were not provided with counsel, either actually or constructively. Over three years after the Court of Appeals decision which significantly narrowed the scope of the plaintiffs' case, after approximately sixty depositions involving more than 10,000 pages of transcripts with teams of plaintiffs' lawyers deployed across the Five Counties and the production of tens of thousands of pages of paper and electronic documents by the State and the Five Counties, the plaintiffs have had ample opportunity to demonstrate that they have evidence sufficient to prove their overarching allegations. The weight of the allegations and the heft of the record of discovery, however, cannot obscure a simple fact: plaintiffs do not have a case. Their theories, as laudably intended as they may be, are just that -- theories.

To prevail, the plaintiffs must be held to their burden of proving systemic actual or constructive denials of the right to counsel in the Five Counties. They must be required to establish that the plaintiffs' experiences actually represent such alleged actual or constructive denials of the right to counsel and that any such denial resulted from systemic deficiencies in the Five Counties. They must connect the plaintiffs to their theories, and they cannot do so.

The infirmities in plaintiffs' case, as more fully set forth below, include: (1) eight of the twenty named plaintiffs failed to appear for depositions, and as a consequence of plaintiffs' failure to appear, allegations relating to those plaintiffs can no longer remain in the case, see Point I, infra; (2) those who were deposed did not support plaintiffs' allegations, see Point III, infra; (3) plaintiffs do not take into account the changes that have occurred in the public defense systems in the Five Counties since the litigation began, see Point III(B) and (C), infra; and (4) counsel for the plaintiffs lost contact with their clients, which prevents them from establishing the factual predicate, if any, to support their allegations. See Points II, III(B), infra.

The question before the Court is not whether additional resources could improve indigent legal services in New York. That, as the Court of Appeals has indicated, is a legislative determination. Indeed, as set forth below, New York has undertaken legislative action to enhance the delivery of those legal services throughout the State. The question is whether the State has met its Constitutional obligations to provide representation in the Five Counties. As the State's proof will demonstrate, the State and the Five Counties meet or exceed the Constitutional standards. The plaintiffs have no proof to the contrary. The one critical stage of representation where plaintiffs in certain counties may, to a limited extent, demonstrate "non representation" is at their arraignments. However, as this Court has noted, plaintiffs have failed

to join the party capable of granting the relief required. Thus, those allegations are not properly made against the named defendants. Accordingly, as a matter of law, the defendants should be granted summary judgment and the second amended complaint should be dismissed in its entirety.

Statement of Facts

New York State has ensured that indigent criminal defendants receive the assistance of free legal services through the enactment of New York State County Law articles 18-A and 18-B in 1965. The statutory scheme of County Law articles 18-A and 18-B enables each county in the State to provide public defense services by relying on (1) a public defender, see N.Y. County Law §721; (2) a private legal aid bureau or society; (3) a plan of a local bar association through which (a) "the services of private counsel are rotated and coordinated by an administrator " or (b) "such representation is provided by an office of conflict defender;" or (4) a combination of these vehicles for representation. See N.Y. County Law §722(1), (2), (3).

More recently in 2010, the legislature enacted Executive Law §832 which created the Office of Indigent Legal Services ("OILS") in an effort to improve the quality of representation provided to indigent criminal defendants. OILS' duties and responsibilities include collecting information and data related to, *inter alia*, defense caseloads, standards of eligibility for public defense services, standards for qualifying to provide public criminal defense services, the resources of the state's public defense systems including experts and investigators, standards relating to cases involving conflicts of interest, standards relating to criminal public defense performance and developing recommendations regarding the distribution and expenditure of monies appropriated for indigent legal services. See N.Y. Exec. Law §832(a)-(j).

Pursuant to OILS' statutory mandate and the State's interests in improving the quality of indigent legal representation, OILS has successfully completed several important tasks including: the adoption and issuance of standards for representation for all trial-level attorneys providing indigent legal services; studies of the caseloads of those providing criminal defense services to the State's poor; and the development of grant programs targeted at addressing the issues of providing counsel at arraignment, monitoring upstate case loads and providing advice on immigration issues. The State's legislative reforms exemplify its commitment to improving indigent legal representation, a commitment beyond the Constitutional minimum.

State funds which support the delivery of services to indigent defendants are provided through multiple agencies and programs. The New York State Division of Criminal Justice Services ("DCJS") was appropriated monies from the State's General Fund to support the thirty-two counties in the State outside of New York City that have the highest crime rates through the Aid to Defense Program. See Strano dep. at p. 57. Onondaga, Ontario, Washington and Suffolk Counties receive Aid to Defense Funds. See Strano dep. at p. 58.

In addition, through DCJS, the State provides money from the State's General Fund to the New York State Defender's Association ("NYSDA"), which operates as a state-wide resource center for public defense attorneys. See Strano dep. at pp. 50, 85. DCJS also provides funds to counties through the federal Byrne JAG Enhanced Defense grant program, see id. at pp. 50, 94-100. The Five Counties each receive grants to fund initiatives for alternatives to incarceration. See Strano dep. at p. 90-91.

In separate appropriations, OILS distributes State funds to the counties for purposes of enhancing criminal public defense services. See N.Y. Exec. Law §832(c). Specifically, OILS is responsible for distributing funds from the Indigent Legal Services Fund, which is funded by four revenue streams: (1) attorney registration fees; (2) fees associated with restoring licenses after suspensions; (3) vehicle and traffic surcharges; and (4) surcharges for checking defendants' criminal histories. See N.Y. Fin. Law 98-b; Leahy dep. at pp. 29-30. OILS distributes money to localities through both statutory distributions and competitive grants. See Leahy dep. at p. 43. Each county receives distributions from OILS as long as the money is used to improve the quality of public defense. See id. at p. 43. The distributions are not competitive and are automatic so long as applicable criteria are met. See id. at p. 43. See also N.Y. State Fin. Law §98-b(3)(c).

Since the creation of OILS in 2010, the first three statewide distributions have been approved by the OILS Board.[1] The first statutory distribution covered the period of June 2011 through March 2013 and was in the amount of $4.4 million. See Leahy dep. at pp. 43-44. The second approved statutory distribution covers the period of June 2012 to May 2015 and provides for the distribution of $24.4 million. See id. at pp. 44-45. The third approved statutory distribution has not yet been finalized. See id. at p. 45, 66-67.

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1 The board consists of nine appointed members: (a) the chief judge of the Court of Appeals, who is the chair of the board; (b) one member appointed by the governor on the recommendation of the temporary president of the senate; (c) one member appointed by the governor on the recommendation of the speaker of the assembly; (d) one member appointed by the governor from a list of at least three attorney nominees submitted by the New York state bar association; (e) two members appointed by the governor from a list of at least four nominees submitted by the New York state association of counties; (f) two attorneys appointed by the governor, one of whom must be an attorney who has provided public defense services for at least five years; and (g) one member appointed by the governor from a list of no more than two nominees submitted by the chief administrator of the courts, each of whom shall be a judge or justice, or retired judge or justice, who was elected to the supreme, county or family court, or appointed to the criminal court or family court in the city of New York, and has substantial experience presiding in trial matters before such court. See Exec. Law §833 (1).

With respect to competitive grants, OILS has secured funding for three competitive grants to address (1) obtaining upstate caseload relief; (2) providing counsel at first appearances; and (3) creating regional resource centers for immigration issues. See id. at pp. 69, 70-72. The awards for the Counsel at First Appearance grant program have been made, and the Requests for Proposals ("RFP"s) are expected to be issued this summer. See id.; Kerwin aff. at ¶44, Exh. R. In the 2012-13 State budget, $82.5 million was appropriated to OILS: $1.5 million for office operations and $81 million to be distributed to the counties ("local aid."). See Leahy dep. at p. 80. Included in this appropriation was $4 million of the $6 million requested by OILS to implement the upstate case load relief grant program. See Leahy dep. at p. 81.

In its 2013-14 budget request, OILS requested $3 million for operating expenses and $91 million for the Counties through distributions and grants, $3 million of which was to fund the counsel at first appearance grant program, $4 million to fund the upstate caseload relief grant program and $3 million to assist the Counties in complying with the conflict standards recently approved by the OILS Board, as discussed below. See Leahy dep. at p. 82. In addition to $111 million in re-appropriations, $82.8 million was appropriated to OILS in the 2013-14 enacted budget as follows: $1.8 million for office operations and $81 million for local aid.[2] See Kerwin aff. at Exh. Q.

2 Due to the organizational complexities posed in responding to plaintiffs' 419 paragraph second amended complaint -- overlaying generalized allegations regarding representation in the Five Counties with an analysis of the plaintiffs' specific claims -- the State has included the balance of its presentation of the facts in conjunction with the relevant legal arguments, infra, and the accompanying affidavits submitted in support of this motion for summary judgment.

Argument

POINT I

PLAINTIFFS SHOULD BE PRECLUDED FROM OFFERING, OR RELYING ON, ANY ALLEGED FACTS OR EVIDENCE RELATING TO THE EIGHT PLAINTIFFS WHO FAILED TO ATTEND COURT-ORDERED DEPOSITIONS

Counsel for the State defendants first attempted to schedule the depositions of the twenty named plaintiffs in October 2010 after this case was remanded by the Court of Appeals. See Kerwin aff. at ¶23. Counsel for plaintiffs refused to schedule depositions and, instead, made a motion to stay their depositions on or about March 13, 2011. The State defendants cross-moved on or about April 22, 2011 to compel the depositions of the plaintiffs. See id. at ¶24. In an order dated August 31, 2011, the Court ordered that the plaintiffs be produced for depositions in a "prompt manner." See id. at ¶25. However, the scheduling of the plaintiffs' depositions continued to be extraordinarily difficult, with the first one conducted more than eight months later, and the last one completed over a year after the Court's August 31, 2011 order.[3] See id.

On June 6, 2012, plaintiff Ricky Lee Glover failed to appear for his scheduled deposition. He was the first of eight plaintiffs who ultimately refused to be deposed. Over the next months, the State defendants attempted to schedule the depositions of all of the plaintiffs and were informed piecemeal, and after significant delay, that plaintiffs Washington, Johnson, McIntyre, Brookins, Metzler, Turner and Kaminsky[4] would not be produced for depositions. That is, 40% of the alleged class representatives did not present themselves for examination by the defendants.

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3 The depositions took place as follows: Winbrone on May 18, 2012; Adams on June 6, 2012; Love and Briggs on June 7, 2012; Yaw and Habshi on July 19, 2012; Steele on August 14, 2012; Loyzelle and Tomberelli on August 21, 2012; Booker on September 18, 2012; Hurrell-Harring on September 21, 2012 and Chase on September 27, 2012. See Kerwin aff. at ¶28.

4 By order dated November 29, 2011 plaintiff Kaminsky was permitted to withdraw as a plaintiff in this action. See Kerwin aff. at Exh. P.

"If the credibility of Court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore Court orders with impunity." Kihl v. Pfeffer, 94 NY2d 118, 123 (1999). Therefore, CPLR 3126 permits the Court to strike a pleading as a sanction for a party's disregard of orders of the Court and frustration of the discovery process. Kihl, 94 NY2d at 122-23. Such a sanction is necessary here. Ernie Otto Corp. v. Inland Southeat Thompson Monticello, LLP, 53 AD3d 924, 926 (3d Dept 2008) (striking complaint because plaintiff "disobeyed Court orders, evaded disclosure and frustrated the disclosure process"); Rossi v. Budget Rent A Car, 49 AD3d 1088, 1089 (3d Dept 2008); Adamski v. Schuyler Hospital, Inc., 36 AD3d 1198, 1199 (3d Dept 2007). See also Almonte v. Pichardo, 105 AD3d 687, 688 (2d Dept 2013) (striking party's pleading after he failed to appear for his deposition).

Without the opportunity to question these eight plaintiffs about any of their allegations contained in the complaint, the defendants are unduly prejudiced and unable to properly test their allegations and mount an appropriate defense. Therefore, the plaintiffs should not be permitted to pursue the portions of the complaint pertaining to these individuals, and should not be permitted to use any information about the alleged public defense representation of these plaintiffs in this case.[5] Legarreta v. Neal, 2013 N.Y. App. Div. LEXIS 5090, *3-4, 2013 NY Slip Op 5129, *2 (4th Dept July 5, 2013) (the penalty to be imposed against a party for failure to comply with Court-ordered discovery may be fashioned by the Court within its discretion); Mehta v. Chugh, 99 AD3d 439, 439 (1st Dept 2012) (precluding plaintiff from testifying at trial

5 The State defendants have not included any proof or argument relating to plaintiffs Washington, Glover, Johnson, McIntyre, Brookins, Metzler, Turner and Kaminsky and have redacted any information relating to these plaintiffs from any documents submitted herewith. In the event that the Court permits plaintiffs to offer proof relating to these plaintiffs and permits the claims alleged by these plaintiffs to continue despite plaintiffs' blatant and willful disregard for the Court's orders, the State defendants respectfully request permission to supplement this motion to include proof related to such claims.

after failing to appear for her deposition). Accordingly, the portions of the second amended complaint relating to the claims of plaintiffs Glover, Washington, Johnson, McIntyre, Brookins, Metzler, Turner and Kaminsky should be stricken. Ernie Otto Corp., 53 AD3d at 926. To hold otherwise subverts the order of this Court and the just defense to which the defendants are entitled.

Should preclusion be granted, plaintiffs who allegedly "represented" a particular "systemic" actual or constructive denial of the right to counsel in a County, and never appeared for depositions are therefore, effectually, no longer in the case. For example, the only plaintiff who was allegedly represented by an attorney with a conflict of interest -- Washington County plaintiff Brookins -- did not appear for her Court-ordered deposition. See Kerwin aff. at ¶27. As a result, all allegations relating to plaintiff Brookins must be stricken from the second amended complaint thereby eliminating any claims in this case relating to conflicts of interest. The only Suffolk County plaintiff who appeared for his Court ordered deposition -- Luther Booker -- was timely determined to be eligible for public defense services, was represented by counsel at arraignment and was represented by attorneys with comfortable caseloads. Since the allegations in the complaint relating to all of the other Suffolk County plaintiffs should be stricken, any allegations concerning Suffolk County that relate to representation at arraignment, eligibility determinations, and caseloads are no longer before the Court.

POINT II

THE CLASS SHOULD BE DECERTIFIED

CPLR 902 "allows the trial Court to decertify the class at any time before a decision on the merits if it becomes apparent that class treatment is inappropriate." City of New York v.

Maul, 14 NY3d 499, 514 (2010); see e.g., Small v. Lorillard Tobacco Co., 94 N.Y.2d 43 (1999) (affirming Appellate Division's decertification of the class). During discovery, it was made apparent that the class representatives cannot fairly and adequately represent the interests of the class. Accordingly, the class should be decertified.

The alleged class representatives cannot fairly and adequately represent the interests of the class. "The factors to be considered in determining adequacy of representation are whether any conflict exists between the representative and the class members, the representative's familiarity with the lawsuit and his or her financial resources, and the competence and experience of class counsel." Ackerman v. Price Waterhouse, 252 A.D.2d 179, 202 (1st Dep't 1998); Rebibo v Axton Owners, Inc., 2012 N.Y. Misc. LEXIS 198, *5-6 (Sup. Ct. N.Y. County Jan. 11, 2012) (quoting Ackerman). A Court may also consider "the representative's background and personal character, as well as his familiarity with the lawsuit, to determine his ability to assist counsel in its prosecution and, if necessary, 'to act as a check on the attorneys.'" Pruitt v. Rockefeller Center Properties, Inc., 167 A.D.2d 14, 24 (1st Dep't 1991).

In reversing this Court's decision denying plaintiffs class certification, the Appellate Division, Third Department, relied upon affidavits of the representative plaintiffs, which purported to demonstrate plaintiffs' familiarity with this litigation. Hurrell-Harring v. State of New York, 81 AD3d 69, 73 (3d Dept. 2011). However, discovery revealed that the affidavits relied upon by the Third Department did not accurately reflect the representative plaintiffs' knowledge of this lawsuit. To the contrary, the representative plaintiffs who actually appeared for Court-ordered depositions were largely unfamiliar with this litigation. Indeed, many demonstrated very little memory and/or knowledge of their own cases as outlined in the

complaint. It is now apparent that the named plaintiffs do not and cannot fairly and adequately represent the interests of the alleged class. Representative plaintiffs in a class action play a critical role in a class action, not the least of which is at trial. The inability of the alleged class representatives to fairly and adequately represent the class will be most glaring at a trial of this action, where the named plaintiffs may not appear, will be unable to testify about the facts of their own criminal prosecutions and will otherwise lack the knowledge or information necessary to participate as actual representatives of indigent criminal defendants in the Five Counties.

A. Failure to Appear for Deposition

As discussed above, a full two-fifths of the representative plaintiffs failed to appear for Court-ordered depositions. See Point I, supra. It appears that these plaintiffs have not been in contact with plaintiffs' counsel: in support of their motion for leave to withdraw those eight plaintiffs as class representatives, plaintiffs submitted sworn documents detailing plaintiffs' counsel's inability to locate and/or communicate with the representative plaintiffs. Essentially, this litigation has proceeded with no participation of these eight plaintiffs, whose names appear to have been used for purposes of a caption only. Plainly, these plaintiffs are in no position to assist counsel in its prosecution of this matter.

B. Lack of Knowledge of This Litigation Generally

The plaintiffs who eventually appeared for Court-ordered depositions demonstrated little knowledge of this litigation. They generally do not know their fellow plaintiffs, nor have they ever spoken to them about this case. See, e.g., Hurrell-Harring dep.[6] at p. 74; Yaw dep.[7] at p. 71;

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6 "Hurrell-Harring dep." refers to the transcript of the September 21, 2012 deposition of plaintiff Kimberly Hurrell-Harring, the relevant portions of which are annexed as Exhibit H to the Muse Affirmation.

Tomberelli dep.[8] at pp. 55-57; Steele dep.[9] at p. 12; Briggs dep.[10] 25; Winbrone dep.[11] at p. 81; Booker dep.[12] at p. 8; Chase dep.[13] at p. 68. Even plaintiffs incarcerated in the same facility or who participated in the same drug court did not discuss this case with their fellow plaintiffs. See Yaw dep. at p. 71; Tomberelli dep. at pp. 56-57; Love dep.[14] at pp. 9-10. At least three plaintiffs do not believe that they have ever seen the complaint in this action. See Habshi dep.[15] at p. 90; Loyzelle dep.[16] at p. 94; Booker dep. at p. 40.

While a few plaintiffs have a very basic understanding of the purpose of this litigation, see, e.g., Winbrone dep. at p. 53; Chase dep. at p. 58, Steele dep. at p. 9, the representative plaintiffs are largely uninformed as to the progress to date and the issues raised. Many testified

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7 "Yaw dep." refers to the transcript of the July 19, 2012 deposition of plaintiff Christopher Yaw, the relevant portions of which are annexed as Exhibit X to the Rutnik Affirmation.

8 "Tomborelli dep." refers to the transcript of the August 21, 2012 deposition of plaintiff Robert Tomborelli, the relevant portions of which are annexed as Exhibit Y to the Rutnik Affirmation.

9 "Steele dep." refers to the transcript of the August 14, 2012 deposition of plaintiff Tosha Steele, the relevant portions of which are annexed as Exhibit V to the Munkwitz Affirmation.

10 "Briggs dep." refers to the transcript of the June 7, 2012 deposition of plaintiff Joseph Briggs, the relevant portions of which are annexed as Exhibit S to the McGowan Affirmation.

11 "Winbrone dep." refers to the transcript of the May 18, 2012 deposition of plaintiff Jacqueline Winbrone, the relevant portions of which are annexed as Exhibit P to the McGowan Affidavit.

12 "Booker dep." refers to the transcript of the September 18, 2012 deposition of plaintiff Luther Woodrow of Booker, the relevant portions of which are annexed as Exhibit R to the Dvorin Affirmation.

13 "Chase dep." refers to the transcript of the September 27, 2012 deposition of plaintiff Shawn Chase, the relevant portions of which are annexed as Exhibit W to the Rutnick Affirmation.

14 "Love dep." refers to the June 7, 2012 transcript of the deposition of plaintiff Richard Love, the relevant portions of which are annexed as Exhibit R to the McGowan Affirmation.

15 "Habshi dep." refers to the transcript of the July 19, 2012 deposition of plaintiff Randy Habshi, the relevant portions of which are annexed as Exhibit F to the Muse Affirmation.

16 "Loyzelle dep." refers to the transcript of the August 22, 2012 deposition of plaintiff Lane Loyzelle, the relevant portions of which are annexed as Exhibit U to the Munkwitz Affirmation.

that they did not know what has happened in the case up to the date of their deposition. See, e.g., Hurrell-Harring dep. at pp. 73-74; Tomberelli dep. at p. 59; Steele dep. at p. 14; Booker dep. at pp. 88-89; Chase dep. at pp. 55-60. Plaintiff Briggs incorrectly testified that his deposition was "the final part of where it goes to trial." See Briggs dep. at p. 26. He further testified that he had no further knowledge of the litigation. See id. Plaintiff Tomberelli testified that he does not know what his responsibilities are as a class representative. See Tomberelli dep. at p. 57. Plaintiffs who professed to have read decisions in this case are unable to speak even generally as to a single issue raised in the Courts' decisions. See, e.g., Love dep. at pp. 22-23; Tomberelli dep. at p. 59; Loyzelle dep. at pp. 93-94; Briggs dep. at p. 27; Steele dep. at pp. 10-13.

Moreover, counsel for the plaintiffs have not consistently remained in contact with the representative class plaintiffs or explained to them the progress of the case. For example, plaintiff Chase testified that he had not been updated on this case for two years prior to his deposition. See Chase dep. at p. 60. Plaintiff Steele does not know the names of the attorney or even the organization representing her in this case. See Steele dep. at p. 63. Plaintiff Yaw has had only one face-to-face meeting with counsel and had not been updated for six months before his deposition. See Yaw Dep. at pp. 65-70. While several plaintiffs acknowledge signing affidavits, they do not know who prepared them or for what they were used. See, e.g., Tomberelli dep. at p. 60; Steele dep. at p. 58; Booker dep. at p. 85.

Simply put, the representative plaintiffs lack even a basic understanding of the progress of this litigation and the issues involved. As such, the representative plaintiffs cannot fairly and adequately represent the class. See Whalen v. Pfizer, 9 Misc.3d 1124(A) (Sup. Ct. NY County 2005) (finding plaintiff who had only vague understanding of issues and mere general

cognizance of role as representative of a class not able to fairly and adequately represent class); Borden v 400 E. 55th St. Assoc. L.P., 34 Misc. 3d 1202(A) (Sup. Ct. NY County 2011) (noting "it is important that the proposed class representative demonstrate that s/he possess an adequate understanding of the litigation, including a knowledge of the claims and progress of the litigation"); cf. Pruitt, 167 A.D.2d at 24 (noting education, background in securities and substantive knowledge of complaint when finding representative plaintiff was able to fairly and adequately represent class in securities litigation). Moreover, none of the plaintiffs signed plaintiffs' responses to the State defendants' First Notice to Admit, see Kerwin aff. at Exh. L., which are therefore deemed admitted.[17]

C. Failure to Articulate Injury

The representative plaintiffs further fail to articulate a cognizable injury. While all are plainly critical of the representation they received, they are unable to articulate how such representation rises to a Constitutional violation. Some plaintiffs' memories are so faulty that they cannot provide basic facts underpinning their claims. See Chase dep. at pp. 20-24. Chase does not know when he obtained an attorney, how many times he went to Court with the attorney, what happened when he appeared in Court or when his trial occurred. See id. at pp. 30-35, 37, 40-43. Similarly, plaintiff Adams does not know when he was arrested on two of his cases, the month or year of his trial, whether his lawyer spoke to his wife about a handwriting expert or whether his lawyer spoke to his wife about clothes for trial. See Adams dep.[18] at pp. 42, 44, 6-65. Plaintiff Habshi -- who candidly acknowledges his guilt -- alleges that his defense

17 The unverified responses to the State defendants' First Notice to Admit were also unverified by counsel. See Kerwin aff. at Exh. L.

18 "Adams dep." refers to the transcript of the June 6, 2012 deposition of James Adams, the relevant portions of which are annexed as Exhibit Q to the McGowan Affidavit.

counsel should have worked with him more to get information that would have lowered his plea. See Habshi dep. at pp. 76, 80-81. Yet, he cannot remember what information he would have provided to counsel that would have impacted his case. See id. at pp. 81-82.

Other plaintiffs are vague as to what they allege their defense counsel failed to do. For example, plaintiff Loyzelle speculates that had his attorney investigated the facts of his case, he may have received a better plea offer. See Loyzelle dep. at pp. 78-81. However, the basis of plaintiff Loyzelle's position is that his version of events was different than that of the victim and the police. See id. at pp. 79-80. Plaintiff Steele also believed that her attorney should have conducted an independent investigation, but acknowledged that she did not know whether he had or had not. See Steele dep. at pp. 33-34. She further testified that she was unaware of any facts that were unknown to her attorney. See id. at p. 35. Plaintiff Tomberelli asserts that he was not properly represented because his attorneys did not discover the identity of the person who called the police to report his drunk driving. See Tomberelli dep. at pp. 23-28, 32-34. Yet, he was unable to articulate how that knowledge would have assisted his case. Notably, he admits that he was drunk, that he was driving without a license and that this was his sixth conviction for drinking and driving. See id. at pp. 8-15.

At least one representative plaintiff's claim is based upon a flawed understanding of the law. Plaintiff Hurrell-Harring was arrested after admitting to State Troopers that she attempted to smuggle marijuana to her husband, who was an inmate in a maximum security correctional facility. See Hurrell-Harring dep. at pp. 12, 21. In a signed statement, she acknowledged that she smuggled marijuana into a correctional facility twice before the time of her arrest. See id. at pp. 87-92. Although she was charged with a D Felony, plaintiff Hurrell-Harring alleges that her

attorney did not properly represent her because she was offered a plea deal of six months in jail and five years probation. See id. at p. 106. While she acknowledges that she broke the law, she alleges that she should have been given an appearance ticket and sentenced to a fine because she had never been in trouble before. See id. at pp. 31, 102-103. The basis of plaintiff Hurrell-Harring's assertion is her personal opinion and her familiarity with the show *Law and Order*. See id. at pp.103, 111.

Three representative plaintiffs' claims are belied by their own admissions. Plaintiff Adams testified that he had a good attorney. See Adams dep. at p. 71. When offered another attorney, he declined. See id. at p. 73. Plaintiff Tomberelli acknowledged in open Court that he was satisfied with his attorney and was not coerced into taking a plea bargain. See Tomberelli dep. at pp. 66-68. During his deposition, he testified that he told the truth in Court. See id. Plaintiff Booker was specifically asked about his claim in this case at his sentencing. See Booker dep. at pp. 52-55. In open Court he acknowledged that his claims in this litigation were not true and that he was pleased with his plea bargain. See id. at p. 53. Plaintiff Booker further acknowledged that he only joined this lawsuit because counsel for the plaintiffs had asked for volunteers. See id. at p. 54.

The Appellate Division granted class certification based on the allegations contained in the complaint and affidavits from seventeen of the twenty plaintiffs, several of whom failed to attend their Court-ordered depositions. Specifically, the Court found that the named plaintiffs are familiar with the litigation and understand the issues involved." See 81 AD3d at 73. However, the "proof" relied upon by the Appellate Division was not borne out by discovery. To the contrary, in their depositions plaintiffs (those who actually appeared) demonstrated that they

were largely unfamiliar with this litigation and had little understanding of the issues involved. Now that the allegations in the complaint are replaced with evidence including, most notably, the plaintiffs' own deposition testimony, or the lack of such testimony, it is entirely clear that the plaintiffs have not, do not and cannot properly represent the interests of the class. As a result, the class should be decertified pursuant to CPLR 902.[19]

POINT III

THE PLAINTIFFS CANNOT ESTABLISH A CONSTITUTIONAL VIOLATION

The plaintiffs allege that their experiences in the public defense systems of the Five Counties represent systemic denials of counsel. Therefore, as a threshold issue, plaintiffs "have the burden to demonstrate that the class representatives have actually been denied their right to counsel and truly embody the violations that are claimed by the entire class." See Kerwin aff. at Exh. J (Hurell-Harring, et al. v SONY, et al., unpublished slip op., August 5, 2011 at pp. 4-5). If that threshold burden is met, plaintiffs must then establish that the alleged denials of counsel experienced by the plaintiffs were caused by systemic deficiencies and not as the result of any alleged deficiencies of a particular lawyer. See Hurell-Harring, et al. v SONY, et al.; 15 NY3d 8 (2010). As shown below, the plaintiffs cannot meet either the threshold burden or their ultimate burden.

The Court of Appeals, in reversing the Appellate Division's dismissal of the complaint in this case, significantly narrowed the scope of plaintiffs' complaint. Id. at 25. Specifically, the Court stated that plaintiffs' "performance-based claims", id. at 19, such as claims relating to

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19 It is also noteworthy that the Appellate Division granted class certification in part to protect the individual plaintiffs from "significant discovery challenges." Hurrell-Harring v. State of New York, 81 AD3d 69, 75 (3d Dept. 2011). As discovery has concluded, this rationale no longer applies.

"uniform hiring, training and performance standards," id. at 24-25, may not be brought in a systemic challenge such as this. Instead, the Court limited this case's reach to "the closely defined claim of non-representation," in the form of either actual or constructive denial of counsel. Id. at 25. According to the Court of Appeals, non-representation may be found, for example, where: (1) attorneys are not, in fact, present at a Court proceeding, id. at 19, 22, 23; (2) attorneys fail to communicate with their clients, id. at 19; (3) attorneys are not assigned because a defendant is found ineligible to receive public defense services, id. at 19, 22; and (4) attorneys undertake a defendant's representation despite a conflict of interest. Id. at 20. Having narrowed this action to these types of circumstances, the Court permitted the litigation to continue based on the "simplicity and autonomy of a claim for non-representation" that does not require any evaluation of attorney performance. Id. at 24.

The Sixth Amendment of the United States Constitution guarantees every individual charged with a crime "the right to . . . have the assistance of counsel for his defense." See U.S. Const. amend VI. Toward this end, every criminal defendant is entitled to the services of an attorney free of charge if he or she is unable to afford an attorney. Gideon v. Wainright, 372 US 335, 342-44 (1963). The "'focus of the Sixth Amendment's protection is 'the adversarial process, not ...the accused's relationship with his lawyer as such.'" Brown v. Doe, 3 F3d 1236 (2d Cir. 1993); Moore v. Kirkpatrick, 2011 US Dist LEXIS 33666, *28. (WDNY 2011). "A defendant does not have a Constitutional right to a meaningful attorney-client relationship, to be completely satisfied with counsel's performance, or to be represented by the lawyer of his choice." Moore at *28. "'If counsel is a reasonably effective advocate, he meets Constitutional standards irrespective of his client's evaluation of his performance.'" Brown, 3 F3d at 1246.

The United States Supreme Court decided the cases of Strickland v. Washington, 466 US 668 (1984), and United States v. Cronic, 466 US 648, 659-62 (1984), on the same day, and enunciated the standards to be used when determining if a criminal defendant's representation complied with the requirements of the Sixth Amendment. These cases identified the two ways in which a criminal defendant's representation could be found unconstitutional. Specifically, these cases establish that a criminal defendant must (1) have legal representation at every critical stage of a criminal proceeding, United States v. Cronic, 466 US at 659-62, and (2) that the representation must be meaningful and effective. Strickland, 466 US at 692. To establish a claim of ineffective assistance of counsel under Strickland, a criminal defendant must satisfy a two-part test: (1) the representation was Constitutionally deficient and not within the range of an objective standard of reasonableness, Rollins v. LaValley, 2012 US Dist LEXIS 170559, **11-12 (NDNY 2012), and (2) that the attorney's performance prejudiced the outcome of the defense case.[20] Id. at p. *12. If a defendant cannot establish the second prong by a demonstration of prejudice, a defendant's claim of ineffective assistance will fail and his or her conviction will be upheld. Strickland, 466 US at 698.

In narrowing the scope of this case, the Court of Appeals held, however, that the appropriate inquiry is not whether plaintiffs can demonstrate that they were denied effective assistance of counsel under Strickland, but whether they can establish a systemic denial -- actual or constructive -- of representation itself under Cronic.

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20 The New York ineffective assistance of counsel standard "has always been deemed to be broader" that the federal Strickland standard, People v. Claudio, 83 NY2d 76, 84 (1993), and requires that an attorney's deficient performance "affect the 'fairness of the process as a whole'" when viewed in the totality of the circumstances. Rollins v. LaValley, 2012 US Dist LEXIS 170559, **13-14. Unlike under Strickland, it is not necessary under the New York State Constitution to show that, but for counsel's errors, the outcome of the criminal proceeding would have been different. Id.

To establish a denial of the right to counsel claim under Cronic, however, a criminal defendant must prove "(1) the complete denial of counsel; (2) a total failure by counsel to subject the prosecution's case to meaningful adversarial testing; [or] (3) instances when counsel is called upon to render assistance under circumstances where competent counsel very likely could not do so." Ramirez v. United States, 898 FSupp2d 659, 670 (SDNY 2012) (citing Cronic, 466 US 648, 659-62). Unlike claims of ineffective assistance of counsel, claims of denial of counsel, whether actual or constructive, are presumed to be prejudicial[21], and therefore a plaintiff need not show that his or her criminal case was prejudiced in any way. Cronic, 466 US at fn 25. "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." Id. fn 26. In other words, the Strickland standard applies in most situations where a criminal defendant's representation is challenged. Cronic is applied only in the very limited situations where the "denial of counsel and the associated collapse of the adversarial system is imminently clear," Moss v. Hofbauer, 286 F3d 851, 860 (6th Cir. 2002), and presents a significantly higher threshold for plaintiffs.

The three circumstances for which no prejudice to the criminal proceeding need be shown[22] are essentially "exceptions" to having to satisfy the second prong of the Strickland standard. Cronic, 466 US at 659-60. Unless a defendant can show that a case is "'squarely governed by Cronic, he must rebut a presumption that Strickland should apply.'" Muyet v. United States, 2004 US Dist LEXIS 15029, *17 (SDNY 2004). To establish a denial of the right to counsel under the first Cronic exception, a plaintiff must show that she or he is completely

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21 Also characterized as "*per se* prejudicial."
22 Referred to herein as "the "Cronic exceptions."

denied counsel at a "critical stage" of a criminal proceeding. Cronic, 466 US at 659-60. Yet, to establish a denial of the right to counsel under the second exception, an attorney's failure to subject the prosecution's case to meaningful adversarial testing must be completely absent throughout the entire proceeding, and not just at one stage of the proceeding. Bell v. Cone, 535 US 685, 697 (2002).

The third Cronic exception has only been applied in two situations in the Second Circuit: (1) when a criminal defendant was represented by an unlicensed attorney, and (2) when a defendant was represented by an attorney implicated in the defendant's crimes. United States v. Rondon, 204 F3d 376, 379-80 (2d Cir. 2000). Even when it did apply the third Cronic exception in these two types of cases, the Second Circuit "resorted to it 'without enthusiasm'." Solina v. United States, 709 US 160, 169 (2d Cir. 1983); Lopez v. Artus, 2005 US Dist LEXIS 7153, *19 (SDNY 2005).

All of the cases in this State and Circuit address claims of the actual and constructive denial of the right to counsel in the context of a post-conviction motion, appeal or writ of habeas corpus. As a result, in deciding whether the "per se prejudice standard" of Cronic applies, as opposed to the Strickland "ineffective assistance of counsel" standard, Courts have necessarily analyzed what occurred within a defendant's criminal proceeding because a determination of whether a Constitutional denial, as opposed to a performance or trial error, is always made looking at a defense in its entirety. However, the Court of Appeals has held in this case that the second amended complaint on its face raises a cognizable claim of systemic alleged actual and constructive denials of the right to counsel; any individual claims of ineffective assistance of counsel under Strickland that might be alleged, on the other hand are not justiciable. Hurrell-

Harring, 15 NY3d at 24-25.

The burden for proving a case of systemic, as opposed to individual, deficiencies in the provision of counsel to indigent criminal defendants is exceedingly high because New York Courts have found that even an attorney's complete failure to put on a defense or participate in a defendant's trial did not violate a defendant's right to counsel in some circumstances. People v. Aiken, 45 NY2d 394 (1978); People v. Diggins, 25 Misc3d 1218(A), 901 NYS2d 909 (Sup Ct New York Co. 2009). Courts have found that, at times, an attorney's decision not to participate in a client's defense is a tactical or strategic decision in her or his client's best interests. Aiken, 45 NY2d at 400; Diggins, 901 NYS2d at 33-35. Reasonable strategic or tactical decisions by an attorney cannot be the basis for finding an attorney's performance per se prejudicial. Ramirez v. United States, 898 FSupp2d 659, 665-66 (SDNY 2012). As a result, it will be difficult, if not impossible, for the plaintiffs to prove that any alleged actual or constructive denial of the right to counsel occurred for reasons other than strategic or tactical ones as a matter of law without looking at each individual representation.

A. Denial of Counsel at a Critical Stage of a Criminal Proceeding

To determine whether a particular stage of a criminal proceeding is critical,

> Courts must "analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." "Perhaps the best way of reaching an answer to that query is to ask whether [the defendant] had any [subsequent] opportunity . . . to recover or exercise whatever privilege he lost."

Ramirez, 898 FSupp2d at 671. A stage is critical if it could result in the "irrevocable loss of a privilege." Id. Therefore, a determination of whether a stage is critical for Sixth Amendment purposes requires the Court to look at the stage itself, and the possible prejudice that could result

to a defendant during that stage, and not whether a defendant actually suffered prejudice during that stage. Id. at fn 78.

It is because the results of a proceeding are irrelevant that the per se prejudice standard of Cronic applies to claims of a denial of counsel at a critical stage. In People v. Margan, 157 AD2d 64 (2d Dept 1990), the appellate Court found a denial of counsel at a critical stage when the Court directed the prosecution to begin its direct examination of a witness before defendant's attorney had arrived in the Courtroom. Id. at 65. The Court held that the denial was per se prejudicial because it caused the defendant to be without counsel at a critical state of the proceeding, even if the defendant was not ultimately prejudiced by that brief absence of counsel. Id. at 66. Similarly, in Miller v. Barkley, 2005 US Dist LEXIS 1665 (SDNY 2005), the Court held that the defendant was denied counsel at a critical stage, without the need of showing that the absence actually prejudiced the defendant, when his attorney left the Courtroom during a pre-charge conference. Id. at **21, 26.

In Hamilton v. Alabama, 368 US 52, 54 (1961) the Supreme Court held that the absence of counsel at an arraignment under Alabama law denied a criminal defendant the right to counsel at a critical stage and therefore the defendant's conviction was reversed without the need to show prejudice in the criminal proceeding. The Court found an arraignment in Alabama to be a critical stage for purposes of the right to counsel because "[a]vailable defenses may be ...irretrievably lost." Id. For instance, under Alabama law, the defense of insanity must be pled at arraignment, or the opportunity to present such a defense will be lost. Id. at 53.

In this case, the Court of Appeals stated

> [a]s 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 [footnote omitted], a circumstance which would undoubtedly require the "critical stage" label [citation omitted], it is clear from the complaint that plaintiffs' pretrial liberty interests were on that occasion regularly adjudicated [citation omitted] 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.

Hurrell-Harring, at 20.

The Court of Appeals in this case noted that the Sixth Amendment guarantees representation at all critical stages of a prosecution, and observed that the period between arraignment and trial is critical for Sixth Amendment purposes. Less clear is the Court's holding with respect to whether arraignment is a critical stage. The Court held that "[i]n New York, arraignment is, as a general matter, such a stage." Id. at 21 (emphasis added). The Court added that under the circumstances alleged in the complaint, arraignment is a critical stage, even absent entry of a guilty plea because "it is clear from the complaint that plaintiffs' pretrial liberty interests were on that occasion regularly adjudicated . . ." Id. at 20. The Court also referred to arraignment in New York as routinely "affecting a defendant's liberty and the ability to defend against the charges." Id. at 21. As discussed below, there was in fact no liberty interest at stake with a respect to a number of the class representatives, (e.g., the individual was released or not entitled to release), nor was the ability of any of the defendants to defend against the charges they faced impaired by the absence of counsel at arraignment.

1. Denial of Counsel at Arraignments

New York State Criminal Procedure Law §170.10(3) provides that:

> 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:

(a) To an adjournment for the purpose of obtaining counsel; and

(b) To communicate, free of charge, by letter or by telephone provided by the law enforcement facility where the defendant is held to a phone number located in the United States, or Puerto Rico, for the purposes of obtaining counsel and informing a relative or friend that he or she has been charged with an offense; and

(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.

See N.Y. Crim. Pro. Law §170.10(3).[23] The Court must advise the defendant of these rights and "not only accord him opportunity to exercise such rights but must itself take such affirmative action as is necessary to effectuate them." See N.Y. Crim. Pro. Law §170.10(4)(a). By enacting this section of the Criminal Procedure Law, New York State has ensured that criminal defendants have counsel at arraignment. Plaintiffs allege, however, that the requirements of the Criminal Procedure Law that a criminal defendant be allowed the advice of counsel at arraignment are not being followed by the Courts in the Five Counties. As this Court has noted on many occasions, the State's judiciary is not a defendant in this case, and the State has complied with its Constitutional duty to ensure that criminal defendants are arraigned with counsel.

This Court raised this problem in its decision denying the State defendants' motion to dismiss when it stated:

The Court also notes that the complaint, as well as the Report on the Future of Indigent Defense Services annexed thereto, contain

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23 Criminal Procedure Law §170.10 governs arraignments upon an information, simplified traffic information, prosecutor's information or a misdemeanor complaint. Section 180.10 governs arraignments upon a felony complaint. See N.Y. Crim. Pro. Law §180.10. However both sections contain the language quoted from §170.10 above.

> allegations that judges undertake critical proceedings without any attorney representing indigent defendants . . . If true, the relief sought by plaintiffs will be incomplete should they emerge victorious. While it appears that many of these alleged problems might not be resolved by this litigation, no relief has been sought against any members of the judiciary. Moreover, it does not appear that any judgment issued herein would adversely affect any members of the judiciary in any legally cognizant manner. . .

See Kerwin aff. at Exh. B, pp. 10-11.

Similarly, in denying plaintiffs' motion for a preliminary injunction, the Court stated "in the context of this instant action . . .plaintiffs must show that deficiencies attributable to the named defendants have caused the [Constitutional] failure. If, for example, the Constitutional violations are attributable to the judiciary, injunctive relief would be inappropriate." See Kerwin aff. at Exh. F, pp. 6-7. The Court went on to point out that 22 NYCRR §202.26 expressly permits judges to issue securing orders -- which typically occurs at arraignments -- in the absence of counsel and

> [p]laintiffs have not challenged such regulation, nor have they included any of the judiciary or the Chief Administrative Judge as defendants. It is also unclear how the state defendants could effectuate the requested injunctive relief, since it is the judiciary which actually assigns counsel and they are not parties to this action.

See id. at p. 9. As a result, any finding in this case that criminal defendants are being denied counsel at arraignment in the Five Counties cannot be remedied by the State and therefore injunctive or declaratory relief against the State defendants would be improper as a matter of law. As a result, the State defendants are entitled to summary judgment on the arraignment issue.

Moreover, the State continues to take steps to improve the quality of representation at arraignments. In accordance with legislation enacted in 2010 to enhance the delivery of legal

services, OILS issued a Request for Proposals seeking applications for grants to be used to improve the quality of representation provided to indigent criminal defendants at arraignments. Four of the Five Counties in this case applied, see McGowan aff. at Exh. V; Dvorin aff. at Exh. T; Rutnik aff. at Exh. V; Munkwitz aff. at Exh. W, and received, substantial grant funding for this purpose. Specifically, $12 million dollars over a three year period was appropriated to OILS by the State for the sole purpose of improving the quality of the representation of indigent criminal defendants at arraignment. Ontario, Suffolk, Onondaga and Schuyler Counties received $750,000, $747,000, $588,000 and $94,000 over the three year period, respectively.[24] See Kerwin aff. at ¶66.

2. Denial of Counsel Because of Eligibility Determinations

The Court of Appeals referred to the allegations of plaintiff Shawn Chase when the Court stated that

> [o]ne 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.

Hurell-Harring, 15 NY3d at 19. As recognized by the Court of Appeals, eligibility determinations may only be made by the judiciary. In connection with the statutory language quoted above, Criminal Procedure Law §170.10(3) (c) states that

> 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:
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> * * *

24 Upon information and belief, Washington County did not apply to participate in the OILS Counsel at First Appearance grant program.

> (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.

See N.Y. Crim. Pro. Law §170.10(3) (emphasis added). By seeking relief that sets standards for eligibility or declares that eligibility standards are not uniform, the plaintiffs are necessarily seeking to obtain relief to which only the judiciary would be subject. However, as noted by this Court and discussed above, the judiciary is not a defendant in this case. As a result, injunctive or declaratory relief against the State defendants on this issue would be improper as a matter of law.

Such relief must also be denied because the only plaintiff allegedly found ineligible for public defense services is plaintiff Chase, who was deemed ineligible in Schuyler County because he was under 21 years old and information about his parent's income and assets was required. However, during discovery it was learned that Schuyler County no longer requires parent information for potential clients under age 21. Therefore, plaintiffs cannot establish entitlement to injunctive relief as to eligibility determinations since the one County in which a plaintiff was allegedly found ineligible ended the complained-of practice. Accordingly, the State defendants are entitled to summary judgment on the eligibility issue.

3. Constructive Denial of the Right to Counsel Following Arraignment

A constructive denial of the right to counsel includes "counsel's total or near total derelictions in representation," Restrepo v. Kelly, 178 F3d 634, 639 (2d Cir. 1999), and is "limited to situations involving Constitutional error of the first magnitude which cannot be cured even if no prejudice is shown." Ivory v. Jackson, 509 F3d 284, 295 (6th Cir. 2007). Examples of such derelictions include (1) filing a cursory appellate brief, (2) sleeping through trial for substantial periods of time, (3) failing to file a notice of appeal when instructed by a client to do

so, Knight v. Phillips, 2012 US Dist LEXIS 169335, *68 (EDNY 2012). See also Childress v. Johnson, 103 F3d 1221, 1229 (5th Cir. 1997) (a constructive denial of counsel occurs when a defendant is forced to confront a critical stage of the proceeding without the assistance of "an attorney dedicated to the protection of his client's rights under our adversarial system of justice."), (4) failing to assist a defendant at plea proceedings, (5) failing to object to a directed verdict against the defendant, (6) "deliberately stress[ing] the brutality of" the defendant's crime, Appel v. Horn, 250 F3d 203, 212-13 (3d Cir. 2001), (7) "expressing contempt and 'unmistakable personal antagonism' toward the client in the presence of the jury" and (8) refusing to present a defense "because of an unsound trial strategy." Maxon v. Bell, 2010 US Dist LEXIS 143872, *90 (WD Michigan 2010). "Courts have been 'reluctant to extend a rule of per se prejudice in any new direction.'" Knight at *68.

Plaintiffs allege that the plaintiffs were constructively denied counsel in the rest of their criminal proceedings following arraignment. See Kerwin aff. at Exh. A, generally. However, as discussed below, "such circumstances fall far short of the magnitude of error that is required for a Sixth Amendment deprivation of counsel violation to constitute Constitutional error without a showing of prejudice." Pugliano v. United States, 2005 US Dist LEXIS 38453, *24 (D. Conn. 2005).

The fact that the Cronic Court found that the facts at issue did not support a constructive denial of counsel claim demonstrates the severity of circumstances that must be present to find a constructive denial of the right to counsel. In Cronic, a young real estate lawyer was assigned to represent a defendant on felony mail fraud charges twenty-five days before trial and after the prosecution investigated the case for four and half years and examined thousands of documents.

Cronic, 466 US at 649. The lawyer put on no defense, but effectively cross-examined the prosecution's witnesses. Id. at 651. The Court held that despite (1) the inexperience of the appointed attorney, (2) the attorney's lack of criminal experience, (3) the attorney's lack of trial experience and (4) the 25 days in which the attorney had to learn about and investigate the case and prepare for trial, plaintiff **did not** demonstrate a constructive denial of the defendant's right to counsel. Id. at 663-667.

Decisions by lower Courts applying Cronic further illustrate the high burden of proof that must be met to establish a constructive denial of counsel. In Lopez v. Artus, 2005 US Dist LEXIS 7153 (SDNY 2005), defense counsel, while representing the defendant, was the subject of eight complaints to the grievance committee and, three months after he concluded his representation of the defendant, counsel was suspended from the practice of law because of mental infirmity or illness. Id. at **5, 8. Counsel failed to appear at some of defendant's Court proceedings and, except during the plea and sentencing appearances, counsel appeared on other occasions only to request adjournments. Id. at **45. The Court held that the defendant was not constructively denied counsel. Id. at *25. See also Fuller v. Sherry, 405 Fed Appx 980, 988 (6th Cir. 2010) (the Court held that, although "[counsel] was forced to meet with a new client, discuss a potential plea, consider motions and discovery requests, review discovery documents, and read the preliminary examination transcript, all within eighty-eight minutes" before trial, the defendant was "never completely without counsel," because counsel did not go to trial "entirely unprepared," and the "trial was not stripped 'of all its integrity.'"); Maxon at **85, 88 (no constructive denial of counsel when counsel (1) failed to investigate mitigating issues in case, (2) did not prepare a defense, (3) did not retain an expert, (4) did not object to the "prosecutor's flagrant misconduct," and (5) did not object to rulings, jury

instructions or sentencing issues); Glover v. Miro, 2762 F3d 268, 271-72, 276 (4th Cir. 2001) (no constructive denial of the right to counsel when the defendant was assigned an attorney who was responsible for fifty to sixty other cases during the term in which defendant's case was to be tried, and plaintiff's trial began two days after counsel first met with the defendant at which time counsel was denied a continuance to find witnesses.)

Also, in United States v. Rogers, 13 Fed Appx 386 (7th Cir. 2001), the defendant informed the Court that his counsel never met with him to discuss his case, did not issue subpoenas or talk to witnesses and would not respond to defendant's calls or letters. Id. at 387. The Court stated that the defendant was not constructively denied counsel because cases "finding an inherently prejudicial constructive absence of counsel mostly involve egregious conduct that is the functional equivalent of actual absence of counsel," and defendant failed to show such egregious conduct of his attorney that "entirely failed to subject the prosecution's case to meaningful adversarial testing." Id. at 388-89. See also Griffin v. Aiken, 775 F2d 1226, 1229-30 (4th Cir. 1985) (no constructive denial when counsel did minimal investigation, was in Court on other matters during the three days before defendant's arraignment and trial, had between 100 and 140 other cases pending at the same time as the defendant's case, had only limited conversations with the defendant in the period between the preliminary hearing and trial, and was unable to present any arguments for the suppression of evidence because he did not have knowledge of the case); Mitchell v. Mason, 325 F3d 732, 741-42, 748 (6th Cir. 2003) (no constructive denial of counsel during the investigative stage of the criminal proceeding when defense counsel had been suspended from the practice of law for the month leading up to murder defendant's trial, never met with or spoke with the defendant -- who was charged with murder --

before trial, never responded to defendant's letters and never spoke to any witnesses).

Significantly, in cases where a defendant was found to have been constructively denied counsel, the defendants were, in actuality, without counsel at all. For example, in United States v. Morris, 470 F3d 596 (6th Cir. 2006), assigned counsel met with the defendant for a few minutes in a public and crowded "bull pen" area before having to decide whether to plead guilty or face more charges. Id. at 598-99. At that time, counsel had not received any discovery, did not know defendant's criminal record and was incorrect about the time that the defendant would face on the new charges if he rejected the plea. Id. at 599, 602. The Court held that the defendant was constructively denied his right to counsel because not even a competent attorney could have provided effective assistance of counsel in those circumstances. Id. at 602. Similarly, in State v. Peart, 621 So2d 780 (La. 1993), the Court held that the caseloads of a public defense attorney that included handling seventy cases per day and having at least one serious case set for trial per day, with no investigative, paralegal or clerical assistance, constructively denied counsel to clients assigned to that attorney. Id. at 784, 789.

As the evidence of what occurred to the plaintiffs during their criminal proceedings, and how indigent criminal defense services are actually provided in the Five Counties presently will show, the plaintiffs cannot meet the very high burden required to establish a claim of the systemic constructive denial of the right to counsel in any of the Five Counties.

B. The Plaintiffs

The plaintiffs cannot show that the indigent criminal defense systems in any of the Five Counties are at risk of denying counsel to indigent criminal defendants due to alleged unconstitutional systemic deficiencies. Instead, the testimony of the plaintiffs in this case has

established that, while they had complaints about the representation provided by their defense attorneys in the cases described in the second amended complaint, they were satisfied, and had no complaints when represented by attorneys from the same public defense providers in other cases. That is, the allegations in the second amended complaint are fairly characterized, based on the proof, as reflecting non-systemic problems more akin to ineffective assistance of counsel than denial of counsel.

For instance, plaintiff Steele testified that she was satisfied with the representation that she was given by a member of the Ontario County Assigned Counsel Plan ("ACP") in connection with a prior criminal prosecution. See Steele dep. at p. 47. Plaintiff Tomberelli had been represented by the Schuyler County Public Defender ("PD") Office on three prior occasions and was satisfied with the representation that he received. See Tomberelli dep. at pp. 47-48. Plaintiff Habshi had previously been represented by the Washington County PD Office and was satisfied with that representation. See Habshi dep. at p. 61. Plaintiff Booker was subsequently arrested two times and represented by a member of the Suffolk County Legal Aid Society ("LAS"). See Booker dep. at pp. 21, 22-23. Plaintiff Booker had no complaints about those representations and was satisfied. See id. at pp. 23, 26, 30-31.

Plaintiff Briggs had been represented at least six previous times by members of the Onondaga County ACP and was satisfied with the representation that he received from those attorneys. See Briggs dep. at pp. 10-11, 15-16. He has also not had a problem with his representation by an ACP lawyer on subsequent charges. See id. at pp. 31-32. In fact, in his most recent representation with an ACP lawyer, plaintiff Briggs had many in-person meetings

with this ACP attorney at the jail, spoke with his attorney on the telephone with no problems and discussed plea offers with his attorney. See id. at pp. 33-36.

Plaintiff Love had been represented by members of the Onondaga County ACP on three or four other occasions. See Love dep. at pp. 10-11. Plaintiff Love testified that every ACP attorney that he has had would respond to his voicemail messages within a couple of weeks. See id. at pp. 36-37, 46-48. He never had an ACP attorney who never came to visit him. See id. at p. 47. Plaintiff Love testified that he was released shortly after Mr. McKenzie took his case and he had no difficulty communicating with Mr. McKenzie. See Love dep. at pp. 38-39. Mr. Love also had no difficulty communicating with Mr. Jeschke. See id. at p. 39.

This testimony alone shows that attorneys in the Counties are not, actually or constructively, leaving indigent criminal defendants without counsel. Just assuming for purposes of this action that some attorneys provide acceptable representation and some do not, any alleged deficiencies necessarily cannot be of systemic proportions. Therefore, to the extent that the Court finds issues of fact as to whether any plaintiff was actually or constructively denied his or her right to counsel, such a finding would support a conclusion that a particular lawyer, and not the system, violated that right. Moreover, as discussed below, an examination of each county's public defense system reveals the lack of any basis for finding a systemic denial of the right to counsel.

1. Ontario County Plaintiffs

a. Lane Loyzelle

Mr. Loyzelle was arraigned on the charge of petit larceny in Canandaigua City Court on September 27, 2007. Bail was set at $2500.00, a typical and reasonable amount for a charge of petit

larceny for someone with a criminal record and on probation, such as Mr. Loyzelle. See Tantillo 2009 at ¶6; Sperano 2009 at ¶5. At the time of his arrest for petit larceny in Canandaigua, Mr. Loyzelle was on probation in Wayne County. See Sperano 2009 at ¶6; Sperano dep. at p. 124. A member of the Ontario ACP panel -- Aaron Sperano -- was assigned to represent plaintiff Loyzelle because, at that time, indigent criminal defendants in Ontario County were represented by the ACP. Attorney Aaron Sperano was informed that a violation of probation would be filed against Mr. Loyzelle as a result of his Canandaigua arrest. See Sperano 2009 at ¶6. Therefore, even were Mr. Loyzelle able to pay bail, or was released on his own recognizance, he would have been held in custody on the probation detainer. See id. Attorney Sperano informed Mr. Loyzelle that if he were released or bailed out on the petit larceny charge, he would continue to be held in custody, without that time counting toward a sentence on the petit larceny charge.[25] See id. at ¶¶6, 21.

Attorney Sperano met with Mr. Loyzelle at Court on October 10, 2007 to discuss the charges against him, his criminal record, his status as a probationer and a plan for his defense. See id. at ¶7; Loyzelle dep. at pp. 57, 58-59. Attorney Sperano gave Mr. Loyzelle his business card, and told Mr. Loyzelle to call at any time with any questions or concerns. See Sperano 2009 at ¶22. On that date, defense counsel also met with Assistant District Attorney ("ADA") Bill Hart who told attorney Sperano that there would be no plea bargain offer to a lesser charge on Mr. Loyzelle's case because of Mr. Loyzelle's criminal record, which included two convictions in a twelve month period. See id. at ¶7. ADA Hart further informed attorney Sperano that if Mr. Loyzelle pled guilty to the petit larceny charge, the recommended sentence would be approximately one year of incarceration. See id.

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25 Notwithstanding, plaintiff Loyzelle testified that attorney Sperano made a bail application for plaintiff in Court at plaintiff's request. See Loyzelle dep. at p. 64.

Attorney Sperano met with Mr. Loyzelle on several occasions[26] and (1) obtained Mr. Loyzelle's pedigree information and the names and telephone numbers of family members; (2) obtained Mr. Loyzelle's version of the facts surrounding the charges against him; (3) obtained information relating to Mr. Loyzelle's criminal record and probationer status; and (4) discussed defense strategy. See id. at ¶¶7, 22; Sperano dep. at pp. 100-02, 105, 108, 110-112. Attorney Sperano also sent two letters to Mr. Loyzelle, which contained a letterhead with all contact information for Attorney Sperano's office. See Sperano 2009 at ¶22. Attorney Sperano also spoke with ADA Hart a couple of other times, after which he relayed the content of those conversations to Mr. Loyzelle. See id. at ¶7. After some negotiating, Attorney Sperano convinced ADA Hart to consider a recommendation from Mr. Loyzelle's Wayne County probation officer regarding the possibility of a jail sentence of less than a year, or probation. See id. at ¶8. ADA Hart agreed to give considerable weight to the opinion and recommendation of the probation officer. See id.

Attorney Sperano informed plaintiff Loyzelle of the People's offer and of ADA Hart's willingness to consider a lesser sentence, or probation, if recommended by Mr. Loyzelle's probation officer. See id. at ¶9. Attorney Sperano thereafter learned that Mr. Loyzelle intended to refuse a sentence of probation, if offered, and preferred to serve time in incarceration instead of being placed back under the supervision of the Probation Department. See id.; Sperano dep. at p.126. Based on these discussions, Mr. Loyzelle understood that his defense counsel would attempt to obtain a plea offer to dispose of the case. See Sperano 2009 at ¶10.

Before Mr. Loyzelle's next Court date, attorney Sperano again contacted ADA Hart inquiring about any change in the People's plea offer. See id. at ¶11. ADA Hart informed defense counsel that

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26 Plaintiff Loyzelle testified that he does not recall whether he had any communication with attorney Sperano between the Court appearances following his arraignment. See Loyzelle dep. at p. 61. He does recall attorney Sperano visiting him at the jail at least once, but possibly more. See id. at pp. 67, 70.

his position had not changed. See id. At the Court appearance on October 31, 2007, attorney Sperano informed Mr. Loyzelle that the People's plea offer continued to be a plea to the charge with one year incarceration. See id. at ¶12. Mr. Loyzelle rejected the plea, and directed his counsel to proceed to trial if he could not negotiate a more favorable plea. See id.

Attorney Sperano met with Mr. Loyzelle at the Ontario County Jail on or about November 14, 2007 and November 17, 2007, and on each occasion discussed the plea bargain, the People's burden at trial, the risks and benefits associated with going to trial, and the plan for his case. See id. at ¶10; Sperano dep. at p. 127; Loyzelle dep. at pp. 74-75. The case was set for motion argument to be heard in the first week of January 2008. See Sperano 2009 at ¶13. Prior to that date, Attorney Sperano had conversations with Mr. Loyzelle's Wayne County probation officer, who agreed to recommend a sentence of three months incarceration to cover both the petit larceny charge and the probation violation. See id. Attorney Sperano immediately contacted the Court and requested a date for a pre-trial conference to discuss the probation officer's recommendation with the judge and ADA Hart. The conference was scheduled for December 7, 2007. See id. at ¶14. Attorney Sperano then sent a letter to Mr. Loyzelle informing him of the recommendation of his probation officer, and the request for a pre-trial conference. See id. at ¶15. Attorney Sperano again wrote to Mr. Loyzelle on December 1, 2007 advising Mr. Loyzelle of the scheduled conference, his intention to seek a firm plea offer and that he would be visiting Mr. Loyzelle at the Jail before the conference. See id. at ¶16. Attorney Sperano thereafter met with Mr. Loyzelle at the Ontario County Jail on December 4, 2007, at which time they discussed the probation officer's recommendation. See id. at ¶17. If accepted by ADA Hart and the judge, Mr. Loyzelle intended to accept the offer of pleading to the petit larceny charge with a sentence of three months incarceration. See id.

Mr. Loyzelle understood that his only alternative to accepting the plea bargain was to proceed to trial. See id. Attorney Sperano discussed with Mr. Loyzelle the People's evidence, informing him that a motion to suppress would likely not be successful, and that all of the evidence was most likely admissible. See id. Mr. Loyzelle entered a plea of guilty on December 12, 2007 and was sentenced to the agreed three months incarceration. See id. at ¶18. While the charge against Mr. Loyzelle stemmed from his theft of twenty dollars, it was alleged that the theft occurred as part of a "drug deal gone bad". See id. at ¶21; Sperano dep. at p. 126. Further, as discussed above, the petit larceny charge was Mr. Loyzelle's third arrest in twelve months. See Sperano 2009 at ¶21. Additionally, he was on probation for one of the two other convictions at the time of the petit larceny arrest. See id. Entering into the plea deal was a strategic decision that was made only after discussion with Mr. Loyzelle and was in his best interests. See id. The plea deal was a very favorable one in Ontario County, particularly in light of Mr. Loyzelle's criminal record and probationary status at the time of the commission of the crime charged. See Tantillo 2009 at ¶11.

Plaintiff Loyzelle was not represented at his initial arraignment in Canandaigua City Court and was unable to make bail. See Loyzelle dep. at 57. However, under the current system in Ontario County, defendants who commit a crime in the City of Canandaigua are arraigned every day with counsel. See Lapp dep. at 139-40. As a result, if plaintiff Loyzelle's arrest happened now, he would be arraigned with counsel. For purposes of the claim of systemic denial of counsel, plaintiff Loyzelle's circumstances, therefore, do not represent how arraignments are conducted in Ontario County today.

When viewed in the light most favorable to plaintiff Loyzelle, plaintiff Loyzelle alleges

that he was constructively denied his right to counsel because (1) counsel did not communicate with him soon enough after his arraignment or often enough, (2) he lost his job because he could not make bail and (3) he believed that his attorney's investigative efforts should have included speaking to the alleged victim of his crime. See Loyzelle dep. at pp. 79-82. However, these allegations fail to establish that plaintiff Loyzelle was constructively denied his right to counsel. First, plaintiff Loyzelle alleges that attorney Sperano did not communicate with him enough. "There is no required minimum number of meetings between counsel and client." Knight at fn 33. Only "a complete breakdown in communications[27]" between an attorney and client is Constitutionally deficient. Dolab v. Donelli, 2010 US Dist LEXIS 137406, *56. (EDNY 2010). Courts have found that as long as an attorney and client can speak at Court appearances, the communication is Constitutionally acceptable. Ping v. Willingham, 746 FSupp2d 496, 500 (SDNY 2010) (defendant's claim that counsel inadequately consulted with her before and during trial was rejected because she was present with counsel all throughout the trial); U.S. v. Nuclovic, 2006 US Dist. LEXIS 90113, **25-26 (SDNY 2006).

In Zimmerman v. Davis, 2011 US Dist LEXIS 34490 (ED Michigan 2011), the criminal defendant alleged that his (retained) attorney only met with him "for brief periods of time before trial," never took defendant's phone calls, never responded to defendant's letters and never met with the client in jail to "discuss evidence and trial strategy." Id. at *6. Since the Cronic exception "applies only in cases in which a lawyer fails to carry out his most basic duties as an advocate," defendant could not establish a constructive denial of counsel on these facts because

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27 In Stenson v. Lambert, 504 F3d 873 (9th Cir. 2007), the Court held that there was not a complete breakdown in communication between trial counsel and client even though they had developed "irreconcilable differences" because the communication between them "remained open" since they both communicated with the second chair attorney who acted as the conduit for communication between attorney and client. Id. at 887.

counsel met with the defendant at least four times "in the attorney interview rooms in the bullpen area," and met with the defendant in jail one time. Id. at *10. The Court found that, since counsel filed a notice of alibi defense and argued that defense at trial, argued two pretrial motions and cross-examined the prosecution's witnesses, he necessarily had to have discussed the merits of defendant's case with the defendant at some point. Id. at *11. Although the defendant "clearly desired more contact with his retained attorney" the Court held that the defendant was not constructively denied counsel. Id.

During the period that plaintiff was represented by attorney Sperano, plaintiff Loyzelle did not call or write to attorney Sperano. See Loyzelle dep. at p. 61. Attorney Sperano met with plaintiff Loyzelle in jail at least once, but possibly more. See id. at pp. 67, 70. They also met in Court at least three times. See Loyzelle dep. at pp. 57, 58-59; Sperano 2009 at ¶¶12, 18. While perhaps not frequent enough to satisfy plaintiff Loyzelle, these communications did not constructively deprive plaintiff Loyzelle of his right to counsel. Zimmerman at **10-11.

Second, even if plaintiff's bail was reduced to zero, he would not have been released from custody because of the probation detainer placed on him. Therefore, plaintiff did not remain in custody and lose his job of three days, see Loyzelle dep. at p. 52, as a result of any constructive denial of counsel. In any event, although the Court of Appeals states that defendants may suffer "collateral" consequences as a result of having to spend any time, at all, in custody such as "the loss of employment and housing, and inability to support and care for particularly needy dependents," see Hurrell-Harring, 15 NY3d at 20, the State defendants cannot find any case law to support a position that the Sixth Amendment was intended to protect any interests of the criminal defendant not associated with his or her criminal case. To the contrary, the United

States District Court for the Southern District of New York has stated that "[w]hile the Court regrets the[] collateral effects of the criminal prosecution" in the form of "loss of employment and the denial of unemployment benefits" "they are not within the usual meaning of prejudice under the Sixth Amendment..." United States v. Fernandez, 1980 US Dist LEXIS 15809, *7 (SDNY 1980).

Finally, plaintiff was dissatisfied with plaintiff Sperano's investigation of his case because attorney Sperano did not speak to the victim of plaintiff Loyzelle's crime. See Loyzelle dep. at pp. 79-82. However, attorney Sperano's investigation into the facts of Mr. Loyzelle's case included ascertaining the facts of the case from Mr. Loyzelle, and reviewing the People's file and evidence, which was openly available to him. See Sperano 2009 at ¶20. Attorney Sperano learned that the People's evidence included an eyewitness to the events as well as a law enforcement eyewitness. See id. Based on the People's strong case, and Mr. Loyzelle's inability to provide his counsel with the names of any witnesses to refute the charges against him, see Sperano dep. at p. 127, there was little more factual investigation to be performed, which was a major factor in seeking a plea offer. See Sperano 2009 at ¶20. While plaintiff Loyzelle thinks that attorney Sperano should have done something different in his investigation into plaintiff's case, such an allegation is, at best, one of ineffective assistance of counsel because plaintiff Loyzelle was not effectively left unrepresented during the investigative stage of his prosecution. Strickland, 466 US at 691.

Based on the proof in this case, plaintiff Loyzelle is unable to meet his threshold burden of establishing that he was denied his Constitutional right to counsel. See Kerwin aff. at Exh. K.

b. Tosha Steele

Tosha Steele was assigned counsel by Geneva City Court Judge Gage on July 30, 2007 and was thereafter arraigned in the presence of her attorney, Michael Roulan, on the charges of criminal possession of a controlled substance with intent to sell. See Roulan 2009 at ¶¶3-4; Steele dep. at pp. 50-51. Ms. Steele could not be released from custody because a parole detainer had been filed against her, so no bail was set. See Roulan 2009 at ¶4; Roulan dep. at pp. 4-5; Steele dep. at p. 25. Ms. Steele spoke with attorney Roulan[28] while in Court on July 30, 2007 and informed him about the circumstances of her arrest and that she had been on parole at the time of her arrest. See Roulan 2009 at ¶5. Attorney Roulan also spoke to the ADA briefly at the July 30, 2007 appearance, and later by telephone. The ADA informed attorney Roulan that drugs were found in Ms. Steele's underwear during a frisk search by her parole officer. See id. at ¶6.

At Ms. Steele's next Court appearance on August 13, 2007, attorney Roulan requested a preliminary hearing, and later informed Ms. Steele that a preliminary hearing was scheduled for August 20, 2007. See id. at ¶7. On August 20, 2007, the People chose not to proceed with the preliminary hearing since Ms. Steele would remain incarcerated upon the parole detainer, regardless of the outcome of the preliminary hearing. See id. at ¶8; Roulan dep. at pp. 7, 16-17. Ms. Steele incorrectly testified that Mr. Roulan had waived the preliminary hearing. See Steele dep. at p. 48. Upon learning of the People's decision, attorney Roulan determined that it would be in Ms. Steele's best interests to waive presentation of the case to the grand jury in order to expedite the case to County Court. See Roulan 2009 at ¶9. Otherwise, Ms. Steele would have to wait for a dismissal of the charge and then an arraignment upon an indictment, all while remaining in custody on the parole

28 Plaintiff thinks that Mr. Roulan should have given her more frequent updates on her case. See Steele dep. at p. 54.

detainer. See id. Attorney Roulan discussed this strategy with Ms. Steele, who agreed with it.[29] See id. Also on August 20, 2007, attorney Roulan spoke to the attorney representing Ms. Steele on the parole violation, who agreed that the parole violation hearing should be adjourned pending completion of the criminal charge to enhance the possibility that any penalties for the parole violation would run concurrently with the probable sentence on the criminal charges. See id. at ¶10.

Based on the facts that (1) the charge was Ms. Steele's third felony charge in a short span of time, and (2) Ms. Steele had previously been sentenced to a term of 4 ½ to 9 years for the same type of charge she was facing, there was great potential for a lengthy sentence. See id. at ¶11. In light of these circumstances, it was attorney Roulan's professional judgment that the best way to proceed would be to have a screening conference with the People to determine the possibility of getting a more favorable sentence at the outset as opposed to litigating any issues that may arise. The screening conference was scheduled for September 21, 2007. See id. at ¶12. At the September 21, 2007 screening conference, attorney Roulan learned that the People had three to four additional charges against Ms. Steele for sales of controlled substances and were recommending a sentence of twelve and a half years. See id. at ¶13; Roulan dep. at pp. 5-6. The screening conference ended without a subsequent conference being scheduled. See Roulan 2009 at ¶13. Attorney Roulan thereafter spoke with Ms. Steele on the telephone and advised her of the four new charges and the offer of twelve and a half years. See id. at ¶14; Steele dep. at pp. 23-24. Attorney Roulan advised Ms. Steele that he would get more information on the new charges from the ADA. See Roulan 2009 at ¶13; Steele dep. at p. 49.

Upon speaking with the ADA after several attempts to reach him, attorney Roulan learned that the three to four new charges stemmed from sales by Ms. Steele to undercover police officers

29 Plaintiff Steele does not recall if this happened or not. See Steele dep. at p. 48.

and that the evidence relating to these sales was very solid. See Roulan 2009 at ¶15. After some negotiation, the ADA agreed to reduce the recommended sentence to seven and a half years. See id. Attorney Roulan thereafter contacted the Court and requested to negotiate a plea on all of the outstanding charges against Ms. Steele before an indictment was voted on the four new charges. See id. at ¶16. A screening conference was held on November 16, 2007, see id., and attorney Roulan convinced the Court to reduce the recommended sentence of seven and a half years to six years. See id. at ¶17. Attorney Roulan researched the sentencing laws to determine the consequences of a parole violation and a conviction upon a plea in Ms. Steele's case and whether the sentences would run concurrently. See id. at ¶18. As part of his research, attorney Roulan took the initiative to contact the NYS Department of Correctional Services Counsel's Office for an opinion on this issue. See id. at ¶18. Based on his research, attorney Roulan determined that Ms. Steele would be eligible, once incarcerated, for programming that could reduce her actual time served to three and a half years. See id. at ¶19.

After discussing this offer and the benefits and risks of going to trial with Mr. Roulan, Ms. Steele accepted the plea offer and pled guilty on November 27, 2007 to one count of criminal possession of drugs with intent to sell to cover all charges. See id. at ¶20. This plea deal was very favorable, particularly in light of Ms. Steele's extensive criminal history, the impending presentment of the four new charges to the grand jury and the strength of the People's evidence against Ms. Steele. See Tantillo 2009 at ¶34. Such a beneficial result was possible only because of the defense strategy and advocacy employed by Ms. Steele's assigned defense attorney. See id. at ¶35. Attorney Roulan's decision to attempt a pre-indictment disposition allowed him to learn of the new charges against Ms. Steele and craft a disposition that would take care of all pending charges. See id. This

decision, which delayed grand jury presentment on any of the charges facing Ms. Steele, resulted in a much more favorable outcome for Ms. Steele who faced her third felony charge in a short amount of time, and had previously been sentenced to a term of four and a half to nine years for the same type of charge she was facing. See id. In light of the People's first offer of twelve and a half years, the sentence of six years was an extremely beneficial outcome for Ms. Steele. See id.

To the extent that arraignment is a critical stage, plaintiff Steele alleges that she was not represented at her initial arraignment at the Geneva Police Department on July 25, 2007, see Steele dep. at p. 50, but both plaintiff Steele and attorney Roulan stated that plaintiff was represented by Mr. Roulan at her arraignment in Geneva City Court on July 30, 2007.[30] See Steele dep. at p. 51; Roulan 2009 at ¶¶3-4. Notwithstanding, under the current system in Ontario County, arraignments are held seven days a week in Geneva City Court with PD counsel present. See Munkwitz aff. at ¶145. As a result, if plaintiff Steele's arrest happened now, she would be arraigned with counsel. Therefore, to the extent that the testimony in this case is interpreted as plaintiff having been arraigned on July 25, 2007 without counsel, plaintiff Steele would not represent how arraignments are conducted in Ontario County currently.

When viewed in the light most favorable to plaintiff Steele, plaintiff Steele alleges that she was constructively denied her right to counsel because "she felt like [attorney Roulan] wasn't doing what a lawyer should do, because he wasn't visiting [her], he wasn't keeping up with me what was going on," and she "just wanted him to communicate with [her] to let [her] know what was going on." See Steele dep. at p. 54. Plaintiff Steele testified at her deposition that this was the only reason

30 Bail was not set because a parole detainer had been filed against Ms. Steele. See Roulan 2009 at ¶4; Roulan dep. at pp. 4-5; Steele dep. at p. 25. Therefore, nothing about plaintiff Steele being placed in custody could have been different if an attorney had been at the arraignment.

that she was dissatisfied with attorney Roulan's representation.[31] See id. at p. 56.

Yet, plaintiff Steele also testified that she was able to contact Mr. Roulan by telephone, that Mr. Roulan met with the plaintiff at jail, and that plaintiff Steele met with Mr. Roulan in Court. See id. at pp. 60-61; Roulan 2009 at ¶14. The plaintiff and attorney Roulan met in Court at least four times. See Roulan 2009 at ¶¶5, 8, 9; Roulan dep. at pp. 7, 16-17, 20; Steele dep. at pp. 48, 51. This communication far exceeds a level of communication that is deemed to constitute a constructive denial of counsel under the Sixth Amendment. Zimmerman at **10-11.

Although plaintiff testified that her only complaint about her representation related to the frequency of attorney Roulan's communication with her, she also testified that she "wasn't expecting as much time as they were trying to give me."[32] See Steele dep. at p. 32. Although plaintiff Steele had previously been sentenced to a term of four and a half to nine years for the same type of charge she was facing, see Roulan 2009 at ¶11, apparently plaintiff Steele thought doing less time for the same felony was reasonable. Notwithstanding, attorney Roulan negotiated a plea deal for plaintiff Steele -- to cover those charges plus additional ones -- of six years incarceration, which -- after programming -- could result in plaintiff's release in three and a half years. See id. at ¶17. This plea offer was decreased substantially from the initial offer of twelve and a half years, see id. at ¶14; Steele dep. at pp. 23-24, and second offer of seven and a half years. See Roulan 2009 at ¶15. However, to the extent that the evidence in this case could possibly be read to allege that plaintiff Steele was denied her Sixth Amendment rights because she was dissatisfied with her plea, such a

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31 Plaintiff Steele testified that attorney Roulan investigated issues at her request, see Steele dep. at p. 49, and did not know if attorney Roulan did any other investigation. See id. at p. 33. She also testified that she did not think that an expert was needed for the defense of her case. See id. at p. 57.

32 Both plaintiff Steele and attorney Roulan testified that attorney Roulan missed one Court appearance. See Steele dep. at pp. 63-64; Roulan dep. at pp. 14-15. However, the only evidence in this case is that attorney Roulan was not told at a screening conference of plaintiff Steele's next Court date and, as a result, he did not diary it. See Roulan dep. at pp. 14-15. Such an alleged isolated incident of diary failure does not constitute a Constitutional denial of the right to counsel.

claim is one for ineffective assistance of counsel, and not one for a constructive denial of counsel because attorney Roulan was far from absent during the plea negotiation phase of plaintiff Steele's representation.

Based on the proof in this case, plaintiff Steele is unable to meet his threshold burden of establishing that she was denied her Constitutional right to counsel. See Kerwin aff. at Exh. K.

2. Suffolk County -- Luther Booker

Luther Booker was charged with the class E felony of Criminal Possession of Stolen Property in the Fourth Degree. See Monastero 2009 at ¶2; Booker dep. at p. 8. He was arraigned, with counsel, see Booker dep. at pp. 54-55, on those charges on September 29, 2007, at which time the Court assigned the Suffolk County Legal Aid Society ("LAS") to represent Mr. Booker and the assigned LAS attorney -- Deborah Monastero -- represented Mr. Booker at that arraignment. See Monastero 2009 at ¶3. Bail was set in the amount of $1000.00. At the time of his arrest, Mr. Booker's criminal record included thirty-five arrests and ten convictions, a history of failing to appear for Court appearances four times and one open warrant. See id. Mr. Booker's assigned LAS attorney conferenced Mr. Booker's case on October 2, 2007 with the ADA, and received voluntary discovery from the People at that time. See id. at ¶2.

Attorney Monastero reviewed the documentation relating to Mr. Booker's case, and shortly thereafter met with Mr. Booker to explain the nature of charge against him and discuss any possible defenses available to Mr. Booker. See id. Mr. Booker's attorney explained the grand jury process to Mr. Booker, as well as Criminal Procedure Law §180.80, and then informed Mr. Booker of the People's offer of one year incarceration in exchange for a plea of guilty to the crime charged. See id. Mr. Booker asked his attorney if she could try to reduce the period of incarceration offered by the

People, and his attorney told Mr. Booker that she would attempt to do so. See id.

Mr. Booker's attorney then met with the assigned ADA's supervisor, who agreed to reduce the period of incarceration sought in connection with a plea to eight months. See id. She then conveyed this second offer to Mr. Booker and requested a two week adjournment from the Court to give Mr. Booker an opportunity to decide how he wished to proceed. See id. Finally, attorney Monastero advised Mr. Booker that the People's offer would remain in effect through his next appearance date scheduled for October 16, 2007. See id.

Mr. Booker's attorney was unable to make a bail application on October 2, 2007 because of the Court's policy not to entertain bail applications unless there has been a change in circumstances from the time that the defendant was arraigned. See id. at ¶3. Mr. Booker had not had a change in circumstance between September 29, 2007 and October 2, 2007 to justify making a bail application at that juncture. See id. On October 16, 2007, Mr. Booker accepted the eight month offer. See id. at ¶4. His attorney informed Mr. Booker that he would have to sign three copies of a "Waiver of Indictment and Consent to be Prosecuted by a Superior Court Information", and that the ADA, judge and defense counsel would also be signing that document. See id. Mr. Booker's attorney further advised Mr. Booker that, by signing the document, he would be giving up his right to have his case presented to a grand jury. See id.

The plea bargain, however, fell apart. When asked during his plea allocution if he knew the credit card was stolen, Mr. Booker responded disrespectfully that if he knew the credit card was stolen, he would have disguised himself. See id. at ¶5. The judge became upset at Mr. Booker's lack of respect for the judicial process and ordered the case transferred to County Court. See id. Upon the transfer of Mr. Booker's case to County Court, Mr. Booker was assigned a different LAS County

Court attorney -- Edward Vitale -- on October 22, 2007, see Vitale 2009 at ¶3, who possessed the experience necessary to represent clients in County Court. However, because of the recency of the appointment, attorney Vitale was unable to attend Mr. Booker's appearance on October 23, 2007. See id. at ¶7. As a result, the other LAS attorney assigned to that Courtroom -- John Schick -- represented Mr. Booker at that appearance, and conferenced the case with the Court and the ADA. See Schick 2009 at ¶3; Vitale dep. at p. 76. The People informed that attorney that the eight month offer was still available. See Schick 2009 at ¶3.

Attorney Vitale met with Mr. Booker for ten or fifteen minutes and advised Mr. Booker that the offer remained eight months incarceration, and discussed with Mr. Booker his options and advised him of his rights and the requirement that he allocute as to his guilt if he chose to accept the plea offer.[33] See Schick 2009 at ¶3; Schick dep. at p. 50. Mr. Booker understood the situation, was happy about the offer and expressed no reservations to his attorney about accepting the plea. See Schick 2009 at ¶3. However, plaintiff Booker alleges that his attorneys never did any investigation into the facts of his case, and only ever spoke to him about taking the plea offer. See Booker dep. at pp. 45-50. Mr. Booker thereafter pled guilty to the E felony of Criminal Possession of Stolen Property in the Fourth Degree, see id. at p. 18, as follows:

> THE COURT: First of all, is this what you want me to do?
>
> THE DEFENDANT: Yes.
>
> * * *
>
> THE COURT: Have you discussed this with your attorney who stands beside you?

33 Once a case has been transferred to County Court, it is very unusual for a client to be offered the same plea that he was offered in the lower Court. See Schick dep. at pp. 55-56. Almost always the plea is less favorable to the defendant. See id. at pp. 56-57.

THE DEFENDANT: Yes.

THE COURT: Had enough time to discuss it with him as well as anyone else you care to speak with?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with the manner in which your attorney has represented you in this case?

THE DEFENDANT: Yes.

THE COURT: You should be. Do you understand by pleading guilty to a charge that is the same as if you had gone to trial and been found guilty of that charge?

THE DEFENDANT: Yes.

THE COURT: By pleading guilty, sir, you're giving up or waiving a number of very important rights, including, but not limited to, your right to trial by jury or the Court whichever you prefer, right to have the prosecution produce evidence and witnesses and to prove your guilt beyond a reasonable doubt, your right to cross examine those witnesses, your right to stand silent or testify in your own behalf or to call witnesses or submit evidence on your own behalf. Do you understand by pleading guilty this afternoon you are waiving each and every one of those rights?

THE DEFENDANT: YES.

THE COURT: Are you entering this plea voluntarily of your own free will?

THE DEFENDANT: Yes.

THE COURT: Has anyone forced you, threatened you, coerced you into pleading guilty?

THE DEFENDANT: No.

* * *

THE COURT: By pleading guilty, sir, you're giving up or waiving any defense you might have in this case. Has your attorney explained this to you, as well as any defenses you might have to this case?

THE DEFENDANT: Yes.

* * *

THE COURT: Do you understand by pleading guilty you're admitting to a serious crime, a felony, should you be convicted of still another felony within the Penal Law within the next 10 years excluding any time you are in custody, any judge for such future conviction may be absolutely required to give you enhanced or additional punishment because of this felony conviction. Do you understand that?

THE DEFENDANT: Yes.

See Vitale 2009 at Exhibit B, pp. 3-6.[34]

On November 15, 2007, attorney Vitale met with Mr. Booker in the Suffolk County Correctional Facility. See Vitale 2009 at ¶8; Vitale dep. at p. 76. Defense counsel asked Mr. Booker if he was unhappy with his LAS representation and plea, and Mr. Booker responded that he was "very happy" and did not wish to change his plea. See Vitale 2009 at ¶8. Thereafter, Mr. Booker and his attorney appeared in Court on November 20, 2007 for sentencing, at which time the following was stated on the record:

MR. VITALE: Your Honor, in the matter of Luther Booker, Mr. Booker entered a plea of guilty on October 23rd before yourself. It was a negotiated plea in which he was to receive eight months' incarceration. He took that plea with an attorney from my office . . . Subsequent to that, the Legal Aid Society was mentioned in a suit by the ACLU against the State of New York on behalf of all Legal Aid Societies, indicating that they felt that their clients were not being properly represented. They believe that, to paraphrase, they're not being properly represented because not enough monies are being expended on to Legal Aid Societies.

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34 On the day of sentencing, Mr. Booker's counsel was made aware by the ADA that Mr. Booker may be subject to some other uncharged offenses. Mr. Booker was offered an adjournment of sentencing to discuss the possibility of disposing of those uncharged offenses in connection with the plea on the current charges. However, Mr. Booker chose to go forward with sentencing, with the knowledge and understanding that any future sentence on those uncharged offenses might not run concurrently with the sentence being imposed on November 20, 2007. Mr. Booker acknowledged this decision on the record in open Court. See Vitale 2009 at Exhibit A, pp. 4-5.

I had an opportunity and, in fact, they specifically mentioned Mr. Booker who they feel was rushed through a plea and that he wasn't adequately prepared for the plea, and that he indicated somewhat that Mr. Booker objected to the plea he had. I myself went to visit Mr. Booker in custody last week, your Honor. I spoke to him. I indicated that if any of that was true that I would be making an application to have his assigned counsel from the 18b list to represent him in any of these questions, Judge. Mr. Booker indicated to me that that was not true. That he is pleased with his plea bargain. That he does not want to change it. And that, in fact, he wants to go ahead with it, Judge. I'm laying this on the record so it's clear.

Mr. Booker, anything that I said you disagree with, sir?

THE DEFENDANT: No, sir.

MR. VITALE: As a matter of fact, I asked why then he was mentioned in the lawsuit as being someone that was unhappy with what had occurred, and he indicated to me that they asked for volunteers and that he had indicated that he felt that the system railroaded individuals, but not that it was Legal Aid, and not specifically in his case. Is that correct Mr. Booker?

THE DEFENDANT: Yes, sir.

MR. VITALE: I don't want to put any words in your mouth. Is that exactly what you told me?

THE DEFENDANT: Yes, sir.

See Vitale 2009 at Exhibit A, pp. 2-4.

The Court also made inquiry of Mr. Booker about this issue as follows:

THE COURT: What do you mean that you were railroaded by the system?

THE DEFENDANT: No, those wasn't my exact words. Me and Legal Aid had a misunderstanding on the plea bargain.

THE COURT: What was the misunderstanding?

THE DEFENDANT: She offered me a year and then said she could get me six to eight months. To my understanding the offer of a year and eight, they came back with an offer of eight months.

MR. VITALE: There was some confusion. At the original – there was an SCI on

prior to his taking the plea here, Judge. He thought the assistant that was representing him, the Legal Aid attorney[,] had promised him an eight-month sentence, which, in fact, means you do five months and something. An apparently for some reason he thought then when he came out that the plea was going to a year, which, in fact, means eight months, which was inaccurate. It was always eight months.

THE COURT: So actually you did better than you thought?

THE DEFENDANT: Yes.

THE COURT: Let me ask you how many times you been arrested. Do you have any idea?

* * *

THE DEFENDANT: From my understanding, like 35 or something like that.

* * *

THE COURT: You understand what a deal they got for you?

THE DEFENDANT: Yes.

THE COURT: You also understand that as a result of this, once I sentence you, if you get any other charges you're not going to get any credit for any time you're in? You understand?

THE DEFENDANT: Yes.

THE COURT: You want to go forward?

THE DEFENDANT: Yes.

THE COURT: Anybody driving the bus as far as railroaded, he's the one that seems to want to expedite this. I'm please to accommodate him.
I will state for the record, though, first of all, specifically with respect to Mr. Vitale, and in general, couple of generations of dealing with Legal Aid, I don't understand how anybody could think they got the short end of any representative of Legal Aid. Mr. Vitale, specifically, as well as most of the others I've come in contact with, are renowned throughout this county as not only of their knowledge of the law but their experience, their ability to fight hard for their clients, and their reluctance to take a plea just for the sake of expediency. And anybody familiar with the system would know that they are not obviously motivated by the

> monetary satisfaction nor are they motivated by the fact that they will get it over quick because I'm not getting paid any more for this. I don't know how anybody could think they're getting a short end of the stick on this. Specifically with respect to this case, which just standing on its own indicates that they did get a good deal for this gentleman. I don't understand how this case could be an example of anything less than charitable remarks about Legal Aid. . .

See Vitale 2009 at Exhibit A, pp. 5-9. Due to the advocacy and negotiation of his LAS attorneys, Mr. Booker received what even the Court described as a very favorable disposition, see Vitale 2009 at Exhibit A, particularly in light of Mr. Booker's extensive criminal history.

Mr. Booker was represented at his arraignment by an LAS attorney. See Booker dep. at p. Booker dep. at pp. 54-55; Monastero 2009 at ¶3. Therefore he was not denied his right to counsel at arraignment. Plaintiff Booker's other claims fail to raise any issues of material fact as to whether he was constructively denied his right to counsel. When viewed in the light most favorable to plaintiff Booker, he appears to allege that he was constructively denied his right to counsel because (1) his bail was too high and his attorneys did not seek a reduction, see Booker dep. at pp. 55-56, (2) he was represented by three different attorneys from the Suffolk County LAS, (3) his attorneys did not investigate his case, see Booker dep. at pp. 45-50, (4) his attorneys only spoke to him about taking a plea, see id., and (5) his lawyers should have obtained a better plea offer. See Vitale 2009 at Exhibit A, pp. 5-9.

First, after bail was set, Mr. Booker's attorney was unable to make a bail application because of the Court's policy not to entertain bail applications unless there has been a change in circumstances from the time the defendant was arraigned. See Monastero 2009 at ¶3. Mr. Booker had not had a change in circumstance between his September 29, 2007 arraignment -- at which he was represented by counsel -- and October 2, 2007 to justify making a bail application at that juncture. See id. Therefore, plaintiff was not denied his right to counsel when his bail was

originally set by the Court because he had an attorney and, Court policy was not to reduce bail unless the defendant had experienced a change in circumstances. Plaintiff Booker's counsel was not required to advance a frivolous position at her client's direction. People v. DeFreitas, 213 AD2d 96, 100 (2d Dept 1995). Therefore, plaintiff Booker was not constructively denied his right to counsel by his attorney not making a bail application after plaintiff Booker was represented by counsel when bail was first set.

Second, contrary to plaintiff's allegations, representation by more than one attorney from a LAS during a single criminal proceeding is an acceptable practice -- and does not constructively deny a defendant his right to counsel -- since one provider, not attorney, was assigned. People v. Knowles, 88 NY2d at 768. Third, plaintiff Booker claims that, because he was charged with possession of a stolen credit card in connection with making a withdrawal with the consent of a friend, his attorneys should have spoken to that friend to prove that he did not steal the card. See Booker dep. at p. 41. However, the plaintiff was not charged with stealing the card, but only possessing the card -- which, according to plaintiff Booker -- was stolen by someone else. See Monastero 2009 at ¶2. In Maxon v. Bell, 2010 US Dist LEXIS 143872 (WD Mich. 2010), the Court held that the defendant was not constructively denied counsel, id. at *88, because defendant made "only discrete and limited complaints about counsel's failure to investigate and present evidence, and "[e]ven assuming that counsel failed to" perform the tasks about which [defendant] complain[ed], [defendant] provide[d] no evidence that those tasks would have generated information helpful to [the defendant]." Id. at *91. Since plaintiff's basis for thinking that his attorneys did not investigate or know the facts of his case was that they "[n]ever brought it up," see Booker dep. at p. 47, and the plaintiff could not articulate how an

interview of the person who allegedly stole the credit card would have generated information helpful in defending the plaintiff against charges that he possessed stolen goods, he was not constructively denied his right to counsel at the investigative stage of his criminal proceeding. Maxon at **88-91.

Fourth, plaintiff claims that his attorneys only spoke to him about taking a plea. However, plaintiff testified at his deposition that attorney Vitale told him that his options were to accept the plea offer or go to trial, see Booker dep. at pp. 45, 48, 50, 51, and that he talked to attorney Monastero about his bail. See id. at pp. 56-57. Plaintiff Booker also spoke to his attorneys at Court, see id. at pp. 64-65; Schick 2009 at ¶3; Schick dep. at p. 50; Monastero 2009 at ¶2, and during one jail visit. See Booker dep. at 62.

The evidence in this case establishes that the communication between plaintiff Booker and his attorneys were more than adequate to refute a constructive denial of the right to counsel claim. Zimmerman at **10-11. However, it also appears to be the content of the discussions -- telling the plaintiff that his choices were the plea offer or going to trial -- was unsatisfactory to plaintiff Booker. The plaintiff claims that he was "threatened with going to trial" by his attorneys if he did not accept the plea offer. See id. at pp. 45, 50, 51. In fact, his attorneys were offering appropriate legal advice and informing the plaintiff of his options. There is no testimony that plaintiff Booker was threatened into taking a plea, only that he was advised that it was the option to going to trial. Moreover, to the extent that plaintiff Booker alleges that this was bad advice, his claim is one of ineffective assistance of counsel and not of constructive denial of the right to counsel. Morales v. U.S., 2013 US Dist LEXIS 76812, *5 (EDNY 2013).

Finally, the plaintiff claims that his attorneys never got him more than one plea offer, see

Booker dep. at p. 84, and should "have tried to get a better offer than they were offering." See id. at p. 66. The proof in this case shows that the first plea offer made to plaintiff Booker was a guilty plea to the charge and one year incarceration. See Monastero 2009 at ¶2. Through negotiation, plaintiff Booker's counsel convinced the prosecution to reduce the time sought to eight months. See id. Plaintiff accepted the offer, but refused to allocute, at which time his case was transferred to County Court. See id. at ¶5. The testimony in this case shows that, once a case has been transferred to County Court, it is very unusual for a client to be offered the same plea that he was offered in the lower Court. See Schick dep. at pp. 55-56. Almost always the plea is less favorable to the defendant. See id. at pp. 56-57. However, plaintiffs' attorneys were able to secure this very unusual and favorable plea offer for plaintiff Booker. Based on this evidence, the plaintiff was not constructively denied counsel at the plea bargaining stage of his criminal prosecution.

Based on the evidence in this case, plaintiff Booker is unable to meet his threshold burden and establish that he was constructively denied his right to counsel. See Kerwin aff. at Exh. K.

3. Schuyler County

a. Shawn Chase

Shawn Chase was charged in Hector Town Court with Driving While Intoxicated, Driving With a Blood Alcohol Content of .08 or higher and miscellaneous traffic violations by the issuance of appearance tickets on April 6, 2007. See Rutnik aff. at Exh. N; Chase dep. at p. 25. A first appearance scheduled for April 18, 2007 was adjourned at the request of Mr. Chase. See Hayden 2009 at ¶8. Mr. Chase was thereafter arraigned on the charges at his next scheduled appearance date

of May 16, 2007. See Exhibit Rutnik aff. at Exh. N. Between the first and second Court appearances, plaintiff Chase filled out an application with the PD Office. See Chase dep. at p. 32. At the May 16, 2007 appearance, Mr. Chase asked for another adjournment because he was not sure if he wanted to hire a private attorney or use a PD attorney. See Hayden 2009 at ¶9. Mr. Chase continued to be free without bail being set and without the suspension of his license. See id. at ¶12.

Mr. Chase appeared in Court on June 20, 2007, at which time he informed the Court that he had not yet retained a private attorney. See id. at ¶13. The Court directed APD Stewart McDivitt to act as Mr. Chase's attorney for the June 20, 2007 appearance because the Court wanted to advise Mr. Chase of the prompt license suspension law and his rights to a Pringle hearing to challenge the suspension of his license. See Hayden 2009 at ¶13; Hayden dep. at p. 80. The Court informed Mr. Chase that he could ask for an adjournment of the Pringle hearing. See Hayden 2009 at ¶14. Such an adjournment would also put off the suspension of Mr. Chase's license for another month. See id. at ¶14. Mr. Chase requested the adjournment, see id. at ¶14, and was advised by the Court that the Pringle hearing would be held on July 18, 2007, and that, if the People met their burden, his license would be suspended. See id. at ¶15. Also at the June 20, 2007 appearance, the People advised APD McDivitt of the People's offer of a plea to Driving While Intoxicated with a conditional discharge and a fine. See id. at ¶16. Mr. Chase refused the People's offer on that date because he wanted an offer of Driving While Ability Impaired, a violation. See id. at ¶16. Between the June and July Court appearances, plaintiff Chase applied for the services of the PD Office, but was found ineligible because he did not provide his father's income information. See Orr 2009 at ¶¶ 3-5.

Mr. Chase appeared on July 18, 2007, and again requested an adjournment to retain private counsel. See id. at ¶17. Plaintiff again applied for the services of the PD Office and was denied

because he failed to provide his father's income information. See Orr 2009 at ¶¶ 3-5. On August 15, 2007, Mr. Chase appeared in Court still without counsel. See id. at ¶18. The ADA informed the Court that he would ask at the next appearance that bail be set because it was obvious that Mr. Chase purposefully continued to not retain an attorney so as to avoid the suspension of his license. See id. at ¶20.

Although Mr. Chase was deemed ineligible for assigned counsel by the Schuyler County PD Office after the June and July appearances because his household income exceeded eligibility guidelines, see Orr 2009 at ¶¶ 3-5, the Court assigned the PD Office to represent Mr. Chase at a September 19, 2007 Court appearance. See Rutnik aff. at Exh. N. APD McDivitt met with Mr. Chase at Hector Town Court upon his assignment, and several times thereafter at defense counsel's private office. See McDivitt 2009 at ¶6 Chase dep. at pp. 42, 44. The People served a Sandoval notice on Mr. Chase, see Hayden 2009 at ¶30, and a Sandoval Hearing was conducted by APD McDivitt in Mr. Chase's presence. See id. at ¶31.

Mr. Chase waived his right to a jury trial on October 23, 2007 by signing a waiver while at the PD Office, and a bench trial was scheduled to be held on October 30, 2007. See Hayden 2009 at ¶29. In advance of that trial, APD McDivitt requested that the radio logs from the night of Mr. Chase's arrest be produced at trial. See Rutnik aff. at Exh. N. During the bench trial, APD McDivitt conducted direct and cross examinations of witnesses and made trial motions. See McDivitt 2009 at ¶6. When the People rested their case, Mr. Chase insisted to his attorney that he testify. See Hayden 2009 at ¶32. After an approximately fifteen minute discussion between Mr. Chase and his attorney, Mr. Chase took the stand and testified. See id. at ¶32. At the close of proof, APD McDivitt made a motion to dismiss, which was partially successful in that he convinced the Court that the People's

foundation for the admission of the blood alcohol content evidence was not sufficient, resulting in a dismissal of the Driving With a Blood Alcohol Content of 0.08 or higher and the miscellaneous traffic offenses. See id. at ¶35. A guilty verdict was rendered by the Court on the Driving While Intoxicated Charge. See id. at ¶35.

Mr. Chase remained free pending sentencing, see Rutnik aff. at Exh. N, which was scheduled for December 19, 2007. See Hayden 2009 at ¶35. However, Mr. Chase failed to appear in Court on December 19, 2007.[35] See id. at ¶36. Sentencing was thereafter adjourned to the dates of January 23, 2008, February 27, 2008, March 26, 2008 and finally to April 23, 2008. See Rutnik aff. at Exh. N. During this period, Mr. Chase's defense attorney[36] appeared with Mr. Chase on each Court date, reviewed the Court's file, including the clerk's notes from trial, spoke with and shared information with Mr. Chase's then-probation officer, reviewed the pre-sentence investigation report, had at least two in-person conferences with Mr. Chase and spoke to Mr. Chase on the telephone on several occasions. See Roe 2009 at ¶11. Mr. Chase continued to possess his driver's license during this period. See Rutnik aff. at Exh. N.

On April 23, 2008, Mr. Chase was sentenced to 90 days in the Schuyler County Correctional Facility, a conditional discharge of one year, and a fine of $1000.00 plus a surcharge of $190.00. See id. The Court's rationale in rendering this sentence was as follows:

> Because the public safety is at risk, this Court must take into consideration several elements of the defendant's actions in rendering this decision. First and foremost is the defendant's atti[t]ude in accepting responsibility [sic] and ownership for his actions in the action at bar. The defendant has shown no remorse to this Court for

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35Mr. Chase was arrested on November 25, 2007 for misdemeanor Endangering the Welfare of a Child and Unlawfully Fleeing a Police Officer. See Hayden 2009 at ¶37.

36Upon the appointment of a new Schuyler County Public Defender on January 1, 2008, Mr. Chase was represented through sentencing by the new APD. See Hayden 2009 at ¶38.

> his actions until he appeared for the sentencing on 03/26/2008. This Justice understands that the defendant has a mental health issue, however this is a treatable condition with the proper medication.
>
> Mr. Chase's atti[t]ude over the entire case has been one of flipant [sic] jovial humor and not treating his situation as one of seriousness until the night of sentencing.
>
> The defendant is currently serving two separate terms of probation in Tompkins County, as the defendant repeatedly ignor[e]s the conditions set forth in the issued terms.
>
> This Justice feels that any further assignment of probation would be a waste of taxpayer's money and time of the Probation Department staff, as the defendant would appear not to gain anything from his time spent. He continues to violate the terms of his probation by violating the laws of the land on a fairly regular basis.
>
> The Tompkins County Probation Department chooses not to violate him, this Court's opinion is the defendant has received a false sense of immunity from penalty for violating the terms set forth because of this action.
>
> It is the opinion of this Court that the People have proved the three elements needed to establish the facts of this case whereby the guilty verdict was rendered.

See Rutnik aff. at Exh. N. At the time of sentencing, Mr. Chase was also ordered to surrender his driver's license, which was thereafter revoked for six months. See id. A notice of appeal was filed by Mr. Chase's attorney dated May 13, 2008. See id.

Plaintiff Chase was not represented at his initial arraignment in Hector Town Court, see Rutnik aff. at Exh. N, but appeared in Court via desk appearance tickets, and was never take into custody until after his conviction. Therefore, plaintiff Chase's arraignment was not a critical stage in the circumstances of his case. For the reasons discussed below, none of plaintiff Chase's other allegations establish a constructive denial of his right to counsel.

When viewed in the light most favorable to plaintiff Chase, plaintiff Chase alleges that he was constructively denied his right to counsel because he was found ineligible for the services of

the PD and therefore was unrepresented through three Court appearances[37] over a period of five months. See Hayden 2009 at ¶¶9, 12, 17, 18; Rutnik aff. at Exh. N. Plaintiff Chase can otherwise remember next to nothing about his representation by the Schuyler County PD Office other than he and attorney McDivitt communicated and attended Court together, including a trial. See Chase dep. at pp. 40-42, 44, 47-48.

The Court records and testimony of ADA Hayden show that after plaintiff Chase was arraigned on May 16, 2007, his case was adjourned. See Rutnik aff. at Exh. N; Hayden 2009 at ¶9. On June 20, 2007, the Court asked APD McDivitt to represent plaintiff Chase for purposes of that appearance during which a plea offer was made by the ADA and rejected by plaintiff Chase. See Hayden 2009 at ¶¶11, 16; Hayden dep. at p. 80. His appearances on July 18, 2007 and August 14, 2007 were adjourned at plaintiff Chase's request. See Hayden 2009 at ¶¶17, 18. Therefore, after his arraignment, nothing substantive occurred at plaintiff Chase's Court appearances without plaintiff Chase being represented by counsel.

Notwithstanding, plaintiff Chase was deemed ineligible for assigned counsel because his household income, which included his father's income, exceeded eligibility guidelines. See Orr 2009 at ¶¶ 3-5. However, criminal defendants are no longer found ineligible for the services of the PD in Schuyler County because of his or her parent's income. See Orr dep. at p. 81. As a result, plaintiff Chase fails to represent the current eligibility determination practice in Schuyler County. Therefore, to the extent that plaintiff Chase is found to have been denied his right to counsel because of his

37 The Court directed the APD in Court to represent plaintiff Chase at his second appearance on June 20, 2007 See Hayden 2009 at ¶13. However, it appears that plaintiff Chase does not recall this, which is not surprising because he remembered little to nothing about the criminal process, or his life in general, at the time of his deposition. See Chase dep., generally.

parent's income -- a point that the State defendants do not concede[38] -- such denial no longer occurs in Schuyler County.

b. Robert Tomberelli

On June 15, 2007, plaintiff Robert Tomberelli was charged with Aggravated Driving While Intoxicated, Driving While Intoxicated, Aggravated Unlicensed Operation of a Motor Vehicle and traffic and parking violations. See Rutnik aff. at Exh. T. Mr. Tomberelli was arraigned on those charges on June 15, 2007 and released on his own recognizance. See id.; Tomberelli dep. at p. 51. A determination of Mr. Tomberelli's eligibility for public defense counsel was also made by the Court on June 15, 2007, and the Schuyler County PD was assigned to represent Mr. Tomberelli. See Rutnik aff. at Exh. T. An appearance date was scheduled for June 20, 2007 in the Town of Hector Justice Court. See id.

The charges of Aggravated Unlicensed Operation of a Motor Vehicle, Aggravated Driving While Intoxicated and misdemeanor Driving While Intoxicated against Mr. Tomberelli were held for presentation to the grand jury. See id. On July 26, 2007, the People advised Mr. Tomberelli's attorney of the People's offer of felony probation with Drug Treatment Court on the condition that Mr. Tomberelli consent to proceeding by a Superior Court Information and plead guilty to Aggravated Unlicensed Operation in the First Degree. See Hayden 2009 at ¶45. Since Mr. Tomberelli's plea agreement included participation in Drug Treatment Court, Mr. Tomberelli was required to meet with Michelle Ormsbee, the Drug Treatment Coordinator, to determine whether he was eligible to participate in that program. See Hayden 2009 at ¶¶49-50; Hayden dep. at p. 90. In

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38 Pursuant to sections 413 and 416 of the New York State Family Court Act, "[p]arents of unemancipated children under 21 are responsible and chargeable for the support of those children [citation omitted], including the payment of their legal fees [citation omitted]." Roulan v. County of Onondaga, 90 AD3d 1617, 1622 (4th Dept 2011). Therefore, the Appellate Division held that "resources of the parents of an unemancipated criminal defendant under age 21" may be considered when determining that defendant's eligibility for assigned counsel. Id.

determining whether a person is eligible for Drug Treatment Court, the Coordinator very thoroughly explains what Drug Treatment Court is and how it works, and ensures that defendants have a clear understanding of what is involved with and required by Drug Treatment Court. See Hayden 2009 at ¶52. It was prudent defense counsel advice and best practice for the PD to have Mr. Tomberelli go through the evaluation process before agreeing to waive grand jury presentment. See id. at ¶¶43-57.

On October 4, 2007, Mr. Tomberelli waived his right to a preliminary hearing and grand jury presentation[39] and agreed to proceed on a Superior Court Information in County Court. See Rutnik aff. at Exh. U, pp. 4-6. Also on October 4, 2007, Mr. Tomberelli pled guilty to Aggravated Unlicensed Operation of a Motor Vehicle and misdemeanor Driving While Intoxicated in full satisfaction of all charges. See id. at pp. 10-14, 17, 22. Following his plea, the matter was adjourned to November 15, 2007 for sentencing and plaintiff Tomberelli remained released on his own recognizance. See Rutnik aff. at Exh.U.

On November 15, 2007, Mr. Tomberelli was sentenced to 5 years probation, conditioned on successful completion of Drug Treatment Court,[40] and a fine of $1000.00 with the understanding that if Mr. Tomberelli failed Drug Treatment Court, he would be given a State prison sentence. See Rutnik aff. at Exh.U, pp. 15-22. Had Mr. Tomberelli not pled guilty, he would have faced a State prison sentence of one and one third to four years. See id. at p. 14. The People also did not oppose Mr. Tomberelli's request for a Relief from Disabilities to permit him to possess a rifle during

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39That Mr. Tomberelli's case was adjourned from the date that the People made their offer (July 26, 2007) and the waiver of indictment on October 4, 2007 demonstrates that the PD properly ensured he was eligible for the Drug Treatment Court program before permitting her client to waive Grand Jury. See Hayden 2009 at ¶50.

40Mr. Tomberelli was not sentenced to one and a half years in Drug Treatment Court, as alleged by Mr. Tomberelli. He was sentenced to participate in Drug Treatment Court until he successfully completed the program. The shortest period of time within which a person could complete Drug Treatment Court is just over 12 months. Others, due to multiple setbacks, have remained in Drug Treatment Court for approximately 3 years. See Hayden 2009 at ¶53.

hunting season. See id. at pp. 15-16; Tomberelli dep. at pp. 29-30.

Plaintiff Tomberelli was not represented at his initial arraignment. However, during that arraignment, no bail was set, the plaintiff was released on his own recognizance, the PD Office was assigned by the Court to represent plaintiff Tomberelli and plaintiff Tomberelli was given a date to appear in Hector Town Court. See Rutnik aff. at Exh. T; Tomberelli dep. at p. 51. Therefore, bail was never set in plaintiff Tomberelli's case, and he was not held in custody as a result of his arraignment. As a result, plaintiff Tomberelli's arraignment was not a critical stage in the circumstances of his case. For the reasons discussed below, none of plaintiff Tomberelli's other claims establish that he was constructively denied his right to counsel.

When viewed in the light most favorable to plaintiff Tomberelli, plaintiff Tomberelli alleges that he was constructively denied his right to counsel because (1) his attorney did not investigate the facts of his case, (2) he had one attorney from the PD Office in Town Court and a different one in County Court, (3) he waived his preliminary hearing without understanding its purpose, (4) he felt pressured into pleading guilty, and (5) his attorneys did not communicate with him enough. None of plaintiff Tomberelli's complaints constitute a constructive denial of counsel.

First, while plaintiff Tomberelli testified that his attorneys did not do any investigation, he also testified that his attorneys knew all of the facts of his case. See Tomberelli dep. at pp. 19, 22-24, 25, 34, 37, 43-44, 45. However, at his deposition, plaintiff Tomberelli testified that his attorneys should have investigated why "a buddy" "ratted him out" and informed law enforcement that he was breaking the law. See id. at pp. 25, 28, 34. Since the defendant was unable to show what an investigation of these allegations would accomplish, he cannot establish that he was denied the right to counsel during the investigation stage of his case. Knight, supra., at *62.

Second, plaintiff complains that he had one attorney in Town Court and another in County Court.[41] There is no Constitutional right to vertical, or continuous, representation. See, e.g., People v McJimson, 135 Cal. App. 3d 873, 880-81 (Cal. App. 2d Dist. 1982). However, both of plaintiff Tomberelli's attorneys were members of the PD Office staff. The Court of Appeals has stated that when an indigent public defense provider is assigned by the Court to represent a criminal defendant, that provider may "divide the defense responsibilities between two attorneys -- a choice that a private firm retained by a criminal defendant would also be free to make." People v. Knowles, 88 NY2d 763, 768 (1996). The Court held that this circumstance did not constitute a constructive denial of counsel. Id. See also Chambers v. Maroney, 399 US 42, 53 (1970) (the defendant was represented by an attorney from the LAS at his first trial, but a different attorney from the same LAS at his retrial). OILS Director William Leahy has testified that the goal of "continuous" or "vertical" representation can be met by representation by lawyers of the same public defense entity. See Leahy dep. at p. 112. Currently, of the eleven local criminal Courts in Schuyler County, the PD covers five of them, and the APD covers the remaining six. See Hughson dep. at p. 26. The PD handles felonies, and the APD handles solely misdemeanors, unless the client specifically requests representation by the Assistant on the felony charge. See Roe dep. at p. 88; Hughson dep. at p. 24. The two attorneys communicate everyday and discuss the cases in which they are both involved. See Roe dep. at p. 88. This organization of responsibilities is completely appropriate and reasonable and does not constructively deny an indigent criminal defendant his or her right to counsel. Knowles, 88 NY2d at 768.

Third, plaintiff alleges that he waived his rights to a preliminary hearing and indictment by

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41 However, plaintiff Tomberelli testified at his deposition that he did not know what vertical representation was or if he had received it. See Tomberelli dep. at p. 61.

the grand jury without understanding what such waivers meant. However, on October 4, 2007 the following inquiry was made of Mr. Tomberelli as to these waivers:

> THE COURT: And did you waive your right to a Preliminary Hearing?
>
> MS. MILLER: We never had a Preliminary Hearing. I don't know as we formally waived it.[42]
>
> ***
>
> THE COURT: I want to tell you that you're entitled to a prompt Hearing to see whether there's sufficient evidence to warrant the Court holding you for the Grand Jury. You can waive such a right. Do you want a hearing or do you want to waive it?
>
> A: I waive it.
>
> THE COURT: All right. Now we're in the County of Schuyler Court. And we're here ostensibly for the purpose of seeing whether you want to waive Grand Jury action. I do want to tell you that you're entitled to be prosecuted on the felony by an Indictment by the Grand Jury. Do you understand that? So I'm going to ask you to raise your right hand.
>
> [ROBERT TOMBERELLI was duly sworn.]
>
> THE COURT: You know very well that you've been held for the action of the Grand Jury, and you've been charged with a crime in the Town of Hector, don't you?
>
> A: Yes.
>
> THE COURT: I want to make sure that you know that under the Constitution of the State of New York, that you have a right to be prosecuted by an Indictment filed by a Grand Jury. Do you understand that right?

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[42] When asked at her deposition about not waiving plaintiff Tomberelli's right to a preliminary hearing, attorney Miller testified that "... it was very common in Schuyler County not to have preliminary hearings in town court." See Miller dep. at p. 37. Plaintiff Tomberelli lost no rights by not having a preliminary hearing because the prosecution is not required to go forward on a preliminary hearing against an ROR'd defendant. See People v Fagan, 53 A.D.3d 983 (3d Dept. 2008) ("A defendant does not have any Constitutional right to a preliminary hearing, nor is it a jurisdictional predicate to indictment.").

A: Yes.

THE COURT: And that you would have a right to testify before that Grand Jury, if you chose to do so, if you file a Waiver of Immunity, you would have that right. Is it my understanding that you're here requesting that the procedure be waived, and that you give up your right to a Grand Jury, and that you proceed by way of a special, um, Superior Court Information?

A: Yes.

THE COURT: You want to do that? You're asking the D.A. to go along with this?

A: Yes.

THE COURT: Now, I want to [sic] you know, though, if you do, that a Superior Court Information has the same effect in the law as if it were a Grand Jury Indictment. Do you understand that? Have you talked about this Waiver with your Attorney? And you've talked to your Attorney about the facts of your case?

A: Yes.

THE COURT: Is anybody forcing you, coercing you, has your Attorney threatened you to give up your right to a Grand Jury?

A. No.

See Rutnik aff. at Exh.U, pp. 3-6. At his deposition, plaintiff Tomberelli testified that when he was under oath, in open Court, on October 4, 2007 he told the judge the truth. See Tomberelli dep. at pp. 4-5, 68. Further, plaintiff Tomberelli signed a waiver of indictment under oath that he made the waiver voluntarily without being "threatened, coerced, forced or in any way intimidated into doing so." See Rutnik aff. at Exh. T. Additionally, attorney Miller testified at her deposition that she believed this statement made by plaintiff Tomberelli was true. See Miller dep. at pp. 33-34. As a result, there is no evidence in this record that plaintiff Tomberelli was constructive denied counsel in connection with his waivers of his rights to a preliminary hearing or grand jury presentment.

Fourth, plaintiff Tomberelli claims that he was pressured into taking a plea. As part of his plea allocution, Mr. Tomberelli answered the Court's questions as follows:

> THE COURT: Okay. Well, Mr. Tomberelli, you heard what your attorney has said, you also heard what the D.A. has said, Is that what you're considering doing, is pleading guilty?
>
> A: Yes.
>
> THE COURT: Okay. And you've talked this over with Attorney Miller?
>
> A. Yes.
>
> THE COURT: Has she answered your questions to your satisfaction?
>
> A. Yes.
>
> THE COURT: You're satisfied with her services?
>
> A. Yes.

See id. at pp. 10-11.

Additionally, the following exchange also took place between Mr. Tomberelli and the Court at Mr. Tomberelli's plea allocution:

> THE COURT: . . . the Aggravated Unlicensed Operation of a Motor Vehicle in the Third Degree, occurring on or about the 15th day of June '07 in the Town of Hector, that is an E felony, and the other Count would be Driving While Intoxicated, which would be a, um, would be an A misdemeanor, occurring on or about the same time. If you plead guilty to those two Counts, do you understand that would be a confession of your guilt to those Counts?
>
> A: Yes.
>
> THE COURT: If you do that. Now, you do know that you have a right to remain silent, don't you?
>
> A: Yes.
>
> THE COURT: . . . Regarding these allegations, you have a right to remain silent, and you'd be giving up that right to remain silent if you plead guilty. Do you

understand that?

A. Yes.

THE COURT: Also, if you plead guilty, you'd be giving up your right to a trial. Do you understand that this . . . S.C.I. is simply an allegation, and the District Attorney would have to prove all the elements of these allegations to a unanimous jury of 12 people beyond a reasonable doubt? Do you understand that's what a trial is about?

A. Yes.

THE COURT: And you at that trial would be able to call witnesses on your own behalf, and you would also through your Attorney be able to question any of the witnesses who testified against you, or to questions any of the documents that were introduced at trial. Do you understand you'd be giving up that right?

A: Yes.

THE COURT: Also, by pleading guilty, you'd be giving up your right to various pre-trial Hearings that you might have? For example, you could question the legality of any statement the Police may have taken from you, or you could question the legality of any evidence they took from you, or the identity of you as a participant in a crime. You'd have the opportunity before you pled guilty or before you went on trial to ask for discovery or other types of suppression. Do you understand you have all those rights before you plead guilty or before you went to trial?

A: Yes.

THE COURT: Do you understand that a plea of guilty has the same effect as if a jury came back with a guilty plea?

[Indicated yes.]

THE COURT: By pleading guilty you give up any defense or defenses that you may have to these charges. Do you understand that?

[Indicated yes.]

THE COURT: . . .Are you agreeing not to make any motions?

A. Yes.

THE COURT: Are you agreeing that . . . if there are any defects in the procedure up to this point or any defects on the face of the Superior Court Information, are you willing to waive those?

[Indicating yes.]

See id. at pp.11-14.

Finally, the Court inquired as follows:

THE COURT: Okay. Has anyone forced you or threatened you in order to make you give up a trial?

A: No.

* * *

THE COURT: Has your Lawyer forced you into taking this deal?

A: No.

* * *

THE COURT: We will have to await the Pre-Sentence Report, but based upon the representation of the District Attorney, I have no reason to believe I can't go along with this. As I say, if something untoward is in there that I can't in good conscience agree to this, I would let you withdraw your plea. Are you pleading guilty to the two crimes that I just talked to you about, the D.W.I. and the Unlicensed Operation, Aggravated Unlicensed Operation of a Motor Vehicle, First Degree, are you pleading to those on your own free will?

A: Yes.

See id. at p. 17. It is incomprehensible that plaintiff can allege that he was pressured to take a plea by his attorney when he told the Court, under oath, the complete opposite. As noted above, plaintiff Tomberelli testified that when he was under oath, in open Court, on October 4, 2007 he told the judge the truth. See Tomberelli dep. at pp. 4-5, 68. Additionally, attorney Miller testified that she believed these statements made by plaintiff Tomberelli were true. See Miller dep. at pp. 41-43. As a result, there is no evidence in this record that plaintiff Tomberelli was

constructively denied his right to counsel during the plea bargaining stage of his criminal proceeding.

Fifth, plaintiff Tomberelli claims that his attorneys did not communicate with him enough. However, plaintiff Tomberelli testified that he spoke with his counsel in their "meetings," see Tomberelli dep. at p. 33, met with attorney Miller at her office, see id. at pp. 84, 88, and met with his attorneys in Court. See id. at pp. 81-83, 91. Plaintiff also testified that nothing prevented him from visiting either attorney's office or writing them letters. See id. at pp. 84-86. This communication, and ability to communicate, cannot support a finding of the constructive denial of plaintiff Tomberelli's right to counsel. Zimmerman at **10-11.

Based on the evidence in this case, plaintiff Tomberelli cannot meet his threshold burden and establish that he was constructively denied his right to counsel. See Kerwin aff. at Exh. K.

c. Christopher Yaw

Christopher Yaw was charged with Grand Larceny in the Fourth Degree and arraigned on that charge in the Town of Dix Justice Court on June 26, 2007. Bail was set in the amount of $5000.00 cash/$10,000.00 bond, which Mr. Yaw could not make, and he was therefore remanded to the Schuyler County Jail.[43] See Rutnik aff. at Exh. O. The Schuyler County PDwas assigned to represent Mr. Yaw. See id. At his first meeting with PD Connie Fern Miller, plaintiff Yaw and attorney Miller spoke about waiving plaintiff Yaw's preliminary hearing. See Yaw dep. at p. 19-20. Attorney Miller advised that, based on the evidence that law enforcement had, it was in plaintiff

43 On July 4, 2007, while incarcerated, Mr. Yaw sent a letter to the ADA stating, "I can't say how thankful I am for being incarcerated and getting a chance to look at what I've done, where I'm going, and where I want to be." See Hayden 2009 at ¶66.

Yaw's best interests to waive the preliminary hearing.[44] See id. at p. 20. Plaintiff Yaw and attorney Miller also discussed possible sentences, see id., and the appropriateness of his charges. See id. at p. 31.

After that first meeting with attorney Miller, plaintiff was sentenced to six months incarceration in Chemung County on a prior DWI conviction. See id. at p. 22. Plaintiff Yaw served that sentence in the Chemung County Jail until November 2007. See id. at p. 22. While at Chemung County Jail, plaintiff Yaw received a letter from attorney Miller about a Court date. See id. at p. 23. A week before plaintiff Yaw was released from Chemung County Jail, his bail on the Schuyler County charge was reduced to on his own recognizance ("ROR'd"). See id. at p. 25. Therefore, plaintiff went home after being released from Chemung County. See id. Attorney Miller appeared with plaintiff Yaw at a November 2007 Court date, see id. at pp. 26, 27-28, and plaintiff Yaw contacted attorney Miller in December 2007 inquiring about his next Court date. See id. at p. 29.

Mr. Yaw was thereafter arraigned on the charge of Grand Larceny in the Fourth Degree in Schuyler County Court on August 30, 2007. See Rutnik aff. at Exh. O. On November 15, 2007, Mr. Yaw pled guilty to the charge in full satisfaction of that charge and other new charges pending against him in the Town of Orange, and was ROR'd pending sentencing. See Rutnik aff. at Exh. P, at p. 12. During his plea allocution, Mr. Yaw answered the Court's questions as follows:

> THE COURT: Okay have you discussed this with Attorney Miller?
>
> A: Yes, sir.
>
> THE COURT: Are you satisfied with her services?
>
> A: Yes, sir.

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44 Plaintiff Yaw speculated at his deposition that this was bad advice because he did not think that there was enough evidence for the DA to prevail at a preliminary hearing. See Yaw dep. at p. 65. That is the reason plaintiff Yaw agreed to participate in this case. See id. at pp. 64-68.

See id. at p. 4. After an extensive inquiry by the Court about the consequences of a plea, Mr. Yaw's various rights in connection with his prosecution, his understanding of the waiver of the various rights and the voluntariness of his waivers and decisions, the Court stated as follows:

> THE COURT: Okay. I'm going to find that Christopher Yaw, here in the presence of his Lawyer, after being advised of his rights, of his right to remain silent, his right to a trial by jury, has knowingly, willingly, voluntarily, intelligently waived those rights; and he has knowingly, willingly, intelligently, voluntarily entered a plea of guilty to Grand Larceny, Fourth Degree, a Class E Felony. That, together with his recitation of the underlying facts is satisfactory for the Court to accept his guilty plea, and the Court is going to do so...

See id. at p. 11.

Before Mr. Yaw could be sentenced on the Grand Larceny conviction, he was charged with Burglary in the Third Degree on January 8, 2008, see Hayden 2009 at ¶68; Yaw dep. at p. 55, in the Village of Odessa and ROR'd. See Yaw dep. at p. 56. Mr. Yaw told the Court that he wished to continue with the Schuyler County PD, who had been appointed to represent him in the charges described above. See Rutnik aff. at Exh. Q, pp. 7-8. Plaintiff subsequently spoke to attorney Miller on the phone about the charges. See Yaw dep. at pp. 58-59. Thereafter, Mr. Yaw pled guilty to the charge of Burglary in the Third Degree with the agreement that any sentence on this conviction would run concurrently with the sentence imposed on the Grand Larceny conviction. See Hayden 2009 at ¶67-68. Following his guilty plea, Mr. Yaw continued to be ROR'd until his sentencing on both pleas. See Rutnik aff. at Exh. Q, p. 18.

Mr. Yaw appeared in Court on December 18, 2008 for sentencing on the Grand Larceny and Burglary convictions. See Rutnik aff. at Exh. R, generally. He was sentenced to two five year terms of probation, to run concurrently, instead of terms of incarceration up to ten years. See id. at pp. 3, 6. Restitution was also ordered, see id. at pp. 3, 8, and attorney Miller represented Mr. Yaw at that

hearing. See Yaw dep. at p. 51.

To the extent that arraignment is a critical stage, it is true that plaintiff Yaw was not represented at his initial arraignment in Dix Town Court. See Rutnik aff. at Exh. O; Yaw dep. at pp. 17. However, plaintiff Yaw's other claims fail to establish that he was constructively denied the right to counsel.

When viewed in the light most favorable to plaintiff Yaw, plaintiff Yaw alleges that he was constructively denied his right to counsel because he believes that the advice given to him by attorney Miller to waive his preliminary hearing was bad advice because he did not think that there was enough evidence for the DA to prevail at a preliminary hearing. See Yaw dep. at p. 65. The alleged giving of "bad advice" may allege an ineffective assistance of counsel claim, but cannot, as a matter of law, constitute a constructive denial of counsel. Morales at *5.

Based on the evidence in this case, plaintiff Yaw meet his threshold burden and establish that he was constructively denied his right to counsel. See Kerwin aff. at Exh. K.

4. Washington County

a. Kimberly Hurrell-Harring

Plaintiff Hurrell-Harring was charged with smuggling 21.1 grams of marijuana into the Great Meadow Correctional Facility on September 29, 2007. See Barber 2009 at ¶13. Plaintiff Hurrell-Harring admitted in her statement to police that she had smuggled marijuana into the facility on two prior occasions. See id. at ¶15. Furthermore, her arrest was premised upon a monitored call between plaintiff Hurrell-Harring and her husband. See id. In addition, Ms. Hurrell-Harring gave an incriminating statement to a state investigator. See id.

She was arraigned on a felony charge of Promoting Prison Contraband in the First

Degree. See Kerwin aff. at Exh. A, ¶45. At her arraignment, where no prosecutor was present, plaintiff Hurrell-Harring was asked if she wanted an attorney and whether she wanted the PD appointed. See Hurrell-Harring dep. at p. 27. She said she wanted appointed counsel. See id. Bail was set at $10,000 cash or $20,000 bond, and plaintiff Hurrell-Harring was remanded to jail. See Kerwin aff. at Exh. A, ¶46. The PD met with plaintiff Hurrell-Harring in jail shortly after her arraignment. See id at ¶47; Hurrell-Harring dep. at p.30. The second amended complaints alleges that "[d]uring this meeting, Mrs. Hurrell-Harring felt that her attorney took no interest in her case, her family, or her future." See Kerwin aff. at Exh. A, ¶47. Further, plaintiff Hurrell-Harring testified that, during that meeting while the PD was telling her about defending her case, plaintiff "really wasn't trying to hear nothing he had to say," see Hurrell-Harring dep. at p. 31, because of the "way he came in and reared back in his chair like he didn't really want to be bothered." See id. at pp. 31-32.

The PD spoke to plaintiff Hurrell-Harring about bail, but plaintiff does not remember the content of the conversation or whether the PD said anything about getting bail reduced. See id. at p. 33. During this meeting, counsel advised plaintiff Hurrell-Harring about the risk of trial in light of the evidence against her and her confession. See Hurrell-Harring dep. at p. 34. Additionally, counsel told plaintiff Hurrell-Harring that bringing drugs into the prison was a big problem in Washington County, so that a plea would likely result in doing jail time. See Hurrell-Harring dep. at p. 37. Counsel advised plaintiff Hurrell-Harring that she could face a minimum of eight years in prison if she lost at trial. See id. at p. 34. The PD visited the plaintiff one more time at jail to discuss the plea offer, see id. at pp. 44-45, 47 and spoke with plaintiff Hurrell-Harring at Court appearances. See id. at p. 43.

Plaintiff Hurrell-Harring alleges that her attorney failed to return her telephone calls[45], see id. at p. 38, or advocate for a plea bargain to a lesser, non-felony charge and/or a sentence of straight probation so that she could care for her stricken mother and two daughters. See id. at pp. 44, 48. Plaintiff Hurrell-Harring believes that her counsel was deficient because he did not get her a plea offer with the sentence of a fine so she "could've went back home and took care of [her] sick mother and two kids." See id. at p. 108. She believes that her attorney could have obtained such a plea deal -- despite the fact that she turned over the drugs and confessed to the crime -- because she had seen it on *Law and Order*. See id. at p. 111. Feeling that she had no other option, plaintiff pled guilty on October 12, 2007 to the charge in exchange for a sentence of six months incarceration and five years felony probation (a "6/5 split"). See Kerwin aff. at Exh. A, ¶49. Plaintiff Hurrell-Harring alleges that, as a result of her felony conviction, she was in jeopardy of losing her license as a nurses aide. See id. at ¶50; Hurrell-Harring dep. at p. 8.[46] Plaintiff Hurrell-Harring did not, however, lose her license. See Hurrell-Harring dep. at p. 72.

During his representation of plaintiff Hurrell-Harring, defense counsel conferenced the matter with the DA on several occasions, and with the DA and the Judge on two occasions, in an attempt to secure Ms. Hurrell-Harring an appropriate plea. See Barber 2009 at ¶18. However, the DA, noting that Ms. Hurrell-Harring had admitted guilt about the charge and admitted that she had previously committed the same crime two other times, would not offer a reduced charge but offered a sentence of a 6/5 split. See id. Defense counsel met with Ms. Hurrell-Harring and spoke with her on several occasions to advise her of the DA's offer and the repercussions of her

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45 Washington County Jail has a telephone from which inmates can make free calls. See Hurrell-Harring dep. at p. 39.

46 Plaintiff Hurrell-Harring actually pled in the Second Amended Complaint that she was in jeopardy of losing her "license to serve as a registered nurse," but Plaintiff Hurrell-Harring was not a licensed registered nurse. This is further support of the lack of communication between plaintiffs' attorneys and the plaintiffs.

plea, if accepted. See Barber 2009 at ¶19.

On October 12, 2007, Ms. Hurrell-Harring signed a Waiver of Indictment, which stated that the plaintiff voluntarily consented to waive her right to be prosecuted by an indictment. See Muse aff. at Exh. G. After several discussions with her attorney, Ms. Hurrell-Harring agreed also to waive a preliminary hearing and accept the plea. Ms. Hurrell-Harring pled guilty to the E felony on October 12, 2007 and was sentenced to the 6/5 split on November 16, 2007. See Barber 2009 at ¶21.

The Washington County Public Defender was not notified that plaintiff Hurrell-Harring was being arraigned -- or even that she had been arrested -- and therefore was not present at her initial arraignment.[47] Plaintiff Hurrell-Harring's remaining complaints do not establish that she was constructively denied her right to counsel. Viewing these facts in the light most favorable to plaintiff Hurrell-Harring, her complaints about her representation distill to the following: (1) not being represented at arraignment where bail was set and she was taken into custody because she did not make bail; (2) her lawyer did not care about the fact that she had to take care of her children and ill mother; (3) her lawyer did not get her a plea that did not require incarceration; (4) her lawyer did not visit or speak to her as much as she would have liked; and (5) she felt pressured into taking the plea offer because her lawyer did not get her a better deal.

First, while plaintiff claims that the attorney from the Washington County PD Office did not appear to care about her family obligations and circumstances, and that she did not like her attorney's attitude, "the Sixth Amendment does not guarantee a 'meaningful relationship between an accused and his counsel.'" Knight at *53. Plaintiff Hurrell-Harring did not have a Sixth

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47 However, her assigned attorney met with her immediately after arraignment, and subsequently made an application to have bail lowered. See Barber 2009 at 17.

Amendment right to a lawyer with a sympathetic ear and attitude so, even if such was absent, she was not constructively denied anything that was Constitutionally required.

Second, plaintiff Hurrell-Harring's complaint that her attorney did not get her a plea offer that did not involve jail time goes to her attorney's performance and does not demonstrate a constructive denial of counsel. Notwithstanding, the proof in this case establishes that (1) the ADA would never have made an offer that did not involve a period of incarceration for the felony charged, see Barber 2009 at ¶18, and (2) plaintiff Hurrell-Harring's attorney did, in fact, have conversations with the ADA about the plea offer. See id. While plaintiff Hurrell-Harring was not satisfied with the offer because it did not meet her expectations governed by the television show *Law and Order*, see Hurrell-Harring dep. at p. 111, "[a] defendant does not have a Constitutional right to a meaningful attorney-client relationship, to be completely satisfied with counsel's performance, or to be represented by the lawyer of his choice." Moore at *28. "'If counsel is a reasonably effective advocate, he meets Constitutional standards irrespective of his client's evaluation of his performance.'" Brown, 3 F3d at 1246. Plaintiff's dissatisfaction with the ADA's plea offer does not support a claim of ineffective assistance of counsel, let alone a finding that she was constructively denied counsel.

Third, plaintiff's complaints about her dissatisfaction with the amount of communication that she had with her attorney -- including not returning her phone calls, see Hurrell-Harring dep. at p. 38 -- do not support a finding that plaintiff was constructively denied counsel as a result of the lack of communication. As noted above, the PD (1) met with plaintiff Hurrell-Harring in jail shortly after her arraignment, see Kerwin aff. at Exh. A, ¶47; (2) discussed defending plaintiff's case, see Hurrell-Harring dep. at pp. 31-32; (3) spoke to plaintiff Hurrell-Harring about bail, see

id. at p. 33; and advised plaintiff Hurrell-Harring about the risk of trial, in light of the evidence against her and her confession. See id. at pp. 106-07. Counsel told plaintiff Hurrell-Harring that because bringing drugs into the prison was a big problem in Washington County, she would likely get jail time with a plea, see id. at p. 37, and could face a minimum of eight years in prison if she lost at trial. See id. at p. 34. The PD visited the plaintiff one more time at jail to discuss the plea offer, see id. at pp. 44-45, 47 and spoke with plaintiff Hurrell-Harring at Court appearances. See id. at p. 43. Defense counsel met with Ms. Hurrell-Harring and spoke with her on several occasions to advise her of the DA's offer and the repercussions of her plea, if accepted. See Barber 2009 at ¶19. However, plaintiff also Hurrell-Harring alleges that her attorney failed to return her telephone calls. See Hurrell-Haring dep. at p. 38.

The communication between plaintiff Hurrell-Harring and her attorney, as described by plaintiff Hurrell-Harring herself, occurred more than just at Court appearances, which would have satisfied Constitutional requirements, Ping at 500, and was far from a "complete breakdown" in communication. Dolab at *56. Additionally, the communication described by plaintiff Hurrell-Harring exceeded that described in Zimmerman, in which the Court found no constructive denial of counsel under Cronic. As a result, plaintiff was not constructively denied the right to counsel as a result of the frequency of her communications with her attorney. Zimmerman at **10-11.

Finally, any alleged "pressure" felt by plaintiff Hurrell-Harring to take the offered plea resulted not from a constructive denial of counsel, but from the ADA's refusal to offer a better plea. The uncontroverted proof in this case is that plaintiff's attorney met with the ADA and the Court several time to attempt to negotiate a proper plea. See Barber 2009 at ¶18. The fact that

counsel was not successful at changing the ADA's mind about a plea offer does not prove that the plaintiff was constructively denied counsel. Instead it shows that the plaintiff was not pleased with the result achieved by counsel. Satisfaction with the result of an attorney's representation is not Constitutionally required. Moore at *28.

Based on the foregoing, plaintiff Hurrell-Harring cannot meet her threshold burden of establishing that she was constructively denied counsel. See Kerwin aff. at Exh. K.

b. Randy Habshi

Mr. Habshi was initially charged with Burglary in the Second Degree, Grand Larceny in the Fourth Degree, Petit Larceny, Possession of Burglar's Tools and Criminal Possession of a Weapon[48], and was arraigned on these charges in the Town of Fort Ann Justice Court on or about July 26, 2007, see Muse aff. at Exh. H, with bail set at $100,000 cash/$200,000 bond. See Habshi dep. at p. 21. A preliminary hearing was scheduled for August 1, 2007. See Muse aff. at Exh. H; Habshi dep. at p. 22. Mr. Habshi learned at his third Court appearance that his case was assigned to Garfield Raymond, a member of the Washington County ACP.[49] See Barber 2009 at ¶¶22-23; Habshi dep. at p. 23. At that Court appearance, Mr. Raymond advised plaintiff Habshi not to bail out because it would be more beneficial for plaintiff Habshi to start doing his time, see Habshi dep. at pp. 26, 28-29, and told plaintiff Habshi that he would try to get the charges lowered. See id. at p. 27. At that first meeting, Mr. Raymond already knew that plaintiff Habshi had given a confession, see id. at p. 27, and plaintiff Habshi agreed to adjourn that Court appearance. See id. at p. 29. Between that Court appearance and the next one, plaintiff Habshi attempted to call Mr. Raymond once, but did not reach him. See id. at p. 31. Plaintiff alleges

48 Mr. Habshi faced a sentence of up to twenty-five years for his alleged crime. See Barber 2009 at ¶24.
49 The second amended complaint alleges that plaintiff Habshi's attorney was present on the preliminary hearing date. See Kerwin aff. at Exh. A, ¶229; Habshi dep. at pp. 89-91.

that Mr. Raymond failed to appear for plaintiff Habshi's next Court appearance.[50] See id. at. 32.

Mr. Garfield visited plaintiff Habshi in jail and told him that he had met with the ADA and that the best plea offer that he was going to get included a sentence of four year determinate in prison and five years post-release supervision. See Habshi dep. at pp. 39-40. Plaintiff Habshi testified that he believed the offer was high because the ADA mistakenly thought that plaintiff had a prior felony conviction and that Mr. Raymond should have cleared up that mistaken belief.[51] See id. at pp. 94-96. Plaintiff told Mr. Raymond that he did not want to accept that offer, so Mr. Raymond said they would go to trial. See id. at p. 43. However, plaintiff did not want to go to trial. See id. Plaintiff Habshi next saw Mr. Raymond in Court. See id. at p. 44. Plaintiff Habshi testified that his Court appearances kept getting "adjourn[ed] and adjourn[ed]" until it was transferred to County Court. See id. at p. 45. However, during those adjournments, Mr. Raymond made a speedy trial motion on plaintiff Habshi's behalf. See id. at p. 47.

Mr. Raymond remained willing to take plaintiff Habshi's case to trial, see id. at p. 40, but on November 19, 2007, Mr. Habshi, after signing a waiver of indictment[52], voluntarily pled guilty to Burglary in the Second Degree with a recommended sentence of four years incarceration and five years of post-release supervision and payment of restitution, to cover all charges pending against him, including a subsequent burglary charge. See id. at pp. 48-49; Muse aff. at Exh. I, p. 14. This was a particularly good outcome for Mr. Habshi, who faced a sentence of up to twenty-five years incarceration. See Barber 2009 at ¶24.

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50 However, contrary to an allegation by Mr. Habshi, there is evidence in this case that counsel was present for Mr. Habshi's October 10, 2007 Court appearance. See Barber 2009 at appendix.

51 Although plaintiff Habshi allegedly did not have a prior felony conviction, he did have a felony sex offense pending at that time. See Habshi dep. at p. 97.

52 Plaintiff Habshi testified that he did not recall whether he had been told about his right to testify before the grand jury. See Habshi dep. at p. 45.

Plaintiff Habshi was not represented at his initial arraignment in the Fort Ann Justice Court. However, when viewed in the light most favorable to plaintiff Habshi, plaintiff Habshi alleges that he was constructively denied his right to counsel because (1) attorney Raymond did not communicate with him enough, (2) attorney Raymond did not get him an acceptable plea bargain and (3) attorney Raymond allegedly missed one Court appearance and adjourned plaintiff Habshi's case a number of times. These claims do not establish that plaintiff Habshi was constructively denied his right to counsel.

First, plaintiff met with attorney Raymond at least five times in Court, see Habshi dep. at pp. 26, 28-29, 44, 46, 48-49, and once in jail. See Habshi dep. at pp. 39-40. During the jail visit, attorney Raymond informed plaintiff Habshi about the plea offer. See id. As discussed in connection with virtually every other plaintiff, this communication was Constitutionally sufficient and there is no evidence in the record that plaintiff Habshi was constructively denied his right to counsel. Zimmerman at **10-11.

Second, plaintiff thinks that his attorney should have obtained a better plea deal. Attorney Raymond met with the ADA and then informed plaintiff Habshi, during a jail visit, that he was offered the best plea bargain that was going to be made in his case, which included a sentence of four year determinate term in prison and five years of mandatory post-release supervision. See Habshi dep. at pp. 38-40. Plaintiff Habshi believed that this plea offer was made upon a belief that he had a prior felony on his record. See id. at pp. 94-96. However, plaintiff Habshi testified that the alleged mistake was cleared up by his probation officer, see id. at 42, and the plea offer did not change. At his deposition, plaintiff Habshi testified that he was guilty, had given law enforcement a statement and drove around with law enforcement to

retrieve all of the goods that he had stolen. See id. at pp.70-73. Notwithstanding, plaintiff Habshi testified that "just because you are guilty, there is always -- this can always be reduced down." See id. at p. 76. Plaintiff Habshi was facing a possible fifteen year prison sentence at that time, and attorney Raymond was able to get plaintiff Habshi an offer of four years incarceration and five years post-release supervision. See id. at p. 77. The fact that counsel was able to get the plaintiff the best plea offer during one negotiation does not mean that the attorney abandoned his client during the plea bargaining stage of the criminal prosecution.

At the time that plaintiff finally pled guilty, he was facing twenty-five years incarceration, because he had been charged with a subsequent burglary. See id. at pp. 48-49; Muse aff. at Exh. I, p. 16; Barber 2009 at ¶24. Attorney Raymond was able to convince the prosecution to allow the plea offer -- that included a sentence of four years incarceration and five years post-release supervision -- to cover both sets of charges. The proof in this case cannot establish that plaintiff Habshi was constructively denied counsel during the plea bargaining stage of his criminal proceeding. To the extent that plaintiff Habshi was dissatisfied with the plea offer, his claim is one of ineffective assistance of counsel. Moore at *28.

Finally, plaintiff Habshi alleges that he was constructively denied his right to counsel because attorney Raymond allegedly missed one Court appearance and adjourned several others. At the one Court appearance that attorney Raymond allegedly missed, the plaintiff did not even go before the judge. See id. at p. 32. One of the adjournments was requested by attorney Raymond for the purposes of conferring with plaintiff Habshi, see id. at p. 29, and the others were made after the plaintiff refused to take the plea offer and refused to go to trial. See id. at 45. Therefore, it is unclear what plaintiff Habshi alleges should have been done during those

appearances until a trial date was set. Knight, at **6 (defendant was not constructively denied the right to counsel because his appointed attorney adjourned several Court appearances because he was busy on other matters). Additionally, during the period of adjourned Court appearances, attorney Raymond did not "abandon" plaintiff Habshi's case but prepared and submitted a speedy trial motion. See id. at p. 47. These facts do not establish that plaintiff Habshi was denied counsel at a critical stage of his criminal proceeding.

Based on the evidence in this case, plaintiff Habshi cannot meet his threshold burden and establish that he was constructively denied his right to counsel. See Kerwin aff. at Exh. K.

5. Onondaga County

a. James Adams

James Adams was charged on July 31, 2007 with Robbery in the Third Degree, Burglary in the Third Degree, and Harassment. See Trunfio 2009 at ¶23. At his arraignment in Syracuse City Court the next day, the Court reduced the felony charges to misdemeanors, appointed Onondaga County ACP panel member, Donald Kelly to represent the plaintiff, and set bail in the amount of twenty-five hundred dollars cash or bond. See Adams dep. at pp. 19-20, 22. At the time of his July 31, 2007 arrest, plaintiff had misdemeanor charges pending against him in the Towns of Salina and Geddes in Onondaga County. See id. at pp. 15, 41, 43-44. Mr. Kelly was also assigned to represent plaintiff Adams on those charges. See id. at p. 45. Plaintiff was never able to contact Mr. Kelly by telephone or letter. See id. at pp. 20-21, 23-24, 28-29. He first met Mr. Kelly on his first Court date, but Mr. Kelly did not speak to him. See id. at p. 21, 25.

Plaintiff Adams testified that he appeared in Syracuse City Court four times, and that Mr. Kelly only appeared with him once. See id. at pp. 35-36. At the fourth Court appearance,

without Mr. Kelly present, plaintiff Adams first learned that a plea offer had been made. See id. at pp. 34-35. The initial plea offer made in the case was if Plaintiff Adams pleaded guilty to a Class E Felony, the people would consent to an indeterminate sentence of no more than three years and no less than one and one-half years. See Kelly dep. at pp. 130-131. After discussing it with Mr. Kelly, Plaintiff Adams rejected this offer. See id. at p. 131.

Plaintiff Adams testified that he learned about his right to appear before the grand jury from mail from the District Attorney's Office received by plaintiff Adams on a Friday at approximately 6:00 pm informing him that he could testify the following Monday. See Adams dep. at p. 37. Mr. Adams was indicted on September 21, 2007 for the crimes of Burglary in the Third Degree and Petit Larceny. See Trunfio 2009 at ¶27. Plaintiff Adams saw Mr. Kelly for the second time at his first County Court appearance during which plaintiff Adams was arraigned on this indictment.[53] See Trunfio 2009 at ¶27; Adams dep. at p. 38. Twenty-five hundred dollars cash or bond bail was set. See Trunfio 2009 at ¶27. At this appearance in County Court, plaintiff and Mr. Kelly spoke about the all three cases (the cases stemming from Syracuse, Geddes and Salina) and bail. See Adams dep. at pp. 47-48. During this conversation plaintiff asked Mr. Kelly to talk to his wife about bail, id. at pp. 48-49, and alerted Mr. Kelly that his arrest on a charge was based on a misidentification. See id. at pp. 49-50. Plaintiff Adams also asked Mr. Kelly to try to get him a plea with a drug court disposition.[54] See id. at p. 51.

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53 Plaintiff Adams testified that he had no communication with Mr. Kelly between the one City Court appearance that Mr. Kelly attended and the first County Court appearance. See Adams dep. at pp. 38-39.

54 Mr. Kelly first had been doing legal work on plaintiff Adams's case since its inception, including hiring a handwriting expert. See id. at pp. 110-11. He had also spoken to the attorney assigned before him, and obtained paperwork and discovery from the ADA. See id. at p. 111. Mr. Kelly appeared in Court with plaintiff Adams on August 7, 2007 and September 26, 2007, see id. at p. 113-14, spoke to plaintiff Adams's wife on September 27, 2007, see id. at p. 117, and appeared with the plaintiff in Court twice in October 2007. See id at pp. 115-16. He also visited location of offense and took photographs, see id. at p. 125-26, and discovered that video footage was

During his second County Court appearance, plaintiff Adams was informed that he did not qualify for Drug Court. See id. at pp. 56-57. Plaintiff Adams then informed Mr. Kelly that he would not accept any other plea, if offered. See id. Mr. Kelly thereafter met with plaintiff Adams at the jail to prepare for trial. See id. at pp. 51-52, 55, 61; Kelly dep. at pp. 110-11. Plaintiff Adams asked Mr. Kelly to attempt to get his bail lowered. See Adams dep. at p. 61. Mr. Kelly attempted, but was denied. See Adams dep. at pp. 61-62. During the pendency of his case, plaintiff Adams wrote directly to the judge and informed the judge that he knew he had a good attorney. See id. at p. 71. At some point prior to trial, the Court asked plaintiff Adams if he wanted a different lawyer and Mr. Adams declined. See id. at p. 73.

On November 1, 2007, Mr. Kelly made a motion to dismiss and for a suppression hearing on behalf of Mr. Adams. See Trunfio 2009 at ¶28; Kelly dep. at pp. 115, 124. Additionally, on November 1, 2007, Mr. Kelly made discovery demands on behalf of Mr. Adams. See Trunfio 2009 at ¶28. By Order dated November 8, 2007, the Court ordered a Wade hearing to be held on the admissibility of identification evidence. See Trunfio 2009 at ¶29; Adams dep. at p. 64. A Wade hearing was held on January 2, 2008, at 2:00 p.m., after which the Court found the show-up to be suggestive and suppressed the identification evidence against Mr. Adams. See Trunfio 2009 at ¶29; Kelly dep. at p. 125. Plaintiff Adams was present for the hearing and spoke with Mr. Kelly during the hearing. See Adams dep. at p. 66. Mr. Kelly retained a handwriting expert to examine handwriting in connection with the charges against Mr. Adams. See Adams dep. at p. 62. On or before December 6, 2007, Mr. Kelly issued a subpoena to Rite Aid Corporation, the alleged victim of Mr. Adams's alleged crimes for records relating to

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never retrieved by police. See id. at pp. 126-27. He also had teleconferences and meetings with the handwriting expert. See id. at p. 127.

the charges against Mr. Adams. See Trunfio 2009 at ¶31.

On December 12, 2007, the People obtained a superseding indictment against Mr. Adams for the crimes of Burglary in the Third Degree, Robbery in the Third Degree and Petit Larceny. See Trunfio 2009 at ¶33. Mr. Adams was arraigned on this superseding indictment on December 13, 2007. See id.

On the first day of trial, which was held on February 11, 13 and 14, 2008, plaintiff Adams was released on bail. See Adams dep. at p. 67. At trial, the People called three witnesses and Mr. Kelly called two witnesses. See Trunfio 2009 dep. at ¶34. Mr. Kelly called a handwriting expert witness to testify for Plaintiff Adams. See Kelly dep. at p. 124. During trial, plaintiff Adams met with Mr. Kelly at Mr. Kelly's office. See Adams dep. at p. 85; Kelly dep. at p. 127. Mr. Kelly and plaintiff discussed whether plaintiff Adams should testify at trial and trial strategy. See Adams dep. at pp. 86, 88. Plaintiff Adams and Mr. Kelly also conferred during trial, and plaintiff Adams participated in jury selection. See id. at pp. 87, 89-90.

In preparation for trial, Mr. Kelly visited the location of the alleged offense and took photographs, which "turned out to be instrumental in his acquittal" of felony charges. See Kelly dep. at p. 126. By visiting the scene, Mr. Kelly learned that video cameras were capable of recording the alleged incident underlying Plaintiff Adams charges, and the police never requested a copy of the video. See Kelly dep. at pp. 126-127.

Mr. Adams was convicted of the misdemeanor charge of Petit Larceny and acquitted of the Burglary in the Third Degree and Robbery in the Third Degree charges. See Trunfio 2009 at ¶34; Adams dep. at p. 93. Mr. Adams was sentenced to time served for the charges in all three Courts, which amounted to approximately six and one half months. See Trunfio 2009 at ¶34;

Adams dep. at pp. 94-95. Had he been convicted of a class D non-violent felony charge[55], as a predicate felon[56], he could have been sentenced to an indeterminate term of incarceration of a minimum of no less than three and one-half years and a maximum of no more than seven years in State prison. See Penal Law § 70.06. After the felony acquittals at trial, plaintiff Adams publicly thanked Mr. Adams for the work he had done on his case. See Kelly dep. at p. 133.

Plaintiff Adams was not represented at his initial arraignment in City Court.[57] However, in-custody defendants that appear in Syracuse City Court for arraignment now, are provided counsel. See Captor dep. at p. 113. As a result, if plaintiff Adams was arrested and arraigned today in the City of Syracuse, under the same circumstances, he would be represented at arraignment and, therefore, is not representative of the current City Court arraignment program in Onondaga County. Additionally, at his initial arraignment, the Court lowered the charges against plaintiff Adams. Further, attorney Kelly attempted to get plaintiff Adams's bail lowered. See Adams dep. at pp. 61-62. Notwithstanding, the remainder of plaintiff Adams's complaints do not establish that plaintiff Adams was constructively denied his right to counsel.

When viewed in the light most favorable to plaintiff Adams, plaintiff Adams alleges that he was constructively denied his right to counsel because (1) counsel did not communicate with the plaintiff as much as plaintiff desired, (2) counsel missed three appearances in City Court, (3) counsel was unable to get plaintiff Adams a plea to Drug Court, and (4) counsel failed to advise plaintiff about his right to testify before the grand jury.

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55 Burglary in the Third Degree and Robbery in the Third Degree are both class D felonies; however, they are not classified as violent felony offenses. See Penal Law §§ 70.02(1)(c), 140.20, 160.20.
56 A review of Plaintiff Adams's criminal history, provided by the Court, revealed two prior violent felony convictions. See Kelly dep. at p. 128
57 Plaintiff Adams believes he was represented at his arraignment in Salina Town Court and he was RORd. See Adams dep. at p. 44. He was given a desk appearance ticket in the Town of Geddes. See id. at p. 43.

First, attorney Kelly spoke with plaintiff Adams at least six times and discussed the plea offer, see Kelly dep. at pp. 130-131, the facts of all three of plaintiff Adams's cases, see Adams dep. at pp. 47-48, bail, see id. at pp. 48-49, 61, and the possibility of drug court. See id. at p. 51, 56-57. Plaintiff Adams and attorney Kelly were also in Court together and conferred during plaintiff's suppression hearing, see id. at 64, and throughout trial including doing jury selection. See id. at pp. 87, 89-90. In addition, attorney Kelly met with plaintiff Adams at the jail for trial preparation, see id. at pp. 51-52, 55, 61; Kelly dep. at pp. 110-11, and also at attorney Kelly's office during trial. See Adams dep. at pp. 85, 86, 88; Kelly dep. at p. 127.

In this case, there is no dispute that there was "an exchange of information " between plaintiff Adams and attorney Kelly because plaintiff Adams necessarily had to tell attorney Kelly about the misidentification issue that led to attorney Kelly hiring the expert. Additionally, plaintiff Adams testified that he met with attorney Kelly to prepare for trial, which continued during trial. See Adams dep. at pp. 51-52, 55, 61, 85-86, 87-90; Kelly dep. at pp. 110-11. Attorney Kelly, himself, conducted the investigation, see Kelly dep. at pp. 126-127, and plaintiff Adams participated in jury selection with attorney Kelly. See Adams dep. at pp. 87, 89-90. The facts are completely on point with those in Scott and, therefore, do not constitute a constructive denial of counsel. Scott, 146 Fed Appx at 879.

Second, plaintiff Adams complains that attorney Kelly missed three Court appearances. However, as discussed above, attorney Kelly did attend Court appearances. Notwithstanding, missing four Court appearances -- **in combination with other alleged errors** -- has been found not to constructively deny a criminal defendant his right to counsel. In United States v. Rogers, 13 Fed Appx 386 (7th Cir. 2001), defendant's retained counsel was chronically late for Court

appearances, failed to appear at three scheduled pretrial conferences, and arrived at the third day of trial one and a half hours late. Id. at 387. However, counsel made evidentiary objections during trial, presented alibi witnesses, effectively cross-examined the prosecution witnesses, made a closing argument and submitted proposed jury instructions to the Court. Id. The defendant was convicted, and then counsel failed to appear at defendant's sentencing. Id. On the day of his sentencing, the defendant informed the Court that his counsel never met with him to discuss his case, did not issue subpoenas or talk to witnesses and would not respond to defendant's calls or letters. Id. The Court appointed new counsel. Id. In denying defendant's appeal for violation of his Sixth Amendment rights, the Court stated

> A presumption of prejudice is warranted when a defendant has been actually or constructively denied counsel at a critical stage of his trial. [Citation omitted] Neither of these exceptions applies in this case. First, although [counsel] missed two pretrial conferences, was late to trial, and did not appear at the originally scheduled sentencing hearing, the record discloses no instance where any proceeding took place without either [counsel] being present. [Defendant] therefore cannot argue that he was actually denied counsel at a "critical stage. . ."

Id. at 388-89. The representation of plaintiff Adams by attorney Kelly was at least, if not more, "active" than the attorney in Rogers, who missed more Court appearances than attorney Kelly is alleged to have missed. He made a motion to dismiss and for a suppression hearing on behalf of Mr. Adams, see Trunfio 2009 at ¶28; Kelly dep. at pp. 115, 124, made discovery demands and motions, see Trunfio 2009 at ¶28, conducted investigation including visiting the location of the crime, see Kelly dep. at pp. 126-127, conducted and prevailed in a suppression hearing, see Trunfio 2009 at ¶29; Kelly dep. at p. 125, retained an expert, see Adams dep. at p. 62; Kelly dep. at p. 124, issued subpoenas, see Trunfio 2009 at ¶31, prepared for, and represented plaintiff

Adams at, trial, see Adams dep. at pp. 85, 86-88, 89-90; Kelly dep. at p. 127, and got the plaintiff acquitted of the felony charge. See Adams dep. at p. 93. Under these circumstances, the fact that attorney Kelly allegedly missed three Court appearances is inconsequential and plaintiff was not constructively denied his right to counsel. Rogers at 388-89.

Third, plaintiff Adams complains that attorney Kelly failed to get him a plea offer that included Drug Court. However, plaintiff Adams was informed by the Court or the ADA that he did not qualify for Drug Court. See id. at pp. 56-57. The fact that plaintiff Adams did not meet this criteria was not the fault of attorney Kelly. Notwithstanding, plaintiff Adams refused to consider any other plea offer, so it cannot be alleged that attorney Kelly was absent during the plea bargaining stage of the criminal proceeding. Further, any dissatisfaction with attorney Kelly's ability to get a certain plea offer goes to attorney Kelly's performance and is subject to the ineffective assistance of counsel standard and not justiciable herein.

Finally, plaintiff Adams alleges that attorney Kelly failed to discuss with him his right to testify in front of the grand jury. Specifically, plaintiff Adams alleges that he learned about his right to appear before the grand jury from mail from the District Attorney's Office received by plaintiff Adams on a Friday at approximately 6:00 pm informing him that he could testify the following Monday. See Adams dep. at p. 37. However, the grand jury notice sent to plaintiff Adams was dated Tuesday, September 18, 2007 and informed plaintiff Adams that his opportunity to testify before the grand jury was Friday, September 21, 2007 -- three days later. See McGowan aff. at Exh. U. As a result, the facts as testified by plaintiff Adams are incorrect. Notwithstanding, plaintiff Adams was ultimately not prosecuted on the indictment that stemmed from the September 21, 2007 grand jury presentation because, on December 12, 2007 (a

Wednesday), the People obtained a superseding indictment against Mr. Adams for the crimes of Burglary in the Third Degree, Robbery in the Third Degree and Petit Larceny, see Trunfio 2009 at ¶27, and plaintiff does not claim that attorney Kelly failed to advise him about testifying in front of that grand jury. In fact, the only evidence about the plaintiff testifying before the grand jury on the superseding indictment in this case is contained in the affidavit of the Onondaga County Chief ADA, who stated that plaintiff Adams did not exercise his right to appear before the Grand Jury on December 10, 2007. See Trunfio 2009 at ¶32.

Based on the evidence in this case, plaintiff Adams cannot meet his threshold burden and establish that he was denied his right to counsel. See Kerwin aff. at Exh. K.

b. Joseph Briggs

Joseph Briggs was arrested on August 7, 2007, on the charges of Burglary in the Third Degree, Grand Larceny in the Fourth Degree and Criminal Possession of Stolen Property in the Fourth Degree in connection with the theft, and attempted subsequent sale, of tools. See Trunfio 2009 at ¶36; Briggs dep. at p. 7. Plaintiff Briggs was arraigned on these charges on August 8, 2007. Id. Stuart Larose, a member of the Onondaga County ACP, was assigned to represent Mr. Briggs at arraignment on August 7 or August 8, 2007, see Briggs dep. at p. 8, and Mr. Briggs voluntarily waived his right to a preliminary hearing on August 10, 2007. See Trunfio 2009 at ¶37. Plaintiff alleges that he had no communication with Mr. LaRose between August 7, 2007 and September 4, 2007, even though plaintiff Briggs tried calling[58] and wrote to Mr. LaRose several times. See Briggs

58 Plaintiff Briggs alleges that Mr. LaRose's ACP voicemail box was always full, see Briggs dep. at pp. 44, 53-54, and his office did not accept collect calls. See id. at p. 47. However, at his deposition plaintiff Briggs testified that when he was represented by ACP lawyers in 2007-08 on the charges involved in this case, there were not ACP "voice mailboxes". See id. at p. 50. When he called Mr. Larose and Ms. Carey a live person on the other end informed him that there mailboxes were full. See id. at pp. 50-51, 65-66. In fact, plaintiff Briggs has never used the electronic ACP voice mail system. See id. at p. 52. As a result, Mr. Briggs testified that he has no knowledge about the ACP voice mailboxes or if they ever get full. See id. at p. 53.

dep. at pp. 17-18. Plaintiff Briggs also alleges that his right to a preliminary hearing was waived without his knowledge.[59] See id. at p. 20. Mr. LaRose visited plaintiff Briggs once in jail and a plea offer was discussed. See Briggs dep. at pp. 49, 63. Mr. Briggs appeared in Court with Mr. LaRose on September 4, 2007, at which time Mr. Briggs rejected the ADA's offer of a plea to Criminal Possession of Stolen Property in the Fourth Degree with a sentence of 1½ - 3 years in state prison. See Trunfio 2009 at ¶38; Briggs dep. at p. 24.

Plaintiff Briggs was thereafter indicted by the Grand Jury on September 24, 2007. See Trunfio 2009 at ¶39. At Mr. Briggs' request, Mr. LaRose was relieved as counsel, and defense attorney Susan Carey, another member of the Onondaga County ACP, was assigned at plaintiff Briggs' request. See id. at ¶40. Thereafter, Ms. Carey first appeared on October 12, 2007,[60] at which time a motion schedule was set. See id. at ¶41. Plaintiff Briggs alleges that Ms. Carey's office voice mailbox was always full or her office would not accept collect calls. See Briggs dep. at pp. 44, 54. However, Ms. Carey was relieved from representing Mr. Briggs on November 16, 2007, at her request. See Trunfio 2009. at ¶42.

Bonnie Levy, another member of the Onondaga ACP was assigned to represent Mr. Briggs. See id. at ¶43. Ms. Levy thereafter appeared in Court with Mr. Briggs on November 19, 2007 and December 21, 2007. See id. at ¶44. At the December 21, 2007 appearance, the parties reported to the Court that there had been no movement with respect to a plea. See id. Ms. Levy filed discovery demands on behalf of Mr. Briggs on December 26, 2007. See id. at ¶45. Ms. Levy made motions on Mr. Briggs's behalf which were argued on January 18, 2008. See id. at ¶46. The Court granted Ms. Levy's motion for discovery, in part, by decision and order dated February 8, 2008. See id. Ms.

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59 Plaintiff Briggs alleges that the judge on his case told him that attorneys can waive preliminary hearings without consulting their clients in Onondaga County. See Briggs dep. at p. 68.

60 Plaintiff Briggs refused to be transported to Court on October 12, 2007. See McGowan aff. at Exh. X, pp. 1-2.

Levy thereafter appeared in Court with Mr. Briggs on February 8, 2008, at which time the People sought an order from the Court for a saliva sample from Mr. Briggs, which was granted despite Ms. Levy's opposition. See id. at ¶47. The parties were also informed by the Court that a final decision on the People's plea offer of a sentence of one and a half to three years incarceration upon a plea of guilty to Criminal Possession of Stolen Property in the Fourth Degree (to cover both the indicted crime and a misdemeanor charge pending in Salina Justice Court) had to be made by February 11, 2008. See id.

Ms. Levy appeared in Court with Mr. Briggs on February 11, 2008, at which time Mr. Briggs refused the People's plea offer. Ms. Levy informed the Court that Edward Klein, another member of the Onondaga County ACP agreed to take over representation of Mr. Briggs upon Ms. Levy's impending retirement from the ACP. See id. at ¶48.[61] Mr. Klein was in the Courtroom during Mr. Briggs's February 11, 2008 appearance, and was directed by the Court to observe the appearance. See id. Also during the February 11, 2008 appearance, Ms. Levy informed the Court that a motion to dismiss on speedy trial grounds may be made on behalf of Mr. Briggs. See id. at ¶49. Ms. Levy then appeared in Court with Mr. Briggs on February 15, 2008, at which time the Court granted the People's order to show cause for a DNA sample from Mr. Briggs. Mr. Klein thereafter took over the defense of Mr. Briggs. See id. at ¶¶50-51.

On February 29, 2008, the People withdrew their notice of readiness for purposes of completing DNA testing of a blood sample found at the crime scene. See id. at ¶52. On April 3, 2008, Mr. Klein made a motion requesting Mr. Brigg's release on speedy trial grounds. See id. at ¶53. The Court declined to release Mr. Briggs on his own recognizance, but agreed to lower the bail

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61 Mr. Klein is on the Board of the New York Civil Liberties Union, plaintiffs' counsel in the case at bar. See Klein dep. at p. 12.

amount to one hundred dollars cash or five hundred dollars bond. See id. Shortly thereafter, plaintiff Briggs posted bail and was released from custody. See id.

On May 20, 2008, plaintiff Briggs failed to appear for his arraignment on the superseding indictment and the Court adjourned the case, at Mr. Klein's request, until May 21, 2008 for Mr. Briggs to appear. See id. at ¶54. The People announced ready for trial on the superseding indictment in the presence of Mr. Klein and the Court. See id. The superseding indictment charged Mr. Briggs with Burglary in the Third Degree, Criminal Possession of Stolen Property in the Fourth Degree, and Petit Larceny. See id. On May 21, 2008, Mr. Briggs failed to appear for arraignment and the Court issued a bench warrant. See id. at ¶55. On May 30, 2008, Mr. Briggs was returned to custody and held without bail. See id. at ¶56. Shortly thereafter, on June 3, 2008, the plaintiff was arraigned on the superseding indictment with counsel present. See id.

On August 12, 2008, the Court denied plaintiff's speedy trial motion and directed the People to make a final plea offer by August 26, 2008. See id. at ¶57. On September 19, 2008, Mr. Briggs pled guilty to Burglary in the Third Degree. See id. at ¶58; Briggs dep. at p. 28. Based on Mr. Briggs's extensive criminal history and the People's evidence of a DNA match to Mr. Briggs from blood left on a window at the crime scene, as well as a statement from an individual to whom Mr. Briggs attempted to sell the stolen goods, the People recommended the Court sentence the plaintiff to the maximum of three and a half to seven years incarceration with an order of restitution in the amount of one thousand dollars. See Trunfio 2009 at ¶59. Mr. Klein successfully convinced the Court to sentence Mr. Briggs to the minimum of two to four years incarceration, over the ADA's objection. See id.

Plaintiff Briggs was not represented at his initial arraignment in Syracuse City Court.

However, like plaintiff Adams, plaintiff Briggs is not representative of the current City Court arraignment program in Onondaga County. Notwithstanding, the remainder of plaintiff Briggs's complaints are insufficient to establish that he was constructively denied the right to counsel.

When viewed in the light most favorable to plaintiff Briggs, plaintiff Briggs alleges that he was constructively denied his right to counsel because (1) two of four of his attorneys did not communicate with him enough and (2) his right to a preliminary hearing was waived without his consent.[62] Plaintiff Briggs was represented by attorney LaRose from August 7 or 8, 2007 until approximately October 10, 2007. See Briggs dep. at p. 8; Trunfio 2009 at ¶40. During that approximate two month period, Mr. Briggs met in Court with Mr. LaRose on September 4, 2007, see Trunfio 2009 at ¶38; Briggs dep. at p. 24, and Mr. LaRose visited plaintiff Briggs once in jail and a plea offer was discussed. See Briggs dep. at pp. 49, 63. At the request of plaintiff Briggs, attorney LaRose was thereafter relieved from representing plaintiff Briggs, and attorney Carey represented plaintiff Briggs from October 10, 2007, see Trunfio 2009 at ¶40, until November 16, 2007 when attorney Carey was relieved from representing plaintiff Briggs at her request. See Trunfio 2009 at ¶42. During that approximate five week-period, the plaintiff met with attorney Carey once in Court, at which time a motion schedule was set. See id. at ¶41. Plaintiff Briggs does not appear to allege that attorney Levy or attorney Klein failed to communicate with him to his satisfaction. As discussed above, "[t]here is no required minimum number of meetings between counsel and client," Knight at fn 33, and only "a complete breakdown in communications" between an attorney and client is Constitutionally deficient.

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62 To the extent that plaintiff Briggs's allegations are read to allege that he was deprived of vertical representation, Mr. LaRose was relieved at plaintiff Briggs's request, see Trunfio 2009 at ¶40, the plaintiff asked to be assigned attorney Carey, who asked to be relieved, see id. at ¶42, and attorney Levy retired from the ACP panel. See id. at ¶48. Nothing about plaintiff Briggs's representation by four lawyers has anything to do with the ACP or the public defense system in Onondagn County and therefore is not indicative of any systemic issue.

Dolab, 2010 US Dist LEXIS at *56. Since plaintiff Briggs spoke with attorneys LaRose and Carey at Court appearances, the communication was Constitutionally acceptable. Ping, 746 FSupp2d at 500.

Plaintiff Briggs also alleges that his preliminary hearing was waived without his knowledge. However, this was apparently done pursuant to a Court rule in Onondaga County. On September 4, 2007, plaintiff Briggs appeared in County Court with attorney LaRose and the following dialogue took place:

> THE COURT: . . . Now Mr. Briggs first of all, with regard to the status of your case, the City Court paperwork indicated that there was an arraignment on August 8th. Now, Mr. LaRose, who is here, indicated that Mr. Scibilia had a meeting with you on or about August 10th. Does that sound right to you?
>
> THE DEFENDANT: No, Your Honor. I saw nobody.
>
> THE COURT: You saw nobody.
>
> THE DEFENDANT: Nobody.
>
> THE COURT: Well, according to the City Court records preliminary hearing was waived on August 10th.
>
> THE DEFENDANT: I never waived my preliminary hearing.
>
> THE COURT: Well, you don't have to be there and you don't have to participate on whether or not the hearing is waived, believe it or not. Because those are the rules.

See McGowan aff. at Exhibit W, pp. 3-4. To the extent that the Onondaga County Court permits a criminal defendant's right to a preliminary hearing to be waived without the knowledge of the defendant, any relief related thereto must be directed at the judiciary, and not the State defendants. Based on the evidence in this case, plaintiff Briggs cannot meet his threshold burden and show that he was constructively denied the right to counsel by any of the defendants in this

action. See Kerwin aff. at Exh. K.

c. Richard Love

On September 12, 2007, Richard Love was charged with Criminal Possession of a Forged Instrument in the Second Degree and Attempted Petit Larceny for which he faced three and a half to seven years in State prison. See Trunfio 2009 at ¶60; Zuhker dep. at p. 96; Love dep. at pp. 6, 7-8. He was arraigned before the Honorable David Gideon in the Town of Dewitt Justice Court on September 13, 2007 without counsel. See Trunfio 2009 at ¶60. The Court assigned Onondaga ACP member David Zuhker, Esq., to represent Mr. Love, and held the plaintiff in custody on no bail because the Court was without statutory authority to consider bail based upon plaintiff Love's criminal history. See id.; Love dep. at pp. 26, 61. Mr. Zuhker met with Mr. Love at jail in the booking area, before Mr. Love had even been put into the jail population, on September 13, 2007. See Zuhker dep. at p. 55. Mr. Zuhker met with Mr. Love and filled out the ACP eligibility form, which Mr. Love signed. See id. at p. 56. During that meeting, Mr. Zuhker discussed the case, including the fact that Mr. Love made full confessions to the crimes. See id. at p. 56.

The People elected not to proceed with a preliminary hearing, and the plaintiff was subsequently released pursuant to Criminal Procedure Law §180.80 on the felony complaint in the Town of Dewitt. See Trunfio 2009 at ¶60. On September 18, 2007, Mr. Love was charged with another set of crimes, specifically, Grand Larceny in the Third Degree and Criminal Possession of a Forged Instrument in the Second Degree felonies that carry additional State prison exposure. See Trunfio 2009 at ¶61; Zuhker dep at p. 96. He was arraigned before the Honorable James Cecile in Syracuse City Court. The Court again assigned David Zuhker, who was present, see Zuhker dep. at pp. 58-59, to represent Mr. Love, and was unable to set bail, again, pursuant to CPL §530.20(2)(a)

because Love had at least two prior felony convictions. See Trunfio 2009 at ¶61; Love dep. at p. 62. For this same reason, Mr. Zuhker could not make a bail application because bail could not be set by the City Court judge as a matter of law. See Zuhker dep. at p. 66.

On September 19, 2007, the assigned ADA called Mr. Zuhker and discussed Mr. Love's cases. See Trunfio 2009 at ¶62. The People made a pretrial offer to Mr. Zuhker, which required the plaintiff to plead to one count of Criminal Possession of a Forged Instrument in the Second Degree and receive a mandatory minimum sentence of 2– 4 years incarceration to satisfy all of the plaintiff's pending charges. See Trunfio 2009 at ¶62; Zuhker dep. at pp. 67-68. On September 21, 2007, plaintiff waived the preliminary hearing and remained in custody with no bail. See id. at ¶63. On September 26, 2007, the assigned ADA received a letter from plaintiff Love, wherein plaintiff Love admitted to the charges and criminal acts and asked to "work with the DAs office" in return for a lighter sentence. See id. at ¶64.

On October 1, 2007, the assigned ADA called Mr. Zuhker to notify him that Mr. Love made highly incriminating admissions in the aforementioned letter, and requested to cooperate with the DA's Office. See id. at ¶65. Based upon plaintiff's desire to cooperate, the assigned ADA presented a new offer to Mr. Love which required him to plead to one count of Grand Larceny in the Fourth Degree and receive a mandatory minimum sentence of 1½ -3 years incarceration to satisfy all pending charges. See Zuhker dep. at pp. 67-68. Mr. Zuhker asked for one week to present and discuss this offer with the plaintiff. See Trunfio 2009 at ¶65.

On October 16, 2007, the assigned ADA had a conversation with Mr. Zuhker wherein Mr. Zuhker indicated that Mr. Love intended to accept the offer. See Trunfio 2009 at ¶66. The assigned ADA then requested a pretrial conference in County Court to discuss and confirm the details of the

proposed negotiated disposition. See id. On October 26, 2007, Mr. Love's case appeared before the Court. See Trunfio 2009 at ¶67; Zuhker dep. at p. 64. By this time a felony memo had been issued on the Dewitt charges, and Mr. Love was charged with two more felonies, which Mr. Zuhker was able to negotiate down to a misdemeanor charge. See Zuhker dep. at pp. 63, 68. The ADA assigned to the Court's calendar that day articulated the one and a half to three year offer on the record. See Trunfio 2009 at ¶67. However, Mr. Love rejected this offer, and, in turn, the offer was revoked on the record. See Trunfio 2009 at ¶67; Zuhker dep. at pp. 67-68. Mr. Love then asked the Court to assign him a new attorney.[63] See Trunfio 2009 at ¶67.

The Court assigned Onondaga County ACP attorney Oscar McKenzie to represent Mr. Love. See id. On November 5, 2007, Mr. McKenzie appeared with Mr. Love in Court. See Trunfio 2009 at ¶68. The assigned ADA advised that the negotiated disposition originally offered to Mr. Love was revoked and no longer available. See id. On November 7, 2007, the case was presented to the grand jury. See id. at ¶69. Mr. Love was indicted on Grand Larceny in the Third Degree, Criminal Possession of a Forged Instrument in the Second Degree (two counts), and Scheme to Defraud in the Second Degree. See id.

On December 6, 2007, Mr. Love was arraigned on the indictment, and was advised that the new plea offer required him to plead as charged to every count in the indictment. See id. at ¶70. The Court stated that if Mr. Love pled to the entire indictment, he would limit the plaintiff's sentence to a term of 2 – 4 years incarceration. See id. At this same Court appearance, upon a request made by his

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[63] Plaintiff Love alleges that sometimes when he called Mr. Zuhker's voicemail box it was full, and sometimes it was not. See Love dep. at p. 36. However, in the approximate one month that the plaintiff was represented by Mr. Zuhker, Mr. Zuhker visited the plaintiff in jail one time, spoke to him on the phone one time and met him in Court on two occasions. See id. at p. 53. During the one meeting at the jail that occurred a few days after his arraignment, plaintiff told Mr. Zuhler about his charges and his thoughts on the case. See id. at p. 55-56, 57.

attorney, the plaintiff's bail was reduced to $2,500.00 cash or bond. See id. On December 11, 2007, Mr. Love made bail and was released. See id. at ¶71; Love dep. at p. 71. On December 14, 2007, at another Court appearance, Mr. Love requested that his case be diverted to Drug Court. See Trunfio 2009 at ¶ 72. He asked Mr. McKenzie about the possibility of Drug Court, see Love dep. at p. 71, and was advised that drug diversion was not an option, due to his criminal record, so the assigned ADA would not consent to it. See Trunfio 2009 at ¶ 72. Anticipating a trial, the Court ordered the grand jury minutes for an in-camera review. See id. On February 22, 2008,[64] Mr. McKenzie appeared in Court and reiterated Mr. Love's desire to pay restitution and cooperate with the prosecution. See id. at ¶75. He was advised that the present offer would not change. On March 25, 2008, the assigned ADA received omnibus motions from Mr. McKenzie on behalf of the plaintiff. See id. at ¶¶75-76; Love dep. at p. 71.

In preparing his response to Mr. McKenzie's Bill of Particulars, the ADA realized that there were potential proof problems with the threshold amount needed to establish a "D" felony, and offered a more favorable disposition which consisted of a plea to an "E" felony with a minimum sentence of one and a half to three years incarceration. See Trunfio 2009 at ¶77. On April 4, 2008, at a scheduled Court appearance, the Judge was advised that Mr. Love rejected that new offer. See id. at ¶78. The Court found that the grand jury presentation was sufficient, and adjourned the case for a Huntley/Wade hearing which had been requested by Mr. McKenzie in his omnibus motions. See id.

On April 24, 2008, the assigned ADA advised Mr. McKenzie that the offer was no longer available and that Mr. Love must now plead guilty, as charged, to all counts of the indictment. See

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64 On January 30, 2008, a previously scheduled Court date, neither Mr. McKenize nor Mr. Love appeared in Court. See id. at ¶73. The case was adjourned until February 13, 2008. See id. On February 13, 2008, again, neither Mr. McKenzie or Mr. Love appeared in Court. See id. at ¶74. The People requested a bench warrant for the plaintiff, but instead, the Court adjourned the case, again, to February 22, 2008. See id.

id. at ¶79. On May 6, 2008, a Huntley/Wade hearing was held.[65] Mr. Love testified at the hearing that his confession was coerced by police. See id. at ¶80; Love dep. at p. 73. Mr. McKenzie vigorously cross-examined the police officer witnesses. See Trunfio 2009 at 79; Love dep. at p. 73. On June 13, 2008, the Court issued an order suppressing Mr. Love's confession to the police. See Trunfio 2009 at 79; Love dep. at p. 73.

A trial date was set for August 18, 2008. In light of the Court's decision to suppress the plaintiff's confession, the assigned ADA again offered Mr. Love a reduced plea to the "E" felony – the lowest felony available for a predicate felon. See id. Mr. Love, again, rejected this offer. See id. On August 4, 2008, the Court adjourned the trial in light of new charges filed against Mr. Love by the Dewitt Police Department on July 30, 2008. See id. at ¶81. Mr. Love was taken into custody by the Dewitt police, arraigned in front of Town of Dewitt Justice Court Judge Jack Schultz, and held with no bail. See id. On August 6, 2008, the assigned ADA discussed with Mr. McKenzie the new charges pending against Mr. Love in the Town of Dewitt, as well as an additional charge in the City of Syracuse involving a counterfeit check. See id. at ¶82. The assigned ADA advised Mr. McKenzie that he would give Mr. Love one last opportunity to take the original offer that had been presented to him. See id. Mr. McKenzie advised he wanted to discuss this further with Mr. Love. See id. In exchange for the new offer, the assigned ADA insisted that the plaintiff agree to adjourn the preliminary hearing in the Town of Dewitt and remain in custody. See id. Mr. Love agreed and the hearing was adjourned. See id.

On August 11, 2008, Mr. Love wrote to the Town of Dewitt Justice Court, demanding to be released pursuant to Criminal Procedure Law §180.80. See id. at ¶83. On August 13, 2008, on the record in the Town of Dewitt Justice Court, Mr. McKenzie stated that Mr. Love, again, rejected the

65 Plaintiff Love testified that he appeared at two pre-trial hearings with Mr. McKenzie. See Love dep. at p. 72.

offer to plea to an "E" felony with a sentence of one and a half to three years incarceration. See id. at ¶84. Following a preliminary hearing, the Court found that there was reasonable cause to believe the plaintiff had committed a felony and Mr. Love was remanded into custody, without bail. See id. On August 14, 2008, the Court reviewed the Town of Dewitt Justice Court bail and set bail at $50,000.00. See id. at ¶85. The assigned ADA, once again, indicated that based upon all the new charges and all that had transpired, Mr. Love had to plead to the entire indictment. See id. Mr. Love rejected this offer. See id. However, later the same day, Mr. McKenzie advised the assigned ADA that Mr. Love had changed his mind and would, indeed, plead guilty. See id. The case was re-scheduled before the Court later that afternoon. See id.

At that Court appearance, the Court promised Mr. Love that if he pled guilty it would sentence him to two to four years incarceration and release him from jail pending his sentencing date. See id. Mr. Love pled guilty to Criminal Possession of a Forged Instrument in the Second Degree (two counts), Grand Larceny in the Fourth Degree, and Scheme to Defraud in the Second Degree. Mr. Love was given Outley warnings and released from custody. The case was adjourned to October 20, 2008, for sentencing. See id.

On September 16, 2008, the Court received a letter from Mr. Love, in which he demanded a new attorney and stated that he "was forced to plead guilty to the indictment by deception and trickery and falsehoods of attorney Oscar McKenzie." See id. at ¶86; Love dep. at p. 74. The Court scheduled a Court date of September 19, 2008 to address this issue. See Trunfio 2009 at ¶86; Love dep. at 75. At the September 19, 2008 Court appearance, Mr. McKenzie defended himself on the record, stating that Mr. Love's allegations were untrue. See Trunfio 2009 at ¶87. Mr. Love admitted to the Court that the letter may not have been entirely accurate. See id. Plaintiff Love testified that he

did not ask to withdraw his plea. See Love dep. at p. 76. The Court relieved Mr. McKenzie as the plaintiff's attorney, and assigned ACP attorney Eric Jeschke to represent the plaintiff at sentencing. See id.; Love dep. at p. 77.

On September 29, 2008, the assigned ADA spoke with attorney Jeschke about the case and asked if he had any questions. See Trunfio dep. at ¶88. On November 3, 2008, Mr. Love was sentenced to two to four years in State prison after admitting his status as a predicate felon. See id. at ¶89; Love dep. at p. 77. Mr. Jeschke stated that he reviewed the paperwork with Mr. Love and, in good faith, could not find any additional motions to file on his behalf. See Trunfio 2009 at ¶89. On November 11, 2008, the Syracuse Police Department filed a warrant charging Mr. Love with a new criminal charge of stealing a check for $190.00 on October 17, 2008. See id. at ¶90; Love dep. at p. 78.

On November 24, 2008, Mr. Love wrote to the Court from State prison requesting that he be allowed to plead guilty to the new charge and receive a concurrent sentence. See id. at ¶91. On January 6, 2009, Mr. Love was transported from the State correctional facility, arraigned in Syracuse City Court on the new charge, and held with no bail. See id. at ¶92. Attorney Eric Jeschke was assigned to represent Mr. Love and represented him at arraignment. See id.; Love dep. at p. 78. On January 9, 2009, Mr. Love pled guilty to a Superior Court Information that charged him with Attempted Criminal Possession of a Forged Instrument in the Second Degree, an "E" felony, as a result of the new charge. See Trunfio 2009 at ¶93; Love dep. at p. 78. The Court sentenced Mr. Love to concurrent State time. See Trunfio 2009 at ¶93; Love dep. at pp. 78-79.

Mr. Love rejected the best offer made by the People, which was a plea to one E felony, contrary to the advice of two ACP attorneys that he asked to be relieved from representing him. This

refusal, coupled with his continuing to commit crimes, resulted in the much less favorable outcome for Mr. Love, which had nothing to do with the representation provided to him. That said, ACP counsel managed to obtain concurrent time on yet another felony charge filed after Mr. Love was sentenced.

Plaintiff Love was not represented at his initial arraignment in the Town of Dewitt Court. See Love dep. at p. 61. Plaintiff Love does not think that he was represented by counsel at his arraignment on other charges in Syracuse City Court. See id. at p. 62. However, like plaintiffs Adams and Briggs, plaintiff Love is not representative of the current City Court arraignment program in Onondaga County. Notwithstanding, the remainder of plaintiff Briggs's complaints are insufficient to establish that he was constructively denied the right to counsel. When viewed in the light most favorable to plaintiff Love, plaintiff Love alleges that he was constructively denied his right to counsel because (1) attorney Zuhker did not communicate with him enough (2) his attorneys did not get him an acceptable plea bargain, (3) he was allegedly pressured into pleading guilty and (4) attorney Zuhker did not investigate his case.

Plaintiff Love was represented by attorney Zuhker from September 12, 2007, see Trunfio 2009 at ¶60, until October 26, 2007. See id. at ¶67. During that approximate six week period, Mr. Zuhker visited the plaintiff in jail one time, spoke to him on the phone one time and met him in Court on two occasions. See Love dep. at p. 53. During the one meeting at the jail that occurred a few days after his arraignment, plaintiff told Mr. Zuhker about his charges and his thoughts on the case. See id. at p. 55-56, 57. This client communication far exceeds that in Zimmerman, which was found not to constitute a constructive denial of the right to counsel. Zimmerman, 2011 US Dist LEXIS at 86. Therefore, the communication between plaintiff Love and attorney Zuhker was

Constitutionally sufficient.

Plaintiff appears to also allege that he was dissatisfied with the plea offers negotiated by his attorneys. However, the proof in this case is that plaintiff's ACP attorneys actively engaged in plea negotiations and obtained offers for the lowest sentence available to a predicate felon such as plaintiff Love. See Zuhker dep. at pp. 63, 67-68; Trunfio 2009 at ¶¶66, 75, 77, 82, 85. Therefore, plaintiff Love was not denied counsel during the plea negotiation stage of his criminal proceeding. Instead, he was dissatisfied with the end results of his attorneys' efforts. This allegation is one of ineffective assistance of counsel, and not justiciable herein. Moore at *28.

Plaintiff further alleges that he was forced into taking the final plea by attorney McKenzie. However, the proof in this case is that plaintiff Love was fully represented by attorneys Zuhker and McKenzie during the plea bargaining stage of his case. Plaintiff Love was offered four different plea deals. See Trunfio 2009 at ¶¶62, 65, 70, 77, 80, 82, 85. When he rejected them, attorney McKenzie conducted two pre-trial hearings and prepared for trial. See Love dep. at pp. 72-73. As a result, there is no proof in this case that plaintiff Love was constructively denied his right to counsel by being "threatened" into taking a plea.

Finally, plaintiff alleges that attorney Zuhker did not conduct any investigation into Mr. Love's case. See Love dep. at p. 63. Mr. Love executed Miranda waivers and made two full confessions to law enforcement, see Zuhker dep. at pp. 56, 103, 104, there was video of plaintiff Love at Best Buy using the forged check, and witness testimony from both the clerk at bank and the clerk at Best Buy. See Zuhker dep. at p. 116. All of this evidence was known to attorney Zuhker, so he necessarily did some investigation to have learned this information. See id. There is no evidence in this case that investigative decisions were made by attorneys Zuhker or

McKenzie for any reasons other than strategic ones. Mr. Love's only basis for surmising that his attorneys never did any investigation is that they never told him about any. See Love dep. at pp. 63-65.

However, in speaking to Mr. Love after he informed the Court that attorney McKenzie forced him into taking a plea, the Court stated as follows:

> ...Mr. Love, first of all, I read this letter. And it's amazing to me that you can allege in this letter what you have alleged, when knowing, you know in your heart of heart that much of what's in this letter is absolutely incorrect.
>
> And one principal glaring issue, Mr. McKenzie failed to do any investigation or research in my case prior to me being forced to take the plea on August 15th, 2008, in this Court.
>
> Now, good lord, the records of this Court, one of which has to do with the very comprehensive, complete omnibus motions filed in this Court by your attorney, Mr. McKenzie -- and I'm not going to go into the entire motion -- but it starts out, in terms of the sufficiency of the evidence based on [attorney McKenzie's] own investigation in this case...

See McGowan aff. at Exh. W, p. 6. The Court then read into the record all of the facts learned by attorney McKenzie, which constituted approximately three pages of the transcript from that proceeding. See id. at pp. 6-9. The Court then continued

> . . .your attorney clearly investigated this case and subsequent to that . . . [he made] as comprehensive as any motion I've ever seen -- and he requested some hearing.
>
> We in fact held a hearing. You participated in that hearing. You testified in that hearing. And it is clear in that hearing that knew exactly what this case was all about.
> And you were contesting the admissibility of that statement, that you had asked for an attorney, but . . .the facts predicating this indictment that you were clearly aware of, in fact you . . . say in your statement to the police and in Court that you [committed the facts alleged in your crime].

> But, as a result of your attorney's hard work and as a result of that hearing, this Court rendered a decision suppressing the use of that statement, as well as some other evidence that I decided was the fruit of a poisonous tree.
>
> So for you to say, Mr.Love, Mr. McKenzie failed to do any investigation or research into my case prior to me being forced to take the plea on August 15th, 2008, is not accurate. I'm not going to use another term that I would like to use, but it was not accurate. The Court records are clear on that.

See id. at pp.9-10.

The Court went on to say ". . . [y]our attorney made a tremendous amount of effort to settle this case," and proceeded to outline all of the plea offers made to plaintiff Love. See id. at p. 11. Continuing to speak about the extent of plea negotiations in plaintiff Love's case, the Court stated

> . . . And there's no question in my mind at this point that . . . your attorney gave you every opportunity to talk about this matter and discuss this matter. Once even before the plea there was a break . . . [and] you and your attorney asked for and the Court granted a recess so you could talk to him about the possibility of disposing all of [your] matters.

See id. at p. 24. The ADA then to proceeded to put on the record all of his dealings with Mr. McKenzie on plaintiff's case. See id.

Based on the actual evidence in this case, plaintiff Love was not constructively denied his right to counsel in the investigatory stage of his criminal proceeding. Maxon at **88-91; People v. Jones, 186 CalApp4th 216, 242 (Cal. App. 1st Dist. 2010). Plaintiff Love cannot, therefore, meet his threshold burden of establishing that he was constructively denied his right to counsel. See Kerwin aff. at Exh. K.

d. Jacqueline Winbrone

Jacqueline Winbrone was arrested on the charges of Criminal Possession of a Weapon in the Second Degree after a loaded handgun was discovered in her vehicle by police on September 12, 2007, upon information provided by Ms. Winbrone's husband. See Trunfio 2009 at ¶5. She was arraigned with counsel, see Winbrone dep. at pp. 17-18, on September 13, 2007 and the Court set bail in the amount of ten thousand dollars cash or bond. Ms. Winbrone did not make bail and was remanded. See Trunfio 2009 at ¶6. Jacqueline Winbrone's husband died on September 17, 2007. See Trunfio 2009 at ¶7.

Onondaga County ACP attorney Tom Marris, a member of the Onondaga County ACP, was appointed to represent Ms. Winbrone without Ms. Winbrone having to request an appointed attorney, see Winbrone dep. at pp. 12-13, and first spoke to Ms. Winbrone on September 13, 2007 – the same day as her arraignment, see Marris dep. at p. 86, or September 18, 2007. See Winbrone dep. at p. 21. Due to a scheduling conflict, Mr. Marris asked a colleague to appear with Ms. Winbrone on September 17, 2007 and to waive the case for grand jury action. See Marris dep. at pp. 86-87. Ms. Winbrone called Mr. Marris's office directly and spoke to Mr. Marris on September 18, 2007 asking if she could go to her husband's funeral.[66] See Winbrone dep. at pp. 23, 26. Mr. Marris had a teleconference on the case on September 20, 2007 with the ADA, see id. at p. 88, and called the Court clerk on September 21, 2007 to schedule a bail review to attempt to get plaintiff Winbrone released to go to her husband's funeral. See Marris id. at p. 88; Winbrone dep. at pp. 28-29. Upon Mr. Marris's bail review application on September 24, 2007, at which plaintiff Winbrone was present, Ms. Winbrone's bail was reduced to five thousand dollars cash or bond, but Ms. Winbrone still could not make bail. See Trunfio 2009 at ¶8; Marris dep. at pp. 88-89; Winbrone dep. at pp. 29-

66 Plaintiff Winbrone testified that she had tried calling Mr. Marris between September 13, 2007 and September 18, 2007 but his ACP voice mailbox was always full. See Winbrone dep. at pp. 23-24.

30. Plaintiff Winbrone does not recall what Mr. Marris said to the Court during the bail review hearing. See Winbrone dep. at p. 34. She does recall Mr. Marris telling her at Court that day that she was facing 3 ½ years in prison. See Winbrone dep. at pp. 66-67.

Mr. Marris spoke[67] to Ms. Winbrone who informed Mr. Marris that the handgun was planted in the plaintiff's vehicle by her husband for purposes of having her arrested, and that the plaintiff's husband admitted this to his brother just before he passed away. See Trunfio 2009 at ¶9; Marris dep. at pp. 90-91. Mr. Marris informed the assigned ADA of these allegations. See Marris dep. at pp. 90-91. After the plaintiff wrote directly to the judge, the judge put plaintiff Winbrone's case on the Court calendar. See Winbrone dep. at pp. 40-41, 43. Mr. Marris then appeared with Ms. Winbrone for a Court appearance on November 1, 2007, which the Court adjourned to the next day so that the ADA handling the case could be present. See Marris dep. at pp. 92-93, 96. Based upon the information that Mr. Marris presented to the assigned ADA, the deceased's brother was interviewed. See Trunfio 2009 at ¶10. After speaking with the deceased's brother, the People agreed to Mr. Marris's request for pre-trial release for Ms. Winbrone on November 2, 2007. See Trunfio 2009 at ¶10; Marris dep. at pp. 97-98. After her release on November 2, 2007, plaintiff Winbrone next communicated with Mr. Marris at her next Court appearance sometime in November. See Winbrone dep. at pp. 53, 58. A Court date in November 2007, before Thanksgiving, was adjourned at the request of the ADA because she was waiting for a notarized statement from the brother of Ms. Winbrone's husband, stating that Mr. Winbrone had told his brother that he, in fact, had planted the gun in Jacqueline Winbrone's car so that she would get arrested and he could reunite with his family before his death without her interference. See Trunfio 2009 at ¶11; Winbrone dep. at pp. 61, 62-63.

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67 Plaintiff Winbrone testified that she called Mr. Marris's ACP voicemail every day between September 19, 2007 and November 2, 2007 and was never able to leave a message because the mailbox was full. See Winbrone dep. at pp. 35-36.

Plaintiff Winbrone never saw or spoke to Mr. Marris again after that pre-Thanksgiving 2007 Court appearance. See Winbrone dep. at p. 64. However, upon the application and motion by Mr. Marris, the charges against Ms. Winbrone were dismissed in the interest of justice on January 3, 2008. See Trunfio 2009 at ¶12.

After receiving an eviction notice in October, plaintiff Winbrone was evicted from her apartment before she was released on November 2, 2007. See Winbrone dep. at pp. 46-47, 48, 53. When she was evicted, all of her property in the apartment was seized. See id. at p. 83.

Plaintiff Winbrone was arraigned with counsel and therefore was not denied her right to counsel at arraignment. See Winbrone dep. at pp. 17-18. The remainder of plaintiff Winbrone's complaints are insufficient to establish that she was constructively denied the right to counsel. When viewed in the light most favorable to plaintiff Winbrone, plaintiff Winbrone alleges that she was constructively denied her right to counsel because (1) her attorney did not communicate with her enough and (2) she was held in custody on a felony with no prior criminal record because she could not make bail and therefore missed her husband's funeral and was evicted from her apartment.

First, during the course of his representation of plaintiff Winbrone, attorney Marris spoke to plaintiff Winbrone on the phone, see Winbrone dep. at pp. 23, 26, and met with plaintiff Winbrone in Court at least three times. See Marris dep. at pp. 88-89, 92-93, 96-98 ; Winbrone dep. at pp. 29-30. Attorney Marris obviously obtained enough information from plaintiff Winbrone to make a bail application, see Marris dep. at pp. 88-89; Winbrone dep. at pp. 29-30, provide the ADA information about plaintiff's husband admitting to planting the loaded weapon in plaintiff's vehicle, see Marris dep. at pp. 90-91, and obtain pre-trial release for plaintiff

Winbrone based on that information. See Marris dep. at pp. 97-98.

Apparently, since plaintiff Winbrone alleges that she was unable to reach attorney Marris by phone between September 13, 2007 and September 17, 2007 -- the day that her husband died -- and therefore the bail reduction hearing could have been done earlier, she alleges that she was constructively denied counsel. See Winbrone dep. at pp. 23-24. While plaintiff may have preferred more communication with attorney Marris, when viewed as a whole, there was sufficient communication during the period between arraignment and the date that her charges were dismissed -- when they spoke once on the phone, see Winbrone dep. at pp. 23, 26, and met in Court at least three times, see Marris dep. at pp. 88-89, 92-93, 96-98; Winbrone dep. at pp. 29-30 -- that she was not constructively denied counsel during that period. Zimmerman at *11.

Plaintiff Winbrone alleges that she was constructively denied counsel because she was not able to make bail and, as a result, missed her husband's funeral and was evicted from her apartment. Importantly, plaintiff Winbrone was represented by counsel at her arraignment when the initial bail was set. The fact that the Court set bail despite plaintiff having no prior criminal record, and setting it in an amount that plaintiff Winbrone could not afford, was not due to an absence of counsel. Additionally, upon plaintiff's telephone request, attorney Marris asked the Court clerk to schedule a bail reduction hearing, which was held on September 21, 2007. See Marris id. at p. 88. At that bail review, plaintiff Winbrone's bail was cut in half. See Marris dep. at pp. 88-89; Winbrone dep. at pp. 29-30. Plaintiff Winbrone still could not make bail. See Winbrone dep. at pp. 29-30. As a result, plaintiff's inability to make bail was not due to a constructive denial of counsel.

Based on this evidence, plaintiff Winbrone cannot meet her threshold burden and

establish that she was denied her right to counsel. See Kerwin aff. at Exh. K.

The plaintiffs must be held to their burden of proving that the named representative plaintiffs actually suffered a denial of their right to counsel and, then, prove that such alleged violations are illustrative of alleged Constitutional systemic actual or constructive denials of the right to counsel in Ontario, Schuyler, Onondaga, Suffolk and Washington Counties. They must connect the plaintiffs to their theories or proof, and they cannot do so. As discussed above at length, the plaintiffs cannot establish that any plaintiff suffered a Constitutional denial of the right to counsel. Having chosen the wrong plaintiffs, or the wrong Counties, to advance plaintiffs' attempt at "reform," plaintiffs' counsel should not be given a pass for their failure to produce evidence related to what actually happened to the plaintiffs and what is actually happening in the Counties. This is the path that the plaintiffs -- not the defendants -- have chosen, and the plaintiffs must be held to their burden under these self-created circumstances and not be permitted to muddy the record or create an irrelevant issue of fact by submitting and relying on evidence unrelated to the plaintiffs to the Five Counties. As demonstrated by the State defendants' submissions in support of their motion for summary judgment, and discussed herein, the delivery of criminal public defense services in the five defendant Counties meets or exceeds Constitutional standards. Therefore, on the law, the defendants should be granted summary judgment and the second amended complaint should be dismissed in its entirety.

C. Plaintiffs Cannot Establish That Any Alleged Denials of Counsel Experienced By Them Were Caused By Systemic Deficiencies

As discussed at great length above, the plaintiffs cannot establish that any of them were constructively denied the right to counsel. As a result, the defendants are entitled to summary judgment. However, even if the Court finds, *inter alia*, issues of fact as to whether the plaintiffs were

constructively denied their right to counsel, the plaintiffs cannot establish that any such denials were caused by widespread deficiencies in the indigent criminal defense systems in the Five Counties. Instead, to the extent that any alleged denials may have occurred, they were caused by the performance of attorneys or a failure by a particular Court to comply with the requirements of the Criminal Procedure Law.

Based on the complaint, the questions asked at depositions, and the thousands of documents produced during discovery, it is anticipated that the plaintiffs will rely on alleged proof mostly, or completely, unrelated to the plaintiffs, in an attempt to convince the Court that alleged system-wide Constitutional deficiencies in the representation of indigent criminal defendants in the Five Counties exist. However, plaintiffs' proffer will fail as a matter of law. They apparently hope to identify aspects of the public defense systems in the Five Counties that "could be better" and convince the Court that such issues rise to the level of a Constitutional failure and that prejudice to criminal defendants may be presumed. However, as the Court of Appeals acknowledged might be the case after factual development, "what is really at issue [here] is whether the representation afforded [the plaintiffs] was effective -- a subject not properly litigated in this civil action." Hurrell-Harring, at 15 NY3d at 23.

Plaintiffs may offer the Court statistics and scholarly opinions about the issues listed above in an attempt to demonstrate a breakdown of the public defense systems in the Five Counties so severe that indigent defendants are effectively going unrepresented. Such an attempt at using theoretic proof must fail because any alleged academic discourse about the provision of public defense services in the Counties, that is belied by the actual experience of criminal defendants in the defendant

Counties, is necessarily irrelevant. That is, first, the claim of constructive denial must be supported by proof; second, that claim is actually contradicted by the evidence.

As set forth above, and was clear from the questions asked at depositions and the thousands of documents requested by the plaintiffs, it appears that plaintiffs may attempt to convince the Court that the existence of issues, considered either singly or in conglomeration, namely (1) allegedly excessive caseloads, (2) lack of communication between attorneys and clients, (3) an alleged lack of experts, investigators and other resources, (4) attorney conflicts of interest, (5) unsupervised attorneys and (6) untrained or inexperienced attorneys, has created circumstances in the Five Counties in which indigent criminal defendants are being constructively denied counsel. However, the proof on these issues fails to establish a systemic constructive denial of the right to counsel in any of the Five Counties.

Moreover, plaintiffs cannot establish a constructive denial claim with respect to Ontario County because there are no plaintiffs in this case representative of the indigent criminal defense system in Ontario County. The two Ontario County plaintiffs who appeared for their depositions -- plaintiffs Loyzelle and Steele -- were represented by members of the Ontario County ACP which operated as that County's provider of indigent legal services at the time that the allegations contained in the second amended complaint occurred. However, since the commencement of this litigation, Ontario County has instituted a PD Office to provide indigent criminal legal services. There is no plaintiff in this case that is representative of the representation currently being provided in Ontario County under its current system. As a result, the second amended complaint fails to allege any systemic problems with the current public defense system in Ontario County.

1. Caseloads

Although caseloads that compel a public defense attorney to "choose between the rights of the various indigent defendants he or she is representing" constructively denies that attorney's clients of the right to counsel, In re. Edward S., 173 CalApp4th 387, 414 (Cal. App. 1st Dist. 2009), there are no bright lines to be drawn in determining the level at which a caseload becomes excessive. In United States v. Rundle, 434 F2d 1112 (3d Cir. 1970), the Third Circuit noted that caseloads of 600-800 cases per year, and 40-50 cases per day could be the reason for an attorney not being able to provide competent representation. Id. at 1115. However, in Griffin v. Aiken, 775 F2d 1226 (4th Cir. 1985), the Court found that counsel who had between 100 and 140 other cases pending at the same time as the defendant's case did not deny his client the right to counsel. Id. at 1229-30.

There is no evidence that the caseloads in the Five Counties are excessive or affect attorneys' representation of clients. Plaintiffs allege that any indigent criminal defense attorneys who carry caseloads in excess of the 1973 national caseload standards -- namely in excess of 400 misdemeanors or 150 felonies annually -- run the risk of denying counsel to their clients. Yet, of significance, OILS Director, William Leahy -- a strong advocate for improving the quality of legal services provided to the indigent -- testified that that the national standards for caseloads are not "magical" because the types of cases being handled necessarily influences how much of a caseload an attorney can handle and still provide quality representation, and that pending caseloads, as opposed to annual caseloads, are better indicators of an attorney's ability to provide quality representation. See Leahy dep. at p. 132. The touted national caseload standards of 400 misdemeanors/150 felonies yearly are not indicative of what an attorney's caseload is at any

given time. See Leahy dep. at pp. 132-35. Director Leahy testified that such inflexible numbers "are unintelligible by definition. They don't take account of vastly different circumstances under which cases come up nor the efficiency of the local Court system nor the plea bargaining practices of the local prosecutor nor a million other things." See Leahy dep. at pp. 132-33.

Notwithstanding, OILS endeavored to examine the caseloads of the State's institutional indigent criminal defense providers – PD Offices, LASs and Conflict Defender Offices[68] – using self-reported County data. According to that study, Ontario, Schuyler and Washington[69] Counties are in compliance with the national standards. The proof in this case also establishes that the caseloads in these three Counties fall below what the plaintiffs contend is some kind of Constitutional benchmark.

In Ontario County, PD Leanne Lapp endeavors to keep each APD's caseload at or under 400 misdemeanors/violations and 150 felonies per year, see Lapp dep.[70] at p. 112, and also tries to keep the caseloads of the APDs as even as possible. See id. at p. 113. She monitors caseloads by periodically having her secretary run reports of how many cases each APD has handled and is handling. See id. at p. 119. When PD Lapp notices that an APD's caseload is getting too large, she adjusts assignments. See id. at pp. 131-32. As recently as November 1, 2012, PD Lapp rearranged what Courts the APDs covered, in part, to redistribute the caseloads because two of the justice Court APDs were approaching 400 misdemeanors/violations for the year. See id. at p. 127.

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68 The study did not include the caseloads of ACP panel members. See Kerwin aff. at Exh. X.
69 The data on Washington County is not as current as that of the other Counties. See Kerwin aff. at Exh. X.
70 "Lapp dep." refers to the transcript of the October 26, 2012 deposition of Leanne Lapp, the relevant portions of which are annexed as Exhibit F to the Munkwitz affirmation.

At the time of his deposition in October 2012, Ontario County APD Lorge had handled approximately 100 cases that year and had approximately 60 open cases. See Lorge dep.[71] at p. 64. Also in October 2012, APD Porter had approximately 100 open misdemeanor cases, see Porter dep.[72] at p. 23, and APD Conklin had 118 open misdemeanor cases. See Conklin dep.[73] at p. 30.

In Schuyler County, the two attorneys in the PD Office handle approximately 400 cases per year, see Roe dep.[74] at p. 96, and the Conflict Defender handles less cases than the attorneys in the PD Office. See Corradini dep.[75] at p. 42. In Washington County, there are twenty-six local Courts, and each attorney in the PD Office is assigned specific local Courts for handling. See Mercure dep. at pp. 20-23; DeClaro-Drost dep. at p. 14. The PD, himself, has one or two felonies open at any given time and handles about two cases a month in one town Court. See id. at 21-22. The Chief APD handles primarily felonies and a few local Court assignments, see Mercure dep. at pp. 19-20, and three full-time APDs cover local Courts, but generally follow a case that moves up to County Court. See id. at pp. 21-22. Another part-time APD also covers some local Courts. See id.

Each APD's assignments are adjusted as needed to ensure even caseloads. See Mercure dep. at p. 100. At least twice a year APDs are asked to report on their case load so that the PD can assess assignments and ensure that nobody is overloaded. See Mercure dep. at pp. 129-30. Chief APD Morris typically has about 35 to 45 open cases, with approximately eighty percent of them being felonies. See Morris dep. at p. 34. The other APD who testified during discovery

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71 "Lorge dep." refers to the transcript of the October 29, 2012 deposition of Jonathan Lorge, the relevant portions of which are annexed as Exhibit G to the Munkwitz Affirmation.
72 "Porter dep." refers to the transcript of the October 30, 2012 deposition of Bradley Porter, the relevant portions of which are annexed as Exhibit to the Munkwitz Affirmation.
73 "Conklin dep." refers to the transcript of the October 30, 2012 deposition of Patrick Conklin, the relevant portions of which are annexed as Exhibit H to the Munkwitz Affirmation.
74 "Roe dep." refers to the transcript of the October 24, 2012 deposition of Wesley Roe, the relevant portions of which are annexed as Exhibit G to the Rutnik Affirmation.
75 "Corradini dep." refers to the transcript of the October 25, 2012 deposition of Paul Corradini, the relevant portions of which are annexed as Exhibit E to the Rutnik Affirmation.

stated that he generally carries approximately a dozen open felony cases, and 60 - 70 misdemeanor cases. See Cioffi dep. at p. 26. However, that caseload includes several Aggravated Unlicensed Operation of a Motor Vehicle ("AUO") charges, which are frequently adjourned so that a defendant can clear up the underlying issue, such as payment of fines, and do not require a lot of investigation or time. See id. at p. 25.

The ABA caseload standard of 400 misdemeanors is not of particular relevance to Suffolk County, where between 25 percent and 40 percent of an attorney's caseload consists of misdemeanor aggravated unlicensed operation charges, which are resolved with very little work necessary. See Caponi dep.[76] at p. 170. Therefore, LAS considers an attorney's ability to handle a high volume of cases, the types of cases that she or he is handling as well as the number of cases that attorney is handling when monitoring attorneys' caseloads. See id. at pp. 170-71. LAS attorneys in Suffolk County District Court appear before one judge in one Courtroom, dealing with the same clients over and over again. See id. at p. 52. As a result, each District Court LAS attorney is able to triage matters and efficiently handle each one, despite a higher caseload in District Court. See id. at p. 52. Notwithstanding, the LAS Director of Training and Education tracks the attorneys' misdemeanor caseloads by having the calendar from each Courtroom printed on a monthly basis. See id. at p. 158. If there is a substantial spike in the number of LAS cases in one Courtroom, LAS will assign another LAS attorney to that Courtroom. See id. at p. 160.

Suffolk County LAS assigns each County Court attorney to two half parts so that each judge's LAS caseload is handled by two attorneys relatively equally. See Vitale dep. at p. 35. The two LAS attorneys assigned to a County Court judge's Courtroom are familiar with each other's

76 "Caponi dep." refers to the transcript of the October 17, 2012 deposition of Sabato Caponi, the relevant portions of which are annexed as Exhibit G to the Dvorin Affirmation.

cases and can cover the case if necessary. See id. at pp. 35-36. LAS attorneys in a judge's Courtroom are alternately assigned cases so that the caseloads between them stay relatively equal. See id. at pp. 40-41. LAS monitors the County Court caseload monthly and adjusts them if necessary to equalize them. See id. at pp. 40, 42-43; Schick dep. at pp. 12-13. The caseloads among the LAS attorneys covering the County Courts can differ because some judges move cases along more quickly, while others drag them out. See Vitale dep. at p. 41. However, the average caseload per LAS attorney in County Court is approximately 50 open cases, all of which are at different stages of the process. See Vitale dep. at p. 41; Schick dep. at pp. 11-12. Out of the average 50 cases, approximately 10 could be violations of probation, which are not very labor intensive. See Vitale dep. at p. 42. In addition, another 15 of the open cases could be awaiting sentencing, and therefore the labor-intensive part of the case is over. See id. at p. 42. As a result, the LAS County Court attorneys average approximately 25 cases that receive daily attention. See id.. at p. 42; Schick dep. at p. 12. Generally, case assignments are distributed evenly, unless an extremely serious case comes in. In those circumstances, the case is assigned to an attorney interested in the subject matter or one who has more seniority. See Schick dep. at 16.

Caseloads do not keep LAS attorneys from providing adequate and Constitutional representation. See Gomes dep. at pp. 57-58; Monastero dep. at pp. 83, 85. If an LAS attorney gets bogged down because he or she has some particularly difficult cases, LAS will assign the next batch of cases that would typically be assigned to that attorney to her or his Courtroom partner. See Vitale dep. at p. 46. When an attorney is preparing to go on trial, she or he will be relieved from covering a Courtroom to devote her or his time to trial preparation. See id. at p. 46.

In Onondaga County, ACP attorneys may not be assigned more than sixty felony cases in a one year time period, excepting assignment on new charges for defendants an attorney currently represents. See Captor 2009 at ¶17; Captor dep. at p. 92. There is no similar cap on the number of misdemeanor cases that an ACP attorney can handle. See Captor 2009 at ¶18; Captor dep. at p. 93. Instead, the ACP relies on each attorney's professional judgment and considerations of ethical standards regarding client representation for the self-monitoring of his or her caseload. See Captor 2009 at ¶18. Pursuant to those considerations, it is expected that an attorney will refuse a case if he or she does not have the time to devote to it. See Captor 2009 at ¶19; Captor dep. at p. 96. This guideline is communicated to ACP attorneys in the Appendix of the ACP handbook where attorneys are directed as follows:

> Experience and Caseload
>
> 1. Do not accept an assignment unless you have available sufficient time, resources, knowledge and experience to offer quality representation to the client in that particular matter.
>
> 2. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw...

See Captor 2009 at ¶20; McGowan aff. at Exh. M. In fact, it has been stated that a "public defender who believes there is a genuine basis upon which to make such withdrawal motion, but fails to do so, participates in the denial of his or her client's Sixth Amendment rights." Jones at 243.

Testimony from ACP attorneys shows that the Experience and Caseload directive is being followed. For example, David Zuhker and Thomas Marris, both of whom devote 70% of their legal practice to criminal defense work, have never refused an assignment because of their caseloads. See,

Zuhker dep. at p. 88; Marris dep. at p. 124.[77] Similarly, Donald Kelly, a practitioner who only takes criminal cases, has never refused an assignment. See, Kelly dep. at p. 7.[78] Attorneys are presumed to follow the ethical standards and rules of the legal profession, Matter of Rowe, 80 NY2d 336, 340 (1992), and therefore, it must be trusted that these ACP attorneys, as well as all others, self-monitor their caseloads to ensure that they do not become too busy to provide clients meaningful and effective representation.

This evidence of the actual caseloads of the indigent criminal defense attorneys in the Five Counties establishes that (1) the caseloads in the Five Counties are not excessive and (2) the representation provided to indigent criminal defendants is not negatively impacted by caseloads. In addition, as discussed above, no plaintiff's representation was affected in any way by an attorney's caseload.

Based on the evidence in the record of this case, the plaintiffs cannot establish that the indigent defendants in the Five Counties are at risk of being denied the right to counsel because of excessive caseloads.

2. Communication

Throughout the testimony of the twelve plaintiffs who appeared for depositions, it was apparent that the plaintiffs' chief complaint was that their appointed attorneys did not communicate with them to the extent that they wished. However, "the Sixth Amendment does not guarantee a 'meaningful relationship between an accused and his counsel.'" Knight at *53.

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77 "Zuhker dep." refers to the transcript of the September 26, 2012 deposition of David Zuhker, the relevant portions of which are annexed as Exhibit L to the McGowan Affirmation. "Marris dep." refers to the transcript of the October 4, 2012 deposition of Thomas Marris, the relevant portions of which are annexed as Exhibit J to the McGowan Affirmation.

78 "Kelly dep." refers to the transcript of the October 2, 2012 deposition of Donald Kelly, the relevant portions of which are annexed as Exhibit K to the McGowan Affirmation.

"There is no required minimum number of meetings between counsel and client." Id. at fn 33. "To require a particular number of meetings between counsel and client would establish a mechanical rule" contrary to the flexibility specifically provided in Strickland. Byas v. Keane, 1999 US Dist LEXIS 12315, *14 (SDNY 1999).

Only a "a complete breakdown in communications[79]" between an attorney and client can violate the Sixth Amendment. Dolab v. Donelli, 2010 US Dist LEXIS 137406, *56. (EDNY 2010). Courts have found that as long as an attorney and client can speak at Court appearances, the communication is Constitutionally acceptable. Ping v. Willingham, 746 FSupp2d 496, 500 (SDNY 2010) (defendant's claim that counsel inadequately consulted with her before and during trial was rejected because she was present with counsel all throughout the trial); U.S. v. Nuclovic, 2006 US Dist. LEXIS 90113, 37-39 (SDNY 2006).

In Zimmerman v. Davis, 2011 US Dist LEXIS 34490 (ED Michigan 2011), the criminal defendant alleged that his (retained) attorney only met with him "for brief periods of time before trial," never took defendant's phone calls, never responded to defendant's letters and never met with the client in jail to "discuss evidence and trial strategy." Id. at *6. Since the Cronic standard "applies only in cases in which a lawyer fails to carry out his most basic duties as an advocate," defendant was not found to have been constructively denied the right to counsel because counsel met with the defendant at least four times "in the attorney interview rooms in the bullpen area," and met with the defendant in jail one time. Id. at *10. The Court found that, since counsel filed a notice of alibi defense and argued that defense at trial, argued two pretrial

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79 In Stenson v. Lambert, 504 F3d 873 (9th Cir. 2007) the Court held that there was not a complete breakdown in communication between trial counsel and client even though they had developed "irreconcilable differences" because the communication between them "remained open" since they both communicated with the second chair attorney who acted as the conduit for communication between attorney and client. Id. at 887.

motions and cross-examined the prosecution's witnesses, he necessarily had to have discussed the merits of defendant's case with the defendant at some point. Id. at *11. Although the defendant "clearly desired more contact with his retained attorney" the Court held that the defendant was constructively denied counsel. Id.

In Scott v. McDaniel, 146 Fed Appx 877, 877 (9th Cir. 2005), the defendant and his assigned counsel "were involved in an irreconcilable conflict and could not communicate." Id. The Court held that the inability to communicate was not a constructive denial of defendant's right to counsel because "an exchange of information" between the defendant and counsel did take place. Id. at 878. Specifically, the defendant was able to tell counsel his version of events, discuss witnesses, trial strategy, whether the defendant should testify and whether a juror should be removed. Id. In addition, counsel's investigator was able to interview witnesses. In these circumstances, defendant was not denied his right to counsel even though he did not otherwise communicate with his attorney. Id. at 879.

As discussed above, none of the plaintiffs experienced a lack of communication with counsel that even approached the level of an unconstitutional total breakdown of communication. Although they all would have preferred more communications with their attorneys, it was not Constitutionally required. Zimmerman at **10-11. Notwithstanding, all Five Counties provide for more than adequate methods of communication between indigent criminal defense attorneys and their clients.

Pursuant to Ontario County PD Office policy, APDs are to visit an incarcerated client within 24 hours of assignment, and then visit him or her every two weeks even if there is nothing new to report. See Lapp dep. at p. 213; Munkwitz aff. at Exh. R. Inmates at the Ontario County

Jail may fill out a slip requesting an attorney visit, and those requests are received by the PD Office two times per day. See Porter dep. at p. 84. PD Lapp monitors every inmate visit request that is received from the Jail and ensures that each one is timely acted upon. See Lapp dep. at p. 216. APDs are also required to return all calls and answer all letters from clients. See id. at p. 213.

It is the policy of the Schuyler County PD Office that the Chief PD and APD meet with their clients immediately after assignment. See Mosher 2008 at ¶12; Roe dep. at p.195. The Schuyler County PD Office is located on the same street block as the County jail, and the close proximity affords the defense attorneys daily access to incarcerated clients, if necessary, and permits attorneys to immediately respond to incarcerated clients if requested. See Mosher 2008 at ¶15. The jail gives attorneys access to their clients 24 hours a day. See Roe 2009 at ¶9.

There is also a direct telephone line from the County jail to the PD Office that inmates can use at any time to contact their attorneys for questions and/or requests to meet. See Mosher 2008 at ¶15. If the secretary is not able to take the call, client calls are directed to an answering machine. See Orr dep. at p. 150. If a client is housed in another facility, the office is set up to accept collect calls. See id. at p. 151. Generally, if a client calls from the jail, an attorney will visit the client the same day or the next one. See id. at p. 152. The Public Defender and his staff work diligently to return phone calls and make sure their jobs are done properly. See id. at p. 93. In an effort to keep in better touch with its clients, the Public Defender's office keeps a record of clients' email addresses and cell phone numbers for text messaging. See Orr dep. at p. 70.

In Washington County, the PD Office is equipped with phone lines that allow incarcerated clients to call from the Washington County Jail without having to call collect. See DeClaro-Drost

dep. at p. 43; Mercure dep. at p. 116. The PD Office has an answering machine for clients to leave messages. See DeClaro-Drost dep. at p. 85. APDs regularly contact their clients by phone, office visits, jail visits and in Court. See Morris dep. at p. 68; Cioffi dep. at pp.37-38. PD Mercure insists that his APDs visit and/or return the phone calls of their clients in jail. See Mercure dep. at p. 116.

As an example of the level of communication between APD and client, when APD Cioffi is assigned a case, he talks to the client, to the DA and, if the client is incarcerated, to Alternative Sentencing.[80] See id. at p. 40. These conversations sometimes lead to a client being released on house arrest instead of bail, and therefore reduces the length of time spent incarcerated. See id. at p. 44.

In Suffolk County, LAS attorneys communicate with their clients by telephone, in Court, at jail and by video hookup. See Vitale dep. at p.62. At arraignment, each defendant is given a slip of paper containing the LAS telephone number, the assigned attorney, the assigned judge and the next Court date. See id. at pp. 63-64. Clients are able to call directly to their assigned LAS attorneys and leave voicemails if the attorney is not available.[81] See id. at p. 63.

LAS attorneys assigned to a client who has been remanded visit the client in jail very soon after the arraignment. See id. at pp. 62-63. Inmates in custody in the Suffolk County Jail may make telephone calls whenever they are out of their cells from 6:00 am to 10:00 pm to anyone that is subscribed to a third-party telephone service. See McCarthy dep. at pp. 47-49. Inmates who do not have access to the third-party telephone service may call their attorneys using the telephones in the rehabilitation unit of the Jail. See id. at pp. 49-50. Inmates are also allowed to send and receive

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80 The Alternative Sentencing Program is a Washington County program that interviews incarcerated criminal defendants and then makes a recommendation as to whether the person is a high, moderate or low flight risk and whether they're eligible for house arrest or electronic monitoring. See Cioffi dep. at pp. 43-44.

81 Some clients call more than five times per day. See Vitale dep. at p. 63.

mail. See id. at p. 51. Attorney visits at the Suffolk County Jail are permitted from 8:30 to 4:30 on weekdays, and by appointment on weekends. See id. at pp. 26-27. There are no time restraints on attorney visits. See id. at pp. 25-26. In addition, inmates are permitted to receive documents from their attorneys and keep the documents in their cells. See id. at pp. 57-58.

To communicate with clients who are in custody using the video conferencing system, the LAS attorney calls the Sheriff's Department and schedules a time for the conference, which usually occurs within twenty minutes. See Vitale dep. at p. 67. The video conferencing system was instituted as a way to communicate with in-custody clients between arraignment and clients' next Court date. See Caponi dep. at pp. 120-26. Since recently, LAS attorneys sat in arraignment Court for one week on a rotating basis, making post-arraignment contact with new clients arraigned during that week difficult to impossible. See id. at pp. 119-20. Therefore, LAS has one attorney dedicated as the "video-conferencing attorney" to contact each in-custody LAS client, via videoconference, the day after her or his arraignment to get information about the case. See id. at p. 120. To initiate a video-conference, an attorney simply calls the jail and tells them with whom he or she wants to speak. The jail advises the inmate, sets up the call and brings the inmate to the video-conference room so the inmate can make the call. See Mitchell dep. at p. 286.

In Onondaga County, the ACP has a voice mail system so that clients can leave messages for their assigned lawyers. See Captor 2009 at ¶36; Captor dep. at p. 109. Each assigned counsel member has his or her own voice mailbox so that any messages left by clients are kept confidential and not heard by any one other than the assigned attorney. See Captor 2009 at ¶37; Captor dep. at p. 109. This voice mail system was set up to eradicate problems caused by the Onondaga County Jail

requiring all calls from inmates to be made collect using several different providers, some of which were unable to accept collect calls from the jail system. See Captor 2009 at ¶38. ACP does reimburse attorneys for collect calls accepted from the jail, but the voice mailboxes are free calls from the jail, see Captor dep. at p. 109, and relieves the ACP attorneys from having to navigate the confusing telephone billing issues. See Captor 2009 at ¶38. Additionally, panel attorneys are provided with a list of telephone numbers that directly reach every pod in the Onondaga County Jail so that attorneys can leave messages for clients. See Klein dep. at pp. 99-100.

Each housing unit in the Jail has a telephone, which inmates can use to make a collect call at any time. See Greco dep. at pp. 16, 18, 21. In addition, an inmate may fill out a "referral form" to make a non-collect call from another telephone, see Greco dep. at pp. 22-23, and no record is kept of how many times an inmate submits a referral form. See id. at p. 50. The Jail posts a list of telephone numbers that are a free call from the Jail, including calls to the ACP voicemail system. See id. at pp. 24-27. There is also a mailbox in every housing unit in the jail, and mail gets picked up every day except weekends and holidays. See id. at pp. 55, 60.

Based on the evidence in the record of this case, the plaintiffs cannot establish that the indigent defendants in the Five Counties are at risk of being denied the right to counsel because of the inability of indigent criminal defendants to communicate with their attorneys in a Constitutionally sufficient manner.

3. Conflicts of Interest

Only an actual, as opposed to a potential, conflict of interest constructively denies a defendant the right to counsel. Cuyler v. Sullivan, 446 US 335, 350 (1980). "An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation,

the attorney's and defendant's interests 'diverge with respect to a material factual or legal issue or to a course of action.'" Knight at *38. See also People v. Payton, 100 AD3d 786, 787 (2d Dept 2012).

The individual plaintiffs cannot establish any substantive conflict issue with respect to their own representation -- let alone a systemic constructive issue in any of the counties. As discussed above, no representative plaintiff, other than Candace Brookins -- who failed to attend her deposition and for whom allegations in the second amended complaint should be stricken -- was initially represented by an attorney who previously represented a witness in plaintiff Brookins' case. See Kerwin aff. at Exh. A, ¶223. In any event, there are no allegations, and is no proof, that the first attorney assigned to represent plaintiff Brookins had an actual, as opposed to a potential, conflict of interest. Therefore, it would be found that plaintiff Brookins' claim of a conflict of interest did not constructively deny plaintiff Brookins the right to counsel if it was still before the Court. In addition, none of the plaintiffs that appeared for their depositions, other than plaintiff Habshi, were represented by the conflict system in his or her County. As a result, there is no plaintiff representative of problems with the conflict determination or representation in the Five Counties except, arguably, Washington County.

Notwithstanding, all Five of the Counties have conflict systems in place. In Ontario County, the APD to whom a case is assigned is responsible for identifying any conflicts involved with the representation of a defendant. See Lapp dep. at p. 85. To do so, the APD is expected to identify any co-defendants and learn the identities of informants, witnesses and other people involved in the case. See id. at pp. 84-85. Moreover, the Ontario County PD Office Case Management Software ("CMS") assists in identifying any potential conflicts. See id. at pp. 86-87. An office specialist inputs the

complainant and witness information for each case into the database, and is alerted if the PD Office has an open case with any of those individuals. See id.

Ontario County contracts with the Ontario County Bar Association annually to provide conflict defense services through the Ontario County ACP, with the County Administrator signing the contract on behalf of the County. See Garvey dep. at p. 19. Once a conflict is identified by the PD Office, an office specialist sends the case to the ACP to assign representation for that defendant by faxing the ACP that person's eligibility and charging documents. See Lapp dep. at pp. 88-89. As of October 2012, approximately 11% of the cases that came into the PD Office in 2012 constituted a conflict. See Lapp dep. at p. 44.

In Schuyler County, attorneys in the PD Office are responsible for identifying any conflict of interest in a case. See Roe dep. at p. 84. If a conflict is identified, then the case is passed onto the Schuyler County Conflict Defender.[82] See id. at pp. 57, 84. The Conflict Defender's caseload has never been such that he was too busy to take on a conflict case. See Corradini dep. at p. 24. The current Conflict Defender has been practicing law for over 40 years, with experience handling criminal cases at the U.S. Department of Justice, the Chemung District Attorney's Office, the Chemung PD Office, and in private practice. See Corradini dep. at p. 10. It is a less than full time position that pays $30,000 per year plus expenses. See id. at pp. 9, 11. The Conflict Defender is independent of the PD Office and often serves as the adversary to the PD in family Court cases. See Roe dep. at p. 57. Sometimes the Conflict Defender serves as counsel for a co-defendant of a PD criminal client. See id. at p. 57. The Schuyler County Conflict Defender handles fewer cases than

[82] If the Conflict Defender has a conflict or is otherwise unable to take the case, then the case is referred to an attorney on the assigned counsel list. See Roe dep. at pp. 58, 120. Assigned counsel attorneys take approximately 60-70 cases a year in Schuyler County, a number that has risen since the 2008 change in administration and an overall increase in persons applying for the services of the Public Defender. See Orr dep. at p. 63.

the PD Office, but they include a broad array of cases in a variety of Courts within Schuyler County. See id. at p. 42.

Suffolk County contracts with the Suffolk County Bar Association to provide conflict representation through an ACP (also referred to as an "18b panel"). See N.Y. County Law 722(3). To identify conflicts of interest between LAS attorneys and clients in Suffolk County, each LAS attorney runs his or her caseload through the LAS WebCrims software, which alerts attorneys if a client has another case pending. See Caponi dep. at p. 180. Attorneys also run the names of co-defendants through WebCrims to identify any conflicts. See id. at p. 181. When a conflict is identified, it is brought to the judge's attention by the LAS attorney who asks that an ACP panel member be assigned. See id. at p. 157. When a conflict is identified by LAS, a request is made to the judge to appoint an attorney from the Suffolk County ACP panel to represent the defendant. See Besso dep. at p. 37.

In Washington County, if there is a conflict of interest prohibiting representation of a client, the PD Office administrator assigns an outside attorney from the Washington County ACP panel. In order to get on that list, the attorney must provide a resume with their experience in criminal law. See DeClaro-Drost dep. at p. 49, 54. When there is a conflict, PD Mercure and the office administrator select an appropriate attorney from a list of eligible attorneys maintained by the office. See Mercure dep. at p. 102. Attorneys are chosen based upon their appropriateness for a case. For example, an attorney who does not handle felonies would not be assigned a felony case. See id. at pp. 102-103.

In Onondaga County, the individual private attorneys assigned cases through the ACP[83] are responsible -- as they are for every client, including retained ones -- for determining whether he or she has a conflict of interest representing a particular client on a particular matter.[84]

Based on the evidence in the record of this case, the plaintiffs cannot establish that the indigent defendants in the Five Counties are at risk of being denied the right to counsel because of a systemic lack of conflict standards.

4. Experts, Investigators and Other Resources

"The United States Supreme Court has said that counsel need not undertake exhaustive witness investigation. The question is not 'what is prudent or appropriate, but only what is Constitutionally compelled.'" Drake v. LaValley, 2010 US Dist LEXIS 19788, * 32 (NDNY 2010). As stated above, what is Constitutionally compelled to satisfy that an attorney has provided Constitutionally adequate representation is a duty "to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 US at 691. Strategic decisions about what to investigate, and to what extent, are analyzed under the ineffective assistance of counsel standard, and not the Cronic constructive denial of counsel standard. Ramirez v. US, 898 FSupp2d 659, 665-66 (SDNY 2012).

In People v. Jones, 186 CalApp4th 216 (Cal. App. 1st Dist. 2010), defendant's attorney did not use an investigator before defendant's suppression hearing because his office only had one investigator for twelve attorneys so he and the investigator had to "prioritize" which cases

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83 For example, plaintiff Love's attorney testified that he performs conflict checks as soon as possible after he receives an assignment using case management software. See Zuhker dep. at p. 88.

84 Specifically, it is expected that an ACP attorney "shall not represent a client if a reasonable lawyer would conclude that either: (1) the representation will involve the lawyer in representing different interests; or (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, property or other personal interests." See NY Rule of Professional Conduct 1.7(a).

would get investigative services. Id. at 229. As a result, defendants facing charges more serious than those facing the defendant got the services of the investigator. Id. at 239. The Court found that counsel's failure to have a trained investigator interview witnesses and take professional photographs constituted ineffective assistance of counsel. Id. at 242. In addition, the Court held that

> [t]o the extent [counsel's] failure to seek investigative assistance was the result of the excessive caseload of the sole investigator made available to the county, [counsel's] deficiency consisted of his failure to file a motion with the trial Court requesting permission to withdraw from the case on that basis and to pursue appellate review if the motion was denied.

Id. "A public defender who believes there is a genuine basis upon which to make such withdrawal motion, but fails to do so, participates in the denial of his or her client's Sixth Amendment rights." Id. at 243. However, once this Constitutional deficiency was identified, the Court applied the Strickland standard. Id. Such situation was not such that prejudice could be presumed.

However, constructive denial of counsel based on an attorney's failure to investigate has been found in cases where (1) attorneys did not do any investigation because they did not think that it was required because the client did not want their representation, Apple v. Horn, 250 F3d 203 (3d Cir. 2001)[85] and (2) an attorney was unable to do any investigation because of his or her own excessive caseload or a lack of resources, such as staff or funding. State v. Peart, 621 So2d

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85 In Apple v. Horn, the Third Circuit held that the defendant was constructively denied counsel during the period between being appointed counsel and the Court accepting defendant's waiver of counsel because his appointed lawyers did no investigation into defendant's competency to execute such a waiver. Appel, 250 F3d 203, 216-17 (3rd Cir. 2001). Specifically, before the competency hearing, the appointed attorneys never spoke to anyone or obtained any records about the defendant's background or history and failed to provide the Court-ordered psychiatrist who met with the defendant and testified at the hearing with any information, at all, about the defendant. Id. at 215-216. Instead, they "'abandoned their duty to both the Court and their client when they decided not to conduct any investigation.'" Id. at 216.

780, 784, 789 (La 1993).

There is no evidence in this case that the public defense attorneys who represented the representative plaintiffs were denied the services of an expert or investigator or any other necessary resource any time that they requested one, or did not seek the use of an investigator or expert for reasons other than tactical ones. In Ontario County, the PD Office budgets for experts, and PD Lapp makes the final decision on whether an expert should be retained on a case. See Lapp dep. at p. 223. The PD Office has never been unable to retain an expert because of a lack of funds. See id. When an APD wishes to use an investigator on a case, she or he gives a written request to an investigator on staff, who then performs the requested investigative services. See Lorge dep. at pp. 63-64. The Schuyler County PD Office has funds available for an investigator to investigate any criminal or family Court matters at the request of the Chief PD or APD. See Mosher 2008 at ¶16; Roe dep. at pp. 125-126. The Public Defender's budget provides for expert services. See Mosher 2008 at ¶17.

In Washington County, all APDs are authorized to hire private investigators, see Mercure dep. at pp. 90-91, and are also able to hire experts, translators and, if needed, immigration attorneys. See id. at pp. 90-95. The PD Office receives funding from OILS and, in 2012, received $12,000 for experts, investigators, and CLE training. See id. at p. 86. If additional funding is required to hire an investigator or an expert a request must be made to the Board of Supervisors, and no such request has ever been denied. See Morris dep. at pp.87, 95. The Board understands that these needs may arise and will approve reasonable requests. See id. at p. 95.

In the 2011-12 period, the PD Office hired investigators on approximately a dozen occasions. See Mercure dep. at p. 94. In 2012, the PD Office contracted for investigative services on three

high-profile cases: a murder case, an arson case, and a rape case. See DeClaro-Drost dep. at p. 38. In one recent high profile case, PD Mercure had an "open checkbook" from the Board and spent $10,000 for an additional counsel. See Mercure dep. at p. 96.

In Suffolk County, LAS has approximately Five investigators on staff. See Mazzola dep. at p. 71; Caponi dep. at p. 143. An LAS attorney submits a written request for the use of an investigator, and those requests are never denied. See Mazzola dep. at p. 72; Caponi dep. at p. 144; Vitale dep. at p. 55; Monastero dep. at p. 148. There are no requirements for, or limitations on, the use of an expert. See Caponi dep. at pp. 144-45. The investigators on the LAS staff are able to satisfactorily handle all of LAS's needs. See Vitale dep. at p. 53. For an 18-b attorney to use an investigator, she or he makes an application to the Court. See Besso dep. at p. 91. As a resource for ACP attorneys, the Suffolk County ACP administrator maintains a list of investigators who have been screened and interviewed and approved by the Plan. See id. at pp. 89-90. However an ACP attorney may also hire an investigator not on the approved plan. See id. at p. 90. Attorneys on the ACP panel hire and use investigators frequently. See id. at p. 134.

Both Suffolk County LAS and ACP attorneys apply to the Court for permission to hire an expert under County Law 18-b, so expert services are paid out of the ACP panel budget and not out of the LAS budget. See Mazzola dep. at pp. 101-02, 104-05; Caponi dep. at p. 145; Besso dep. at pp. 90-91, 165-66. The ACP administrator also maintains a list of experts on its website as a resource for indigent defense attorneys. See Besso dep. at p. 91. Although the statutory cap for expert services is $300, that cap has not been imposed on Suffolk County LAS for twenty years or more. See Vitale dep. at p. 53. No LAS requests to County Court for experts have been denied. Seeid. at p. 54.

In Onondaga County, there is no known instance of a defendant being denied investigative or expert services by the Court. See Captor 2009 at ¶24; Captor dep. at p. 288; Zuhker dep. at p. 94; Marris dep. at pp. 70-71. As in Suffolk County, whether expert, investigative, interpreter or social worker services can be retained on behalf of a defendant represented by the ACP is determined by the Court upon an ex parte application of the attorney assigned. See Captor 2009 at ¶21; Captor dep. at pp. 277-78, 282-83, 290. If such services are deemed necessary to a client's case, the assigned attorney submits an ex parte application for expert services and a pre-authorization form and affidavit in support of authorization to the Court for consideration. See County Law §722-c; Captor 2009 at ¶22; Captor dep. at pp. 277-78, 282-83, 290; Zuhker dep. at pp. 93-94. After completion of the approved services, the original authorizations, as well as a sworn statement of expert services, are submitted to the ACP, see Captor dep. at pp. 283-84, and the Executive Director then reviews the submission and makes a payment recommendation to the Court, see id. at p. 284, which fixes compensation. See Captor 2009 at ¶23; Kelly dep. at p. 101. The ACP always recommends that payment be made as long as the attorney follows the proper procedure. See Captor dep. at p. 287.

There is also no evidence in this case that any of the indigent criminal defense providers in the Five Counties lack the resources necessary to provide effective and meaningful representation. To the contrary, in Ontario County, the PD Office has a library stocked with legal research materials and a Westlaw account accessible by all attorneys. See Lapp dep. at p. 218. In addition, PD Lapp sends around new relevant appellate decisions to the APDs. See id. The PD Office has used grant money to improve the Spanish speaking skills of APD Morrow. See id. at p. 220. One of the investigators in the Office also has some Spanish speaking skills,

and an office staff member knows some sign language. See id. PD Lapp has a source to call if other language interpreters are needed. See id.

The Schuyler County PD Office has a Lexis account for research. See id. at p. 213. Books commonly used in criminal defense and family Court work, like "Gilbert's", the "yellow book", and the "gray book" are updated yearly for the attorneys by the Schuyler County PD office. See Mosher dep. at p. 42. The PD's budget provides for expert services, equipment and criminal defense case management software ("CMS"), which allows for the more efficient and effective representation of Schuyler County indigent defendants. See Mosher 2008 at ¶17.

In Washington County, the PD Office has a Westlaw account and all of the APDs have access to it. See Mercure dep. at pp. 89-90. The County also pays for CLE materials and research materials for the PD Office staff. See id. at pp. 97, 99. Additionally, the Board recently added two 15 hour/week attorneys to the PD Office to help provide Court coverage in various town Courts over the County. See Hayes dep. at p. 83. Despite major cuts in County jobs, none of the staff reductions over the last four years have come from the PD's Office. See Hayes dep. at p. 84.

In Suffolk County, LAS attorneys do not feel that they lack time or resources to properly represent their clients, see Schick dep. at pp. 43-44, and LAS has enough attorneys to cover the County Courts and prefers not to have any more. See id. at pp. 55-56. LAS attorneys also have access to Westlaw. See id. at pp. 61-62. In Onondaga County, the ACP attorneys utilize the resources of their private offices because they treat their ACP clients the same as retained clients.

Based on the evidence in the record of this case, the plaintiffs cannot establish that the indigent defendants in the Five Counties are at risk of being denied the right to counsel because

of an unconstitutional lack of resources.

5. Supervision

As noted above, the Court of Appeals emphasized that any claims plaintiffs may have "for constructive denial of counsel should not 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." Hurrell-Harring, supra., 15 N.Y. 3d at 24-25. Plaintiffs may not therefore pursue their claims concerning the supervision, training and experience of assigned counsel or public defenders in the Five Counties. Plaintiffs nonetheless appear insistent on pursuing those claims which, in any event, are meritless.

The plaintiffs seem to allege that they were denied the right to counsel because their attorneys were inadequately supervised. However, discovery in this case has established that the four institutional providers -- Ontario County PD Office, Schuyler County PD Office, Washington County PD Office and Suffolk County LAS -- are well supervised. In Ontario County, PD Lapp oversees the office, supervises the APDs and office staff, which includes a confidential secretary, two office specialists that perform secretarial and receptionist tasks, one paralegal, and two investigators. See Lapp dep. at p. 18. The Office also has intermediate levels of supervision, with APD Porter supervising one intern, see id. at p. 33, APD Bleakley supervising APD Porter and another intern, see id. at p. 34, and APD Morrow supervising APD Conklin. See id. PD Lapp monitors caseloads, see id. at p. 119, and monitors every inmate visit request that is received from the jail and ensures that each one is timely acted upon. See Lapp dep. at p. 216. PD Lapp, herself, reviews every ineligible determination before it is finalized. See id. at p. 58.

In Schuyler County, the daily responsibilities of the PD include administration of the office, managing personnel issues, managing the budget, and handling criminal and family court cases. See Roe dep. at p. 37. There are two attorneys on staff at the PD office, and the case assignments are split between the two of them. See id. at p. 40. After January 1, 2008, the PD ushered in changes to the office, which included establishing a central office for the PD and APD to meet with clients. See Mosher dep. at p. 24. This change made it easier for the PD to supervise the staff and manage files. See id. at p. 24. The current PD works closely with his two employees, and because of the small size of the office, is aware of "almost everything that is going on." See Roe dep. at p. 48. Both staff members communicate with the PD daily. See Roe dep. at p. 38. The attorneys communicate everyday and discuss the cases in which they are both involved. See Roe dep. at p. 88. Supervision of attorney caseloads is done by the PD, who uses an office software program to track statistics. See id. at p. 95.

In Washington County, the office administrator keeps track of clients with a spreadsheet that is updated daily and contains a client's name, date of initial contact, date of appointment for services, charges, and Court, see DeClaro-Drost dep. at p. 21, and PD Mercure supervises all staff. See Mercure dep. pp. 15-16. Additionally, PD Mercure meets with the APDs on a weekly basis to discuss what they are doing on their cases. See id. dep. at pp. 123-24.

In Suffolk County, LAS employs a combination of flexible incremental advancement, instruction in lecture/discussion format, mentoring and on-site supervisory assistance to train newly hired attorneys in the criminal division. See Caponi 2009 at ¶5. There are five full time supervisory personnel in the criminal division, not including the respective bureau chiefs and deputy bureau chiefs. See id. at ¶14. Three of the supervisors are responsible for monitoring between the

Courtrooms each day and providing guidance, instruction and supervision to the staff attorneys. See id. at ¶15. Although they pay special attention to new attorneys, supervisors' responsibilities are not limited in this respect, and they provide supervision to all staff attorneys regardless of seniority. See id. Once a case begins to move beyond the negotiation stage, the file is referred to the fourth member of the supervisory staff. See id. at ¶16. He reviews the file, edits and critiques any proposed motion practice, and meets with the staff attorneys to discuss the progress of the case. See id. LAS's policy provides for a supervisory presence during significant stages of a new attorney's progress such as first trials or hearings. See id. at ¶18. If this is not possible, a senior attorney will be assigned that role. How frequently or intensely a new attorney will be second-seated, and the nature of the second seat, depends on the abilities and advancement of the individual attorney. See id.

LAS staff attorneys are evaluated on a yearly basis. See Caponi 2009 at ¶20; Caponi dep. at p. 63. Until 2008 and during the period in which plaintiff Booker was prosecuted, the evaluation instrument addressed eleven categories including (1) general comportment and demeanor, (2) file maintenance, (3) case management, (4) utility and adaptability, (5) case analysis and preparation, (6) the attorney client relationship, (7) motion practice, (8) courtroom demeanor, (10) negotiation and trial skills and (11) sentencing advocacy. See Caponi 2009 at ¶20; Caponi dep. at pp. 65-71. Many of these broad categories were further broken down into subcategories so that the attorneys were further evaluated in 29 categories in all. See Caponi 2009 at ¶20. These evaluations were based on the first hand observations of supervisory personnel, and were generated by the entire supervisory staff as a cooperative effort. See id.

Since 2008, the evaluation process has become less formal. See Caponi dep. at pp. 67-71. Now narrative evaluations on each attorney are written, with supervisory input, and presented to

LAS Administration. See Caponi dep. at pp. 71-73; Vitale dep. at p. 68. In preparing evaluations now, LAS considers (1) how well the attorney handles his or her caseload, (2) how well motions are drafted, (3) observation of attorneys in courtrooms, (4) random case reviews and (5) any client complaints. See Caponi dep. at pp. 78-83; Vitale dep. at p. 68.

Because the supervision of the PD Offices in Ontario, Schuyler and Washington Counties and the Suffolk County LAS is well documented in the record in this case, and the plaintiffs will no doubt allege that the attorneys who provide public defense representation in Onondaga County as members of the ACP[86] are not "supervised," and that somehow the United States and State Constitutions require that private attorneys providing representation to indigent criminal defendants be supervised by the State. While County Law §722(3)(a)(i) requires an "administrator" to "rotate and coordinate" the assignment of private counsel to provide indigent legal services pursuant to an approved ACP, the purpose of that administrator is not to act as a "supervisor" of representation provided to defendants by ACP panel members.

Based on the evidence in the record of this case, the plaintiffs cannot establish that the indigent defendants in the Five Counties are at risk of being denied the right to counsel because of a lack of supervision of indigent criminal defense attorneys.

6. Training and Experience

Plaintiffs allege that indigent criminal defendants are provided with representation in the Five Counties by inexperienced attorneys without criminal practice training. However, the issue of an attorney with no criminal law experience being assigned to represent a criminal defendant was addressed in Cronic, itself, where the Supreme Court held that the ineffective assistance of

86 While the plaintiffs may attempt to attack the ACP attorneys that provide conflict representation in Ontario, Schuyler and Suffolk Counties, no representative plaintiff was represented by any of those panels.

counsel standard, and not the Cronic constructive denial of counsel standard, applied when considering the representation provided by an inexperienced lawyer. In Cronic, a young real estate lawyer was assigned to represent a defendant on felony mail fraud charges twenty-five days before trial and after the prosecution investigated the case for four and one-half years and examined thousands of documents. Cronic, 466 US at 649. The lawyer put on no defense, but effectively cross-examined the prosecution's witnesses. Id. at 651. The Court held that these facts did not create circumstances under which "the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair." Id. at 660-61. The Court stated that this

> conclusion is not undermined by the fact that respondent's lawyer was young, that his principal practice was in real estate or that this was his first jury trial. Every experienced criminal defense attorney once tried his first criminal case. Moreover, a lawyer's experience with real estate transactions might be more useful in preparing to try a criminal case involving financial transactions than would prior experience in handling, for example, armed robbery prosecutions. The character of a particular lawyer's experience may shed light in an evaluation of his actual performance, but it does not justify a presumption of ineffectiveness in the absence of such an evaluation.

Id. at 665. Therefore, issues relating to an attorney's experience or training go to performance and, as stated by the Court of Appeals, are not properly before the Court in this action. See Kerwin aff. at Exh. D, p. 17.

In any event, there is no evidence that the representation provided to indigent criminal defendants by the Five Counties is being provided by inexperienced or untrained attorneys. In Ontario County, First Assistant PD, Jeffrey Morrow, has eight years of experience in criminal law, see Kerwin aff at ¶62, APD Kehoe has twelve or thirteen years of experience, see Lapp dep. at pp.

24-25, APD Walsh has more than 10 years experience, see id., APD Karynski has twelve or thirteen years of experience, see id., and APD Bleakley has nine years of experience. See Kerwin aff. at ¶62.

In Schuyler County, the County pays for membership to NYSDA for the PD and APD, see Mosher dep. at p.41, as well as for training from that state-funded organization for the PD. See id. at pp. 28, 33. When attorneys in the office are not able to attend training provided by the New York State Defender's Association, the funds can be used to pursue other Continuing Legal Education courses. See Roe dep. at p. 193. In Washington County, the PD, Chief PD and six APDs, all have criminal law experience. See DeClaro-Drost dep. at p. 14; Mercure dep. at p.19. Each attorney on the Washington County PD staff is required to remain current on his continuing legal education requirements. See Barber 2009 at ¶8. APDs are also encouraged to attend the State Defenders Association Conference and CLE, for which the County pays. See Mercure dep. at p. 97.

In Suffolk County, LAS employs a combination of flexible incremental advancement, instruction in lecture/discussion format, mentoring and on-site supervisory assistance to train newly hired attorneys in the criminal division. See Caponi 2009 at ¶5. For the first one to three months of a newly hired attorney's employment, the employee is assigned to work in the misdemeanor arraignment part. See id. at ¶6; Caponi dep. at p. 25. He or she is teamed with at least one, but usually two, more senior attorneys. Id. During the first week in the arraignment part the new attorney's activities are limited to observing the senior attorneys and assisting in generating case files. See Caponi 2009 at ¶6; Caponi dep. at pp. 25-26. By the second week, the new attorney is permitted to conduct arraignments on select misdemeanor cases. See Caponi 2009 at ¶6. During the first week, the new attorney spends half of each day in the arraignment part observing, and half of

the day receiving instruction in lecture/discussion format from a member of the supervisory staff. See Caponi 2009 at ¶7; Caponi dep. at p. 26. The instruction covers substantive and procedural issues relevant to the new attorney's responsibilities in the arraignment part. See Caponi 2009 at ¶7. Examples of the types of topics covered include (1) making effective bail applications, (2) establishing productive relationships with clients and (3) Criminal Procedure Law sections 170.70 and 180.80 and writs of habeas corpus. See id.; Caponi dep. at pp. 27-28.

In the next training phase, the new attorney moves from arraignments to the "prisoner part".[87] See Caponi 2009 at ¶8; Caponi dep. at p. 54-55. The timing of this transition varies from attorney to attorney depending upon how quickly and thoroughly the attorney masters the skills and knowledge necessary to function effectively in the arraignment part. See Caponi 2009 at ¶8. During the week immediately prior to a new attorney's transition from the arraignment part to the prisoner part, he or she spends another week receiving instruction in lecture/discussion format. See id. at ¶10. The instruction focuses on substantive and procedural issues and practices relevant to the attorney's responsibilities in the prisoner part. See id. Topics include (1) effective plea negotiations, (2) sentencing options, (3) alternatives to incarceration and (4) sufficiency of accusatory instruments. See id.; Caponi dep. at pp. 55-56. As in the new attorney's initial arraignment assignment, he or she is teamed with a more senior attorney in the prisoner part. See Caponi dep. at p. 56. Primary responsibility for the prisoner part rests with the senior attorney so that the new attorney's role is to assist the primary attorney. See Caponi 2009 at ¶11; Caponi dep. at p. 56. The new attorney then

[87]Until 2011, the judges rotated through the arraignment part on a fourteen week cycle. The week following a judge's week in the arraignment part was reserved to deal with those cases where the defendant was unable to post bail and consequently remained in custody. This week is referred to as the "prisoner part" or "custody part". See Caponi 2009 at ¶9.

spends another one to three months floating between the arraignment part and the prisoner part. See Caponi 2009 at ¶12.

Once the new attorney has demonstrated sufficient mastery of skills and knowledge needed to function effectively in the prisoner part, she or he will begin to be deployed as a floater to help fill temporary coverage gaps or assist other attorneys. See id. During this phase, the new attorney participates in pre and post file reviews for the cases she or he will handle on a given day with a member of the supervisory staff. See id.; Caponi dep. at pp. 111-12. This phase of the training continues for an indefinite period of time. See Caponi 2009 at ¶12. The goal is to eventually place the attorney in a permanent assignment, subject to employee turnover or advancement and the demonstrated abilities of each attorney. See id. When LAS attorneys get assigned to the County Court division to handle felonies, they are assigned to observe different judges and second seat different LAS attorneys. See Vitale dep. at pp. 39, 57. When they are comfortable, they start getting assigned less-complex cases. See Vitale dep. at p. 57.

Applicants for the Suffolk County ACP panel submit an application and resume and are interviewed by a group of seasoned attorneys. See Besso dep. at pp. 15, 107-08. Many people who apply to be on the felony and murder panels are found not to be qualified. See id. at p. 13. An attorney can be placed on the misdemeanor panel or felony panel, but not both. See id. at p. 168. To be eligible for the felony panel, Suffolk County requires that an attorney must have tried at least two criminal trials or one criminal jury trial and one non-jury trial, to verdict. See id. at p. 155.

In Onondaga County, attorneys interested in serving on the Onondaga County ACP panel submit an application to the Executive Director, who evaluates applications according to the

qualifications set out in the Onondaga County ACP handbook, which is approved by the Administrative Judge of the New York State Unified Court System, as required by statute. See Captor 2009 at ¶8; N.Y. County Law §722(3)(b). To be eligible for assignment of misdemeanor cases, an attorney must satisfy nine requirements. See id. at ¶9. Specifically, the attorney must (1) be admitted to practice law in the State of New York, (2) agree to follow the rules set out in the handbook and attend an orientation program, (3) maintain his or her own malpractice policy, (4) be registered in good standing with the New York State Office of Court Administration, (5) be a resident of, or have a place of business in, Onondaga County or a contiguous county, (6) complete an application, (7) attend the annual ACP training (or an equivalent program) and earn at least half of his or her mandatory CLE credits in panel-related practice, (8) complete an orientation program upon appointment to the Panel and (9) comply with the Rules of Professional Responsibility and the Canons of Ethics. See id.

To be eligible for assignment of non-homicide felony cases, an attorney must have (1) been a member of the Misdemeanor Panel for at least one year during which she or he assisted, pro bono, an experienced Felony Trial Panel-eligible attorney in the trial of at least one felony case to verdict, (2) been admitted to practice law in New York State for a minimum of two years and have tried either at least one felony case to verdict or five misdemeanor cases to verdict as chief trial counsel within the preceding ten years or (3) been granted a waiver of these requirements by the Executive Director. See id. at ¶11. To be eligible for a homicide assignment, an attorney must satisfy the requirements for appointment to the Felony Panel list and (1) been a member of the Felony Panel list for at least one year during which she or he tried at least two cases to verdict as chief counsel or assisted, pro bono, an experienced trial attorney in at least one homicide trial to verdict or (2) been admitted to

practice law in New York State for at least two years and have tried either at least one homicide case to verdict or five felony cases to verdict within the preceding ten years or (3) been granted a waiver of these requirements by the Executive Director. See id. at ¶12.

Upon appointment to the ACP panel, an attorney undergoes an orientation program, which consists of review of the ACP rules and procedures, see Captor 2009 at ¶ 25; Captor dep. at p. 37, and instruction on how to use the electronic billing system. See Captor dep. at p. 40. ACP attorneys must maintain their license, which necessarily requires that each attorney complete mandatory Continuing Legal Education ("CLE") credits. See Captor 2009 at ¶ 26. The Onondaga County ACP always offers at least one full day training per year, and usually offers 2 full day programs each year. See id. at ¶27. The topics covered during these trainings are determined based on feedback from various sources, including panel attorneys and the Courts. See id.

Based on the evidence in the record of this case, the plaintiffs cannot establish that the indigent defendants in the Five Counties are at risk of being denied the right to counsel because of a lack of training or experience of indigent criminal defense attorneys.

Conclusion

As the State's detailed analysis of the record reveals, plaintiffs cannot establish any triable issues of fact to support their sweeping claims and are thus not entitled to the far reaching prospective relied they seek. Plaintiffs have not been denied counsel, either actual or constructive, and therefore cannot satisfy the first prong of their legal claim that their Sixth Amendment rights were violated. That is, their case fails at this juncture of the analysis. Yet, even if the plaintiffs could meet this threshold, they can point to no proof to support the allegations that the State's system of delivering indigent legal services poses a risk to plaintiffs' Sixth Amendment rights. Instead, the

record demonstrates that the State affords indigent criminal defendants the legal assistance the Constitution requires as well as enhanced legal assistance through legislation and supplemental funding. Accordingly, the State's motion for summary judgment should be granted.

Dated: Albany, New York
August 22, 2013

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